

Facilitated transition to democracy and rule of law

by

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The initial position

Mr *Tomas G. Masaryk*, the founder and the first President of Czechoslovakia (formerly Professor of sociology at Charles University) said at the end of his term of office (1918-1935): „We have democracy, but still no democrats.“ It is rather more easy to implement institutional reforms than to (re)form the people.

This target was in 1990´ after the collapse of totalitarian regime more difficult than passing from the inferior position of the society as an ethnicum under the monarchy to an independent (multi)nation state in 1920´. The recent transition was much more faced with challenges of discontinuity, provoked by the globalization: a mere taking over of the established balanced western social model of liberal democracy (*Liberté*), rule of law (*Egalité*) and solidarity (*Fraternité*) became an illusion. This model was stable when it had been exposed to threats of totalitarianism, attacking its very existence. But, whenever this confrontation dropped twenty years ago, no spontaneous self-sustaining perpetuity of the western social model proved. In this respect the expectation of „the end of history“ (*Francis Fukuyama*) appeared mistaken. Instead, the public area, necessary for materialization of civic virtues as an essential fuel of democracy, has been to a large extent „colonized“ by driving forces of the „ever growing“ market. It seems, *Alexis de Toqueville* was right that the system of democratic government is the most vulnerable from inside: through the danger of tyranny by the majority - by „ethos“ of mass consumerism and its efficient manipulations through electronic communication. The former balance disappeared. As the consequence, the current recession is manifestly not only an economic phenomenon, but, first, a crises of trust.

The new democracies in Central and Eastern Europe produced no alternative or at least an improved vision of society, in contrast to the *Prague Spring* of 1968, even when it had been limited to corrections within the *status quo* („socialism with a human face“). They were fragile and not immune against the speed encroachment of post-modernism upon the sphere of politics, getting the initial enthusiasm of the self-confident citizens estranged. Transnational capital investors anticipated their chance to easy returns by exploitation of the local sources in a milieu of large-scale privatization, low regulatory frames and weak supervisory authorities. The political control over economy by a rational discourse of national elites was getting illusory. New political parties had no time enough to constitute themselves as different representatives of a common sense competing with each other. Moreover, they started to play a role of „privatized“ dealers of interest groupes in influence and political power, accompanied by corruption and clientelistic networks. Simply speaking, a mess (for the Czech

Republic see the speech of President *Vaclav Havel* in the concert hall „Rudolfinum“ in October 1997, followed soon after by the fall down of the government of *Vaclav Klaus*). Etc.

At this critical moment a opportunity – even when still far away - to join the European Union, occurred: the Union as a chance to reinforce the lost balance of values by a collective action and to share the position of a global actor. The institutional as well as intellectual change of the CEE societies obtained a solid footing. The dialectics of *Gilbert K. Chesterton* became real: a revolution cannot deliver liberal democracy; foundations of the democratic order must be introduced, first, to enhance and cultivate the process of fundamental turn in the minds of the people (process never ending also in the western democracies...).

The renovation of the institutional and legal system in the Czech Republic as a would-be (candidate) member state, facilitated by the instruments and the funds of the EC-association as well as by the experience collected during earlier enlargements, advanced altogether successfully – from the perspective of „technology“ of this exercise. The general public was busy by many other developments and did not pay (much) attention to the gradual europeanisation of its social environment.

A lack of understanding (not of information about) the logics and particular steps of this manoeuvre and a gap in the concerned acceptance of its records by the people stood behind a political decision of the European Commission from mid of 1990' to involve also the Czech academic community with its broad capacity of appearance at the public in this process and to invite university people to take part in the European studies, supported under the Jean Monnet Action. Several missions aimed by this decision may be identified:

- to raise attention to and knowledge of the operation of essential requirements for the democratic governance, respecting the rule of law, enjoying fundamental rights of men and citizens and observing the international obligations, as the very basis of social transformation;
- to clear that the European institutional and legal system has been working towards the background of the same criteria, meeting of which is a pre-condition for the accession; the adoption of national implementation measures to plenty of community legal acts and rules for their enforcement, technical standards, etc., assumes also a value-based approach to their internalization by society, in favour of their functionally equivalent application in practice;
- to foster the self-determination and responsibility universities should have to be aware of in the process of social transition;
- to strengthen the autonomous status of universities in their position towards business, state authorities and general public as well as their skills of mutual communication in expertise affaires;
- to help to build up networks of academic cooperation open to learning the art of debate, cross-fertilization by exchange of reasoned opinions and reflection of partner's view in my own, by sharing the common and balancing the specific individual standpoints in looking for „the academic unity in diversity“, by promoting collegial friendly relations of cooperation...

