The semantics of constitutional sovereignty in post-sovereign "new" Europe: A case study of the Czech Constitutional Court's jurisprudence

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The article discusses recent constitutional developments and conflicts in the Czech Republic. These are used as an example of the semantic persistence of sovereignty and the new jurisprudence emerging in the post-sovereign constellation of the European Union. After a brief introduction to the problem of sovereignty in the EU and its member states, constitutional conflicts in the Czech Republic at the time of the ratification of the Lisbon Treaty are analyzed to show different conceptualizations of sovereignty by different constitutional bodies. In this struggle, the Czech Constitutional Court eventually formulated the concept of sovereignty as part of political and legal globalization. The Court considers sovereignty as an instrument for achieving the post-national rule of law and constitutional accountability beyond the classical notions of international politics and state organization. This approach is profoundly different, for instance, from the German Federal Constitutional Court's more traditional dualistic perspective of national and European law. It also has not been affected by the Czech Constitutional Court's recent conflict with the Court of Justice of the EU in the Landtová *case. The article, therefore, concludes by stating that the Court's doctrine of sovereignty significantly contributes to the Court's tradition of fundamental value judgments and interventions.*

1. Introduction

This article discusses the persistence of the semantics of sovereignty in the EU and using the example of the recent constitutional developments and conflicts in the Czech Republic. After a brief description of sovereignty's persistence and resurgence in EU member states, it focuses on recent constitutional conflicts between the different branches of constitutional power in the Czech Republic and between the Czech Constitutional Court (CCC) and the Court of Justice of the EU (CJEU). It examines

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various uses of the concept of sovereignty employed in the Lisbon Treaty case by the Treaty's critics and the CC itself. These conceptualizations have their external context and define the CC's relationship to the EU and its institutions, most notably the CJEU.

The second section describes how the CC gradually moved from the basic conceptualizations of sovereignty, such as the one formulated in the *Sugar Quota III* judgment, to more complex and theoretically challenging definitions in the Lisbon Treaty judgments. Comparatively analyzing the CC's *Lisbon I* and *Lisbon II* judgments and the German Federal Constitutional Court's (FCC) *Lisbon* judgment, I argue that the CC actually addresses profound questions of constitutional sovereignty in global society, typical of legal and political systems evolving beyond the organizational framework of the sovereign constitutional state. The CC perceives sovereignty as being part of political and legal globalization and considers it to be an instrument for achieving the post-national rule of law and constitutional accountability beyond classical notions of power politics and state organization. Nevertheless, the CC does not shy away from using the constitutional sovereignty argument, as proved by the *Holubec* case, and thus reasserting its powers against both the EU and national judicial bodies.

This article, therefore, concludes by demonstrating that this complex practice and engagement of the CC in debates regarding legal and political globalization and supranationalism, of which the EU is a prime example, has its intrinsic jurisprudential logic and belongs to the CC's tradition of fundamental value judgments and interventions.

2. The semantics of sovereignty and its persistence in the EU

It is impossible to discuss contemporary globalized society in Europe and worldwide in terms of the institutional hierarchy of the nation state, its indivisibility, and the ultimate decision-making power and enforcement of supreme will within a political community.[1] It is no wonder that political and legal theorists often criticize current theories of state constitutionalism and international law drawing on the concept of sovereignty.[2] Some scholars thus "question sovereignty"[3] and others call for "a constitution for world society"[4] or "constitutionalism beyond the state."[5]

Nevertheless, these criticisms and normative visions are usually countered by both academic and political reiterations of the principle of constitutional sovereignty, liberties and democratic legitimacy in contemporary politics and law.[6] Political and legal conflicts and debates in the EU, especially those following Maastricht Treaty and

1 Stephen D. Krasner, Problematic Sovereignty: Contested Rules and Political Possibilities (2001). *See also* State Sovereignty as Social Construct (Thomas J. Biersteker & Cynthia Weber eds., 1996).

2 Andreas L. Paulus, *The International Legal System as a Constitution*, *in* Ruling the World? Constitutionalism, International Law and Global Governance 69 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

3 Neil MacCormick, Questioning Sovereignty: Law, State, and Nation in the European Commonwealth 75 (1999).

4 Jürgen Habermas, *Constitutionalisation of International Law and the Legitimation Problems of a Constitution for World Society*, 15 Constellations 444, 444–455 (2008).

5 Neil Walker, *Taking Constitutionalism Beyond the State*, 56 Pol. Stud. 519 (2008).

6 Michael Fowler, Law, Power, and The Sovereign State: The Evolution and Application of the Concept of Sovereignty (1995).

Amsterdam Treaty integration and enlargement,[7] the process of constitution-making, and eventually the ratification of the Lisbon Treaty,[8] show that the concepts of the state and/or constitutional sovereignty remain highly popular[9] among citizens, politicians, civil servants, and judges living and working in the European post-national and post-sovereign constellation.[10] Political leaders and senior judges also increasingly speak out against the idea of a supranational EU limiting its member states to some kind of federal or other state-like constitutional settlement.[11]

The endlessly discussed democratic deficit[12] of the European Union and the potential risks associated with the erosion of the democratic legitimacy of member states cannot be easily remedied by the ideas of governance-based post-sovereign and post-constituent supranational European polity. As regards EU member states and their sovereignty, in the United Kingdom, for instance, it is not only the tabloids blaming Brussels for all the ills of the British Isles that invoke an urgent need to defend state sovereignty against the supranational power of the EU. In parliamentary debates, the issue of parliamentary sovereignty is raised with increasing frequency in the context of European integration, foreign policy, immigration, defense, judicial independence, and other matters associated with the territorial nation state.[13] Sovereignty, its exercise, and democratic constitution are major issues of electoral campaigns, often internally dividing both government and opposition.[14]

In German constitutional debates on the process of European integration, the FCC has famously and repeatedly ruled that constitutional sovereignty and the rights of German citizens take precedence over European law. In its classic and endlessly discussed *Maastricht* judgment,[15] the FCC controversially stated:

> If the peoples of the individual States (as is true at present) convey democratic legitimation via the national parliaments, then limits are imposed, by the principle of democracy, on an extension of the functions and powers of the European Communities. State power in each of

[7] Ingolf Pernice, *Multilevel Constitutionalism and the Treaty of Amsterdam, European Constitution Making Revisited*, 36 Comm. Mkt L. Rev. 703 (1999).

[8] EU Law After Lisbon (Andrea Biondi, Piet Eeckhout, & Stephanie Ripley eds., 2012).

[9] European Disunion: Between Sovereignty and Solidarity (Jack Hayward & Rüdiger Wurzel eds., 2012).

[10] Jürgen Habermas, Postnational Constellations: Political Essays 89–103 (2001); William Wallace, *Europe after the Cold War: Interstate Order or Postsovereign Regional System?*, 25(5) Rev. Int'l Stud. 201, 217–218 (1999).

[11] *See, e.g.*, Roman Herzog [Germany's former federal President] and Lüder Gerken, *Stop the European Court of Justice*, EU Observer (Sept. 10, 2008), *available at* http://euobserver.com/opinion/26714. *See further* Gerard Conway, The Limits of Legal Reasoning and the European Court of Justice 83 (2012).

