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# IMPLEMENTATION OF THE EU LAW IN THE CZECH REPUBLIC: A COMPARATIVE PERSPECTIVE

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## Abstract

*This article deals with selected constitutional law aspects of the European integration. First, the variants of relation between *acquis communautaire* and the national legal orders of several Western and Central European countries are analyzed. The author takes notice that there is no need for a special form of integration; however, he argues that such a solution would be more suitable. The sense of the integration legal provision is in the confirmation by the member states that they create the power of the unified communities. The legislative acts of this power intervene in the national legal orders of the member states, and are superior to the national law. This article also deals with the European integration models: the functional, the substantive and the procedural. The article concludes that it is possible to expect, in the case of the Czech Republic, an inclination towards the functional model.*

The process of European integration represents an interdisciplinary issue, because the phenomenon of the European Union itself can be observed from various points of view: economic; social; national security; political; political science; and, constitutional. The European Union does not only represent a way of ensuring and providing the free movement of persons, services, and capital among the particular contractual parties at the moment; at the same time, the European Constitution, the federalization of the European Union, etc. are also being discussed (e.g. the Charter of Fundamental Rights was recently passed). Therefore, it is important to analyze the possible interactions between the European law and the national laws. While the international law system has been hitherto based on the principle of the sovereign equality of the individual states, as a

supranational community, the European Union represents a brand new quality, in which this principle is substantially modified in deference to the European Union. It is also necessary, from a legal point of view, to differentiate between the European Communities and the European Union; they are interconnected, but they are legally separate institutions. The European Communities are the international legal personality; the European Union is the denotation only for the co-operation of the member states in the fields of common foreign and security policy, and in the spheres of judicial and domestic affairs, i.e. it does not have the position of an international legal personality.

It is possible to generally assert that the relationship between the EC law and the national laws is based on the principle of EC law primacy over any other source of national legal orders, including constitutional law; this primacy is derived from the certain judicial review of the Court of Justice. The method of regulating integration into the European Communities, and the relationship between international and national laws depend on the sovereign decisions of any state in accordance with its constitutional system. This article deals with one aspect of the agenda of the Czech Republic's integration into the EU: the constitutional aspect. Thus, it focuses on the possibilities of integration delegation in the constitutional order of the Czech Republic *de constitutione ferenda*. First, it outlines a comparison of the methods of constitutional integration in some other candidate countries.

Initially, it is necessary to highlight that the execution of the sovereign powers of the state is a matter of the given state's competence, and only its constitution is capable of the explicit assumption of such execution of power; even without the regulation of such explicit delegation, it is obvious that the state is authorized to such execution (1) and is able to act without explicit constitutional delegation, i.e. directly in the international treaty (for example, Great Britain and Finland did so) (2). However, the prevailing opinion of the expert community stipulates that explicit integration delegation is the more appropriate method for "constitutional solution" of EU accession; this opinion is based on the principle of legal certainty, because with explicit integration delegation, some procedural requirements for this transposition and its limits can be set out. The meaning of the integration rule is rooted in the fact that through this regulation, the individual states acknowledge that the member states

create the unified communities' power, the legal acts of which directly affect the national legal orders of the member states and are superior to the national law.

As stated, this article deals only with the national legal aspects of the integration into the EU, although the accession from the point of view of international law will be a more important and difficult matter. In accordance with Article O of the EU Treaty, the accession has to be achieved through international agreement concerning the accession; such agreement will be signed and ratified by all the EU member states.

### **1. The Comparison of the Integration Delegations In Some Candidate Countries**

In their integration, the EU countries (with the natural exception of Great Britain) delegate provisions for the "transfer of sovereign powers" or to the "transfer of jurisdiction or competence" (R. Arnold, 1998: 2). The meaning of such constitutional delegation is to enable the creation of supranational organizations through the transposition of the original national competencies, and to enable the organizations to be entitled to their own power, derived from the transferred national sovereignty. The legal acts of the supranational institutions become a directly applicable part of the national legal sphere of the member states, although international law is the source of the acts. The form and the content of the integration delegation are substantial, because –as will be shown later– they are able to determine the future interpretation of the relationship between the national legal order and the EC law.

Certain differences between particular countries can be observed, e.g. in the fact that some countries delegate only the competence to the enforcement (Spain, Belgium); or that they temporarily limit the transposition (Luxembourg); or that they delegate only some of the sovereign rights (Austria, Belgium). Some constitutions explicitly prescribe certain functions that are typical of the European law, and stipulate that the constitution themselves adopt the attributes of the European law. For example, Article 8 par. 3 of the Constitution of Portugal allows the formation of international organizations, the legal acts of which have direct legal effects on the Portuguese legal order. The Irish constitution explicitly asserts the priority of the EC law, even over the Irish constitutional law.

