THE CONSTITUTIONAL COURTS IN THE NEW MEMBER STATES AND THE UNIFORM APPLICATION OF EUROPEAN LAW

by

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A. Introduction

The enlargement of the EU 2004 is expected to accelerate within next few years the increasing volume of preliminary rulings, overloading the working capacity of the Court of Justice and lengthening the proceedings under Art. 234 EC and Art. 35 EU. What reasons justify this expectation? By which means they may be relieved? How the top judicial authorities in the new Member States can cultivate the emerging *reference culture* of the courts? The situation differs in the individual states.

B. Challenging the judicial routine

The common feature was an outlasting inclination of the practice of law application to overestimate the role of the legislative branch of power and to underestimate the role of the judicial branch. Such a „legislative optimism" and „statutory positivism"[1] implied the ideology of the narrow application of law, limited only to the binding force of the form of a legal act, and rejected the broader concept of law, open also to another arguments like the normative force of an act resulting from its convincingness or acceptability. The advancing constitutionalization of private (contract) law by the horizontal effects of fundamental rights („Drittwirkung") has been perceived – untill recently - as an inadmissible judicial activism.

This self-restrained approach of the general practice led before the accession to the EU to an understanding of the legal approximation as a mere exercise of the national law-maker (approximation of the normative texts), not as a task of the courts of law, too. A misgiving as to the judicial discourse („dialog") with „extramural"

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1 The denomination used by the Constitutional Judge *P. Hollander*, Ústavněprávní argumentace. Ohlédnutí po deseti letech Ústavního soudu (Constitutional law reasoning. Looking back after ten years of the Constitutional Court), Praha 2003.

authorities, producing some „cross fertilization“[2] in the reception of international (since 1 May 2004 also Community/Union) law by inland courts, is to be attributed - rather than to an intentional aversion – to a path dependence: the lack of experience with the extraneous case-law and the comparative method of interpretation. The general courts had not felt themselves competent to assist in the renovation of the local legal order. It can impair the enforcement of European law in the new Member States for some time to come.

C. Open-mindedness (nearly enthusiasm)

The position of their constitutional or supreme courts is somewhat different. At the beginning of the social transformation in early 1990´ they helped to form the newly established democratic states based on the rule of law and fundamental rights, gained the reputation in public as guarantors of the inicial social consensus and arbitrators in the principal value controversies, and obtained the broad scope of competences in judicial review.

The Polish Supreme Administrative Court exploited this position in a statement that the obligation under the Association Agreement was violated not only by an unproper legislative implementation at the national level, but also by a judicial interpretation of the respective national legislative act, disregarding the *acquis communautaire* as a subsidiary source of law.[3] The argument of “full compatibility” was used – even if not as a bearing one (*racio decidendi*) - also by the Polish Constitutional Tribunal.[4]

The similar “euro-friendly” approach demonstrated also the Czech Constitutional Court as early as in 1997 in the case *Skoda Auto* on the abuse of dominant position. The Court refused the argument of the complainant, that the penalty imposed in a consideration of the Community competition rules had been unconstitutional.[5] The main field of such a demonstration was the abstract constitutional review of norma-

2 *A.-M.Slaughter/A.Stone Sweet/J.H.H.Weiler(eds.)*, The European Court and National Courts-Doctrine and Jurisprudence. Legal Change in Its Social Context, Oxford 2000, p. xii.

3 Case *Senagpo* from 13 March 2000, Polish Yearbook of International Law vol. 24, p. 219.

4 Cases K 15/97 from 29 September 1997 (East European Case Reporter of Constitutional Law vol. 5, p. 284) and K 27/99 from 28 March 2000 on gender equality in civil service; case K 12/00 from 24 October 2000 on emergency service of doctors; case K 33/03 from 21 April 2004 on bio-components in fuels; K 15/04 from 31 May 2004 on participation of Union citizens in the European Parliament election; K 34/03 from 21 September 2004 on cash registers in cabs; K 24/04 from 12 January 2005 on equal position of both chambers in parliamentary scrutiny of EU draft acts; P 10/04 from 26 January 2005 on enforcement of bank instruments (www.trybunal.gov.pl/eng/summaries).

