

# CONSTITUTIONAL PLURALISM AND THE SLOVAK CONSTITUTIONAL COURT: THE CHALLENGE OF EUROPEAN UNION LAW

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**Abstract:** *After the accession of several Central and Eastern European countries to the European Union in 2004, new challenges arose for their highest judicial institutions to define and shape the relationship between the national and European legal order. This paper assesses the first decade of the effort of the Slovak Constitutional Court (SCC) in interpreting the relationship between domestic and EU law via applying the concept of constitutional pluralism which presumes a specific relationship between the legal orders characterized by their heterarchical structure, mutual interaction and cooperation rather than of a hierarchical, monistic structure, governed by clash over dominance. Answering the research question how the SCC has positioned itself vis-à-vis the constitutional monism v. pluralism dilemma can offer an insight on the general relationship between domestic and EU law in Slovakia. By analysing statutory law, selected judgments and reviewing secondary literature, the paper argues that the SCC seems to have chosen the monistic, hierarchical approach to the relationship, having rejected constitutional pluralism. At the same time, this position is not articulated clearly enough due to the veil of secrecy that to some extent still prevails over the SCC's doctrinal attitudes to EU law. The findings of the paper, which combines conceptual analysis of constitutional pluralism with review of relevant legal provisions and case law, demonstrate the need for a more active and straightforward approach of the SCC when dealing with the challenges of EU law.*

**Keywords:** *constitutional pluralism, monism, Constitutional Court, Slovak Republic, European Union law*

## 1. INTRODUCTION

*'What begins as heterodoxy becomes prevailing orthodoxy,  
in this case when Constitutional Pluralism (...)  
suddenly emerges as hopelessly politically correct.'*<sup>2</sup>  
Joseph H. H. Weiler

It seems counterintuitive to start an article that has 'constitutional pluralism' in its title with a quote that depicts it as a concept used for potential indoctrination and domination of a single view, instead of an open and free debate, inherently present in a pluralist environment. However, it makes sense for two reasons. Firstly, the quote is a gentle but very sharp warning from one of the foremost living constitutional scholars (and advocates of the European project of 'unity in diversity'), which stresses the risk of domination instead

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<sup>2</sup> WEILER, J. H. H. Prologue. In: Gráinne de Búrca and Joseph H. H. Weiler (eds.). *The Worlds of European Constitutionalism*. Cambridge: Cambridge University Press, 2011, p. 8.

of equality and multiplicity in any concept, approach or even policy. Secondly, it highlights how much constitutional pluralism has moved to the center of constitutional discourse in Europe, especially in the context of the emergence and development of multiple legal orders on the continent constituted not only by domestic and international law but also the supranational legal order of the European Union (EU).

The birth of the concept was not accidental. When in 1999, Neil MacCormick first used it in his analysis of the impact of the transformation of sovereignty on the relationship between law and the state,<sup>3</sup> the European Union, a polity in the making,<sup>4</sup> has changed much since its emergence as an association aimed at bringing peace to Europe, and with an added value of economic cooperation to increase the well-being of citizens. There is no room to elaborate on this transformation in detail here but to be sure, law made up a huge portion of it, as it became the ‘driver’ of European integration,<sup>5</sup> perhaps the only one through which the EU has had a chance to become ‘ever closer’<sup>6</sup> to its citizens after the signature of the Treaty on European Union in Maastricht in 1992. All these changes, which, obviously, carried a great deal of uncertainty, facilitated the search for new models of description of the relationship between member state and EU law that would transcend the Kelsenian, hierarchical view with the *Grundnorm* at its peak, or, for that matter, the otherwise quite different, Schmittian approach of the single political decision of a community to create an exclusive order.

Legal pluralism turned out a fair choice to bet on. As national constitutional courts in EU member states started to handle questions related to EU law, often using them to stipulate some reservations to the principle of supremacy *à la* the Federal Constitutional Court (FCC) of Germany,<sup>7</sup> legal pluralism offered a framework for analysis of the nuanced differences in the approaches of these judicial bodies. At the same time, the concepts ‘legal pluralism’ and ‘constitutional pluralism’ differ for a reason. Theories based on the former ‘generally criticize the concept of law as a normative order sanctioned by the state’s monopoly on political violence.’<sup>8</sup> Theories constructed on the latter do that as well, but they

<sup>3</sup> MACCORMICK, N. *Questioning Sovereignty*. Oxford: OUP, 1999, pp. 97–121.

