

The Czech Constitutional Court's Second Decision on the Lisbon Treaty of 3 November 2009

On 3 November 2009 the Czech Constitutional Court gave its second ruling within a year on the Treaty of Lisbon.¹ The Court squarely rejected the complaints against the Treaty. For scholarship the most interesting characteristic of the ruling is the way the Court distanced itself from the *Lissabon-Urteil* of the *Bundesverfassungsgericht* in such unequivocal terms that the judgment's central passages deserve a place in this issue, even though we only dispose of a provisional translation by Jan Komárek and cannot make comments available yet. As it did in the previous judgment on the Lisbon Treaty of 28 November 2008,² the Czech Court again belies the established idea that eastern European constitutional courts take the *Bundesverfassungsgericht* as their guide.

The paragraphs below take issue directly with three major considerations in the *Lissabon-Urteil*: those about the list of non-transferable competences, about the democratic flaws of the Union and about sovereignty remaining essentially national property.

As to competences, the Czech Court does not consider it a task for itself to indicate areas which must remain with the Czech Republic.

As to democracy the Court does not consider European popular representation fundamentally flawed by the lack of a one man one vote equality in elections of the European Parliament.

As to national sovereignty, according to the Court the Czech Republic has opted for a notion of sovereignty that can be pooled or shared among states. This does not entail a loss but instead can reinforce sovereignty.

THE EDITORS

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¹ Judgment of 3.11.2009, Pl. ÚS 29/09. Press release here: <www.usoud.cz/view/2144>. The Court's own translation of this judgment shall eventually be available at <<http://www.usoud.cz/file/2506>>.

² See Peter Bříza in 5 *EuConst* (2009) p. 143.

Excerpts from a Translation by Jan Komárek*

[...]

[The rejection of the request to create a list of competences that cannot be transferred and the emphasis on the responsibility of political actors]

110. In the introductory part of its petition the petitioner claims that ‘unfortunately the Constitution does not define more closely the essential requirements for a democratic state governed by the rule of law’ (petition, point 13).³ According to the petitioner ‘it is true that the Constitutional Court has touched upon this concept [references to some previous judgments of the Court], but it does not provide any comprehensive, complex and close interpretation of it, which in future would be immune to momentary political pressures and [hence] would become subject to an expedient interpretation influenced by the currently pending cases’ (petition, point 13). In point 49 of the petition, the petitioner requests the Constitutional Court to define ‘the substantive limits to transfers of competences’, and in point 51 to 56 it attempts to define these limits itself, while it is obviously inspired by the judgment of the German Constitutional Court,⁴ which provides such a list in point 252 (*see* particularly points 51 to 56 of the petition).

111. However, the Constitutional Court does not consider it possible, with regard to its place in the constitutional system of the Czech Republic, to create such a list of competences that cannot be transferred and to authoritatively define ‘substantive limits to transfers of competences’, as it is demanded by the petitioner. It recalls that in its [Lisbon Treaty I judgment⁵], the Constitutional Court stated that ‘these limits should be left primarily to the legislature to specify, because this is *a*

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³ The petitioners refer to the ‘eternity clause’ of the Czech Constitution, contained in Art. 9(2) (‘Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.’), which must be read in conjunction to Art. 1(1) (‘The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.’). It is the key provision with regard to the EU (also in relation with Art. 10a(1): ‘Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.’).

⁴ Judgment of 30.6.2009, 2 BvE 2/08, available in English at <http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>.

⁵ Pl. ÚS 19/08, available in English at <<http://www.usoud.cz/file/2339>>.

priori a political question, which provides the legislature wide discretion' (point 109). Responsibility for these political decisions cannot be shifted onto the Constitutional Court; the Court can make these decisions subject to its review only after they have actually been made on the political level.

112. For the same reasons, the Constitutional Court does not feel competent to formulate in an abstract context and in advance what the precise content of Article 1 paragraph 1 of the Constitution is, as requested by the petitioner supported by the President, who welcomes the effort to 'define the features of the so called substantive core of the constitutional order, or more exactly said, of the sovereign democratic state governed by the rule of law by an enumerative list' and submits (in line with the petitioner), that this could 'prevent a future expedient definitions of these features in relation to currently pending cases' [part C of the President's submission⁶].