[12] *See, e.g.*, Debating the Democratic Legitimacy of the European Union (Beate Kohler-Koch & Berthold Rittberger eds., 2007)

[13] Mark Elliott, *United Kingdom: Parliamentary Sovereignty under Pressure*, 2(3) Int'l J. Const. L. 545 (2004)

[14] Pre-2010 election discussions and programs revealed growing Euro-skepticism across the whole political spectrum, pushing even the traditionally pro-European Liberal Democratic Party to make huge concessions as a junior partner in the coalition government. This government subsequently legislated for the European Union Act 2011 which was heavily inspired by national-sovereignty-oriented politics. The Act is *available at* http://www.legislation.gov.uk/ukpga/2011/12/contents/enacted/data.htm.

[15] *See, e.g.*, Matthias Herdegen, *Maastricht and the German Constitutional Court: Constitutional Restraints for an "Ever Closer Union"*, 31 Comm. Mkt L. Rev. 235 (1994); Trevor C. Hartley, European Union Law in a Global Context, Text, Cases and Materials 159–160 (2004).

> the States emanates from the people of that State. The States require sufficient areas of significant responsibility of their own, areas in which the people of the State concerned may develop and express itself within a process of forming political will which it legitimates and controls, in order to give legal expression to those matters which concern that people on a relatively homogenous basis spiritually, socially, and politically.[16]

Despite the fact that the judgment echoed Hermann Heller's idea of constitutional democracy and popular sovereignty emanating from social homogeneity,[17] the FCC was criticized for promoting the pre-political notion of a nation.[18] However, the FCC did not treat the sovereign nation state as an absolute organization or an existential reservoir of political values and principles. Rather, it considered it as an organization and instrument and guarantee of the democratic selfhood, self-rule, welfare generated by social solidarity and popular government[19]—something the FCC summarized in its recent *Lisbon* judgment in the following words:

> Within the order of the Basic Law, the structural principles of the state laid down in article 20 of the Basic Law, i.e., democracy, the rule of law, the principles of the social state, the republic, the federal state, as well as the substance of basic fundamental rights indispensable for the respect of human dignity are, in any case, not amendable because of their fundamental quality.[20]

In the German context, the constitutional sovereignty argument was a response to the progressive political and legal integration of the EU in the 1990s.[21] The FCC's *Lisbon Judgement* refers to the state as a primary democratic space and, in the classical dualist view of international law applied to the EU,[22] states that "the Member States are the constituted primary political area of their respective polities, the European Union has secondary, i.e., delegated, responsibility for the tasks conferred on it." [23]

This reasoning shows that popular sovereignty can hardly be replaced by judicial sovereignty[24] of the CJEU shared with other top judges in Member States through channels of "constitutional cooperation" or "judicial dialogue."[25] Reflecting on the growing tension between the democratically legitimate and representative bodies of member states and the primarily technocratic and expert-driven legitimacy of the administration and

[16] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Oct. 12, 1993, BVerfGE 89, 155 (Ger.); Brunner v. European Union Treaty [1994] CMLR 57, § C/I/2/b2.

[17] The Court's reference was to: Hermann Heller, Politische Demokratie und soziale Homogenität: Gesammelte Schriften 421 (1971).

[18] Joseph H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1(3) Eur. L.J. 219 (1995).

[19] For a recent theory of the constitutional subject and its identity, see Michel Rosenfeld, The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community (2009).

[20] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], June 30, 2009, BVerfG, 2 BvE 2/08, ¶ 217 (Ger.), *available at* http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html.

[21] Donald P. Kommers & Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany 331–342 (3d ed., rev. & exp. 2012).

[22] *Id.* at 345.

[23] BVerfG, 2 BvE 2/08, ¶ 301.

[24] For the concept of judicial sovereignty, its general jurisprudential meaning and contextualization in other countries, such as India, *see* Pratap B. Mehta, *The Rise of Judicial Sovereignty*, 18(2) J. Democracy 70 (2007).

[25] Francis Jacobs, *Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice*, 38 Texas Int'l L.J. 547, 550 (2003).

justice of the EU,[26] the drafters of the Lisbon Treaty explicitly recognized different forms of constitutional arrangement and state sovereignty, and different national identities, in article 4(2). The article protects constitutional identity of member states, and thus legally confirms what legal theorists have been describing as a state of constitutional, legal, and political pluralism and the end of the EU law's absolute primacy doctrine.[27]

Despite the ongoing transformation of the global society, international law, and statehood,[28] the semantics of sovereignty persists in both political and legal communication[29] and even thrives within the discourse of emerging European post-sovereign constitutionalism.[30] The following sections of this article therefore pursue the goal of both demonstrating this semantic persistence of constitutional sovereignty in the post-sovereign EU constellation and analyze its theoretical and practical conceptualizations and uses by the CC and other constitutional bodies of the Czech Republic as one of the EU member states. I argue that the CC's complex doctrine of self-limited constitutional sovereignty is an example of an argument evolving within the post-sovereign EU which actually facilitates the legal and political operations and communication emerging at both EU and member state levels. Even the CC's most controversial *Holubec*[31] judgment, which declared the CJEU's *Landtová* judgement[32] to be *ultra vires*, is still part of the doctrine. Discussing the variety of uses of the concept of sovereignty in different judgments, I argue that the CC thus considers sovereignty an instrument of achieving the post-national rule of law, political legitimacy, and transnational constitutional accountability beyond the sovereign state.

3. A brief history of the CC's doctrine of constitutional sovereignty and the delegation of powers to the European Union

Since the fall of the Communist regime in 1989, constitutional developments in the Czech Republic and other post-Communist countries may be described as a gradual shift from simple interpretations to more complex doctrines and jurisprudence of constitutional sovereignty and statehood in the post-sovereign constellation of the EU.[33]

[26] *See, e.g.*, James A. Caparaso, *The European Union and the Forms of State: Westphalian, Regulatory or Postmodern*, 34 J. Comm. Mkt Stud. 29 (1996)

[27] Armin von Bogdandy & Stephan Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, 48 Comm. Mkt L. Rev. 1417, 1432–1454 (2011).

[28] Martti Koskenniemi, *The Future of Statehood*, 32 Harv. Int'l L.J. 397 (1991).

[29] Jean L. Cohen, Globalization and Sovereignty. Rethinking Legality, Legitimacy and Constitutionalism (2012).

[30] Christoph Schreuer, *The Waning of the Sovereign State: Towards a New Paradigm of International Law?*, 4 Eur. J. Int'l L. 447 (1993).

[31] Ústavní Soud České Republiky [ÚS] [Constitutional Court], Jan. 31, 2012, Pl ÚS 5/12 (Czech) (hereinafter the Holubec case), *available at* http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=911a315c9c22ea1989d19a3a848724e2.

[32] C-399/09 *Landtová*, 2011 E.C.R. I-05573.

[33] *See especially* Anneli Albi, EU Enlargement and the Constitutions of Central and Eastern Europe 9–13 (2005). On the EU enlargement process, *see generally* The Enlargement of the European Union (Marise Cremona ed., 2003) and EU Enlargement: A Legal Approach (Christophe Hillion ed., 2004).

