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The imperfect dismantlement of the Czechoslovak Pension System as an impulse for rebellion against European Union Law

I. INTRODUCTION

In countless cases, the law of the European Union[2] has been ignored without sanctions by legislatures, administrations and the judiciary of the Member States. This disregard is mostly due to poor knowledge, albeit hidden intent cannot be excluded in some cases.

The most radical criticism is the opposition to total primacy of the law of the European Union.[3] The Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) provides for control if principles and fundamental rights are threatened[4] or if the competence of the European Union is exceeded (*ultra vires*).[5] Superior courts of several other Member States emulate this stance.

The Constitutional Court (*Ústavní soud*) of the Czech Republic is, however, the first superior court which overtly refused to comply with this supranational law, as it was authoritatively interpreted. It refused in *Holubec*[6] to comply with the rules for the coordination of national pension schemes interpreted by the Court of Justice of the European Union (CJEU) in *Landtová*.[7]

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1 I was (1998-2003) an assistant to the vice-chairman of the Constitutional Court and later on (2004-2008) an expert in European law at the Supreme Administrative Court. I was involved in analyses for several decisions. I thank associate professor Kristina Koldinská (Charles University in Prague) for her careful peer review resulting in numerous comments, remarks and interventions in the text.

2 Many measures mentioned here as measures of the European Union were developed within the European Communities absorbed by the European Union in 2009.

3 Judgement 11/70 *Internationale Handelsgesellschaft*.

4 BVerfGE 73, 339 - Solange II, BVerfGE 102, 147 - Bananenmarktordnung of 7 July 2000, BVerfGE 123, 267 - Lissabon of 30 June 2009.

5 Among the newest, the judgement BVerfGE 126, 286 - Ultra-vires-Kontrolle Mangold of 6 July 2010.

6 Judgement of plenary session Pl. ÚS 5/12 of 31 January 2012. Crucial parts are translated in English, see www.concourt.cz/view/pl-05-12.

7 Case C-399/09, M. Landtová v Česká správa sociálního zabezpečení, 22.06.2011, not yet recorded. Questions were submitted on 23 September 2009.

In *Landtová*, the CJEU responded to the Supreme Administrative Court (*Nejvyšší správní soud*), who questioned whether the case law of the Constitutional Court requiring compensation for Czech nationals with lower Slovak pensions is in accordance with EU law.

The Supreme Administrative Court requested the CJEU for clarification of the situation in another preliminary ruling, *viz J.S.*[8]

The rebellion will be analysed by legal theorists, constitutionalists and political scientists even if it remains an isolated event. It will be mentioned as a symptom of chaos in legal spheres if the European Union politically disintegrates due to serious ongoing debt and the currency crisis.

Readers of the European Journal of Social Law will also be interested in the dismantlement of the Czechoslovak pension scheme into Czech and Slovak national schemes, a solution for shortcomings with specific measures and their conformity with the supranational coordination of social security after the integration of both countries in the European Union.

There is little jurisprudence on similar issues in Central and Eastern Europe. Comparative legal analyses require the study of law in countries the languages of which are not widely known. Furthermore, English summaries or information provided by colleagues contacted are insufficient. It is also hard to find all information in the countries themselves, because controversial policies are not disclosed.

II. THE BREAK-UP OF CZECHOSLOVAKIA AND ITS CONSEQUENCES FOR PENSIONS

Czechoslovakia dissolved on 1 January 1993. Elections in June 1992 had revealed two nations speaking mutually intelligible languages, and their politicians could not agree on many issues in a period of democratisation and liberalisation after the collapse of socialism in 1989.

The break-up was peaceful. Representations of both nations negotiated the dissolution. The country was dissolved by a constitutional act adopted by the Federal Assembly.[9]

The Czech Republic and Slovakia have remained close. A customs union and the free movement of workers were established by means of bilateral treaties which were already agreed before the dissolution. There is a voluminous exchange of goods, services and migration. Moreover, language proximity has eased integration until now.

Feelings of proximity are also reflected in approaches of individuals and institutions towards affected Czechoslovak pensioners.

During the period of socialism (1948-1989), the Czechoslovak public pension scheme was nationalised. Pensions were financed with contributions by enterprises and there were no public funds cumulating savings for the coverage of future pensions.

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8 Decision 6 Ads 18/2012 – 82, C-253/12, J.S. v Česká správa sociálního zabezpečení, 09.05.2012.

9 *Ústavní zákon č. 542/1992 Sb., o zániku České a Slovenské federativní Republiky* (the Constitutional Act on the End of the Czech and Slovak Federal Republic), adopted 25 November 1992.

The pension scheme covered the entire population and single rules were applicable.[10] Individual pensions were, nevertheless, administered by the authorities of two constituent republics.[11]

The dismantlement of pensions was agreed in a bilateral treaty already before the dissolution. It was applied preliminarily since the beginning of the successor countries and was quickly ratified.[12] No funds were to be divided; solely obligations towards existing and future pensioners thus needed to be distributed. Existing pensioners were assigned to the country which administered their pension as a constituent republic.[13] Future pensioners were distributed according to their employer's seat on 31 December 1992 and few individual entrepreneurs were assigned according to their private domicile on Czechoslovakia's last day of existence.[14]

Standard coordination was envisaged for the period after the dissolution. People would get partial Czech or Slovak pensions depending on the periods they acquired in the different territories.[15]

III. PERCEIVED INJUSTICE AND ADMINISTRATIVE ALLEVIATIONS

The Czech economy was more productive than the Slovak one. This difference became apparent after the dissolution: Czech pensions were significantly higher than Slovak pensions. Higher economic growth in Slovakia in the last years reduced the difference, but Slovakia restricted spending on social protection. Consequently, most Slovak pensions remain lower.

The '31 December 1992' criterion mentioned above was insufficiently explained, with incomplete information about the attribution of workers to parts of Czechoslovakia. Czechs assigned to the Slovak system due to their employer's seat in Slovakia, albeit they had worked on Czech territory, perceived their attribution to Slovakia as unjust, which resulted in a number of complaints. Another group that was prone to making complaints were persons who were employed in Slovakia for a short time. There was little migration from the Czech territory to Slovakia in the last years Czechoslovakia existed. The unemployment rate increased sharply in Slovakia after the collapse of socialism.