At that time, the Czech academic environment already had introduced European studies in its teaching and research focus. As for the legal studies, we organized in Prague – with the support by Friedrich-Ebert-Foundation - the first international conference on the approximation of the Czech legislation to *acquis communautaire* in October 1991. The first book on the European Community was published in 1992. In January 1993 we started at the Faculty of Law Charles University the regular course on European law, followed soon by the 1st edition of the textbook and the volume of cases and materials. The pioneer work done was also the translation of the EC/EU Treaties into Czech.

It is proper to remember the merits for the JMP-extension to CEE: due to the personal engagement of Mme *Jacqueline Lastenouse* and kind patronage of Mr *Emile Noël* the European studies in the Czech Republic and other CEE-countries get the strong impetus and orientation. But money was not the only contribution. We were impressed by generosity of the evaluators, who assessed the applications from the CEE candidate countries on equal grounds with others, anticipating (at least at the very beginning without a tested experience) later, not immediate returns. Such a bold reliance on decency of the people proved to be a good strategy soon: the European Union won in the JMP-granholders its trustworthy allies. This is apparent until now.

The impact of the European legal studies on legislation of the Czech Parliament

How this support was employed? What outcomes it brought about? Instead of statistical data or some loose generalizations I – as a lawyer – prefer to mention several personal examples, that can give an idea of the tangible impact of the JMP-European studies.

Soon after the conclusion of the Europe agreement on association to the European Communities, two possible alternative structures for decision-making in the agenda of association policy incl. legal approximation were debated in the government's gremia. The first model was based on the exemption of the whole European agenda (the expertise, drafting the measures, the communication with European institutions a.o.) from all state bodies and its concentration in one specialized ministry. The advantage of this model was the more flexible and effective action, the disadvantage – the loss of close links to internal affairs. The second alternative preferred the diffused model of the existing ministries, responsible for the respective subject-matters, with the strong specialized unit for consultation, methodical and coordination, located within the office of the Government (Department for compatibility).

Our recommendation, based on comparative studies of this question from the EU member states, favoured the latter solution, considering the more feasible passage it offers to the accession and beyond for the benefit of consistency of internal and European policies of the Czech Republic. The debate resulted in the second alternative, which proved itself during the accession negotiations and is appreciated today as the best choice.

During the most rush time of catching up the targets of the legal approximation scheduled by the White Paper of the European Commission (I was already a member of the Council on Legislation of the Government), a proposal, spurred by the justification based on European studies, suggested to introduce in the Czech Constitution a special instrument – the governmental regulation with statutory legal force. The purpose was clear: to facilitate the legal approximation, where no discretion of the national legislator existed; the Parliament could within a limited period of time dismantle the governmental regulation without giving

any reason. Nevertheless, the Parliament did not accept this proposal and reserved the whole responsibility for itself.

Another our analysis recommended later to shape the focus of the parliamentary scrutiny over governmental mandates for the Council voting on draft European legislative acts into an earlier period of the European legislative procedure. It would allow the Czech Parliament to play a more substantive (undirect) role in the European law-making and to occupy a more informed position when transposing these acts (directives) into the Czech legal norms. The ratio of our proposal has been adopted and confirmed recently by the amendment act to the parliamentary procedures, which accompanied the consent of the Parliament to the ratification of the Treaty of Lisbon (incl. „imperative mandate“ in some issues).

The impact of the European legal studies on case law of the Czech Constitutional Court

After the EU accession Czech judges were expected to act as „European judges“, applying the doctrine of full effectiveness of Community law under the principles of the primacy, the direct effect, the conformity interpretation of national rules and their setting aside in cases of conflict, the liability of the state for damage arising out of a breach of Community law as well as to communicate with the European Court of Justice through reference for preliminary rulings. Therefore, they were expected to depart from the tradition of the mechanical jurisprudence and statutory positivism, discouraging them from using abstract legal principles, teleological method of interpretation and comparative arguments in the legal reasoning. This traditional judicial ideology had relied on *Hans Kelsen's* hierarchy of force of legal norms, rather than on more subtle forms of persuasive authority, convincingness or acceptability of the court's judgement as – a. o. - a defence against „a legislative optimism“ (an inclination to reflect ever-changing social reality by new urgent complementary and amending legal regulation), which destabilises the legal order.

