



MUNI Law Working Paper Series
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MUNI Law Working Paper 2017.05

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**CONSTITUTIONAL IDENTITY IN THE CZECH REPUBLIC: A NEW TWIST
ON THE OLD FASHIONED IDEA?**

December 2017/ Prosinec 2017

Masaryk university * Law Faculty * Brno * Czech Republic
MUNI Law Working Paper Series can be found at:
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MUNI Law Working Paper Series
ISSN 2336-4947 (print)
ISSN 2336-4785 (online)
Copy Editor: Adam Blisa
© David Kosař & Ladislav Vyhnánek
2017
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Právnická fakulta
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Doporučená citace/Suggested Citation:

Kosář, David, Vyhnánek, Ladislav 'Constitutional Identity in the Czech Republic: A New Twist on the Old Fashioned Idea?' (2017), MUNI Law Working Paper No. 2017.05, available at: <http://workingpapers.law.muni.cz/dokumenty/42064>.

CONSTITUTIONAL IDENTITY IN THE CZECH REPUBLIC: A NEW TWIST ON THE OLD FASHIONED IDEA?

David Kosar & Ladislav Vyhnánek

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Introduction: Setting the Scene

In November 2009 the whole of Europe watched the Czech Constitutional Court (hereinafter referred to also as “the CCC”) closely as the future of the Lisbon Treaty as well as the European Union (hereinafter also “EU”) hinged upon the Czech Court’s judgment.¹ The CCC has eventually found the Lisbon Treaty to be in conformity with the Czech constitutional order (again²) and thereby lifted the last major obstacle to the entry into force of the Lisbon Treaty. It adopted a very euro-friendly interpretation of the Czech constitutional order and by doing so it distanced itself from the rather assertive *Lissabon-Urteil* of the *Bundesverfassungsgericht*.³ However, just two years later the very same court dropped a bombshell onto the European constitutional landscape. In the *Holubec* judgment,⁴ delivered in reaction to the *Landtová* judgment⁵ of the Court of Justice of the EU of June 2011, the CCC for the first time in the history of European integration clearly and openly declared an EU act *ultra vires* and thus not applicable on the national territory.⁶ These two judgments make it clear that the Czech Constitutional Court has been called upon to decide on the most vexing issues concerning the relationship of the Czech Constitution with EU law and it has shown its teeth.

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¹ See, for instance, Czech court to hear legal challenge to Lisbon treaty, *Guardian*, 27 October 2009, available at <https://www.theguardian.com/world/2009/oct/27/czech-republic-lisbon-treaty>.

² Note that there was an earlier challenge to the Lisbon Treaty before the CCC in 2008. See Judgment of CCC of 26 November 2008, Pl. ÚS 19/08 *Lisbon I*.

³ Judgment of CCC of 3 November 2009, Pl. ÚS 29/09 *Lisbon II*.

⁴ Judgment of CCC of 31 January 2012, Pl. ÚS 5/12 *Holubec* (in the Czech context this judgment is often referred to also as *Slovak Pensions XVII* to show that it is a part of the much longer “Slovak Pension Saga”).

⁵ ECJ, Case C-399/09 *Landtova* [2011] ECR I-5573.

⁶ See Jan Komárek, ‘Playing with matches: The Czech Constitutional Court declares a judgment of the Court of Justice of the EU ultra vires.’ (2012) 8 *European Constitutional Law Review* 323; Robert Zbiral, ‘Czech Constitutional Court, Judgment of 31 January 2012, Pl. ÚS 5/12: A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra Vires’ (2012) 49 *Common Market Law Review* 1475; Michal Bobek, ‘Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure’ (2014) 10 *European Constitutional Law Review* 54; and Zdeněk Kühn, ‘Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts’ Defiance of EU Law’ (2016) 23 *Maastricht Journal of European and Comparative Law* 185.

Surprisingly, the Czech Constitutional Court did not engage with the concept of constitutional identity adequately in either of these two judgments. In fact, it has not referred to the concept of “constitutional identity” in any decision in its entire body of case law apart from one sentence in the *Holubec* judgment. Similarly, neither the Supreme Court nor the Supreme Administrative Court has used this concept in its case law.⁷ Only in the second request for a preliminary ruling,⁸ submitted in reaction to the *Holubec* judgment of the Constitutional Court, has the Supreme Administrative Court suggested that the split of the Czechoslovak federation and its consequences form part of the national constitutional identity and should be respected as such.⁹ The government machinery as well as the public have been silent and have shown little interest in the constitutional identity so far. Even Czech scholarly debate on this concept has been rather scarce.¹⁰

Therefore, defining the Czech constitutional identity, the process of its formation and its relation to EU law is not an easy task. However, the founding principles of the Czech Constitution, and especially the Czech Eternity Clause¹¹ and the relevant case law of the Czech Constitutional Court, provide helpful starting points for reconstructing one. Yet the lack of public debate and the limited involvement of constitutional institutions other than the Constitutional Court in the constitutional identity discourse pose another challenge to such enterprise. Even though the concept of a state’s constitutional identity is a normative one, the process of discovering and defining it cannot be limited to a textual analysis of the constitution itself or even of the relevant case law of a constitutional court.

Instead, the concept of constitutional identity should be understood in a more dynamic way: it also reflects the state’s history, the state’s *raison d’être*, the founding narratives as understood by the people and their constitutional sentiments, the practice of relevant constitutional actors as well as disputes about the content constitutional values. As Jacobson puts it,

*“[a] constitution acquires an identity through experience; this identity exists neither as a discrete object of invention, nor as a heavily encrusted essence embedded in a society’s culture, requiring only to be discovered. Rather, identity emerges dialogically and represents a mix of political aspirations and commitments that are expressive of a nation’s past, as well as the determination of those within the society who seek in some ways to transcend that past.”*¹²

⁷ The latter has not done so even in the context of the so-called Slovak Pensions Saga (of which the *Holubec* judgment is just one chapter; see note **Chyba! Záložka není definována.**). The only judgment of the Supreme Administrative Court that comes close is its judgment of 28 August 2013, 3 Ads 183/2011 (which refers briefly to “national identity” of the Czech Republic).

⁸ Supreme Administrative Court of the Czech Republic, Order of 9 May 2012, 6 Ads 18/2012-82.

⁹ Michal Bobek. ‘Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure’ (2014) 10 *European Constitutional Law Review* 64.

¹⁰ For exceptions, see Robert Zbíral, ‘Koncept národní identity jako nový prvek ve vztahu vnitrostátního a unijního práva: poznatky z teorie a praxe’ (2014) 153 *Právník* 112; Pavel Maršálek, ‘Evropská integrace, unijní občanství a česká národní identita’ (2014) 60 *Acta Universitatis Carolinae – Iuridica* 73; and Jan Grinc, Jana Ondřejková. ‘Stát a nadnárodní integrace – případ Evropské unie.’ In Jan Kysela (ed.), *Kolos na hliněných nohou? K proměně státu a jeho roli*, at pp. 150-197 (available also in English In Jan Kysela (ed.), *State as a Giant with Feet of Clay*, Peter Lang, 2014, pp. 61-100) and Ondřej Preuss. ‘Demokratický právní stát tesaný do pískovce’ (2016) 24 *Časopis pro právní vědu a praxi* 365 (note that none of those pieces focus primarily on the constitutional identity). Of course, those scholars who engage with a foreign audience have discussed these issues; see articles referred to in note 6.

¹¹ The ‘Eternity Clause’ is stipulated in Article 9(2) of the Czech Constitution. For further details see below, especially Part I.

¹² Gary J. Jacobsohn. ‘The formation of constitutional identities.’ In Rosalind Dixon, Tom Ginsburg. *Comparative Constitutional Law* (Cheltenham: Edward Elgar, 2011), pp. 129–130.

Thus, it is important to bear in mind that a judicially created understanding of constitutional identity does not necessarily have to find traction among the people. To put it more bluntly, the “legal” concept of constitutional identity developed by the Czech Constitutional Court may significantly differ from the people’s “popular” understanding of constitutional identity.