Furthermore, joint financing of pensions and huge transfers between the republics blurred collective merits. Many individuals could not be easily connected with parts of the country. There was Czech solidarity towards Slovaks even after the dissolution, which resulted in the acceptance of the above-mentioned criteria. The Czech Republic

10 *Zákon č. 100/1988 Sb., o sociálním zabezpečení* (the Social Security Act) and its predecessors č. 121/1975 Sb. and 101/1964 Sb.

11 *Zákon 582/1991 Sb., o organizaci a provádění sociálního zabezpečení* (the Act on the Organisation and Realisation of Social Security) replacing *zákon 114/1988 Sb., o působnosti orgánů České socialistické republiky v sociálním zabezpečení* (the Act on the competence of the organs of the Czech Socialist Republic in Social Security).

12 *Smlouva mezi Českou republikou a Slovenskou republikou o sociálním zabezpečení* (the Treaty between the Czech Republic and the Slovak Republic on Social Security), agreed 29 October 1992 and entered into force on 3 May 1993. It was published in the Czech Republic in 228/1993 Sb.

13 Article 33 of the Treaty.

14 Article 20 (1) and (2) of the Treaty.

15 Article 11 of the Treaty.

provides higher Czech pensions to numerous Slovaks employed in the Czech industry for part of their career.

Attention to the peculiarities of pensions during the break-up was limited. As a country break-up is an extraordinary event, it was hard to manage it without making mistakes. And, although it was peaceful, the dissolution was accompanied with significant tensions. In general, the collapse of socialism brought many legal problems of general importance. Democratisation, liberalisation and the introduction of a market economy were great challenges. Moreover, young inexperienced liberals perceived social security as an unimportant topic.

Czechoslovak and Czech laws allowed authorities to grant or increase social benefits if special circumstances existed with the so-called removal of hardship.[16] The Czech-Slovak bilateral treaty expected this. Special agreements shall arrange the compensated transfer of duty to provide pensions based on the application of favourable domestic pension rules.[17]

The policy was tricky. The compensation schemes changed for cohorts of pensioners. Elder pensioners were spared from these changes as their pensions were once awarded.

Slovakia adopted a restrictive approach towards transfers and finally stopped them. It switched from traditional egalitarianism to a merit-based scheme.[18] Top-earning Slovaks now enjoyed higher pensions than Czechs even for periods completed in Czechoslovakia. This prompted fears that similar compensation would be claimed by numerous Slovaks with lower Czech pensions. Czech authorities thus resorted to compensation by calculating the difference.

The importance of such alleviation for individuals gradually decreased in the last two decades, because new cohorts of pensioners were covered by the Czech Republic for an increasing number of periods. Dozens of pensioners were transferred or compensated and everything was perceived as an exception. The attribution was applied without troubles in most cases. Most Czechs and Slovaks never migrated and were thus assigned to one of both countries in accordance with their expectations.

The '31 December 1992' criterion was agreed in 2003 as a specific rule for Czechoslovak periods for the coordination of national pension schemes in the European Union. The Treaty of Accession, according to which the Czech Republic and Slovakia became Member States in 2004, amended Regulation 1408/71 listing applicable provisions of bilateral treaties.[19] This exception has been clarified in recast Regulation 883/2004.[20]

16 § 106 of *Zákon č. 582/1991 Sb., o organizaci a provádění sociálního zabezpečení* (the Act on the Organisation and Realisation of Social Security).

17 Article 26 of the Treaty.

18 Introduced by *Zákon 493/2003 Z.Z., o sociálnom poistení* (the Act on Social Insurance).

19 Annex III, paragraph 44 to the Regulation as amended by the Act on the Conditions of Accession lists Article 20 of the Treaty.

20 Annex II, paragraph Czech Republic – Slovakia to Regulation 883/2004 of the European Parliament and the Council on the coordination of social security as amended by Regulation No 988/2009 added Articles 12 and 33 of the Treaty.

IV. INTERVENTIONS BY THE CONSTITUTIONAL COURT RESISTED

Assistance to certain groups of pensioners caused other Czechs with lower Slovak pensions to request this assistance as well. Refusals by the Czech Administration of Social Security (*Česká správa sociálního zabezpečení*) were confirmed by ordinary courts.

The Constitutional Court finally intervened in favour of these pensioners. In *Hozák*,[21] the Constitutional Court required Czech full early pensions also for Czechoslovak periods, because Slovakia, as the competent country, did not provide such pension.

Two dozen judgements on 'Slovak pensions'[22] followed. The complainants were Czech nationals in various situations ranging from persons who worked on Czech territory before the dissolution, to persons who lived in Slovakia and migrated to the Czech Republic after the dissolution, mostly with their Czech spouses, and who were naturalised.

The Supreme Administrative Court objected this case law vehemently. The most notable judgement, *Weiszová*, was adopted for the first time by the panel of the Constitutional Court[23] and then by its plenum. The disregard of the *res iudicata* principle was criticised in the latter.[24]

The Constitutional Court argued that Czech nationals formerly covered by Czechoslovakia should not be attributed to foreign pension schemes. Their attribution to Slovakia resulting in a lower pension was labelled as arbitrary differentiation and condemned as discrimination. Czech nationality as a condition for the compensation was confirmed in the judgement *V.K.*, rejecting a similar claim of one Slovak national residing in the Czech Republic.[25]

The equality that is expressed in the Charter of Fundamental Rights and Freedoms was invoked.[26] The wording of the Charter that establishes citizens' fundamental right to social security in old age[27] played only an auxiliary role. It was clear that Czechoslovak and Czech pensions were not based on nationality. In addition, this right is to be specified with legislation whose constitutional control is limited.[28]

21 Judgement II. ÚS 405/02 of 03.06.2003, N 80/30 SbNU 245.

22 It is better to label the cases 'Czechoslovak Pensioners', because Slovak pensions are not evaluated in reality.

23 Judgement III. ÚS 252/04 of 25.01.2005.

24 Judgements Pl. ÚS 4/06, N 16/36 SbNU 173 of 20.03.2007, N 54/44 SbNU 665, paragraphs 43 and 50.

25 Judgement I. ÚS 294/06 of 24.06.2008, N 115/49 SbNU 633, paragraph 25.

26 The Czech Republic reaffirmed the Czechoslovak Charter of Fundamental Rights and Freedoms (*Listina základních práv a svobod*) as its second constitutional law besides the Constitution of the Czech Republic (*Ústava České republiky*). For an English translation, see www.concourt.cz/clanek/czech_charter. 'All people are free and equal in their dignity and rights' according its Article 1.

