Landtová, *Holubec*, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure

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The *ultra vires* judgment of the Czech Constitutional Court in *Holubec* and its significance – Evolution and unfolding of Czechoslovak pension saga – *Landtová* judgment of the Court – Later developments and approaches of the various actors – *Holubec* as a revolt that did not take place – Broader structural implications for the preliminary ruling procedure and its reform – The functions of the preliminary rulings procedure – Atomisation of national judicial hierarchies and its consequences – Voice and representation before the Court – The role of governmental agent in proceedings before the Court – Law-making without representation – The position of constitutional courts in the European judicial system – When judicial cooperation turns uncooperative – Conceptualizing judicial non-cooperation and disobedience.

Introduction

It happens only rarely that a decision of a court in a middle-sized EU member state with a non-understandable language attracts considerable attention Europe-wide. The *Holubec*[1] decision of the Czech *Ústavní soud* [the Constitutional Court, hereinafter '*ÚS*'] of January 2012, rendered in reaction to the *Landtová*[2] judgment of the Court of Justice of the EU [hereinafter 'the Court'] of June 2011, gained

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[1] ÚS, plenary judgment of 31 Jan. 2012, Pl. ÚS 5/12, available in English at <www.usoud.cz>.

[2] ECJ, Case C-399/09 Landtová [2011] ECR I-5573.

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such a status. Everybody has started talking about *the* decision of a national highest jurisdiction that for the first time in the history of the European integration clearly and openly declared an EU act *ultra vires* and thus not applicable on the national territory.

Readers who wished to see for themselves what and why the *ÚS* decided in *Holubec* and attempted to read the decision directly nonetheless became soon quite puzzled. They downloaded the decision from the website of the *ÚS* in an English translation. The language was therefore not the problem. It was the content of the decision that hardly made any sense.[3] What? Why? Is this it? Was it with this reasoning, or better to say with this absence of any compelling reasons, that the *ÚS* decided to take what is often believed to be the ultimate step in EU judicial architecture?

This article has three aims. First, it wishes to help all the puzzled readers of the *Holubec* decision to understand how and why it came about. It puts the decision into the context of the bitter and lengthy Czech judicial feud over so called 'Czechoslovak pensions' that had been raging within the Czech judiciary for almost a decade before *Landtová*.

Second, with the benefit of hindsight and a 'cooling off' period of two years after both decisions were handed down, this article (re)interprets the *Holubec* decision. By putting together both the pre-*Holubec* evolution and the post-*Holubec* reactions and practice, it emerges that the *ÚS* in *Holubec* meant something different than it in fact said. The language used was out of sync with the genuine meaning. Although the decision has already entered the EU textbooks as the first national *ultra vires* decision ever, it is suggested that *Holubec* was a revolt that in fact did not take place.

Third and perhaps most importantly, on the basis of the *Holubec* saga and other case-law and practice of the Court and the national courts, this article outlines systemic weak spots in the preliminary ruling procedure today. It is suggested that not all factors that led to *Holubec* are attributable solely to the uninformed and somewhat self-centred Czech *ÚS* or other judges in a new member states who cannot yet behave properly in the European judicial space. It was a number of questionable elements in the preliminary rulings procedure, united in the most unlucky constellation, that eventually propelled the *ÚS* toward its extreme response in kind in *Holubec*. The Czechoslovak pension saga and its (anti)climax in *Holubec* thus provide rich food for thought as to whether some strands of the case-law of the Court relating to the structure, hierarchy, and the procedure on preliminary

[3] Anecdotal experience of the author of this article includes instances when colleagues from other member states interested in reading the *ultra vires* decision of the Czech *ÚS* came back to the author, once having read the English translation, to double-check whether they had downloaded the correct document.

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rulings should not be reconsidered in order to avoid clashes of similar kind in the future.

Two caveats are due from the outset. First, this article is contextual and sociological. It focuses on the actors and their motives, less on the legal or technical side of the argument. What is sought is the translation of a highly technical and somewhat regional problem of Czechoslovak pensions, their coordination and calculation, into a more general case study of motives and techniques for (non-) cooperation and disobedience in the European judicial space. In order to be able to do so, this article necessarily simplifies and advisedly omits a number of technical details.

Second, it is well known that courts are 'they', not 'it'. This applies even more to highest continental civil law jurisdictions. These tend to be composed of a number of judges and chambers. Thus, there is necessarily a considerable diversity of opinion within such a larger supreme or constitutional court. This article, however, intentionally remains at the level of an institutional 'it', with the full knowledge that this might be unjust to some individual judges whereas it might give too much credit to others.

The case

This part explains the origins, background, and the context of the *Holubec* decision. The focus is more on the decade-long unfolding and escalation of the Czech judicial feud which lies beneath and the position of individual actors therein, and less on the technical arguments or their absence in the *Landtová* and *Holubec* decisions.[4]

The origins

The story begins with the dissolution of Czechoslovakia on 31 December 1992. One of the many issues relating to the peaceful split of the former federal state was to decide how pensions and other social security claims would be divided between the two succeeding states, the Czech Republic and Slovakia. In spite of being a federation, Czechoslovakia always maintained a unitary pension system, with the pensions being effectively paid from the yearly federal budget. It was

[4] For further analysis of the decisions in English *see* e.g., J. Komárek, 8 *EUConst* (2012) p. 323; R. Král, *European Public Law* (2013) p. 271; P. Molek, 6 *European Law Reporter* (2012) p. 162; L. Pítrová, *The Lawyer Quarterly* (2013) p. 86; R. Zbíral, 49 *CML Rev* (2012) p. 1475. In Czech, *see* in particular M. Knob, 'Další pokračování ságy slovenských důchodů před Ústavním soudem' ['The Continuation of the Slovak Pension Saga before the Constitutional Court'], 4 *Soudní rozhledy* (2012) p. 127 or F. Křepelka, '"Československí" důchodci v pasti práva Evropské unie' ['"Czechoslovak" Pensioners Trapped in EU Law], 2 *Časopis pro právní vědu a praxi* (2011) p. 131.

therefore necessary to set principles according to which individuals who previously participated in a single federal pensions system would be split up between two succeeding systems for the future.

The solution eventually chosen and encapsulated in an international treaty signed by both succeeding states in 1992[5] foresaw as the determining criterion the seat of the employer in case of employees and the place of their habitual residence for self-employed persons. The determining moment was in both cases the situation on the last day of the existence of the federal state, 31 December 1992.

In the second half of the 1990s, however, problems started emerging with respect to one particular group of pension claims: those made by Czech citizens living on the territory of the Czech Republic, who were nonetheless receiving their pensions from Slovakia. Similar scenarios could emerge on the application of the criterion outlined in the previous paragraph. For example, it could happen that a Czech citizen, who never set foot on the territory of Slovakia in her life, would receive her pension from Slovakia after 1993, because on 31 December 1992, she was employed by a company which was incorporated in Slovakia, although her actual place of work was in the Czech Republic.

The nature of the problem was an economic one. After the dissolution of the federation, Slovak pensions gradually became lower than the Czech ones, for the reason of their lower nominal value as well as the lack of annual valorisation. The difference was strongly resented by Czech citizens who were nominally employed by Slovak companies but in fact had always worked on the territory of the Czech Republic. Their pensions paid by the Slovak social security institutions could be lower by one third, or in extreme cases even more, relative to those of other comparable Czech pensioners who might have worked and lived across the street in the same town. However, the pension claims of the latter were taken over and paid by the Czech social security authorities.

The economic problem became soon translated into a legal one. Dissatisfied Czech citizens receiving their pensions wholly or partly from the Slovak system after 1993 started asking the Czech social security authorities for various increases in or recalculations of their pension segments paid from the Czech system. In particular, a number of them requested to be paid a discretionary supplement for the alleviation of the duress of the law. Alternatively, they wished their pensions to be taken over wholly and paid by the Czech social security authorities.

[5] '*Smlouva mezi Českou republikou a Slovenskou republikou o sociálním zabezpečení*' [Treaty between the Czech Republic and the Slovak Republic on Social Security] of 29 Oct. 1992, published with respect to the Czech Republic as No. 228/1993 Coll.

In 2003, the *Ústavní soud* held that Czech citizens are entitled to have their lower Slovak pensions topped up by the Czech social security administration.[6] The special supplement was conceived of as an individual, constitution-based right. For introducing it, the ÚS relied on Article 30 of the Czech Charter of Fundamental Rights (right to adequate material security in the old age) combined with Articles 1 and 3(1) of the Czech Charter (equality and prohibition of discrimination).

There are two important elements that should be noted with respect to the position of the ÚS. Both elements remained, in spite of the different ups and downs and initial inconsistencies in the constitutional case-law, a constant for the next ten years. First, the *ÚS* never accepted on the ideological level the key principle stemming from the 1992 Czecho-Slovak Treaty on Social Security, namely that for the purpose of calculating pension claims, the work on the territory of the other federal state would be taken into account as employment abroad. The *ÚS* always stressed this to be a fundamentally mistaken legislative fiction created *ex post* that cannot be applied to the detriment of individuals, who have in good faith contributed into a single federal pension system all their lives.[7] Second, the duty of the Czech social security authorities to top up the lower Slovak pensions for the Czech citizens was created by and always remained nothing more than constitutional case-law. Although the Czech social security administration was eventually forced to comply, at least in majority of the individual cases, the constitutional case-law was only reflected in internal circulars of the administration, but never in binding national legislation.

The escalation

The subsequent evolution in matters of Czechoslovak pensions after 2003 witnessed an unfortunate variety of a 'ping pong' a hierarchical civil law judicial system can generate. On the one hand, the Czech administrative courts led by the newly created *Nejvyšší správní soud* [Supreme Administrative Court, hereinafter '*NSS*'],[8] frequently refused to accept the constitutional construct created by the *ÚS*. The Czech social security administration and, by extension, the executive, were of the same opinion. Their reasoning relied more on the level of statutes and principles

[6] *See* in particular *ÚS* judgments of 3 June 2003, II. ÚS 405/02; of 25 Jan. 2005, III. ÚS 252/04; of 4 April 2005, IV. ÚS 158/04; of 20 March 2007, Pl. ÚS 4/06; of 13 Nov. 2007, IV. ÚS 301/05. All decisions of the *ÚS* quoted here and in subsequent footnotes can be located online at <http://nalus.usoud.cz>.

[7] Conviction expressed already in the first case, II. ÚS 405/02, *supra* n. 6, and running like a proverbial *file rouge* through the entire case-law up and strongly resounding in the *ÚS*'s letter to the Court of 8 March 2011 in the *Landtová* case, *infra* n. 83, as well as in the *Holubec* decision.

[8] The *Nejvyšší správní soud* was established following the entry into force of Act No. 150/2002 Coll., Code of Administrative Justice.

of social security law. The provisions of the Czecho-Slovak Social Security Treaty were clear. The *ÚS*, however, refused to reconsider its value-based constitutional position. It maintained that the logic of international coordination of social security systems ought not to be applicable to the unique case of division of a formal federation, which in terms of social security systems was in fact a unitary state.