This chapter proceeds as follows. Part I defines the content of the Czech constitutional identity, as it is understood by the Czech Constitutional Court, and the process of its formation in the Court’s case law. Bearing in mind the complexity and dynamic nature of this concept, it also takes into account the historical and political origins of the Czech constitutional order as well as its evolution since the early 1990s. Part II explores the normative effects of the judicially created Czech constitutional identity, especially in relation to the EU and the principle of the primacy of EU law. Finally, Part III summarizes the key findings and problematizes the concept of constitutional identity. Most importantly, it shows that there is a growing gap between the “legal” constitutional identity and the “popular” constitutional identity of the Czech Republic, which has significant ramifications for the Czech constitutional order as well as for its relationship with the EU law.

I. The Content of the Czech Constitutional Identity and the Process of its Formation

The single most important actor in defining the contours of the Czech constitutional identity in the public sphere is the Czech Constitutional Court. Even though it has not used the “constitutional identity” language explicitly, it has built a considerable amount of “identity fabric” over the last two decades that we can build on. For this reason, we will first discuss the relevant provisions of the Czech Constitution that served as a point of departure for the Constitutional Court. Subsequently, we will explain how the Constitutional Court interprets the Eternity Clause and what implications this may have for the construction of the Czech constitutional identity.

A. The Constitutional Text and Its Origins

The logical point of departure in the search for constitutional identity is the constitutional text. However, the Czech Constitution (hereinafter also referred to as “CC”) does not explicitly mention the concept of constitutional identity. Nevertheless, it contains two provisions that are quite useful for constructing one: (1) the set of basic principles that define the nature of Czech statehood in Article 1(1) CC, and (2) the “Eternity Clause” in Article 9(2) CC that immunizes some of those principles. As von Bogdandy and Schill note, the very fact of deep entrenchment of eternity clauses can be understood as evidence of their importance in the context of national constitutional identity.¹³ We will thus first analyse the content of the Eternity Clause and then try to extrapolate from it (at least partially) the concept of Czech constitutional identity.

Pursuant to Article 1(1) CC: “[t]he Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law^[14], founded on respect for the rights and freedoms of men and of citizens.”

¹³ Armin von Bogdandy, Stephan Schill, 'Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty' (2011) 48 *Common Market Law Review* 1432.

¹⁴ More precisely, both provisions do not mention the “rule of law” in the proper sense. It is based on the notion of “právní stát“, which is the literal translation of the German “Rechtsstaat”. There are some conceptual differences between “Rechtsstaat” and “rule of law”, mostly related to the substantive aspects of the respective concepts (see e.g.

Article 9(2) CC then further entrenches some of the principles set out in Article 1(1) CC. More specifically, the Eternity Clause in Article 9(2) CC provides that: “*Any changes in the essential requirements of a democratic state governed by the rule of law are impermissible.*”¹⁵ Even a quick glance at the text of these provisions reveals that Article 1(1) CC and the Eternity Clause are interrelated and have two concepts in common, namely the principles of democracy and the rule of law. The other principles mentioned in Article 1(1) CC (unitary state, sovereignty and respect for human rights) are not explicitly protected by the Eternity Clause, but that does not necessarily mean that they are not significant for its interpretation. Unlike some other constitutions,¹⁶ the Czech Constitution does not include a more detailed list of values and principles entrenched in the Eternity Clause. Therefore, in order to understand the substantive content and meaning of this clause, we have to analyse the relevant case law of the Czech Constitutional Court as well as the doctrinal efforts to make sense of it.

Before doing that, however, it is important to understand the logic and consequences of inclusion of the aforementioned abstract principles in the very core of the Czech constitutional project. First of all, these principles are not unique or specific to the Czech Republic as a political community. The concept of sovereignty (notwithstanding the disputes about its content and evolution) has been a definitional sign of a state ever since the Westphalian consensus.¹⁷ Democracy, the rule of law and respect for human rights are considered core principles of western liberal democracies. Even the principle of unitary state is hardly something that would make the Czech Constitution specific and recognizable.

The Eternity Clause, or at least its abstract textual expression, thus does not emphasize the “unique features” of the Czech Republic and its aspirations, but rather the values and aspirations it shares with other states, especially with the Western and Central European ones.¹⁸ The preamble to the Czech Constitution bolsters this understanding by referring to the Czech Republic as “*a part of the family of democracies in Europe and around the world*”.

Such a conception should not come as a surprise if we take into account the origins of the Czech constitutional project. After the fall of the communist regime and the short intermezzo before the dissolution of Czechoslovakia, the Czech Republic aimed to deal with its past and then “return to Europe”¹⁹ where it thought it belonged. The constitutional emphasis on the shared values of liberal democracies was a logical choice from both points of view.

Michel Rosenfeld ‘The Rule of Law and the Legitimacy of Constitutional Democracy’ (2001) 74 *Southern California Law Review* 1307, at pp. 1318 and 1334; Nicholas Barber, ‘Review: The Rechtsstaat and the Rule of Law, (2003) 53 *The University of Toronto Law Journal* 443 at p. 444; and Martin Loughlin, *Foundations of Public Law* (Oxford: Oxford University Press, 2010), pp. 312-341. However, for the sake of simplicity we are using the terms “Rechtsstaat” and “rule of law” as synonyms in this chapter.

¹⁵ The Eternity Clause could obviously (as a matter of fact) be replaced or modified by a revolution, i. e. outside the existing constitutional system. As a matter of law (within the existing constitutional system), the Eternity Clause is arguably untouchable by any institution acting within the Constitution (judgment of CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*). In theory, both Orbán’s (a brand new constitution) and Erdogan’s (an ad hoc constitutional referendum) scenarios are thus possible, but they would be considered extraconstitutional and it is unclear how the CCC would react to such change if it were to touch the Eternity Clause.

¹⁶ See, for example, Art. 79(3) of the German Basic Law; and Art. 288 of the Portuguese Constitution.

¹⁷ See e.g. José Enrique Alvarez, *State Sovereignty Is Not Withering Away: A Few Lessons for the Future, in Realizing Utopia: The Future of International Law* 26 (Antonio Cassese, ed., Oxford University Press, 2012)

¹⁸ A similar trend is recognizable even in the case law of the Czech Constitutional Court which seems to be quite open to foreign and supranational inspirations. See also below

¹⁹ The main Czech political goals of the 1990s were to finish the political transformation (i.e. to establish liberal democracy), economic transformation (to entrench free market economy) and to join the “western structures” such as the EU, the Council of Europe and the NATO. For the popular reflection of this phenomenon, cf. Maršálek, ‘Evropská integrace’, p. 77.

B. *The Interpretation of the Eternity Clause and Its Relation to Constitutional Identity*

As we suggested above, the (more) precise content of the Eternity Clause and its relation to Article 1(1) CC were developed in the CCC's case law. In fact, the Czech Constitutional Court has been the single-most important player in both developing the content of the Eternity Clause and giving it some bite and practical effect.

First, the CCC does not limit the extent of the Eternity Clause to the values and principles explicitly mentioned in the text of Article 9(2) CC. Relying on Article 1(1) CC, the Court recognized protection of the fundamental rights²⁰ and state sovereignty²¹ as integral parts of the Eternity Clause and thus expanded its scope.

Furthermore, the CCC had several opportunities to concretize the meaning of the principles protected by the Eternity Clause. It interpreted the rule of law principle as including several more specific components such as the prohibition of the arbitrary overruling of previous case-law,²² the prohibition of retroactivity,²³ and the principle of the generality of law²⁴. The democratic principle then includes popular sovereignty and representative democracy²⁵ as well as some basic principles of electoral law.²⁶ As regards the protection of fundamental rights, the Czech Constitutional Court has even held that “*limiting an already achieved procedural level of protection of fundamental rights and freedoms*” is inconsistent with the Eternity Clause.²⁷

A similar – but slightly wider – understanding of the Eternity Clause can be found in doctrinal literature. In the leading commentary on the Czech Constitution Šimíček included the following principles within the scope of the Eternity Clause: the sovereignty of the people, the entrenchment and protection of fundamental rights, the rule of law, free competition among political parties, majority rule complemented by the protection of minorities, limited terms of office, basic principles of election law, judicial independence, the separation of powers and basic features of self-government.²⁸

Some authors have recently gone even further. Molek has suggested that the Czech Constitution – just like any other constitution – has a certain “substantive core” that reflects its inner logic and integrity. In the event of a change or a removal of the substantive core, the integrity of the affected constitution would be destroyed and consequently the old constitution would be replaced by a new one with a new substantive core.²⁹ Molek argues that the Czech Eternity Clause is an attempt to express the constitution's substantive core but that it fulfils this aim (as any other such attempt) only approximately. He claims that the scope of the Eternity Clause is in some respects narrower than the substantive core: for example the republican form of government forms a part of the Czech Constitution's substantive core even though it is not

²⁰ Judgment of CCC of 29 May 1997, III. ÚS 31/97.