5 Case III. US 31/97 (Sbirka rozhodnuti Ustavniho soudu CR=Collection of Decisions of the Constitutional Court of the CR vol. 8, p. 149).

tive acts. In the *Milk Quota* case (2001)[6] the Court – irrespective of its reserved position to the regulatory drive of the CAP – refused the argument that Community law is not the relevant legal standard in a Non-Member State: "Primary law of the EU is not foreign to the Constitutional Court; it radiates, mainly through the general principles of European law, to a large extent into the Court´s adjudication", thanks to the common European legal culture.

On the other hand, the Czech Supreme Court in 2000 was not ready to interpret the provision of the Civil Code on consumer contracts concluded outside the bussines premises with regard to its Community model,[7] following the arguments of the Slovak Supreme Court (1999).[8] Both Courts fulfil the mission to unify the law application by the general courts.

D. Realism (and cautiousness)

In front of this background, the constitutional courts in the new Member States have been building and refining – within eighteen months since the accession to the EU – their European law doctrine.

The Polish Constitutional Tribunal tried to balance the openness of the constitutional order to obligations of the membership with other constitutional principles.[9] For the first time it was confronted with the constitutional review of the implementation legislation to the act of secondary European law in the case of the Framework Decision on the European Arrest Warrant.[10] The Tribunal found the constitutional protection of Polish citizens against the extradition as an obstacle to the surrender procedure, without referring a question to the ECJ. This controversy necessitated a constitutional amendment, after the Tribunal had resigned on the option to settle the case by a dynamic interpretation. Nevertheless, the Tribunal – in a "euro-friendly" way - postponed the effects of its judgment for the maximum period of 18 months and justified the temporary admissibility of non-conformity of the implementation legislation (incl. the running practice of surrender) with the Constitution by its own requirement to respect the Treaty obligations.

6 Case Pl. US 5/01(Sbirka rozhodnuti Ustavniho soudu CR=Collection of Decisions of the Constitutional Court of the CR vol. 24, p. 79).

7 Case 25 Cdo 314/99 (www.nsoud.cz).

8 Zbierka stanovisk Najvyssieho sudu a rozhodnuti sudov SR (=Collection of Opinions of the Supreme Court and of Decisions of the Courts of the SR) vol. 4/2000, no. 76, p. 55.

9 *B.Banaszkiewicz*, Ústavní judikatura nového členského státu EU vůči výzvám evropské integrace (=Constitutional Case–Law of a new Member State of the EU as Challenged by the European Integration), Jurisprudence (Prague) no. 7/2005, p. 4.

10 Case P 1/05 from 27 April 2005.

In another case on the constitutional review of the Treaty on Accession,[11] few days later, the Polish Constitutional Tribunal pronounced the supremacy of the Polish Constitution over the application of any legal provision within the sovereign territory of Poland, not affected by the priority of application of international treaties over the statutory law. It defined its position as an *ultima ratio* in the review of limits of the exercise of competence conferred on the EC/EU by the Treaty on Accession and not admitted a transfer of competence authorizing the EC/EU institutions to adopt legal acts as well as decisions out of keeping with the Constitution. The Tribunal stated that the "pro-integration" interpretation of national law, practiced since recently, is limited by the prohibition to interpret national law *contra constitutionem*. The opinions concerning the competence of the Tribunal to review acts of secondary European law, adopted already with the participation of Polish representatives, remained divided.[12] The Tribunal also stated that references by the Polish courts incl. the Tribunal itself to the ECJ would be made in execution of their judicial power entrusted to them under the Constitution; the ECJ should adjudicate with respect to the principle of subsidiarity and *mutual* loyalty.

The Constitutional Court of Slovakia in the case on the Anti-discrimination Act[13] refused to refer a question to the ECJ, as its power of review is limited by the criteria of constitutionality (not primarily of compatibility with Community law) and should be used only when there is a space in the Community act left for consideration by the national legislator. Otherwise the Court should be aware of the risk to clash with the jurisdiction of the ECJ.[14]

There has been no "real European" case decided by the Czech Constitutional Court yet, the proceeding on constitutional review of the implementation legislation to the Framework Decision on the European Arrest Warrant is pending since November 2004 there. The Constitutional Court seems to be self-restrained to prejudge its position *vis-à-vis* the EU law only on the basis of a single case. On the other hand, it seems to be aware of desirability to put into place a predictable attitude, taking due notice of the ECJ-competence, as well as the presumption, that there exist in principle the harmony between the primary EU law and the Czech Constitution: any potential conflict between them, especially any clash with the essential requirements for a democratic state governed by the rule of law[15] and forming the core of

11 Case K 18/04 from 11 May 2005.

12 *B.Banaszkiewicz*, op. cit. in note 9, p. 11.