113. The Constitutional Court considers that it is exactly the concrete cases that can provide the Court with the relevant framework within which it is possible, by interpretation on a case-by-case basis, to specify the content of the concept of 'a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens.' The Constitutional Court has already done so in the decisions mentioned by the petitioner himself (*see* point 110 of this judgment), or in, e.g., judgment [Pl. ÚS 36/01] and for the last time in judgment [Pl. ÚS 27/099]. It is not a manifestation of its arbitrariness, rather on the contrary of its restraint and judicial minimalism, which is understood as a means of limiting judicial power in favour of political procedures, and which prevails over the demand for absolute legal certainty (*see* particularly C.R. Sunstein, *Judicial Minimalism on the Court* (Cambridge, Harvard University Press 1999) p. 209-243 directly to the relationship between judicial minimalism and the demand for legal certainty). The effort to define the concept of 'a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens' once and forever (as requested by the petitioner supported by the President) could on the contrary be understood as a manifestation of judicial activism, which is by the way continuously criticised by some political actors.

[...]

⁶ It is available in English on Václav Klaus personal webpage <<http://www.klaus.cz/klaus2/asp/clanek.asp?id=JEeS0sJVW0EF>>, but the concluding part is missing. The submission is available also at the webpage of the Court <http://swww.usoud.cz/assets/Pl-29-09_LS-II_vyj_d_en_prezidenta_republiky.pdf>.

Democracy in the European Union

134. As regards the question of democratic deficits of decision-making procedures in the European Union, its conflict with principles of a democratic state and the separation of powers, which the petitioners seek in Article 1(1) of the Constitution, and its possible elimination through adoption of a 'bound mandate' [...] in the first place it is necessary to note that the Lisbon Treaty does not in any way prevent the Member States from adopting such measures on the internal level, which is, by the way, proven by the practice of particular Member States in questions concerning the exercise of control on the part of national legislatures on the government's actions in the European Union (see, e.g., P. Kiiiver, *The National Parliaments in the European Union: A Critical View on EU Constitution-Building* (The Hague, Kluwer Law International 2006). Similarly, as the Constitutional Court did not make the constitutionality of ratification of the Lisbon Treaty conditional on the adoption of internal procedures concerning decisions possibly adopted on the basis of Article 48(6) and (7) (although it expressly formulated its reservations as regards their absence), the absence of the controlling mechanisms, which the Lisbon Treaty does not limit in any way, cannot be the reason for its conflict with the constitutional order.

135. At the same time the Constitutional Court does not overlook the tendency to strengthen the role of parliaments of the Member States in the decision-making procedures on the level of the European Union, an example of which is the Lisbon Treaty, after all [...]

136. Finally, the Constitutional Court adds that it is in the essence of the transfer of competences of the Czech Republic that instead of Parliament (and also other authorities of the Czech Republic) these competences are being exercised by the international organisation to which these competences have been transferred. The conditions of conformity with the constitutional order of this transfer have been comprehensively delimited in points 88 to 120 of the Lisbon Treaty I judgment, where the Court did not find their violation in the case of the Lisbon Treaty either. At the same time, the Court stressed in several places of that judgment that it is prepared to intervene in case of their violation (see particularly points 120, 139, 196 and 197 of the Lisbon Treaty I judgment).

137. It is possible to connect with the above-mentioned reservation against the Lisbon Treaty the argument of the petitioners concerning the conflict of Article 10(1) TEU with Articles 1(1) and 10a of the Constitution [...]. When this provision provides that 'the functioning of the Union shall be founded on representative democracy', it is not intended to mean that only processes on the European level should secure fulfilment of this principle. The provision concerns processes

both on the European and internal level, not only the European Parliament, as the German Federal Constitutional Courts states in point 280 of its decision to which the petitioners refer (although they expressly refer to point 271 of that decision).

138. Advocate-General Póitares Maduro has recently expressed a similar view in his Opinion of 26 March 2009 in Case C-411/06, not yet reported, footnote 5:

Democracy can take a number of different forms, however, especially in the European Community. At Community level, democratic legitimacy is derived from two main sources: either the Council, in which the will of the peoples of Europe is expressed through the positions adopted by their respective governments, under the control of their national parliaments; or the European Parliament, the directly representative European institution, and the Commission, which is directly accountable to it. Directly democratic representativeness is undeniably a relevant gauge of European democracy, but it is not the only one. In particular, European democracy also entails achieving a delicate balance between the national and European dimensions of democracy, without either one necessarily prevailing over the other. This is why the European Parliament does not have the same power as national parliaments in the legislative process and, although an argument could be made for stronger powers for the European Parliament, it is for the peoples of Europe to make that decision through treaty amendment. The balance between the powers conferred on the European Parliament and the other institutions as expressed in the different legislative procedures has evolved over time and reflects the balance which the peoples of Europe have wanted between national and European means of giving legitimacy to the exercise of power at European level.

139. In other words, the democratic processes on the Union and national level complement and condition each other. The petitioners are, by the way, mistaken if they contend that 'representative democracy can only exist inside states, inside sovereign subjects.' The principle of representative democracy is one of the common principles of organisation of larger entities of an interstate type as well as non-governmental organizations. The existence of elements of representative democracy on the Union level does not exclude realisation of the same elements anticipated by the constitutional order of the Czech Republic, nor does it mean surpassing the limits of transferrals of competences given by Article 10a of the Constitution.