²¹ *Lisbon I* judgment, in particular § 97.

²² Judgment of CCC of 11 June 2003, Pl. ÚS 11/02.

²³ Judgment of CCC of 10 September 2009, Pl. ÚS 27/09, *Melčák*.

²⁴ *Ibid.*

²⁵ Judgment of CCC of 21 December 1993, Pl. ÚS 19/93.

²⁶ Judgment of CCC of 6 February 2001, Pl. ÚS 42/2000.

²⁷ Judgment of CCC of 25 June 2002, Pl. ÚS 36/01.

²⁸ Vojtěch Šimíček, ‘Komentář k čl. 9’ in Lenka Bahýlová et al. *Ústava České republiky – komentář*. (Praha: Linde, 2010), pp. 156 and following.

²⁹ Pavel Molek, *Materiální obnisko jako věčný limit evropské integrace?* (Brno: MUNI Press, 2014), p. 138. The concept of the substantive core is very similar to the understanding of the eternity clause in the Norwegian constitution (the “spirit” and “principles” of the Norwegian constitution cannot be amended). See Eivind Smith ‘Old and Protected? On the “Supra-constitutional” Clause in the Constitution of Norway’ (2011) 44 *Israeli Law Review* 369.

covered by the Eternity Clause.³⁰ In other words, substantive core is an ideal compressed essence that each constitution logically possesses whereas the Eternity Clause is just an explicit prohibition of altering certain basic principles of the Czech Constitution. There might be significant overlaps between these two concepts, but they are not the same.

This view has generally been accepted by Preuss³¹ who also points out that the concept of substantive core can be understood as an equivalent of the concept of constitutional identity. At the same time, he advises against frequent practical use of these concepts as they are not sufficiently defined by any authority and we even lack meaningful criteria for establishing such a definition.³²

On a general level, these judicial and doctrinal lists of values and principles protected by the Eternity Clause and/or the substantive core, seem to support our previous argument that the Czech constitutional project is centred around the shared values of European liberal democracies. Still, it would be hasty to conclude that the Czech constitutional conception of these principles and values does not include *anything* unique.

When reflecting some of the aforementioned formative historical events, the CCC as well as the political bodies had the opportunity to shed some light on their understanding of the basic constitutional principles (such as the rule of law, equality, and protection of fundamental rights).

Perhaps the most significant judgment in this regard was issued in the *Dreithaler* case.³³ In this judgement, the CCC refused to annul a decree of president Beneš,³⁴ that provided for confiscation of the enemy (mainly German and Hungarian) property after World War II based on the principle of collective guilt. The CCC opined that given the extraordinary nature of World War II and its aftermath, it is impossible to look at the arising legal problems purely through the lens of a modern liberal democracy and impose the current values on a problem that is half a century old. The reasoning of the judgment also clearly reflects the notion of collective responsibility of the German (and to a lesser extent the Hungarian) people that is very problematic from the point of view of contemporary understanding of individual responsibility and dignity of a human being. It is not without interest that the aftermath of World War II and the Beneš decrees have played a role in yet another episode of the Czech constitutional identity. The fear – realistic or not – that the EU Charter of Fundamental Rights might jeopardize the Beneš decrees was arguably the reason for the Czech insistence on joining Protocol n. 30 to the Lisbon Treaty.³⁵

Therefore, we might tentatively conclude that while the Eternity Clause and/or substantive core emphasize the shared values of European liberal democracies. On the other hand the last two examples have shown that the Czech constitutional institutions may be willing to adjust the interpretation or acceptance of these values, especially if they threaten to influence the status quo that was brought about by the formative historical events of the modern Czech constitutional history.

³⁰ Molek, Materiální ohnisko, p. TBA.

³¹ Ondřej Preuss. 'Demokratický právní stát tesaný do pískovce' [2016] 24 *Časopis pro právní vědu a praxi* 365. Preuss for example claims that the nature of the Czech Republic as an unitary state as opposed to a federation might be understood as a part of the constitution's substantive core despite not being mentioned by Art. 9(2) CC.

³² Ibid. at p. 367.

³³ Judgment of CCC of 8 March 1995, Pl. ÚS 14/94 *Dreithaler*.

³⁴ Decree No. 108/1945, on the confiscation of enemy property and the National Restoration Fund.

³⁵ For more information and the importance of this episode for the Czech constitutional identity, see Pietro Faraguna. 'Taking Constitutional Identities Away from the Courts'. [2016] 41 *Brooklyn Journal of International Law* 492 at p. 548 et seq.

Still, the question remains – in the absence of an authoritative definition – whether we should base our tentative conception of the Czech constitutional identity (1) on the Eternity Clause (as developed by the CCC) or (2) on the less defined yet theoretically founded concept of substantive core, or (3) to develop the Czech constitutional identity as a completely distinct concept. Each of these three approaches has its own merit. Unamendable provisions surely have something to do with polity's identity and according to some scholars form “the genetic code of the constitution”.³⁶ Thus, the Eternity Clause is a natural starting point for the construction of constitutional identity, if only for practical reasons.³⁷ At the same time, several Czech scholars have argued persuasively that the Eternity Clause does not contain the entire basic structure of the Czech Constitution and hence it provides an incomplete picture of the Czech constitutional identity.³⁸ The third approach is supported by a short dictum of in the *Holubec* judgment, in which the CCC opined that seventy years of the Czechoslovak statehood and the subsequent peaceful dissolution of Czechoslovakia are building blocks of the Czech constitutional identity.³⁹ Interestingly, this approach goes beyond the text and legal values of the Czech Constitution, and incorporates a reflection of the Czech nation's past into the concept of constitutional identity.⁴⁰

For the purposes of this chapter, we will refer to the first two approaches as to the “legal” constitutional identity and to the third approach as to the “popular” constitutional identity of the Czech Republic. “Legal” constitutional identity has been created almost exclusively by the CCC and constitutional lawyers.⁴¹ It may oscillate between its “thin” version (if it includes only the Eternity Clause as understood by the CCC) and its “thick” version (if it includes additional principles from the substantive core⁴² that go beyond the Eternity Clause). However, this distinction between “thin” and “thick” versions of “legal” constitutional identity should not be exaggerated, as it very much depends on how one interprets the Eternity Clause. As pointed out above, even the CCC itself has already been reading some aspects of human rights protection and state sovereignty into the Eternity Clause.⁴³ Therefore, when we refer to the Czech “legal” constitutional identity in what follows, we understand it as encompassing the content of the Eternity Clause in its entirety as developed by the CCC and *possibly* several other principles that have been included in the substantive core of the Czech Constitution by academics but not yet confirmed as a part of the core or the Eternity Clause by the CCC.⁴⁴

³⁶ See Yaniv Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (Oxford: Oxford University Press, 2017), chapter 1.

³⁷ As we show in the next part, the CCC intends to protect the Eternity Clause against all possible threats and has equipped it with far-reaching effects.

³⁸ See *in particular* Ondřej Preuss. ‘Demokratický právní stát tesaný do pískovce’ [2016] 24 *Časopis pro právní vědu a praxi* 365 at p. 367.

³⁹ Judgment of CCC of 31 January 2012, Pl. ÚS 5/12 *Holubec*.

⁴⁰ This understanding of constitutional identity is close to the one put forth by Jacobson; see note 12.

⁴¹ Note that the Czech Constitution itself, including the Eternity Clause, was drafted in a hasty manner by a narrow group of constitutional lawyers within few weeks in 1992 (see Jiří Malenovský, ‘O legitimitě a výkladu české ústavy na konci století existence moderního českého státu’ (2013) 152 *Právník* 745). *There was no discussion among the experts on the draft text and no trace of wider participatory constitutionalism.*

⁴² Such as the already mentioned republican form of government or the nature of the Czech Republic as an unitary state that recognizes territorial self-government.