13 Case Pl US 8/04 from 12 May 2005.

14 *J.Mazak*, Prispevok Ustavneho sudu Slovenskej republiky pri uplatnovani prav a plneni povinnosti na komunitarnej urovni (=The Contribution of the Constitutional Court of the Slovak Republic to Enforcement of Community Rights and Duties), Jurisprudence (Prague) no. 6/2005.

15 Art. 9 para. 2 Const. (Act no. 1/1993 Coll.).

the national identity, was ascertainable by the Constitutional Court and removable before the ratification of the Treaty on Accession.[16]

Since the Constitutional Court was not given a chance to *examine the compliance* of the Treaty on Accession with the Czech Constitution before its ratification (*ex ante*), it is not possible to question the consequences of this Treaty for and within the Czech legal order on any later occassion after its ratification (*ex post*).[17] Therefore, not only the secondary EU legislation cannot be examined by the Constitutional Court, but also the national measures to its implementation are exempted from the constitutional review to the extent that they simply took over provisions of the Community directive. The national general court must rely on the competence of the ECJ to review the respective directive under the principles of rule of law and fundamental rights, common to the whole community of the EU and its Member States, and refer – as a case may be - the preliminary question under Article 234 EC or Article 35 EU to the ECJ.

The Constitutional Court could interfere only when the secondary EU legislation gives a certain *substantive autonomy* in implementation to the national lawmaker. The implementation measure taken within the limits of such a national discretion may be reviewed also in respect of the constitutional provision (as a part of the essential requirements for a democratic state governed by the rule of law and protection of human rights) which has no equivalent at the EU constitutional level and – therefore – is forming the *national identity* of the Member State,[18] respected by the Union.[19]

The "European provision" of the Czech Constitution,[20] inspired largely by the Polish one, did not introduce the clause about precedence of the Community acts over the domestic *statutes*.[21] Such a clause, presuming the general predominance of

16 The constitutional conformity of an international treaty may be examined under Art. 87 para. 2 Const., excluding its ratification untill the conflict would have been removed.

17 *J.Malenovsky*, Mezinárodní smlouvy podle čl. 10a Ústavy ČR (=International Treaties under the Art. 10a Czech Constitution), Pravnik (Prague) no. 9/2003, p. 853 ; see also: *J.Zemanek*, Czech Republic (national report), in: The Impact of EU Accession on the Legal Orders of New Member States and (Pre-)Candidate Countries. Hopes and Fears (ed. by A.E.Kellermann, J.Czuczai, S.Blockmans, A.Albi, W.Th.Douma), T.M.C.Asser Institute, The Hague 2004, pp. 313-330.

18 Art. 6 para. 3 EU.

19 See also the decision of the French Conseil constitutionnel from 10 June 2004, pt. 7 : «qu´ainsi, la transposition en droit interne d´une directive communautaire résulte d´une exigence constitutionnelle a laquelle il ne pourrait etre fait obstacle qu´en raison d´une disposition expresse contraire de la Constitution; qu´en l´absence d´une telle disposition, il a´appartient qu´au juge communautaire, saisi le cas échéant a titre préjudiciel, de controler le respect … »

20 Art. 10a, 10b Const.

21 Art. 91 para. 3 Polish Const., also Art. 7 para. 2 Slovak Const.

the national Constitution, could lead to narrowing of the scope of application of the principle of supremacy of the Community law[22] and cause references to the ECJ.