27 Article 30 (1) of the Charter: 'Citizens have the right to adequate material security in old age [...]'.

28 Article 41 of the Charter.

The emphasis on nationality requires attention to issues of citizenship. Czech nationality law[29] unsurprisingly pays much attention to its consequences.[30] The division of Czechoslovaks into Czech and Slovak nationals followed the existing attribution to the constituent republics after the federalisation.[31] A similar approach was adopted by Slovakia.[32]

Many people of Slovak origin lived in the Czech part of Czechoslovakia for decades. They became Slovak nationals by legislation of both countries. The Czech Republic also allowed naturalisation on demand and individuals rejected due to criminal records were naturalised after criticism from human rights activists and from the Council of Europe.

The Constitutional Court joined this benevolence while accepting complaints against refusals and undermined efforts to exclude double nationality.[33] It should underline then that citizenship creates no right for social security. Nobody questioned this approach's consistency with the case law requiring compensations for Czech nationals with lower Slovak pensions.

A constant flow of complaints and various links with the Czech lands and Slovakia before and after the dissolution enabled a differentiated response according to unpublished guidelines of the Ministry of Labour and Social Affairs and the Czech Administration of Social Security.[34]

The Czech Administration of Social Security thus partially complied with this case law. Compensation of people working in the Czech territory of Czechoslovakia with Slovak pensions due to their employer's seat resumed. Nevertheless, other complaints were refused. The Supreme Administrative Court and regional courts acting as inferior administrative courts upheld this.

Resistance against unnecessary spending would not play a significant role under normal conditions. Hundreds would receive assistance if the case law was entirely abided by.

The social security administration and the administrative judiciary hesitated to abide by this case law for perceived incompliance with the principle of equality of citizens of the European Union established with its primary[35] and secondary law.[36]

29 *Zákon č. 40/1993 Sb., o státním občanství České republiky* (Act on State Citizenship of the Czech Republic).

30 P. Kandalec, *Státní občanství při rozpadu státu a vzniku státu nových* (State Citizenship after the Break-up of the State and the Establishment of New States), thesis, Masarykova univerzita, Brno, 2007, available at www.is.muni.cz.

31 Paragraphs 18-19 of the Act on State Citizenship mention *Zákon České národní rady 39/1969 Sb. o nabývání a pozbývání státního občanství české socialistické republiky* (the Act of the Czech National Council on Acquisition and Withdrawal of State Citizenship of the Czech Socialist Republic).

32 *Zákon Národnej Rady Slovenskej Republiky 40/1993 Z.z. o štátnom občianstve Slovenskej republiky* (the Act of the National Council of the Slovak Republic on State Citizenship of the Slovak Republic).

33 Judgement IV. ÚS 34/97.

34 A short guideline of the Ministry of Labour and Social Affairs was concretised with instructions of the Czech Administration of Social Security.

35 Article 18 TFEU and Article 12 TEC respectively before the entry into force of the Lisbon Treaty.

36 Article 4 of Reg (EC) 883/2004 of the European Parliament and of the Council on the coordination of social security systems and Article 3 of Reg (EEC) 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community.

In addition, economic concerns were raised if compensations required by the Constitutional Court must comply with this principle of equality. All Slovak pensioners would then be able to ask for compensation. Costs were estimated in billions.[37]

The resistance against the case law of the Constitutional Court was criticised periodically on television and in newspapers as unfounded formalism affecting disadvantaged pensioners. However, nobody investigated the causes for the resistance of the social security administration and the administrative judiciary. Few analyses of the problem emerged.[38] The Office of the Ombudsman (*Kancelář veřejného ochránce práv*) was the only public authority which supported claims for compensation required by the Constitutional Court.[39]

The request for a preliminary ruling was delayed for years. First, the Supreme Administrative Court feared rejection if petition started before the accession, because the CJEU refused to interpret the law of the European Union for adjudication based on pre-accession national law.[40] Second, concerns were raised that the request would be rejected as hypothetical.[41] Complaints were filed by Czechs demanding privileged compensation required by the Constitutional Court. No complaints were raised by Slovaks against the resulting discrimination, albeit the position of the Constitutional Court was clearly discriminatory.

The Supreme Administrative Court put an end to its hesitating in *Landtová*. With carefully formulated questions, it not only questioned the privileged compensation of Czechs, but also the compensation as a departure from the rules on coordination – which is the '31 December 1992' criterion here.[42]

V. THE RESPONSE IN LANDTOVÁ AND THE REBELLION AGAINST THIS CASE IN HOLUBEC

The CJEU handled the request for a preliminary ruling submitted by the Supreme Administrative Court in standard proceedings in a five-member chamber, although rare tension between the law of the European Union and the case law of the national constitutional court was apparent from the beginning.

The attorney to Ms *Landtová* probably summarised the argumentation of the Constitutional Court. Nevertheless, he obviously did not fine-tune his arguments to the law

37 In the *J.S.* request, the Supreme Administrative Court mentions (paragraph 62) estimates of the Ministry of Labour and Social Affairs expecting 120-160 billion CZK (5-7 billion EUR), which is 4% of the Czech Republic's GDP. It adds that several hundreds of Slovak pensioners in the meantime asked for compensation.

