CONFERENCES AND REPORTS

Professor Michal Tomášek fifty years old

On February 20th 2013, Professor Michal Tomášek, Head of Editorial Board of The Lawyer Quarterly, celebrated together with his family, collaborators and friends his 50th birthday.

All his professional career has been connected with the journal Právník (The Lawyer). In 1987, he published in Právník his first scientific article on legal language and legal linguistics under the tutorship of Professor Viktor Knapp.[1] At the end of 1980s he spent a part of his postgraduate studies at the Beijing University in China. At the time, Chinese experience of economic and legal reforms seemed to be very stimulating experience for Czechoslovak reforms. Michal Tomášek published in the journal Právník several articles on Chinese legal system and became one of our first scholars dealing with Chinese law.

After a short career of a research fellow at the Institute of State and Law of the Czechoslovak Academy of Sciences, Michal Tomášek left the Institute in 1990 to join the new Czechoslovak diplomatic service. He served in Washington, D.C. and then in Brussels at our Mission to the European Communities. During his diplomatic career he still remained an active contributor to the journal Právník. His main topic was a comparison between U.S. federalism, European "federalism" and a solution of Czechoslovak federal settlement in 1992–1993. In late 1990s Michal Tomášek wrote in Právník numerous articles about EC single market, concerning particularly free movement of capital and payments including the issue of economic and monetary union.

In June 2000, Dr. Michal Tomášek was invited to become member of the editorial board of the journal Právník. He replaced the deceased Professor Pavel Kalenský in responsibility for European and Comparative Law. In his quality of member of editorial board of the journal Právník he has contributed to an increasing scientific level of the journal as well as to broader information on the pages of the Právník about international scientific events worldwide. His reports from conferences were bringing information from the United States, Canada, Mexico, Australia, Singapore or New Zealand.

Numerous research and pedagogic activities of Professor Michal Tomášek have obviously gone far beyond the scope of the journal Právník. He is professor and Head of Department of European law at the Faculty of Law of Charles University in Prague. He has been visiting professor at several universities in Europe (Brussels, Nancy, Paris – Panthéon – Assas), United States of America (Miami, New York – Fordham), Japan (Kobe, Tokio – Wasseda), Australia (Queensland) or New Zealand (Otago). As a research professor he has directed important research programs both of the Ministry of Education and of the Charles University. He received a special award of Minister of Education for outstanding results in research, development and innovative technologies for 2010. Since 2008 he has been member of the Committee for Scientific Degree DSc. "Doctor of Science" at the Czech Academy of Science.

On the occasion of 150th anniversary of the journal Právník in 2011, Professor Michal Tomášek together with Dr. Jan Bárta, Director of the Institute of State and law of the Czech Academy of Sciences, founded an English parallel of the Právník – The Lawyer Quarterly (TLQ). Professor Tomášek was appointed Head of the Edotorial Board. As he wrote together with Dr. Jan Bárta in the Editorial of 1st issue of The Lawyer Quarterly: "*TLQ intends to become a truly international journal enhancing the crossborder exchange of legal thought. … By nature of things, TLQ shall expectedly focus on problems felt in (and authors originating from) Central and Eastern Europe: It is commonplace that countries in the said geographical region share much in their history, in their legal culture, in their situation in respect of European structures. Let us regard this not only as a fact, but also as a value, and try to make the most of it so as to expand something like a regionally based pool of contributions to law theory*".[2]

Professor Michal Tomášek was one of co-authors of *liber amicorum* published as a tribute to 150th anniversary of the journal Právník in 2011. He was dealing with an uneasy period of history of Právník of

[1] TOMÁŠEK, M. K některým otázkám stylového rozvrstvení právního jazyka, *Právník* 1987, No. 1, pp. 65–75.
[2] BÁRTA, J., TOMÁŠEK, M. Editorial, *The Lawyer Quarterly*, 2011, Vol. 1, No. 1, pp. 1–2.

1948–1989.[3] In this very monograph a lot of articles written by Professor Michal Tomášek are reminded and highly appreciated by other co-authors, in particular by Professor Jaroslav Fenyk for the field of criminal law or by Professor Monika Pauknerová for the field of international private law. During a presentation of *liber amicorum* to the journal Právník held in November 2011, Professor Tomášek mentioned our journal The Lawyer Quarterly not only as a parallel but also as a continuation of a brilliant tradition of Právník for the future. On behalf of our editorial board we wish to Professor Michal Tomášek many years of fruitful activities in The Lawyer Quarterly and in Právník. *Ad multos annos.*

