Chapter IX

Constitutional Identity and Relationship Between European Union Law and National Law of the Slovak Republic

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Abstract

This book chapter addresses identity, an elementary theoretical concept, which also has penetrated the field of constitutional law. The identity of the Constitution as a fundamental law is a variable that determines the direction of the state. It was created in parallel with the creation of the Constitution. However, the Constitution is not immutable; its dynamism reflects, as a minimum, social change. The first part addresses the concepts of constitutional identity versus national identity. The second part analyses the impact of selected constitutional amendments on the identity of the Constitution in the Slovak Republic and the constitutional aspects of the relationship between European Union Law and the National Law of the Slovak Republic.

Keywords: identity, authority, constitution, European Union law, Slovak Republic, national law

1. Introduction

The nature of the constitution as the supreme and fundamental law of the state with the highest legal force presupposes a certain degree of authority of the constitution. The degree of authority is naturally modified by social development, either increasing or decreasing, and rarely remains constant. The authority of the

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Constitution is influenced by several factors, including its identity and legitimacy, the constitutional concept of its protection, and the political distribution of power in the state. The concept of normative authority reflects that of sovereignty. Since its independence (1 January 1993), the Slovak Republic has undergone (and is still undergoing) a rather turbulent constitutional development, which has undoubtedly been reflected in the identity and authority of the Constitution of the Slovak Republic (460/1992 Coll., as amended, the 'Constitution'). The thirtieth anniversary of the sovereign Slovak Republic raises several questions about the identity and authority of the Constitution, both internally within the legislative system and externally within the international community and the European Union (EU). For example, what factors influenced the identity and authority of the Constitution? How have amendments to the Constitution influenced them? One of the most important questions is the extent to which the authority and identity of the Constitution have been modified in the context of the Slovak Republic's membership in the EU and the position of the Constitutional Court of the Slovak Republic in this process.

2. Constitutional and national identity

Etymologically, 'identity' has its basis in the Latin word 'idem', meaning 'the same'. In terms of meaning, it can be specified as sameness or conformity in all characteristics or as a specific, integral, and unmistakable essence that distinguishes individual human beings from one another.

In general, identity can be formulated as an attribute—that is, a qualitative characteristic of a certain phenomenon or person.[1] This sameness is also somewhat diverse, as the sameness can only be determined by comparison with the differences. Thus, identity expresses the quality of similarity and difference.[2] Hence, the commonly defined features of one group can be determined using the different features of another group. According to Alexy, 'the nature of a principle—that is, the fact that a certain norm is a principle—is only cognisable in a collision with another principle and its property of being fulfilled to a different degree'.[3]

Thus, we can simplistically state that the basis of identity formation can also be a contrast to something or someone else. Identity can manifest in different ways, either explicitly or derivatively or by defining features. Nevertheless, even if it enables a certain dynamism, it is linked to the stability of its content, especially regarding the substance that it defines.

1 http://slovnikcudzichslov.sk/slovo/identita.
2 See more: Zvoníček, 2018, pp. 23–53.
3 Alexy, 2009, pp. 101–105.

In the context of the Maastricht Treaty, developments among Member States have given rise to reflections on the content and application of national identity. The original provision of Article F(1) was unsatisfactory. Therefore, the Treaty of Lisbon revised it and created a more detailed clause in Article 4(2):

> The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect the essential State functions, including ensuring the territorial integrity, maintaining law and order and safeguarding national security.

This concept promotes a balanced relationship between the Union and Member States, which the Member States have embraced and have begun to make use of. This was mostly the case when they wanted to protect their national identity; for example, when they challenged the validity of EU legal acts, they wanted to justify their failure to comply with their obligations under EU law or when national identity became a suitable argument for disputes between Member States and the EU.[4] In this context, national identity is a broader concept that encompasses cultural, political, and constitutional identities. However, it is important to consider constitutional identity as a key aspect in defining national identity.

However, constitutional identity cannot be associated solely with the definition of national identity in the sense of EU law. This is a traditional concept in constitutional theory,[5] although it cannot be denied that it enjoyed a renaissance in the context of the above-mentioned specification of national identity. When a constitution is created, identity is also created. However, the identity of the Constitution, in particular, must be seen not only in its normative but also in its social, political, and historical dimensions. If a constitution is ratified by referendum, the necessary legitimacy is created by the people affirming its identity. According to G. J. Jacobsohn, a constitution acquires identity through experience from a mix of political aspirations and commitments that express a nation's past and the desire to transcend that past. He sees the identity of the Constitution as changeable but resistant to its own destruction.[6] The identity of the Constitution could be most convincingly determined if it were anchored in its entirety in its original text, which is clearly impossible.

If identity is a certain qualitative attribute, constitutional identity expresses not only what a given constitution is but also what it is not. In other words, it is an abstraction of the spirit of a given constitutional text or particular constitutional system. Identity expresses what is truly essential to the Constitution and the foundations on which it is built. Thus, it is a certain dimension of constitutional identity in

4 From a certain point of view, the UK's withdrawal from the EU and the attitudes of Hungary, Poland and Germany can also be seen as a consequence of the preference for national identity.

5 Kosař and Vyhnátek, 2018, pp. 854–872.

6 Jacobsohn, 2010, p. 368.

an objective sense, and these foundations, as values, enter the Constitution in the process of its creation. Thus, constitutional values are present in the text of the Constitution. Undoubtedly, they form part of their material core, but it is not possible to equate their constitutional identity with the material core of the Constitution alone. According to Bárány, constitutional identity is expressed at the base of the Constitution and its material core.[7]

> The value base of a constitution is not identical with the material core of a constitution. The value base of a constitution consists of the values on which it is based and which are also present in its text or at least constitute its demonstrable background. The material core of a constitution consists of those parts (principles) which the constitution itself designates as part of its material core. The essentials of a democratic state governed by the rule of law are not the value base of a constitution. It is democracy and the rule of law.[8]

3. Authority and identity

The origin of the word 'authority' can be traced to Italian. 'Auctor' is a creator, a doer, and subsequently 'auctoritas' denotes power and influence. Dictionary definitions define authority as respectability, recognition, or influential personality, which is a manifestation of high expertise.[9] This concept has a cross-cutting character in the branches of science and is, for example, a grateful object of study for political scientists and sociologists.[10] Authority is related to power. In principle, it is generally accepted that authority differs substantially from power, which is based on direct coercion, in that it is legitimised in some way. It can demonstrate that a person, institution, or group has obtained basic consent to exercise their power, stimulate, coordinate, control, and organise human activities or express individual and general interests. Thus, authority is linked to legitimacy. The power of authority is used even when it is rationally impossible or difficult to justify the means chosen to achieve general values or truths.[11]

7 Bárány, 2013, pp. 113–116.

8 Ibid.

9 https://slovnik.aktuality.sk/pravopis/kratky-slovnik/?q=autorita.

10 Authority was a concern of A. Comte or Spinoza's Tractatus theologico-politicus (1670). B. Malinowski defines it as a legitimate power used to establish norms whose observance is reinforced or enforced, such as by means of sanctions. A group of authors (e.g. H. D. Lasswell, A. Kaplan, H. Arendt) tried to distinguish the concept of authority as precisely as possible from the concepts of power, influence, and coercion. G. C. Lewis showed how important it is not only to define authority or to determine what authority will be but also, above all, to examine how consent is obtained for someone to exercise authority. In the same vein, Max Weber distinguished authority based on tradition, charisma, and rational legitimacy. See more: https://encyklopedie.soc.cas.cz/w/Autorita.

11 Ibid.

As the constitution emerges and creates its own identity, it can create its own authority. This situation is influenced by several factors that can enhance or diminish the authority of the Constitution. These include, for example, the political consensus within the constitution-making process, the process of drafting and adopting the constitution, the quorum achieved in the voting on the constitution, the presentation and public acceptance of the constitution, and its approval in a referendum.

The Constitution of the Slovak Republic was created during the time of the common state with the Czech Republic, during the time of the Czechoslovak Federative Republic.[12] Its creation was the result of turbulent democratic changes that began with the fall of the totalitarian regime in November 1989. The coexistence of the Czech and Slovak people in a common state gradually became increasingly problematic. In January 1990, shortly after the November events, the Slovak National Council (the Chamber of the Federal Parliament for the Slovak Republic) adopted a declaration on the drafting of three separate constitutions: the federal constitution and the constitutions of two Member States—the Czech Republic and the Slovak Republic.[13] Unfortunately, it was not possible to synchronise the work on the three constitutions in the course of further development.[14]

The Slovak party had a stronger desire for its own constitution and constitutional system and immediately set up a constitutional drafting commission headed by Professor Karol Plank.[15] Work on the Constitution was quite intensive, with several drafts submitted from the beginning of 1991. By the end of the parliamentary term, there were nine drafts of the Constitution of the Slovak Republic, almost all of which envisaged a common state system within Czechoslovakia.[16] An important development in this respect was the June 1992 parliamentary election.[17] In Slovakia, the Movement for Democratic Slovakia (HZDS), which had no secret about its preference for an independent Slovak Republic within the framework of a constitutional settlement, won.[18] A new committee was set up under the chairmanship

12 Orosz et al., 2009, pp. 9–37.

13 Petranská Rolková, 2017, pp. 31 *et seq*.

14 A problematic issue was the degree of centralisation of the federation and the autonomy of the Member States.

15 The so-called Plank committees, modified during the more than two years of their existence, proved to be crucial in the whole process of creating the Constitution of the Slovak Republic. In August 1990, the so-called Second Plank Committee was set up, which, unlike the first one, was a joint committee of the Slovak National Council and the Government of the Slovak Republic.

16 The proposal of the then Slovak National Party and the proposal of the MP Peter Brňák, which did not envisage a federal structure, were fundamentally different from all the other proposals.

17 The elections were held in an unconventional way, two years after the so-called first free elections in June 1990, which were a kind of trial period for democracy.

