The Constitutional Court of the Czech Republic and European Integration in the Context of Judicial Dialogs

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Introduction

I would like to thank the organizers of this meeting to be invited to this event and to have the opportunity to hold a lecture here and to present you with the issue of the Czech Constitutional Court's role within the European Integration. Btw. it seems to me the cooperation between the MU and the CC could be stronger as the CC is seated in Brno and the building of the court is actually surrounded by the university facilities – the Faculty of Social Studies, the Faculty of Arts and the building of rector's office (as I noticed you had a welcome party at the faculty yesterday, so you could spot the building of the court as well). I hope this could be the very good start of such a co-operation.

When I was asked by the organizers as a representative of the Czech Constitutional Court to hold a lecture here, I decided to choose the topic concerning the European integration and the role of courts and particularly the Czech Constitutional Court. As I noticed from the list of the participants this topic could be attractive for most of you, as the majority are political scientists (and I do apologize to the rest who engage in other fields of social science).

As you remember our constitutional court enjoyed its international and European glory a few years ago when it decided on the constitutional conformity of the Lisbon treaty and "thanks" to the euro-pessimistic views of our senators and the president we had the exceptional opportunity among other European constitutional courts to review the treaty even twice (Pl. ÚS 19/08 and Pl. ÚS 29/09). I will try here to depict what is the role the Czech CC played and plays as concerns the European integration issues and I will attempt to put it into the broader framework of the so-called constitutional debates within the European system of courts.

1. Short characteristics of the Czech CC

As I am here as a representative of the Court today and most of you come abroad it would be undoubtedly appropriate to start with some few words about the court in general. When speaking about **the history of the court** we are usually proud to reffer to the predecessor of the contemporary Czech constitutional Court which was **the constitutional court of the first Czechoslovak Republic** that served as a first court of such a type (the so-called specialized constitutional judicial review) in Europe. However, it functioned in a limited manner and was not been reestablished after WWII. The current court has been founded **after the split of the Czechoslovak federation** – and as it was **established after the breakdown of the former communist regime** its concept followed the similar examples, such as the German constitutional court or the Spanish constitutional tribunal. It means it has – from the formal point of view - **relatively broad and strong competences** – it is authorized to annul legal acts passed both by the parliament or executive bodies, it deals with the individual constitutional complaints, it decides on the impeachment of the president of the republic and last but not least it reviews the international treaties before they are ratified by the president.

Therefore the court **substantially and greatly intervenes to Czech politics** – however compared to other comparable European constitutional courts it is nothing extraordinary. E.g. in 2000 it **stroke down the electoral reform** arranged by the two biggest parties – ODS and ČSSD – that should have eliminated the significance of other smaller parties. What was exceptional in the European constitutional milieu was its decision of 2009 when the court **annulled even a constitutional law amending the constitution which**

intended to shorten the regular period of the Czech parliament and was prepared in order to open the space for new parliamentary election. To strike down the constitutional law by the constitutional court is not an unknown step in Europe, but frankly speaking, it happens rarely (there are similar examples from Austria when the CC annulled an ordinary legal act and the parliament passed such an act repeatedly, however by the constitutional majority and therefore the act passed again was formally labeled as a constitutional one.

It is obvious that **the court has large and politically rooted prerequisites to become an important participant within the so-called judicial debates (dialogs) between European courts on the issues of European integration.** These debates has its long-lasting tradition going back to the 1960s and 70s when some of the national constitutional courts (especially the German and Italian ones) challenged the extensive case-law of European court of Justice.

It was not so surprising the Czech constitutional court which has very similar competences and position within the domestic political system as its German counterpart delivered two European-wide important decisions on the Lisbon treaty that could influence the future of European integration.

2. Courts as actors of European integration

2.1 ECJ as an "engine" of integration, neutral arbiter or wicked initiator and manipulator

It is well known fact that most of the **important constitutional principles of EU have been promoted not by member states and political bodies, but through the judicial case law of ECJ**. The **direct effect and primacy of European law**, fundamental rights protection etc. – all these fundamental principles of EC/EU law have been originally articulated by the ECJ and only then accepted by other institutions and member states and reflected in the treaties. What is still disputed on this role of ECJ **is the evaluation of this function: has the ECJ been a neutral arbiter, the positive engine of integration or the negative and even wicked initiator and manipulator** of all that unwanted shifts in the integration, it is the question.

