
AICEI PROCEEDINGS

A Constitutional Review of EU Treaties: Democratic Fig Leaf or Genuine Protection of National Sovereignty?

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Abstract

In this paper I will explore the issue of national constitutional limitations upon the transfer of competences/sovereign powers to the EU, with particular focus upon the doctrines developed by the Czech Constitutional Court since the Czech Republic's accession to the EU in 2004, and especially in its two decisions on the Lisbon Treaty. As is the case with the highest judicial instance in many EU Member States, the Czech Constitutional Court has developed doctrines that approve the transfer of sovereign powers to the EU while purporting to delimit the outer boundaries of the constitutionally acceptable transfer. The two parts of the doctrine focus on ensuring that the essence of sovereignty (also related to the issue of the maintenance of representative democracy at the Member State level) is preserved, and on ensuring that the substantive law-based state is respected. It is my contention that the doctrine on the essence of sovereignty is a constitutional fig-leaf in that it has no discernible content and the Constitutional Court has no intention of blocking a democratic decision to transfer competences to the EU. On the other hand, I will argue that the Constitutional Court's major focus has been on ensuring the substantive law-based state by rhetorically strengthening its asserted power to police specific EU legal acts for their compatibility with the essence of the democratic law-based state, a concept whose contours have been taking more distinct shape in recent years and which the Constitutional Court can more effectively employ to ensure that the EU does not overstep its bounds. Constitutional Review of EU Treaties: Democratic Fig Leaf or Genuine Protection of National Sovereignty?

Keywords: Europe, Constitutional Court, democracy, Czech, sovereignty.

Doctrines Developed by the Czech Constitutional Court on EU Law

Among the most contentious issues raised about the EU is whether a particular Member State's constitution actually permits such a large transfer of powers to an international organization. Although the mundane matters of EU law are handled almost exclusively by ordinary courts in conjunction with the European Court of Justice, these key issues are handled by constitutional courts (or supreme courts exercising constitutional jurisdiction). Although there do not tend to be a large volume of decisions issued by constitutional courts, those that are issued are almost invariably of especial importance.

Since the Czech Republic joined the EU in 2004, the Constitutional Court of the Czech Republic has had ample opportunity to pass judgment upon several critical issues of the relationship between EU law and Czech law. In contrast to the high courts of many other Member States, however, the Czech Constitutional Court did not have the opportunity to pass judgment upon the validity of the transfer of powers to the EU at the time of the Czech Republic's accession to the EU. Two years were to elapse before the Constitutional Court decided its first major case on EU law, the Sugar Quotas Case.¹

In view of the way in which the Czech Constitution deals with the constitutional conformity of treaties, the fact that the Czech Constitutional Court did not pass judgment upon the validity of the transfer before accession resulted in that issue being permanently foreclosed. Under the Czech Constitution, the issue as to whether a treaty is in conformity with the Czech Constitution may only be raised prior to the treaty being ratified by the Czech Republic: thereafter the issue is foreclosed. It is no surprise, then, that in its first major decision on EU law, the Sugar Quotas Case, the Court did not even consider the validity of the transfer of powers; it merely declared this as the situation resulting from accession.²

Essentially, it was not until the Lisbon Treaty was submitted to the Court that it was presented with the issue of the validity of the transfer of powers to the EU. However, the fact of the foreclosure of such review was cited by the Court in these cases as determinative, so that the issue of the constitutionality of the transfer of powers (at least the original ones) has been definitively determined in favor of its constitutional conformity.³

Czech Constitutional Limitations upon the Transfer of Powers to the EU

Of critical importance in its Sugar Quotas Case was the Court's statement delimiting the outer boundary of the acceptable transfer of sovereignty. In that case it raised the issue of whether the doctrine of the applicational precedence of EU law (the ECJ supremacy principle) over the entire legal order of a Member State, including its constitution, was compatible with the Czech Constitution. Early in its reasoning, the Court pointed out that several other high courts of Member States had refused to accept this doctrine unconditionally⁴ and noted that the doctrine was especially problematic in relation to Article 9 paragraph 2 of the Czech Constitution, which is the Czech version of the "eternity clause".⁵ Toward the end of its reasoning, the Court took a very firm position on the transfer of powers, from which the applicational precedence of EU law follows. First it pointed out that, although certain powers had been transferred, the Czech Republic remained the source of sovereign authority; accordingly, the transfer of powers by the Czech Republic (which it renamed as a conferral of powers but elsewhere refers to them as delegated powers) was not irrevocable but conditional.⁶ As for the condition, it formulated its own "Solange" test, but a dual one: the conferral "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."⁷