The cases kept piling up. The 'non-debate' between the *ÚS* on the one side and the administrative courts on the other became also increasingly unpleasant as to its style. In terms of numbers, the case-law database of the *ÚS* registers 17 cases on the matter of 'Czechoslovak pensions' between the initial decision of 2003 and the '*ultra vires* declaration' in *Holubec* in January 2012. Dozens or perhaps even hundreds of similar cases were tried in administrative courts, with divergent results. In terms of the style of the debate, the metaphor of the dialogue of the deaf clearly offers itself. More and more cases were decided on both sides, with greater and greater judicial formations called forward,[9] but with no genuine dialogue in fact happening, certainly not from the side of the *ÚS*.

The one-sided self-asserting also gradually became more and more aggressive. On the side of the *NSS,* it contained, after the initially polite and well-reasoned invitation to reconsider,[10] the subliminal messages that the *ÚS* does not understand the basics of social security law, coupled with pointing out the inconsistencies in the case-law of the *ÚS* on the matter. On the side of the *ÚS*, the striking and stubborn unwillingness to engage was able to generate only arguments of blunt institutional force with little substantive reasons given. In a decision of August 2010, the *ÚS* suggested that administrative judges who keep refusing to comply with its decisions on Czechoslovak pensions should face disciplinary proceedings and that their behaviour may give rise to state liability.[11] In another decision of August 2010, the *ÚS* annulled an order by which the *NSS* stayed proceedings in a case parallel to the *Landtová* litigation.[12] The reason for staying proceedings was to await the decision of the Court in *Landtová* and then apply the holding of the Court to all the remaining pending cases on that matter. The *ÚS* quashed the order staying proceedings[13] with the argument that it had already ruled on the matter in an earlier decision in the same case. The *ÚS* added that the binding force of its previous decision in the individual case takes precedence over any (broader

[9] Both courts gradually internally delegated the decisions to its greater formations – the *NSS* to the grand chamber (NSS, judgment of 26 Oct. 2005, 3 Ads 2/2003-112) and the *ÚS* to the plenary court (ÚS, judgment of 20 March 2007, Pl. ÚS 4/06). All decisions of the *NSS* quoted here and in subsequent footnotes can be located online at <www.nssoud.cz>.

[10] NSS, judgment of 23 Feb. 2005, 6 Ads 62/2003-31.

[11] ÚS, judgment of 3 Aug. 2010, III. ÚS 939/10.

[12] NSS, order of 4 Feb. 2010, 3 Ads 80/2009-102.

[13] ÚS, judgment of 12 Aug. 2010, III. ÚS 1012/10.

precedent-based) binding force of the decision requested from the Court on a preliminary ruling in a parallel case.[14]

The euro-challenge

The Czech accession to the European Union in May 2004 added to this national dispute the European dimension. The originally bilateral international agreement between the Czech Republic and Slovakia of 1992 became embedded into the framework of Regulation No. 1408/71.[15] Point 9 of Annex III(A) to the Regulation stated that the key articles of the Czecho-Slovak Treaty on Social Security of 1992, namely Articles 12, 20, and 33, shall be applied as *lex specialis* within the regulation system. This was essential for any pension decisions issued after the Czech accession to the EU. The pension entitlements accrued before 1992 within the unitary Czechoslovak system were after 2004 calculated as pension entitlements coming from another member state of the EU, subject to the criteria established by the 1992 bilateral treaty which was absorbed into the Regulation 1408/71.

Even if the Czechoslovak pensions were a specific case under the Regulation 1408/71, the general principles of the Regulation were still applicable. The general principle applicable in this area, as well as transversally in EU law, is the prohibition of discrimination on the basis of nationality.[16] The *ÚS* case-law requiring the special supplement to be paid only to the Czech citizens who are resident on the territory of the Czech Republic could be seen as direct discrimination on the basis of nationality with respect to the citizenship condition and indirect discrimination on the same basis with respect to the residency requirement.[17]

After the Czech accession to the EU, the *NSS* invited the *ÚS* to reconsider its position in view of the changed legal situation. It expressly made the point that the *ÚS* case-law became incompatible with EU law.[18] This offer was met, however, with a firm refusal on the part of the *ÚS*.[19] The arguments with respect to the incompatibility with EU law were nonetheless not addressed. The *ÚS* merely

[14] The opinion of the *ÚS* in this respect was at odds with both: ECJ, Case C-210/06 *CARTESIO Oktató* [2008] ECR I-9641 as well as ECJ, Case C-173/09 *Elchinov* [2010] ECR I-8889.

[15] Council Regulation No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

[16] Art. 3(1) of the Regulation No. 1408/71; Art. 18 TFEU and Art. 21(2) of the Charter.

[17] *See also* Art. 10(1) of the Regulation No. 1408/71.

[18] NSS, judgments of 23 Feb. 2005, 6 Ads 62/2003-31 and of 26 Oct. 2005, 3 Ads 2/2003-112.

[19] ÚS, judgments of 13 Nov. 2007, IV. ÚS 301/05; of 25 Jan. 2005, III. ÚS 252/04; and of 20 March 2007, Pl. ÚS 4/06 respectively.

insisted that there was no EU law element to the Czechoslovak pensions, even after 2004.[20]

In and after 2007, the dispute appeared to calm down. The administrative courts and the Czech social security administration became, willingly or not, bound by the decisions of the *ÚS*, rendered eventually by the plenary court. There was nowhere else to go within the national legal order. At the same time, in the silent reversal of its previous case-law on admissibility of preliminary rulings *ratione temporis* in *Ynos*,[21] the Court sent the message that requests for preliminary rulings from the new member states were not welcome too early after the enlargement.[22] It was thus not until 2009 that a 'post-accession' case of Czechoslovak pensions made its way up the judicial system and was taken up by the *NSS* as the suitable vehicle for requesting the opinion of the Court on the matter. By that time also, the Court had considerably qualified (or even silently reversed) the *Ynos* holding.[23] This made cases with facts originating partly prior to the accession admissible on preliminary rulings.[24]

The *NSS* took the opportunity to request a preliminary ruling on this matter by an order of 23 September 2009, in the case of Mrs Marie Landtová.[25] The manner in which the request for a preliminary ruling was phrased hardly allowed the Court to reply in any other way than it replied, provided that it wished to decide the merits of the case. Both Advocate-General (AG) Cruz Villalón in his Opinion of 3 March 2011, as well as the Court in the judgment of 22 June 2011, confirmed that a member state can provide for additional pension supplements. Such supplements cannot, however, be subject to discriminatory conditions based on nationality or residence.[26]

Both the judgment of the Court as well as the AG's Opinion were nonetheless very accommodating towards the *ÚS* and the situation of the Czechoslovak pensioners. Although they declared the way in which the supplements were currently granted incompatible with EU law, they at the same time left the door open to the Czech legislature or the *ÚS* itself to reconsider the future position or case-law. Equally, it was stressed that EU law does not require those individuals already

[20] But *see* the dissenting opinion of Justice Nykodým to the plenary judgment Pl. ÚS 4/06.

[21] ECJ, Case C-302/04 *Ynos kft* [2006] ECR I-371.

[22] Critically M. Bobek, 'Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice', 45 *CML Rev* (2008) p. 1611, at p. 1616-1620; or N. Półtorak, 'Ratione Temporis Application of the Preliminary Rulings Procedure', 45 *CML Rev* (2008) p. 1373.

[23] *See* in particular ECJ, Case C-64/06 *Telefónica O2 Czech Republic* [2007] ECR I-4887; Case C-168/06 *Ceramika Paradyż* [2007] ECR I-29; and later Case C-96/08 *CIBA* [2010] ECR I-2911.

[24] If point 37 of the *Ynos* decision were applied, the *Landtová* case would not had been admissible *ratione temporis*, as fair portion of the facts of the case in the main proceedings preceded the Czech Republic's accession to the EU.

[25] NSS, order of 23 Sept. 2009, 3 Ads 130/2008-107.

[26] ECJ, Case C-399/09 *Landtová* [2011] ECR I-5573.

benefiting from 'unlawful' pension supplements to be deprived of them. The decision was prospective, allowing for a 'face saving exit' for all the actors concerned.

The retaliation

In ancient Greek drama, an apparently insoluble difficulty in the plot would be resolved by the unexpected and often sometimes artificial descent of a god on the stage. The timely arrival of a *deus ex machina* would allow all the characters to reconcile and the curtain to go down.

The pulling of the Court into the on-going feud between the Czech courts might have provided such an opportunity. After the Court's *Landtová* decision, most of the spectators, including the author of this contribution, expected a speedy legislative intervention, implementing the tenets of the holding of the Court, followed by a diplomatic re-evaluation of own case-law by the *ÚS*. Alternatively, the other conventional course of action might have been for the *ÚS* to submit its own request for a preliminary ruling to the Court, stressing its points of view and approach, and asking the Court to reconsider.[27]

To general surprise, however, the *ÚS* used a parallel pending case in another dispute involving a different Czechoslovak pension claim to turn a promising Greek drama into an absurd, Ionescu-styled piece. In its plenary decision of January 2012, involving a pension claim of Mr Holubec,[28] the *ÚS* declared the June 2011 judgment of the Court to be an *ultra vires* act, by which the Court exceeded the powers transferred by the Czech Republic to the EU. The *ÚS* simply denied that Regulation No. 1408/71 would be applicable to the cases of Czechoslovak pensions, in spite of the Regulation clearly stating the contrary, and accused the Court of the ignorance of the European history.

To discuss the (absence of) substantive reasons of the *ÚS* for reaching such a sweeping conclusion is not the aim of this contribution. Attempting to do so would furthermore be a rather thankless job, limited to second-guessing or creating, *ex post,* the virtually non-existent reasoning of the *ÚS*. The *Holubec* decision of the *ÚS* cannot be understood by reading its text. It is the context of the decision, composed of both the past fabric of national case-law and its political undertones, coupled with subtext messaging between the lines of the reasoning of the *ÚS*, as well as subsequent reaction of the various actors and in particular the subsequent case-law of the *ÚS* itself, that may give a more understandable picture of what happened and why.

[27] Modelled on the German constitutional approach announced in BVerfG of 6 July 2010, 2 BvR 2661/06 (BVerfGE 126, 286) and recently implemented in BVerfG of 14 Jan. 2014, 2 BvR 2728/13, online at <www.bverfg.de>.

[28] ÚS, plenary judgment of 31 Jan. 2012, Pl. ÚS 5/12, available in English at <www.usoud.cz>.

The aftermath

The first part of this article has portrayed the *Holubec* decision as a prolongation or externalisation of a national judicial feud spanning over a decade. The focus of the second part is arguably even more important, as it outlines what happened next, after the *ÚS* have 'pulled the ultimate trigger' of EU law.