There are even arguments (advocated for instance by Alec Stone Sweet) asserting that the **process of supranationalisation was not influenced by the member states** (that have not intended to create such an entity), **but it was a specific constellation between the ECJ, the domestic courts and the private actors** (individuals, private enterprises and European pressure groups) that shifted the project of European integration further!

Every actor in this constellation followed his own interest, but **the point of intersection created the pressure for supranationalisation irrespective of the will of member states** – see the following table. In other words from this point of view the shifts in the European integration were **a matter of specific constellations, strategies and interests between individual participants of judicial procedures, the national courts implementing European law and the ECJ.** While the individual actors aim at protecting their individual rights, limiting their losts or maximizing their profits (mainly economic ones) stemming from the promotion of new European standards, the national courts in this multilevel game try to achieve stronger position in the domestic separation of power (e. g. through widening the space for judicial review) or through the adjudication of European law they often urge particular policy that is denied by the domestic political actors. The aim of the ECJ itself is then to strengthen its own position and prestige in relation to other EU institutions and member states through developing the original aims of European integration.

Key actors of integration

Actors	Objectives and Preferences	Limitations and Constraints
European Court of Justice	To promote its own prestige and power by increasing the effectiveness of EU law and developing a constituency for EU law and litigants and national courts To advance the objectives of the Treaty of Rome	Consistency with substantive legal doctrine and methodological constraints imposed by legal reasoning Extent of „information asymetry“ between ECJ and member state governments Institutional rules governing EC decision making Public attitudes toward EU integration
Individual litigants a) „one-shotters“ (individuals)	To minimize loss by winning case (thus coercing compliance with EU rules in a given case)	Limited resources and relatively short time horizon
b) „repeat players“ (large corporate actors, public interest pressure and lobbying groups)	To maximize trade gains and individual rights by seeking new (or expanded) EU rules	Inherent difficulties of case, „selection and litigation timing“
National courts	To gain and solidify power of judicial review To improve institutional power and prestige relative to other courts within the same national judicial system To increase power to promote certain substantive policies through the law	Consistency with substantive legal doctrine and methodological constraints imposed by legal reasoning Minimum democratic accountability

Source: Mattli, W. – Slaughter, A. – M. (1998): Revisiting the European Court of Justice. International Organization, No. 1, p. 187.

This kind of interaction between the European judicial authorities **was labeled as judicial dialogs or judicial debates** and represented a very interesting stuff for the application of the theory of multi-level governance or the theory of legal pluralism. The debates can be viewed as multilevel network among several variables in non-hierarchic position (between legal norms, principles, values etc.) or as a network of games and strategies of different actors (judicial bodies, supranational institutions, private actors). It also represented an impulse for the European political science to invent the term **“judicialization of politics”** which has been very well known in the U.S. from the deliberations on the role and impact of the U.S. Supreme Court case-law on American politics. Btw. I consider it a regrettable shame that this issue has been perverted in the Czech Republic by the president Klaus into rather a political debate on the so-called “juristocracy” which has only a negative and slandering connotation.

2.2 Judicial dialogs and the role of constitutional courts

The political science, especially the Czech one has not still fully realized how important role has been played by the judiciary in the course of European integration (one most recent

example is the decision of the German constitutional court of 7th September 2011, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10**,** on the constitutional conformity of the German participation in the financial aid to Greece; if the court would define such help unconstitutional this would probably radically change the strategies of EU and member states towards the Greek economic situation and led to the Greek expulsion from the European monetary union). The afore-mentioned judicial debates create an important part of the integration politics as they formulate the institutional as well as content limits for the integration.