38 B. Michálková, 'Problémy českých správních a soudních orgánů při interpretaci a aplikaci Československé smlouvy o sociálním zabezpečení' (Problems of Czech Administrative and Judicial Organs with Interpretation and Application of the Czech-Slovak Treaty on Social Security), in *Vývojové trendy důchodových reforem v Evropě* (*eds. Štanglová V., Troster P.*) (Pension Reform Trends in Europe) (Praha, Univerzita Karlova v Praze - Právnická fakulta, 2010), 45-53.

39 The opinion to judgement Pl. ÚS 4/06 of 03.04.2008 welcomes this judgement as it puts an end to the muddle. A press release published on 14 July criticised the Czech Administration of Social Security for ignoring this case law.

40 Case C-302/04, Ynos kft v János Varga [2006] ECR I-371.

41 Case C-244/80, Foglia [1981] ECR 3045, paragraph 21.

42 See the negative conditionality of the two questions in paragraph 25 of the judgement.

of the European Union.[43] The representative of the Cabinet did not communicate the arguments of the Constitutional Court. On the contrary, the Czech Republic condemned its case law as contrary to EU law.[44] Slovakia as the second Member State involved claimed that the questions were hypothetical and thus inadmissible.[45] Other Member States of the European Union did not intervene.

The Opinion of the Advocate General[46] was followed in substance by the CJEU and can thus provide an additional official interpretation of various aspects of the case addressed by the court in a simplified manner or omitted completely.

The CJEU refused, in compliance with the Advocate General's alleged inadmissibility, while mentioning the interest of administrative authorities in the ongoing dispute.[47] In addition, the Advocate General showed understanding for the prevention of the instant removal of the discrimination required by the settled CJEU case law, which results here in the compensation for people who are not considered by the Constitutional Court.[48]

The CJEU concluded that compensation of lower Slovak pensions is not incompatible with EU law. Compensating the difference between lower Slovak and hypothetical Czech pensions required by the Constitutional Court does not constitute a second Czech pension and is thus not prevented with measures aimed at the prevention of overlapping of applicable national legislations.[49]

Nevertheless, the CJEU decisively refused the unequal treatment of nationals of Member States identified clearly in case law of the Constitutional Court, and no justification for exceptions was presented.[50] The requirement of residence was condemned as indirect discrimination of nationals of other Member States and as a criterion excluded by the European Union rules for coordination of pensions.[51]

After the *Landtová* judgement, the Ministry of Labour and Social Affairs felt that it was allowed to refuse any compensations based on nationality. The Parliament addressed the problem with the provision later on, excluding any compensation to individuals with Slovak pensions.[52]

The Constitutional Court responded to *Landtová* in *Holubec* seven months later with an unprecedented opposition. It perceived the lack of competence of the CJEU to adjudi-

43 Neither the Opinion of the Advocate General, nor the judgement mention his arguments.

44 See paragraph 34 of the judgement. The Czech Republic perceived the double consideration of periods as incompliance with the principle of social security in a single Member State of the European Union.

45 See paragraph 26 of the judgement. According to experts, the Slovak government tries to avoid similar petitions for compensations raised by Slovaks with lower Czech pensions after the reform of pensions, which significantly increased the consideration of previous earnings.

46 Opinion of AG *Cruz Villarón* delivered on 03.03.2011.

47 See paragraphs 26-30 of the judgement and part VI, paragraphs 28-31 of the Opinion.

48 See paragraphs 60-73 of the Opinion.

49 See paragraphs 31-40 of the judgement.

50 See paragraphs 41-43 of the judgement.

51 See paragraphs 44-47 of the judgement. This requirement was questioned by the Supreme Administrative Court. By the way, the Constitutional Court did not require to apply it. The criterion was applied by the Czech Administration of Social Security partially in compliance with the case law as mentioned above.

52 § 106a of *Zákon č. 155/1995 Sb., o důchodovém pojištění* (the Act on Pension Insurance) as amended by Act č. 428/2011 Sb. In *Holubec*, the Constitutional Court labelled the provision obsolete.

cate measures to alleviate the consequences of the dismantlement of the Czechoslovak pension scheme. It concluded that the CJEU acted *ultra vires*[53] and criticised the CJEU for its unwillingness to consider the opinion submitted.[54]

The judgement that rebels against the CJEU will hardly gain respect, and the resistance by the social administration and administrative courts will surely continue. They can insist on EU law clarified in *Landtová*. However, the Constitutional Court can further abrogate judgements by inferior courts refusing its interpretation. Furthermore, it threatens disobedient judges with disciplinary sanctions.[55]

A summary of *Holubec* already circulated among judges and other personnel of the CJEU and met with criticism.[56] The absence of any official reaction is not surprising. There is no competence and no tradition of making statements on national legislation, practice or judgements apart from in a judgement. By the way, the CJEU will soon have an opportunity to comment in *J.S.*

Some would say the ongoing debt and currency crisis is an explanation for the silence of the European Commission. Nevertheless, other agendas are routinely administered. Another explanation is thus necessary. The European Union is reluctant to criticise the Member States for their courts' actions. The fact is that independent courts form an important instrument for the implementation of European Union law. The Commission is possibly awaiting Czech courts, administration and political institutions to take the next steps.

The *Holubec* judgement attracted little media attention.[57] Several papers emerged in legal journals,[58] but no extensive debate took place. Politicians did not discuss this judgement and the public was totally disinterested. The law of the European Union did not

53 'European law, i.e. Regulation 1408/71 [...] cannot be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1992; and, based on the principles explicitly stated by the Constitutional Court [...] we cannot do otherwise than state, in connection with the effects of ECJ judgment [...] C-399/09 [...], that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was *ultra vires*.' (judgement Pl. ÚS 5/2012 *Holubec* cited above, VII – Review of the case under European law).

54 'In a situation where the ECJ was aware that the Czech Republic, as a party to the proceeding, in whose name the government acted, expressed in its statement a negative position on the legal opinion of the Constitutional Court, which was the subject matter for evaluation, the ECJ' statement that the Constitutional Court was a "third party" in the case at hand cannot be seen otherwise than as abandoning the principle *audiatur et altera pars*.' (*ibid*). It should be noted that neither the opinion of the Advocate General, nor the ECJ's judgement in *Landtová* mention any attempt by the Constitutional Court to submit its opinion.