18 On 17 July 1992, the HZDS, together with the Slovak National Party and the Party of the Democratic Left, supported the proclamation of the Declaration of the Slovak National Council on the Sovereignty of the Slovak Republic, which aggravated the already rather tense relations between the Czech and Slovak political representatives and in a way triggered the process of the division of Czechoslovakia.

of the academician Milan Čič.[19] The text of the Slovak Republic Constitution was drafted and adopted in a relatively hectic manner, as is sometimes the case with the constitutions of newly emerging states. This was reflected in the fact that the draft constitution only underwent an accelerated interministerial comment procedure that took place in a conference format.[20] The draft constitution was discussed in the fifth session of the 10th Constitutional Electoral Period, which lasted two days.[21] The Constitution was adopted by acclamation on the evening of 1 September 1992; 114 of the 134 members of the Slovak National Council voted in favour of the adoption of the Constitution of the Slovak Republic.[22] Despite the relatively high number of votes in favour, the adoption of the constitution caused embarrassment, especially on the Czech side, where it was seen as a clear signal for the dissolution of the federation.[23] Although the process of its creation diminished its authority in some way, the euphoria of the new independent state and the fact that a new legal system began to be created, partly in support of the legal system of the former federation[24], partially offset the authority of the Constitution. Notably, a country that fought so hard for independence and full sovereignty 30 years ago did not hesitate to accelerate its integration efforts later in the context of its accession to the EU.

4. Constitution of the Slovak Republic and constitutional identity

Like other Constitutions, the Constitution of the Slovak Republic created its identity during its creation, which was influenced by relevant historical events. By

19 The academician Milan Čič was the first Prime Minister of the Government of National Understanding after the November Revolution in the period from 12 December 1989 to 26 June 1990, and from 13 December 1989 to 27 June 1990, he was also the Deputy Prime Minister of the Czech and Slovak Federative Republic. From July 1992, he was the Deputy Prime Minister of the Czech and Slovak Federative Republic with oversight over legislation. After the dissolution of the federation and the establishment of the independent Slovak Republic, as a plenipotentiary of the Government of the Slovak Republic, he focused on the establishment of the Constitutional Court of the Slovak Republic. After its establishment, he became its first Chairman. He held this position for the whole of his first term of office (seven years) until January 2000.

20 It was also strange that the draft Constitution was submitted to the parliament without an explanatory memorandum, which was prepared later.

21 Petranská Rolková, 2017, pp. 33 *et seq*.

22 Paradoxically, the Constitution of the Slovak Republic was published in the Federal Czech-Slovak Collection of Laws (in Volume 92/1992, under No. 460/1992 Coll.), while the Constitution of the Czech Republic became the first law of independent Czech legislation under No. 1/1993 Coll.

23 Palúš and Somorová, 2008; 2010.

24 Some laws from the period of the common state with the Czech Republic are still in force in the Slovak Republic (e.g. Act No. 40/1964 Coll. Civil Code, as amended, Act No. 83/1990 Coll. on association of citizens, as amended).

defining identity, the constitution can also be identified.[25] In the original text of the Constitution, a large part of its identity in relation to the self-determination of the nation is found in the preamble, in which national and civic principles were eventually combined.[26] In material terms, the identity of the Constitution was created in accordance with the basic principles of modern constitutionalism: the principles of the sovereign state, democracy, separation of powers, pluralism, the rule of law, legal certainty, the principle of the guarantee and protection of fundamental rights and freedoms, republican parliamentarianism, the unitary state, local self-government, and the principle of a socially ecologically oriented market economy.[27]

It can be stated with some generality that interference with these principles would constitute an interference with the identity of the Constitution; as constitutional principles express the essence of the whole social value system, they carry the axiological meaning of the Constitution. They are an expression of the most important values of society, and, thus, express the essence of the entire social value system. Constitutional principles must be considered in the drafting of all pieces of legislation; thus, by changing them *ex constitutione,* the legal system changes as well.

Based on features identical to the model forms of government, the constitution defined its identity relative to the parliamentary form of government, where the National Council of the Slovak Republic (the 'National Council of the SR') has played a key role since the beginning regarding other constitutional bodies and the exercise of power in the State. This overlap with the classical parliamentary form of government, with minimal deviations, created an appropriate framework for its implementation, given the period in which the constitution was created.[28] *'The Constitution of the Slovak Republic, in its original wording, despite some reservations, was a very solid piece of legislation, especially in the context of the time and the socio-political conditions in which it was adopted'.*[29] The scope of this study does not allow for a more detailed analysis of all the aspects of constitutional identity that have been proposed. The next section will focus mainly on those that have become prominent in the context of the selected amendments.[30]

25 See more on the creation process of the Constitution of the Slovak Republic, *e.g.* Orosz et al., 2009.

26 The final text, after extensive discussion, is as follows: '*We, the Slovak Nation, bearing in mind the political and cultural heritage of our predecessors and the experience gained through centuries of struggle for our national existence and statehood, mindful of the spiritual bequest of Cyril and Methodius and the historical legacy of Great Moravia, recognising the natural right of nations to self-determination, together with members of national minorities and ethnic groups living on the territory of the Slovak Republic, in the interest of continuous peaceful cooperation with other democratic countries, endeavouring to implement democratic form of government, to guarantee a life of freedom, and to promote spiritual culture and economic prosperity, thus we, the citizens of the Slovak Republic, have, therewith and through our representatives, adopted…'.*

27 See more, *e.g.* Giba et al., 2019, pp. 128 *et seq.*; Palúš and Somorová, 2008; 2010.

28 See, *e.g.* Petranská, 2017. Orosz et al., 2009, p. 48.

29 Orosz and Svák et al., 2021, p. xxxv.

30 See more on the amendments of the Constitution, *e.g.* Hodás, 2017, pp. 13 *et seq*; Orosz et al., 2009, pp. 49 *et seq*; Orosz and Svák et al., 2021.

5. Constitutional identity and selected amendments to the Constitution

However, the concept of parliamentarianism, with the strong constitutional position of the National Council of the SR, was not sustainable in the long term in the Slovak Republic. The original intention of the constitution-making body regarding the office of the president proved insufficient in the 1998 presidential elections. According to the original text of the Constitution, the president was elected by the National Council of the SR, with a 3/5 qualified constitutional majority of all members of the National Council of the SR required for election.[31] This majority was also required for the re-election of the president; no reduction of the quorum was envisaged for the re-election. Given the political situation in Slovakia, there were real concerns about whether the parliament would elect the president. It was the historic first amendment of the Constitution, implemented by Constitutional Act No. 244/1998 Coll., which affected the position of the president and heralded the erosion of the identity of the Constitution regarding the existing parliament–president–government concept. Constitutionally and politically, it was not negatively evaluated, as it somewhat eliminated the systemic defects of the Constitution.[32] If the office of the president was vacant, the amendment divided the exercise of certain presidential powers between the government—explicitly, the Prime Minister, as in Article 105(1)—and the President of the National Council. Of the original non-transferrable presidential powers, only minimal powers (e.g. the conferring of honours) remained in the Constitution. A subsequent amendment by Constitutional Act No. 9/1999 Coll. continued to interfere with the position of the president, changed the method of electing the president to direct election by citizens (Article 101 of the Constitution), and partly modified the president's constitutional position, for example, by defining the powers to act as arbitrators (Article 102(1)(e) of the Constitution) and weakening the president's position by introducing the institution of countersignature (Article 102(2) of the Constitution).

Although the modification of the creation of the president affected the original concept of the Constitution, it also affected its identity sustainably. However, much more extensive interference with the president's position was made by the tenth amendment to the Constitution, Constitutional Act No 356/2011 Coll., which *de facto* strengthened the powers of the president in the so-called crisis regime.[33] Thus, the

31 Which is 90 out of a total of 150 MPs.

32 The non-transferrable powers of the President of the Republic included the power to appoint and remove Government members (i.e. if the President was not elected, there would be no one to appoint the Government.

33 Following the fall of the Government, a third para. was added to Art. 115: *(1) The President of the Slovak Republic shall recall the Government if the National Council of the Slovak Republic passes a vote of no-confidence in the Government or if it turns down the Government's request to pass a vote on confidence in it. (2) If the President of the Slovak Republic accepts the Government's resignation, he or she*

powers of the President do not fit into the concept of a parliamentary form of government. Moreover, in the period in question (from the recall of the government), the National Council of the SR had no real power to control the government. Meanwhile, when to put an end to the situation created and how to start the process of establishing a new government is in the president's hands. Given the real political events in the Slovak Republic, a situation may arise when the president activates Article 115(3). Its actual use should be the result of mature and statesman-like decisions that are naturally influenced by the wisdom and moral strength of the personality who holds the office of the President of the Slovak Republic.

The position of the president was also affected by the sixteenth amendment to the Constitution (Constitutional Act No. 71/2017 Coll), a controversial amendment resulting from considerable social pressure. It expanded the powers of the National Council of the SR to include the possibility of annulling the president's decisions regarding amnesty or pardon.[34] Meanwhile, it broke the principle of the prohibition of officiality in proceedings before the Constitutional Court of the Slovak Republic (the 'Constitutional Court of the SR').[35] Consequently, the decision of the Constitutional Court of the SR in the matter[36] became fundamental in the direction of constitutionality from the perspective of values and, thus, the very identity of the Constitution. By balancing legal principles, the Constitutional Court of the SR allowed interference with the powers of the president regarding granting pardons or amnesties.

> In an objective balancing of constitutional principles, which were affected on the one hand by the resolution of the National Council under review and on the other hand by the derogated decisions of the Prime Minister on amnesties, in the opinion of the Constitutional Court, the preference of the legal certainty of persons who are reasonably suspected of committing serious crimes cannot stand. The annulment of an amnesty (or pardon) in the form of an abolition does not call into question the fundamental right of the persons concerned to the presumption of innocence and all

shall entrust it with the execution of its duties until a new Government is appointed. (3) If the President of the Slovak Republic recalls the Government in accordance with para. (1), then by a decision promulgated in the Collection of Laws of the Slovak Republic, he or she shall charge the Government with further performing its competences until a new Government is appointed, but solely those competences set out in Art. 119(a), (b), (e), (f), (m), (n), (o), (p), and (r); however, the performance of competences of the Government set out in Art. 119(m) and (r) shall require the prior approval of the President of the Slovak Republic in each individual case.

34 Art. 86(i) of the Constitution of the SR: *'adopting resolutions annulling a presidential decision under Art. 102(1)(j) if this decision violates the principles of a democratic state governed by the rule of law; the resolution adopted shall be generally binding and shall be promulgated in the same manner as prescribed for the promulgation of laws'.*

35 *Art. 129a of the Constitution of the SR: 'The Constitutional Court shall decide on the compliance of resolutions of the National Council of the Slovak Republic annulling an amnesty or a pardon adopted under Art. 86(i) with the Constitution of the Slovak Republic. The Constitutional Court shall commence proceedings in cases referred to in the first sentence upon its own motion; Art. 125 shall apply mutatis mutandis'.*

36 Finding of the Constitutional Court of the SR in Case No. PL. ÚS 7/2017 of 31 May 2017

the fundamental guarantees of a fair criminal trial guaranteed by the Constitution and international treaties on human rights and fundamental freedoms.[37]

The indicated direction was pursued by the Constitutional Court of the SR in Case No. PL. ÚS 21/2014 of 30 January 2019, where the Constitutional Court based its reasoning on a certain change in the concept of the roles of legal principles and in their value shift.[38] Thus, the Constitutional Court of the SR clarified the overcoming of the thesis that the law is only what materialises in the applicable legislation, rules, or sources of law. In any case, the noted amendments to the Constitution, modifying the position of the president, also modified its identity.