140. For similar reasons, it is not possible to see a contradiction between Article 14(2) TEU, which provides for a number of the members of the European Parliament, with the principle of equality provided for in Article 1 of the Charter of Fundamental Rights and Basic Freedoms, as the petitioner contends [...] As it has been shown above, the European Parliament is not the exclusive source of democratic legitimacy of decisions adopted on the level of the European Union. It is

derived from a combination of structures existing on both national and European level and it is not possible to insist on the requirement of absolute equality among the voters in particular Member States. It would be the case only if the decisions in the European Union were adopted with exclusion of the legitimation bonds to governments and particularly legislatures in particular Member States. As the Constitutional Court shown above in this part of its judgment, however, the contrary is true.

[...]

Sovereignty of the Czech Republic and the State Power

146. At first the Constitutional Court refers to the conclusion expressed in its previous Lisbon Treaty I judgment as regards the character of the European Union, conditions on preserving the foundations of sovereignty of the Czech Republic as well as control, which the Member States retain.

147. The Court recalls that (as it found in point 209 of the Lisbon Treaty I judgment) sovereignty of the state in a modern democratic state is not an aim in itself, thus in isolation, but it is a means to fulfil the foundational values upon which the construction of the democratic state based on the rule of law stands. In point 107 it inferred (with reference to considerations in points 98 to 107 of that judgment) that the transfer of competences of the state, which emanates from the free will of the sovereign and will continue to be exercised with its participation through previously agreed-upon, controlled means, is not a conceptual weakening of sovereignty, but can to the contrary in its consequences mean its strengthening in a common action of the integrated whole. The Constitutional Court also stated in point 104 of that judgment that the European Union has advanced most in the concept of shared – “pooled” sovereignty and that already today it constitutes a *sui generis* entity which can hardly be subsumed into classical categories of constitutional theory. The key manifestation of sovereignty of the state is also a possibility to further dispose of its sovereignty (a part of it), or to transfer some competences temporarily or permanently.

148. When the President disputes this delimitation of sovereignty with a contention that ‘even though the term “shared sovereignty” has recently been used rather frequently, it has only been used in non-rigorous debates’, since this concept is, according to the President, ‘self-contradictory’, because, as the President opines, ‘our legal system does not recognise the term “shared sovereignty”, and this term is not recognised by the law of the European Community either’, the Constitutional Court considers it suitable to recall in this connection the Memorandum

attached to the Czech Republic's application for accession to the European Union.⁷ The Czech Republic's application for accession to the European Union:⁸

The Czech nation has only recently regained its full national sovereignty. Yet, as the Governments of present Member States have done in the past, the Government of the Czech Republic has irrevocably arrived at the conclusion that within the context of modern European developments *the exchange of a part of its national sovereignty for a shared supranational sovereignty and co-responsibility is an inevitable step to be taken for the benefit of its own country and the whole of Europe.*

149. Decision of the Government of 13 December 1995 No. 732 on the Czech Republic's application for accession to the European Union authorised the then-Prime Minister (and today's President) Václav Klaus to present the Application and the Memorandum (which was in conformity with the Decision of the Government an inseparable part of the Application) in January 1996 to the Government of the Italian Republic as a presiding Member State of the European Union for the first half of 1996. It is therefore beyond any doubt that the concept of shared sovereignty must have been well-known to the President, but also to other political actors responsible for adoption of the mentioned Memorandum at a time when the Czech Republic was not yet a member of the European Union. The legal representative of the President proved this fact at the oral hearing when he extensively quoted from the Memorandum to support his contention that the character of the European Union would be principally changed with the adoption of the Lisbon Treaty.

150. The Constitutional Court also held in point 120 of the Lisbon Treaty I judgment:

- The Constitutional Court generally recognises the functionality of the EU institutional framework for ensuring review of the scope of the exercise of conferred competences; however, its position may change in the future if it appears that this framework is demonstrably non-functional.
- In terms of the constitutional order of the Czech Republic – and within it, especially in view of the material core of the Constitution – what is important is not only the actual text and content of the Treaty of Lisbon, but also its future concrete application.
- The Constitutional Court of the Czech Republic will (may) also – although in view of the foregoing principles – function as an *ultima ratio* and may review

⁷ Available at <http://www.mzv.cz/jnp/cz/zahranicni_vztahy/neverejne/205891-memorandum.html>.

⁸ Available in English at <http://www.ena.lu/czech_republic_application_accession_european_union_17_january_1996-2-17915>.

whether any act of Union bodies exceeds the powers that the Czech Republic transferred to the European Union under Article 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.