55 The judgement of the Constitutional Court III.ÚS 939/10 of 03.08.2003 labels the incompliance by the Supreme Administrative Court with its case law as punishable behaviour of the judge, compromising trust in the judiciary.

56 According to my doctoral student H. Bončková, who is temporarily studying at the University of Luxemburg.

57 The only insight commentary was M. Bobek, '...a Ústavní soud skočil. O lumících a konci transformace české justice', *Lidové noviny*, 20.02.2012. The author ardently compares the decision of the Constitutional Court with the alleged behaviour of lemmings.

58 R. Král, 'Otazníky nad posledním nálezem Ústavního soudu ČR týkajícího se tzv. slovenských důchodů' (Question Marks regarding the Last Judgement by the Constitutional Court of the Czech Republic Related to so-called Slovak Pensions), *Jurisprudence*, 4, 2012, 28-33.

become a tidal flood to the dismay of all[59] in the Czech Republic. Judges of superior courts, legal experts of the Parliament and of ministries, and legal scholars reflect the situation. Many of them met at a seminar organised at the Faculty of Law at Charles University in Prague on 30 May 2012.[60]

The first analyses for the European readership were mostly published by Czech authors.[61] Foreign legal scholars then recognised the significance of the issue within a few months. The first comments appeared in blogs,[62] while the first in-depth analyses are currently emerging.[63] Significant academic interest will surely continue.[64]

The last request by the Supreme Administrative Court for clarification of the situation tries to reconcile opposing views. In my eyes, it is a masterpiece of judicial diplomacy. The court does not conceal its opposition towards the case law of the Constitutional Court. Nevertheless, it tries to communicate its argumentation to the CJEU. Injustice perceived by affected nationals is explained. Severe economic consequences of joint compliance with case law of both the Constitutional Court and the CJEU are summarised.

VI. CRITICISM OF THE CZECH AUTHORITIES

The Constitutional Court failed to put forward convincing arguments to justify its rebellion. The CJEU could hardly be blamed for the interpretation of the rules for the coordination of pensions including those incorporated from bilateral treaties.

Closed doors are also a false argument. Inferior courts are not parties in proceedings before superior courts. Courts express their opinions in judgements. A hearing is thus unnecessary and rather unusual. Furthermore, communication is possible with reference to a preliminary ruling.

59 Contrary to the famous quotation of Lord A.T. Denning.

60 Few participants questioned the legitimacy of national constitutional control of actions of the European Union. Participants only disagreed on whether this case was suitable. 'Constitutionalists' claimed that the CJEU should stop applying the coordination of pensions on the dismantlement of the Czechoslovak pension scheme, because it was a purely internal issue. The representation of the Czech Republic was blamed for failing to back the Constitutional Court. The European Union was criticised for 'painting handrails on a sinking Titanic'. 'Europeanists' defended the CJEU, because it simply applied rules of coordination. The Constitutional Court was criticised that its 'aggressive stance hides a serious mistake'.

61 R. Zbíral, 'Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12. A Legal revolution or negligible episode? Court of Justice decision proclaimed ultra vires', (2012) *Common Market Law Review* 49, 1-18.

62 M. Steinbeis, 'Der Krieg der Richter findet doch statt - in Tschechien', 17.05.2012, a comment on the second request for a preliminary ruling; A. Dyevre, 'The Czech Ultra Vires Revolution – Isolated Accident or Omen of Judicial Armageddon?', 29.02.2012; and M. Steinbeis, 'Hat Tschechiens Verfassungsgericht die Ultra-Vires-Bombe gezündet?', 15.02.2012, introducing the explanation of J. Komarek, 'Playing with Matches: the Czech Constitutional Court's Ultra Vires Revolution', 22.02.2012; all available at www.verfassungsblog.de.

63 A. Dyevre, 'Judicial Non-Compliance in a Non-Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?', Social Science Research Network (www.ssrn.com), Working Paper Series, 2012.

64 The case was selected for simulation (moot court) in the prestigious Model European Union Conference for 2013 organised by the Walter-Hallstein-Institut of the Humboldt University in Berlin (www.meuc.eu).

The *Landtová* judgement confirms the interpretation of the administrative courts, who always claimed that a privileged compensation does not comply with the law of the European Union.

Criticism of the request for a preliminary ruling, thereby saying that this is disobedience to a superior court, is false. All courts may refer if they do not know the interpretation of the law of the European Union. The Supreme Administrative Court as the last instance is required to make a request. In fact, the Constitutional Court criticised the Supreme Administrative Court for declining such request in another case.[65]

For decades, the Supreme Administrative Court unwisely refused to recognise the troubles resulting from the dismantlement of the Czechoslovak pension scheme. It also unnecessarily hesitated to make a request for a preliminary ruling and thus delayed the process of clarification.

The Czech Administration of Social Security merely enforces Czech acts, EU law, international treaties, ministerial guidelines and judgements of courts. Therefore, it is spared from criticism.

On the other hand, political authorities may be blamed for the chronic incapability to address the problem. Assistance was granted or rejected according to nebulous guidelines or entirely arbitrarily. The Ministry of Labour and Social Security never prepared, the Cabinet never proposed and the Parliament never adopted legislation to address the issue, defining individuals who deserved a Czech compensation for a lower Slovak pension or determining the take-over of the Slovak duty and setting related procedures.

Such legalisation would make the problem familiar. It could be an impulse for renegotiations with Slovakia. Furthermore, it would surely serve as a warning for the incompliance with European Union law and push for negotiations on exceptions during the process of accession.