This dual test was repeated in the Lisbon Treaty I Case: "Thus the transfer of powers of Czech Republic bodies cannot go so far as to violate the very essence of the republic as a sovereign and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and of citizens or to establish a change in the essential attributes of a democratic state governed by the rule of law."⁸ It should be noted, however, that the test is formulated in a significantly different manner in at least two respects. First, the Sugar Quotas case speaks of the conferral persisting, while Lisbon refers to permissible transfer. This difference appears to be due, at least in part, to the fact that the two cases involved different types of review: whereas the Sugar Quotas Case concerned an abstract review of a legal enactment assuming the EU regime already in force, the Lisbon Treaty cases concerned a preliminary review of an as-yet unratified treaty. Second,

the test appears to add the essence of the substantive law-based state concept (the second prong of the test) to the first prong of the test.

The Preservation of Sovereignty Prong

The Court engaged in an extended discussion about the meaning of sovereignty and concluded that it is not undermined by participation in collective structures.⁹ As it concludes in Point 108, this can lead to a strengthening of sovereignty within the joint actions of the integrated whole. It also rejects arguments in Lisbon II that “divided sovereignty” is a nonsensical concept.

Scope of Review of the Lisbon Treaty

Points 79–87 in Lisbon I and Point 108 in Lisbon II point out that the Court is precluded from reviewing the constitutional conformity of the EC and EU Treaties in the wording prior to the entry into force of the Lisbon Treaty. In other words, in reviewing the Lisbon Treaty it can only review those provisions of the Treaty that are viewed as substantive changes to the EC and EU or as normatively new (although it does seem to allow that, when in doubt, it will assume it can review). This follows from the principle that, following the ratification of a treaty, its conformity with the Constitution cannot be questioned, at least in an abstract proceeding. The Court did point out, however, that in exceptional cases it could review the conformity with the Czech Constitution of the application of a treaty to a specific case—at least in the case of treaties which cannot be considered as part of the constitutional order (treaties on human rights). This point considerably muddies the waters because it suggests that, despite their special status in other respects, EU treaties are not among those treaties which are part of the constitutional order. Still, this approach to the matter indicated that the Court would only review a limited group of Treaty norms for their conformity with Czech constitutional law.

The Court’s Deferential Approach

The Court’s approach is nicely summarized in Point 109 of Lisbon I. It is almost a tautology to declare that Article 10a of the Czech Constitution does

not allow unlimited transfers; however, at least with regard to the initial transfer, the Court defers to other powers (leaving it to their discretion): the “limits should be left primarily to the legislature to specify, because this is *a priori* a political question, which provides the legislature with wide discretion; interference by the Constitutional Court should come into consideration as *ultima ratio*, i.e., in a situation where the scope of discretion was clearly exceeded.” This approach seems like an unusual form of “political question”, at least as that term is meant in American constitutional jurisprudence, which is a doctrine of justiciability, meaning the court lacks competence to decide a particular issue. This instance seems rather like a form of judicial restraint with an extremely high threshold.

With regard to numerous varied arguments, some serious and others not, the Court found no violations of the Czech Constitution. The actual transfer of powers was not deemed excessive. The Court found some problems in relation to Treaty amendments and the vagueness of the provision on EU treaties (Art. 216 TFEU), but was able to accept these without finding a violation of the Czech Constitution.

Kompetenz-Kompetenz and the Amendment Procedure

The Court placed great emphasis on the issue of whether the Lisbon Treaty gives *Kompetenz-Kompetenz* to the EU. Despite some questionable points, it concludes that *Kompetenz-Kompetenz* remains with the Member States as the EU can only act within the scope of the powers conferred on it by the Member States. It went on to reject the contention that Article 352 (the Flexibility Clause) can do just that; Points 149–152 as conditions for invoking it are sufficiently strict and the institutional (ECJ) framework for reviewing conferred competences is adequate. The Court does not see the simplified revision procedure as a problem since the ECJ ensures consistency with the Treaties and thus they are not real amendments to Treaties that would affect competences. It stressed that the EU bodies have their own legitimacy and that the Lisbon Treaty increases the involvement of national parliaments in the EU legislative process.