<sup>4</sup> See e.g. ERIKSEN, E. O. *Making the European Polity: Reflexive Integration in the EU*. London: Routledge, 2005.

<sup>5</sup> HUNT, J., SHAW, J. Fairytale of Luxembourg? Reflections on law and legal scholarship in European integration. In: Hunt, J. et al. (eds.). *Reflections on European Integration: 50 Years of the Treaty of Rome*. Basingstoke: Palgrave Macmillan, 2011, pp. 93–109.

<sup>6</sup> This well-known phrase is included in the Preamble and Article 1 of the Treaty on European Union, for example: “This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.”

<sup>7</sup> These are notably the *Solange I* and *Solange II* decisions. Although the ‘constitutional reservation’ to EU law was much firmer in *Solange I*, even in later decisions of the *Bundesverfassungsgericht* there is room for reviewing obligations deriving from EU law from a fundamental rights perspective, as these are enshrined in the German constitution. (MAYER, F. C. Multilevel Constitutional Jurisdiction. In: von Bogdandy, A., Bast, J. (eds.). *Principles of European Constitutional Law*. 2<sup>nd</sup> revised edition. Oxford: Hart, 2009, pp. 410–417.). In a more general sense, this reservation can be interpreted as being in accordance with the principle of respect towards national identities of the member states. For more on this and other principles of the relationship between the EU and the member states in Slovak scholarship, see LALÍK, T. Ústavnoprávna povaha Európskej únie. In: *Justičná revue*. 2013, Vol. 65, No. 6-7, pp. 790–794.

<sup>8</sup> PŘIBÁŇ, J. Asking the Sovereignty Question in Global Legal Pluralism: From “Weak” Jurisprudence to “Strong” Socio-Legal Theories of Constitutional Power Operations. *Ratio Juris*. 2015, Vol. 28, No. 1, p. 32.

relate the interaction of legal orders to constitutions, in the broad sense of the word as a set of principles that form the basis of a political community. Therefore, it can be argued that while constitutional pluralism is a form of legal pluralism,<sup>9</sup> its distinct characteristic rests in the *multiplicity of constitutions* that are applicable for a certain community living in a certain territory at a particular moment in history.

Given that constitutional pluralism is intertwined with dilemmas on the conceptualization of sovereignty, the state and constitutions, analyses working with it face the danger of stepping ‘off the mark’ by trying to include all its various ‘faces’<sup>10</sup> into its scope. This article does not do that; instead, it limits itself to the question how the Slovak Constitutional Court (SCC) has positioned itself vis-à-vis the form of relationship between EU law and Slovak constitutional law. In particular, it inquires whether the approach of the SCC can be seen as constitutionally pluralist, one that imagines a heterarchical, rather than hierarchical ordering of the sources of law, where neither domestic constitutional law nor EU law takes unconditional primacy over the other but both exist in a predominantly harmonious state and jointly contribute to the core aim of constitutions, which is to uphold and guarantee individual human rights and freedoms. The relevance of this question is underlined by the increasingly important interaction between EU and domestic law in human rights matters, which have been ‘constitutionalized’ by the CJEU as well as by the inclusion of the Charter of Fundamental Rights into primary EU law.<sup>11</sup>

The paper starts with a brief overview of the main theories of the so-called ‘European constitutionalism.’ As it is not possible to omit the country specifics of a particular legal order and the position of the judicial institutions, in the next section some remarks on the framework in which the SCC operates are provided, including relevant provisions of the Slovak Constitution. Then, an analysis of the case-law of the SCC with emphasis on two key rulings follows: one related to the Treaty Establishing a Constitution for Europe (below: Treaty) and the other which provided a (seemingly) clear answer to the relationship be-