⁴³ In a similar vein, those scholars who construe the Eternity Clause narrowly tend to read additional principles of the substantive core into the concept of constitutional identity, whereas those who adopt a broader interpretation of the Eternity clause tend to equate it with the constitutional identity, because they do not need to read anything additional in. *In sum, both approaches may lead to the same substantive definition of constitutional identity.*

⁴⁴ The republican form of government or the unitary nature of the state have simply not been put under pressure by any internal or external factor yet and it is not very probable that the CCC would have a chance to work with these principles as justiciable concepts anytime soon.

In contrast to Czech “legal” constitutional identity, which is largely aspirational, based almost exclusively on the text of the Czech constitution and crafted by (legal) elites, Czech “popular” constitutional identity goes beyond the constitutional text and is built around formative historical events in Czech(oslovak) history that are more understandable by the people than the abstract constitutional text. In the ideal scenario, the legal and popular constitutional identity of the Czech Republic would converge and forge a strong sense of constitutional patriotism.⁴⁵ However, given the exclusion of the people (and even of most of the political institutions) from the formation of Czech constitutional identity, there is limited interaction between legal and popular conceptions of constitutional identity. The lack of these dynamic factors may stall the process of development of Czech constitutional identity shared by the wider public and even increase the gap between legal and popular constitutional identity, which in turn may alienate the legal elites from their people.⁴⁶

In order to address both legal and popular constitutional identity and their interaction, we will proceed as follows. In Part II we will focus exclusively on “legal” constitutional identity and discuss its normative effects, as understood by the CCC. Subsequently, in Part III we will discuss the broader repercussions of the CCC’s approach and attempt to conceptualize Czech popular constitutional identity.

II. Normative Effects of the Czech “Legal” Constitutional Identity

The mere fact that the Czech “legal” constitutional identity is potentially quite broad does not in itself lead to the conclusion that it might pose problems for EU law (or for anything else, for that matter), because it still might be understood as a mere dormant declaration or a theoretical concept without any real practical implications. However, as we will, see nothing could be further from truth; the Czech Constitutional Court can be considered one of the most activist constitutional courts in the world when it comes to protection of the basic identity of the constitutional system – or rather what the CCC understands as the basic identity of the Czech Constitution.

Despite earlier uses of the Eternity Clause in the CCC’s case law,⁴⁷ it was the judgment in Pl. ÚS 36/01 *Euro-Amendment*⁴⁸ that identified the full potential of Eternity Clause in the Czech Constitution. In this case, the Czech Constitutional Court effectively disregarded a constitutional amendment adopted by the Parliament and interpreted the Czech Constitution as if such an amendment had never taken place – all of this based on Article 9(2) CC.

In this case, the Czech Constitutional Court was confronted with constitutional changes introduced by the Constitutional Act No. 395/2001.⁴⁹ Prior to the adoption of this Constitutional Act the Czech Constitution basically adhered to the dualist concept of the relationship between international and national law. At the same time, it recognized one important exception, namely so-called “international human rights treaties”. This category of international treaties not only

⁴⁵ On constitutional patriotism, see in particular Jürgen Habermas, *Between Facts and Norms: Contribution to a Discourse Theory of Law and Democracy* (Cambridge: MIT Press 1996), pp. 491–515 and 566–567; Jan-Werner Müller, *Constitutional Patriotism* (Princeton University Press, 2007); and Symposium on Constitutional Patriotism in ICON (2008) Volume 6, Issue 1.

⁴⁶ We will return to this issue in Part III.

⁴⁷ Judgment of CCC of 21 December 1993, Pl. ÚS 19/93.

⁴⁸ Judgment of CCC of 25 June 2002, Pl. ÚS 36/01.

⁴⁹ So called “Euro-amendment”; this name is derived from the fact that this amendment was meant to prepare the Czech Constitution for the accession of the Czech Republic to the European Union.

enjoyed direct effect in national law;⁵⁰ it effectively occupied a position in the Czech legal order that was in many respects identical to that of the Constitution itself. For example, pursuant to Article 87(1)(a) of the Czech Constitution, the Czech Constitutional Court had the authority to annul a piece of legislation that was not in conformity with such an international human rights treaty. Hence, *in this regard* international human rights treaties were treated as a part of the Czech “constitutional order”.⁵¹

Following the aforementioned constitutional amendment the situation changed considerably. Firstly, the Czech Constitution adopted a monist approach towards international treaties, declaring that all promulgated treaties to the ratification of which Parliament has given its consent and by which the Czech Republic is bound form a part of the Czech legal order and take precedence over statutes (Article 10 of the Czech Constitution). Secondly, since international human rights treaties have ceased – from the constitutional point of view – to form a special category of international treaties, the Czech Constitutional Court lost its authority to review whether national legislation conforms to standards set by them. This competence of the Czech Constitutional Court was functionally replaced by the authority of general courts directly to apply any international treaty (including, but not limited to international human rights treaties) in cases where it conflicted with a domestic statute.

Quite surprisingly, the Czech Constitutional Court came to the conclusion that this constitutional amendment, which could be viewed as a “neutral” change of fundamental rights protection system,⁵² in its effect violated the Eternity Clause. It held that:

„[...] Article 9 para. 2 of the Constitution has consequences not only for the framers of the constitution, but also for the Constitutional Court. The inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the Constitutional Court, that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms.”⁵³

Afterwards the Czech Constitutional Court went on to argue that the aforementioned constitutional change should indeed be considered a limitation of an already achieved procedural level of fundamental rights’ protection:

“where a statute conflicts with a constitutional act, a general court judge is not qualified to evaluate the matter and is required to submit it to the Constitutional Court, [whereas] in the event of a conflict between a statute and an international treaty on human rights, which is

⁵⁰ See Art. 10 of the Czech Constitution prior to changes introduced by constitutional Act. No. 395/2001: “*Ratified and promulgated international human rights treaties, by which the Czech Republic is bound, are directly binding and take precedence over statutes.*”

⁵¹ A peculiar concept (basically a polycentric constitution) defined in Art. 112(1) of the Czech Constitution: “The constitutional order of the Czech Republic is made up of this Constitution, the Charter of Fundamental Rights and Basic Freedoms, constitutional acts adopted pursuant to this Constitution, and those constitutional acts of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic, and the Czech National Council defining the state borders of the Czech Republic, as well as constitutional acts of the Czech National Council adopted after the sixth of June 1992.”

⁵² Although as Kühn and Kysela rightly observed, the amendment could be seen as improving the system of fundamental rights protection, because it simply introduced some features of diffuse judicial review in the Czech Constitution. Zdeněk Kühn, Jan Kysela. ‘Je ústavou vždy to, co Ústavní soud řekne, že ústava je?’ (Euronovela Ústavy ve světle překvapivého nálezu Ústavního soudu) (2002) 3 *Časopis pro právní vědu a praxi* 205.

⁵³ Judgment of CCC of 25 June 2002, Pl. ÚS 36/01.

of the same nature and quality in constitutional law, under Article 10 of the Constitution the judge is required to follow the international treaty. No matter which court adopts such a decision, in a legal system which does not rely on judicial precedent with the quality and binding nature of a source of law, it could never have even de facto derogative consequences. The Constitution would thus create an unjustified procedural inequality for two situations identical in their constitutional nature, which, on the basis of the argument reductionis ad absurdum, cannot be ascribed to the framers of the constitution as the intended purpose of the constitutional amendment.”

Based on these considerations, the Czech Constitutional Court refused to acknowledge the effects of the constitutional amendment (the Euro-Amendment) and interpreted the Czech Constitution as if the CCC was still allowed to review domestic legislation from the point of view of its conformity with international human rights treaties. This heavily criticized⁵⁴ judgment indicated the resolve of the Czech Constitutional Court to draw very concrete practical implications from the Eternity Clause.