Cases of pensioners with lower Slovak pensions asking for Czech compensation became an endless saga due to the influx of new pensioners. The principal causes, however, are a lack of appropriate political attention, a nebulous policy for compensations and ineffective adjudication. Readers from Western Europe would describe it as chaotic. Such a situation is, however, not rare in post-socialist countries. This has several causes.[66]

The Czech Republic has a complicated system of judicial appeals. Proceedings are lengthy. The Constitutional Court, the Supreme Court (civil and criminal cases) and the Supreme Administrative Court decide in panels. Inconsistency is, consequently, not rare. Generations of judges think differently. Formalism is widespread, but revolts against it are not rare and are sometimes frenzy.

The German model of a strong constitutional control was adopted by the Constitutional Court, determining the style of its case law. The Constitutional Court is empowered to abrogate unconstitutional acts and to intervene in judgements and decisions.[67]

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65 According to judgement II.ÚS 1009/08 *Pfizer s.r.o. v. Ministerstvo zdravotnictví* of 08.01.2009, the Supreme Administrative Court should request interpretation of the European Union legislation related to the authorisation of pharmaceuticals if the case law of other states is inconsistent.

66 For a recent international reflection by a prominent Czech legal scholar, see Z. Kühn, *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* (Martinus Nijhoff Publishers/Brill Academic, Leiden/Boston, 2011).

67 Article 83 and 87 (1) (a) of the Constitution of the Czech Republic.

The Court is perceived as an important guardian of the rule of law and of value-based adjudication and became an overtly activist institution.[68]

Nevertheless, a comparison with its German counterpart shows shortcomings. Several times, the Federal Constitutional Court threatened to rebel against the primacy of the law of the European Union, but never realised it. Nevertheless, it influenced adjudication in the European Union by uttering threats. Its judgement *Honeywell*[69] promises the communication of objections by means of a request for a preliminary ruling before evaluating the actions of the European Union itself.

The Constitutional Court should not escalate the conflict menacing inferior judges by threatening disciplinary proceedings. It has no power to initiate such proceedings. By the way, it is the Supreme Administrative Court who is competent for disciplinary proceedings. It is hard to imagine a judge being punished arguing with the compliance with the law of the European Union.

VII. CRITICISM OF EUROPEAN UNION AUTHORITIES

It is unclear whether the CJEU understood all aspects of the controversy. Its argumentation is short. Nevertheless, claims of judicial activism are to be rejected. The judgement is not surprising from a European perspective.

Certainly, we could discuss whether the Court could and should be benevolent and grant an exception from the principle of equality. Certain objections against such a step may be raised. The Czech Republic should be capable to identify its problems and to negotiate adequate solutions in advance. The CJEU – expected to decide in a thirteen-member Grand Chamber – will surely not accept the doctrine of constitutional control of the activities of the European Union developed by the Federal Constitutional Court of Germany and emulated by several other high courts of Member States. Any concession would undermine the position of the law of the European Union. However, it is unclear whether it will use the *J.S.* case to condemn the doctrine. A reluctance to debate this chronic tension while answering to an inferior court of another Member State can be expected.

The Court will probably reject claims that the dismantlement of the Czechoslovak pension scheme was an internal issue, as in the Belgian case on public health care insurance.[70] The existence in two Member States does not allow to label it as purely internal.

The provisions of the founding treaties that conform the respect for national identity[71] are mentioned as a possible argument. The CJEU showed its willingness to establish exceptions from the principle of equality and from accepted obstacles besides exceptions

68 For example, in judgement Pl. ÚS 27/09 of 10.09.2009, it abrogated *ad hoc* constitutional law expecting early elections instead of the application of constitutional provisions for the approval of the Cabinet perceiving it as a grave violation of the core principles of constitutionalism.

69 See judgement 2 BvR 2661/06 of 06.06.2010.

70 Case C-212/06, Government of the French Community and the Walloon Government v Flemish Government [2008] ECR I-1683. This was a response to the decision of the *Cour d'arbitrage (Cour constitutionnelle)* on the dispute between the Walloon and Flemish Regions on the attribution of individuals to their health care systems. The relation was found internal and the application of the principle of equality established in EU law for the coordination of social security was refused.

71 See Article 4 (2) TEU.

established in the founding treaties and in secondary law, if they reasonably addressed serious problems. It should be noted that a judicial exception would not compromise the contemporary migration among the Czech Republic, Slovakia and other Member States.

There are, however, serious obstacles to such an outcome. Campaigning by the Czech Republic is necessary. There are no signs of change in the approach of the Czech authorities. Furthermore, the CJEU would certainly hesitate to allow such an exception after the unprecedented judicial rebellion.

The stalemate shows interplay within the judiciary in the European Union. The hierarchy is compromised by the preliminary ruling. Inferior courts sometimes resort to these proceedings with the intent to pass existing or expected case law of superior national courts. Unsurprisingly, the CJEU underlines the independence of inferior courts in these cases.[72]

VIII. SIMILAR SITUATIONS AND THEIR SOLUTIONS

The international and supranational coordination of pensions is based on several generally recognised principles: aggregation of periods, exportability of benefits and partial pensions, and the equal treatment of immigrants compared to nationals.[73]

Several countries feel a specific commitment towards persons of the same ethnicity living abroad in dire conditions for various reasons. Their eventual return is eased. Specific policies assist with their integration into domestic economic and social life, which includes pensions for periods spent in the country of origin.

Germany experienced an influx of Germans who were expelled (*Vertriebene*) from Central and Eastern European countries after the Second World War. Most ethnic Germans living there returned later on (*Spätaussiedler*). Germany naturalised them in a simplified procedure,[74] whereby *Fremdrenten* was a solution for their old-age social security. Due to certain circumstances partial pensions from their countries of origin were excluded. They obtained pensions based on their professional category at the expense of the German state. The pensions are 'foreign', as they are based on periods acquired abroad without contributions to German schemes.[75] Germany later negotiated an exception from equal treatment in bilateral social treaties agreed with these countries.[76] This exception was confirmed in the European Union, not with the Treaty of Accession, but with an amendment to the related Regulation.[77]

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72 Case C-173/09, Elchinov [2010] ECR I-8889, and Cases C-188/10 and C-189/10, Melki and Abdeli [2010] ECR I-5667.