<sup>9</sup> There are several classifications of legal pluralism, usually by authors specializing on sociology of law. One of the prime ones is differentiation into ‘weak’ and ‘strong’ legal pluralism, whereby the former stipulates the requirement of multiple legal orders existing alongside each other, and the latter attributes validity to the existence of non-legal normative orders such as those created and moderated by churches or intergovernmental organizations. Constitutional pluralism in the EU could be seen as part of the strong legal pluralism, as both EU law and member state constitutional law claim a form of legitimate authority (via the national constitution and the principles of EU law stemming indirectly from the treaties, in particular the principle of supremacy). However, the boundaries of the ‘weak-strong’ distinction are always blurred to some extent. See VEČEŘA, M. *Pluralita jako projev práva*. In: Lengyelová, D. (ed.). *Pluralismus moci a práva*. Bratislava: Ústav štátu a práva SAV a BVŠP, 2009, pp. 28–30; also PŘIBÁŇ, J. Asking the Sovereignty Question in Global Legal Pluralism: From “Weak” Jurisprudence to “Strong” Socio-Legal Theories of Constitutional Power Operations, pp. 35–37.

<sup>10</sup> Avbejl and Komárek identify six theoretical approaches to constitutional pluralism (socio-teleological constitutionalism, epistemic meta-constitutionalism, best fit universal constitutionalism, harmonious discursive constitutionalism and multi-level constitutionalism), which signalize not only the popularity of the concept, but also the tendency to use it in multiple, sometimes conflicting meanings. AVBEJL, M., KOMÁREK, J. Introduction. In: Avbejl, M., Komárek, J. (eds.). *Constitutional Pluralism in the European Union and Beyond*. Oxford: Hart, 2012, pp. 5–7.

<sup>11</sup> See a thorough (though a bit too optimistic) account of the development of the CJEU’s ‘pro-human-rights’ positions in the last decades by the President of the CJEU in LENAERTS, K. EU Values and Constitutional Pluralism: The EU System of Fundamental Rights Protection. *Polish Yearbook of International Law*. 2014, Vol. 34, pp. 135–160.

tween the two legal orders. Finally, a possible answer to the SCC's doctrinal position towards European integration and EU law is discussed. It is argued that while the SCC tried to avoid a direct answer to the question of the relationship between the two legal orders, in recent case law it seems to have provided one, which, however, does not fit with constitutional pluralism. Quite the contrary, the Court has followed the conventional belief in the hierarchy of the sources of law in a monist legal environment, 'just' this time with EU law 'trumping' domestic (including constitutional) law. Finally, the tentative causes and consequences of choosing such an approach by the SCC are briefly discussed. In lieu of a conclusion, it is asserted that a more sophisticated and active approach of the SCC in this area inspired by the debates on constitutional pluralism is likely to have positive influence for facing the many challenges of EU law for Slovakia.

## 2. THEORETICAL AND METHODOLOGICAL FOUNDATIONS

The accession of states to the European Union (EU) bears not only political and societal, but also important legal consequences. A whole new legal order becomes relevant for a particular state, with its distinct doctrines (such as the primacy and direct effect) and mechanisms (enforceable in the final instance before the Court of Justice of the EU (CJEU)). Constitutional courts (CCs), the guardians of constitutionalism, cannot ignore such a change, because it raises at least three broad questions. The first and perhaps most important one is how to define the relationship between the European and national legal order: which of them 'trumps' the other if they conflict *or* how they (can) cooperate. The answer to this question is closely interwoven with the second one: where are the limits of European integration? Finally, CCs must often cope with the difficult problem of the nature of the EU, as the answer could have influential effects on many legal mechanisms. Indeed, if the EU was viewed as a federation, the position of its legal acts would be surely different than if it was 'only' a quite untypical international organization. In the background of the dilemmas these questions create, there is the possibility of EU law being a threat to democracy,<sup>12</sup> mostly because of its doubtful democratic legitimacy, if the Union is compared rather to a federation than an international organization. Moreover, what might be seen as being under threat especially due to the principles of supremacy and direct effect of EU law,<sup>13</sup> is the hierarchy of domestic sources of law with the primacy of the Constitution, that gives the ground for CCs' existence.