Early constitutional and political transformations were typical of the process of regaining, rebuilding, and legitimizing a sovereign constitutional and democratic state; however, the same process was instrumental in achieving one of the most fundamental goals, namely accession to the EU.[34] The parallel processes of constitution-making, which served to reconstitute state sovereignty, and EU integration, which limited the very reconstituted sovereignty and used it as a primary vehicle for entering the exclusive club of EU member states, have been extensively analyzed by legal and political scholars over the past two decades.[35]

Similarly, early constitutional arguments and deliberations on the supremacy of EU law and their effect on Central and Eastern European states candidates for accession have been the subject of numerous works in constitutional theory and EU law studies.[36] Technical uses of constitutional sovereignty generally facilitated the accession of post-Communist states to the EU; however, they also highlighted a more general problem of democratic legitimacy and accountability *vis-à-vis* the processes of supranational integration. Constitutional bodies in different countries, and constitutional courts in particular, gradually adopted the post-accession doctrines of divided sovereignty and *Kompetenz der Kompetenz*, thus impacting on the supremacy of democratically legitimized national legal systems.[37]

A good example of such early semantics of sovereignty in post-sovereign legal and political structures in the EU is the CC's *Sugar Quota III* judgment[38] of March 2006. In their complaint, the conservative opposition MPs argued that the EU regulation of the sugar market amounted to the violation of the right to free commerce activities. The Court declared the national regulation void on procedural grounds and basically reiterated the FCC's position regarding the delegation of powers and the relationship between Member State constitutions and EU law in the following words:

> [T]he 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.[39]

The Court also acknowledged "a definite principle of constitutional self-restraint"[40] regarding economic measures resulting from EU policies and CJEU case law. Due to this

[34] Constitutional Evolution in Central and Eastern Europe: Expansion and Integration into the EU (Alexander He Morawa & Kyriaki Topidi eds., 2011).

[35] Spreading Democracy and the rule of Law: The Impact of Eu Enlargement on the Rule of Law, Democracy, and Constitutionalism in Post-Communist Legal Orders (Adam Czarnota, Martin Krygier & Wojciech Sadurski eds., 2006); The Impact of EU Accession on the Legal Orders of New Member States and (Pre-)Candidate Countries (Alfred E. Kellermen et al. eds., 2006).

[36] *See especially* Wojciech Sadurski, Constitutionalism and the Enlargement of Europe 66–79 (2012).

[37] Wojciech Sadurski, *"Solange, chapter 3": Constitutional Courts in Central Europe—Democracy—European Union*, 14(1) Eur. L.J. 1, 6–23 (2008).

[38] Ústavní Soud České Republiky [ÚS] [Constitutional Court], Mar. 8, 2006, Pl. ÚS 50/04 (Czech) (hereinafter Sugar Quota III Case), *available at* http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=516&cHash=9dec62b1eff2cd2f132580867455cac8.

[39] *Id.* part VI.B.

[40] *Id.* part VI.A-3.

self-restraint in economic matters, the Court refused to review EU law-based sugar quota regulations.[41] Repeating the FCC's *so long as (Solange)* formula in the Czech context,[42] the CC, nevertheless, specifically referred to article 9(2) of the Czech Constitution protecting the substantive core of the democratic state which is considered unchangeable by any constitutional amendments and laws. Any transfer of national competences to the EU must comply with the very essence of the democratic republic and its laws founded on the rights and freedoms of the citizens. These foundations are protected by article 9(2) of the Constitution and are unalterable, and therefore they cannot be transferred to another political and juridical entity, such as the supranational EU.

Despite these principled limitations of the delegation of national constitutional powers to the supranational EU, the CC further stretched its commitment to an EU-friendly interpretation of constitutional provisions in a judgment rejecting the petition of conservative opposition members of parliament (MPs) to annul the national implementation of the *European Arrest Warrant*.[43] Apart from emphasizing the necessity of EU cooperation in criminal law matters,[44] the CC's reasoning highlighted the close relationship between rights and responsibilities related to the legal status of EU citizenship. Recalling the importance of effective international extradition procedures. The CC took the view that:

> [T]he contemporary standard for the protection of fundamental rights within the European Union does not . . . give rise to any presumption that this standard for the protection of fundamental rights, through invoking the principles arising therefrom, is of a lesser quality than the level of protection provided in the Czech Republic.[45]

Following these early reflections on the relationship between the Czech constitutional order and EU law, the doctrine of divided sovereignty adopted by the CC and the Court's general commitment to a pro-EU interpretation of the Czech Constitution, nevertheless needed to be substantially refined during the process of the Lisbon Treaty ratification.

4. The Lisbon Treaty ratification and its political context in the Czech Republic

Before analyzing the landmark *Lisbon I*[46] and *Lisbon II*[47] judgments of the CC, a brief overview of the political developments and the different players involved is essential

41 This position was criticized by some scholars as, for example, weakening the protection of constitutional rights of citizens in the new member states of the EU after its enlargement in 2004. *See* Anneli Albi, *Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums*, 15(1) Eur. L.J. 46 (2009).

42 Sadurski, *supra* note 37, at 6–9.

43 Ústavní Soud České Republiky [ÚS] [Constitutional Court], May 3, 2006, Pl. ÚS 66/04, No. 434/2006 Coll (hereinafter European Arrest Warrant case) (Czech), *available at* http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=512&cHash=94f2039f92b13843f3a3b93c6fcb237e.

44 Harmen van der Wilt, *On the Hierarchy between Extradition and Human Rights*, in Hierarchy in International Law: The Place of Human Rights 148, 163 (Erika De Wet & Jure Vidmar eds., 2012).

45 European Arrest Warrant Case, Pl. ÚS 66/04, ¶ 71.

46 Ústavní Soud České Republiky [ÚS] [Constitutional Court], Nov. 26, 2008, Pl ÚS 19/08 (hereinafter Treaty of Lisbon I case) (Czech), *available at* http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=484&cHash=621d8068f5e20ecadd84e0bae0527552.

47 Ústavní Soud České Republiky [ÚS] [Constitutional Court], Nov. 3, 2009, Pl ÚS 26/06 (hereafter Treaty of Lisbon II case) (Czech), *available at* http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=466&cHash=eedba7ca14d226b879ccaf91a6dcb276.

for understanding the constitutional context of the Lisbon Treaty's ratification in the Czech Republic.[48]

Václav Klaus, President of the Czech Republic between 2003 and 2013, was one of the most radical critics of the EU. Nevertheless, he did not have enough constitutional power and political force to block the country's accession to the EU in 2004 or its participation in the process of European constitution-making. Using the public authority of his office, Klaus often voiced his fundamental opposition to the Constitutional Treaty of the EU. While having no direct constitutional power to block its ratification, Klaus relied on the traditionally skeptical and hostile views of the Czech public and strongly supported the ratification referendum in order to undermine the pro-European and pro-Treaty politics in the Czech Republic.

Following the collapse of the Constitutional Treaty's ratification in the French and Dutch referenda and the formation of the centrist conservative coalition government in the Czech Republic in 2006, President Klaus attempted to exercise more pressure and influence in the government's executive branch. The Civic Democratic Party, of which Václav Klaus was one of the leading founding fathers,[49] was the strongest party in the coalition, and its Euro-skeptic faction supported the President's anti-EU position. The period between 2007 and 2009 was thus typical of President Klaus's conflicts with Karel Schwarzenberg, Minister of Foreign Affairs, who was then nominated by the pro-European Green Party as a junior coalition partner in the government. After the coalition government, composed of the Civic Democratic Party, the Christian Democratic Party, and the Green Party, had lost the vote of confidence in March 2009, a new caretaking "government of experts," headed by a former director of the National Statistics Office, Jan Fischer, was appointed by President Klaus to lead the country into the early parliamentary election in 2010.