E. Looking for the balance

What conclusions may be drawn from the current state of acquirement of the European law doctrine by the top courts of the new Member States for their performance in the agenda of preliminary ruling? What can they learn from the experience collected by their partners in the "old" Member States? Should they follow the practice of the *Austrian* Verfassungsgerichtshof, which referred the first question in 1999, i.e. four years after the accession,[23] but later did not hesitate to repeat it, the *Belgian* Cour d´Arbitrage and the *Portuguese* Tribunal Constitutional, which declared their very open position to the preliminary ruling procedure? Or should they rather follow the *Italian* Corte Constitutionale (after 1995), the *Spanish* Tribunal Constitutional or the *French* Conseil d´Etat (untill 1989), which do not promote the idea, that the observance of EU law should be also a matter of the national Constitutional Courts? What can they learn from the famous judgements *Solange I - Solange II – Maastricht – Bananenmartordnung - Alcan* of the *German* Bundesverfassungsgericht, which abstains in practice from referring to the ECJ?[24]

Besides the differences in the above mentioned practical approaches and doctrinal positions, the decisive factor, affecting the reference-behavior of the top judicial authorities in the new Member States, is their relationship to the general judiciary. In Poland and Hungary a direct concern is missing: the constitutional complaints in individual matters against the previous decisions of judicial or administrative authorities, breaching fundamental human rights, can be aimed only at the review of the law as a normative basis for an individual decision, not at the review of the decision in question by itself. The constitutional courts in both countries perform neither quasi-appellation nor –cassation functions and leave the full space for findings on the validity and interpretation of the applicable EU law to the general courts, in-

22 *B.Banaszkiewicz* , op. cit. in note 9, p. 9.

23 Case C-143/99 *Adria-Wien Pipeline GmbH*, [2002] ECR I-8365.

24 The *Hungarian* Constitutional Court, which rejected earlier the effects of implementation rules to the Association Agreement (by the Decision of the Association Council) in the domestic legal order (the judgement 30/1998 of 25 June 1998), followed the cases of the BVerfG, but the reaction of the hungarian doctrine was rather perplexed : *B.Berke*, Implementation of the Association Agreement, Approximation of Laws, Eventual Accession-Some Constitutional Implications, in : On the State of the EU Integration Process-Enlargement and Institutional Reforms, F. Madl (ed.), Budapet 1997, p. 328 ; *J.Volkai*, The Application of the Europe Agreement and European Law in Hungary : The Judgment of an Activist Constitutional Court on Activist Notions, Harvard Jean Monnet Working Paper 8/99; *I.Vörös*, The Legal Doctrine and Legal Policy Aspects of the EU-Accession, AJH 2003 vol. 44, p. 141.

cluding the inquires to the ECJ.[25] Both courts invoke European law as a legal standard, appearing in cases of the *general (abstract) constitutional review* of legal acts with the normative force, and could – apparently quite rarely - refer their questions for preliminary ruling to the ECJ.

The constitutional courts of Slovenia, Slovakia and the Czech Republic exercise – except of general review of statutes - the direct jurisdiction on *constitutional complaints*.[26] They are aware of their responsibilities to deal with European law immediately and of the need to identify actively their position towards the preliminary ruling, not merely resist encroachments of European law and defend national sovereignty.[27] They must do it in the more clear way, the minor is the attention paid to the cooperation with the ECJ by the general courts.[28] On the other hand, there has been an obvious tendency in the Slovak judicial system, to concentrate all the most important decisions in the hands of the Constitutional Court. Also the Czech Constitutional Court emphasized the need to keep the existing (i.e. concentrated at the Court) "procedural level of protection" of fundamental rights guaranteed by international conventions on human rights, after their predominant position within the national legal system has been aligned under the "European provision"[29] with other international treaties, having priority over the local statutes. Whether this paradigm could discourage the general courts in the exercise of their mandate as the "European" judicial authorities, might be proven soon.

If a decision of the general court disregarded the correct application of Community law, the Constitutional Court (under the respective procedure on the constitutional complaint[30]) may state the infringement of the constitutional right of judicial protection and of the principle of fair trial,[31] annul the decision or provide the general court with guidance concerning the correct application, without prejudice – as the case may be - to its own reference to the ECJ. The Constitutional Court should pay attention not only to the direct and priority application of Community law, but could also contribute to its uniform application. It could become also a matter of economy of the reopened judicial procedure, whether validity or interpretation of the respective provision of Community law might be cleared at the ECJ by the immedi-

25 *B.Banaszkiewicz,* op. cit. in note 9, p. 4.