According to R. Arnold (1999: 2), we can divide the particular types of integration provisions into three groups:

I. The constitutions passed immediately after the end of World War II, but before the founding of the European communities, explicitly react to the war and declare the values of peace and international co-operation; they therefore delegate limitations of sovereignty (Italy, Germany). For instance, according to Article 11 of the Italian constitution, Italy rejects war as an instrument of endangering the freedom of other nations and as an instrument of solving international disputes, "in the presupposition of the equality with other states, it agrees with the limitation of sovereignty necessary to create the order which would ensure peace and justice between nations, it enforces and supports the international organizations with such goals." Although the original meaning of the integration provisions was obviously different, they were reinterpreted after the EC was founded in order to apply them to the creation of and membership in supranational organizations, i.e. in entirely different institutions than were originally intended. This reinterpretation was introduced mainly by the constitutional courts, and in some cases by the general courts, and also by the Court of Justice.

II. The second type is represented by constitutions dating back to the 19<sup>th</sup> century (Belgium, the Netherlands); these constitutions have been gradually adapted to new circumstances. The integration rules were incorporated into the constitutions parallel with, or even after, the foundation of the European communities, and their content was adapted to the character and legal conception of the communities.

III. The third group consists of the "new" constitutions, which have functionally and intentionally contained the integration provisions since their formulation, because such countries (Portugal, Greece, and Spain) were focused on becoming the members of the communities at the time their constitutions were being formulated. The states currently aspiring to EC membership can be included in this group.

As to the contents of the provisions, it is possible to separate the rules that delegate "the transposition of the sovereign rights or competencies" (e.g. Spain) from the rules that delegate "sovereign

limitation,” which can be understood by the judicial review as a transmission of sovereign rights (Italy), as well as from those that delegate only the transposition of the realization of the rights (France). The latter rules differ from others that contain additional limiting conditions for the transposition of the sovereign rights; for example, they allow the transposition only of certain competencies belonging to the state authorities (Denmark), competencies derived from the constitution (Spain), or particular competencies (France)(3). These rules tend - to a certain extent - to restrict the integration; the national courts understand these restrictions as a requirement for the constitutional conformity to the EC legal acts. Luxembourg represents a special case; according to its constitution, the fulfillment of the competencies given by the constitution to the legislative, executive, and judicial powers can be *temporarily* assigned to the international institutions by a treaty (Article 49 bis).

Some constitutions presuppose more difficult procedural conditions for the further process of integration, e.g. the Basic Law (Grundgesetz) of the Federal Republic of Germany requires a two-third majority in the parliament, the Danish constitution requires a five-sixth majority of the Folketing members; if such a majority is not reached, but the majority is sufficient to pass the law, the proposal can be introduced in a referendum.

## **2. The Proposals of the Integration Delegation in the Constitution of the Czech Republic**

In the case of the Czech Republic, it is necessary to note that the Constitution of the Czech Republic is negatively influenced by the circumstances of its formation. At the time of its preparation, the authors of the constitution were under time restrictions, and it was also obvious that it was not an appropriate period to search for political consensus in opinions concerning matters that could cause certain problems, as happened, for example, in Poland. The imperfection of the final constitutional text is particularly clear in the sphere of the relationship between national and international law; this imperfection has been described as “constitutional anemia.” (Malenovský, 1997: 537 ff.) This description stems from the fact that the Constitution of the Czech Republic does not contain the concept of international custom at all, and the incorporation is presumed only in the case of international treaties concerning human rights and fundamental freedoms (further, the qualification of certain treaties as such is a matter of

some dispute), and the other treaties are *via facti* based on the principle of adaptation.

A) The government of the Czech Republic is well aware of the deficit of the international dimension of the Constitution. Therefore, in 1999 it put forth a proposal of constitutional change (4), which was derived from the idea that the constitution should contain and define the principle of preservation of "the international legal rules that are being generally accepted, as well as other international obligations." It is quite interesting that this formulation was furthered by the explicit reference to "the patterns of two newer constitutions," i.e. to the constitutions of Poland (1997) and Switzerland (1999). According to the cited governmental proposal, Article 10 of the Constitution should have been expanded (to date, it only regulates the supra-legality and direct applicability of the "treaties concerning human rights and fundamental freedoms" that have been ratified and published) in the following way: "The international treaties that have been accepted by the Parliament, are obligatory for the Czech Republic, and have been published, are directly applicable and have priority over any law, with the exception of provisions that have to be implemented by a legal act." According to proposed Article 10a, "some of the competencies of the authorities of legislative, executive, and judicial powers may be assigned by an international treaty, or on the basis of an international treaty, to international organizations. If the international treaty so stipulates, the law of such an international organization is directly applicable and takes precedence over the law of the Czech Republic."