These "dialogs" originate in early 1970s when the German constitutional court delivered its famous decision called **Solange I** in which it criticized the EC for the democratic deficit and the lack of human rights protection (this decision forced the ECJ to invent the system of fundamental rights protection in its case-law and made the EC to promote the direct election into the European parliament in 1979). It continued by strong criticism of democratic deficit and the lack of original EU souvereignty **in the Maastricht Urteil (decision)** of 1993 where the German constitutional court settled clear criteria under which the German membership in the EU would be unconstitutional. However **only recent years brought an unprecedented series of landmark decisions** of the national constitutional courts towards the European integration and these recent judgments address key questions of European constitutionalism. These decisions represent real series of debates on the same themes – I can mention **the sugar quota cases** delivered by the constitutional courts in Hungary, Estonia, Czech Republic in 2004 – 2006, **arrest warrant decisions** (on the question whether the own citizen of one member state can be extradited to other member state in order to be charged and prosecuted) delivered by the Polish, German, Cypriot and the Czech constitutional courts and last but not least there is a set of decisions on the Lisbon treaty. **The Lisbon saga** represents the most important milestone in the previous judicial debates. You are probably familiar with the decision of the German court and the 2 judgments of the Czech constitutional court that obtained the most visible attention by the media. But there were other constitutional courts deciding on the Lisbon treaty: the first decision was issued by the French Conseil Constitutionnel in December 2007, followed by the Austrian constitutional court in September 2008. The Lisbon treaty was under the review even after it became effective in December 2009 by the Hungarian court, Polish constitutional tribunal and the reviewing procedure in Denmark is even still pending….

All the mentioned decisions are undoubtedly interesting both from the constitutional point of view as well as from the perspective of European integration. However the real mutual dialog took place between the German and the Czech constitutional courts as the German one could react to the first decision of the Czech counterpart and our court replied in its the second judgment.

Now, what are the spheres of European integration that remain disputed and discussed in the constitutional courts case-law:

1. First of all it is the very nature of EU itself, i.e. **the deficit of the original sovereignty of EU and its institutions and the lack of democratic legitimation.** This was explicitly highlighted in the German decision on Lisbon treaty where the court stipulated that the EU authority is not the original one, but still derives from the sovereignty of member states. As **there is nothing like the European people** that could legitimate the EU institutions in direct and equal elections the public authority of EU can derive from the "state people" (Staatsvolk). According to the German court **even the European parliament is not a representative body of a sovereign European people as it is not elected in uniform European-wide elections**. This has however serious consequences for the functioning of the EU and the functioning of the multi-level governance:

a) this means that not the EU, but **still and only the member states and their bodies are the only masters of the whole integration**, therefore i**t is not possible that the EU institutions could change the institutional framework (which in fact means the founding treaties) by their own.** That is why the German court requested that the simplified revision of the treaties established in the so-called bridge-clauses or passerele clauses must be accompanied by the fully-pledged consent of the German parliament.
b) this conclusion supports the earlier doctrine also developed by the German CC, but accepted by most of the European courts (including the Czech one), which is the **doctrine of kompetenz-kompetenz**. This means that not the EU institutions but the constitutional courts are the final and definite authority to decide whether the competences of EU institutions were realized in conformity of founding treaties and national constitutions.
c) The German CC went further on in its Lisbon judgment when **it set explicit content limits to the future of European integration**. It identified 5 key areas that represent a red line of material core of nation states constitutions that cannot be overstepped by the integration: these are (1.) **decisions on substantive and formal criminal law** (from this point of view it is not possible that the EU institutions could be authorized to pass whole-European criminal codes), (2.) **disposition and monopoly on the use of force by the police within the state and by the military abroad**, (3.) **fundamental fiscal (budget) decisions on public expenditures, esp. the within the social policy**, (4.) **decisions on living condition within the social (welfare) state that differ around Europe**, and finally (5.) **decisions of particular cultural importance, for example on family law, schooling and education systems and dealing with religion.**

2. Another disputed sphere are still **guarantees of human rights existing on the European level**, even the EU passed a special catalogue – the Charter of EU fundamental rights – that is after Lisbon a part of the European primary law . The constitutional courts over Europe remain reluctant to give the EU institutions definite competence to solely protect human rights – therefore there is a doctrine of Solange II which is closely connected with the doctrine of kompetenz-kompetenz. The CC all over Europe manifested they are prepared to protect their own citizen if they find the European protection as insufficient (btw. It is also the case of the Czech constitutional court). This could however change if the EU would access the European Convention of Human rights and all the EU institutions would be submitted to the European court for HR in Strasbourg which is likely to happen now.