6. Constitutional identity and the accession of the Slovak Republic to the European Union

Of the other amendments that have affected the identity of the Constitution, it is important not to forget the one that resonated in the context of the Slovak Republic's preparations for accession to the EU (in this context, it also became known as the Euro Amendment). This was the third amendment to the Constitution (Constitutional Act No. 90/2001 Coll.), visibly shifting its identity. Although this so-called major amendment to the Constitution was the most extensive in terms of content

37 *'…the Constitutional Court, after evaluating the negative consequences of the interference with the legal certainty of persons who were amnestied by the decisions of the Prime Minister for acts related to the abduction of Michal Kováč Jr. to a foreign country, caused by the resolution under review, and balancing it with the principles of a democratic state governed by the rule of law, which, according to the above-mentioned conclusions of the Constitutional Court, have been violated by the decisions of the Prime Minister on amnesties in the parts relating to the 'abduction' (the principle of prohibition of arbitrariness, the principle of legality, the principle of protection of human rights and fundamental values in conjunction with the principle of respect for international obligations, the principle of separation of powers, the principle of transparency and public accountability in the exercise of public authority, and the principle of legal certainty and the protection of citizens' confidence in the rule of law), and ultimately guided by the key principle of the rule of law in a substantive sense – the principle of justice, which constitutes the fundamental basis for the exercise of judicial power..'.* – Ibid.

38 *'…In this context, the Constitutional Court also referred to the oath of the Constitutional Court judge, whose task is, among other things, to protect the rule of law. Given that the constitution does not contain explicit provisions on immutable articles, it is only possible to speak of an implicit material core of the Constitution, the scope of which is determined by the case law of the Constitutional Court. A fundamental decision in this respect was the Finding in Case No. PL. ÚS 7/2017 (the so-called Mečiar amnesties), in which the Constitutional Court stated that the material core of the Constitution consists of the principles of a democratic state governed by the rule of law. As regards these principles, their enumeration is not definitive and is constantly evolving; therefore, it is necessary to assess interference with the material core of the Constitution on a case-by-case basis, taking into account also the intensity of any interference…'* – see the Finding of the Constitutional Court of the SR in Case No. PL. ÚS 21/2014 of 30 January 2019.

(it changed approximately 40% of the original text), it was adopted by a marginal constitutional majority (90 MPs voted in favour of it). This amendment modified the identity of the unitary state regarding the Slovak Republic's accession to the EU. Objectively, it can be assessed as a necessary amendment to the Constitution, as it constituted a necessary constitutional framework for the harmonisation of Slovak law with EU law. Beyond specifying relations with international and European communities (ECs), it also affected the regulation of a wide range of national legal institutions (e.g. the judiciary, constitutional judiciary, local self-government, Supreme Audit Office, and Public Defender of Rights). It can be stated that the Constitution has significantly expanded and, in a way, redirected its identity with this amendment by subsuming the prefix euro.

From a substantive perspective, this was a justified constitutional amendment related to inclusion in international structures, although, since the establishment of its independence, the Slovak Republic has become a member of several international organisations (e.g. the United Nations and the Council of Europe) only based on the established rules of international law.[39] The text of the Constitution was amended only before the accession of the Slovak Republic to the EU, mainly in connection with the fact that the sovereignty of the Slovak Republic was expected to be limited as a result of the transfer of powers to the Union.[40]

Meanwhile, it was considered that there would be a need for the reception of the already existing legislation but not the new Slovak Republic legislation. The Explanatory Memorandum to the prepared constitutional amendment states:

> A new state acceding to the European Communities is contractually obliged to adopt 'the acquis communautaire', i.e. it is obliged not only to accede to all the treaties establishing the European Communities, but also to adopt all the legal acts adopted by the Community authorities at the time of the state's accession. This includes, for example, the case-law of the Court of Justice of the European Communities).
>
> European Community law (also known as Community law, European law, Community – European Union law) is a system of supranational law. It differs from ordinary legal systems in particular in that the European Communities have acquired from the Member States the power to create laws which are binding not only on

39 See, *e.g.* Jánošíková, 2013, pp. 249–264.

40 *'Following the transfer of sovereignty, most Member States have included in their constitutional texts not only general receptive provisions guaranteeing the primacy of Community law over national law, but also, for example, the direct binding force of general rules of international law (e.g. Art. 25 of the Basic Law of the Federal Republic of Germany, Art. 8 of the Constitution of the Portuguese Republic, Art. 9 of the Constitution of the Republic of Austria, and others). The vast majority of these countries have applied a monist conception of the relationship between international and domestic law in this respect (an exception is, for example, the United Kingdom of Great Britain and Northern Ireland, which applies a dualist conception).'* Explanatory Memorandum to Constitutional Act No. 90/2001 Coll., available at: https://www.nrsr.sk › web › Dynamic › Download

> the Member States themselves but also on natural and legal persons established on their territory. Community law is therefore a specific and independent legal system which, as a whole, cannot be defined either as international law or as the national law of the individual Member States of the European Communities. It comprises so-called primary law (the treaties establishing the European Communities, the treaties amending them, the treaties by which the new Member States acceded and the international treaties to which the EC is a party), secondary law (regulations, directives, decisions, recommendations, opinions and acts adopted by the Commission pursuant to the treaties establishing the European Communities or on the basis of a mandate from the Council), the judgments of the Court of Justice of the European Communities and the customary law applicable in the EC, including unwritten principles which, in the course of the judicial development of the law, have been taken over from the national law of individual countries and principles of international law and further developed by the Court of Justice of the European Communities (in particular, the Court's opinions on the validity of human and fundamental rights in Community law).
>
> The provisions of the national legal systems of the Member States of the European Communities and of the European Union may not therefore be contrary to the primary law of the European Communities, to the secondary law of the European Communities or to the case-law of the Court of Justice of the European Communities. For this reason, these States have adapted the text of their constitutions and, consequently, their legal systems in order to make them compatible with Community law.[41]

Experts have discussed the accession of the Slovak Republic to the EU since the establishment of the independent Slovak Republic.[42] More intensive (sometimes heated and even contradictory) discussions took place from 1999 onwards when work gradually began on the actual text of the constitutional amendment.[43] Progressive and beneficial amendments to the Constitution were also proposed, which unfortunately did not make it into the final text of the amendment in question (e.g.

41 Ibid.

42 The explanatory memorandum to the amendment states that *'by concluding the Association Agreement in 1993, the Slovak Republic committed itself to joining the European Communities and the European Union (Communication of the Ministry of Foreign Affairs of the Slovak Republic No. 158/1997 Coll.; Amendments No. 4/1999 Coll. and No. 107/2000 Coll.). The implementation of this international treaty requires not only the approximation of Slovak law to European Communities law, but also the creation of constitutional conditions for the future ratification of all fundamental international treaties on which the European Communities and the European Union are based and, in particular, for their subsequent application in the manner required for all Member States of these international organisations'.*
Explanatory Memorandum to Constitutional Act No. 90/2001 Coll., available at: https://www.nrsr.sk › web › Dynamic › Download.

43 Between May 1999 and May 2000, 52 lengthy articles on the content of the proposed amendment were published in the press. The intensity of these articles increased, with 117 published between January 2000 and February 2001. The television debates were equally intense. During the preparatory work, 27 versions of draft amendments of the Constitution were prepared.
See more: Lešková, 2021, pp. 60–61.

the constitutional definition of the legal force and effects of secondary community law).[44]

In the context of EU membership, two major issues had to be resolved: how powers would be transferred to the ECs and the EU and the rules for integrating the already extensive EC and EU law. Both issues were essential for the successful future coexistence of the EU and Slovak law. On both issues, the new wording of the then rather short Article 7 of the Constitution of the Slovak Republic is crucial.[45] The key to this was the addition of a second paragraph to the Article:

> The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120(2).[46]

The relatively clear and somewhat standard constitutional wording raises several questions regarding its interpretation; for example, in connection with the fact that Article 7(2) of the constitution does not speak of a transfer of powers but only of a transfer of *'the exercise of part of its rights'*. According to the wording of Article 7(2), the

44 Jánošíková, 2013, pp. 249–264.

45 Original wording No. 7 before the amendment: *'The Slovak Republic may, by its own discretion, enter into a state union with other states. The right to withdraw from this union may not be restricted. A constitutional law, which shall be confirmed by a referendum, shall decide on the entry into a state union, or on the withdrawal from such union.'*

46 Current wording of Art. 7: '(1) The Slovak Republic may, by its own discretion, enter into a state union with other states. A constitutional law, which shall be confirmed by a referendum, shall decide on the entry into a state union, or on the withdrawal from such union. (2) The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and the European Union. Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic. The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Art. 120(2). (3) The Slovak Republic may for purpose of maintaining peace, security and democratic order, under conditions established by an international treaty, join an organisation of mutual collective security. (4) The validity of international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which a membership of the Slovak Republic in international organisations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary and international treaties which directly confer rights or impose duties on natural persons or legal persons, require the approval of the National Council of the Slovak Republic before ratification. (5) International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws'.

Slovak Republic may only transfer the exercise of a part of its rights to the ECs and the EU. Currently, if the transfer of the exercise of a part of its rights were to be modified, it would only be in relation to the EU and Euratom.[47] At the time of the amendment to the Constitution, inspired by some Member States, this was considered the best possible solution.[48] Accession treaties are international and induce international membership. Thus, the amendment to the Constitution also reflected the newly emerging need to specify international treaties that have taken on a multilevel character.