Antonín Lojek*

On the ongoing "war" between the Czech Constitutional Court and the ECJ

The first ever rejection by the Constitutional Court of EU Member State to apply the decision of the European Court of Justice (hereinafter ECJ) was the topic of discussion convened by Departments of Constitutional and European law, held at the Law Faculty of Charles University on May 30, 2012. In the spotlight was the judgment of the Czech Constitutional Court (hereinafter CC) No. Pl. ÚS 5/12 from January 30, 2012, details of which were already made available to international audience, for instance in Common Market Law Review No. 49/2012, and in number of English-language law-blogs.[1] Due to the extraordinary and burning nature of the issue, known also as the „Slovak pensions" cause, the discussion, chaired by the Dean, Prof A. Gerloch, has outgrown its intra-faculty dimension into an open event attended also by representatives of law schools from Brno and Olomouc, as well as of the Office of the Government, the Ministry of Foreign Affairs of the Czech Republic and other institutions. Nevertheless, the discussion could not come to a definite conclusion, since the case at issue has its continuation and the ECJ is currently deciding on yet another preliminary reference from the Czech Supreme Administrative Court (hereinafter SAC) related to the identical legal issue (case C-253/12 *JS*[2]).

Background to the dispute between the supreme judicial instances is briefly as follows: At the moment of dissolution of the former Czechoslovakia it was agreed among the successor states, the Czech Republic (hereinafter CR) and Slovakia, that the claims for pensions due for the years worked in Czechoslovakia (with a uniform pay-as-you-go pension system) will be satisfied by the successor State in whose territory was located the seat of the employer on the date when Czechoslovakia ended (December 31, 1992). This criterion led, often due to the peculiar structure of state-owned "federal" undertakings, to situations when a Czech employee who never worked outside the territory of today's CR, was legally employed with the Slovak company and vice versa. As a result of subsequent differences in the social and economic development of both countries after 1993, a gap gradually developed also in the amount of paid pensions. In several cases where this occurred to the detriment of Czech citizens, the issue was addressed by the courts, including the CC of the CR. In its 18 decisions up to the year 2012 the CC consistently ruled that a citizen of the CR cannot be damaged by the fact that Czechoslovakia was once dissolved and the above described agreement on the partition of pension obligation was adopted. Therefore, any negative balance in a pension received must be equalized by the Czech Social Security Administration. After 2004 however, when the CR and Slovakia joined the EU, the issue received another dimension, due to the EU law principle of non-discrimi-

[3] MASOPUST, Z. (ed.). *Právo a stát na stránkách Právníka.* Ústav státu a práva Akademie věd ČR, Praha 2011.

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[1] See Zbíral, R., 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 in *Common Market Law Review* N 49/2012 pp. 1475–1492, or also Komárek, J., Playing With Matches: The Czech Constitutional Court s Ultra Vires Revolution, available from http://verfassungsblog.de/playing-matches-czech-constitutional-courts-ultra-vires-revolution/

[2] Three question referred by SAC on May 24, 2012 are available from http://curia.europa.eu/juris/document/document.jsf?text=&docid=126042&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=499971

nation among EU citizens on the basis of citizenship of different Member States. Can the difference in pensions paid by Czech and Slovak social systems to those who worked under the defunct federation be made up only to the current Czech citizens? And what if there are citizens of other EU member states who also used to work in former Czechoslovakia and some of them can now also be receiving pensions from Slovakia that are lower than those that would be received from the CR?

The first "shot", simply said, in the current war of judiciaries came from the ECJ. In a preliminary ruling to the reference made by the SAC in the case C-399/09 *Landtova* of June 22, 2011, the ECJ found as discriminatory if EU citizens finding themselves in the same situation are treated differently solely on the basis of their belonging to different Member States[3]. The CC "fired back" in its judgment of January 30, 2012, stating that the ECJ had exceeded the powers conferred by the EU Treaty by enlarging its competence to a situation free of any EU-element. According to the CC, the pension claims arising from the Czechoslovak period had nothing to do with claims arising from labor migration among EU Member States, as the situation of Czechoslovak citizens covered by unified pension system had certainly been different. The CC therefore called the ECJ decision in *Landtova* case to be ultra vires and rejected its national application. This challenge to the ECJ primacy was a historical one, as the Federal Constitutional Court of Germany, in its famous *Solange, Maastricht* and *Mangold (Honeywell)*[4] judgments only pointed at such a possibility, but it was the Czech CC who for the first time in the history of European integration openly rejected the ECJ decision on grounds of transgression of conferred powers.