Shortly after its announcement, the *Holubec* decision started resonating all around Europe, in both academic as well as judicial circles. This was hardly surprising, as the *ÚS*, in a somewhat twisted *Star Trek* scenario, appeared to 'boldly go where no man has gone before'. The ripples the decision caused in the EU law community and beyond differed nonetheless considerably. The potential conceptualisation of the decision ranged from signalling, in particular in conjunction with other recent critical decisions of national courts,[29] the dawn of a larger crisis in the legitimacy of the Court and authority of EU law in the member states, to discarding it as a one-shot oddity that happened in a somewhat peculiar judicial environment of a new Member State.[30]

Nejvyšší správní soud*: The victor without the spoils?*

After receiving the answer of the Court in *Landtová*, the *NSS* applied the holding of the Court to the original case at hand. In its final decision,[31] the *NSS* noted that the national practice which was incompatible with EU law has its roots only in the case-law of the *ÚS*. The *NSS* thus implemented the decision of the Court by denying binding force to the relevant case-law of the *ÚS*. Apart from that, the judgment of the *NSS* also included two jabs at the ÚS. First, the *NSS* noted that with respect to the post-2004 constitutional case-law on Czechoslovak pensions, the *ÚS* went beyond its competence, as the competent and ultimate interpreter in matters of EU law was the Court and not the *ÚS*. Thus, the previous case-law of the ÚS involving the (non-)interpretation of EU law was in fact *ultra vires*. Second, the *NSS* stressed that it did not doubt the ultimate power of the *ÚS* to interpret the Czech Constitution, including the definition of national constitu-

[29] In particular the judgment of the Polish Constitutional Tribunal of 16 Nov. 2011, SK 45/09, in English translation at <http://trybunal.gov.pl/en/case-list/judicial-decisions>, that subjected Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and enforcement of judgments (the Brussels I Regulation) to direct judicial review as to its compatibility with the Polish Constitution.

[30] Apart from the analysis offered in the works cited *supra* n. 4, *see also* for instance A. Dyevre, 'Judicial Non-Compliance in a Non-Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?', online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2084639>, visited 10 Feb. 2014 or Georgios Anagnostaras, 'Activation of the Ultra Vires Review: The Slovak Pensions Judgment of the Czech Constitutional Court', 14 *GLJ* (2013) 959.

[31] NSS, judgment of 25 Aug. 2011, 3 Ads 130/2008-204.

tional limits to European integration and the degree of permissible transfer of competence onto the Union.[32]

The *ÚS* reaction in *Holubec* some five months later, however, undermined this judicial self-assertion. In its final decision on *Landtová*, the *NSS* acknowledged the power of the *ÚS* to pass ultimate pronouncements on the interpretation of the Czech Constitution. It merely insisted that the *ÚS* is not the ultimate interpreter of EU law. However, now the *ÚS,* the ultimate interpreter of national constitutionality says, while calling the bluff and raising the stakes, that the *Landtová* decision could not be legitimately passed by the Court. Consequently, the *ÚS* has 'rebounded' the *NSS* back to Czech constitutionality, as defined by the *ÚS*. Unless, of course, the *NSS* would have made the last logical step and declare that it believed that EU law has unqualified primacy over the Czech constitution as well.

The *NSS* perhaps never wished to go that far. Against such context, the *NSS* submitted a second request for a preliminary ruling in May 2012.[33] In contrast to the reasoning of the *NSS* in *Landtová*, the reasoning of the NSS can be said to be much more nuanced. In fact, the *NSS* was reasoning for and in the place of the *ÚS*. In particular, in the second question submitted, the *NSS* asked whether or not the direct discrimination on the basis of nationality with respect to the special pension supplement available only to the Czech citizens may not be still justified by virtue of Article 4(2) TEU. The *NSS* suggested that the split of the Czechoslovak federation and its consequences form part of the national constitutional identity and should be respected as such. Moreover, the situation relates to the facts long passed, which cannot in any way affect current and future free movement of workers within the Union.[34]

Submitting a second request for a preliminary ruling by the *NSS* might be interpreted in several ways. The more idealistic approach would suggest that the *NSS* was saving the day by duly cooperating with and bringing to the attention of the Court the arguments the *ÚS* should have asked itself by a preliminary ruling in the first place, if its stubbornness and false pride had not taken the better of it.[35] The more realistic view might suggest that the *NSS* was above all trying to save itself from the impossible position it put itself into by asking the question at all in *Landtová* and then facing the vexed retaliation in *Holubec*. As it apparently was not ready to draw the ultimate consequence by declaring its full and unreserved allegiance to Luxembourg irrespective of what the *ÚS* says, it needed somebody to reconsider.

[32] Ibid. [71] and [76].

[33] NSS, order of 9 May 2012, 6 Ads 18/2012-82.

[34] Ibid. [53-67].

[35] But also, the arguments that the Court could have already addressed and dealt with in *Landtová* if it were ready to read a 'mere letter' submitted to it by the *ÚS* and engage with the ÚS on that basis – *see* n. 83 *infra*.

Perhaps luckily for the Court, the case that gave rise to the second request for a preliminary ruling by the *NSS* was eventually settled. Luckily because the position the Court had found itself in once the order of the *NSS* submitting the second question arrived[36] was not easy. On the one hand, to simply reaffirm its case-law on primacy and the absence of binding force of national superior decisions if incompatible with EU law[37] might have been seen as inconsiderate, not just from the side of the *ÚS*. On the other hand, to reconsider and to pull back would be considered a sign of weakness. To find a compromise solution which would have looked neither retreating nor insulting would be difficult. The case, however, was settled following the intervention of the Czech Government.[38] Consequently, the Court struck the case off the register.[39]

In decisions that followed after the withdrawal of the second request for a preliminary ruling,[40] the *NSS* maintained that the case-law of the *ÚS,* as far as it is contrary to the holding of the Court in *Landtová* is devoid of any domestic binding force. At the same time, however, the *NSS* declined to submit again the questions formulated in *JS*. The *NSS* adopted the construction that following *Landtová*, the domestic application of the case-law of the *ÚS* has been excluded. Once the constitutional case-law is set aside, there is in fact no further dispute that would require any new involvement on the part of the Court. Thus, the interpretation of Union law is an *acte éclairé* and there is no need to submit the question to the Court again.

In adopting this construction, the *NSS* was nonetheless also obliged to declare the *Holubec* decision of the *ÚS* devoid of any domestic binding force because of it being equally adopted outside the scope of competence of the *ÚS*. Thus, whereas the *ÚS* claimed that the Court finds itself *ultra vires* in *Landtová*, the *NSS* states that the ÚS is *ultra vires* in *Holubec*. However, the latter suggestion is not logically consistent: the *NSS* could have maintained that the pre-*Holubec* case-law was adopted outside the scope of competence of a national constitutional court, because it concerned the interpretation of Union law, which is the competence of the Court. However, in *Holubec*, the *ÚS* expressly changed the playing field (back) to national constitutionality, by stating, wrongly or not, that *Landtová* is *ultra vires* from the point of view of the Czech Constitution. Now, discarding the domestic binding force of *Holubec* is not possible: implicitly, the *NSS* is denying the power

[36] ECJ, Case C-253/12 *J. S.*, case notice published in OJ C 273/2 of 8 Sept. 2012.

[37] Along the lines of ECJ, Case C-173/09 *Elchinov* [2010] ECR I-8889 or Case C-416/10, *Križan,* judgment of 15 Jan. 2013, n.y.r.

[38] NSS, order of 23 Jan. 2013, 6 Ads 18/2012-191.

[39] ECJ, Order of 27 March 2013 in Case C-253/12 *JS,* notice in OJ C 225/57 of 3 Aug. 2013.

[40] Cf. in particular NSS, judgments of 30 May 2013, 4 Ads 116/2012-43, and of 28 Aug. 2013, 3 Ads 183/2011-96.

of the *ÚS* to define the scope of national constitutionality, and became inconsistent with respect to its final *Landtová* decision, and own previous case-law.

In sum, the *NSS* sought to reaffirm its own position without, however, ultimately submitting to neither the Court nor the *ÚS*. In doing so, it run into the logical difficulty described. The fact that the *NSS* appears no longer interested in submitting anew its second request for a preliminary ruling in order to resolve this inconsistency may be attributed to external changes, examined in the ensuing points of this section: the intervention of the Czech legislature and, above all, the striking post-*Holubec* case-law of the *ÚS*.

Finally, why then should the *NSS* remain the 'victor without the spoils', if it appears to have eventually succeeded in its 'liberation' and self-affirmation within the national judicial system? First, as is apparent from the previous discussion, whether *Landtová* was in the end a victory for the *NSS* far from clear. The *NSS* put itself into an impossible position and was eventually forced to retreat. Second, the protracted judicial dispute, which the *NSS* externalized by bringing it onto the European level, has gradually worn out everybody. Third, from the very beginning, the position maintained by the *NSS* has hardly won it many hearts. In a simplified popular perception, which nevertheless still fuels diffuse support and legitimacy of an institution, it might have been rather the 'good' *ÚS* who understood the special context of the split of the federation and wished to protect the elderly citizens from its adverse consequences and the 'bad' *NSS* that kept insisting on taking the special supplement away from them.

Ústavní soud*:* Holubec *without* Holubec*?*

The *ÚS* case-law rendered after the January 2012 *ultra vires* declaration in *Holubec* is remarkable. In a handful of cases handed down between February 2012 and December 2013 and relating in one way or another to the Czechoslovak pensions, the *ÚS* never again applied *Holubec*. Instead, while sometimes invoking *Holubec* at least in passing and at other times not even mentioning it at all, the *ÚS* started narrowing or distinguishing *Holubec* considerably. The *ÚS* for instance held (without really explaining why) that *Holubec* and the previous constitutional case-law are applicable only to old age benefits but not to invalidity benefits.[41] *Holubec* is not applicable to cases when the individual acquired Czech citizenship only later through naturalisation and not at the time of division of the Federation.[42] From the scope of application of the *Holubec* decision are also excluded cases in which the combination of the partial Czech and Slovak pensions is in sum higher than

[41] ÚS, order of 24 Jan. 2013, III. ÚS 181/12.
[42] ÚS, order of 19 June 2012, IV. ÚS 3400/11.

would be a pension calculated on only on the basis of Czech legislation topped up with the supplement.[43]

Without wishing to enter into the discussion of the very technical details of the individual cases, the gist of the post-*Holubec* case-law is to affirm, at least on its surface, the ideological dimension of previous case-law on Czechoslovak pensions without the constitutional and procedural implications of *Holubec*. The *ÚS* maintains that its task is to guarantee fair and decent treatment of individuals[44] who might have been harmed in their pension rights as a consequence of the split of the Federation. At the same time, however, the extreme self-containment policy and the sometimes not very convincing distinguishing or narrowing of previous case-law signal that the policy chosen is a silent retreat from *Holubec*.[45]

Two last points should be added with respect to the post-*Holubec ÚS*. First, as will be discussed later on,[46] in 2012, the personal renewal of the *ÚS* started. Between 2012 and 2015, the *ÚS* is being completely renewed. However, in all the seven or eight cases decided in matters of Czechoslovak pensions since *Holubec*, it was the outgoing members of the *ÚS* who were the reporting judges. All of them voted with the majority in *Holubec*. Thus, this change in approach cannot (yet) be attributable to the changed composition of the *ÚS*. It is a retreat sounded by the same court. Second, in July 2013, the *ÚS* received a petition from the *Krajský soud* v. *Ostravě* [Regional Court in Ostrava], requesting an abstract review of constitutionality of the first as well as the second of the legislative solutions, i.e., the new Czech laws on social security, adopted after the *Holubec* ruling.[47] It remains to be seen how far the new *ÚS* will be able to dodge such a straight question on its post-*Holubec* position.