It was desirable to change the post-communist judicial ideology, hostile to discursive interaction with the parties to the dispute, which is more adequate to the needs of modern, rather complex legal systems like the European one.

The Czech Constitutional Court played a ground-breaking role in this respect. It referred to the common European legal culture already before the accession and continued later to promote democratic values of European law, that are „irradiating“ into the domestic constitutional systems. In its „European“ judgments (on *European arrest warrant*, a. o.) the Court presumed that the Czech Parliament have legislated in compliance with European law and rejected to derogate the implementation act. This self-restrained constitutional doctrine, serving as a guidance for ordinary courts and public administration, has been largely inspired by the lively academic discourse about the legal basis and emanations of European law within the Czech legal system.

This doctrine continued in *obiter dictum* of the *Lisbon I* case on preliminary review of compliance of The Treaty of Lisbon with the Czech Constitution (no Pl. US 19/08 of 26 November 2008). The Court reconsidered the old concept of state sovereignty, which cannot be understood in a static way any more, but rather as capacity of a supreme authority to dispose of (to confer, to withdraw) its exclusive power. The Court also cleared „the material core“ of the Constitution as a reservation, which could be - quite exceptionally - pronounced against an *ultra vires* act of the Union or an act violating „essential requirements for a

democratic state governed by the rule of law“. Even when subjected by a failed remedy at the European level, the latter conclusion was criticised by some commentators.

The second petition for constitutional review of the Treaty of Lisbon

On 3 November 2009 the Czech Constitutional Court decided on the case *Lisbon II* (Pl. US 29/09), initiated by a group of 17 Senators, who used the remedy still open by the *Lisbon I* case.

The strategy chosen by the petitioners was the following: They produced self-made definition of „the sovereign democratic rule of law-State“, allegedly missing in the constitutional jurisprudence and the doctrine. On this basis they assessed the Treaty as a whole, as well as a couple of its individual provisions, as contradicting with the Czech Constitution, in particular by

- an extreme complexity of the reform Treaty, undermining legal certainty
- the incapacity of the European Parliament to compensate the „deficit of democracy“
- the absence of an imperative mandate of the Czech Parliament for all legislative decisions of the Union
- the non-neutral formulation of the Union’s objectives allegedly based on ideology („social market economy“, „full employment“ etc.)
- no clear exclusion of any federative finality of the Union
- the suspension of membership rights under Art. 7 TEU-Lis, based on vague terms
- a special relationship with neighbouring countries“ (Art. 8 TEU-Lis)
- the principle of representative democracy (Art. 10 TEU-Lis), incompatible with the status of an international organisation, founded on sovereign equality of its member states
- the promotion of the general interest of the Union by the Commission (Art. 17 TEU-Lis), the European commitment of which was said to be not neutral, discriminatory requirement for nominees not sharing „the European ideology“
- the enhanced cooperation (Art. 20 TEU-Lis), limiting the right to cooperate without an approval by the Union
- the governance at the global level (Art. 21 TEU-Lis), being politically not neutral
- the common defence as an objective (Art. 42 TEU-Lis), contrary to the right of self-determination of people
- the withdrawal from the Union (Art. 50 TEU-Lis), not free of any pressure
- the Union decision-taking in immigration affaires (Arts. 78-79 TFEU)
- the declaration of the European Council on the guarantees for Ireland as a separate international treaty, requiring 3/5 majority approval by the Czech Parliament before its ratification
- the exclusive competence of the Union as such, since its non-execution by the Union would amount to *denegatio* of public power vis-a-vis the citizens at the national level
- the Union competence in criminal matters and implied external powers
- the Union citizenship and legal personality as the symptoms of a federation

- the key for distribution of seats in the European Parliament, being contrary to equality of the member states (Germany 12,6 % v. Luxembourg 0,8 %) as well as of the citizens
- the competence of the European Court of Justice, prejudicing an independent preliminary review of compliance of international treaties with the Czech Constitution by the Czech Constitutional Court.

Such a total disregarding of fundamental principles of European law, of membership obligations etc. evidenced the only reason of the petition: to obstruct the ratification of The Treaty of Lisbon.

The Czech Constitutional Court refused the part of these objections as inadmissible („apparently unjustified“) for being out of scope of its jurisdiction, the other part as *res iudicata* with reference to its *Lisbon I* judgment. The reaction of vast majority of commentators from the domain of the European legal studies was unambiguously consonant.