This article reflects upon the difficult position of CCs of EU member states through the example of the Slovak Constitutional Court, a court of a 'new' EU member state which celebrated its first decade of EU accession in May 2014. After ten years of application of EU law (not only) in Slovakia, it is reasonable to expect that at least some challenges arose for

<sup>12</sup> SADURSKI, W. "Solange, Chapter 3": Constitutional Courts in Central Europe – Democracy, European Union. *EUI Working Papers, Law*. 2006, No. 40, pp. 1–37.

<sup>13</sup> E.g. CRAIG, P., DE BÜRCA, G. *EU Law: Text, Cases and Materials*. 6<sup>th</sup> edition. Oxford: OUP, 2015, pp. 184–224, 266–315; FOSTER, N. *EU Law: Directions*. 4<sup>th</sup> edition. Oxford: OUP, 2014, pp. 141–174 (principle of supremacy only); SCHÜTZE, R. *European Union Law*. Cambridge: Cambridge University Press, 2015, pp. 77–146.

the SCC which required expressing its opinions on the relationship between Slovak and EU law. In addition, Slovak statutory law, especially the Slovak Constitution, also provides a framework for understanding and interpreting this relationship. The practice of other member states' CCs in the recent years has opened up the room for new theoretical views on the issue as well.

## 2.1. Scope, methods and their limits

While the foremost scholars working on constitutional pluralism (such as MacCormick, Walker or Weiler) are public lawyers with expertise in constitutional law and legal theory, the concept is, as has been demonstrated, linked to the broader concept of legal pluralism, which comes from legal sociology. Moreover, the context of constitutional pluralism's emergence and spread is intimately connected to political developments in the EU and its member states, thereby inducing the need to take categories of political theory into account as well. This necessitates an interdisciplinary focus of research applying constitutional pluralism, albeit some strands of scholarship may be used more often than others. As this article applies the concept to derive the position of the SCC articulated via its case law, legal analysis is the dominant research method. However, in the literature review as well as the penultimate section, perspectives from political theory and legal sociology are also utilized on an occasional basis.

It is not a widespread tendency to apply constitutional pluralism in the 'Slovak legal doctrine', including legal academia. One textbook on constitutional law<sup>14</sup> and one conference contribution<sup>15</sup> mention the term, the former in its conventional and acceptable understanding, the latter in a rather disputable one.<sup>16</sup> Therefore, bringing the concept into the already existing debates on the approach of the SCC towards EU law, which are usually ongoing only in Slovak-language sources, can be beneficial for gaining a deeper understanding of this approach. In terms of the empirical/normative divide, while empirical analyses try to answer the questions whether an approach of a certain institution (including, for example, the CJEU) is constitutionally pluralist, normative analyses are concerned with whether it *should be* such. Most contemporary public lawyers believe that it should, which is exactly what Weiler's quote in the introduction regarding heterodoxy transform

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<sup>14</sup> OROSZ, L., SVÁK, J., BALOG, B. *Základy teórie konštitucionalizmu*. Bratislava: Paneurópska vysoká škola, Žilina: Eurokódex, 2011, pp. 264–265. According to the authors, in European constitutional pluralism as a model of interaction between national constitutional courts and the CJEU, 'the relationship between norms (i.e. the legal orders of the member states and the European legal order) as well as between constitutional courts of the member states and the CJEU is not hierarchical, but these orders and courts are located at a horizontal level.' Absence of final authority, judicial cooperation and dialogue and mutual respect are other characteristics of constitutional pluralism listed there.

<sup>15</sup> BÁRÁNY, E. Kariéra právneho pluralizmu. In: Lengyelová, D. (ed.). *Pluralizmus moci a práva*. Bratislava: Ústav štátu a práva SAV a BVŠP, 2009, pp. 312–319.

<sup>16</sup> For Bárány, 'legal pluralism (...) includes constitutional pluralism' (ibid., p. 316), while legal pluralism is defined as a 'situation, when in the same territory for the same subjects more than one legal system applies and the legal system is identifiable and definable with the help of the Kelsenian-Weyrian basic norm and Hartian rule of recognition' (ibid., p. 313). As the previous analysis has shown, in legal pluralism it is exactly the 'basic norm' approach that presumes a hierarchy of the sources of law, which does not apply.

ing to an orthodoxy refers to.<sup>17</sup> In this sense this paper is predominantly empirical, examining the elements of constitutional pluralism (or the lack thereof) in a specific legal order.