The Constitution specified several categories of international treaties, namely international treaties by which the Slovak Republic may, for maintaining peace, security, and democratic order, join an organisation of mutual collective security—Article 7(3)—and international treaties on human rights and fundamental freedoms, international political treaties, international treaties of a military character, international treaties from which membership of the Slovak Republic in international organisations arises, international economic treaties of a general character, international treaties for whose exercise a law is necessary, and international treaties that directly confer rights or impose duties on natural persons or legal persons—Article 7(4). Their validity requires the approval of the National Council of the SR before ratification, which allows the members of parliament to discuss such a treaty before its entry into force. Meanwhile, along with Article 125a, a preliminary review of constitutionality was provided, which enables the President and the Government of the Slovak Republic to submit a proposal to the Constitutional Court to review the conformity of a negotiated international treaty before its ratification by the National Council of the SR.

International treaties on human rights and fundamental freedoms, international treaties for which exercising a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons, which were ratified and promulgated in the way laid down by law, shall have precedence over laws in accordance with Article 7(5).[49] This Article establishes the primacy

47 Since the entry into force of the Lisbon Treaty (1 December 2009), there is only the EU and Euratom.

48 The Constitutions of Belgium and Luxembourg have similar provisions – see: Klokočka and Wagnerová, 2004.

49 *'The constitutional statement according to which international treaties for whose exercise a law is not necessary, which were ratified and promulgated in the way laid down by a law and by which the Slovak Republic is bound shall have precedence over laws means not only that the constitution-maker considers such treaties to be part of the legal system of the Slovak Republic, but also that in the hierarchy of legal norms it assigns them a place between the Constitution (constitutional laws) and the laws of the National Council of the Slovak Republic.'*
'The rule of precedence of directly binding international treaties approved by the National Council of the Slovak Republic will also result in the judges being bound by these international treaties (the proposed wording of Art. 144(1) of the Constitution states in this regard that judges, in the performance of their function, shall be independent and bound by the Constitution, by constitutional laws, by an international treaty pursuant to Art. 7(2) and (5), and by laws). It is therefore assumed that in the event of a conflict between a law and an international treaty approved by the National Council of the Slovak Republic, the judges will give precedence to the international treaty, i.e. they will not apply the law'.
Explanatory Memorandum to Constitutional Act No. 90/2001 Coll., available at: https://www.nrsr.sk › web › Dynamic › Download.

of the aforementioned international treaties over law. Hierarchically, they remain below the Constitution in the legal system, which is ultimately guaranteed by the Constitutional Court of the Slovak Republic in accordance with Article 125a.[50] The international treaties by which the Slovak Republic became part of the EC and EU were perceived in this regime.

However, this also deconstructs the traditional grouping of legal rules, the top of which is the Constitution, whose position is diminished by the case law of the Court of Justice of the European Union (CJEU). By rejecting the classic intergovernmental subtext of the founding (international) treaties, according to which only the Contracting (Member) States have direct rights and obligations, the Court of Justice has undermined the principle of the unchallengeability of the legal system.[51] The international character of the Communities and the literal interpretation of the founding treaties have been discarded through the case law of the CJEU in favour of quasi-constitutional principles to be considered in any interpretation of EU law. This has transformed the communities of sovereign Member States into supranational communities, despite the initial opposition of some governments or constitutional courts of the Member States (Germany, Italy, Ireland, Spain, France, Italy, Denmark, and the Czech Republic). The supranational understanding of integration in the eyes of the CJEU, thus, dominates today's pan-European legal discourse despite many reservations.[52]

Based on the current experience, despite the above, the impact of constitutional changes has gone well beyond what was anticipated.[53] However, the optimism of the Explanatory Memorandum and the relatively unambiguous provisions of the Constitution have given rise to several application problems over time. One is that the processes of integration and globalisation undermine the unchallengeability of the legal system, which is a fundamental and necessary condition for effective functioning. For example, they have led to a perceived diametrical difference between the application of international treaties while maintaining the national degree of legal force and the approach of European law. Similarly, the CJEU does not consider the hierarchical order of the sources of national law in its decision-making.[54]

50 *'It is therefore not possible to assume that an international treaty would be concluded whose the content would contradict the Constitution of the Slovak Republic, nor that the content of such an international treaty would make it impossible to apply the constitutional standard of protection of human rights and fundamental freedoms in the Slovak Republic'.* – Ibid.

51 Breichová Lapčáková, 2020, p. 108.

52 Baraník, 2017, pp. 238–243.

53 See, *e.g.* Orosz, 2001, pp. 969–991.

54 Breichová Lapčáková, 2020, p. 108.

7. Constitutional aspect of the relationship between European Union law and national law of the Slovak Republic

Despite the Court's preference for uniformity of application, each national law has its own way of national acceptance of EU Law, including the Slovak Republic. The fact that, from the perspective of EU law, it is 'only' a national interpretation of the effects of EU law does not change this. By accessing the EU, Member States committed themselves to respecting all EU laws, which became part of their national laws at the moment of membership. The CJEU has given Union law a direct effect and immediate primacy of application over the laws of Member States. In its fundamental case law, the CJEU has defined EU law as superior to all national laws of Member States, irrespective of their national legal force or constitutional review procedures.[55] Although national laws (especially through the doctrines of constitutional courts) interpret these effects in different ways, they are obliged to accept them in light of the above. In case of violation or non-respect of the effects of EU legal acts by Member States, there is an adequate sanctioning mechanism at the union level, for example, in the form of non-negligible financial sanctions. However, this problem arises when the effects of the application of EU Law are disproportionate to specific national conditions, which naturally creates a conflict and raises the question of the appropriateness of the application of EU Law. Even in such cases, the constitutional court should prioritise the constitutionality of national law. The Constitutional Court of the Slovak Republic is one of the most restrained constitutional courts on these issues; its rather modest case law in this respect is discussed below.

The relationship between EU law and the national law of the Slovak Republic from a constitutional perspective is specified in two lines:

1) Vertical separation of powers relating to the transfer of the exercise of powers under Article 7(2),
2) The line of transformation of Union Law and its subsequent coexistence within the national law of the Slovak Republic.

7.1. On the transfer of powers

The constitutional basis for the operation of EU Law in Slovak Law is Article 7(2). This is the so-called delegation or transfer clause, providing the necessary constitutional legal basis for the proper fulfilment of the obligations assumed by the Slovak Republic when concluding the Europe Agreement establishing an association between the Slovak Republic, on the one hand, and the ECs and their Member States, on the other hand.

55 We refer, *e.g.* to Judgement of 3 June 1964, *Costa v E.N.E.L.* 6/64; as well as Judgement of 17 December 1970, *Internationale Handelsgesellschaft mbH*, C-11/70; and Judgement of 9 March 1978, *Simmenthal* 106/77.

> The Slovak Republic may, by an international treaty, which was ratified and promulgated in the way laid down by a law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and the European Union.—Article 7(2)

The constitutional text allows the Slovak Republic to transfer the exercise of a part of its rights to the EU. This refers to the conclusion of an international treaty which, if adopted, becomes part of the union's primary law. Given the international character of the founding treaties, this part is also the determining regime for the operation of EU law in Slovak law. Under this regime, the Slovak Republic (together with other acceding states) concluded an EU Accession Treaty with the original EU Member States. The National Council expressed its approval at its meeting on 1 July 2003. The president signed an instrument for ratification on 26 August 2003. The Treaty was promulgated in the Official Gazette of the Slovak Republic by Communication of the Ministry of Foreign Affairs of the Slovak Republic No. 185/2004 Coll., as required by Slovak legislation.

The first part of Article 7(2) of the Constitution explicitly speaks only of the transfer of 'the exercise of a part of its rights', not of the transfer of rights or powers themselves. Based on this provision, there was no surrender of national sovereignty to a supranational organisation; therefore, we cannot speak of a surrender or transfer of sovereignty. This provision is unusual and rather imprecise from the perspective of international law, since states delegate powers, not the exercise of rights, to international organisations. However, a comparative perspective shows that even constitutional articles that allow for the transfer of the exercise of power do not entail the loss of a state's sovereignty. In contrast, the sovereign act of a temporary transfer of powers can also be understood as a declaration of the full sovereignty of a particular state. Only a fully sovereign state can perform such an act.[56] Meanwhile, the wording of Article 7(2) also implies that it cannot transfer the exercise of all rights held by the Slovak Republic but only the exercise of some of those rights.

The transfer of the exercise of powers was also linked to the holding of a referendum on the Slovak Republic's accession to the EU in May 2003, with a simple question—*'Do you agree to the proposal that the Slovak Republic should become a Member State of the European Union?'* This referendum was the fifth such attempt in Slovakia. To date, 52.15% of eligible voters have participated, making it the only valid referendum among all national referenda held in Slovakia to date.[57] The required turnout threshold for the validity of the referendum was only just exceeded, despite a state-funded information agenda, and the consensus of all relevant political

56 Orosz and Svák et al., 2021 pp. 182 *et seq*.

57 The way the referendum was initiated was also specific—the President announced it based on a resolution of the National Council of the SR under Art. 95 of the Constitution, and all 147 participating MPs voted unanimously in favour of the resolution, including MPs from the then Communist Party of Slovakia (KSS), which had a strong negative attitude towards the EU.

parties with the help of dissenting voters, without whom the turnout would have reached only 48.9%. Thus, the mobilising effect of the official campaign was very limited. Accession to the EU was a long-term agenda of all previous Slovak governments, and thus, even though at certain stages it was more declaratory than a realistic policy, most citizens identified with this foreign policy goal, which was confirmed by long-term opinion polls. Nevertheless, during the referendum, there were concerns about reaching the required turnout threshold.[58] Since one of the arguments in favour of participation in the referendum was the claim that it was constitutionally mandatory, it is important to point out certain constitutional contexts.

From a substantive perspective, the Constitution distinguishes between obligatory and optional referenda. The provisions of the Constitution of the Slovak Republic concerning the regulation of obligatory referenda appear to be the least controversial (Article 93.1 and Article 7). In this context (Article 93.1), it is necessary to hold a referendum if the parliament adopts a constitutional law on joining a state union with other states or on secession from such a union. The Constitution lays down the obligation to call and hold a referendum in such a situation. It was also confirmed by the opinion of the Constitutional Court of the Slovak Republic— 'Mandatory referendum can be defined as a referendum by which a fundamental decision of the Parliament, whose nature is defined by the Constitution, must be approved by the citizens' (II. ÚS 31/97).

