The Unbearable Lightness of Being Guardian of the Constitution (Revolt and Revolution Dilemma in the Approach of Czech Constitutional Court Vis-à-Vis EU and Supranational Legal Order)[1]

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Summary: The article is devoted to the issue of acceptance of the effects of European law by the Czech Constitutional Court. National courts in connection with the membership in the European Union face the problem of "revolt or revolution." So-called "Revolt or revolution dilemma" confronts the Court with the choice between the national constitutions (revolt) or European law (revolution). In the existing case law of the Constitutional Court one can discover a hint of these two poles.

Keywords: EU Law, National Constitutional Law, Czech Constitutional Court, Revolt, Revolution, Primacy, Acceptation.

1. Pluralism of players and dilemma of choice in the realm of the EU legal order

1.1. Plurality and no final arbiter

The system of the European integration is based on pluralism and on the separation of law making-centres. This structural characteristic together with the direct applicability of EU law creates space for the tension between the supranational law and national law of the Member States. Neil MacCormick talked about the plurality of players that logically implies the risk of a constitutional conflict.[2] Impossibility of building the legal system of the Union as a single pyramidal structure on one hand and the requirement for uniform and effective

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[2] MacCormick, Neil. *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*. New York: Oxford University Press, 1999, pp. 97–121.

application of supranational law in all Member States on the other hand offers an opportunity for potential disputes.

EU law is an independent legal system which significantly affects the understanding and contours of law, legal system and legal norms in all Member States. Supranational law may impact the legal order of a Member State in two ways. Either directly, in the form of normative influences on the national legal system i.e. its enrichment of the new "European" rules. Or indirectly, through the influence on the understanding and interpretation of the national law i.e. its enrichment of the new "European" meanings. Integration brings the plurality of norms, meanings and interpretations into one legal space – the legal practice within each of the Member States.

Neil MacCormick also wrote that to understand a new legal reality which results from the development of supranational entities a certain amount of imagination is needed.[3] Imagine then the legal system of European integration and its functioning as a certain game – such as football[4] – which has set certain rules. EU law and the Court of Justice as its chief interpreter provide the basic framework of that game. Matches, however, take place on playgrounds within Member States and national courts of the Member states have to be understood as a "players of that game."

Effects and impacts of EU law therefore create space for the emergence of the conflict between European and national rules or European and national modes of interpretation. These two sets of rules (two legal systems) are derived from separate legal systems and due to this separation we cannot apply the classical relational imperatives to determine their relationship. The principles of superiority (lex superior derogat legi inferiori), temporality (lex posterior derogat legi priori) and speciality (lex specialis derogat legi generali) cannot be applied here. The relation between those sets of rules is based on the principle of priority by which Court of Justice if the European Union articulated the preference of the application of EU law over national law. The primacy principle is derived from the requirement of en effective and uniform application of the EU law within all Member States. It is necessary to mention here that an application of the principle of primacy does not cause any (nor immediate nor future) invalidity or nullity of the national law. The issue of validity and invalidity in relation between EU law and national law of the Member States is out of the question. Those are two separate legal systems and there is no hierarchy

[3] Ibid.

[4] Similarly French Foreign Minister Laurent Fabius responded to the UK efforts for a special status in the EU by the words (January 2013): "Imagine Europe as a football team in which you participate, once you're in you cannot say let's play Rugby."

between them. Their relationship is defined by the matrix of applicability of concrete rules on the certain matters of fact.

1.2. The revolt or revolution dilemma of national courts

So there are two sets of rules and one supranational principle that resolves their potential conflicts or inconsistencies. But the question remains to what degree national authorities are willing to accept this principle? The paradox of European integration may be seen in the fact that the consensus of political representation of the Member States to choice the supranational method of integration (which serves as the base for the introduction of the principles of direct applicability and primacy of EU law) is followed by the sort of judicial disagreement. Tensions between EU law (and particularly Court of Justice) and the law of the Member States (and the national – especially constitutional – courts) are based on a different understanding of the legal foundations of the Union's legal system and on a different approach due to its validity.[5] According to the Court of Justice the EU law is autonomous legal system because it rises from its own source which is of the Treaty. From the perspective of national (constitutional) courts the reason of validity of EU law is enshrined in national constitutions.[6]