73 R. Holzmann, J. Koettl & T. Chernetsky, 'Portability Regimes of Pensions and Health Care Benefits for International Migrants: an Analysis of Issues and Good Practices', Social Protection Discussion Paper Series No 0519, World Bank Group, 2005, available at www.worldbank.org; or M. Fuchs, *Europäisches Sozialrecht* (Nomos, Baden-Baden, 2010).

74 *Gesetz über die Angelegenheiten der Vertriebenen und Flüchtlinge*, 19.05.1953 (Bundesgesetzblatt I S. 201).

75 *Fremdrenten (und Auslandsrenten)gesetz*, 1959, §§ 14-31 and *Anlage* (appendix) 1.

76 Czech-German Treaty on Social Security (*Abkommen über Soziale Sicherheit*, *Smlouva o sociálním zabezpečení*) agreed on 27 July 2001, final protocol, paragraph 14.

77 Regulation 1791/2006 amending numerous regulations and directives due the accession of Bulgaria and Romania established the subsequent application of the above-mentioned provision of the Czech-German Treaty.

Ethnic Jews are entitled to immigrate to Israel according to the Law of Return (*ḥok ha-shvūt*).[78] Millions have done this since 1948, making Israel the last genuine immigration country. Jews from Western Europe or from the United States of America retain their pensions, which is usually coordinated with bilateral treaties. Jews from socialist and Islamic countries have no such protection. Local pensions, if they existed, are denied to them. People who are uninsured because of their age at the time of the immigration are given a 'special old-age benefit' by the government instead of pension funds.[79]

For the last ethnic Czechs whose ancestors migrated to imperial Russia after the collapse of socialism, a specific repatriation programme exists. Pensions are paid entirely by the Czech Republic, because according to a Czechoslovak-Soviet treaty[80] a single pension is expected to be paid by the state of residence, also for periods acquired in another country to the treaty. However, this formal reciprocity established with the treaty and retained by successor countries recently became a problem due to immigration from Russia, Ukraine and other post-Soviet countries. The Czech Republic terminated these treaties and negotiates new ones.[81] This outdated model was raised in debates about Czechoslovak pensioners in favour of privileging Czech nationals, because immigrants without previous ties with Czechoslovakia should get Czech pensions.

Certainly, the unification of Germany in 1990 did not include privileged immigration. Nevertheless, the consequences were similar. Eastern Germans were integrated in the German pension system.[82] Earnings in the period of socialism were considered generously. This inclusion is one of the greatest costs of the unification, besides the advantageous conversion rate for the DDR-mark and subsidising public services and infrastructure based on redistribution among provinces.

Yugoslavia collapsed with ethnic conflicts. Thousands were compelled to migrate. The economic and social situation worsened due to the collapse of the single market, military expenditures and hyperinflation. Documents addressing human rights issues written after the Yugoslav wars reveal poor protection and widespread discrimination of various groups of pensioners.[83] The solution, however, was gradually found. The constituent republics of the Socialist Federal Republic of Yugoslavia had their own pension schemes. The federation paid pensions to its own employees (army), coordinated pensions for intrastate migrants and fixed minimum standards.[84] The dismantlement

78 For an English translation, see http://www.knesset.gov.il/laws/special/eng/return.htm.

79 See the overview of Israeli Social Security Schemes compiled by the United States Social Security Administration, available at www.ssa.gov/policy/docs/progdesc/ssptw/2010-2011/asia/israel.html.

80 *Dohoda mezi Československou republikou a Svazem sovětských socialistických republik o sociálním zabezpečení* (Agreement between the Czechoslovak Republic and the Union of Soviet Socialist Republics on Social Security) signed 2 December 1959, Articles 3 (benefits in the country of residence) and 4 (aggregation of periods).

81 Ukraine negotiated a standard treaty in 2001. The treaty with Russia renounced by the Czech Republic is no longer applicable since 2009. Russia seems to be unwilling to negotiate a standard social treaty.

82 *Gesetz zur Herstellung der Rechtseinheit in der gesetzlichen Renten- und Unfallversicherung* of 25.07.1991 amending *Sozialgesetzbuch - Sechstes Buch (VI) - Gesetzliche Rentenversicherung*.

83 Recommendation 1569 (2002) – Situation of refugees and internally displaced persons in the Federal Republic of Yugoslavia, adopted 27.06.2002 by the Parliamentary Assembly of the Council of Europe.

84 UNHCR, 'Pension and Disability Insurance within and between Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia in the Context of the Return of

was adopted in the framework of rules governing the succession in 2001. Countries have to pay pensions to everybody who is entitled to his or her former republican pension. Federal pensioners shall be paid according to their citizenship. The succession countries were invited to clarify the details in bilateral treaties.[85] A brief look into some of these treaties, however, reveals little attention to painful historical issues.[86] It is unclear whether richer countries grant compensations or special social benefits, depending on lower pensions from poorer countries, to their citizens who have returned due to ethnic hatred or for economic and/or social reasons. Slovenia acceded to the European Union in 2004. Croatia will follow in 2013. There is no specific provision on the coordination of social security in the Treaty of accession of Croatia.[87] We will wait whether possible Slovenian-Croatian specialties will be addressed with secondary law.

The break-up of the Soviet Union was not accompanied by large-scale conflicts. The dominant successor is Russia. The immigration of ethnic Russians from other republics to Russia is the most important. Estonia and Latvia have a sizable Russian minority. Many ethnic Russians remain second-class inhabitants. The European Court of Human Rights condemned, in *Andreyeva v Latvia*,[88] the unequal treatment of permanent residents as regards the consideration of periods acquired on the territory of parts of the Soviet Union. Indirect criticism of a restrictive naturalisation and status of non-citizens (*nepilsoni*) can be perceived behind this judgement.[89] Therefore, it should not be interpreted as entirely excluding nationality as a criterion for the right of residence and pensions. This case enables to investigate the ways of integration of ethnically defined compatriots if they returned from other parts of the Soviet Union.[90]

Some pension schemes based on savings allow insured foreigners to opt for a payoff corresponding to their contributions for their relinquishment of a future pension.[91] Nevertheless, such a solution is hard to imagine during country break-ups.