This referendum is a necessary precondition for the effectiveness of constitutional law, in that the Slovak Republic would join a state union with other states (or would secede from such a union). Therefore, this is also a ratification referendum, as without a positive result, the constitutional law will not come into force, and the effects arising from it (the entry of the Slovak Republic into the state union) will not be valid. If constitutional bodies decided to join a state union with another state, it would be up to the citizens of the Slovak Republic to express their opinion on whether they would accept the will of their legitimate state bodies. If the results of the referendum were positive, constitutional law would be enforced. Meanwhile, the Constitution would also change, and the subsequent decision-making of the Parliament would no longer be necessary. If the opinion expressed in the referendum was negative, the nation would exercise its right of veto, and the discussion on joining the state union (or secession from it) would have to be postponed for at least three years, as per Article 99.2 of the Constitution. Therefore, the adopted constitutional law was not enforced. The

58 The referendum was held on two days, 16 and 17 May 2003. The fact that the President used his constitutional power to set two voting days instead of one can be seen as an intention to ensure greater voter participation. Meanwhile, it allowed the political parties to continue their agitation in the event that the turnout on the first day did not reach the necessary 50% threshold, which in fact happened. Thus, on the evening of 16 May, the chairmen of the parliamentary parties met in the building of the National Council of the SR and called on the citizens to increase their participation during the second voting day. Similarly, on the next day, at lunchtime on 17 May, the top constitutional officials met and called on citizens to participate in the referendum.

results of the referendum would lead to a valid but ineffective constitutional law. The Constitution also provides for an optional referendum in Article 93.2 on other important issues of public interest.

The fact that the EU was not a state refutes any doubt that the referendum on accession to the EU was optional under the Constitution of the Slovak Republic. Notwithstanding the above, the fundamental objective—that is, the confirmation of this foreign-policy agenda—was achieved in the referendum, and the government could, thus, present its mandate to conclude accession negotiations related to accession to the EU. Meanwhile, it confirmed its legitimacy in transferring the exercise of power to the EU.

7.2. On the transformation of European Union law

EU law must be viewed on its own terms. Thus, primary and secondary sources of EU law work differently in the Slovak Republic.

7.2.1. Primary law and the Constitution of the Slovak Republic

The relationship between the primary law of the then ECs and the EU and the national law of the Slovak Republic had to be addressed comprehensively by an amendment of the Constitution within the framework of the regulation of the relation of the Slovak Republic to international law. In its original wording, the Constitution did not regulate this category of relations to a great extent. As already mentioned, the relationship to international law was, until then, assessed as moderately dualistic, as the Constitution provided for the primacy of only one group of international treaties over laws (i.e. international treaties on human rights and fundamental freedoms) but only provided that these treaties ensured a greater scope of constitutional rights and freedoms. Other international treaties can be applied in preference based only on specific clauses contained in individual laws. However, the dualistic concept of the relationship between international and national law, of which the Constitution provisions were characteristic until the relevant amendment, could jeopardise the fulfilment of the obligations the Slovak Republic would assume by acceding to the EU. As already mentioned, the case law of the CJEU upholds the principle of community monism, which is linked to the principles of primacy and the direct applicability of union law at the member-state level. Therefore, the regulation of the relationship between national and international laws has also been considered vital from the perspective of EU law. Therefore, in the context of the amendment of the Constitution in question, a new paragraph 2 was added to the original Article 1 of the Constitution[59], according to which the Slovak Republic acknowledges and adheres to the general rules of international law,

59 Wording of Art. 1 in the original text of the Constitution of the Slovak Republic: *'The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion'.*

international treaties by which it is bound, and its other international obligations.[60] Regarding the primary sources of European law, we perceive Article 1(2) only in a subsidiary way because it does not establish norms of international law as part of Slovak law, and primacy over national law, which is considered a means of fulfilling obligations arising from international law, is guaranteed by the Constitution only for certain groups of international treaties.[61] The Constitutional text still lacks a declaration that the norms of international law become part of the Slovak legal system. However, based on the amendment in question, under Article 7(5) of the Constitution of the Slovak Republic, there is room for a monistic solution to the relationship between a wider range of international treaties and national law. Even so, this applies only to a narrower category of international treaties, namely, international treaties on human rights and fundamental freedoms, for which exercising a law is not necessary, and international treaties which directly confer rights or impose duties on natural or legal persons that have precedence over laws. Primary Union law may, thus, be classified as international treaties for which exercising a law is not necessary and international treaties which directly confer rights or impose duties on natural or legal persons. This interpretation is also supported by the fact that, in 2003, the National Council expressed its approval of the Treaty on the Accession of the Slovak Republic to the EU and simultaneously decided that it was a treaty under Article 7(5).[62]

The special position of these categories of international treaties was also specified based on Articles 125 and 144(1) of the Constitution, which were modified by relevant amendments to the Constitution. Article 125 of the Constitution regulates the procedure for the conformity of laws before the Constitutional Court, within which the Constitutional Court may also consider the conformity of laws with international treaties approved by the National Council of the SR. Article 7 (4) of the Constitution of the Slovak Republic specifies international treaties that require the approval of the National Council before ratification by the president. This includes all groups of international treaties which, as per Article 7(5) of the Constitution, take precedence over laws. Thus, in the hierarchy of sources of law, international treaties to which the National Council of the SR has expressed its approval can be placed between the Constitution and constitutional laws, on the one hand, and laws, on the other. The protection of the constitutionality of these international treaties in

60 Current wording of Art. 1 of the Constitution of the Slovak Republic: *'(1) The Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion. (2) The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations'.*

61 Jánošíková, 2013, pp. 249–264.

62 The same is also clear from Communication of the Ministry of Foreign Affairs No. 185/2004 Coll. regarding the EU Accession Treaty, which states that the National Council agreed to ratify the EU Accession Treaty and decided that it is an international treaty under Art. 7(5) of the Constitution, which has precedence over laws, as well as from Communication No. 486/2009 Coll. concerning the Treaty of Lisbon.

the ratification process results from the special preventive constitutionality review procedure under Article 125a.[63]

In this context, we refer to Article 144 of the Constitution of the Slovak Republic.[64] The first paragraph of this Article regulates the sources of law by which judges are bound in their decisions, which include international treaties under Article 7(2) of the Constitution (i.e. international treaties by which the Slovak Republic has transferred the exercise of a part of its rights to the EU) and international treaties under Article 7(5) of the Constitution (i.e. international treaties which have precedence over laws). The order to bind the judges of the general courts directly through these international treaties may, thus, be regarded as a means of ensuring their primacy, as provided for in Article 7(5) of the Constitution.

7.2.2. Secondary law and the Constitution of the Slovak Republic

The basic line of the EU legal system regarding secondary law is determined by the Constitution of the Slovak Republic in the second sentence of Article 7(2): *'Legally binding acts of the European Communities and the European Union shall have precedence over the laws of the Slovak Republic'*. The Constitution explicitly refers to the so-called secondary law of the EU, which has been or will be adopted by the bodies of the EU based on the delegation of powers by Member States. Thus, the Constitutional text refers quite clearly to the dichotomy of the union's primary and secondary laws. By not explicitly mentioning primary law, the Constitution maintains it within the above-mentioned regime of international treaties.

We cannot conclude that the method chosen in this manner, which declares the primacy of secondary EU Law over law, is the most appropriate solution. According to Jánošiková, the term 'legally binding EC and EU acts' was used inappropriately, particularly given that at the time when the amendment of the Constitution was adopted (2001), EU law consisted of two parts: community law and union law. Traditionally, priority has been given to community law acts. However, the Slovak

63 Art. 125a *'(1) The Constitutional Court shall decide on the conformity of negotiated international treaties to which the approval of the National Council of the Slovak Republic is necessary with the Constitution or a constitutional law. (2) The President of the Slovak Republic or the Government may submit a proposal for a decision pursuant to para. 1 to the Constitutional Court prior to the presentation of a negotiated international treaty for discussion of the National Council of the Slovak Republic. (3) The Constitutional Court shall decide on a proposal pursuant to para. 2 within a period laid down by a law; if the Constitutional Court holds in its decision that the international treaty is not in conformity with the Constitution or a constitutional law, such international treaty may not be ratified'*.

64 Art. 144 *'(1) Judges, in the performance of their function, shall be independent and, in decision making shall be bound by the Constitution, by constitutional laws, by an international treaty pursuant to Art. 7(2) and (5), and by laws. (2) If a court assumes that other generally binding legal regulation, its part, or its individual provisions which concern a pending matter contradicts the Constitution, a constitutional law, an international treaty pursuant to Art. 7(5) or a law, it shall suspend the proceedings and shall submit a proposal for the commence of proceedings according to Art. 125(1). The legal opinion of the Constitutional Court of the Slovak Republic contained in the decision shall be binding for the court'*.

Republic voluntarily guaranteed the primacy of legal acts of union law. Another problem in the formulation of the primacy of secondary union law over the law concerns the temporal effects of Article 7(2) of the Constitution. The amendment to the Constitution came into force on 1 July 2001 almost three years before the Slovak Republic's membership in the EU. The Slovak Republic, thus, guaranteed primacy over its laws of legally binding acts of an international organisation of which it was not yet a member. This paradox cannot be mitigated by the obligation to ensure that its legislation will be gradually made compatible with that of the Union, which the Slovak Republic assumed in Article 69 of the Europe Agreement, establishing an association between the Slovak Republic, on the one hand, and the ECs and their Member States, on the other.[65]

The second sentence of Article 7(2), thus, gives secondary EU law supra-legislative status. Given the effects of EU Law and its characteristics, as shaped by the case law of the Court of Justice, the national formal assignment of supra-legislative status is, in Baránik's view, manifestly nonsensical, and one can reasonably doubt the compatibility of any confirmatory clause with primary or secondary EU law. Such additional national confirmation of the effects of EU Law could reduce the effectiveness of the operation of EU Law, which is by its nature unacceptable. The approach where a Member State, through its national law, seeks to give EU law national effects directly contradicts the established case law of the Court of Justice, even with the terminology of the EC or the EU. By joining the EU, the Slovak Republic respected these effects. Therefore, it is impossible to accept an explanation according to which EU law exists in the Slovak legal system in a legal regime determined exclusively by Articles 7(2) and (5). These provisions justify the national effects of primary and secondary EU laws inadequately and rigidly.[66] There are many open questions in this regard, which is why an inter-systemic solution, in which the Constitution, by explicit definition, opens itself up to EU law and neutrally states that EU law enjoys a status in a given legal system it itself establishes, may be preferable. The solution offered by the Constitution of the Slovak Republic is based on leaving room for interpretation by the Constitutional Court, but in the Slovak Republic (unlike other Member States), its activity in this direction is not widespread.