The discussion at the Law Faculty of Charles University mainly showed that the entire "Slovak pension" cause was much more complex than the brief outline above can suggest as it had more stages and more participants, and none of them could flaunt his flawless performance. Dr P. Mlsna, who took the floor on behalf of the Department of Constitutional Law, pointed out that at the very beginning of the whole issue the SAC referred to the ECJ a hypothetical question that did not necessitate an answer in order to decide the pending case as Ms. Landtova was a citizen of the CR. The fact that the SAC opened the preliminary ruling procedure, even though its judges were well aware of the constant CC case law on the "Slovak pensions" issue and that the Czech Government in the proceedings before the ECJ stood at the SAC side, i.e. against its country s CC, was a regrettable example of frictions between institutions of one Member State. The ECJ unfortunately joined this game, because if it had acted in accordance with its long established principles[5], any hypothetical reference for preliminary ruling would have been refused, and the problem had not degenerated into an *ultra vires* outcome. However, the ECJ somewhat dogmatically felt the need to take action against alleged discrimination, without taking into account all the historical aspects of the dissolution of Czechoslovakia and its pension system.

Another controversial point is the interpretation of the EEC Regulation No. 1408/71[6], now superseded by the European Parliament and Council Regulation No. 883/2004 on the coordination of social security systems. It takes into account the exceptions to the general (strictly non-discriminatory) system that had been historically agreed between the Member States, provided that such an agreement is listed in the Annex to this Regulation. Agreement between the CR and Slovakia was one of the Annex to this Regulation, however listed in another part of it than was that which would clearly allow the exemption from the EU non-discriminatory regime (in IIIA instead of IIIB). As a result, according to Dr Mlsna, an unfortunate situation has occurred when the CC s authority is threatened because lower Czech courts could be pushed to try their luck in Luxembourg to get sanctification of their disobedience. If the ECJ proves amenable to their opinions, then they would not refer any more for the final interpretation of national Constitution to the CC.

Assoc. Prof R. Král, representing the Department of European Law, stressed the question of whether the split of the pension system of the dissolved federation gave birth to a situation with

[4] Decisions of the German Federal Constitutional Court (Bundesverfassungsgericht) *Solange* BVerfGE 73, 339, *Maastricht* BVerfGE 89, 155 and *Mangold (Honeywell)* 2 BvR 2661/06.

[5] See for instance the ECJ long established case law on unacceptable preliminary references: 126/80 *Salonia*, 149/82 *Robards*, C-286/88 *Falcioala*, C-373/95 *Maso*, C-451/99 *Cura Anlagen*, C-225/02 *García Blanco*…

[6] Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

or without an EU element. If there is an EU element, then in accordance with the EU law, it would be necessary either to pay a top-up allowance for differences in the level of pensions to all EU citizens regardless of their current national citizenship, or to pay none at all. Czech CC, however, was right that taking the work of former Czechoslovak citizens on the territory of Czechoslovakia for a migration abroad would be a distortion of history. And if the EU Regulation at issue protects pension claims of migrant workers, then those formerly Czechoslovak citizens certainly do not belong to that category. On the contrary, those few citizens of Poland, Hungary, Bulgaria, etc., who worked before 1993 for some time for employers seated in Czechoslovakia, and today they are receiving from Slovakia a part of their pensions would clearly qualify for migrant workers treatment. However, the ECJ in its *Landtova* decision did not specify whom exactly it considered as migrant EU worker and who then must not be discriminated against by the CR. The Czech courts (SAC and CC) based their conclusions on the widest possible interpretation of that category of workers thus understanding that also all Slovak citizens who were of active labor in times of Czechoslovakia would have to be included.[7]

The ECJ unfortunately refused to deal with an explanatory letter from the CC on a purely formal ground that the CC was not a party to the proceedings in *Landtova* case, and thus did not take care to penetrate into details of the partition of the federal pension system which would have been essential to clarify whether and where in the present case the EU element was comprised. The CC from its end did not consider of paramount importance to clarify this confusion and did not make its own reference for preliminary ruling to the ECJ. Instead, without making sure whether the ECJ had not in mind only the citizens of other EU Member states than the former Czechoslovak federation, who were in all aspects labor migrants, the CC escalated the fight by finding the ECJ ultra vires. According to R. Král an earlier judgment by the ECJ, the one in case C-212/06 concerning social security of Flemish and Walloon citizens of the Belgian federation[8] rather attested for the absence of an EU-element in the case of citizens of the late Czechoslovakia. He also pointed to the onus born by the Czech Government, due to the fact that the Czech-Slovak agreement on the split of the federal pension system was listed in the "wrong" part of the Annex III to the EU Regulation which is totally incomprehensible in light of its recodification, which took place in 2008 and to which the Czech Government could and should have intervened being equipped with the knowledge of the CC constant case law on the issue of lower Slovak pensions paid to Czech citizens.