In the realms of European integration the national courts are confronted with the phenomenon of "revolt or revolution dilemma" once their resolve the question of the applicability of EU law rules and their potential conflict with the national constitutional rules.[7] They are facing the problem of ultimate choice between national constitutional requirements (the option of revolt) or EU law rules (the option of revolution). In the up-to-date case law of the Czech Constitutional Court (CCC) we may find a hint of both options. Revolution (in the classical constitutional doctrines) occurred when Constitutional Court recognized the normative autonomy of EU law and foremost when it formulated the modern concept of state sovereignty in the context of the European integration. On the other side it revolted against the EU law by

[5] Borowski, Martin. Neil MacCormick's Legal Reconstruction of the European Community — Sovereignty and Legal Pluralism. In MENÉNDEZ, Agustín José, FOSSUM, John Erik (eds). *The Post-Sovereign Constellation. Law and Democracy in Neil D. MacCormick's Legal and Political Theory*. Oslo: Arena, 2008, pp. 194 et seq.

[6] Maduro, Miguel Poiares. *We The Court. The European Court of Justice and the European Economic Constitution. A Critical Reading of Article 30 of the EC Treaty.* Portland: Hart Publishing, 1998, pp. 31.

[7] See Phelan, Diarmuid Rossa. *Revolt or Revolution: At the Constitutional Boundaries of the European Community*, Round Hall: Sweet & Maxwell, 1997, 540 p.

the introduction of the "Solange" attitude and by the actual use of the saving clause in January 2012.

2. The revolutionary features in the case-law of the Czech Constitutional Court

2.1. Broad acceptation of autonomy and originality of EU law

A key element of the independence of European Union law lays in its ability to have a normative influence on the national legal orders of the Member States. It is interconnected with the one of the greatest achievements of the Court of Justice jurisprudence – the principle of direct effect of EU law norms within the national legal practice. This principle built the bridge between EU law-makers and individuals. From the spring of the sixties not only states but also the individuals became the subjects envisioned by the supranational law (Van Gend). Direct effect is one of the elementary structural features of a supranational legal system. It is a prerequisite for the application of EU law and one of the conditions of effective functioning of the European integration.

Thanks to the direct effect the provisions of EU law are capable to create the rights and impose the obligations on the addressees within the national legal system without any need of the adoption of national acts of transposition. Therefore the supranational set of legal rules is able to serve as an autonomous legal order. Individual rights and obligations contained in the directly effective norms of EU law then may be a subject of decisions of the national authorities which apply the law (i.e. courts and public authorities). Or in more strict words the national authorities are under duty to accept and apply these legal norms as they are, without need of transposition by national legal acts. Lord Denning expressed this phenomena in his famous statement according to which EU law is "like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."[8] Supranational law is a body of legal norms that emanate from autonomous sources but have their arena of impact in the Member States.

The Czech Constitutional Court in its *Sugar Quotas* decision[9] explicitly recognized the independence of supranational law and its abovementioned impact. The basis for this approach lays in two-way interpretation of Article 10a of the Czech Constitution. CCC has expressed its attitude by taking a stance on the question of conferral and division of powers between EC and Member

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[8] HP Bulmer Ltd v. J Bollinger AS (No 2) [1974].

[9] Decision of 8 March 2006, Pl.US. 50/04 Sugar quotas III

states. In connection with that CCC also resolves the dispute about the constitutional basis for the position of EU law within the Czech legal system. It concluded that the constitutional authorization for the delegation of powers to the EU in art. 10a of the Constitution has a dual nature. On the one hand, it is the basis for the transfer of national competences to a supranational body. On the other hand, it represents an open door for the inclusion of effects and the application of principles of EU law within the Czech legal system. CCC recognized the independence as a fundamental attribute of EU law and approved its application also within the Czech legal system. Its position relied on the existence and nature of transfer of powers to the EU. Opening of the Czech law by the gate of article 10a of the Constitution created space for the internal effects of EU law. Direct effect, priority in application as well as other effects of European Union law where therefore recognized as a result of the restriction of sovereignty and transfer of some powers to a supranational body.