The Lisbon Treaty was a product of the failed EU constitution-making process drafted at a time when the conservative coalition government had come into power in the Czech Republic in January 2007.[50] While the initial area of influence of these Euro-skeptics in Parliament and the government had been limited and contained by the coalition manifesto and negotiated agreements, the faction gained momentum after the first Irish referendum which had rejected the Lisbon Treaty on June 12, 2008.[51] In this respect, President Klaus repeatedly noted that the ratification process should not be hurried, and stated that he would not ratify the Lisbon Treaty until Ireland's ratification, which was pending the outcome of another referendum.

The Treaty, and its potential clash with the constitutional order of the Czech Republic, was subject to particularly heated debates among an influential faction of the Euro-skeptic Civic Democratic Party members of the Senate (the upper chamber of Parliament), and this faction eventually submitted a Senate petition to the CC seeking

[48] Geoffrey Pridham, *European Party Cooperation and Post-Communist Politics, in* Opposing Europe?: The Comparative Party Politics of Euroscepticism 76, 89 (Aleks Szczerbiak & Paul Taggart eds.,2008).

[49] Sean Hanley, The New Right in the New Europe: Czech Transformation and Right-Wing Politics, 1989–2006 (2007).

[50] Paul Craig, The Lisbon Treaty: Law, Politics, and Treaty Reform 20–31 (2010).

[51] Jean-Claude Piris, The Lisbon Treaty: A Legal and Political Analysis 51–60 (2010).

a review of whether the Lisbon Treaty was consistent with the constitutional order of the Czech Republic. The CC's landmark judgment of November 26, 2008—known as the *Lisbon I* judgment—was thus directly responding both to the specific legal challenges of the anti-Lisbon Treaty senators and, more generally, to the political conflicts and tensions emerging within the executive branch between the President and the coalition government, on the one hand, and among the different parties of this government, on the other.[52]

It was only after the *Lisbon I* judgment that the Chamber of Deputies (the lower chamber of Parliament with primary legislative power) ratified the Lisbon Treaty by a constitutional majority of 125 MPs (the motion was supported by the opposition Social Democratic Party, but was rejected by a number of Euro-skeptic MPs from the Civic Democratic Party as a major party in government) on February 18, 2009. The Senate subsequently ratified the Treaty by a sound majority of 54 votes on May 6, 2009; however, a critical minority of senators, closely coordinating their motion with President Klaus and explicitly voicing his own criticisms, submitted another petition to the CC on September 29, 2009. This motion effectively put the ratification process on hold, because the Czech Constitution states that such a treaty cannot be ratified until a judgment of the CC has been delivered.

Meanwhile, President Klaus responded to the second Irish referendum, which approved the Lisbon Treaty on October 2, 2009, by raising yet another objection to the Treaty. This time, he asked for an opt-out from the Charter of Fundamental Rights of the European Union, arguing that the Charter could lead to the annulment of post-World War II Presidential decrees. Issued by President of Czechoslovakia Edvard Beneš, these decrees had been the legal basis for the expulsion of those ethnic Germans and Hungarians who could not prove that they had actively resisted the Nazi occupation during the war and confiscation of their property.[53] Although they had remained dead-letter laws for decades, the so-called *Beneš decrees* have technically continued to be part of the legal order of the Czech Republic and, more importantly, have constituted a very important symbol in the Czech post-war collective memory and recent national history. The President's argument thus belonged to the arsenal of political populism without any legal substance, especially after the European Parliament's *Frowein Report* in 2002 had clearly stated that EU laws did not have a retrospective effect and the status of the 1945 Beneš decrees remained unaffected and constituted no obstacle to the Czech Republic's accession to the EU.[54]

While short on legal reasons and certainly acting *ultra vires* in terms of powers granted him as President of the Czech Republic, Klaus's move was politically powerful due to its historical evocativeness and political symbolism. The weak caretaking

[52] For further description and details, *see, e.g.*, Petr Bříza, *The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, 5 Eur. Const. L. Rev. 143 (2009).

[53] For further discussion, *see* Renáta Uitz, Constitutions, Courts, and History: Historical Narratives in Constitutional Adjudication 123–125 (2005).

[54] *See* European Parliament, *Legal Opinion on the Beneš Decrees and the accession of the Czech Republic to the European Union*, Document prepared by Prof. Dr. Dres. h.c. Jochen A. Frowein, Prof. Dr. Ulf Bernitz, the Rt. Hon. Lord Kingsland Q.C. (October 2002), *available at* http://www.europarl.europa.eu/RegData/etudes/etudes/join/2002/323934/DG-4-AFET_ET(2002)323934_EN.pdf.

government, therefore, agreed to adopt the President's position and, despite the successful ratification of the Lisbon Treaty by the Parliament of the Czech Republic and the CC's *Lisbon I* judgment, asked the European Council for an opt-out. On October 29, 2009, member states of the EU agreed in the European Council on a political promise to grant the same opt-out already granted to Poland and the UK if it is demanded by the Czech government during the next round of opt-out negotiations.

During this time, the CC considered the second petition of the senators, and eventually rejected it in a strongly worded judgment of November 3, 2009—known as the *Lisbon II* judgment—thus firmly closing the door to any further constitutional review of the Lisbon Treaty and removing the final obstacle to the ratification process.[55] On the same day, the Lisbon Treaty acquired the Presidential Assent and its ratification could be completed in the Czech Republic.[56]

5. From the adopted doctrines to the complex jurisprudence of constitutional sovereignty: the CC's reflections on globalization and sovereignty

As shown in the previous section, the CC dealt with most of the challenges well, and successfully insulated its constitutional arguments from ongoing constitutional confrontations, party politics, and ideological conflicts. In principle, the CC ruled that the Lisbon Treaty does not alter the EU's status as an international organization with attributed powers, and therefore lacking the capacity to change its powers at will.

The most remarkable outcome of the CC's ruling is the Court's rejection of what may be described as an absolutist notion of sovereignty in the current globalized and Europeanized political societies. Using the Czech constitutional order as their point of reference,[57] the judges stated that "today sovereignty can no longer be understood absolutely; sovereignty is more a practical matter."[58] It is not an existential matter of an *either/or* choice. Rather, sovereignty can be cumulative, shared, and divided and, therefore, exercised by participating in supranational, international, and transnational legal and political settings.

In paragraph 104 of the *Lisbon I* judgment, the CC comments as follows on the paradoxical semantics of state sovereignty in the post-sovereign EU:

> 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

[55] *See* Jan Komárek, *The Czech Constitutional Court's Second Decision on the Lisbon Treaty of 3 November 2009*, 5(3) Eur. Const. L. Rev. 345 (2009).

[56] Jacques Ziller, *The Treaty of Lisbon: Constitutional Treaty, Episode II*, *in* Designing the European Union: From Paris to Lisbon 244, 264 (Finn Laursen ed., 2012).