Therefore, few experts could be genuinely surprised when – in 2009 – the Czech Constitutional Court in the *Melčák* judgment⁵⁵ took yet another step and made it clear that it has, or thinks it has, the authority to annul constitutional acts. The constitutional act in question (No. 195/2009 Coll.) was adopted in the middle of a political crisis and was supposed to solve the crisis by a one-time shortening of the fifth term of office of the Chamber of Deputies, thus finding the quickest way to snap elections. Even though Article 35 of the Czech Constitution provided for a number of opportunities to dissolve the Chamber of Deputies, the deputies did not find them acceptable and opted for an ad hoc constitutional act that allowed one-time shortening of the electoral term. Most scholars considered this solution to be in conformity with the Czech Constitution as the same solution had been successfully employed in a similar political impasse in 1998.⁵⁶ However, the Czech Constitutional Court thought otherwise and annulled the constitutional act in question because it was a one-time solution that contravened the principle of generality of law and the prohibition of retroactivity.⁵⁷

Both the aforementioned examples show that the Czech Constitutional Court is not shy of using the Eternity Clause to drastically reinterpret or even annul constitutional acts. Moreover, it has not exercised much restraint and has done so even in cases where the violation of the Eternity Clause was far from obvious. But the question remains whether it would show the same level of resolve in cases concerning the relationship between the Czech legal order and the EU law.

One can argue that – at least theoretically – this may be the case.⁵⁸ In its *Sugar Quotas III* judgment, the Czech Constitutional Court rejected the doctrine of unconditional supremacy of EU law.⁵⁹ More specifically, it opined that:

⁵⁴ Cf. Kühn, Kysela, “Je ústavou vždy to, co Ústavní soud řekne, že ústava je?”, footnote n. 29 or Jan Filip. ‘Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem’ (2002) 11 *Právní zpravodaj* 11.

⁵⁵ Judgment of CCC of 10 September 2009, Pl. ÚS 27/09 *Melčák*. For further analysis, see also Yaniv Roznai, ‘Legisprudence Limitations on Constitutional Amendments? Reflections on the Czech Constitutional Court’s Declaration of Unconstitutional Constitutional Act’ (2014) 8 *Vienna Journal on International Constitutional Law* 29; and Ivo Šlosarčík, ‘Czech Republic 2009–2012: On Unconstitutional Amendment of the Constitution, Limits of EU Law and Direct Presidential Elections’ (2013) 3 *European Public Law* 435.

⁵⁶ See Constitutional Act No. 69/1998 Coll. of 19 March 1998, on Shortening the Term of the Chamber of Deputies.

⁵⁷ See note 55.

⁵⁸ An useful overview of the relationship between EU law and Czech constitutional law can be found in Pavel Molek ‘Chapter 5: The Czech Constitutional Court and the Court of Justice: Between Fascination and Securing Autonomy.’

There is no doubt that the Czech Republic's accession to the European Communities (EC), or European Union (EU), brought about a fundamental change within the Czech legal order, as at that moment the Czech Republic incorporated into its national law the entire mass of European law. This undoubtedly caused a shift in the legal environment formed by sub-constitutional legal norms, and this shift must necessarily influence the understanding of the entire existing legal order, including its constitutional principles and maxims, naturally on the condition that the factors influencing the national legal environment are not, in and of themselves, in conflict with the principle of a democratic state based on the rule of law, or, in other words, that the interpretation of these factors must not endanger this democratic state based on the rule of law. Such a shift would come into conflict with Article 9(2) or Article 9(3) of the Constitution of the Czech Republic.⁶⁰

If “such a shift” occurs, the Czech Constitutional Court would probably feel obliged to ensure that the competences conferred on the European Union are retrieved:

“The Czech Republic has conferred these powers upon EC institutions. In the Constitutional Court's view, this conferral of a part of its powers is naturally a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty still stems from Article 1(1) of the Constitution of the Czech Republic. In the Constitutional Court's view, the conditional nature of the delegation of these powers is manifested on two planes: the formal and the substantive plane. The first of these planes concerns the power attributes of state sovereignty itself, the second plane concerns the substantive component of the exercise of state power. In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. In such determination the Constitutional Court is called upon to protect constitutionalism (Article 83 of the Constitution of the Czech Republic). According to Article 9(2) of the Constitution of the Czech Republic, the essential attributes of a democratic state governed by the rule of law, remain beyond the reach of the Constituent Assembly itself.”⁶¹

This warning did not remain isolated in the case law of the Czech Constitutional Court. In the *Lisbon I* judgment the Court reiterated that in the event of a clear conflict between the domestic Constitution and EU law that cannot be overcome by any reasonable interpretation,

In Monica Claes, Maartje de Visser. (eds.) *Constitutional Conversations in Europe*. (Cambridge: Intersentia Publishing, 2012), at. pp. 131-159.

⁵⁹ Due to this aspect the *Sugar Quotas III* judgment is considered the Czech cousin of the famous judgments of the Federal Constitutional Court of Germany in *Solange I*, *Solange II* and *Maastricht*. See Pavel Holländer. ‘Soumrak moderního státu’ (2013) 152 *Právník* 1. In English, see Darinka Piqani ‘Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration’ (2007) 1 *European Journal of Legal Studies* 213.

⁶⁰ Judgment of CCC of 8 March 2006, Pl. ÚS 50/04 *Sugar Quotas III*.

⁶¹ *Ibid.*

the constitutional order of the Czech Republic, in particular its substantive core,⁶² must take precedence.⁶³ The CCC thus holds that the core parts of the constitutional order (Eternity Clause) are absolutely protected against both domestic and international (European) influences and that the primacy of EU law should and would not be respected by domestic bodies in the event of a clear conflict with the Eternity Clause.

It remains to be addressed, though, whether one can realistically expect such a conflict between the Czech constitutional identity and the concept of the primacy of EU law. Even though it is always problematic to make such predictions, we do not consider this likely. The arguments that lead us to believe that the Czech Eternity Clause does not pose a practical threat to the primacy of European integration can be divided into two categories: those related to the attitude of the Czech Constitutional Court and those related to the attitude of the European Union.

Despite its proclamations that it is ready to protect the basic values enshrined in the Czech constitution even against the impact of EU law, the Czech Constitutional Court's case law can generally be considered quite euro-friendly.

Convincing evidence of the Czech Constitutional Court's euro-friendliness can be found in its *European Arrest Warrant* judgment.⁶⁴ In that judgment the CCC made it clear that the obligation⁶⁵ to interpret domestic law in a manner consistent with EU law applies even to the interpretation of the Czech Constitution. The compatibility of the European Arrest Warrant with the Czech Constitution (or more precisely with the Charter of Fundamental Rights and Freedoms) was objectively quite questionable, because Article 14 para. 4 of the Charter explicitly guarantees that no citizen may be forced to leave her homeland. The outcome of the case was to a great extent influenced by the way the Czech Constitutional Court formulated the starting point of its approach:

*“if the Constitution [...] can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected which supports the carrying out of that obligation, and not an interpretation which precludes it.”*⁶⁶

In accordance with this attitude, the Czech Constitutional Court went to great lengths to find the interpretation of the Charter that would be compatible with the European Arrest Warrant framework decision or – more precisely with the law implementing it. This approach is all the more noteworthy in view of the fact that other European constitutional courts did not employ as euro-friendly an interpretation as the Czech one.⁶⁷ This led even foreign authors to

⁶² It is not entirely clear whether the CCC used the term „substantive core“ as an equivalent to the more developed (by the CCC) Eternity Clause but we believe that it is the case, as Pavel Holländer, the (then future) judge-rapporteur in *Melčák* published an influential law review article which connected Art. 9(2) CC with the concept of “substantive core”. See Pavel Holländer ‘Materiální ohnisko ústavy a diskrece ústavodárce’ (2005) 144 *Právník* 313.

⁶³ *Lisbon I* judgment, § 85.

⁶⁴ Judgment of CCC of 3 May 2006, Pl. ÚS 66/04 *European Arrest Warrant*.

⁶⁵ The Czech Constitutional Court drew the obligation not only from Art. 1(2) of the Czech Constitution but also from the former Art. 10 of the EC Treaty; see Judgment of CCC of 3 May 2006, Pl. ÚS 66/04, § 61.

⁶⁶ Judgment of CCC of 3 May 2006, Pl. ÚS 66/04 *European Arrest Warrant*.