Article 7(2) continues with the third sentence, *'The transposition of legally binding acts which require implementation shall be realized through a law or a regulation of the Government according to Article 120(2)'*, which is already more explicit in terms of interpretation. It lays down the method of national implementation of those Union acts that need transposition into national law to be applied in the legal system (i.e. to be in effect). The Constitution provides for two basic ways in which implementation can be realised: via a law or the so-called approximation regulation of the government. This provision is inherently non-controversial and deals only with the effects of legal acts that require national implementation for their national effect.

65 Jánošíková, 2013, p. 249–264.
66 Orosz and Svák et al., 2021, p. 104.

Moreover, it is sufficiently flexible to respond to potential requirements of EU law.[67] To regulate relations between the Union and the Slovak Republic, it is necessary to remember the existence of Constitutional Act No. 397/2004 Coll. on cooperation between the National Council of the SR and the Government of the Slovak Republic on EU matters. It is one of the few pieces of legislation that remains in force in its original form and has never been amended. However, it is not because it exhaustively regulates relevant relations.

This constitutional law was adopted in a relatively short period after the Slovak Republic acceded to the EU on 24 June 2004. At that time, it was fully in line with the trend towards eliminating the democratic deficit within the union by strengthening the influence of national parliaments on decision-making on matters concerning the EU. This trend was later embraced by the Union through the Treaty of Lisbon. The adoption of this constitutional law was not a requirement for a state to become a member of a union under EU law. It was also not a regulation of matters whose national constitutional solution would have been required by union law. It was, and is, a matter for the state to decide whether to regulate these matters at a national level.

The Slovak Republic chose to regulate this in the form of constitutional law, thus blocking a more flexible method of its (sometimes necessary) amendment. According to this constitutional law, the government or an authorised member of the government shall submit to the National Council of the SR drafts of legally binding acts and other acts of the ECs and the EU to be discussed by the representatives of the Governments of the Member States of the European Union and shall inform it of other matters related to the Slovak Republic's membership in the ECs and the EU—Article 1(1). This constitutional law, thus, introduced an information obligation of the government towards the National Council of the SR regarding drafts of legally binding acts and other acts of the then ECs and the Union and matters related to the membership of the Slovak Republic in the EU. The Government (or its authorised member) shall, simultaneously with the draft acts of the union, provide a draft opinion of the Slovak Republic on these drafts, which includes an assessment of their impact and effect on the Slovak Republic, sufficiently in advance for discussion—Article 1(2).

The National Council of the SR has, thus, acquired the authority to grant a member of the government an imperative mandate in connection with the opinion to be presented by a member of the government when representing the Slovak Republic in relevant institutions of the EC and the Union. It remains an unanswered question as to why the issue of the influence of the National Council on decision-making on union matters was not addressed in the 2001 amendment to the Constitution. The adoption of this constitutional law deepened undesirable practices in the Slovak Republic through the adoption of constitutional laws with no constitutional authority.[68]

67 Ibid.

68 See more, *e.g.* Breichová Lapčáková, 2011, pp. 1–15.

Leaving aside its questionable form, from a substantive perspective, this rather brief constitutional law has some inaccuracies.[69] According to it, the National Council of the SR has the power to approve the opinions of the Slovak Republic on drafts of legally binding acts and other acts of the ECs and the EU to be decided upon by the representatives of the governments of the Member States of the EU—Article 2(1). In this spirit, a direct contradiction is visible in Article 2(2), according to which the National Council of the SR may be authorised by law by its committee to exercise its powers, as referred to in para. 1. However, the Constitution does not contain a constitutional law establishing the responsibility of a member of the government towards a committee of the National Council (the Constitution envisages only responsibility towards the National Council as a whole), nor does it contain a constitutional law explicitly allowing for the relevant committee of the National Council to adopt opinions binding to the member of the government concerned. The National Council of the SR may also approve the opinions of the Slovak Republic concerning other EU matters if requested by the government or by at least one-fifth of the members of the National Council of the SR—Article 2(3). If the National Council of the SR approves the draft opinion of the Slovak Republic, it will be binding to a member of the government representing the Slovak Republic in the relevant body of the EC and the EU. If the National Council of the SR does not comment on the draft opinion of the Slovak Republic within two weeks of its submission or if it does not approve the draft opinion of the Slovak Republic without adopting another opinion on the matter, the member of the government shall be bound by the draft opinion of the Slovak Republic—Article 2(4). A member of the government may deviate from the opinion of the Slovak Republic adopted by the National Council of the SR only if necessary, and due consideration is given to the interests of the Slovak Republic. In such a case, he shall inform the National Council of the SR without delay and explain the reasons for taking such action. However, should this become necessary, a member of the government may ask the National Council of the SR to alter its original opinion of the Slovak Republic—Article 2(5). Moreover, the position of the National Council of the SR is also strengthened by the fact that, according to this constitutional law, at least once a year, on the basis of a report submitted by the government, it shall discuss matters relating to the Slovak Republic's membership in the EU and approve recommendations to the government for the following period—Article 2(6). As noted, this constitutional law has not been amended despite several attempts to do so.[70]

69 Constitutional Act No. 397/2004 Coll. on the cooperation between the National Council of the SR and the Government of the Slovak Republic in EU matters consists of only four articles, the first three dealing with the substance, and the last one providing for its entry into force.

70 The last proposal for amendment was in the first half of 2022, where it was proposed, among other things, that if the National Council of the SR does not comment on the draft opinion of the Slovak Republic within two weeks of its submission by the Government of the Slovak Republic, the member of the Government shall be bound by the draft opinion of the Slovak Republic that was submitted by the Government of the Slovak Republic.

8. The Position of the Constitutional Court of the Slovak Republic in the relationship between European Union law and national law of the Slovak Republic

Constitutional courts play an important role in Member States, not only in the protection of constitutionality. They are the highest judicial authorities and their decisions often define the direction of the state. Based on their jurisprudence, it is possible to perceive the value setting and direction of the state. The position of constitutional courts is not the same in the Member States. The Constitutional Court of the Slovak Republic gradually and cautiously developed its adjudication activity regarding the EU laws. Article 7 (2) of the Constitution provides room for clarification, explanation, and a comprehensive definition of the relationship between the Slovak constitutional order and the EU law. However, thus far, the Constitutional Court of the Slovak Republic has done so partially and cautiously.

There have been few court decisions in the Constitutional Court of the Slovak Republic related to EU law. Since the Slovak Republic acceded to the European Union, the Constitutional Court of the Slovak Republic first dealt with EU law when assessing the decisions of other public authorities relative to the requirement for a Euroconform interpretation of national legal acts and ensuring the effectiveness and full effect of EU law. He also defined his position relative to the requirement to respect EU laws. In this respect, he defined his decision-making activities as part of his constitutional duty arising from Article 1(2) of the Constitution of the Slovak Republic.

First, we should mention the decision of the Constitutional Court, in which it specified the EU's state law definition. This was *the Ruling of the Constitutional Court of the Slovak Republic in the case II. ÚS 171/05 of 27 February 2008*. In the proceedings on the constitutional complaint of 11 July 2005, the Constitutional Court of the Slovak Republic dealt with the question of whether the EU was a state union. The proceedings were closely related to the ratification of the treaty that established a Constitution for Europe. The applicants argued that the Slovak Republic had entered into a state union within the meaning of Article 7 (1) of the Constitution. According to this Article, the decision to join a state union is made by constitutional law, which is confirmed by a referendum. As this had not been done, the applicants argued that their fundamental right to participate directly in the administration of public affairs by referendum had been violated. However, the Constitutional Court did not share the applicants' arguments. It stated that

> The question of the legal nature of the European Union in its present state, after the eventual entry into force of the Treaty, and in the future in general, is in many respects an extremely complex question with intertwined international and national aspects. The Constitutional Court notes that the development in the European Union is undoubtedly tending towards a state form, i.e. a state union, but in the opinion

> of the Constitutional Court it is not yet possible to determine in a serious way the moment when this will happen. The evidence in the present proceedings has shown that the European Union, even in its present state, has a number of features and functions which, within the framework of accepted legal theory, can be subsumed under the characteristics of a state union (which is not disputed by the applicants). On the other hand, even after the entry into force of the Treaty, there would be differences and specificities in the legal status of the European Union, including the regime for the exercise of its competence under the Treaty, which, in their totality, significantly undermine the applicants' thesis on the exclusive nature of the European Union as a State Union after the adoption of the Treaty (e.g. the manner in which decisions are to be taken outside the organs of the Union and the notion of the territory of the European Union, which is only affected by the Treaty on a piecemeal basis, and which does not create a legal basis for a uniformly understood territory within a State Union, etc.). As stated above, the applicants have also used definitions and opinions from the field of legal theory as a basis for their argumentation on this issue. It must be said, however, that the Constitutional Court considers their choice of authorial citations to be largely one-sided, since there are undoubtedly differing views in this area, both at home and abroad. Moreover, the Constitutional Court does not consider it adequate to subordinate the assessment of the legal nature of the European Union to the conventional categories of legal theory, precisely because of the uniqueness of the European Union and the many specific features that characterize it.

The Constitutional Court further stated,

> It does not follow from these or any other provision of the Treaty that the Treaty establishes a common state of the members of the European Union or that the European Union, as a political and economic grouping of Member States, is to acquire the nature of a state union after the adoption of the Treaty, and, according to the Constitutional Court, the Slovak Republic cannot itself confer this status on the European Union. Such a decision can only be taken by the European Union institutions with the consent of all Member States. In the light of all the foregoing, the Constitutional Court finds that, within the limits of the present case, it does not consider that the applicants' fundamental allegation that the European Union will be a State Union once the Treaty is approved has been proved.

Although the Constitutional Court did not take the opportunity given by this complaint to clarify the content of the not-so-happy term 'EU' in Article 7 (1) of the Constitution, its decision nevertheless contains an important conclusion from the perspective of the constitutional perception of international treaties by which the Slovak Republic delegates the exercise of part of its rights to the EC/EU. According to this ruling,

> (…) all other acts and actions taken by the Slovak Republic within the framework of the relevant ties with the European Communities and the European Union must, in terms of the approval process, be subject to the constitutional norm contained in Article 7 (2), first sentence, of the Constitution. This does not change the fact that even if it is an act that changes the qualitative parameters of cooperation between the members of the grouping, as is the case with the Treaty. It follows from the foregoing that, irrespective of the nature of the European Union, neither the accession of the Slovak Republic to the European Union nor any other acts initiated either by the European Union or by the Slovak Republic can create a situation which would be causally related to the purpose and content of the provisions of Article 7 (1) of the Constitution.