[57] For further details, *see, e.g.*, Emil Ruffer, *The Quest of the Lisbon Treaty in the Czech Republic and Some of the Changes it Introduces in EU Primary Law*, 1 Czech Y.B. Pub. & Priv. Int'l L. 23, 32 (2010).

[58] Treaty of Lisbon I case, Pl ÚS 19/08, summary introduction, ¶ 4.

> 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.[59]

According to the CC, these arrangements are agreed by the sovereign state in advance and may be reviewed and thus actually strengthen the state's sovereignty by its joint actions at a supranational level, for example within the EU institutional framework. As long as review of the scope and the exercise of the transferred powers as well as the possibility of future changes to those powers are guaranteed, the state's sovereignty is not weakened.

The CC "can review whether an act by bodies of the Union exceeds the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution, although only in wholly exceptional cases."[60] According to the CC, this review represents another important safeguard within the sovereign constitutional and democratic state against the encroachment of supranational political and legal institutions. Furthermore, the ability of member states to withdraw from the EU guaranteed by article 50 of the Treaty on the European Union (TEU) confirms, according to the CC, the principle that "States are the Masters of the Treaty," which reinforces the enduring and continued sovereignty of member states.[61]

The CC summarizes:

> [T]hese deliberations that the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The EU's integration process is not taking place in a radical manner that would generally mean the "loss" of national sovereignty; rather, it is an evolutionary process and, among other things, a reaction to the increasing globalization in the world.[62]

Sovereignty signifies the state's dynamic legal status defined by European law which, nevertheless, is an outcome of close collaboration and participation among EU member states, including the Czech Republic. This collaboration evolves, and the very meaning of state sovereignty, therefore, is subject of historical change.

The CC has subsequently commented at length on state sovereignty and globalization:

> The global scene can no longer be seen only as a world of isolated states. It is generally accepted that the state and its sovereignty are undergoing change, and that no state is such a unitary, separate organization as classical theories assumed in the past. An international political system is being created in the global scale that lacks institutionalized rules of its own self-government, such as the international system created by sovereign states had until now. It is an existential interest of the integrating European civilization to appear in global competition as an important and respected force. These processes quite clearly demonstrate that the sovereign legitimate state power must necessarily observe the ongoing developmental trends and attempt to approach them, understand them, and gradually subject this spontaneous globalization process, lacking hierarchical organization, to the order of democratic legitimacy.[63]

[59] *Id.* ¶ 104.
[60] *Id.* summary introduction, ¶ 5.
[61] *Id.* ¶ 106.
[62] *Id.* ¶ 108.
[63] *Id.* ¶ 105.

This conclusion and the emphasis on efficient and principled governance beyond the nation state in global society[64] is different from, for instance, the FCC's *Lisbon* judgment which mainly highlights the precondition for sovereign statehood[65] and reiterates the old task of the EU to maintain peace in Europe and to strengthen the possibilities of policy-making through coordinated joint action.[66]

Regarding the specific arrangements of the Lisbon Treaty, the CC adopted the general post-war international law doctrine that sovereign equality of states does not mean that all states are equal in terms of their power and international influence; however, the equality of all states as subjects of international law means that these states are equally constrained in their freedom of action and are required to fulfill their legal obligations.[67] The CC has even made a strongly worded reference to this principle in its *Lisbon II* judgment:

> [S]overeignty does not mean arbitrariness, or an opportunity to freely violate obligations from international treaties, such as the treaties on the basis of which the Czech Republic is a member of the European Union. Based on these treaties, the Czech Republic has not only rights, but also obligations vis-à-vis the other Member states. It would contravene the principle of pacta sunt servanda, codified in Article 26 of the Vienna Convention, if the Czech Republic could at any time begin to ignore these obligations, claiming that it is again assuming its powers. If it were to withdraw from the European Union, even in the present state of the law, the Czech Republic would have to observe the requirements imposed by international law on withdrawal from the treaty with other Member States. This follows from Article 1(2) of the Constitution, pursuant to which "The Czech Republic shall observe its obligations resulting from international law." Thus, it is fully in accordance with this constitutional law requirement that the Czech Republic would have to, if withdrawing from the European Union, observe the pre-determined procedures (regarding limitations arising from international law and the law of the European Union.[68]

Furthermore, the CC has addressed the hypothetical situation raised by the Senate's initial application of the Lisbon Treaty's regime if the Czech Republic seriously violates the values defined in article 2 of the Treaty, and stated that such a violation would be considered to be a violation of the fundamental constitutional values of the Czech Republic itself. The CC, therefore, would be obligated to protect these values against any violation in the first place.[69]

However, the most important conclusion of the CC is that these *values* and their protection cannot be compromised even by a reference to the concept of *the people* as the source of the power of state. Because these rights and values are protected at both the national and EU levels, suspending any rights because of membership in the EU is

[64] Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden J. Int'l L. 553 (2002).

[65] Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgement of the German Constitutional Court*, 46 Comm. Mkt L. Rev. 1795 (2009). *See also* Dieter Grimm, *Defending Sovereign Statehood Against Transforming the European Union into a State*, 5 Eur. Const. L. Rev. 353 (2009).

[66] BVerfG, 2 BvE 2/08, ¶¶ 220 and 222.

[67] *See further* Bardo Fassbender, *Sovereignty and Constitutionalism in International Law*, *in* Sovereignty in Transition 115, 128–129 (Neil Walker ed., 2003).

[68] Treaty of Lisbon II case, Pl ÚS 26/06, ¶ 168 (Czech).

[69] Treaty of Lisbon I case, Pl ÚS 19/08, ¶ 209 (Czech).

out of the question; consequently, the CC has concluded that this parallel protection of rights and values at the EU and national levels served to reinforce "the arguments that the two systems, domestic and Union, are mutually compatible and support each other in the most important area, concerning the very essence of law and justice."[70]

The CC has thus adopted the view of the EU as an avant-garde organization reframing the notion of sovereignty as both a substantive value and in terms of formal legal constraints on the freedom of the state to act outside the common framework of international law. This institutional and conceptual layout is summarized as follows:

> [I]n a modern, democratic state, governed by the rule of law, state sovereignty is not an aim in and of itself, in isolation, but is a means for fulfilling the fundamental values on which the construction of a constitutional state governed by the rule of law, stands.[71]

According to this view, the fundamental values of democracy and the rule of law take precedence over state sovereignty.[72]

6. Sovereignty as a post-sovereign technique

According to the CC, the concept of sovereignty as independent enjoyment of state power, both internally and externally, is obsolete in a global society in which states enter into multiple relationships and legal obligations or political commitments.[73] Strictly speaking, any state obligation would imply a limitation of its sovereignty if the latter is narrowly perceived as a mere ability to exercise political will independently and without any internal or external constraints. Citing the classic work of Georg Jellinek, the CC ruled that a state's ability to restrict itself by the rule of law or international obligations, and thus to regulate its competences, is a sign of its sovereignty and not its inadequacy.[74] The Czech Republic's EU membership, therefore, can even enhance and strengthen its sovereignty in the global world and as part of its new geopolitical and economic constellations.[75]

Instead of theorizing sovereignty as a rigid legal or political concept, the CC considers sovereignty to be a practical concept that opens up the possibility for states to be active players and negotiators at international and global level of political and legal interdependence and networking.[76] This is a profound shift from political and constitutional essentialism to a pragmatist concept of sovereignty as a technique that

[70] *Id.* ¶ 209

[71] *Id.* summary introduction, ¶ 14.