Conferred Powers and the EU's Treaty-Making Power

The Courts analyzed the provisions in the Lisbon Treaty that outline the exclusive and shared competences, as well as those concerning the EU's international personality and its treaty-making power. First it pointed out that the general clauses declaring the competences (Arts. 3, 4 TFEU) and the treaty-making power (Art. 216 TFEU) are not problematic as they do not confer independent and general competence; rather, as for example with the competences, they only outline the structure and areas while the individual competences depend on specific treaty provisions. Also, the transferring of exclusive competence or comprehensive areas of legal regulation does not violate Article 10a of the Czech Constitution. As regards treaties and international personality, Article 216 of the TFEU is more declaratory in that it codifies what the ECJ already developed. The conferral of international legal personality and expanded treaty-making power does not go too far (Points 183–86).

The EU Charter of Fundamental Rights and Values

The Court rejects the concern that the EU Charter of Fundamental Rights would allow for the expansion of the scope of application of EU law into areas reserved to Member States, as EU law itself makes clear that it does not. The Court practically rules out the likelihood of a conflict because of the mutual compatibility of the two systems in terms of their values. The ECJ human rights standards and institutional guarantees are sufficient and cooperation with Member States courts is good. (Point 197). Nonetheless, the Court still points out that, should the standard of protection of fundamental rights prove unsuitable in the future, it would be necessary to rescind the transferred powers (Point 196). The only point upon which the Court comes close to finding a violation of the Czech Constitution is in relation to the treaty power in Article 216 of the TFEU which, it declared, “because of its vagueness, is on the borderline of compatibility with the requirements for normative expression of a legal text that arise from the principles of a democratic, law-based state” as “this transfer must be delimited, recognizable, and sufficiently definite”.¹⁰ This would also suggest the reason as to why it changed the sovereignty prong of the test on the transfer of powers to include the concept of the law-based state.

Referential Norms for Review

Despite its generally deferential approach, an example of the full scope of review (i.e., review in relation to the entire constitutional order) is found in Point 94 of the Lisbon I Case and Point 172 of the Lisbon II Case. The Court made the point that it should review the Lisbon Treaty in relation to the entire constitutional order because this would assist in the process of bringing CR and EU law into conformity: to the extent that the USCR can point out inconsistencies between EU law and any provision of the Constitution, it would facilitate constitutional amendment. As was pointed out above, however, the Court found no actual conflicts with the Czech Constitution.

The Essence of the Substantive Law-Based State Prong

In sharp contrast to the preservation of the sovereignty prong, where the Court has proven to be highly deferential, it has taken a much more active stance in relation to the essence of the substantive law-based state prong of the test. A brief review of its jurisprudence on EU law will demonstrate this distinction.

As mentioned above, this prong of the test has developed into the Court's asserted power to assess the validity of EU law in the Czech Republic. To gain a full understanding of how and in what circumstances that power is asserted it is necessary briefly to consider the development of this power in the Court's case law, beginning with the Sugar Quotas Case.

That case concerned the constitutionality of a ministerial regulation adopted to implement an EU regulation in the area of agriculture—specifically to designate the key for determining sugar quotas. The Court first considered whether it was at all permissible for it to review the constitutionality of a Czech enactment relating to EU law. It determined that it had such power; but the reasons why it had such power were not entirely clear from the reasoning. The Court emphasized that, although it was entirely incompetent to assess the validity of EU law, the ministerial regulation in question was not strictly EU law since the applicable EU norm left the Member States a significant amount of discretion in choosing the manner of regulating the issue, so that it could be characterized as a mixed norm. Accordingly, the Court pointed out that while EU law standards applied to such Czech norms, so did Czech constitutional standards. The Court went further and emphasized that, since the key in

question was in the area of EU law, Czech constitutional norms could not be applied to it in isolation from EU law. For this reason, it declared that Czech constitutional standards would apply as “infused” by EU general principles. In addition, as pointed out above, the Court declared the essence of the substantive law-based state prong of its test, namely that EU law would enjoy applicational primacy over national law unless the EU law norm came into conflict with the core of the constitutional order—the substantive law-based state. The reasoning in the Sugar Quotas Case could be viewed as highly Euro-friendly. First, even where the Court was applying Czech constitutional norms to a Czech-enacted law related to EU law, it respected EU standards. Further, EU law enactments would be subject to constitutional review only in relation to issues affecting the core of the law-based state.

In fact, a further case decided upon only two months later, the European Arrest Warrant Case, was also very Euro-friendly. In that case the Court laid down the principle that when interpreting whether an EU law norm was consistent with the Czech Constitution the Constitution should, wherever possible, be given a Euro-conforming interpretation. In doing this, the Court decided that the constitutional provisions on extradition could be interpreted in such a way that the European Arrest Warrant comported with them.