It follows from these conclusions of the Constitutional Court's ruling that any treaty concluded by the Slovak Republic following its membership in the EU cannot fall under the application of Article 7 (1) of the Constitution; that is, it is not even a possible treaty in which the states explicitly state that it establishes between them a state union called the EU. Regarding further decision-making activities, in the framework of individual proceedings on the compatibility of legislation under Article 125 of the Constitution, the Constitutional Court dealt with the law of the EU at two main, partly overlapping levels:

1. When assessing the question of whether Slovak legislation complies with EU law; that is, when assessing the euro conformity of Slovak legislation (e.g. decisions of the Constitutional Court adopted in proceedings under Case No. PL. ÚS 3/09, Case No. PL. ÚS 105/2011 and Case No. PL. ÚS 10/2014),

2. When assessing whether Slovak legislation, which has its origin or is based on the law of the European Union, complies with the Slovak Constitution; that is, when assessing the constitutional conformity of Slovak legislation, the existence of which is conditioned by the law of the EU (e.g. decisions of the Constitutional Court adopted in the proceedings filed under PL. ÚS 12/2012, PL. ÚS 115/2011, PL. ÚS 10/2014).[71]

Some of the reasoning in these decisions was more relevant to EU law, while others were less relevant. In the following section, we select the decisions that have defined, at least in a minimal way, the position of the Constitutional Court of the Slovak Republic towards the EU legal order. Most regard primary EU laws.

One of the judgements in which the Constitutional Court of the Slovak Republic dealt with the relationship between Slovak constitutional law and EU law was *the Ruling of the Constitutional Court of the Slovak Republic of 26 January 2011, Case No. PL. ÚS 3/09.* The complainants were a group of members of the National Council of

71 Macejková, I. *European Union law in the decision-making activity of the Constitutional Court of the Slovak Republic,* [Online]. Available at: https://www.ustavnysud.sk/documents/10182/0/Presentation-Ms_Macejkova.pdf/c4af38fe-b1d4-4fd2-957c-35f28a321717.

the SR, in their petition for initiation of proceedings they objected to the incompatibility of the provisions of Act No. 581/2004 Coll. on health insurance companies, as amended, with, *inter alia*, the provisions of the founding treaties (the Treaty on EU and the Treaty on the Functioning of the EU). The applicants alleged infringement of Articles 18, 49, 54, and 63 of the Treaty on the Functioning of the EU, which presupposed that the Constitutional Court would be active regarding the primary law of the EU.

The appellants proceeded on the basis that *'primary Community law is based on international treaties (in particular the EC Treaty), which directly create rights or obligations of natural persons or legal persons (Article 7 (5) of the Constitution), and therefore takes precedence over Slovak laws'* while the Constitutional Court *'may, in accordance with Article 125 (1) (a) of the Constitution, also conduct proceedings on the compatibility of laws with those international treaties which constitute primary Community law'*; that is, norms of primary EU law, in the opinion of the group of Members of the European Parliament, constitute a 'special derogation criterion' applicable by the Constitutional Court in proceedings on the compatibility of legislation, pursuant to Article 125 (1) (a) of the Constitution.[72] The Constitutional Court stated that

> In the course of its previous adjudication under Article 125 (1) (a) of the Constitution, the Constitutional Court has not yet been confronted with such an application under which it would have to exercise this power also in relation to the alleged inconsistency of a national legal norm with an international treaty forming part of the primary law of the European Union.

He also defined the Treaty on the Functioning of the European Union—that is, the norm of primary law—as an international treaty that directly creates the rights or obligations of natural persons or legal entities, pursuant to Article 7 (5) of the Constitution of the Slovak Republic. Thus, he adhered to the characterisation of the founding EU treaties as international treaties. Hence, the Constitutional Court of the Slovak Republic classified primary EU Law as a *'special sub-category of international treaties'*. According to a Constitutional Court,

> These are treaties by which the Slovak Republic has transferred the exercise of part of its rights to the European Communities and the European Union. However, even this constitutional exclusion of the international treaty(s) by which the Slovak Republic has transferred the exercise of part of its rights to the European Communities and

72 Pursuant to Art. 125 (1) (a) of the Constitution of the Slovak Republic, the Constitutional Court decides on the conformity of laws with the Constitution, with constitutional laws and with international treaties to which the National Council has given its consent and which have been ratified and promulgated in the manner prescribed by law. It follows from this text that the jurisdiction of the Constitutional Court under Art. 125(1)(a) of the Constitution is limited to those international treaties that have been approved by the National Council and ratified and promulgated in the manner prescribed by law.

> the European Union does not alter the scope of the jurisdiction of the Constitutional Court under Article 125 (1) of the Constitution, since the basis for such exclusion was only the purpose of such international treaty(s), which otherwise remains a treaty to which the National Council has given its consent and which has been ratified and promulgated in the manner provided for by law.

The Constitutional Court added that both the Treaty of Accession to the EU and the Treaty of Lisbon, amending the EU and EC Treaties, were categorised nationally as international treaties under Article 7(5). According to the Constitutional Court, these were undoubtedly international treaties meeting the criteria of Article 125(1).[73]

Despite a specific constitutional Article referring to EU law, the Constitutional Court of the Slovak Republic directly confirms the international character of the EU law. Thus, it seeks to gain control over it, which it cannot have in the case of EU law or its specific effects. Finally, in this decision, the Constitutional Court reached the fundamental question of examining the hypothetical conflict between the Constitution and EU primary law. In this regard, it states that:

> The Constitutional Court is of the opinion that if, in proceedings under Article 125 (1) (a) of the Constitution, it finds and decides that the contested law, part of it or some of its provisions are incompatible with the Constitution or a constitutional law, it is no longer necessary, in principle, to examine their incompatibility with European Union law (despite the fact that the appellants suggest that it is not necessary to examine their incompatibility with European Union law), because even their possible inconsistency would only lead to the same result and the same legal effects as those achieved by a decision according to which the contested legislation is incompatible

73 *'The National Council, by Resolution No.365 of 1 July 2003, expressed its consent to the Treaty on the Accession of the Slovak Republic to the European Union (hereinafter referred to as the 'Accession Treaty') and at the same time decided that it is a treaty pursuant to Art. 7 (5) of the Constitution, which takes precedence over the laws of the Slovak Republic. The President of the Slovak Republic ratified the Treaty on 26 August 2003, the Treaty entered into force on 1 May 2004 and was published in the Collection of Laws of the Slovak Republic under No 185/2004 Coll. The Accession Treaty also amended the Treaty establishing the European Community and the EU Treaty. By Resolution 809 of 10 April 2008, the National Council gave its consent to the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (this Treaty renamed, among other changes, the Treaty establishing the European Community as the Treaty on the Functioning of the EU; the consolidated text of the EU Treaty and the Treaty on the Functioning of the EU, i.e. the text incorporating the changes brought about by the Lisbon Treaty, was published in the Official Journal of the EU C83 of 30 March 2010, see note), and at the same time decided that it is a treaty under Art. 7 (5) of the Constitution, which takes precedence over the laws of the Slovak Republic. The President of the Slovak Republic signed the instrument of ratification on 12 May 2008 and the Lisbon Treaty entered into force on 1 December 2009. It was published in the Collection of Laws of the Slovak Republic under No 486/2009 Coll. On this basis, the subcategory of international treaties under Art. 7 (2) of the Constitution includes the Accession Treaty and, through it, the Treaty establishing the European Community and the Treaty on European Union and the Treaty of Lisbon, which, among other things, renamed the Treaty establishing the European Community as the Treaty on the Functioning of the European Union. At the same time, these are undoubtedly treaties that meet the criteria laid down in Art. 125 (1) of the Constitution'.*

> with the Constitution or a constitutional law. Such a 'self-limiting' approach to the exercise of its jurisdiction is essentially justified by the Constitutional Court on the grounds that, once a declaration of incompatibility with the Constitution or constitutional laws has been made, the subject-matter of the proceedings on the compatibility of legislation in relation to the alleged incompatibility with European Union law, such as the Treaty on the Functioning of the European Union, ceases to exist, as is the case in the present case.

From the further decision-making activity of the Constitutional Court of the Slovak Republic, we analyse a decision that partly follows the above conclusions. The case law of the Constitutional Court of the Slovak Republic in matters of EU law has been and is being developed gradually, but so far in a uniform line. By its *ruling of 29 April 2015, Case No. PL. ÚS 10/2014*, the Constitutional Court of the Slovak Republic confirmed the previous perception of the EU's primary law of the European Union. In this case, a group of members of the National Council of the SR initiated proceedings under Article 125(1)(a) on the compatibility of several legal regulations with, *inter alia*, the provisions of the Charter of Fundamental Rights of the European Union.[74] First, the Constitutional Court of the Slovak Republic defined the position of the Charter of Fundamental Rights of the European Union:

> On this basis, the Treaty of Accession and, through it, the Treaty establishing the European Community and the Treaty on European Union and the Treaty of Lisbon, which renamed the Treaty establishing the European Community as the Treaty on the Functioning of the European Union, may also be included in the sub-category of international treaties pursuant to Article 7 (5) of the Constitution. On the basis of Article 6 (1) of the Treaty on European Union, which gives the Charter the same legal force as the treaties on which the Union is founded, the Charter may be accorded the same status in the legal order of the Slovak Republic as international treaties under Article 7 (5) of the Constitution. At the same time, these are undoubtedly treaties which meet the criteria laid down in Article 125 (1) of the Constitution. Based on the constant jurisprudence of the Constitutional Court, which, in accordance with the principle of pacta sunt servanda, requires that fundamental rights and freedoms under the Constitution be *interpreted and* applied at least in the sense and spirit of international treaties on human rights and fundamental freedoms (PL. ÚS 5/93, PL. ÚS 15/98, PL. ÚS 17/00, PL. ÚS 24/2014, PL. ÚS 24/2014) and the relevant case-law issued thereon (II. ÚS 55/98, PL. ÚS 24/2014), fundamental rights and freedoms under the Constitution must, where the contested national legislation falls within the scope of Union law, also be interpreted and applied within the meaning and spirit of the Charter and the relevant case-law of the Court of Justice issued thereon.