[72] For another example of this normative interpretation, *see, e.g.*, Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State*, *in* Ruling The World? Constitutionalism, International Law and Global Governance 258–324 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

[73] *Contra, e.g.*, Martti Koskenniemi, *The Fate of Public International Law; Between Technique and Politics*, 70 Mod. L. Rev. 1 (2007).

[74] Treaty of Lisbon I case, Pl ÚS 19/08, ¶ 100 (Czech).

[75] For an academic reflection on the same topic, *see, e.g.*, Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 Eur. J. Int'l L. 885 (2004).

[76] Treaty of Lisbon I case, Pl ÚS 19/08, ¶ 107 (Czech), *citing* David P. Calleo, Rethinking Europe's Future 141 (2001).

enhances operative power of states in global legal and political settings and makes states more flexible and adaptable to the emergence of supranational and transnational legal and political networks.[77]

To understand this general and theoretical position of the CC, one has to remember that the judges were forced to respond to the President's general questions regarding state sovereignty, summarized in the initial petition and repeated in the second petition regarding the Lisbon Treaty. In his initial brief of June 2008, the President raised questions of the sovereignty test, including whether the Czech Republic would remain a sovereign state and a full subject in the international community after it has ratified the Treaty of Lisbon. Furthermore, the President's second brief, submitted to the CC on October 16, 2009, stated that the CC "avoided answering directly, and raised a new theory of sovereignty shared jointly by the European Union and the Czech Republic (and other Member States)." According to the President, the concept of shared competence "is a contradiction in terms"[78] because "the essence of sovereignty is the unrestricted exercise of power. Sovereignty rejects the sharing of power."[79]

Responding to the President's essentialist view of sovereignty, the CC's *Lisbon II* judgment included a quote from the memorandum attached to the Czech Republic's application to join the EU which read:

> The Czech nation has only recently reacquired full state sovereignty. However, the government of the Czech Republic has irrevocably reached the same conclusion as that reached in the past by today's Member states, that in modern European evolution, the exchange of part of one's own state sovereignty for a share in a supra-state sovereignty and shared responsibility is unavoidable, both for the prosperity of one's own country, and for all of Europe.[80]

It is deeply ironic that this memorandum, dated December 13, 1995, was authorized by the then Prime Minister Václav Klaus himself. As the text clearly shows, the concept of shared sovereignty and competence had been familiar to the Czech and European political representatives, including Václav Klaus, as early as the mid-1990s.[81]

Another essentialist question submitted to the CC by the President in his brief targeted the European Union itself; namely, the President asked whether the post-Lisbon EU would remain "an international organization, or institution, to which Article 10a of the Constitution permits transferring the powers of the authorities of the Czech Republic."[82]

Responding to this challenge, the CC, once again, repeated its argument summarized in paragraph 104 of the *Lisbon I* judgment, and later restated in the *Lisbon II* judgment:

> A key manifestation of a state's sovereignty is the ability to continue to manage its sovereignty (or part of it), or to cede certain powers temporarily or permanently.[83]

[77] Jean L. Cohen, *Sovereignty in the Context of Globalisation: A Constitutional Pluralist Perspective*, *in* The Philosophy of International Law 261–280 (Samantha Besson & John Tasioulas eds., 2010).
[78] Treaty of Lisbon II case, Pl ÚS 26/06, ¶ 61 (Czech).
[79] *Id.* ¶ 62.
[80] *Id.* ¶ 148.
[81] *Id.* ¶ 149.
[82] *Id.* ¶ 65.
[83] *Id.* ¶ 147.

Again, replacing the essentialist concept of sovereignty with the pragmatic one, the CC reiterated its views and position defined in the *Lisbon I* judgment, namely that state sovereignty is not an aim in and of itself but rather "a means [of] fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands."[84] The transfer of specific state competences can therefore be considered as a continuation of the exercise of sovereignty if it has been agreed upon in advance and remains subject to review. The CC's emphasis on the consistency of EU objectives and on the fundamental values of the constitutional order of the Czech Republic explains why the general interests of the Union actually further state interests of the Czech Republic.

For the CC, the transfer of sovereign powers is not unlimited. However, it is extremely important that the CC refrains from specifying these limits, and states that they should be left primarily up to the legislature as an *a priori* political question.[85] The CC considers possible interference with the legislator as *ultima ratio* only in a situation when the legislator has clearly exceeded its political discretion and when the most important constitutional principles, as stated in article 1(1) of the Czech Constitution, have been affected due to an excessive transfer of powers, i.e. outside the scope of article 10a of the Constitution.

7. Beyond the dualistic view of the EU and its member states: comparative remarks on the CC and FCC's Lisbon judgments

The CC has engaged in the pragmatic and strategic conceptualization of state sovereignty and criticized the essentialist notion of sovereignty, yet it never stated that sovereignty is just a formalist concept drawing on operations of constitutional power. Consistent with its previous case law, the CC adopted the semantics of the substantive values and foundations of the sovereign constitutional state. In this sense, the Lisbon Treaty judgments coincided with one of the most significant cases decided by the CC in its twenty years' existence—the *Melčák* judgment of 2009 in which the CC declared the Constitutional Act on Shortening the Term of Office of the Chamber of Deputies of Parliament (May 28, 2009) unconstitutional and declared itself to be the guardian of the substantive core of the democratic state as provided for by article 9(2) of the Constitution.[86]

In the Lisbon Treaty judgments, the CC emphasized the coeval bases of the EU and of the Czech constitutional democratic state as organizations sharing universally applicable fundamental values, rights, and principles common to all member states. This emphasis on political and legal reciprocity between the EU and its member

[84] *Id.*

[85] Treaty of Lisbon I case, Pl ÚS 19/08, ¶ 109 (Czech).

[86] Ústavní Soud České Republiky [ÚS] [Constitutional Court], Sept. 10, 2009, Pl. ÚS 27/09 (the Melčák case) (Czech), *available at* http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=468&cHash=44785c32dd4c4d1466ba00318b1d7bd5.

states may be contrasted with the FCC's *Lisbon* judgment, which drew on an idea of separation between the European and German national political and constitutional developments.

Indeed, the FCC referred to the CC's *Lisbon I* judgment[87] and the Czech court's reserved power to review whether legal instruments of EU institutions remain within the limits of the sovereign powers conferred upon them. However, this reference would be hard to take as evidence of judicial cross-fertilization or even of an emergence of transnational epistemological community of senior judges, because the FCC actually repeatedly refers to its "so long as (*Solange*)" doctrine formulated several decades ago. This act of self-referential reasoning, therefore, is mainly evidence of doctrinal narcissism without any theoretical impact or innovation.

Invoking "the obligation under European law to respect the constituent power of the Member States as the masters of the Treaties,"[88] the FCC effectively reiterated the impossibility for the CJEU to claim the *Kompetenz der Kompetenz* to unilaterally determine whether the principle of enumerated powers has been respected. Unlike the FCC in its *Lisbon* judgment,[89] the CC engaged in a more profound examination of European and national legal and political developments as coeval and mutually intertwined processes. In this context, the reader certainly should not be distracted by the CC's references to classic theories of the modern nation state, such as Georg Jellinek's statist monism. Unlike the FCC's dualistic view, which makes a clear distinction between European and national institutions and which can be summarized as: "what happens in Europe is for Europe to decide and remains subject of the ultimate constitutional review by this Court", the CC's view invokes the commonly shared values and principles of the democratic constitutional state and the rule of law as pluralistically applicable across the EU and within its institutional settings.