## 2.2. The concept of constitutional pluralism and the role of constitutional courts

This section identifies the reasons why theories of European constitutionalism are relevant for analysing the position of domestic CCs. If we imagine a domestic (national) and the European legal order as two elements, logically, the relationship between them can be either *hierarchical*, with one element being superior to the other, or *equal*, where both elements are on the same level and they have to compete or cooperate in each particular situation where there is a potential conflict between them. Assuming the hierarchical relationship can go both ways, these two relationships can be distilled into three theoretical positions (although a range of variations *within* them are possible): member states monism, European constitutional monism and constitutional pluralism.<sup>18</sup>

While member states monism declares that ‘member states are hierarchically superior to the non-constitutional legal order of the Union’, and that they also ‘remain the ‘masters’ of such an order’, European constitutional monism assumes an ‘independent constitutional authority’ of Europe which is not subordinated to the member states and is hierarchically superior to them.<sup>19</sup> These two approaches do not necessarily overlap with the ‘monist’ and ‘dualist’ position known mainly in international law scholarship.<sup>20</sup> Moreover, in the EU law context, the classification with three categories seems more nuanced because (1) the dualism of legal orders does not imply that one of them is superior to another, (2) the significant third approach – constitutional pluralism – is in no way represented in the second classification. Constitutional pluralism, this ‘third way’ of understanding the position of EU law, stresses a different understanding of the whole relationship, not as a hierarchy, but rather as a *heterarchy*, i.e. the constant overlap between the two orders in which neither is absolutely superior to the other.<sup>21</sup> In the 2000s, constitutional pluralism has become an ever more attractive alternative to the classic monist views of the EU – national law relationship,<sup>22</sup> although at the same time some fierce criticisms of the concept have also appeared.

<sup>17</sup> Neil Walker also wonders whether constitutional pluralism can be at work in reality, or it is merely a ‘wishful thinking’ of those, who believe that pluralism can be squared with constitutionalism, which ‘has been traditionally understood in unitary and hierarchical terms.’ See WALKER, N. Constitutional Pluralism in Global Context. In: Avbelj, M., Komárek, J. (eds.). *Constitutional Pluralism in the European Union and Beyond*. pp. 17–21. Christiaan Timmermans aptly captures this dual purpose of constitutional pluralism when he argues that it ‘first of all intends to give a systemic explanation of this situation but it intends also – and here comes the magic trick – to legitimize it.’ TIMMERMANS, Ch. The Magic World of Constitutional Pluralism. *European Constitutional Law Review*. 2014, Vol.10, No. 2, p. 350.

<sup>18</sup> JAKLIC, K. *Constitutional Pluralism in the EU*. Oxford: OUP, 2014.

<sup>19</sup> *Ibid.*, pp. 2–4.

<sup>20</sup> For example, BOGDANDY, A., von. Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law. *International Journal of Constitutional Law*. 2008, Vol. 6, No. 3-4, pp. 397–413. See also CAIRNS, W. *Introduction to European Union Law*. 2<sup>nd</sup> edition. London: Cavendish Publishing, 2002, pp. 114–115.

<sup>21</sup> JAKLIC, K. *Constitutional Pluralism in the EU*. p. 5.

<sup>22</sup> CRAIG, P., DE BÚRCA, G. *EU Law: Text, Cases and Materials*. 4<sup>th</sup> edition. Oxford: OUP, 2008, p. 375.

For Loughlin, constitutional pluralism is ‘an oxymoron’ because in his view ‘(in a political understanding), sovereign continuing authority remains vested in the member states. There exists (...) no constitutional pluralism.’<sup>23</sup> Essentially, he challenges the applicability of the concept on the basis of its correspondence with empirical reality but fails to demonstrate its alleged oxymoronic nature on examples from case law of the highest European courts. Neither can he explain why a ‘pluralism of foundations’, as he calls it,<sup>24</sup> in this case the fundamental political decision that is made separately at the state and EU level, is a necessary condition for constitutional pluralism to be at work in the practical dynamics of relations between the legal orders. Where he has a point is that constitutional pluralism and its various conceptualizations move at the edges between legal theory, political philosophy and constitutional law, and therefore sometimes fail to distinguish between descriptive and prescriptive dimensions.<sup>25</sup> This, however, does not make his critique, that indicates a degree of ‘fear from novelty’ – the modification of the conventional understanding of the legal order in the state context – any more convincing.