The legislature (and the executive): A sleeper has finally awoken

Should it be the role of the legislature to 'pacify' squabbling courts? If so, at which stage should the legislature step in? When the dispute no longer generates any positive tensions in terms of law creation? When the judicial squabbling reaches such a level as to threaten the goods the courts are called to protect, i.e., indi-

[43] ÚS, judgment of 5 Sept. 2012, II. ÚS 2524/10 or order of 26 Nov. 2012, I. ÚS 3650/11.

[44] The expression chosen matters: there is a shift in the rhetoric of the *ÚS*. In, e.g., the order of 26 Nov. 2012, I. ÚS 3650/11, the *ÚS* referred primarily to the protection of 'persons' after the division of Czechoslovakia, not just to the protection of Czech 'citizens'.

[45] Or even silent overruling: for instance, ÚS, order of 19 June 2012, IV. ÚS 3400/11, denying the supplement to a person who acquired the Czech citizenship only later, is on its merits incompatible with decisions of 25 Jan. 2005, III. ÚS 252/04 and (even a plenary judgment) of 20 March 2007, Pl. ÚS 4/06, in which the claimant also acquired the Czech citizenship later.

[46] *See* text to n. 60 *infra*.

[47] Case Pl. ÚS 36/13, pending.

vidual rights? When the same squabbles start damaging the reputation of the member state in Europe and abroad?

To determine such a moment in an abstract way is difficult. The dubious advantage with respect to the issue of Czechoslovak pensions is that all of these hypothetical thresholds had already been reached before the Czech legislature deemed fit to intervene. The reasons for such legislative hesitation are not difficult to find. First, as was already explained,[48] there was strictly speaking no problem of a legislative origin. The social security legislation provided for the situation in question was, at least to those few who understand its complexities, clear. The problem was the case-law of the *ÚS*. To legislate side-by-side or even against the case-law of the *ÚS*, which additionally for a number of years was not unified and clear, would be a thankless job. Second, there were always the pondering financial implications of any legislative intervention. Over the years, there have been a number of calculations of what the (full) implementation of first the case-law of the *ÚS* and then the *Landtová* decision of the Court would mean for the state budget. Most of them run into hundreds of millions of Czech Crowns (millions of euros). This might also explain why the (executive-dominated) legislature appeared not too keen to intervene.

The situation changed swiftly with *Landtová* and then *Holubec*. In *Landtová*, the Court stated that as long as measures reinstating equal treatment have not been adopted, the observance of the principle of equality can be ensured only by extending the same benefit to everybody. However, the Court also added that 'EU law does not, provided that general principles of EU law are respected, preclude measures to re-establish equal treatment by reducing the advantages of the persons previously favoured.'[49]

It was perhaps not surprising that this statement resonated very favourably with the Czech Government. Facing the potential of claims for supplements by non-citizens, an amendment to the law on social security was quickly brought into the Chamber of Deputies already in August 2011. The amendment was 'smuggled into' the second reading of a different but already pending bill and attached to it by a deputy sympathetic to the government.[50] This ensured that the first post-*Landtová* amendment entered into force already in December 2011.[51]

This first post-*Landtová* amendment provided for two things. First, it abolished the special supplement with respect to everybody. Second, it made the abolition merely prospective: no new supplements shall be granted, but those already grant-

[48] *See* text to n. 7 *supra*.

[49] *Landtová* [53].

[50] *See* Parliamentary print No. 414/3 of the 6th election period (31 Aug. 2011), available at <www.psp.cz>.

[51] As part of Act No. 428/2011 Coll.

ed would continue being paid.[52] In this way, the Czech legislature implemented the *Landtová* decision in a 'minimalist' fashion. It removed the discrimination by taking the benefit away from everybody. Such a reaction could nonetheless have been expected. Courts like to state in general that removing discrimination in similar situations should not necessarily mean 'levelling down' and treating 'all equally badly'.[53] However, in cases of considerable financial implications for the government, it will inevitably mean precisely that, unless the levelling-down would also be expressly prohibited, for instance by substantively underpinning the prohibition of discrimination with other rights or principles, such as human dignity. Universal 'levelling-down' is even more likely to ensue once the Court puts the government under considerable time pressure by stating that as long as the judgment is not complied with, the preferential treatment is *automatically* extended to everybody.[54] The reaction of any government is likely to be hastily shut down the whole scheme, even if, as will be shown immediately, the government would be able to come up with something more balanced if given a little more time to think about it properly.

In January 2012, i.e., few weeks after its entry into force, the *ÚS* stated as an 'obiter dictum' in *Holubec* that the newly adopted amendment which entered into force in December 2011 was 'obsolete'. It stated that as the amendment was implementing an *ultra vires* judgment of the Court that has no legal effect on the territory of the Czech Republic, the amendment cannot have any legal effects either.[55]

However, the legislature understood that the amendment could face problems in the *ÚS* in the future. It therefore drew up a second post-*Landtová* amendment, which entered into force on 1 December 2013.[56] The second amendment repeals the first. It (re)introduced the special supplement, but does so in a nuanced and balanced way.[57] The second amendment tries to satisfy both, the requirements of EU law as well as, as far as possible, the *ÚS*. First, the supplement becomes a regular social benefit, no longer just discretionary. Second, the new amendment makes its award conditional upon a number of requirements, none of which, however, is bound to citizenship or permanent residence. The new conditions for

[52] Art. XII point 18 and Art. XIII of Act No. 428/2011 Coll.

[53] Cf. the discussion by the AG Cruz Villalón in [53-73] in his Opinion in *Landtová*.

[54] *Landtová* [51], relying on the Case C-18/95 *Terhoeve* [1999] ECR I-345.

[55] Point IX. of *Holubec*. It might be added that the amendment was not even applicable or in any way involved in the *Holubec* case. However, as with many other elements in the *Holubec* decision, the *ÚS* just felt the desire to pronounce itself on it as well, apparently not being bound by such minor technical details as the scope of a case.

[56] Act No. 274/2013 Coll.

[57] For further detail going beyond this rude summary, *see* the (for the Czech legislative standards excellent) explanatory report submitted with the bill as a part of the Parliamentary print No. 905/0 of the 6th election period, available at <www.psp.cz>.

the award of the supplement nonetheless require a 'closer link' of the claimant with the Czech and Czechoslovak social security system. Thus, the claimant must have accumulated a period of at least 25 years of Czechoslovak insurance before 1992 for which she was granted a pension from the Slovak social security system. After the split of the Federation, the claimant must have acquired at least a one-year insurance period in the Czech social security system.[58]

It remains to be seen whether the thoroughly prepared second amendment will withstand all the potential judicial scrutiny ahead of it. The new legislation eventually adopted nonetheless sincerely tries to square a circle by respecting the ideological tenets of the *ÚS* case-law (the Czech Republic is obliged to protect the individuals from adverse consequences resulting from the split of the former Federation) with the requirements of EU law (this cannot be directly or indirectly discriminatory on the basis of nationality) while keeping the state budget afloat and the administration of the entire system still manageable.

Legal solutions from beyond the law

There are two further points that ought to be mentioned in order to complete the post-*Holubec* picture. They are, strictly speaking, not attributable to any premeditated behaviour of any of the actors involved: they just happened. They might nonetheless eventually have an even greater impact on the entire saga than its actors.

First, as was already explained,[59] the entire problem with Czechoslovak pensions started in the second half of 1990s as an economic problem that spilled over into the legal domain. Today however, with the gradual reforms of the Slovak social security system carried out in the last few years, it would appear that the Slovak pensions (or the Slovak segments of Czechoslovak pensions) are no longer as low as they used to be in the 1990s. In a number of cases for pension calculations made with respect to the more 'fresh' pensioners but still with some Czechoslovak insurance periods, the sum of the partial Czech and Slovak pensions might be higher than the sum of the Czech-only pension topped up with the special supplement. Thus, elegantly and rather silently, the economic crux of the problem is in fact disappearing, as asking for the special Czech supplement might no longer be profitable in most cases.

Second, the justices at the *ÚS* serve a ten-year mandate. The term of office of the members of the Second *ÚS,* which issued *Holubec,* lapses between the mid-2012 and 2015. Thus, a complete renewal of the *ÚS* is currently underway. Moreover, the overall exchange is coupled with important personal moves: two eminent

[58] New § 106a of the Act No. 155/1995 Coll., as amended by the Act No. 274/2013 Coll.
[59] *See* text to n. 5 and 6 *supra*.

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members of the *NSS*, previously involved in the saga at the side of the *NSS*, became members of the *ÚS*. On the other hand, a former member and the former secretary general of the *ÚS* were recently appointed judges at the *NSS*. Already the outgoing *ÚS* sought to 'contain' *Holubec* by a series of distinctions and narrowing, bordering on silent overruling.[60] This move might be further cemented by the arrival of new constitutional judges who would be very unlikely to have ever agreed with the *Holubec* decision in the first place.

Eventually, therefore, it might be that the most 'efficient' solutions to a legal problem come from beyond or outside the law. Economic changes and the lapse of (some) time, including the corresponding institutional renewal, banal as they may sound, might be more efficient than any strong legal or political actions taken immediately after.

An evaluation: The revolt that did not take place

With the benefit of (some) hindsight, the picture that emerges from the analysis offered in this article is not one of judicial revolts or revolutions 'against Europe'. The resulting picture is rather one of a deeply vexed and not entirely competent court that saw its position threatened. It wanted to send a certain message to a certain constituency. For that purpose, however, it reached for a vocabulary and techniques that signal many different messages to much broader constituencies.