⁶⁷ Germany and Poland, for example, had to find other (legislative) ways in order to accept the effects of the framework decision. See e.g. Jan Komárek, ‘European Constitutionalism and the European Arrest Warrant: In Search of the Limits of “Contrapunctual Principles” (2007) 44 *Common Market Law Review* 9; and Orreste Pollicino ‘European Arrest Warrant and Constitutional Principles of the Member States: a Case Law-Based Outline in the Attempt to Strike the Right Balance between Interacting Legal Systems’ (2008) 9 *German Law Journal* 1353.

note that “[i]n contrast to its Polish (and especially German) counterpart, the Czech Constitutional Court tried to minimise any kind of possibility of a clash between its constitutional fundamentals and the European legal order” and that “[i]t did not engage in any kind of sovereignty discourse, which would be typical in the context of extradition procedures that usually trigger serious concerns for the protection by the state of its own citizens.”⁶⁸

But an even more specific (and perhaps more important) argument supporting our position rests on the fact that the Czech Constitutional Court is willing to interpret even the content of the Czech constitutional identity itself with respect to the logic and nature of European integration.

As we suggested earlier, there are two aspects of Czech constitutional identity that might create problems from the point of view of EU law, namely the concepts of democracy and sovereignty, because the very logic of European integration pressures the traditional understanding of these concepts in national setting.⁶⁹ However, the relevant case law shows that these concepts are not rigidly interpreted by the Czech Constitutional Court. In fact, the Court does not hesitate to employ euro-friendly and evolutive interpretation even in the case of these very basic principles that define Czech statehood.

The interpretation of “sovereignty” in the *Lisbon I* judgment⁷⁰ may serve as a fine example of this trend. In this case, the Czech President claimed, inter alia, that the Lisbon Treaty (or rather the Treaties after its ratification) calls into question the basic meaning of state sovereignty and thus threatens the very nature of the Czech Republic as a sovereign state. The Czech Constitutional Court once again showed its readiness to accept paradigmatic changes brought about by European integration:

*“The European Union has advanced by far the furthest in the concept of pooled sovereignty, and today is creating an entity sui generis, which is difficult to classify in classical political science categories. It is more a linguistic question whether to describe the integration process as a ‘loss’ of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., ‘lending, ceding’ of part of the competence of a sovereign. It may seem paradoxical that the key expression of state sovereignty is the ability to dispose of one’s sovereignty (or part of it), or to temporarily or even permanently cede certain competences.”*⁷¹

The Court then went on to emphasize that the concept of sovereignty can no longer be understood in a traditional sense as “a rigid legal concept, but also as a concept with a practical, moral, and existential dimension”.⁷² The Court also appreciated that the EU’s integration process is not changing the nature and understanding of sovereignty in a radical manner and that it is “an evolutionary process and, among other things, a reaction to the increasing globalization in the world”.⁷³

The Czech Constitutional Court, however, did not deprive the sovereignty requirement of all its bite; it emphasized that Article 10a of the Czech Constitution does not permit the transfer of all the state powers to the European Union. In other words, an “unlimited transfer of sovereignty” cannot take place. Still, the Court stated that the limits of this transfer are

⁶⁸ Piqani, ‘Constitutional Courts in Central and Eastern Europe’, p. 225 (both citations).

⁶⁹ This presumption can be supported by the fact that both Lisbon judgments of the Czech Constitutional Court had to address these issues (and not for example the impact of European integration on the rule of law).

⁷⁰ For a succinct commentary of this judgment, see Petr Bříza ‘The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008’ (2009) 5 *European Constitutional Law Review* 143.

⁷¹ *Lisbon I* judgment, § 104.

⁷² *Lisbon I* judgment, § 107.

⁷³ *Lisbon I* judgment, § 108.

predominantly a political question and judicial interference should come into consideration only in cases where the basic identity of the Czech Constitution was clearly being violated.⁷⁴

Similar conclusions can be made as regards the Czech Constitutional Court's approach to the concept of democracy. In its *Lisbon II* judgment, the Court rejected the idea that representative democracy (as protected by the Eternity Clause) is by definition tied to the level of national states. It affirmatively quoted the opinion of Advocate General Maduro in Case C-411/06 *Commission v Parliament and Council*⁷⁵ and stated that:

*“the democratic processes on the Union level and the domestic level supplement each other and are mutually dependent. The petitioners are mistaken when they claim that ‘representative democracy can exist only within states, within sovereign subjects’. The principle of representative democracy is one of the standard principles for the organisation of larger entities, both inter-state and non-state organisations. The existence of elements of representative democracy on the Union level does not rule out implementation of those same elements presupposed by the constitutional order of the Czech Republic, nor does it mean exceeding the limits of the transfer of powers established by Article 10a of the Constitution.”*⁷⁶

This line of cases was confirmed in a recent *5% Electoral Threshold II* judgment (no. Pl. ÚS 2/14). The Czech Constitutional Court, even though it addressed a seemingly purely domestic issue (the constitutionality of the election threshold in domestic parliamentary elections), has stressed the impact of European integration on the understanding of the concept of democracy:

“(…) the functioning of electoral systems at the domestic level cannot be assessed on its own anymore, as it gradually has become a part of representative democracy system in the multi-level association of the European Union and its member states. The proper functioning of this association is a necessary precondition of due democratic processes at the domestic level. The prospective function of constitutional judiciary, that reviews the constitutionality of election laws using the possibility of cross-fertilization, is irreplaceable”.⁷⁷

Perhaps the only exception (but none the less problematic) to the generally euro-friendly attitude of the Czech Constitutional Court is represented by the judgment in the *Holubec* case.⁷⁸ In this case, the Czech Constitutional Court held that the CJEU acted ultra vires when it issued its ruling in the *Landtová* case.⁷⁹ This ruling impugned the previous case law of the Czech Constitutional Court relating to the pension benefits of persons adversely affected by the dissolution of Czechoslovakia.⁸⁰

However, the importance of this judgment for the future evolution of the Czech Constitutional Court's case law should not be overestimated. It can be argued that this exception

⁷⁴ *Lisbon I* judgment, § 109.

⁷⁵ Opinion of Advocate General Maduro in C-411/06 *Commission v Parliament and Council*.

⁷⁶ *Lisbon II* judgment, § 139.

⁷⁷ Judgment of CCC of 19 August 2014, Pl. ÚS 2/14 *5% Electoral Threshold II*. A similar approach to the concept of democracy (and even to the more concrete principle of voting rights equality) was taken by the CCC in the judgment of 19 May 2015, Pl. ÚS 14/14, *EP Threshold*. For an analysis of this judgment, see Hubert Smekal, Ladislav Vyhnanek 'Equal voting power under scrutiny: Czech Constitutional Court on the 5% threshold in the 2014 European Parliament Elections.' (2016) 12 *European Constitutional Law Review* 148.

⁷⁸ Judgment of CCC of 31 January 2012, Pl. ÚS 5/12 *Holubec*.

⁷⁹ ECJ, Case C-399/09 *Landtová* [2011] ECR I-5573.

⁸⁰ For further details of this complex problem, see articles referred to in note 6.

was motivated by predominantly domestic reasons and not by an aspiration to take on the Court of Justice of European Union. The act of defiance of the Czech Constitutional Court was merely a flashpoint in its long-lasting and somewhat bitter struggle with the Supreme Administrative Court, which refused to follow the Constitutional Court's case law and in the end decided to drag the Court of Justice into the battlefield.⁸¹ The two courts have fought over the outcome of the Slovak pensions saga for many years and the intensity (one could say emotional charge) is evident in many of the Constitutional Court's actions over the years.⁸²

Despite being quite interesting for both EU and constitutional scholars, this unique case can hardly be seen as a true reflection of the Czech Constitutional Court's attitude towards EU law and it will probably be viewed as an outlier case or material for "footnotes of EU law textbooks".⁸³ Moreover, this struggle and its personal dimension were strongly tied to the composition of the so-called 'second'⁸⁴ Czech Constitutional Court (2003-2012) and it seems likely that the 'third' Czech Constitutional Court (2013-now) will take up only the more euro-friendly aspects of its case law.⁸⁵

Hence, we might argue that the Czech Constitutional Court's evolutive and (generally) euro-friendly interpretation of the Czech Constitution reduces the risk of friction between the Czech constitutional identity and EU law. In other words, the euro-friendly interpretation of the core concepts of the Czech constitutional order should be seen as evidence of the CCC's willingness to meet EU law halfway: its approach, taken together with the EU's duty to respect national identity pursuant to Article 4(2) TEU, creates a complementary set of conflict aversion strategies.