Another critique is provided by Kelemen, who refers to Loughlin and argues that constitutional pluralism is ‘unsustainable’ because ‘ultimately, in any constitutional order worthy of the name, some judicial authority must have the final say.’<sup>26</sup> However, the position of setting clear boundaries between the jurisdictions of the CJEU and domestic constitutional courts would precisely require the courts to engage in a dialogue similar to what constitutional pluralism envisions—with the difference that constitutional pluralism accepts this dialogue to unfold on a case-by-case basis rather than through a structural delimitation of competences. Moreover, the ‘remedies’ against infringements of ‘constitutional identity’ such as amendment of the constitution, change the EU norm, work on opt-outs or withdraw from the Union<sup>27</sup> all require extraordinary efforts and cannot be performed by the judicial institutions themselves.

Yet another critique at its core emphasizes the normatively desirable position of ‘integration by law’ and perceives constitutional pluralism as a resignation on that position.<sup>28</sup> However, it does not offer arguments against using constitutional pluralism as a category in the classification serving to identify the relationship between the two legal orders. Moreover, from a normative standpoint, it seems to perceive constitutional pluralism as a hidden effort of ‘member state monists’ instead of a position that attempts to live up to the ‘unity in diversity’ principle by perceiving EU law as bound by the values of human rights and democracy, same as the constitutional order of the member states, whereby EU law may at some point also offer insufficient, or at least not the highest possible guarantees for protection of some of these rights.

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<sup>23</sup> LOUGHLIN, M. Constitutional Pluralism: An Oxymoron? *Global Constitutionalism*. 2014, Vol. 3, No. 1, p. 19.

<sup>24</sup> *Ibid.*, p. 29.

<sup>25</sup> *Ibid.*, pp. 19–21.

<sup>26</sup> KELEMEN, D. On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone. *Maastricht Journal of European and Comparative Law*. 2016, Vol. 23, No. 1, p. 139.

<sup>27</sup> *Ibid.*, p. 149.

<sup>28</sup> BAQUERO CRUZ, J. Another Look at Constitutional Pluralism in the European Union. *European Law Journal*. 2016, Vol. 22, No. 3, pp. 356–74.

Finally, an interesting case-based perspective on constitutional pluralism is offered by Kühn.<sup>29</sup> However, the assumption he seems to make is that the infamous decision of the Czech CC in the pension saga was a manifestation, or at least a consequence, of constitutional pluralism, although it is hardly compatible with its principles, that favorize cooperation and dialogue over conflict and struggle for domination (in this case, between the CJEU and the CCC). Without a detailed analysis, this case is more likely to reflect the incompatibility of the monistic positions, which both the CJEU and the CCC have adopted regardless of the possible ‘Euro-friendliness’<sup>30</sup> of the CCC in earlier cases. Additionally, in an earlier work, Kühn asserted that ‘the idea of constitutional pluralism must continue to exist for a foreseeable time to come.’<sup>31</sup> While it is true that the idea persists, it has apparently not been implemented by many core judicial actors on whom it focuses, including the CJEU or the CCC.

What the mere existence of these critiques demonstrates though is that the acceptance of constitutional pluralism opens up many new questions, because such a seemingly equal relationship between the legal orders may reach the forms of either cooperation or competition, with the latter one causing complicated legal and political conflicts. This is also identified in Goldoni’s essay, where he considers ‘the absence of a more sophisticated account of the interaction between institutions belonging to different levels’ as one of the weakest points of the pluralist understanding.<sup>32</sup> Hence, leading legal scholars construct different ‘visions’ of constitutional pluralism which aspire to solve such dilemmas.<sup>33</sup> For instance, Miguel Maduro creates a set of ‘contrapunctual meta-principles’ which should govern the relationship between the legal orders and are, despite their complicated title, quite easy to understand. They include the mutual respect of each legal order to the existence of the other (*pluralism*), intensive dialogue between legal institutions and the application of discursive practices (*participation*), consistency in both national and European courts’ decision-making (*coherence*) and the awareness of the variety of actions which are possible in the pluralist order, and of their consequences (*institutional choice*).<sup>34</sup> The respect for these principles requires that the process of creation and interpretation of EU law is ‘dependent on a discursive process with other actors and that it is both shaped by that discourse and has to be shaped in the light of its likely ‘appropriation’ by those actors.’<sup>35</sup> In other words, it de-