Holubec is an odd case about judicial weariness and judicial ego. There was the weariness on the part of the *ÚS* of the disobedience of the administrative courts that now sought to buttress their insubordination with the help of EU law. How much the Czechoslovak pension saga eventually became just a game of judicial egos may be perhaps illustrated by the position of Mr Holubec himself. In the *Holubec* litigation, it was the pension of Mr Holubec that was supposed to be the object of the dispute. In its decision, the *ÚS* restated in the strongest possible terms that Mr Holubec is entitled, in line with its previous case-law, to a Czech pension plus the special supplement. The problem was that in his particular case, the pension already awarded to Mr Holubec on the application of the Regulation 1408/71 as the combination of the Czech and Slovak partial pensions was in total higher than what he could receive if the constitutional case-law was to be followed, i.e., if his pension were calculated solely as a Czech pension topped up by the supplement. This fact notwithstanding, the *ÚS* issued a remarkable judgment, in which it stated that it felt compelled to declare a decision of the Court *ultra vires*, and that the pension of Mr Holubec ought to be calculated as a Czech pension plus the special supplement. One may only speculate whose rights the *ÚS* sought to

[60] *See* text to n. 41-45 *supra*.

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protect.[61] It is nonetheless clear that it was not the rights of Mr Holubec, because if the Czech Social Administration were to follow the decision of the *ÚS*, they would have to *lower* the total pension of Mr Holubec.[62]

Holubec is not a case of premeditated or a larger scale national constitutional revolt against Europe. Such a scenario would arguably require broader support and allegiance within a member state, resulting in a large-scale contestation of the authority of the Court or EU law as such. Instead, one sees an isolated constitutional court which, although originally driven by good intentions perhaps, decided now to wage a bitter crusade against everybody:[63] the national social security administration, the government, the administrative courts represented by the *NSS*, and the somewhat indifferent (and executive-dominated) legislature. Against this background, the Court may be seen, at least to some extent, as just another 'collateral fatality' in a series of shots fired primarily at somebody else: the Czech administrative courts and the Czech social security administration.

As the entire saga has always been 'national' at its heart, it may be suggested that it was indeed wise for the other EU institutions to remain, as far as possible, outside of it, even after the *Holubec* decision. The EU institutions could have considered political or legal action against the Czech Republic. After all, for all practical purposes a 'supreme' court of one member state had just formally refused to comply with a decision of the Court. However, pursuing the matter politically, issuing condemning press statements, or even launching Article 258 TFEU infringement proceedings,[64] would have created more damage than benefits in the case of a derailed national constitutional court. In similar situations, it may be advised to keep such an institution with minimal national support isolated and brought gradually to its senses internally. Formalized external pressure put on all institutions of a Member State, including those which originally disagreed, might

[61] The somewhat novel constitutional law approach, suggesting that the *ÚS* was protecting its own 'human rights', is discussed *infra*, text to n. 85

[62] In reaction to the decision of the *ÚS* in *Holubec*, the Czech Ministry of Labour and Social Security diplomatically stated in a press release that the pension of Mr Holubec will remain the same, i.e., calculated on the basis of Regulation 1408/71 as a combination of partial Czech and Slovak pensions. The ministry said that they assumed that it was certainly not the intention of the *ÚS* to take away part of Mr Holubec´s pension by excluding the application of Regulation 1408/71. In: press release of the Ministry of Labour and Social Security of 16 Feb. 2012, available online at <www.mpsv.cz/files/clanky/12417/tz_160212.pdf>, visited 10 Feb. 2014.

[63] The position of the *ÚS* received public support (certainly as far as the ideal and values underlying it were concerned) only from the Public Defender of Rights (the Ombudsperson). Cf. '*Stanovisko veřejného ochránce práv k nálezu ÚS ze dne 29. 3. 2007*' ['Opinion of the Public Defender of Rights on the Judgment of the Constitutional Court of 29 March 2007'] of 4 April 2007, online at <www.ochrance.cz/tiskove-zpravy/tiskove-zpravy-2007/stanovisko-verejneho-ochrance-prav-k-nalezu-us-ze-dne-29-3-2007>, visited 10 Feb. 2014.

[64] Cf. ECJ, Case C-154/08 *Commission* v. *Spain* [2009] ECR I-187, *see also* Case C-129/00 *Commission* v. *Italy* [2003] ECR I-14637.

only generate potential allies for the derailed constitutional court. Others might end up defending it.

Holubec is likely to enter EU law textbooks as *the* case in which, to the general surprise, the Czech *ÚS* did in eight years after the Czech accession to the EU what the German *Bundesverfassungsgericht* has only been theorizing about for decades. It became the first case in which the *ultra vires* doctrine was applied by a national court. The problem is that if read and understood in its context, it is difficult to put the case into the textbooks under this heading. The *Holubec* decision says something else than it apparently wanted to do. The prior evolution, the context, and the subsequent actions appear to be out of sync with the language of the decision.

Taking into account the whole Czechoslovak pension saga outlined here, may it be concluded that it is over now? Welcome as it would be, such conclusion cannot be offered yet. Nobody can predict in what strange variations the saga may continue or reignite. There might be further domestic review or problems with the new (second) legislative framework, reasonable as it may appear. The European Court of Human Rights (ECtHR) in Strasbourg might get involved at some stage in some of these cases.[65] Finally, and most interestingly, the Czech constitutional case-law might be unexpectedly revived in Slovakia, especially as the Slovak pensions for some segments of pensioners became higher.[66]

However, on the whole, and whilst running the danger of being proven blatantly wrong later on, it may be suggested that at least with respect to the Czechoslovak pensions as administered by the Czech Social Security Authorities, the heat is off. The combined effect of a new and decent legislative framework adopted, the exhaustion of most of the actors involved, change in the economic basis of the respective pension systems and renewal of the *ÚS* provide the reason for a moderate optimism.

Implications for the preliminary rulings procedure

The argument presented so far in this article suggested that *Holubec*, if read and understood in its context, poses no lasting threat to primacy, unity, and other sacraments of the EU legal order. It was a bad call by a derailed and outgoing

[65] Cf., e.g., ECtHR, judgment of the Grand Chamber of 18 Feb. 2009, *Andrejeva* v. *Latvia*, Case No. 55707/00, in which the GC held that Latvian refusal to pay full pension to Latvian non-citizens who have worked their entire life on the territory of Latvia and are resident there violates Art. 14 of the European Convention taken in conjunction with Art. 1 of Protocol No. 1.

[66] Cf. For instance the judgment of Slovak *Najvyšší súd* [Supreme Court] of 30 Jan. 2013, 9So/203/2011, available at <www.supcourt.gov.sk>, in which the court takes over (without expressly quoting) the construction of the Czech *ÚS* and obliges the Slovak Social Security Authority to top up the lower Czech pension of a Slovak citizen.

national constitutional court. It would be nonetheless perhaps too easy to discard the entire saga and (hopefully) its climax in *Holubec* as an 'uninformed mistake' committed by a bunch of post-Communist judges who do not (yet) know how to behave in the European judicial space. Bad decisions rarely happen out of the blue. They tend to be the result of a series of factors that pushed the actor in certain direction.

The task of this section is to flag and discuss some of the structural factors within the preliminary rulings procedure that might push a national (constitutional) court towards similar extreme positions. The purpose is certainly not to justify the *ÚS*'s jumping off the cliff. It is rather to explain why and how a national constitutional or supreme court might see itself pushed towards the edge of the cliff. More importantly, would it be possible to avoid similar cases in the future? If so, what insights might the entire saga provide for the preliminary rulings procedure?

The atomisation of national judicial hierarchies

Article 267(2) TFEU states that *any* court or tribunal *may* submit a request for a preliminary ruling to the Court. For many years in the past, the exercise of the faculty to request a preliminary ruling by lower courts was made subject to national procedural provisions. Equally, what consequence and how a lower court may draw from a possible incompatibility of national and EU law was no doubt already implicit in earlier case-law on primacy.[67] It has not been, however, expressly dwelled upon by the Court.

Over the last few years, however, the case-law of the Court became much more explicit and assertive on what might be called 'atomisation' of national judicial hierarchies. To mention just a few recent examples: a lower national court cannot be precluded from making a request for a preliminary ruling by a superior court;[68] previously rendered higher courts' decisions which the lower court believes to be incompatible with EU law have no binding force in the national legal system, be it in the relation between ordinary courts[69] or between an ordinary court and a national constitutional court.[70] Moreover, a lower national court is entitled to assess such incompatibility with EU law and to draw the consequences on its own, without being obliged to request the opinion of the Court on the matter.[71]

[67] Already for instance ECJ, Case 106/77 *Simmenthal* [1978] ECR 629 or Case C-348/89 *Mecanarte* [1991] ECR I-3277.

[68] ECJ, Case C-210/06 *CARTESIO Oktató* [2008] ECR I-9641, which in fact reversed Case 146/73 *Rheinmühlen* [1974] ECR 139.

[69] ECJ, Case C-173/09 *Elchinov* [2010] ECR I-8889.

[70] ECJ, Case C-416/10 *Križan*, judgment of 15 Jan. 2013, n.y.r.

[71] *Elchinov* [28 and 31] or also Case C-555/07 *Kücükdeveci* [2010] ECR I-365 [54 and 55].

The combined effect of this case-law is considerable atomisation of national judicial hierarchies. Again, it is certainly not suggested that some of these consequences would not follow already from earlier case-law relating, in particular, to primacy. There is also no doubt that some of these situations might have been in fact happening in practice in the past. However, in the course of the last decade, following the last two waves of EU accession in 2004 and 2007 and the request for a preliminary ruling in this regard flowing from, in particular, the new member states, these consequences became much more visible and explicit.

A number of questions arise in relation to this line of cases, both normative and empirical. *Normatively*, is this a wise policy? It might be understandable from a short-term perspective, displaying perhaps the need of greater engagement and penetration of EU law into the national legal orders. But is it wise in the mid-term or long-term perspective, in particular in institutional settings in which national judiciaries are built up as hierarchical systems? Traditionally, national judges have been portrayed as being bound by both national law as well as EU law. EU law would authorise a national judge not to be bound by national law, if incompatible with EU law. Implicitly, however, this consequence is based on the assumption that the same judge will feel, in turn, bound by EU law. Is the eventual image of the kingdom to come a new hierarchy, with the Court at its apex, but with just randomly moving, loose set of atoms beneath? But for this to happen, further institutional changes would be necessary. What if and instead, however, the consequence would rather be not to be bound by anything at all? To make a metaphorical parallel here: imagine a new general coming into a joint command and suggesting that the soldiers do not need to listen to the other generals, but only to him. After some lengthy contestation of who is actually in command there, the soldiers might be inclined to stop listening to *all* the generals.

Furthermore, it may be also suggested that *empirically*, the somewhat offensive stance taken by the Court against superior national courts is not warranted. It rests on a widely spread legend, which would need to be empirically confirmed first, namely that a) for the construction of the EU legal order, the direct engagement of the Court with any first instance court in the middle of nowhere is essential, because it is these courts which send the most important, progressive questions;[72] and b) national superior courts are opposed to this fact and are trying to block the access of lower courts to the Court[73] or prevent the effects of the judgments of the Court in the national legal order.

[72] Critically J. Komárek, 'In the Court We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure', 32 *ELRev* (2007) p. 467.

[73] Critically M. Bobek, 'Cartesio – Appeals against an Order to Refer under Article 234 (2) EC Treaty Revisited', 29(3) *CJQ* (2010) p. 307.