Another solution for groups of migrants is a compensated transfer between national schemes, as it was done between Czechoslovakia and Greece.[92] It would reduce the

Refugees and Displaced Persons', Sarajevo, 2001, available at www.unhcr.ba/images/stories/Publications/pensoutf.pdf, 25 pages, executive summary.

85 Agreement on Succession Issues signed in Vienna on 29 June 2001 applicable for Bosnia and Herzegovina, Croatia, Macedonia, Slovenia and (then) the Federal Republic of Yugoslavia (now Serbia and Montenegro), Annex E - Pension, Articles 1, 2 and 3.

86 The treaties between Croatia and Slovenia (1997) and Croatia and the Federal Republic of Yugoslavia (2001) are available at www.mirovinsko.hr.

87 'Treaty [...] concerning the accession of the Republic of Croatia to the European Union', *Official Journal of the European Union* (2012) L 112.

88 Judgement of the Grand Chamber, Andrejeva v Latvia, (55707/00) of 18.02.2009.

89 *Likums 'Par to bijšas PSRS pilsonu statusu, kuriem nav Latvias vai citas valsts pilsonibas'* (The Act on the Status of Former USSR Citizens who do not have the Citizenship of Latvia or of any Other State) adopted 12.04.1995.

90 See paragraph 35 citing Article 1 of the Latvian *Likums Par valsts pensijām* (State Pensions Act). Citizens, repatriates and their family members receive a pension for periods before 1991, even if the periods were acquired outside Latvia. Those driven to parts of the Soviet Union with cruel living conditions enjoy a multiplied consideration.

91 According to collegiate experience, the World Intellectual Property Organization allowed it to its employees. Several groups of non-resident aliens are, under a number of conditions, entitled to request a refund for their social security contributions under Federal Insurance Contribution Act (payroll tax) in the United States of America.

92 The intergovernmental agreement of 1985 related to pensions of Greek communists and their families who took refuge in socialist Czechoslovakia after the civil war and returned to their

burden imposed on individuals who otherwise depend on partial pensions or their exclusion if foreign periods are not recognised.

Break-ups and unifications of countries, and the repatriation of people have an impact on national pension schemes and specific measures are necessary. Nationals are explicitly privileged in some cases, but at the same time implicit privileging can be identified in most other cases. Nevertheless, an increasing awareness of equality in international[93] and supranational laws creates limits for such measures. These measures need to be covered with timely negotiated exceptions.

IX. CLOSING REMARKS ON THE ROLE OF THE EUROPEAN UNION

The European Union has coordinated social security since its beginnings. Specific situations within an increasing number of Member States, however, require exceptions. These situations have not always been timely identified and appropriately addressed on both a European and national level. The endless saga of Czechoslovak pensioners is an example.

Problems arise related to exceptions established by bilateral treaties and later incorporated by the European Union. The international law nature of these rules is confirmed.[94] Nevertheless, it is unclear whether these rules can be amended by the Member States as contracting parties.[95]

The Member States continue to coordinate their social security with third countries by means of bilateral treaties. The European Union gradually acquired competences in external relations and tries to Europeanise existing treaties. This gives rise to complicated problems. We may question whether the European Union is competent,[96] as it

homeland. Czechoslovakia paid a lump sum; Greece responded with a pension increment. Nevertheless, it covered only part of the Czechoslovak periods. The Czech Republic thus provides reduced partial pensions to these Greeks in accordance with EU law.

93 The International Covenant on Economic, Social and Cultural Rights (1966) requires social security including pensions in Article 9 and condemns discrimination, among others, based on national origin or other status in Article 2. The Convention concerning the Establishment of an International System for the Maintenance of Rights in Social Security, adopted in 1982, has, however, attracted a limited number of contracting parties and can thus not be labelled as a global standard setting the principle of non-discrimination in coordination of pension for migrant workers.

94 See Article 8 of Reg 883/2004. Provisions addressing specific historic situations are allowed indefinitely. The Ministry of Labour and Social Affairs claims that bilateral treaties exist, but that regulations of the European Union are applied preferentially. Treaties are applicable to that extent except as annexes to regulations. Similarly: M. Fuchs (ed), *Europäisches Sozialrecht* (Nomos, Baden-Baden, 2010), 146-151.

95 Let us imagine two model solutions. First, the Czech Republic and Slovakia agree on the repudiation of the '31 December 1992' criterion. Standard rules would thus apply retrospectively. Injustices mitigated with take-overs and compensations would disappear, including most of these addressed by the Constitutional Court. Second, they agree on an exception from the principle of equality. Compliance with the case law requiring Czech pensions for nationals will thus not open doors for the compensation of all Slovak pensioners. Would the first or even the second solution comply with EU law?

96 Article 48 TFEU expects coordination of social security in the framework of interstate free movement of workers. Article 207 defines a common trade policy without mentioning migration, which is not liberalised with the law of the World Trade Organization.

has limited power to regulate immigration from the third countries.[97] Europeanisation would also require the acceptance of a particular third country. If these preconditions were met, specific cases addressing historic events and related migrations would equire provisions related to particular Member States. There are no current efforts to replace bilateral social treaties with a single treaty concluded by the European Union. The first studies are reluctant.[98]

A judicial mismatch caused by the craze of the Constitutional Court to assist few Czech pensioners reveals the limits of legal integration in the European Union. The *J.S.* judgement will thus be surely awaited with increased interest by scholars of law of the European Union. How will the CJEU respond to an unprecedented judicial rebellion in a marginal issue which, however, coincides with the most serious crisis of the European Union, caused partially by the chronic incompliance with the limits of the European Union on public debt?

97 See the wording of Article 79 of the Treaty. European measures for integration of immigrants from the third countries can be adopted. Nevertheless, the Member States are free to set a number of immigrants from these countries.

98 See B. Spiegel, 'Analysis of Member States' Bilateral Agreements on Social Security with Third Countries', the European Commission, 2010, 68.