<sup>29</sup> KÜHN, Z. Ultra Vires Review and the Demise of Constitutional Pluralism: The Czecho-Slovak Pension Saga, and the Dangers of State Courts’ Defiance of EU Law. *Maastricht Journal of European and Comparative Law*. 2016, Vol. 23, No. 1, pp. 185–94.

<sup>30</sup> *Ibid.*, pp. 186–7.

<sup>31</sup> KÜHN, Z. Making a European Transnational Constitution: Some Central European Perspectives. In: Pernice, I., Zemánek, J. (eds.). *A Constitution for Europe: The IGC, the Ratification Process and Beyond*. Baden-Baden: Nomos, 2005, p. 140.

<sup>32</sup> GOLDONI, M. Constitutional Pluralism and the Question of the European Common Good. *European Law Journal*. 2012, Vol. 18, No. 3, p. 401.

<sup>33</sup> Four of them are presented in AVBELJ, M., KOMÁREK, J. (eds.). *Four Visions of Constitutional Pluralism*. *EUI Working Papers, Law*. 2008, No. 21, pp. 1–37.

<sup>34</sup> GOLDONI, M. *Constitutional Pluralism and the Question of the European Common Good*, pp. 395–398.

<sup>35</sup> MADURO, M. P. Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism. *European Journal of Legal Studies*. 2007, Vol. 1, No. 2, p. 15.



mands courts to stay in ‘dialogue’, especially when it comes to hard constitutional disputes.<sup>36</sup>

At this point, CCs enter the stage. If a pluralist structure described above is to be working, the highest judicial institutions (such as the CCs and the CJEU) should be the first who advance it and apply it in their decision-making, as they possess the greatest powers when interpreting constitutional provisions. One might think, that the doctrines of EU law put forward by the CJEU’s rulings (supremacy and direct effect) have ‘killed’ this dialogue before it could even start.<sup>37</sup> However, this is not so, as these doctrines were not automatically adopted by CCs of the member states. On the contrary, most CCs, beginning with the Federal CC of Germany, have successfully resisted the mechanical adoption of the doctrines and ‘continue to locate the authority of EU law in the national legal order centrally within the national constitution, and not in the jurisprudence of the Court of Justice or in the sovereignty of the EU.’<sup>38</sup> This serves as an indicator of an *evolving, but equal relationship* from both the European and the national perspective. Naturally, the dilemma which then arises is the one of a *conflicting, rather than cooperative* relationship. As the CJEU and national courts acknowledge different sources of EU law (the CJEU the Treaties and the CCs the national constitutions), a conflict, captured by the metaphor of ‘two roosters in one yard’,<sup>39</sup> may easily appear. What is more, the widening ‘zone of discretion’ in which CCs (and also the CJEU) operate, may reinforce this conflict.<sup>40</sup>

Such reasoning leads to the question, how we should evaluate constitutional pluralism in the EU if the key institutions do not always support this position. The answer to this is beyond the scope of this text, but one thing should be clear by now: CCs of EU member states are in a key position for shaping the relationship between the legal orders and therefore affecting other institutions both on national and European level. They are actors with a significant power to disseminate their views on the relationship and, more generally, on issues of European integration as a whole.

In sum, CCs of EU member states can adopt one of the three conceptions of the interaction between national and EU law.<sup>41</sup> Either they admit the dominance of EU law or vice

<sup>36</sup> According to one of the core thinkers on constitutional pluralism, this approach is particularly suited to capturing the *empirical developments* of European integration especially in the legal sphere (WALKER, N. Constitutional Pluralism Revisited. *European Law Journal*. 2016, Vol. 22, No. 3, pp. 333–55). At the same time, the acceptance of the usefulness of this approach does not have to come together with a normative preference of constitutional pluralism over, say, a federalist vision.