None of these assumptions appears to be warranted. Whatever the reality may be, the more explicit and assertive case-law of the Court encourages more explicit conflicts, in particular in the new member states that joined the Union in 2004 and 2007. It is no accident that most of the preliminary rulings on the issues of national judicial hierarchies originated precisely from these states.[74] Yet again: it is in no way suggested that there were not instances of lower courts circumventing the opinions of their superior courts via Luxembourg in the old member states in the past. It is just that after 2004, this phenomenon reached completely new dimensions, both quantitatively as well as qualitatively.

The reasons are cultural and structural. It would appear that a number of judges in the post-Communist new member states have a problem with judicial authority other than their own. This is perhaps historically conditioned by the context of legal transformation, which appears in many aspects dialectic. Before 1989, the judiciary behind the Iron Curtain was for obvious reasons excessively bound. After 1989, a number of judges might have mistaken 'judicial independence' for the guarantee of being completely 'unbound'.[75] Moreover, in structural terms, judicial systems in the new member states are hierarchical, career judiciaries. This means that lower echelons of the judicial system tend to be staffed with younger judges whereas higher and supreme level with more senior judges. If within such a context, a (post-)transforming judicial system accedes to the EU, EU law and its national application might become a tool and an articulation of generational tension within the national judiciary.

However, it would be mistaken to discard the atomisation problem by declaring it to be a CEE transformation issue that will pass soon. The enhanced number of such cases might of course be traced back to the post 2004 enlargement reality. However, as other cases from the 'older' member states demonstrate,[76] similar examples may lead to creation or vocalisation of the similar cases and conflicts

[74] Apart from the already mentioned cases *Elchinov, Križan, Cartesio* and *Landtová*, further examples might include Case C-328/04 *Vajnai* [2005] ECR I-8577; Case C-302/06 *Koval'ský* [2007] ECR I-11; or Case C-17/10 *Toshiba,* judgment of 14 Feb. 2012, n.y.r.

[75] To provide an example in this respect, which is certainly not just anecdotal, as much as it may appear to be. By an order of 7 Dec. 2009, Rvp 2207/09, the *Okresný súd Prešov* [District Court in Prešov, Slovakia] submitted an abstract review of constitutionality to the Slovak *Ústavný súd* [Constitutional Court]. In its submission, the District Court maintained that the Constitutional Court should annul the provision of the Slovak Code of Civil Procedure that provides that a first instance court is bound by the decision of the higher court rendered on appeal. The District Court was of the opinion that such binding force of an appellate decision violates the constitutional (and international) guarantee of judicial independence.

[76] From the recent ones, cf., e.g., ECJ, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667; Case C-409/06 *Winner Wetten* [2010] ECR I-8015; or Case C-396/09 *Interedil* [2011] ECR I-9915.

elsewhere, simply by showing the other courts in other cultural contexts 'yes, you can'.

In sum, allowing for and even encouraging judicial disobedience in the member states' judicial hierarchies in the name of EU law in the recent case-law was likely to backfire sooner or later at the Court itself. From this point of view, the Court does not entirely qualify as just an 'innocent bystander', who by no fault of its own fell victim to the Czech judicial feuds.

In order to avoid similar situations in the future, at least three options might be considered. First, the recent case-law atomising national judicial hierarchies could be qualified or nuanced. It may be seen as ideologically mistaken from the point of view that it is driven by the wrong incentives. It encourages disobedience instead of cooperation. The same result could be nonetheless achieved by restating the same obligations in a positive way while preserving the national judicial hierarchy. For instance, assume that the overreaching idea of *CARTESIO*[77] was to guarantee that a case with importance for EU law reaches the Court. This could be achieved by not stating that lower courts are free to disregard their superior courts (negative, conflict creating incentive), but rather by stating that if a superior court wishes to quash an order by which the lower court submitted a reference to the Court, the superior court can do so. If it does, however, it will then itself fall under the obligation to submit the same question once the case reaches it on the merits (positive, cooperation enhancing incentive). In this way, the same result could be achieved (i.e., the question will be submitted to Luxembourg eventually) in a positive way, by setting positive incentives (you can still do that, but it comes with a price), instead of creating unnecessary tensions.

Second, stricter approach on admissibility of preliminary rulings could perhaps help weeding out some requests for preliminary ruling that are somewhat self-serving for the submitting court. This means adding a new inadmissibility ground for preliminary rulings, which could be called 'questions asked in bad faith'. In contrast to purely hypothetical questions, there would be a genuine dispute before the national court. However, whatever answer the Court would give, this would in no way contribute to the protection of EU-based individual rights. Naturally, such ground of inadmissibility would be limited to extreme scenarios, placing prima facie trust into the assessment by the referring national court. The same is true of other inadmissibility grounds. However, as the Court has noticed already some time ago, even such initial trust has its limits.[78]

Third, as an alternative to both previous points that is discussed in the immediately following section, even if the national judicial hierarchies kept being atom-

[77] *Supra* n. 68.

[78] In this sense already ECJ, Case 104/79 *Foglia* [1980] ECR 745 [11] and the ensuing case-law on the various grounds of inadmissibility of requests for preliminary rulings.

ized, much could be remedied by the dissonant national judicial voices being heard in Luxembourg.

Finally, it may be said that the suggestions just presented are merely cosmetic containment measures aimed at some of the symptoms and not the roots of the problem. Perhaps rightly so: naturally, at the highest level of abstraction, all this can be traced back to the irreconcilable conflict over the final say within the EU (judicial) structure. As long as this conflict is not be resolved, the European atomisation of national judicial hierarchies will be the necessary side effect of EU law penetrating the national legal orders coupled with the peculiar nature of the preliminary ruling procedure. This may not be, however, a necessary consequence. The unresolved meta-conflict hovering in the background of the European judicial system does not predetermine any concrete procedural and institutional structure that would have to ensue. Furthermore, if there is something the EU construction and the Court itself have been successful with in the past, it has been in not translating, as far as possible, this meta-conflict into micro-conflicts.

The preliminary ruling procedure today: Law-making without representation?

The second implication of the *Landtová* saga concerns representation in the preliminary ruling procedure before the Court. The interest representation therein was designed and remains even today essentially state-centred. The parties to the original case are naturally entitled to submit observations. However, quantitatively as well as qualitatively, it is the member states and the EU institutions that are the chief players, coordinating and exercising influence. Moreover, the representation of member states is conceived of as a holistic enterprise: there is one governmental agent representing a member state as a whole. Such style of representation might work in a more traditional international law environment, where a state can be seen to indeed speak with one voice. Even the European Convention and the procedure before the ECtHR fit this picture. To be admissible in Strasbourg, all the national remedies must have been exhausted. This means that all the national judicial echelons, even if they may not entirely agree with each other, had their say. They participated.

In contrast, the preliminary ruling procedure as well as EU law as such has evolved over the years considerably, pulling in more and more interests and by implication more and more actors. The procedural design, however, remained state-centred in nature, with just other member states and EU institutions having a voice. More and more requests for preliminary rulings today are concerned not primarily with adjudicating disputes *between* member states, but *within* the member states. The atomizing of national judicial hierarchies, discussed in the previous section, that has for its consequence the referral of essentially intra-state disputes before the Court has not, however, been matched with corresponding adjustments

in the procedure before the Court itself that would allow the national dissenting voices to be heard as well. The governmental agent speaking on behalf of the member state will be instructed by the government, i.e., by the executive, what the position of the member states ought to be. There might be nobody, however, to speak on behalf of the internal, national dissidents. If in such cases the individual actors will not be heard, this may quickly generate the feeling of 'about us without us' or of 'law-making without representation'.

Apart from *Landtová*, there is a second recent decision of the Court in which this problem of (non)representation arose openly: *Melki and Abdeli*.[79] Similarly to *Landtová, Melki and Abdeli* also concerned internal judicial disagreement. In a nutshell, the French *Cour de cassation* [Court of Cassation] challenged the new French legislation giving the *Conseil constitutionnel* [Constitutional Council] new power to carry out *ex post* review of constitutionality (*la question prioritaire de constitutionnalité*).[80] Both national supreme courts involved, the *Cour de cassation* in *Melki and Abdeli* and the *NSS* in *Landtová*, presented their case to the Court in a certain way, as to arguably favour the outcome they wished the Court to reach. In neither of the cases, neither of the courts whose competences were in fact challenged, the *Conseil constitutionnel* and the *Ústavní soud,* was heard. They were not party to the procedure on preliminary ruling. However, in *Melki and Abdeli,* the original interpretation offered by the *Cour de cassation* was somewhat corrected by the observation submitted by the French and Belgian governments, who relied upon the position taken in the meantime by the *Conseil constitutionnel*.[81] Thus, the *Conseil constitutionnel*, although not being entitled to submit observations to the Court in a question which directly concerned it, was heard indirectly, through the observations submitted by national governments. Its message was passed on to the Court.

Landtová had a somewhat less lucky course of procedure and outcome. The Czech Agent submitting observations on behalf of the Czech Government had been clearly instructed to defend the position of the Government, which was the same as that of the administrative courts and the *NSS*: the pension supplement, based on nationality, was in violation of EU law.[82] Thus, the opinion of the *ÚS*, which was in fact under direct attack in proceedings before the Court, was not represented. After becoming aware of this fact, especially through the Opinion of

[79] ECJ, Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667.

[80] Art. 61-1 of the French Constitution, introduced by the constitutional reform of 23 July 2008 and further implemented by the 'Loi organique no 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution'.

[81] *Melki and Abdeli* [33-36] and [48-51].

[82] Such a frank concession on the key point of the entire case likely caused some surprise and uneasiness in Luxembourg, as may be inferred from the Opinion of AG Cruz Villalón in *Landtová* [3, 47, and 52].

AG Cruz Villalón, the *ÚS* wished to communicate its views to the Court. It believed that the AG's Opinion contained a number of inaccuracies and mistakes due to the way in which the reference by the *NSS* was framed. Equally, the *ÚS* believed that its side of the story should be heard as well.

The *ÚS* thus drafted a statement reproducing its position and arguments, put it into a letter and sent it to the Court. On its content, it would appear that by that letter, the *ÚS* essentially sought to become an *amicus curiae* to the *Landtová* case before the Court.[83] The registry of the Court, instructed by the president of chamber deciding the case, nonetheless put the letter into an envelope and sent it back to the *ÚS*, noting in its reply that '*members of the Court do not correspond with third persons regarding cases that have been submitted to the Court*'.[84]

This not very diplomatic step by the Court apparently struck a very sensitive chord with the *ÚS*. The *Holubec ultra vires* declaration is, in a way, also a vexed reply to the Court in this regard. Not only do the arguments on which the *ÚS* based its *Holubec* decision overlap with the content of the letter on substance; *Holubec* furthermore added that by not allowing the *ÚS* to be heard, the Court disregarded the safeguards of a fair trial by not listening to the other party on trial. The Court therefore violated *ÚS*'s right to a fair trial[85] [sic!].

