

Nedenfor er optrykt Tjekkiets præsident Vaclav Klaus's 10 kritikpunkter af Forfatningen, MEP Jo Leinens gensvar samt IND/DEM-gruppens juridiske vurdering af argumenterne

## **A NEW PRAGUE SPRING: WHY THE CZECHS ARE GETTING RIGHT**

### **A legal assessment of two contradictory arguments**

Vaclav Klaus, the President of the Czech Republic, had published ten arguments against the EU Constitution. These arguments were eventually rebutted by MEP Jo Leinen (PES) in the Czech publication, [Lidové Noviny](#) (1 March 2005). The Czech press gave great coverage to the debate; see the newspapers [Ceskenoviny](#), and [Cesko](#) in Czech.

IND/DEM group made a legal assessment of the arguments.

#### **Point 1**

##### **Vaclav Klaus - President of the Czech Republic**

The European Union will become a state and it will have all the basic features of a state. It will have its constitution, its citizens, its territory, its external border, its currency, its President, its Minister of Foreign Affairs, etc. It will have its flag, anthem, and state holiday.

##### **Jo Leinen - President of the Constitutional Affairs Committee**

The European Union will not become a state. A state has the right to give itself competences, whereas only Member States can give competences to the Union and all of them have to agree on this. The Union cannot change its area of competence itself. This is the main difference between a state and an association, unique in the world, which is being called the European Union. Even today the EU has a flag, an anthem, a currency, and these symbols do not make it a state.

**IND/DEM legal assessment:** The European Union is on its best way to become a State.

- a) Regardless of the different views, the Constitutional Treaty itself clearly states by its own titles and by Article I-1 that it "establishes a Constitution" and that "the Constitution" establishes the Union"(I-1.1). Therefore, the foundation of the supranational EU is not a Treaty anymore, but a Constitution.
- b) Although basically empowered by the Member State (I-1.1; I-6, I-11.1), Union law prevails over national law (I-6) and only the EU Court can ultimately decide on the delimitation between Member States and Union competence (III-375.3);
- c) The Union HAS the power to change, and thus enlarge its area of competence (flexibility clause I-18, the simplified revision procedures IV-444 and IV-445, the so-called "passerelle" clause). This means a power to self-empowerment);
- d) The EU is given many basic state features (see annex 1);
- e) More and more areas are subject to the ordinary legislative procedure, hence moving unanimity to qualified majority in the Council (see annex 3). Hereafter a Member State's veto falls and the competence is irretrievably given to a higher level;
- f) The Union has the power to submit any area (except defence) to the ordinary decision-making procedure and to qualified majority vote in the Council (passerelle IV-444);
- g) The objective is to create an ever closer Union, which provides for more European integration which in its final logic inevitably leads to the transmission of more and more competence and to the creation of a European State.

#### **Point 2**

##### **Vaclav Klaus - President of the Czech Republic**

In this newly created state of a federalist type, current Member States will be simple regions or provinces.

##### **Jo Leinen - President of the Constitutional Affairs Committee**

No, they will not. The Constitution itself says that the Union respects the identity of its Member States including their internal structure, political and constitutional systems, and so on. The Union cannot change the internal structure of individual countries and the Constitution will change nothing to that. The Czech Republic will remain the Czech Republic even after the adoption of the Constitution.

The affirmation of Václav Klaus, that states will lose the right to adopt their own laws is an absolute stupidity. Neither the Czech parliament nor the German Bundestag will lose their role of law-makers. The Union does not intervene in a

that.

**IND/DEM legal assessment:** Although bound to respect the identity of its members (I-5), the Union would change the nature of its composing Member States, not least by simply taking away their competence, because:

- a) more and more competences are given from the Member States to the Union (see annex 2);
- b) Union law prevails over national law (I-6 III-375.2);
- c) the Union HAS the power to self-empowerment (I-18, IV-444, IV-445);
- d) more and more areas are subject to the ordinary legislative procedure, hence moving unanimity to qualified majority in the Council (see annex 3), doing away with the Member State's final say and thus its competence;
- e) the Union has the power to submit any area from Part III (except defence) to the ordinary decision-making procedure and to qualified majority vote in the Council (passerelle IV-444).

### **Point 3**

#### **Vaclav Klaus - President of the Czech Republic**

The Constitution of the state European Union will be superior to constitutions of Member States. Even the entire legal order of the Union will be superior to the legal orders of Member States.

#### **Jo Leinen - President of the Constitutional Affairs Committee**

The European Constitution will not be superior to constitutions of Member States and the same applies to the legal order of Member States. Only European laws in those areas where the European Union has the competence to adopt legal acts will be superior to national legislation. It was already like that from the beginning of the integration and this applies even today. It is surely logical that when Member States agree together that they will not pollute the air, all of them have to comply with it.