The FCC's justification of the EU on the basis of its peacekeeping mission on the continent is entrenched in classic doctrines of international law and, by drawing on legitimacy through efficiency rather than through democratic representation, participation, and deliberation, it ignores the issues of supranational and multilevel governance and regulatory practices. In this respect, it is significant that the CC once again raises the problem of legitimation by way of fundamental, democratic values and the rule of law at the EU level, by stating that these values are commonly shared and constitute the legitimizing foundation of both European integration and constitutional democracy of EU member states.

Where the FCC separates European integration and national democracy,[90] the CC highlights the legitimation issues and deficits of both national democracies and EU regulatory and governance networks and practices. Instead of simply contrasting

[87] BVerfG, 2 BvE 2/08, ¶ 338 (Ger.).

[88] *Id.* ¶ 235.

[89] *See, e.g.*, Damian Chalmers, *European Restatements of Sovereignty*, *in* Sovereignty and the Law: Domestic, European and International Perspectives 186, 205–206 (Richard Rawlings, Peter Leyland, & Alison Young eds., 2013).

[90] Daniel Halberstam & Christoph Möllers, *The German Constitutional Court says "Ja zu Deutschland"*, 10 German L.J. 1241 (2009).

national representative democracy with the supranational organization of the EU, the CC calls for a scrutiny of all forms and techniques of governance, whether local, national, or supranational, in terms of their consistency with democratic values which obviously cannot be limited by the forms and techniques of political representation present exclusively at the nation-state level.[91]

8. … and now for something completely different: the CC reasserting its *Kompetenz der Kompetenz*

This article could well end with a comparison of the arguments of the CC and the FCC, were it not for the CC's response to the CJEU *Landtová* judgment. On January 31, 2012, the CC ruled in the *Holubec* case[92] that the CJEU's judgment in the *Landtová* case[93] of June 22, 2011 was *ultra vires* because the CJEU wrongly applied an EU regulation.[94] Another point of contrast, therefore, may be drawn between the FCC and the CC: if the FCC is described as "the dog that barks but does not bite,"[95] the CC, after the *Holubec* ruling, may be described as the dog that both bites and wags its tail.

The matter under dispute in the *Holubec* case may be briefly summarized as follows: after the split of Czechoslovakia in 1992, the Czech Republic and Slovakia came to a special agreement according to which the employer's place of residence at the time of the split of Czechoslovakia would determine the pension scheme of its employees. This, however, resulted in a series of disputes[96] due to the fact that Slovak pensions were substantially lower, and some people, while never working in the Slovakian part of the federation, ended up with significantly lower financial support merely because their employer's resided in Slovakia. These disputes eventually reached the CC which declared this impact of the agreement between the Czech and Slovak Republics unconstitutional and ordered that the disadvantaged pensioners be paid a special supplement.[97] However, the Nejvyšší správní soud (Supreme Administrative Court of the Czech Republic, SAC) did not accept the CC's judgments granting the supplementary payments to Czech citizens and, by means of a preliminary question, referred the *Landtová* case to the CJEU in 2009.

The conflict between the CJEU and the CC was thus initiated by the SAC[98] asking the CJEU a preliminary question and arguing that the CC's judgments were incompatible

[91] For further details regarding the difference between the CC's and the FCC's Lisbon judgments, *see* Mattias Wendel, *Comparative Reasoning and the Making of a Common Constitutional Law: EU-related Decisions of National Constitutional Courts in a Transnational Perspective*, 11(4) Int'l J. Const. L. 981, 987 (2013).

[92] Holubec case, Pl ÚS 5/12 (Czech).

[93] C-399/09 *Landtová*, 2011 E.C.R. I-05573.

[94] Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, O.J. L 149/2, July 5, 1971.

[95] Joseph H.H. Weiler, *The Lisbon Urteil and the Fast Food Culture: Editorial*, 20 Eur. J. Int'l L. 505, 505 (2009).

[96] For the judgment of the Court stating that the CJEU's decision was *ultra vires*, *see* Ústavní Soud České Republiky [ÚS] [Constitutional Court], June 3, 2003, 405/02 II. ÚS (hereinafter Slovak Pensions I)

[97] *Id.*.

[98] For an overview of the structure and administration of the Czech system of justice, *see* Michal Bobek, *The Administration of Courts in the Czech Republic—In Search of a Constitutional Balance*, 16 Eur. Pub. L. 251 (2010).

with EU law. The confrontation between the CC and the CJEU, therefore, is a direct consequence of another confrontation between the two top judicial bodies in the Czech Republic, which had been going on for several years. The whole situation was further complicated by the fact that the Czech government submitted observations to the CJEU, openly stating that it believed the CC's case law contradicted EU law. The government's financial interest to avoid the added expenditure of pension supplements, compelled to take the most unusual position of undermining the CC's authority *vis-à-vis* the EU's legal system—a position termed by the Advocate General as "unprecedented."[99]

The CJEU was clearly aware of the complexities of the *Landtová* case and of the potentially damaging consequences of its own judgment. A Spanish jurist, and one of the CJEU's Advocates-General, Cruz Villalón, explicitly remarked that the case "has arisen in an institutional context which is as controversial as it is delicate."[100] Though a ruling that the CC's judgment discriminated both directly (the requirement of citizenship) and indirectly (the requirement of residence), the CJEU attempted to soften its judgment by stating that the pension supplement could be maintained if it extended to all EU nationals. It also ruled that "there is no provision of EU law which requires that a category of persons who already benefit from supplementary social protection . . . should be deprived of it."[101]

According to the CJEU, the Czech Republic would therefore be able to find a practical solution satisfying both the EU law requirements and the CC's interpretation of the relevant constitutional rights.[102] However, the Czech response to the CJEU's ruling in the *Landtová* case was anything but conciliatory, because Parliament, referring to the CJEU's decision, passed an act banning prospective payments of the supplement to everybody.[103] As regards the SAC's response, its position was described by some commentators as amounting to the provocation of the CC,[104] because it stated that the CC's case law violated EU law and could not be binding on the SAC. The general question of the European mandate of ordinary courts and its impact on the jurisdiction of constitutional courts of member states[105] thus became part of the most specific power struggle within the Czech justice system.[106]

Without raising a preliminary question, the CC eventually responded to the CJEU's judgment by another ruling in the ongoing dispute concerning the Slovak pension supplement. In the *Holubec* case, the CC summarized its previous case law establishing

[99] Jan Komárek, *Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU* Ultra Vires*; Judgment of 31 January 2012, Pl. ÚS 5/12,* Slovak Pensions XVII, 8 Eur. Const. L. Rev. 323, 327 (2012).

[100] C-399/09 *Landtová*, 2011 E.C.R. I-05573, A.-G. Cruz Villalón, opinion of Mar. 3, 2011, ¶ 5.

[101] C-399/09 *Landtová*, 2011 E.C.R. I-05573, ¶ 53.