There is an on-going debate about the extent to which legal persons benefit from human rights protection. To state, however, that a constitutional court, i.e., an organ of the state, has constitutionally guaranteed rights, is quite a groundbreaking innovation. If one rises above this and other obvious misconceptions the *ÚS* has formed about the preliminary rulings procedure in *Holubec*,[86] what emerges in the subtext is a picture of a deeply vexed court that reacted somewhat bluntly and entirely disproportionately to an undiplomatic step by the Court.

It is certainly not the claim of this article that the procedure before the Court should be changed because the *ÚS* got it wrong. It is rather suggested that *Landtová*, as well as *Melki and Abdeli*, and other cases discussed in the previous section,[87] evidence a broader problem. As a consequence of EU law reaching further and further into national law and the above discussed atomisation of judicial hierarchies, the Court finds itself, and will find itself, confronted ever more frequently with externalized national disputes. The preliminary ruling procedure before the Court should be nonetheless able to accommodate dissonant voices from within the national legal systems. Failing to do so, the Court might face unnecessary opposi-

[83] The letter has been made publicly available at the website of the *ÚS* at <www.usoud.cz> (letter of the president of the *ÚS* of 8 March 2011, Př. 31/11).

[84] ÚS, *Holubec*, point VII in fine.

[85] Ibid., point VII of *Holubec*.

[86] The *ÚS* believed that in the procedure on preliminary rulings, the Commission acts as *amicus curiae*.

[87] *See* n. 74 *supra*.

tion. 'Unnecessary' because the national actor in question might not eventually even oppose the outcome, as long as it was heard and its view duly considered. Voice and face may matter more than the eventual outcome.

It may be furthermore counterclaimed that there is no problem with representation. National constitutional courts or whatever other higher courts that might feel the threat of being circumvented and not being heard before the Court should file a request for a preliminary ruling themselves. Then they will be duly heard. A national superior court should therefore either a) be first to seek to submit a request for a preliminary ruling; or b) if it is dissatisfied with the answer the Court has given to a the question already posed by a lower national court, nobody will prevent the national superior court from submitting a second request for a preliminary ruling.

As far as the former option is concerned, an advised national court might indeed seek to carry out a 'pre-emptive first strike', submitting its question first, having the advantage of the 'first serve'. But is this really the policy the preliminary ruling procedure should stimulate? Again, are these the correct incentives? Rushing in as quickly as possible in order to exclude the opponent? Not just excluding the domestic opponent from framing and asking the question, but also from being heard? Because unless the other national court is able to drum up a case on the same legal point it could also submit quickly, so that both cases could be joined by the Court and heard together, the other court became effectively excluded from participation and from being heard. Apart from being normatively flawed, this proposition also disadvantages superior or constitutional courts in practice. They find themselves at the apex of the judicial hierarchy. They hear fewer cases and only later on. Thus, to rush in as the first ones might not always be easy or even possible for them.

By contrast, to file a second request for a preliminary ruling with respect to an issue already dealt with should be always possible, even for a superior court. However, this suggestion suffers from an even greater number of shortcomings than the previous one: symbolic, functional, and policy-oriented. The symbolic objection can be quickly discarded, certainly from the point of view of an EU lawyer, but here it is: traditionally, constitutional courts do not file requests for preliminary rulings. Submitting a request for a preliminary rulings necessarily implies being bound by its result. A number of constitutional courts portray themselves as ethereal constitutional beings, guardians of national constitutionality, silently hovering over the stormy waters of 'mere legality', including 'mere EU law'. The natural reply from the point of EU law is that hovering is fine, but then do not complain about the traffic going on below you.

The functional or pragmatic reasons for a second request for a preliminary ruling not really being an option are perhaps more weighty, even for EU lawyers. The

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court asking the initial question is also framing the question. The framing of the question will be normally no doubt carried out in a balanced and objective way. Sometimes, however, it may be done in a less balanced way. If uncorrected, much can be achieved by putting a question in a certain way. However, once the Court has already decided on a certain issue on a preliminary ruling, how likely is it to qualify or to change its previous decision, even if the second question was compelling and excellently put? Metaphorically speaking, this suggestion of a second reference on a point already decided is like suggesting to an esteemed professor of EU law who feels vexed about not being invited to contribute to the first edition of *the* book on EU law that she might be one day perhaps invited to add few footnotes to the second edition, but she has to respect the chapters already written.

In sum, the otherwise (theoretically) appealing suggestion that 'the others might submit as well' faces a number of practical as well policy-driven problems. A second request for a preliminary ruling is not really an option in face of a case already decided. What is needed is to be heard when the first case is being decided.

The last piece of the puzzle called representation in today's preliminary ruling procedure is the definition of the role of agents appearing before the Court. Whom exactly are or should they be representing and why? The heading of each decision rendered on preliminary rulings states that the observations these agents submit to the Court are *on behalf of the national government*. However, should the agents not be instead representing a member state as such? In this capacity, they would be more 'attorneys general' acting on behalf of the member state, but not acting in the interest of one particular power within the state. They should objectively and faithfully account for all the potentially competing interests and views within the member state, relating the matter to the Court in full.

The perhaps laudable normative idea suggesting that the agents ought to be representing a state and not just the government quickly encounters difficulties in reality. First, most of the permanent[88] governmental agents are civil servants. Whether or wish it or not, they are obliged to follow clear instructions issued to them by their superiors. Thus, they are bound by the instructions given by their governments, even if some of them might wish otherwise. Second, it is hardly possible for the governmental agent to appear on behalf of a member state, if there is a considerable opinion diversity within that member state, both between the powers of a state (the executive, legislature, and the judiciary), or even within a power of a state (individual ministries or courts that are in non-hierarchical relationship may be of different opinion).[89] To request an agent to appear on behalf

[88] As opposed to those agents who might be hired by the national government for just individual cases, typically from the ranks of private attorneys/barristers.

[89] Governments are bound not just by laws but also (or in particular) by constitutions. With respect to the particular settings of *Landtová,* it could be suggested that the Czech government was

of the 'whole' member state in these situations would mean, unless one would be ready to abandon the horizontal division of powers in the member states, either diluting her submission to just a opinionless summary of extant national views or appointing only agents with an advanced level of schizophrenia.

In sum, perhaps the most important implication from the *Landtová* story is the following: if the Court's atomisation policy of national judicial hierarchies is to continue, then the national dissidents must be given a proper voice in the Court in the course of the procedure when it still matters. This could happen in at least three ways. First, within the current procedural setup, there could be (legislative or judicial) drive for current governmental agents to be 'upgraded' or restructured into the role of government-independent national attorney-generals. They would be acting before the Court in the interest of (national) law, not bound by instructions from (only) national governments. This would require, however, institutional changes in the member states: 'governmental' agents would have to be become 'state' agents.

Second, more realistically perhaps, the Court would be well advised to start accepting third party interventions from other interested national courts or institutions as *amici curiae* briefs. This suggestion is made with the knowledge of the established case-law of the Court that with the quite questionable assumption (or fiction?) that the preliminary ruling procedure is not a contentious procedure but 'a procedure whose aim is to ensure a uniform interpretation of Community law by cooperation between the Court and the national courts' has always excluded other entities than those expressly listed in Article 23 of the Statute of the Court from submitting observations/*amici curiae* briefs.[90]

Third, a change in the Rules of Procedure of the Court could provide for a formalised co-respondent or co-submission mechanism from other national courts. This mechanism would be triggered in cases in which the request for a preliminary ruling represents, in its essence, a challenge to the legal opinion of a higher court within the national legal system. Before the Court reaches its conclusions on the interpretation of EU law, the circumvented national court should have the chance to be heard, if it wishes so. There is no hiding that this suggestion is inspired by

bound by the Czech Constitution as interpreted by the *ÚS*. Thus, there was no opinion diversity, but it was the fault of the Czech government that disregarded its constitutional obligation by not instructing the governmental agent to defend the view of the *ÚS* before the Court. However, what if the constitutional interpretation adopted by the national constitutional court is in evident violation of EU law, as later confirmed by the Court? Is then the national government still obliged to defend such a position against its will?

[90] Cf., e.g., ECJ, order of the President of the Court of 12 Sept. 2007 in Case C-73/07 *Tietosuojavaltuutettu* [2007] ECR I-7075 [9] or order of the President of the Court of 16 Dec. 2009 in Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd*, not reported, online at <www.curia.eu>.

the currently contemplated co-respondent/prior involvement mechanism[91] that should be put in place for the EU accession to the ECHR: if a case is arriving in Strasbourg that has previously not been heard in Luxembourg, the Court ought to be asked for its opinion. A number of national (constitutional or supreme) courts could rightly ask why a similar courtesy should not be extended to them. In contrast to the contemplated post-Accession prior involvement mechanism that would trigger a new, additional procedure in the Court, all this could be done relatively easily within one and the same preliminary ruling procedure. Or is it that *quod licet Iovi, non licet bovi*?

What role for constitutional courts?

Finally, *Holubec* poses with renewed force the question which keeps coming back in the European judicial space: what of the national constitutional courts? What should be their role in the European judicial structure in general and within the preliminary ruling procedure in particular? The Treaty of Lisbon, which gave the Charter the primary law status, pushed the issue again to the fore.

There is a straightforward, legalistic answer to the question, formulated from the point of view of EU law orthodoxy: constitutional courts are 'courts or tribunals' within the meaning of Article 267 TFEU. They are an institution of the member state. They are therefore equally obliged, as any other body of a member state, to apply EU law fully and effectively within the scope of their competence. They may submit a request for a preliminary ruling as any other national court. In fact, as they are functionally courts of last instance, they are even under an obligation to do so.

Such simple answer fails to satisfy a number of national constitutional courts, perhaps even all of them. Ever since the Nicomachean Ethics,[92] it has been considered unequal and hence unjust not only to treat the same differently, but also treating objectively and evidently different the same. Most of the national constitutional courts, especially those of German design, which are entitled to carry out not only abstract but also concrete review of constitutionality, consider themselves to be special. They are not 'a court or tribunal'. They are 'a court of courts' or a 'court beyond mere courts'.

This lies, in a nutshell, at the heart of the problem. A number of constitutional courts might feel that they have been left out of the EU project. Or, more precisely, EU law brought them only losses in terms of institutional and proce-

[91] Most recently fleshed out in the 'Fifth Negotiation Meeting between the CDDH ad hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights: Final report to the CDDH' of 10 June 2013, 47+1(2013)008rev2, 6-7 and 22-28.

[92] Aristotle, *Nicomachean Ethics*, book V (online, e.g., at: <http://nothingistic.org/library>).

dural uniqueness without providing much gain in return.[93] Accordingly, a number of these courts have driven themselves, wisely or not, into a sort of 'splendid isolation'. They insist, sometimes on rather shaky grounds, that they are not concerned with EU law at all.