**IND/DEM legal assessment:** Article I-6 makes it clear that "the Constitution AND law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States". The term "law of the Member States" embraces national constitutional law. This has been confirmed by the ECJ in many cases and article I-6 is supposed to reflect this jurisdiction.

Furthermore, it will be up to the ECJ to decide on disputes related to the interpretation and application of the Constitution and on questions of EU/Member States' competence (III-270.2, III-284).

### **Point 4**

#### **Vaclav Klaus - President of the Czech Republic**

The term "constitutional treaty" per se is imprecise and only temporary. This document will be a treaty between sovereign states only until it will be- as a treaty- ratified in Member States. Then, this document will become a real constitution.

#### **Jo Leinen - President of the Constitutional Affairs Committee**

The Constitution is an agreement between Member States such as the Maastricht or the Amsterdam Treaty. It has the characteristic of a constitution because it contains the Charter of Fundamental Rights, Union's values, its institutions and so on, and the term constitution has become part of the political vocabulary. From the legal perspective, it is however an international agreement because all Member States have to ratify it, and it will remain an agreement as well after being ratified.

**IND/DEM legal assessment:** Although Member States will have the right to leave the Union (I-60), the Constitutional Treaty itself clearly states by its own titles and by Article I-1 that it "establishes a Constitution" and that "the Constitution establishes the Union"(I-1.1). That means that as long as it has not been ratified, it is to be considered as a Treaty, which (legally) needs the ratification of all signatories before it can enter into force (IV-447). Once in force however, a Constitution is established.

### **Point 5:**

#### **Vaclav Klaus - President of the Czech Republic**

The concept of "shared sovereignty" that was dominant so far is in today's old EU deserted and new paneuropean sovereignty is being created instead. The states in the new EU are loosing their up to now exclusive right to create their own laws.

### **Jo Leinen - President of the Constitutional Affairs Committee**

The principle of shared sovereignty remains. The Union can permanently act only in those areas where it has been given mandate by Member States. In other areas, the individual countries are sovereign. This principle is even reinforced by the Constitution because it says that the Union has to act only where it is useful. It even gives national parliaments the power to control the adherence to this principle. And the affirmation that states will lose the right to adopt their own laws is an absolute stupidity. Neither the Czech parliament nor the German Bundestag will lose their role of law-makers. The Union does not intervene in a whole range of areas, it leaves a wide space to national legislators and the Constitution does not change anything to that.

**IND/DEM legal assessment:** Although the principle of shared competence is not new, the Constitution clarifies that "the Member States shall exercise their competence to the extent that the Union has not exercised... its competence (I-12.2.2). Furthermore, Article I-14.1 states that "The Union shall share competence with the Member states where the Constitution confers on it a competence..."

According to Article I-11,2 the principle of subsidiarity means that the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Experience shows that this wording (corresponding to Article 5 TEC) has in practice never hindered the Community to extend its competence. On the contrary, using the argument that a problem usually exists in at least one Member State, this principle has regularly served - against its original purpose - as a pretext to propose harmonised "solutions". The right of the Member States to monitor the principle of subsidiarity is extremely limited since the European institutions shall only take note of the reasoned opinions issued by national Parliaments or, where reasoned opinions on a draft European legislative act's non compliance with the principle of subsidiarity represent at least one third of the national Parliaments, review it (which means it is not even bound to alter it) (Article 7 Protocol on Subsidiarity). The statement that "states will lose the right to adopt their own laws" is therefore not a stupidity but a logical consequence of the above.

### **Point 6**

#### **Vaclav Klaus - President of the Czech Republic**

Citizens of the individual Member States will become citizens of the state European Union with direct rights and obligations to the institutions of this European state.

#### **Jo Leinen - President of the Constitutional Affairs Committee**

The citizenship of the European Union is nothing new. It was put in place already in 1992 by the Maastricht Treaty. It is however a supplementary citizenship - for example, it gives to citizens of Member States the right to vote in local elections of any country of the Union - and it does not replace for example the Czech citizenship.

**IND/DEM legal assessment:** Article I-10.1 states: "Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it."

Mr. Klaus did not state that it would "replace" Czech citizenship. He only (and rightly) stated that "Citizens of the individual Member States will become citizens of the European Union with direct rights and obligations to the institutions of this European state." In case of conflict between Union and national citizenship, the EU citizenship would prevail over the national citizenship, just as e.g. the German citizenship would prevail over the Bavarian.

### **Point 7**

#### **Vaclav Klaus - President of the Czech Republic**

The Member States will be able to exercise only the competences that are left to them by the EU constitution, not the other way round, which was the original idea of the European integration. Derived (secondary) EU legal acts will be superior to the original (primary) legal acts of Member States.