Therefore, it is obvious that, in accordance with the proposal, the direct applicability of the treaties mentioned above would demand the cumulative fulfillment of four requirements: the consent of Parliament, a binding character for the Czech Republic in the sense of the Vienna Convention on the Law of Treaties, publication in the International Treaty Gazette, and a form that indicates that the implementation through a legal act is not necessary (i.e. the issue of *self-executing treaties*). At the same time, the integration provision should not be limited only to the accession of the Czech Republic to the EU, but it should also have a more general impact, and should be able to cover the transfer of the sovereign competencies to other international organizations, such as the International Criminal Court. The proposed mechanism of the particular international obligations did not presume explicitly (but also did not exclude) passage by

a public vote (referendum).

In terms of the classification of the integration delegation, it is possible to characterize the proposed provision as simple, not limited to a short time, and attempting to regulate certain restrictions for the transposition of the sovereign rights.

It should be mentioned that the proposal was ultimately not passed. The basic reason it did not obtain the appropriate political support was not the above-mentioned integration provisions and the relation to the international law, but another part of the submitted proposal, according to which the government was entitled to issue an order with the legal power "to implement the obligations connected with the legal approximation resulting from the European Agreement setting up the association between the Czech Republic on one side and the European Communities and their member states on the other." (5) The proposal of such delegation (6) caused fears of abuse in Parliament (7) (in the situation when the minority government was in power; the government at the time consisted only of the Czech Social Democratic Party), and although the government put forth the proposal of the constitutional law as a whole, it is mainly for these reasons that it was not passed.

B) The government put forth a second proposal ensuring the removal of the international legal deficiency of the Constitution of the Czech Republic in 2001 (8), and it is currently under discussion in the Assembly of Deputies of the Parliament of the Czech Republic (Poslanecká sněmovna Parlamentu ČR). In substance, it is a supplement to Article 10 of the Constitution, and would explicitly stipulate that the Czech Republic complies with "the rules and obligations of international law and that all the agreed international treaties are part of the legal order and have priority over any legal act" (Article 10). It is necessary to note that the Czech Republic obliges itself in this form to openly meet the international obligations, not only in the sphere of international contractual law but also in the field of customs law and other rules of international law. According to the proposed amendment to Article 10, all international treaties (i.e. not only the treaties concerning human rights and freedoms) are superior to a legal act; the amendment also corresponds to the principle of open compliance with international obligations.

The integration delegation clause itself is represented by a new draft of Article 10a, according to which "some of the competencies of the constitutional bodies may be transferred to an international institution." A qualified majority of the members of both Parliament chambers must approve this international treaty; it means the same majority as in the case of constitutional laws. In this proposal of the constitution change, as in the preceding case, it is obvious that direct applicability would demand the cumulative fulfillment of four requirements as they were stated above: i.e. the consent of Parliament etc.. Additionally, the integration provision should not be limited only to the Czech Republic's accession to the EU; it should also have a more general impact, and should be able to cover the transfer of sovereign competencies to other international organizations as well, such as the International Criminal Court.

While dealing with this "integration clause," it is necessary to mention that comparable regulations have been adopted in Denmark (§ 20 par. 1 of the constitution) and in Luxembourg (Article 49 bis of the constitution). Some other countries have chosen another alternative: the transposition not only of "some of the competencies of the constitutional bodies," but also of some "sovereign state rights" (for example, see Article 24, par. 1 of the Basic Law of the Federal Republic of Germany). As in the preceding case, it is possible to characterize the proposed provision as simple, not limited to a short time, and attempting to regulate certain restrictions for the transposition of sovereign rights.

The remaining question regarding this proposal is whether the ratification of the relevant international treaty (i.e. the treaty dealing with the EC accession) will require public consent in a referendum, and if so, what form of referendum. The answer to this question has been postponed, because the submitted bill explicitly leaves space for the adoption of special and separate constitutional laws that could determine if the ratification requires passage by a referendum (see below).

The implementation of a "preventative check" of constitutional conformity in the case of international treaty ratification is an innovation in the Czech Republic's constitutional system. According to the analyzed proposal, the Constitutional Court of the Czech Republic shall be competent to decide the constitutional conformity of international treaties (including those on the subject of integration) before their ratification (Article 87, par.