This antagonistic relationship EU law and the case-law of the Court might generate in the minds of national constitutional courts is neatly visible in the rapid evolution a number of constitutional courts in the new member states went through in the last decade. Before the 2004 enlargement, a number of constitutional courts in the Central European region, in particular the Polish *Trybunał Konstytucyjny* or the Czech *Ústavní soud*, were the pro-active champions of 'Europeanization'. They even insisted on legal approximation and interpretative use of EU law in the periods before the Accession.[94] Around or after the Accession, these courts would issue strongly pro-European decisions.[95] However, already some seven or eight years later, the same courts started assertively reviewing an EU regulation on its compatibility with EU law,[96] or even declared an EU act to be *ultra vires*.

This is a radical U-turn. But it may be explained, at least on the level of a hypothesis, by the equally radical shift in the standing of these courts. Within the last twenty years, constitutional courts in the new democracies in Central Europe have first risen to become the omnipotent supreme tribunals for all branches of law and effectively controlling all the powers in the state.[97] Soon afterwards, following the EU accession, they have been demoted to 'a court or tribunal' that, even if it is only in extreme cases, nobody needs to obey if a point of EU law is found.

All this might cause, arguably, a considerable disenchantment with EU law on the part of constitutional courts, as somebody who has been left out of the EU

[93] In detail *see* M. Bobek, The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts', in M. Claes et al. (eds.), *Constitutional Conversations in Europe* (Intersentia 2012).

[94] For a detailed discussion, *see* the respective chapters in A. Łazowski (ed.), *The Application of EU Law in the New Member States – Brave New World* (TMC Asser Press 2010).

[95] By the way of illustration, the ÚS judgment of 3 May 2006, Pl. ÚS 66/04, might be recalled. In this decision, the Czech *ÚS* showed an extremely pro-European stance, pushing the doctrine of consistent interpretation to its limits in order to conclude that Art. 14(4) of the Czech Constitution that states '*No citizen may be forced to leave his homeland*' does not preclude the surrendering of Czech nationals to other member states within the European Arrest Warrant Framework Decision. In contrast, the German as well as Polish constitutional courts that faced similar constitutional provisions in their respective constitutions declared that national legislation needed to be amended first.

[96] The already mentioned judgment of the Polish Constitutional Tribunal of 16 Nov. 2011, SK 45/09, n. 29 *supra*.

[97] Further M. Bobek, *Comparative Reasoning in European Supreme Courts* (Oxford University Press 2013), p. 255-268.

project. Similar feelings might be further encouraged when contrasting the EU law approach towards constitutional courts with the standing of constitutional courts under the European Convention. The European Convention introduces the review of national decisions, including the decisions of national constitutional courts. At the same time, however, it leaves the internal standing of constitutional courts and the internal hierarchies intact. The Convention allows the national constitutional courts to keep control over the national legal system. In systems with an individual constitutional complaints procedure, all cases before coming to Strasbourg must effectively go through the national constitutional court so that the remedies exhaustion rule might be satisfied. Thus, constitutional courts´ powers remain intact, with the national constitutional courts being given the additional role of the Strasbourg national gatekeeper and later 'translator' of the Strasbourg case-law back on the national level. Conversely, EU law empowers only national ordinary courts; for constitutional courts, it only means the loss of uniqueness.

In sum, national constitutional courts might feel, rightly or not, that EU law and the Court have so far given sticks but hardly any carrots. The overall problem is one of alienation of those living on the edge. If further pushed, a vexed national constitutional court might more easily move (or rather slip) from an antagonised 'splendid isolation' into a 'splendid defiance' than it is likely to go for 'splendid cooperation'.

The Charter of Fundamental Rights becoming part of binding primary law provides a good opportunity to try to bring the national constitutional court back into the game.[98] Since its entry into force, the Charter has been exercising the same centripetal effects onto the legal discourse in EU law as national bills of rights have had onto national law since the Second World War. Today, virtually any dispute in EU law can also be rephrased in terms of fundamental rights protection. Thus, the words of EU law and those of national constitutionality might be drawn nearer than any time before, with the divide between the EU 'economic' and the national 'constitutional' perhaps somewhat diminishing. Would this not be the opportune time to start recognising, substantively as well as perhaps procedurally, the special position national constitutional courts occupy?

Of course, such suggestion is much more easily done in general than carried out in concrete procedural steps within the current institutional setup. Moreover, the procedural settings tend just to be the external manifestation of much deeper problems and unresolved issues of European constitutionality and the role of

[98] But *see* J. Komárek, 'The Place of Constitutional Courts in the EU', 9 *EuConst* (2013) p. 420, at p. 443-446 and 449-450.

national constitutional courts therein.[99] However, as has been argued elsewhere,[100] most of the sticks are purely of judicial origin, laid down exclusively in the case-law of the Court. They can be therefore altered in the same way.

Failing to bring the constitutional courts more to the centre of the EU judicial structure, the system might not only encounter situations similar to *Landtová*, in which a constitutional court already living at the outskirts of EU law slides even further. Moreover, when (or still if?) the much bespoken but in reality, little thought-through accession of the EU to the European Convention on Human Rights (ECHR) happens, the national constitutional courts will become the imaginary gates not only to the ECtHR. They will also be the last potential point of review of national application of EU law before it can be brought to Strasbourg, as only by passing through them can all national remedies be exhausted. And there is one simple fact of life common to all gatekeepers: one wants to be friends with them.[101]

An epilogue: Of snakes in the garden of judicial dialogues

Hard cases make bad law. Odd cases generate non-representative theories. The *Holubec* decision and the overall *Landtová* saga are by all means singular, uniting the most unlucky set of events: an extremely sensitive issue couched and somewhat hidden in terms of 'mere' technical dispute over pension calculation; a preliminary ruling question used as a way of externalizing internal disputes; correspondingly antagonised national actors; a national constitutional court still searching for its role within the EU judicial structure and not very skilled in EU law; and a somewhat inflexible and undiplomatic Court. Thus, to generate any theory of 'judicial disobedience' on the basis of *Holubec* would be unwise.

However, even if *Holubec* can hardly provide for any 'theory' of its own, it is the ideal counter-example. When taken as a case study, its mere existence and outcome put a number of more idealist theories of judicial interaction in Europe to a serious test. With the risk of caricaturing, the 'judicial dialogues' academic

[99] Further *see* more recently, e.g., the various contributions in P. Popelier et al. (eds.), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2012); M. de Visser, 'National Constitutional Courts, the Court and the Protection of Fundamentals Rights in a Post-Charter Landscape', 14 *Human Rights Review* (2013) p. 1; or V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009).

[100] *Supra* n. 93.

[101] Perhaps also because the Protocol No. 16 to the European Convention that is since 2 Oct. 2013 open to signature will give the power to the highest national courts, which will no doubt include a number of national constitutional courts, to ask the ECtHR an advisory opinion. It is not hard to imagine that a discontent national constitutional court might be tempted to put the Court into a similar position that the Court has been putting some of the constitutional courts for a number of years: by circumventing Luxembourg by asking directly in Strasbourg.

literature on judicial engagement in Europe assumes that courts are responsible and informed actors. Bound by the spirit of cooperation permeating the preliminary ruling procedure as the instance of on-going judicial dialogues, they jointly participate in the construction of the European legal order. The Czechoslovak pensions saga presents a case rather for (neo-)realist or even (neo-)cynical approaches. It is difficult to spot informed and responsible actors in there who would have engaged in a dialogue worthy of that name: a sincere exchange of views that helps the actors to understand each other and to adapt their mutual positions. Instead, the *Landtová* saga unites the most unfortunate constellation of three courts: one *uncooperative*, one *uninformed* and one *undiplomatic*.

Why the Court was not entirely diplomatic and why the *ÚS* was 'uninformed' (to say the least) in its understanding of the preliminary ruling procedure as well as EU law as such has already been discussed in previous parts of this article. But why should the *NSS* be labelled the 'uncooperative' court in this story? After all, it duly submitted a request for a preliminary ruling as it was obliged to do as a court of last instance in *Landtová*. It implemented the judgment of the Court. Later on, it sought to further cooperate with the Court by asking a second request for a preliminary ruling in *JS*.

Looking just at the outcome of the *Holubec* decision, one could assume that the uncooperative court was the *ÚS*. However, seeing the entire story in its context and evolution, one notices that the serpent slyly playing with the apple in the background all along was in fact the *NSS*. True cooperation may not always mean to be active. Perhaps even more importantly, sometimes it includes the sensible decision to remain silent, i.e., not to ask certain questions.

Such a judgment call can naturally be contested. It relies, similarly to this whole article, on certain vision of the role of the preliminary ruling procedure in particular and the function of courts in general. First, whether the function of the preliminary ruling procedure is just to safeguard unity/uniformity of EU law or/and to protect individual EU law based rights is a constant and eternal debate. However, submitting a request for a preliminary ruling in *Landtová* was not really warranted under either of these headings. It was certainly not for protecting any EU law-based rights of Mrs Landtová, who could have been potentially deprived of her supplement, a consequence that left a number of people, including the learned Advocate General,[102] rather perplexed. Was it then necessary for safeguarding the uniform application of EU law? The split of the Czechoslovak Federation was a singular historical event. What broader and prospective uniformity in application of EU law needed to be achieved with respect to a closed (and, for obvious natural reasons, diminishing) group of Czechoslovak pensioners? Moreover,

[102] Cf. [30] of the Opinion of AG Cruz Villalón in *Landtová*, which prompted him also into a detailed discussion of the potential consequence of the judgment of the Court in [53-73].

some degree of uniformity, even if from the point of view of EU law 'illegal uniformity', was already achieved by the national supreme jurisdiction, the *ÚS*, within the only member state in which the situation of Czechoslovak pensions can arise, having been decided in a certain way.

The latter proposition can be certainly challenged. It is fair to admit that it is perhaps too much influenced by the overriding general vision of courts as institutions that ought to be smoothing and solving problems, not heating them up. Equally, even if the preliminary rulings procedure may be primarily driven by the interest of uniform application of EU law and European legality, should this be allowed to hollow out the essential function of any court, which is to protect individual rights? On a meta-level, are the legality of administrative action and uniform application of the law in themselves not just transitive values that are put in place in order to safeguard the intrinsic value of any judicial activity, which is the protection of individual rights by courts?

All this is certainly not to say that the Czech *ÚS* was right. It is rather to suggest that the *NSS* was not right either. In the future, without procedural or institutional reforms, it will be no doubt difficult, if not impossible, to eliminate instances of preliminary rulings asked in not entirely good faith. After all, no system is bullet-proof. There have always been requests for a preliminary ruling sent to Luxembourg precisely because of self-serving judicial interest. Still, the task of law, including the rules of the preliminary rulings procedure, should arguably be to limit the actions of the (uncooperative) snake and not just to restate solemn but somewhat toothless proclamations of friendship to the (uninformed) Adam and the (undiplomatic) Eve.