Recognition of the autonomy of EU law is based also on the fact that CCC abandoned the possibility to review the constitutionality or validity of the supranational norms. In fact the CCC accepted the autonomy of supranational law. It stated that this law cannot be reviewed and tested by Czech constitutional rules. This position applies not only to the directly effective formal sources of EU law (like the Treaty or secondary legislative provisions) but it was extended also to national measures which implement the supranational requirements within the internal legal order of the Member State. Constitutional Court stated that it is not competent to judge the validity of the norms of EU law. Such matters fall within the exclusive competence of the Court of Justice. The law which is the outcome of the realization of the powers delegated to the European Union is beyond the control of the Constitutional Court.

In its second famous "European" decision (*European Arrest Warrant*[10]*) CCC continued in its Euro-friendly approach and furthermore it served as the prophet of future depilarisation of the EU law. The court has broadened its attitude towards the question of the autonomy of EU law with respect to (then) third pillar provisions. CCC in principle ignored the "weaker" nature of the law of the third pillar. It continued the development of its European doctrine that began in the Sugar Quotas Case* and granted a specific position within the Czech legal order also to non-community law. It presented its universal attitude towards EU law despite some critics[11]. Now we know that the evolution

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[10] Decision of 3 May 2006, Pl.ÚS 66/04 European Arrest Warrant.

[11] The opposition came from the CCC itself. *See, e.g.,* the dissenting opinion of Judge Eliška Wagnerová in the *Sugar Quota Case,* who criticized a lack of reflection on the specifics of the third pillar of the European Union.

of European integration has confirmed its predictions. The doctrine of the CCC was enriched by respect for the principle of loyal cooperation and the principle of a "euro-conformal" (Euro-friendly) interpretation of national law. CCC has stated that if there are several ways to interpret the Constitution, then a constitutional court (as well as other bodies resolving cases with some European implications) has to choose and apply the one that leads to the fulfilment of EU law requirements. That means that potential conflict between constitutional law and European law rules will be resolved (or better stated, foreclosed) by reading the domestic rule into the meaning that reinforces the EU law substantive prerogatives. In the court's words: "If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, 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 with supports the carrying out of that obligation, and not an interpretation which precludes its."

2.2. The revolutionary approach to the state sovereignty

The other manifestation of the CCC's open approach to the European integration is connected with its shift to the flexible understanding of the concept of state sovereignty. This display of the revolutionary option can be found in its decisions on the constitutional conformity of the Lisbon Treaty (*Lisbon Treaty I* in 2008, *Lisbon Treaty II* in 2009)[12]. Here CCC expressed beyond all doubts that it will not recognize the European Union and European integration as a prima facie threat to the constitutionality respectively sovereignty of the Czech Republic. European Union is an entity which in turn is the basis for strengthening and protecting of the national sovereignty in its modern conception.

According to CCC the notion of sovereignty passed through significant evolution and gained new meanings and proportions. It is no longer just a mere attribute of the national state and the expression of its power to have control over the territory. Today's concept of sovereignty is necessarily tied to the willingness and the will of the state to participate in international cooperation and use its possibilities and sources in conjunction with the other actors of the international community. Sovereignty is the manifestation of the "New order globalized world." In this globalized space we are facing not only to the interconnection of economies and decision-making processes but also the shifts of responsibility and rising of the new policy centres. The new order creates

[12] Decision of 26 November 2008, Pl.ÚS 19/08 Lisbon treaty I; Decision of 3 November 2009, Pl. ÚS 29/09 Lisbon Treaty II.

also new approaches to traditional terms and concepts. One of them – state sovereignty – necessarily gets a new dimension in the context of European integration. This notion is denotes as the pooled of shared sovereignty model.

The Constitutional Court rejected to measure notion of sovereignty and the question of transfer of competences to the supranational entity from the "protectionist" perspective. The process of European integration is not considered as a process of gradual disappearance of original power of the Czech Republic. On the contrary it brings the opportunity to reinforce the position of the state. The concept of sovereignty is understood as the ability of the state to determine its own future, the ability to move, share and use together a certain part of the powers, what leads to a simpler and more effective achievement of the objectives of the state. According to the CCC: "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 they 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."