III. Taming the Tensions between "Legal" and "Popular" Constitutional Identity

We have shown in the previous parts that the concept of constitutional identity has not been *explicitly* developed in the case law of the Czech Constitutional Court (nor by any other relevant body, for that matter), and that it has been quite neglected by domestic academic literature as well. At the same time, we have suggested that the concept of the Eternity Clause embedded in Article 9(2) CC (perhaps combined with a slightly broader concept of substantive core as developed in academic literature) is roughly equivalent to what might be labelled as the Czech "legal" constitutional identity. The CCC was at first almost single-handedly responsible for

⁸¹ As Zbírál puts it: "[the Constitutional Court's] prime target was the SAC, and the ECJ was used as a mere accessory, whose exemplary rebuke was necessary in order to sentence the main culprit." Zbírál, 'Czech Constitutional Court, Judgment of 31 January 2012', p. 1488.

⁸² Only the unique nature of this case can explain the fact that the Czech Constitutional Court harshly criticized the Supreme Administrative Court for triggering a preliminary question procedure before the CJEU (Judgment of CCC of 12 August 2010, III. ÚS 1012/10). In other cases, the Constitutional Court chastised ordinary courts for the contrary (as not asking a preliminary question, where it was appropriate, violates the principle of a "legal judge") and sometimes even forced them to ask a preliminary question (see e.g. Judgment of CCC of 8 January 2009, II. ÚS 1009/08).

⁸³ Zbírál, 'Czech Constitutional Court, Judgment of 31 January 2012', p. 1490.

⁸⁴ This term is used to describe the members of the Czech Constitutional Court between 2003 and 2013.

⁸⁵ Even though the recent changes in the composition of the Court cannot serve as conclusive evidence of this presumption, some of them may prove important. For example, Pavel Holländer (judge rapporteur of the Court's opinions in the Melčák and Landtová cases and a strong proponent of expansive interpretation of the Eternity Clause) has left the Court in 2013, whereas Jiří Zemánek (a prominent advocate of the euro-friendly attitude of the Court) was appointed in 2014. Zemánek's euro-friendliness became clear in particular in his majority opinion in the EP Threshold judgement, in which he vigorously defended the 5% threshold in the European Parliament elections. See also Smekal, Vyhnánek 'Equal voting power under scrutiny', at pp. 149 and 163.

defining the content of the Eternity Clause and determining the consequences of its violation. Other domestic institutions⁸⁶ and academics⁸⁷ have until recently remained passive. Only since the *Melčák* judgement of 2009, has the academic literature caught up and recently, several academics have helped to map the conceptual framework and have even developed it further.⁸⁸

The relationship between such understood Czech “legal” constitutional identity and the EU law is quite complex. The Czech Constitutional Court generally respects the primacy of EU law over the Czech legal order, including the Czech constitutional order. On the other hand, it has developed a “Solange-like” doctrine that poses substantive limits based on the Eternity Clause both to a transfer of powers to the EU and to the subsequent application of these powers by EU bodies.⁸⁹ The Eternity Clause cannot be limited (i.e. proportionality balancing in the event of a conflict is unacceptable), so that its protection should be considered absolute. The CCC event went so far as to declare a judgment of the European Court of Justice to be ultra vires and thus exceeding the powers transferred to the EU by the Czech Republic.

However, we have shown that the Czech “legal” constitutional identity does not pose a significant *practical* obstacle to the primacy of EU law. First of all, the Czech Eternity Clause/“legal” constitutional identity as defined in the constitutional text and as developed by the CCC is based on *shared values* like democracy, the rule of law, respect for human rights and state sovereignty. Moreover, despite the traditional understanding of democracy and state sovereignty being put under pressure by the course of European integration, the CCC does not hesitate to interpret these concepts in a “euro-friendly” way, which greatly minimizes the risk of conflict between EU law on the one hand and “sovereignty” and “democracy” as parts of the Czech “legal” constitutional identity on the other. This “euro-friendly” interpretation makes it easier for the domestic legal order and EU law to co-exist and interact. It can thus be argued that the CCC’s treatment of the Eternity Clause means that the Czech constitutional order is quite open to the idea of multi-level constitutionalism.

But this euro-friendly attitude does not have to last long. As we have indicated above, the people and even the political institutions have so far generally been left out of the process of formation of constitutional identity so far. The ever strengthening voices that support the traditional understanding of state sovereignty⁹⁰ or the calls for strengthening the role of the

⁸⁶ Besides the aforementioned insistence of President Václav Klaus to join Protocol no. 30 to the Lisbon Treaty, the biggest contributions by other institutions to the development of the Eternity Clause/constitutional identity are probably the petitions of the Senate and Senators in the *Lisbon I* and *Lisbon II* cases respectively. The petitioners in these cases formulated a list of questions concerning the content of the Eternity Clause and its effects, which in turn pushed the CCC to formulate its position. It is also interesting to note that while the CCC is responsible for the development of the content of the Eternity Clause, it has virtually no opportunity to directly engage in a dialogue with the CJEU concerning Art. 4(2) TEU. That was clearly visible in the *Landtová* case where the CCC even sent the CJEU the *amicus curiae* brief (which was not reflected by the CJEU). The representative of the government offered a very different account of the case and did not side with the CCC’s opinion that the peaceful dissolution of Czechoslovakia and the related legal acts form a part of the Czech national identity.

⁸⁷ The most important exception is perhaps an article by Pavel Holländer, Justice of CCC in 1993-2003, the Vice-President of the CCC in 2003-2013 and a judge-rapporteur in *Melčák* case, concerning the constitutional core and its effects. See Pavel Holländer ‘Materiální ohnisko ústavy a diskrece ústavodárce’ [2005] 144 *Právník* 313.

⁸⁸ See *supra* for example the texts by Molek and Preuss.

⁸⁹ Cf. the above quoted judgments of the CCC in *Sugar Quotas III* and *Lisbon I*, § 85.

⁹⁰ A typical proponent of such view is Václav Pavlíček, a Professor of Constitutional Law at the Charles University. See Václav Pavlíček. ‘Kdo je v České republice ústavodárcem a problém suverenity.’ In Marie Vanduchová and Jaromír Hořák (ed.), *Na křižovatkách práva: pocta Janu Musilovi ke sedmdesátým narozeninám*, C.H. Beck, 2011, pp. 21-38; and, more recently. Václav Pavlíček, Ústavní právník k migrační krizi: Stát rozhoduje, komu umožní vstup, *Novinky.cz*, 11 July 2016, available at <https://www.novinky.cz/domaci/408830-ustavni-pravnik-k-migracni-krizi-stat-rozhoduje-komu-umozni-vstup.html>.

“nation” in the Czech Constitution⁹¹ might soon be the driving force of a process that “takes the constitution away from courts” and reshapes the understanding of the Czech constitutional identity.

Even though constitutional scholars view these recent proposals with suspicion, they struck a chord with many people and exposed significant tensions between the elites and the rest of the society. These tensions have been present since the very beginning of the independence of the Czech Republic,⁹² but they were, to a large extent, hidden behind the post-Velvet euphoria, joining the European Union and “catching up” with the West.⁹³ Only the financial and migration crises exposed them fully.

This brings us back to the popular constitutional identity, which operates alongside the legal constitutional identity. Since the people (and even most of the political institutions) have been excluded from the formation of the Czech legal constitutional identity and there has been no discussion on to extent of which this elitist view of constitutional identity reflects the public’s view of constitutional identity, the gap between legal and popular constitutional identity might have increased.

We cannot delve into the details of the Czech popular constitutional identity here. However, the formative historical events are clear: suffering of Czechs from the Germanisation and Catholicization politics as well as suppression of the autonomy of Czech lands under the Austrian Empire (1620-1918), the creation of an independent Czechoslovakia in 1918, the Great Depression in the late 1920s and early 1930s, the Munich Treaty of 1938 and the subsequent annexation of Czech lands by the Third Reich in 1939, the 1946 free parliamentary elections⁹⁴ and the subsequent communist coup d’état in 1948, the Prague Spring of 1968, the Velvet Revolution of 1989, and the dissolution of Czechoslovakia in 1993.