The petition against the „Lisbon“ amendment of parliamentary scrutiny on European laws

The reinforced rules, seeking to satisfy requirements of democratic control of the implementation of The Treaty of Lisbon by the Czech Parliament, had been challenged by a petition for annulment submitted by the same group of Senators, demanding to obtain also an express confirmation of the guarantees of national sovereignty for the time after the entry into force of this Treaty (no Pl. US 26/09).

On 6 October 2009 the Czech Constitutional Court rejected this petition as „apparently unjustified“ on the following grounds:

- There is no reason to replace simple majority by a qualified (3/5) majority in parliamentary preliminary scrutiny of governmental positions on application of the general bridging (“passerelle”) clause (Art. 48 para. 7 TEU-Lis), since the proposed extension of the ordinary legislative procedure or the qualified majority voting in the Council does not entail the transfer of any new competence on the Union. The same is true concerning the special bridging clause (Art. 81 para. 3 d/ TFEU) enabling the extension of ordinary legislative procedure on some aspects of family law, because the parliamentary approval is required in a negative way: the Parliament is expected to vote only on a refusal, not on an approval of the draft act and the existing voting mode makes the protection more easy than the mode proposed by the petitioners.
- The principle of democracy (Art. 1 para 1 and Art. 6 Const.) doesnot require to cut the minimum number of MPs necessary for initiating an action to the European Court of Justice in subsidiarity matters, as erroneously assumed by the petitioners (3 instead of 41 or 17); the needed higher number of MPs has the rational ground and doesnot deprive the minorities of the essence of their right of protection.
- The reasons above, based on *prima facie* findings that the arguments delivered by the petitioners did not amount to intensity and quality of a constitutional conflict, resulted in the conclusion about “the apparently unjustified” petition without starting judicial

proceedings *in rem*. Therefore, the Court did not need to wait for opinions of other parties – chambers of the Parliament.

- The same conclusion was drawn concerning the demanded express confirmation of the limits of transfer of competences, listing of the minimum scope of powers of a sovereign state, the position of the Czech Republic as a „master of the Treaties“ forever, the necessity to extend imperative mandate for all legislative decisions, the restrictive interpretation of Union law and of the role of the Czech Constitutional Court as an ultimate guardian of the Czech Constitution required by the petitioners, too, the respective amendment the Act on the Constitutional Court, etc. The Court has no jurisdiction to pronounce mere interpretative declarations, having no immediate concern to the merit. This is an inadmissible concern for the proceedings in question.

It remains to say, that this decision found the full support among Czech „European“ lawyers.

The objection of the Czech President against the EU Charter of Fundamental Rights

After his call with Swedish Prime-Minister *Fredrik Reinfeldt* on 8 October and meeting with President of the European Parliament *Jerzy Buzek* on 9 October, the Czech President *Vaclav Klaus* announced, that „Before the ratification [of The Treaty of Lisbon], the Czech Republic must at any rate in addition negotiate a similar exception [from the application of the Charter of Fundamental Rights, as the Poland and the United Kingdom did]. In this way a guarantee will be given to us, that The Treaty of Lisbon cannot lead to a break-through of the so called Benes´ decrees [from 1940-1946 on property confiscations mostly of *Sudetendeutschen*].“

He justified his requirement by a fear that “[...] the Court of Justice will review the compliance of legislation, practices and procedures of Member States with this Charter. It will make possible to circumvent Czech courts and to assert immediately at the Court of Justice for instance property claims of persons expelled after world war II. The Charter enables even to review valid decisions of Czech courts.” He did not specified the form, in which his requirement should have to be enacted.

This requirement was attempting to resist an inventive interpretation of European law. Its non-retroactivity is generally accepted. But, Union citizens allegedly might claim at any national court their rights granted by the Charter (he expressly mentioned Art. 17 – right to property) in so far as their non-discriminatory status under the Treaty had been violated by a member state. The Czech legislation on *restitution of property* (confiscated during the communist regime) from early 1990´, conditioning individual claims by the Czech nationality, was reminded. The European Court of Human Rights in Strasbourg found this legislation not in contradiction with the ECHR, for which the condition of nationality is irrelevant (cases *Des Fours Walderode, Harrach, Gratzinger, Polacek, Pinc*, a.o.) - in contrast to the findings of the United nations Committee on Human Rights. Czech courts have the duty to recognize and enforce decisions of national courts of other Member States in civil law matters (reference was made to the regulation no. 44/2001). Petitions from the member states to the European Commission concerning Czech restitution affaires were mentioned, too. The petitioners often use the tactic of questioning the – of the time - legality of application of the Benes´ decrees as the legal foundation for confiscations by *actio negatoria* and then sue for *vindicatio* under the

legislation on restitution of property or simply the civil law in force, towards the background of declared continuity of their property rights.