2). If the Constitutional Court recognizes any discord, the ratification will be halted until this discord is eliminated. The wording of the provision implies that the elimination of the discord is possible, either on the side of the international treaty or on the side of the corresponding constitutional law in which the discord is observed. It will be mainly the competence of Parliament to determine the method leading to the appropriate improvements.

### **3. The Czech Republic Integration into the EU in Constitutional Law and Direct Democracy**

Put quite simply, the contemporary situation in the Czech Republic can be characterized by the fact that the European integration has a relatively considerable support from both the public and the relevant political subjects; however, such support and the corresponding political consensus are sometimes not sufficiently displayed in particular areas.

The pronounced subject of the present discussions, as was mentioned above, is therefore the basic question regarding whether the accession of the Czech Republic to the European Union should be decided by the instruments of representative or by that of direct democracy. The situation in the Czech Republic differs in this aspect from the situation, e.g. in the Slovak Republic or in Poland, because the Constitution of the Czech Republic does not exclude a referendum from the constitutional system; however, it is dependent on the adoption of a special constitutional law which has not yet been passed. It is therefore too early to make conclusions about whether a referendum regarding EU accession will be held in the Czech Republic, and the form such referendum would take. The governmental proposal for the constitutional change itself avoids this question.

The following alternatives are the only realistic ones:

A) The Czech Republic's accession to the EU will be carried out without the use of direct democracy, i.e. the accession would be on the legitimate basis of the Czech Parliament's acceptance of the treaty concerning the entry. This variant has a substantial comparative historical precedent: an essential constitutional change (the split of the Czechoslovak Republic in 1992) was conducted through constitutional law without any subsequent

referendum. It is therefore possible that opponents of the referendum will, somewhat reasonably, argue using this precedent.

B) The constitutional law on a referendum will be adopted; however, the referendum will be only facultative, not obligatory. This variant has been promoted to a certain extent by the deputies' proposal, which originated in the conception of the referendum concerning the "factual object"; the government would be obligated to introduce the proposal in the Parliament after it was passed in the referendum. If the government did not introduce the proposal, no direct legal sanctions would be imposed, and Parliament would not be obliged to pass the submitted bill. Such a constitutional bill has not yet been passed, and it is unrealistic to expect that it would be adopted in the near future.

C) A constitutional law about referendums, which could form the basis for a referendum concerning the Czech Republic's accession to the EU, might be adopted. The particular form the constitutional law would acquire (9) is not important. However, the essential point is that such a variant would allow an obligatory referendum that would appropriately legitimize the Czech Republic's entry to the EU.

The application of direct democracy to the decisions regarding EU accession is preferable. Apart from the general advantages of direct democracy, it is important that the experience of the states that become members of the European communities proves a certain disillusionment of the citizens shortly after joining the EU. The crucial expectations connected with entry into the EU, which are generated by the persuasive campaign, and -to a certain extent- activities outside the campaign, are transformed into disappointment and disillusionment a relatively short period after the integration. Therefore, if a country enters the EU without using the instruments of direct democracy, the unfulfilled expectations will be capable of causing a crucial separation between the political elite that supported the integration and the considerable percentage of dissatisfied citizens. It could result in the strengthening of anti-system political powers. The legitimization of European integration through a referendum could reduce such a risk.

#### **4. Conclusion**

The entry of any individual country into the European Communities represents the most essential decision. From a constitutional point of view it is important that, as a result of this decision, the state transfers part of its sovereignty; however, the state does not lose its rights, it only delegates the supranational integration entity to fill the sphere of the transferred sovereign rights by its own legal acts instead of the acts of the state. Moreover, these former acts are valid for all individual member countries of the given organization. In parallel, a new quality – a supranational legal order - is created (Arnold, 1999: 2 ff.). The question of constitutional conformity of the European integration must be analyzed very carefully prior to the entry, because if there is discord, the entry should not be made. For this reason, the adoption of a "preventive check" by the Constitutional Court of the constitutional conformity of the international treaties before their ratification should be regarded as an appropriate move; this "preventive check" was part of the government-proposed changes to the Constitution of the Czech Republic. As mentioned, the form of the integration in the constitutional law can, to a certain extent, determine the future character of the relationship between the national and the EC legal orders.