The Constitutional Court reminded the modern concept of power-sharing between Member States and the European Union and the notion of pooled or shared sovereignty also in its second Lisbon decision. It stated that: "in a modern democratic state governed by the rule of law, the sovereignty of the state is not an aim in and of itself, that is, in isolation, but is a means for fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands. […] 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 upon in advance and is subject to review, is not a conceptual weakening of sovereignty, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. […] 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." It is evident that despite the critical voices which deny this concept, the Constitutional Court is in its approach stable and confirms its prior conclusions. Constitutional Court underlined that EU membership and the concept of pooled sovereignty is connected with certain amount of responsibility and cannot be viewed form mere national perspective: "sovereignty 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 […]".

3. The revolt signs and displays

3.1. Raised finger…

Although the Constitutional Court respects the law of the European Union as an autonomous legal system which through article 10a of the Constitution gain a space to produce its effects within the Czech legal order, it added that these effects cannot be considered as unlimited. In the very beginning of its "European" doctrine (*Sugar Quotas Case*) it presented its intention to operate as the ultimate guardian of the inviolable values of Czech constitutionality which cannot be affected in any case so even not by the impacts of autonomous supranational legal order. Material core of the Constitution protected by the eternity clause acts as a general corrigendum to all excesses of public authorities, both national and supranational.[13] The fact that the (implicit) openness to European integration is a constitutional principle does not exclude the necessity of material focus and this ultima ratio protection.

CCC explicitly referred to the fact that the doctrine of the primacy of European law was not and is not a trouble-free concept. It stated that "Without the Constitutional Court being obliged to gives it view on this ECJ doctrine, it cannot overlook the following circumstances. There are additional circumstances and reasons which must be considered when assessing this issue. First and

[13] See Tomoszek, M. Nezměnitelnost materiálního jádra ústavy jako řešení konfliktu ústavních hodnot [Inalterability of the material core of the Constitution as a solution to the conflict between constitutional values]. *Časopis pro právní vědu a praxi*, 2010, vol. 18, no. 4, pp. 325–329.

foremost, the Constitutional Court cannot disregard the fact that several high courts of older Member States, including founding members […] have never entirely acquiesced in the doctrine of the absolute precedence of Community law over the entirety of constitutional law; first and foremost, they retained a certain reserve to interpret principles such as the democratic law-based state and the protection of fundamental rights."

In response to that opinion, CCC adds that also in the Czech Republic it does not intend to accept the doctrine of absolute priority, according to which supranational law takes precedence also over national constitutional law. We have seen above that the basis for establishing the position of CCC with respect to the European legal issues lies within the interpretation of article 10a of Czech constitution. The doctrine of CCC is based on the concept of delegation of powers from the Czech Republic to the European Union. The Constitutional Court does not consider this delegation to be permanent and unlimited. Conversely, it states that: "[T]he 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. Should one of these conditions for the transfer of powers cease to be fulfilled, that is, should developments in the EC, or the EU, threaten the very essence of state sovereignty of the Czech Republic or the essential attributes of a democratic state governed by the rule of law, it will be necessary to insist that these powers be once again taken up by the Czech Republic's state bodies."

CCC repeatedly stressed its "Solange" attitude also in its Lisbon findings. It pointed out that openness and positive attitude towards the autonomy of EU law does not relieve its role of final arbiter which leaves the open door for the monitoring of the activities of the Union institutions in the future. It said that it will "[…] function as an ultima ratio and may review whether any act of Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could be, in particular, abandoning the identity of values and, as already cited, exceeding the scope of conferred competences."

