

Václav Klaus on his way to teleological eternity

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During one of my walks in Lisbon I met an old beggar playing Ode to Joy on harmonica. It reminded me another harmonica virtuous player (have you ever seen the TV show with Václav Klaus playing on it?). This impression together with the fact of living in the city which gave its name to the European document causing my apologetic smiles whenever I introduced myself last autumn as coming from the Czech Republic (yes, yes, the strange country blocking the whole European integration process) caused a sort of “shining” in my mind. I realized that once again I had underestimated our president....

At the beginning I believed that his “non-signature” of the Lisbon Treaty was in fact only an attempt to become The First by being The Last. In other words, that his only aim was to enjoy those few weeks when European politicians would be calling him again and again promising blue sky (shining sun included, especially for Sweden it was not supposed to be a big problem taking into account their national colors) and then finally, he would show how constructive he is, would not give up (never!) but would constructively and wisely sign. Now I see that his attitude is much more....sophisticated.

How will be the Charter of Fundamental Rights of EU applied with the Czech exception? Let's imagine that Czech Republic will be simply added to the Protocol concerning UK and Poland. We have heard so much in the Czech media that “adding a comma and “the Czech Republic” is enough...” (well, and then a little obstacle with the ratification). That is suppose to imply that in situations where for other MSs the Charter will be applicable, that will not be the case for the Czech Republic. What situations are we talking about? According to Art. 51 (1): *“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”* In other words two basic situations when the EU law was “scrutinized” by Human Rights even before December 2009: (i) in EU institutions' decision making (at least since ECJ judgment 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125), and (ii) when MSs are applying EU law (at least since ECJ judgment 5/88 *Wachauf* [1989] ECR 2609). In the pre-Charter era the ECJ had to *“draw inspiration from the constitutional traditions common to the Member States”* and as the number of MSs was growing it was more and more amusing to imagine what these “common traditions” can be... And concerning the Czech Republic only from them will the ECJ draw inspiration even in the future. When shall be this exception applied?

If it will be the same as that one applied for UK and Poland, than according to Art. 1 of their Protocol *“1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.*

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.”

Let's ignore the fact that only by a random choice would Václav Klaus mention Chapter IV: this Chapter is essential for “Kaczynski Brothers Ltd.” who wants to defend the Polish family against abortion, homosexuals and other cardinal sins against The Creator of All Poles. It is indeed essential for the Brits, because it establishes such rights of collective bargaining that may be perceived as normal on the Continent but if they were to be applied in UK, the remains of Adam

Smith would have to emigrate to USA. Václav Klaus claims that he wants to prevent possible reopening of Beneš Decrees. But if this is the case then rather Art. 17 in Chapter II should be his natural target (“1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.”), or maybe prohibition of discrimination in Art. 21, i. e. Chapter III (“1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”) Well, the Czech conscience may have some problems with discrimination on the grounds of ethnic origin, taking into account our previous confiscations (but I cannot believe that Václav Klaus really wanted to exclude whole Chapter III, because he personally is not a teenager anymore and may find Art. 25 very useful in a near future: “The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.”)

But I simply cannot imagine, how could these decrees from last world war possibly come into the scope of Treaties at all? His generous statements concerning this question convinced me that – notwithstanding all his honorary doctorates of law from faculties hidden in deserts and jungles of all five continents – he should never be a judge of CJ. Before defining the scope of Treaties in such a generous way (especially *ratione temporis*) the judges of CJ would have to use some hallucinogens and then protect Luxemburg by a new Maginote Line against the German Bundesverfassungsgericht who still optimistically believes that Germany is “the Master of the Treaties”.

Nevertheless, what would happen in a situation when CJ would apply the Charter against all MSs but will be blocked by this Protocol concerning Czech Republic? Well, he will supposedly have to use once again *the constitutional traditions common to the Member States*. And where he can find them? Supposedly in the Charter: why should the CJ now complicate its task by looking in MSs' constitutions or use other complicated ways when he has the Charter which was applicable even before Lisbon Treaty? It is prohibited to use Charter directly in a case concerning the Czech Republic, but it is impossible to exclude its use as a way how to define *the constitutional traditions common to the Member States*. Another support can the ECJ find in teleological interpretation: Indeed, those Czechs wanted the Charter to be excluded only because of Beneš decrees!

Therefore, I believe that this pompous Czech exception will apply only for wholly artificial case of application of some decrees from World War II. In every other situation will the Charter be used in a similar way as in case of any other MS by a reference to *the constitutional traditions common to the Member States*. But! In every single case when CJ will use such an explanation he will have to mention what was the funny limited purpose of the Czech exception and therefore will have to quote some of the statements of Václav Klaus (as he did not gain any support by the government or other relevant political forces and his statements establish a sort of very lonely voice). Who knows, maybe he will be even invited as a witness (or maybe even *inimicus curiae*;) to the hearing to explain what were his intentions.

In other words, whenever will the CJ apply the Charter in a case concerning the Czech Republic he will have to mention that the “departure point” distinguishing Czech Republic from *the constitutional traditions common to the Member States* is Václav Klaus. His way to teleological eternity is thereby secured...

I gave 20 cents to that beggar in Lisbon. Eurocents of course. Good price for inspiration....