74 Available at: file:///C:/Users/krunkova/Downloads/Rozhodnutie%20-%20N%C3%A1lez%20PL.%20%C3%9AS%2010_2014%20(1).pdf.

> However, the Constitutional Court considers it necessary to point out its previous case-law (PL. ÚS 3/09), according to which, in the event that in proceedings under Article 125 (1) (a) of the Constitution, the Constitutional Court finds and decides that the contested law, part of it or some of its provisions are not in accordance with the Constitution or a constitutional law, it is no longer necessary in principle to examine their incompatibility with the law of the European Union (even though the appellants propose to do so), because even their possible incompatibility would only lead to the same result and the same legal effects as those achieved by the decision according to which the contested legislation is not in accordance with the Constitution or a constitutional law. The Constitutional Court justifies such a 'self-limiting' approach to the exercise of its jurisdiction on the grounds that once a declaration of incompatibility with the Constitution or constitutional laws has been made, the subject matter of the proceedings on the compatibility of legislation in relation to the alleged incompatibility with European Union law ceases to exist.

Thus, the Constitutional Court of the Slovak Republic confirmed that the law of the EU and its compliance with national legislation are implemented only secondarily; that is, only when the provision of legal regulation is not found to be incompatible with the Constitution of the Slovak Republic. Meanwhile, the Constitutional Court of the Slovak Republic recalled that it was

> an independent judicial body for the protection of constitutionality according to Article 124 of the Constitution. Therefore, even after the accession of the Slovak Republic to the European Union, the norms of the constitutional order of the Slovak Republic remain the frame of reference for the Constitutional Court's review. However, the Constitutional Court cannot disregard the impact of the law of the European Union on the creation, application and interpretation of national law in the field of legislation, the origin, operation and purpose of which are rooted in the law of the European Union (cf. the ruling of the Constitutional Court of the Czech Republic, Case No. Pl. ÚS 24/10, para. 25). European Union law has that effect on national law where the national legislation falls within the scope of European Union law.

Notably, in this decision, the Constitutional Court expressed respect for the principle of sovereignty of the Slovak Republic. First, it views the Slovak constitutional order as the primary lens for examining compliance with the Constitution, which is correct. The Court does not ignore the norms of international and European law. However, these follow only the next steps of the analysis. This decision represents an imaginary first step towards strengthening the position of the Slovak constitutional order relative to the law of the EU, which began to develop with the Ruling of the Constitutional Court of the Slovak Republic (Case No. PL. ÚS 3/09).[75]

75 Orosz and Svák et al., 2021, p.109.

In these and other decisions, the Constitutional Court relies heavily on the classic doctrines of the CJEU but also tries to keep its place in the national review of its compatibility with the law. It links the constitutional status of EU Law to the constitutional concepts of Article 7(2) and (5). Its decision-making is linked to primary union law, and it has only marginally dealt with secondary law issues. On the relationship between EU law and the internal state law of the Slovak Republic, he maintained his moderate optics. Given its constitutional mandate, the Constitutional Court of the Slovak Republic cannot give EU Law explicit supra-constitutional status, though the case law of the Court of Justice requires it in principle. It is a pity that, relative to EU law, it has not yet formulated any limits by which it would not allow a breach under any circumstances, as with the Constitutional Courts of other Member States.

Thus, the decision-making activity of the Constitutional Court of the Slovak Republic shows that the primary law of the EU does not 'only' have the priority of application over laws but the Constitutional Court also perceives it as a potentially supra-constitutional source. Unfortunately, this was the end of the Constitutional Court's clarification of the relationship between constitutional law and EU law. Nor has it commented on the definition of constitutional or national identity.

In conclusion, we would like to mention *the Resolution of the Constitutional Court of the Slovak Republic of 11 January 2017, Case No. I. ÚS 14/2017*, which ended with the rejection of the constitutional complaint. However, in its reasoning, it contained suggestive parts. In this constitutional complaint, the complainant objected, *inter alia*, to the inconsistency in the application of the law by the general courts of the Slovak Republic with the case law of the CJEU, and the violation of the Euroconforming interpretation of EU law. The Constitutional Court rejected the complaint, stating the following:

> …a violation of an EU right does not always entail a violation of a constitutional right. Such a legal effect occurs only when the violation of a source of EU law has constitutional intensity. The Constitutional Court does not have jurisdiction to review compliance with the source of EU law not only under the conditions defined in the case-law of the Court of Justice of the EC/EU, but also in disputes over law that do not reach the constitutional intensity of illegality. The fact that EU law has been violated does not in itself establish the constitutional intensity of the unlawful situation.

In reasoning, the Constitutional Court partly touched on the sources of secondary law.

> To the sources of primary European law in the category of 'legally binding EC/EU acts' (Article 7 (2) of the Constitution) must be added, from secondary European law, regulations and case-law of the Court of Justice, which would easily escape the protection of the primacy clause in the Slovak view of judicial decisions as a source of law if a more conservative notion, such as the notion of 'legally binding acts of the EC and the EU', were used in the Constitution. As a separate issue in relation to the

interpretation of 'legally binding EC/EU acts', EU directives should be mentioned. In their case, an alternative interpretation is possible, whereas in the first version, when interpreted according to the 'nomenclature' of EC/EU sources of law, the directives cannot be classified as 'legally binding acts' under Article 7 (2) of the Constitution. On the contrary, in the second version, the directives belong to the sources of EC/EU law which, according to Article 7 (2) of the Constitution, may take precedence over the laws of the Slovak Republic. The alternative is determined by the very nature of the directives, predetermined by their content, which is mostly addressed only to Member States, but sometimes also regulates the rights of natural persons and legal entities. Thus defined, the question of 'legally binding EC/EU acts' loses its hitherto political or academic character and becomes a very important legal question of interpretation and application of European law at the interface with constitutional law. In the first alternative interpretation of the term 'legally binding EC/EU acts', directives cannot be subsumed under this term either, since they are intended to create a positive obligation for Member States to adopt national legislation with the prescribed 'directive' content within specified time limits, but are not applicable for direct application as a source of national law. If a State does not fulfil a positive obligation at all, if it does not fulfil the obligation in its entirety or if it does not fulfil it in time, the transposition of the Directive into national law does not take place by priority application of the Directive over national legislation. Proceedings to compel a Member State to transpose the Directive shall be initiated against a State which fails to establish national legislation complying with the Directive. Therefore, in accordance with European law, the Directives cannot be characterized as legally binding EC/EU acts under Article 7 (2) of the Constitution. In the second alternative, the purpose of directives in European law must be put in the background, 'on the back burner'. In the process of transposition of directives into the legal order of the Slovak Republic, not only hypothetically, but also factually, mistakes are made. The directives are transposed incorrectly, part of their content does not become part of the legal order of the Slovak Republic. In such cases, the content of the Directive, which does not make it into the law but 'goes beyond' it, could become part of the regulation applied in Slovakia under the provision of Article 7 (2) of the Constitution, by means of an interpretation of the law derived from the primacy of the 'legally binding act of the Directive' over the laws of the Slovak Republic so that the set of rights and obligations determined by the Directive, but not by law, would be enforced by the public authorities in the Slovak Republic at the stage of application of the law pursuant to Article 7 (2) in conjunction with Article 152 (4) of the Constitution. From the point of view of the topic of 'legally binding EC and EU acts' as a constitutional notion relevant in the territory of the Slovak Republic, this means that directives with precedence over the laws of the Slovak Republic based on the case-law of the Court of Justice will in the foreseeable future be the exception rather than the rule. If the exception were to be converted into a rule, for example, in the event of an error in the transposition of a directive, then the legal basis for such an interpretation is not the case-law of the Court, but Article 7 (2) of the Constitution and its interpretation beyond the case-law.

Based on the above, it can be concluded that Article 7 (2) does not sufficiently regulate the relationship between the secondary law of the European Union and the national law of the Slovak Republic and does not provide definitive answers to several fundamental questions concerning the relationship between EU law and the Slovak constitutional legal order. Sources of secondary law cannot be classified as a subcategory of international treaties under Article 7 (5). As a subject of international law, the Slovak Republic has never consented; therefore, it cannot be assessed through the lens of international law.

9. Conclusion

Initiatives aimed at changing and amending the Constitution of the Slovak Republic fundamentally reduced its stability, seriousness, and authority. This has also negatively impacted the political and legal culture in Slovakia. The changes to the Constitution were not only driven by pragmatic reasons but also reflected political influences. Amendments related to the accession of the Slovak Republic to the EU and elections in the European Parliament were necessary. However, Constitutional Act No. 397/2004 on 24 June 2004 on cooperation between the National Council of the SR and the Government of the Slovak Republic in the EU matters in the relationship of the National Council of the SR and cannot be seen in the same spirit. This fundamentally undermined the compactness of the relationship between the Government and the National Assembly as regulated by the Constitution. Currently, it is possible to speak of a low degree of compatibility between the Constitution and Constitutional Law. If these relations were to be regulated, it should not have been by constitutional law but directly in the Constitution.

Thus, although the relationship between constitutional law and EU law is undoubtedly bidirectional, according to the doctrines of the Court of Justice, EU law will prevail in Slovakia in most cases. However, a national legal order could carve out certain inviolable zones (e.g. implicit or explicit material cores) that protect the fundamental political decisions of the national sovereign. EU Law, when applied, must not undermine the foundations of the existence of constitutional orders. Moreover, the question of the unconditional primacy of the application of EU Law remains unresolved in positive law to this day, as it has only been confirmed in the case law of the Court of Justice. Numerous amendments to the Constitution of the Slovak Republic have confirmed that the matter of the constitution has ceased to be a static variable and that its dynamism is currently significant.

The identity of the Constitution also shifts or shapes it dynamically. The categorical assertion that the Constitution should rigidly preserve its original identity even after its amendments is probably not appropriate. This is confirmed by objective shifts in identity, as was the case, for example, in connection with the Slovak

Republic's accession to the EU. However, the question remains as to whether the degree of identity deviation is proportional to the key aspects on which the constitution is based. The Constitutional Court of the SR indicated some profiling in this respect in its decisions concerning the material core of the Constitution. However, the performance of this role should be performed cautiously, as it can easily slip into the performance of the so-called contra-principle role. Its essence lies in interfering with the established, universally recognised principles of constitutionalism the Constitution should contain and protect. The State's commitment to its law is the foundation of any State governed by the rule of law, which ensures the regulation of the means of State power and limits its use.

However, is the path for determining the identity of the Constitution through the decisions of the Constitutional Court the only way if we have a fully functioning constitution-making body with no fundamental challenge in obtaining a constitutional majority? Is it necessary to amend the Constitution in such a way that we unwittingly divert its identity? What is the appropriate balance between amending the Constitution and preserving its identity? Thus, the materialisation of the considerations presented above continues to create room for raising several polemical questions that are open to further rational exploration and are certainly not meant to be merely archival.

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