CCC thus for the future leaves free space for re-delegation of powers back to the Czech sovereign and for some sort of preclusion of effects and the enforcement of EU law in a case in which it is in conflict with the inviolable basis of Czech constitutionality. CCC sees itself as the final arbiter called upon to review the European legislation (which is the result of the exercise of delegated powers) that is empowered to identify and select which of European norms

will apply as long as they do not endanger the fundamental values of Czech constitutionality. In the event that the EU will take and exercise powers which were not (and, as defined in article 9 paragraph 2 of the Constitution, never could be) bestowed to it by the Czech sovereign, the result of these activities will not have the characteristics which the Court of Justice granted to EU law. It may be concluded that CCC by its "Solange" approach raises a warning finger towards the legislative power of the EU (in the same way as BverfG) and notes that it intends to respect the effects and character of the EU law only as long as this law is compatible with the basic values of Czech constitutionalism. CCC builds the relation between EU law and the Czech constitutional law on the principle that Ulrich Hufeld determined as the principle of review/scrutiny reservation. This reservation forms a basis for the review of "seceding" acts of the European Union.[14] All acts of the European Union that could be considered as such "deflections" must pass a test of conformity with the elementary requirements of Czech constitutional law as contained in article 1, paragraph 1 of the constitution (protection of sovereignty and democratic, rule of law based state) and in article 9, paragraph 2 of the constitution (Substantive Heart of Constitutionality).

3.2. … and revolt episode in practice

At the beginning of 2012 the Constitutional Court gave an important and surprising decision in the case of *Slovak pensions*. This decision in which the Constitutional Court directly opposed to the Court of Justice and used the "raised finger" was classified as uprising of the constitutional court vis-à-vis the EU law.

The core of the conflict between the Constitutional Court and the Court of Justice lays in their different view on the issue of pensions of Czech citizens that before the demise of Czechoslovakia worked for an employer based in Slovak part of the federation.

In Czech legal system there is a rule (promoted mainly by the CCC itself) according to which citizens of the Czech Republic who were in the period until 31 December 1992 employed by an employer based in the Slovak part of common state, are entitled to a supplementary payment up to the amount of the expected (theoretical) pension that would have been granted if all the insurance

[14] See Hufeld, U. Česká ústavní úprava vztahu k Evropské unii. Podklady a nález k evropskému zatýkacímu rozkazu [Czech Constitutional Regulation of Reation towards European Union. Basis and Decision in European Arrest Warrant Case]. *Časopis pro právní vědu a praxi*, 2008, vol. 16, no. 4, pp. 316.

periods from the time of the joint state were considered to be Czech periods. In contrast to that, the Court of Justice expressed the opinion (in the judgment C-399/09 Landtová) according to which payment of a supplement to old age which benefits solely the individuals of Czech nationality residing in the territory of the Czech Republic constitutes discrimination on the grounds of nationality which is prohibited under EU law. According to the Court of Justice EU law has to take priority over national rule on the supplementary payment notwithstanding that this rule was defined and upheld by the Constitutional Court.

The critical opinion of the Court of Justice became the central-point of a derogative decision of the Constitutional Court. It opposed the view of the Court of Justice and explicitly accused that I Landtová decision it went beyond the powers delegated by the Czech Republic to the European Union. Therefore for the first time in history it used the reservation formulated in its previous "European" cases. By the words of the CCC "there were excesses on the part of a European Union body that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra vires."

CCC's decision provoked opinions according to which silent duel or how aptly labelled by Joseph Weiler and Ulrich Haltern – Cold War between the courts[15] (national courts and Court of Justice) grew into a real conflict. The question (still open) is what consequences will arise from this conflict. Jan Komárek wrote in connection with this decision that CCC was playing with the matches[16]. Of course there was and still is a space for the consideration of some responsibility regimes. But the quiet after the storm may lead us to the conclusion that it was mere negligible episode[17] rather than revolution. In any event it is indisputable that the CCC just crossed the Rubicon of "threats" and brings the Solange abstract revolt to the real life.

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[15] Weiler, J. H. H., Haltern, U. The Autonomy of the Community Legal Order – Through the Looking Glass. *The Jean Monnet Working Paper*, 1996, no. 10.

[16] Komárek, J. Playing With Matches: The Czech Constitutional Court's Ultra Vires Revolution. Verfassungsblog, 22 February 2012.

[17] See Zbíral, R. 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. *Common Market Law Review*, 2012, vol. 49, no. 4, pp. 1475–1492.