#### **Jo Leinen - President of the Constitutional Affairs Committee**

It was already said that Member States will continue to exercise competences in these areas where they would like to do so and where the Union does not have exclusive competence. The principle of subsidiarity, which means that the EU has to act only in these areas, where it is beneficial, is being very strengthened by the Constitution. Any new EU legislation will be double-checked: in the Council of Ministers and in the national parliaments. And they will be able to say stop, if they will come to the conclusion that the Union has exceeded its area of competence. As regards the superiority of secondary law over primary law, it is a legal nonsense. The secondary law, that is, the law cannot be superior to the primary law, that is, the Constitution.

**IND/DEM legal assessment:** It was already said that:

- the Union has the power to self-empowerment (I-18, IV-444, IV-445);
- Union law prevails over national law (I-6, III-375.2);
- the Member states will NOT be able to say "halt" (Art. 7 Prot. on Subsidiarity);
- in cases of shared competence "the Member States shall exercise their competence to the extent that the Union has not exercised... its competence" (I-12.2.2).

## Point 8

### Vaclav Klaus - President of the Czech Republic

The EU, not the Member States, will conclude international agreements with other states.

### Jo Leinen - President of the Constitutional Affairs Committee

The European Union will sign international agreements, but only in areas where it has exclusive competence to act - for example in foreign trade. This is the case even today. The difference is only that whereas so far the European Community was signing the agreements, from now on it will be the Union because with the Constitution it acquires a legal personality.

**IND/DEM legal assessment:** According to I-14.2, the Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union, or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope. This means that the Union has the exclusive competence to sign agreements with third countries whenever one of its competences (not only its exclusive competence) is being concerned.

At present, the EU has no complete legal personality. Accordingly, its capacity to act on behalf of the Member States is limited in the second (CFSP) and the third pillar (JHA). The safeguard of the Member States' competence in those areas is underlined by Article 24.5 TEU and Declaration N° 4 annexed to the Amsterdam Treaty. A single personality aims "per se" to the conferral of additional external powers which would enable the Union to commit itself (and thus its Member States) more intensively at international level, not allowing competing international agreements of Member States.

## Point 9

### Vaclav Klaus - President of the Czech Republic

The weight of smaller Member States, that is, the one of the Czech Republic as well, is being decreased in the voting procedures (in comparison to the current situation resulting from the Nice Treaty) by the constitutional treaty.

### Jo Leinen - President of the Constitutional Affairs Committee

The Constitution introduces the principle of double voting majority: majority of states and of citizens. For less-populated countries, it includes several safety locks, when the population viewpoint is not going to be the decisive one, but the number of countries will. And out of the total number of twenty-five states, 19 are smaller and medium big. Moreover, smaller countries almost never stand on one side against the big countries on the other side; coalitions are created according to the topic. That is why it is a virtual argument.

**IND/DEM legal assessment:** According to the present TEC, as amended by the Protocol on enlargement, as amended by the Accession Act, the Czech Republic has at present 12 out of 321 votes (=3,74%). After the accession of Romania or Bulgaria, the Czech Republic will have 12 out of 345 votes in the Council (=3,48%). After 2009 and according to the Constitutional Treaty, the Czech Republic will have 1 out of 27 (3,7%) votes in the Council and a population of approximately 10.2 million (2,11% of the EU population). Those 2 figures would mean that the Czech Republic's voting weight would be 2,905 % (3,7 + 2,11 = 5,81% divided by 2)

Thus, the Czech Republic's voting weight would decrease from 3,74 % to 2,905 %.

## Point 10

### Vaclav Klaus - President of the Czech Republic

Even the areas of decision-making, in which Member States will retain in the future the right of veto, can be at any time subordinated to a majority vote (it is enough if Presidents or Prime Ministers of EU countries agree on it, which means that it can be done without the national parliaments having the possibility to decide about it, not to say citizens to express their agreement with it).

### Jo Leinen - President of the Constitutional Affairs Committee

This is absolutely false. It is a plain lie. The Constitution itself says that all Heads of States and Prime Ministers as well

as national parliaments have to agree with the change of voting. If the national parliament opposes it, the change is not possible.

**IND/DEM legal assessment:** Article IV-444 states the following:

- On a unanimous decision of the European Council, the Council may be authorised to act by a qualified majority in a specific area (except defence).
- Acting unanimously, the European Council may also allow for the adoption of such European laws or framework laws in accordance with the ordinary legislative procedure.
- Any national Parliament may reject such a decision within 6 months.

It is important to note that a national Parliament must actively object such a decision. Therefore, such a decision does not need the approval of the national parliaments in order to come into force. This distinction is crucial since active resistance is required in order to oppose. Furthermore, there is no need to ask the peoples in referenda.

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**Documents:**

[Annex 1](#) - [Annex 2](#) - [Annex 3](#)

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