This is not to say that these historical milestones themselves belong to the constitutional identity.⁹⁵ However, they translated into specific constitutional narratives that cannot easily be discerned from the constitutional text. For instance, the Great Depression and communist rule resulted in a strong emphasis on eradicating socio-economic inequalities, but significantly less so on socio-cultural inequalities.⁹⁶ Even though this has been translated “only” into the protection of social and economic rights in the Czech Charter of Fundamental Rights and Freedoms and not into the Eternity Clause (unlike in Germany), the principle of the welfare state is arguably one of the key components of the Czech popular constitutional identity.

⁹¹ Such idea was proposed by Aleš Gerloch, the former Dean and Head of the Constitutional Law Department at the Charles University. See Aleš Gerloch, *Ústavní právník Gerloch chce vrátit do ústavy národ*, Novinky.cz, 14 November 2016, available at <https://www.novinky.cz/domaci/420565-ustavni-pravnik-gerloch-chce-vratit-do-ustavy-narod.html>.

⁹² Note that the Czech people were not given an opportunity to express their opinion on the dissolution of Czechoslovakia in referendum, played no role in the drafting of the Czech Constitution, and many of them had a limited understanding about the nature of the capitalist regime they ended up in. A recently published oral history of the Velvet Revolution is telling in this respect; see Miroslav Vanek, Pavel Mücke, *Velvet Revolutions: An Oral History of Czech Society* (Oxford: Oxford University Press, 2016).

⁹³ However, “catching up” is not a natural development; see e.g. Jan Komárek, “The Struggle For Legal Reform after Communism: Zdenek Kuhn, The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation? (Martinus Nijhoff, 2011)” (2015) 63 *American Journal of Comparative Law* 85.

⁹⁴ Note that the Communist Party won the 1946 *free and democratic* elections in the Czech lands (not in Slovakia).

⁹⁵ But cf. Václav Pavlíček who claims that the guarantees of Czech statehood must be found in the historical context and experiences the Czech society has lived through (see Václav Pavlíček. *‘O české státnosti: úvahy a polemiky, část 3., Demokratický a laický stát’*. Praha, 2009).

⁹⁶ See Barbara Havelková, ‘Resistance to Anti-Discrimination Law in Central and Eastern Europe – a Post-Communist Legacy?’ (2016) 17 *German Law Journal* 627.

Similarly, dealing with the past after the Velvet Revolution, which led to the adoption of some specific lustration⁹⁷ and restitution laws,⁹⁸ forms a part of Czech constitutional identity, despite the fact that none of these laws had constitutional rank and the Czech Constitution does not mention them at all. It is telling that the Czech Republic defends its own understanding of restitution laws so vigorously that it rejected the implementation of the Human Rights Committee's rulings, which found them to be in violation of the International Covenant on Civil and Political Rights.⁹⁹ For the same reasons, the Czech Republic has not ratified Protocol No. 12 to the European Convention on Human Rights (a freestanding prohibition of discrimination), because it fears litigation that could undermine the limited scope of Czech restitution laws.

To give one more example, seven decades of Czechoslovak statehood and the peaceful dissolution of Czechoslovakia is for many also a part of the genetic code of the Czech popular constitutional identity and may justify the adoption of special measures such as topping the Slovak pensions for Czechs to the level of Czech pensions, which resulted in the *Landtová* litigation before the European Court of Justice.¹⁰⁰ It is a pity that the CCC has not elaborated on this issue more thoroughly in its *Holubec* judgment,¹⁰¹ because this is the only seed of popular constitutional identity in its case law.

These three examples show that the Czech “popular” constitutional identity may have a different pedigree from its “legal” counterpart. However, the main point is that the lack of any discourse between proponents of legal and popular constitutional identity deprives this concept of the dynamic aspect that could reduce the gap between these conceptions and forge a widely shared conception of constitutional identity that stands on firm ground. This neglect of the popular input is in fact a typical trait of Czech constitutionalism. Legal constitutionalism has been prioritized over political constitutionalism,¹⁰² which undermined popular constitutionalism and severely limited participatory elements in democratic government.¹⁰³ As a result, the Czech Republic does not have a developed understanding of its constitutional identity and its constitution does not seem to be as important to its self-understanding as in Germany or France.¹⁰⁴

Therefore, the main task for the elites in the coming years is to initiate the discussion about the Czech constitutional identity and to find common ground, not necessarily in the lowest common denominator, between legal and popular conceptions of constitutional identity. This debate should ideally in the long run develop into the sense of political belonging and constitutional patriotism¹⁰⁵ that would complement the ethnic and religious (in the Czech context

⁹⁷ On the perseverance of the Czech lustration laws, see e.g. David Kosař, 'Lustration and Lapse of Time: Dealing with the Past in the Czech Republic' (2008) 4 *European Constitutional Law Review* 460.

⁹⁸ See e.g. Patrick Macklem, 'Rybná 9, Praha 1: Restitution and Memory in International Human Rights Law' (2005) 16 *European Journal of International Law* 1.

⁹⁹ See e.g. *Adam v. Czech Republic*, CCPR/C/57/D 586/1994, Decision of 23 July 1996, para. 1 2.8; *Blazek et al. v. Czech Republic*, CCPR/C/72/D/857/1999, Decision of 9 Aug. 2001, para. 5.8; *Des Fours Walderode v. Czech Republic*, CCPR/C/73/D/747/1997, Decision of 2 Nov. 2001, para. 8.4.

¹⁰⁰ See notes 78-85 above.

¹⁰¹ See note 39 above.

¹⁰² The best analysis of the differences between legal and political constitutionalism can be found in Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

¹⁰³ See Paul Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of the Czech Republic, Hungary, Poland, Romania and Slovakia* (London: Routledge 2013).

¹⁰⁴ For a succinct study of the German conception of *Verfassungsidentität* and its French equivalent of *identité constitutionnelle de la France*, see Jan-Herman Reestman, 'The Franco-German Constitutional Divide. Reflections on National and Constitutional Identity' (2009) 4 *European Constitutional Law Review* 374.

¹⁰⁵ On constitutional patriotism, see note 45.

largely atheist) identities of the Czech people. Unfortunately, Czech public intellectuals have so far failed to even start reconciling these two positions and forging them into the constitutional identity that would find robust support among Czech citizens. This is a pity since constitutional identity is a double-edged sword. If grasped properly, it is an opportunity to build a new foundation of Czech statehood and glue the polarized segments of Czech society together. However, constitutional identity can also be abused, as we can see in Viktor Orbán's disingenuous attempts at nurturing national constitutional identity as a counter-concept to European constitutional identity.¹⁰⁶

IV. Conclusion

This chapter has traced the evolving interpretation of the Czech Eternity Clause by the CCC and the development of the Czech constitution's substantive core by Czech constitutional scholars. This analysis has shown that the Czech constitutional actors still prefer to play with the Eternity Clause, the concept of substantive core of the Constitution and the well-established concept of sovereignty. In other words, constitutional identity is not yet „à la mode“, while sovereignty is definitely not „passé“. It is thus not clear whether Czechs would treat the concept of constitutional identity as a new twist on the Eternity Clause and on the substantive core or rather as a separate value. We indicated in the introduction that constitutional identity emerges dialogically and elements like the popular reflection of a nation's past and aspirations play an important role in this dynamic process. In the Czech Republic, the dialogical process has barely started and so far we have just the incomplete “thesis” of the CCC. It seems that the popular “anti-thesis” just brewing. Therefore, we may conclude that constitutional identity in the Czech context is a dormant concept that still lies abandoned. That may not be the worst thing since the concept of constitutional identity is dangerous as, in contrast to the rather technical concept of sovereignty, it brings the identity politics into the picture. The problem with this argument is that sooner or later someone will pick up the gauntlet and run the show.

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¹⁰⁶ See Uitz, Renáta. ‘National Constitutional Identity in the European Constitutional Project: A Recipe for Exposing Cover Ups and Masquerades’, *VerfBlog*, 2016/11/11, <http://verfassungsblog.de/national-constitutional-identity-in-the-european-constitutional-project-a-recipe-for-exposing-cover-ups-and-masquerades/>, DOI: <http://dx.doi.org/10.17176/20161111-103427>.