The ECJ position in the cause was defended by Dr J. Zemánek, also from the Department of European Law. He raised the question whether the ECJ intervention in the competences of the CR was of such a fundamental nature to justify the historically unprecedented ultra vires response. According to him, the decision of the ECJ in *Landtova* case was quite understandable, precisely because the CR did not negotiate for its agreement with Slovakia on the partition of the federal pension system an appropriate exception (i.e. its inclusion in the Annex IIIB of the EU Regulation) despite its repeated opportunity to do it. The ECJ consistently rules in the sense that if a Member State grants to its own citizens a certain super-standard, it must then reserve the same treatment for the citizens of other EU Member States, if they are in the same situation. Czech CC should have shown more restraint. Had it referred to the ECJ a preliminary question, their misunderstanding could have been clarified beforehand.

In a lively debate that followed these per-prepared statements, the bellow summarized observations and comments were made:

Just as the ECJ rules over a hypothetical question in *Landtova* case, also the CC judgment No. Pl. ÚS 5/12 "rescued" a hypothetical victim as the Czech pensioner at issue was receiving Slovak pension that turned out to be higher than that to which he would have been entitled to

[7] For details of R. Král s argumentation see his article in Czech legal journal *Jursiprudence* No 2/2012, pp. 28–33, available from http://www.jurisprudence.cz/clanek.html?id=1313&seznamtyp=&rocnik=&cislo=

[8] See the ECJ judgment in full for details: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62006J0212:EN:HTML

from the CR. Slovakia's economic successes have led in recent years to a shift in pensions that deprived many "Slovak pensions" cases of their material substance.

At the core of the current dispute between the two Courts is the eternal ideological controversy over the primacy of EU law over Member States law and subsequently the question which Court will ultimately have the very last word. One of the newly referred questions of the SAC to the ECJ in C-253/12 *JS* case goes straight in the same direction: "Does European Union law prevent the national court, which is the highest court in the State in the field of administrative law and against whose decision there is no right of appeal, from being, in accordance with national law, bound by the legal assessment of the Constitutional Court of the Czech Republic where that assessment seems not to be in accordance with Union law as interpreted by the Court of Justice of the European Union?". "Slovak pensions" are just a pretext to wage this "war of courts" to its end. The SAC had been looking forward to a case that would give it an opportunity to outsmart the CC.

We live in a standard, "normal" society where such war of independent courts sometimes occurs, as it used to be the case elsewhere in Europe. Our highest courts are getting into more complex and delicate issues and, of course, some of them touch upon their prestige and make them promote their point of view. But the CC s perspective has been problematic from the beginning, because no court decision should and could ever make up for all possible consequences of major historical events, such states' changeovers, their borders shifts etc. Their 'sometimes uneven outcome simply cannot be properly fixed by the judiciary. Nevertheless, wrong decisions of constitutional courts are not that rare in Europe and we know that it will take years until the system will be able to cope with them.

Czech Government did not fight before the ECJ against its own CC. Its representative only expressed the opinion of State administration, as any government of a Member State is entitled to do in preliminary ruling proceedings. Of course, it was the opinion of the executive power that includes also the Czech Social Security Administration. The latter had quantified potentially enormous costs that might arise if the category of persons having a legitimate claim to get retirement pension compensation from the CR were given a broad interpretation. Claims of all Slovak pensioners who were active in times of Czechoslovakia and now receive the Slovak pension lower than the corresponding Czech one would have to be satisfied.

The CC itself went ultra vires by providing an interpretation of EU law which is beyond its competencies. Now, the CC seeks for domestic enforcement of its interpretation against the ECJ. On the other side, the ECJ just did what it usually does: it only interprets the EU law, never national constitutions, but it commits national judges to apply the EU law prior to the conflicting national law. If the CR disregards the ECJ decision in *Landtova* case it runs the risk of infringement proceedings and the threat of sanction from the EU.

It would be ideal if both supreme judicial instances, the ECJ and the CC, do not escalate further their dispute. If the ECJ, by dint of answering just the first of the three questions newly asked by SAC, narrows the application of its previous decision in *Landtova* case only to those non-citizens of Czechoslovakia, who were working at the time of federation on its territory, no one would lose face. Acting in this way, the ECJ would not have to answer the other question whether a national judge should disobey its own Constitutional Court, when he considers that it contradicts the EU law.

Discussion on "Slovak pensions" had provisionally to stop at this point and all participants could not but eagerly wait to see whether the ECJ's answers to the questions referred by the SAC in this or other way.[9]

Václav Šmejkal*

[9] Czech government, in an effort to meet both the ECJ and the Czech CC requirements, approved on January 16, 2013 a legislative amendment specifying conditions for top up allowance without mentioning the criterion of Czech citizenship. For details, see the Czech Chamber of Deputies Print 905/0, Part No. ¼ http://www.psp.cz/sqw/text/tiskt.sqw?O=6&CT=905&CT1=0.

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