26 Next to "Verfassungsbeschwerde", Art. 93 para.1 pt. 4a GG.

27 *Z.Kühn*, Making a European Transnational Constitution : Some Central European Perspectives, in : I.Pernice/J.Zemanek (eds.), A Constitution for Europe : The IGC, the Ratification Process and Beyond, Nomos 2005, p. 138.

28 *Z.Kühn*, Aplikace práva soudcem v éře středoevropského komunismu a transformace. Analýza úpříčin postkomunistické právní krize (=Judicial Application of Law in the Era of Central European Communism and Transformation. Analysis of the Reasons of Post-communist Legal Crisis), C.H.Beck Praha 2005, p. 163.

29 Art. 10 Const.

30 Art. 87 para. 1 d/ Const.

31 Chapter Five of the Czech Constitutional Charter of Fundamental Rights and Basic Freedoms (Act no. 2/1993 Coll.).

ate reference of the Constitutional Court or – later - by the general court. The failure of the general court of last instance to refer would deprive the person of his/her lawful judge.[32]

F. Engagements to refer: who shall meet them?

Any direct interference of the Constitutional Court into decision-making of judicial authorities when applying the Community law should respect the criterion of *adequacy*, as it should not deprive them of their primary responsibility by themselves. Three situations of such an interference may occur: the reference will not be feasible or the Constitutional Court should do so or it will have a discretion in this respect.

The reference to the ECJ on interpretation of the draft revision Treaty on EC/EU, serving *ex ante* review of its compliance with the Constitution, will not take place, as the ECJ can interpret under Art. 234 a/ EC only the applicable Treaty provisions, i.e. the provisions already in force. It would be not this case.

The clearance of direct effect or priority of the Community law over the national law by the reference to the ECJ is a matter of *general courts*, even if the result should entail non-application of the national constitutional provision.

The deficient measure on implementation of the Community act does not entail an automatic infringement of the national Constitution and *vice versa*: the full compatibility does not make the measure compliant in constitutional terms yet. Only the qualified deficiency of implementation can have the constitutional impact.[33] The preliminary question on the interpretation of the Community act for the purpose of *constitutional review* may concern, first, the scope of substantive consideration given by this act to the national implementation measure and, second, the validity of the Community act which is in conflict with the national Constitution. To the extent of a mere implementation without any scope of an autonomous discretion at national level, the Constitutional Court should have to resign on its review, presuming its constitutional compliance from the examination of the Community act made by the ECJ. No double check of conforminty will be required, what takes away the issue of preliminary question. Although the constitutional review of norms is not a true contradictory procedure, it meets the (moderated) requirements of adjudicative function of the national court as the precondition of Art. 234 EC.[34]

When ruling on a constitutional complaint against a final decision of a public authority infringing constitutionally guaranteed fundamental rights and basic freedoms, the Constitutional Court can make – concerning the provision of European

32 *J.Mazak*, op. cit. v pozn. 14.
33 This concept was developed by the Constitutional Courts in Spain and Austria.
34 Case C-54/96 *Dorsch Consult*, [1997] ECR I-4961, pt. 31.

law at issue - an option: to require the general court to respect in its new decision the doctrines *acte claire/éclairé*[35] and take into consideration the ECJ case law on the subject, to require it to refer the question to the ECJ or to express in the judgement its own binding opinion, based on the doctrines mentioned. The Constitutional Court will be obliged to refer when – rather exceptionally, as a court against whose decisions there is no judicial remedy under national law – it does not need to annul the decision of the public authority, but wants to make it more convincing. So far the role of the constitutional court in referring to the ECJ should be *strictly subsidiary.* The constitutional complaint should serve rather as a means of sanctioning the cases of non-reference by the general courts of last instance, in extension of the fundamental rights of legal protection and fair trial.

Taking into account the self-restrained approach of general courts in the new Member States to law application, no boom of references – within next several years after the accession – may be expected. The Constitutional Courts there could play – at least in some new Member States - rather a more active role in this respect, expressing their view on the interpretation of EU law and providing the ECJ with a first hand information on the capacity of the judiciary in those states to cope with the European culture of judicial reasoning. It could inspire the ECJ case law to come.[36]

35 Case ECJ 283/81 *C.I.L.F.I.T.*, [1982] ECR 3415.

36 See also : *J.Kokott*, Report on Germany, in : op. cit. in note 2.