In this respect, it is interesting to observe the various integration concepts that were developed by some constitutional courts. R. Arnold describes three basic models: the functional, the substantive, and the procedural one. (Arnold, 1998: 3–22)

*The functional model* is presented in the case of the Federal Republic of Germany, in which –according to the preceding judicial review– the EC law had nearly unlimited priority over the national law, but the fundamental human rights and freedoms guaranteed by the Constitution had priority over the EC law. The constitutional court arrived at this conclusion, as it argued that at the EC level, there was not sufficient protection of fundamental rights. However, the effective protection of human rights has recently been developed at a European level (originally in the form of legal principles derived from the common legal traditions of the member states, and currently in the form of the Charter of Fundamental Rights of the EU, which is not yet legally obligatory); therefore, the Federal Constitutional Court has modified its approach and decided that it would keep the guarantee function, and would exert jurisdiction over the constitutional conformity of the EC legal acts only if the protection of

human rights were substantially limited. Otherwise, it will fully respect the position of the Court of Justice. In other words, this model (also called substitutive) respects the principle priority of the EC law over the national law (i.e. it substitutes the constitutional regulation in the framework of fundamental rights) and only supplements the EC law by emphasizing the relevant protection of fundamental rights. This concept demonstrates a monistic form of the relation between international and national law.

*The substantive model* was formulated by the Italian constitutional court, and is based on the idea that only a partial priority of the EC law over the Italian constitutional law can be recognized. The Italian state authorities apply the EC law only in situations in which the EC law does not contradict the basic elements of the Italian constitutional system. This approach differs -particularly in comparison with the functional model- from the general principle of the superiority of the European law to the national law; for this reason, it may be characterized as a dualistic model.

*The procedural model* derives from the judicial review of the Spanish constitutional court, according to which the state bodies shall apply the European law but remain subordinate to the Spanish constitution at the same time. The reason is the sovereign rights have been transferred, in accordance with the integration provision, only to the extent necessary for the execution of these rights and in the range that can be deduced from the constitution. Further, when the EC and the national law collide, such a collision should be decided by the national constitutional court or even a general court, i.e. instead of the Court of Justice.

Although the Constitution of the Czech Republic does not contain the necessary integration delegation yet, and it is very difficult to predict the results of the integration delegation, it is more probable that the Czech Republic will incline toward the functional (substitutive) model of relation between the European and the national law. This opinion is confirmed by the proposed formulation of the integration provision, which presumes the general superiority of the EC law to the national law (including the constitutional laws), and by the judicial review of the Constitutional Court of the Czech Republic; in a number of aspects, this review is comparable to the judicial review of the German Federal Constitutional Court, which has competencies and procedural regulations very similar to those of the Constitutional Court of the Czech Republic.

## Notes

- 1) This was confirmed in the case of the former German Democratic Republic (GDR) and its incorporation into the Federal Republic of Germany in 1990. This was characterized from a political point of view as the "Unification of Germany"; from a legal point of view, it was the fall of the GDR and the accession of five new states to the Federal Republic of Germany.
- 2) As R. Arnold (1999: 2) noted, Great Britain acceded to the EU on the basis of general law (European Economic Communities Act of 1972); there was no other possible way, because there was no written and rigid constitution in the usual continental sense. On the other hand, Finland had a written and rigid constitution, but it chose to accede through the international treaty and adaptation acts in its national law as well. For further information on the Finnish changes see e.g. L. Mäkinen, 1998.
- 3) Compare, for example, Article 88 par. 2 of the Constitution of France, according to which France agrees with the transposition of the competencies necessary for the creation of the European economic and currency union as well as for imposing the rule for crossing the external borders of the EC member states.
- 4) The governmental bill introduced in the Assembly of Deputies as Assembly File No. 208. This bill was rejected by the Assembly in June 1999. For further details, see, for example, V. Schorm (1999: 67 ff.).
- 5) It should be mentioned that the proposal of the order with the legislative power would have to be introduced in the Parliament, and if any of the chambers did not agree with the proposal in 30 days the proposal would have to be discussed as any other bill.
- 6) The arguments supporting the adoption of the delegation were summarized by V. Schorm (1999: 151 ff.).
- 7) E.g., compare the opinion of Deputy M. Benda, that "no reasonable parliament can decide and allow the government to hold such a wide delegation."

8) See Assembly File No. 884.

9) The general constitutional law that would enable holding an obligatory referendum concerning constitutional laws (and common laws), and the international obligations are in principle acceptable. A special constitutional law regulating only the referendum about the Czech Republic's entry into the EU (it should also determine the exact date of the referendum) is another method. The latter variant is more politically enforceable, because skeptical opinions about the referendum are still prevalent.

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