President *Klaus* neither expressed a reservation against the Charter when delegating to the Government the power to negotiate and sign the Treaty of Lisbon in late 2007, nor he mentioned the Benes' decrees in his brief to the Constitutional Court during the preliminary constitutional review of the Treaty of Lisbon.

The Czech Constitutional Court already analyzed thoroughly compliance of the entire Charter towards the reference criteria of the Czech constitutional order on the occasion of its *Lisbon I* judgment and came to the conclusion, that there are no contradictions between the both.

The awareness of the Benes' decrees became topical later, during the parliamentary debates on The Treaty of Lisbon last February. The consent of the Assembly of Deputies to ratification of the Treaty (given by more than 3/5 majority of all MPs) was accompanied by a resolution, supporting the opinion, that “[T]he legal status of the Charter guarantees, without any doubts, that the Charter cannot be effective in a retroactive way and question legal and property relationships arising from the Czechoslovak legislation, in particular, that adopted within the period 1940-1946, as well as the existing case law of European and national courts on these legal and property issues.”

A couple of advisory opinions invited by the European institutions (*Ulf Bernitz, Jochen A. Frowein and Lord Kingsland, Christian Tomuschat*, a.o.), by the Czech authorities (the President of the Assembly of Deputies, the Czech Ministry of Foreign Affairs, the Government, the Committee on European Affairs of the Senate) and by other bodies¹ confirmed the non-retroactivity of European law and the passing-by of its subject-matter with the Benes' decrees.

The Benes' decrees presumed “state untrustworthiness” as a criterion for confiscations of property of Germans, Hungarians and other persons, who allegedly acted during the time of “lack of freedom” (occupation by the repressive regime of Nazi-Germany) against national interest (territorial integrity) of Czechoslovakia. All persons, affected by the Benes' decrees, had the right to prove their innocence. If they had been in the post-war disorder deprived of this right or treated illegally, they have - under specific circumstances, but on equal footing, regardless of their nationality - the access to Czech justice, which shall review and – as the case may be – redress their status. The principle of non-discrimination on grounds of nationality under Art. 21 of the Charter changes nothing in *locus standi* of Union citizens at Czech courts and administration.

Everyone's equality before the law (Art. 20 Charter) has not an absolute, but a relative nature: a different treatment may be justified by an objective reason (only). The “state untrustworthiness”, used as a criterion by the Benes' decrees and approved by the Allies at the conference in Potsdam 1945, cannot be questioned at present as such. Only the “objectively justified” past application of this criterion can be made - in an exceptional individual case - subject to the judicial review by a Czech court and towards the Czech legal standard, preceding the European Convention of Human Rights - and the EU-accession. The valid judgment can be reviewed by the European Court of Human Rights only towards the rules on fair trial. It cannot be reviewed by the European Court of Justice towards the principle of

¹ The contributions by *Christian Tomuschat* and *Jiri Zemanek*, in: *Ist das tschechische Rechtssystem bereits EU-konform?*, from the colloquium, held by *Friedrich-Ebert-Stiftung e.V.* in Prague on 3 May 2001.

equality, so far as a link with European law (or its implementation at national level) is missing: Art. 345 of The Treaty on Functioning of the EU (Art. 295 TEC) does not prejudice the rules in the member states governing the system of property ownership (incl. restitution of property).

This Union *status quo* has been already available on the basis of general principles of law and the case law of the European Court of Justice. The Charter does respect the limits of powers conferred on the Union and does not extend any property claims to the prejudice of the Benes' decrees. Therefore, there was no legal reason to require an additional protocol to The Treaty of Lisbon on an exception from the application of the Charter. The political stipulation by the European Council of 29 October 2009, followed by the legally binding attachment to the next treaty on accession, is superfluous.

Final remark

The remarks above wanted to demonstrate, how uneasy, but exciting has been the task of those, who boarded the European legal studies in (one of) the CEE countries with the JMP. I may summarize, that this alliance proved well.