2.3 The European doctrine of the Czech CC

As I mentioned Czech CC became an active and important participant of these Euro-debates even before the Czech Republic joined the EU in 2004. **After 7 years we can speak about the complex European doctrine of the Czech court that is framed not only by the two most famous Lisbon judgments but there are also preceding judgments to Sugar quota (Pl. ÚS 50/04) and European Arrest warrant** (Pl. ÚS 66/04) that shaped the CC attitude towards European integration.

How does the Czech doctrine look like?

1. Compared to the German attitude it is **more Euro-optimistic**. In the Sugar quota decision we stipulated we are prepared to **reflect the standards of HR protection on the EU level and to adapt and adjust the interpretation of their domestic constitutional guarantees if this would represent an obstacle for the membership**

in the EU. On the other hand the CC borrowed from its German counterpart the kompetenz-kopetenz doctrine which means that the **competences realized by the EU institutions are only delegated by the Czech Republic which means their original bearers are still the Czech authorities and the guarantor of constitutional conformity of the competences is still the CC.**

2. As concerns our two Lisbon decisions **we do not share such a strong mistrust of the German constitutional court towards the political processes that take place on the European level.** First of all our court does not agree with the opinion of the German CC dealing with the lack of democratic legitimacy of EU institutions. Our decisions speak about the concept of the **so-called "pooled sovereignty"**: this means that as far as the functioning of the member states as well as the EU is founded on the representative democracy, such political processes on the Union and domestic levels are mutually supplement and are dependent on each other. That is the essence of multilevel-governance that the political processes taking place in the EU cannot be evaluated in isolation, but only in connection with the mutual processes on the national levels. Therefore we do not see the democratic situation in the EU at contemporary stage so deficit and insufficient as our German counterpart.
3. Unlike the German court **the Czech CC has not settled any detailed limits for the future development of European integration as we think these questions are rather of a political nature** and depend on the future decisions of political representatives. On the other hand there is one important criterion determined in the Czech constitution which is **the preservation of democratic state governed by the rule of law.** The principles of such state are unchangeable even by the constitution itself it means they cannot be overruled by our membership in the EU as well.

Conclusions

I wanted to show how the courts and debates between the European courts contributed to the European integration and how it can determine its future direction. The constitutional courts including the Czech one have never refused the integration as such, but as guardians of national constitutions have set certain limits upon it. In this way the debate is definitely not over and it is necessary that politicians as well as political scientist should keep this in mind.

By the way, to conclude with **I expect that in a short period of time the decision-making of the Czech Constitutional court will fulfill the pages and broadcasting time of European media again.** You all remember that before the ratification of the Lisbon treaty it was president Klaus who enforced from the European institutions an exception from the application of the Charter of EU fundamental rights as the same opt-out was negotiated by the U.K. and Poland before. However, this exception does not have a legal power as it must have been proven and ratified by all the member states and therefore it is expected to be acknowledged in the Croatian accession treaty. I noticed president Klaus now tries to persuade the Czech social democrats that have majority in the senate (the upper house of the parliament) and who oppose the exception to vote for as it can become an obstacle to the Croatian membership in the EU. However, nobody noticed that such an exception legally acknowledged after the Charter is already in force in the Czech Republic can be discrepant to the constitutional case-law. This case-law is based on the assumption that the state cannot deteriorate once settled standard of human rights protection – this means when the Czech Republic once agreed with and ratified the Lisbon treaty and the Charter as a part of it could be contrary to our own constitution to withdraw from the Charter…

I cannot tell you if this scenario will really come true, but as I know the case-law of our court it is very likely to happen, although it could lead to another Euro-scandal of the Czech Republic president as it will obstruct the Croatian membership in the EU.

Thank you very much for your kind attention!