[102] Robert Zbíral, *Czech Constitutional Court, Judgment of 31 January 2012, Pl. US 5/12. A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed* Ultra Vires, 49 Comm. Mkt L. Rev. 1475, 1480 (2012).

[103] Act of Parliament No. 155/1995Coll, § 106a, amended by the Act of Parliament No. 428/2001Coll (in force Dec. 28, 2011) (Czech). It is worth noting that the Chamber of Deputies specifically referred to the CJEU judgement.

[104] Komárek, *supra* note 99, at 328.

[105] Michal Bobek, *The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts*, *in* Constitutional Conversations in Europe 287 (Monica Claes et al. eds., 2013).

[106] On May 9, 2012, the Supreme Administrative Court, responding to the Constitutional Court's *Slovak Pensions XVII* judgment, actually raised the stakes by sending the CJEU another set of preliminary questions related to the Slovak pensions dispute.

the pro-EU interpretation of the Czech Constitution. It reasserted its commitment to the cooperation between member states and EU institutions and the principle of Euro-conformity as an intrinsic part of its decision-making. Nevertheless, it also stated that the EU could not violate the basic principles of the Czech Constitution or transgress the competences transferred to it by the Czech state. The CC has thus established itself as the ultimate judicial body exercising the sovereign *Kompetenz der Kompetenz* even against its EU partner court. In other words, the CC firmly reserved itself the right of *ultima ratio* to review the constitutionality of EU legal acts.

The CC did not bother engaging in substantial arguments, for instance by invoking the TEU's constitutional identity clause.[107] Furthermore, the CC did not consider a preliminary question to the CJEU despite the CJEU *Pfizer* judgment of 2009[108] in which the Court of Justice asserted that a national court of last instance, applying an EU legal norm and entirely failing to raise the possibility of referring a preliminary question to the CJEU, commits an arbitrary action and thereby violates the constitutional right to the defendant's statutory judge.

While referring to the FCC's jurisprudence regarding the possibility of its *Kompetenz der Kompetenz* in the *Landtová* case, the CC, nevertheless, ignored the subtleties of the FCC's position.[109] These are mentioned, for instance, in the *Honeywell* case,[110] which is principally the FCC's response to the European Court's controversial, landmark *Mangold* case,[111] and which states, however, that an act would have to be drastically, manifestly, consistently and grievously *ultra vires*. Furthermore, the FCC's position[112] assumes sending a preliminary question to the CJEU prior to issuing an *ultra vires* judgment and grants the CJEU a right "to a tolerance of error"—something ruled out by the CC's "zero tolerance" policy towards the CJEU.[113]

9. Conclusion

The CC's response to the CJEU's *Landtová* case was praised, for instance, by the President of the FCC as following the German example and reinvigorating the nation-state's sovereignty *vis-à-vis* the process of European integration.[114] At the same time, other

[107] Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01, art. 4(2) (hereinafter TEU). For an academic assessment of the clause, *see* von Bogdandy & Stephan Schill, *supra* note 27.

[108] Ústavní Soud České Republiky [ÚS] [Constitutional Court], Jan. 8, 2009, No. 1009/08 II ÚS, (hereinafter Preliminary Question to the CJEU) (Czech), *available at* http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=479&cHash=6c59499e0cee477a06b54ec18b82b40a.

[109] For general comments, *see* Arthur Dyevre, *The German Federal Constitutional Court and European Judicial Politics*, 34 W. Eur. Pol. 346 (2011).

[110] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], July 6, 2010, BVerfG, 2BvR 2661/06 (the Honeywell case) (Ger.), *available at* http://www.bundesverfassungsgericht.de/en/decisions/rs20100706_2bvr266106en.html.

[111] C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981; the case was heavily criticized as *ultra vires* by constitutionalists and legal scholars in Germany.

[112] Christoph Möllers, *German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell*, 7(1) Eur. Const. L. Rev. 161 (2011).

[113] For comparisons, *see* Zbíral, *supra* note 102, at 1485.

[114] Andreas Vosskuhle, *Bewahrung und Erneuerung des Nationalstaats im Lichte der Europäischen Einigung*, Lecture at the Hessen Regional Parliament, Wiesbaden (Mar. 1, 2012).

commentators described the CC's position in the *Slovak Pensions* case as an "aggressive application" of *ultra vires* argument against the CJEU.[115]

Indeed, the interpretation is controversial and challenging for all the parties to the conflict. The *ultra vires* review of CJEU rulings challenges the arrangement between the CJEU and the constitutional courts of member states, which, according to Weiler, has resembled the Cold War Mutually Assured Destruction (MAD) strategy drawing on the assumption that no party can secure any gains or benefits by pushing the red button of the ultimate confrontation and war.[116]

Some scholars have described the *Holubec* case as "an odd case about judicial weariness and judicial ego."[117] However, the CC's position in the *Slovak Pensions* cases is not just bellicose, and cannot be criticized as being merely an excessively arbitrary measure. Nor is it just an outcome of deliberations among judges fallen victim to a growing anti-EU sentiment among EU member states' political and judicial élites. The reasoning in the *Holubec* case actually reads like a summary of the divided sovereignty doctrine and the Euro-conformity principle of the Czech Constitution's interpretation adopted by the CC. However, like any conceptualization of sovereignty, it is impossible to reduce the *Kompetenz der Kompetenz* question to the normative structure of either a member state's constitution or the supranational system of EU law. This intrinsic tension between the normative and volitional aspects of constitutional sovereignty thus explains the diversity of decisions, conceptualizations, and arguments deployed by the CC as regards the *Kompetenz der Kompetenz* question in the last two decades.

While reaffirming its commitment to a pro-EU interpretation of the Czech Constitution, the CC resorted to the most general argument of the basic constitutional principles and values to confront the CJEU in the *Holubec* case, and thus strictly confirm its position as the guardian of the Czech Constitution. Despite its different practical and jurisprudential consequences in the realm of EU law and divided sovereignty, the CC's *Slovak Pensions* judgments, may be described as belonging to a series of foundational cases defining the bases of the rule of law and constitutional democracy in the Czech Republic after 1993—cases which also include both the *Lisbon I* and *Lisbon II* judgments.

Criticizing formalist notions of legality and legitimizing the rule of law by the substantive values of the democratic state and human rights, the two *Lisbon* judgments, in particular, define the very concept and conditions of legitimacy of a sovereign constitutional, democratic state in a post-sovereign political and social constellation. These judgments fundamentally contributed to the formulation of the substantive core of the Czech Constitution. They also articulated the CC's determination to protect the Constitution against both internal and external threats and risks. Recent jurisprudence of the CC is thus a persuasive example of a general process in which constitutional courts adopt post-sovereign perspectives of a constitutional democratic state while keeping the semantics of constitutional sovereignty as their persisting point of reference and empowerment.

[115] Georgios Anagnostaras, *Activation of the* Ultra Vires *Review: The* Slovak Pensions *Judgment of the Czech Constitutional Court*, 14(7) German L.J. 959, 965 (2013).

[116] Joseph H.H. Weiler, *The Reformation of European Constitutionalism*, 35(1) J. Comm. Mkt Stud. 97, 125 (1997).

[117] Michal Bobek, Landtová, Holubec, *and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure*, 10 Eur. Comp. L. Rev. 54, 71 (2014).