This seemingly highly Euro-friendly approach did not stand up for very long, as a subsequent case demonstrated that the Court’s approach was not as Euro-friendly as it had originally appeared. In its Medications Reimbursement Case,¹¹ the Court was considering a Czech statute that had transposed an EU directive. In contrast to the Czech enactment in the Sugar Quota Case (the key), this statute transposed *mandatory* provisions from the directives; hence in its transposition the Czech Parliament did not enjoy any range of discretion in choosing the regulatory policy. If one had interpreted the Sugar Quotas case as being highly Euro-friendly, then it would appear that this case would be a perfect example of a norm that the Court could not review due to its being a norm of EU law (at least in substance). Despite this, the Court appeared to focus strictly on the formal origin of the norm: as this statute was formally a Czech enactment, then the Czech constitutional standards must apply to it, albeit its standards as infused by the EU general principles.¹²

This ruling threw into doubt the notion that EU law would enjoy general immunity from constitutional review in the Czech Republic. While norms that are strictly EU enactments in the formal sense (such as regulations or Treaty

provisions) would appear to enjoy this immunity, the same could not be said of any enactments that were Czech law in the formal sense (such as statutes or ministerial regulations), even if they were transposing mandatory EU norms. Such an approach would place the Czech Constitutional Court very much in the camp of courts that are not deferential to EU law and ECJ rulings.

The Lisbon Treaty Cases strengthened the impression given by the Medications Reimbursement Case in that, although the Court stated many times that its standard of review for EU law matters was the core of the law-based state, it also hinted that it could also review EU law norms in relation to the entire constitutional order. If this impression is correct, then the Czech Constitutional Court might decide at any time to review a particular EU law norm for its conformity with any Czech constitutional principle.

Conclusion

In summary, although the Czech Constitutional Court's statement of the test for determining the outer limits of the transfer of powers indicates a dual-pronged test which gives equal weight to both prongs, in fact only the second prong has any real bite. The Court applies the first prong, the preservation of sovereignty, only in the context of the preliminary review of EU Treaties and has been highly deferential in applying it, making it appear that it is highly unlikely ever to declare, as an abstract proposition, that a transfer of powers to the EU is in conflict with the Czech Constitution. In sharp contrast, the Court has made clear that it will employ the second prong in the course of its ordinary constitutional review and will not be deferential.

The prong of the test concerning sovereignty is not one that is well suited to adjudication by a court, whereas the prong concerning the essential attributes of a law-based state is. Further, the Czech Constitutional Court has shown itself very timid in jumping into the fray in the context of a proceeding on the preliminary review of an EU treaty, while it has been much less timid in relation to the abstract review of norms concerning EU law.

Endnotes

¹ PI. ÚS 50/04, 8 March 2006.

² “As a result of the Czech Republic’s accession to the EU, a transfer of powers of national organs to supra-national organs has taken place on the basis of Art. 10a of the Constitution of the Czech Republic.”

³ The Lisbon Treaty I Case essentially said this was all a given, and Lisbon II cited the doctrine of *res judicata*.

⁴ It cited the Italian, German, Danish and Irish jurisprudence in this regard.

⁵ Any changes in the essential attributes of a democratic state governed by the rule of law are impermissible.

⁶ Of course, the fact of its conditional nature now enjoys explicit Treaty support after the Lisbon Treaty resolved the issue as to whether a Member State may withdraw from the Union by inserting provisions into the Treaty on European Union allowing for a Member State to withdraw.

⁷ The Sugar Quotas Case, Part VI. B.

⁸ PI. ÚS 19/08, 26 November 2008, Point 97: “Thus the transfer of powers of Czech Republic bodies cannot go so far as to violate the very essence of the republic as a sovereign and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and of citizens or to establish a change in the essential attributes of a democratic state governed by the rule of law.” It should be noted that soon after the Sugar Quotas Case was handed down, the Court introduced a practice whereby it numbered the paragraphs of its judgments, thus facilitating citation of its reasoning.

⁹ The Lisbon II case makes a similar argument in relation to NATO.

¹⁰ Point 186.

¹¹ Judgment No. PI. ÚS 36/05 of 16 January 2007.

¹² ‘ . . . the European Communities, just the same as is the Czech Republic, are law-based communities. The European Communities are constructed on the respect and esteem for the essential attributes of a law-based state. As can be deduced from the jurisprudence of the European Court of Justice, its interpretation of general legal principles corresponding to the fundamental rights contained in national constitutional catalogues is quite similar to the Constitutional Court’s approach.’