<sup>37</sup> Even the president of the CJEU admitted that the Court is generally not following the principles of constitutional pluralism. LENAERTS, K. Democracy, Constitutional Pluralism and the Court of Justice of the European Union. In: van Middelaar, L., Van Parijs, P. (eds.). *After the Storm. How to save democracy in Europe*. Tiel: Lannoo, 2015, pp. n.a.

<sup>38</sup> CRAIG, P., DE BÚRCA, G. *EU Law: Text, Cases and Materials*. p. 377.

<sup>39</sup> HAMULÁK, O. *Integrující se Evropa a suverenita České republiky*. Olomouc: Olomouc University Press, 2013, pp. 55–56.

<sup>40</sup> The wider zone of discretion is caused by the fact that ‘the Treaties give little guidance as to the interaction between national and Community law’ (DAVIES, K. *Understanding European Union Law*. 2<sup>nd</sup> edition. London: Routledge, 2003, pp. 58–59). Sometimes, the basic rules are set in the state constitutions (such as in the case of Slovakia), but they are not sufficient to fully set the *modus vivendi* of the relationship.

<sup>41</sup> With some country specifics, these positions can be recognized in case studies on positions of CCs in the region to EU law. See the Polish and Estonian case studies in an edited volume. See GÓRSKI, M. European Union law before national judges: the Polish experience. Adept multicentric vision or creeping hierarchical practice & EVAS, T. Judicial reception of EU law in Estonia. In: de Witte, B., Mayoral, J., Jaremba, U., Wind, M., Podstawa, K. (eds.). *National Courts and EU Law*. Edward Elgar Publishing, 2016. pp. 127–67.

versa of national law (although with the latter they would directly contradict the jurisprudence of the CJEU), or they decide to support a pluralist account in which they again have more options of where to put the ‘limits’ of EU law. It appears that the most progressive position they could take would be the ‘cooperative pluralist’ one in which they would foster an intensive dialogue with the (not only) judicial institutions, especially the CJEU, on both formal (such as submitting preliminary references to the CJEU<sup>42</sup>) and informal (such as following the up-to-date jurisprudence of the CJEU, the national CCs and theoretical discussions on the topic) levels. The remainder of this article discusses whether the SCC proceeds this way.

### 3. THE CASE OF SLOVAKIA

Before proceeding to the analysis of case law, it is helpful to review the preconditions for the relationship between EU law and Slovak constitutional law in the Slovak Constitution, and the powers of the SCC to interpret the Constitution.

#### 3.1. The SCC: Background

As was demonstrated earlier, CCs can directly influence a country’s standing in relation to EU law via the opinions in their rulings. Nevertheless, the basic mechanisms set in statutory law by the national legislature are binding for them with no exception. Therefore, an analysis of these position has to take into account the provisions of statutory law as well as the rulings themselves.

Additionally, it is important to set up the context (geographical, historical, and political) in which a particular CC operates. The SCC, similarly to other Central European CCs, belongs to those highest judicial institutions which possess extensive powers of both abstract<sup>43</sup> and concrete<sup>44</sup> constitutional review. The explanation of such powers lies in the establishing process of constitutional review in the region, where an important role was played by the aim to provide these countries with a ‘European image’ associated with advanced Western democracies.<sup>45</sup> When it comes to the SCC and its usage of the wide range of formal powers, the thesis of the contribution of this institution to the consolidation of democracy in Slovakia in

<sup>42</sup> In fact, the questions posed by national courts are considered to be helpful for shaping EU law. See MADURO, M. P. *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*. p. 15.

<sup>43</sup> Abstract review is ‘the method of considering a statutory rule not in the actual context of a specific case but rather in abstracto’ (SADURSKI, W. *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. 2<sup>nd</sup> edition. Dordrecht: Springer, 2014, p. 13, see also the assessment on pp. 91–102). For example, the SCC possesses abstract review powers on the basis of Article 125 of the Slovak Constitution.

<sup>44</sup> Concrete review is based on review of individual complaints on human rights violations submitted to the Court, usually after all previous remedies have been exhausted (Article 127 of the Constitution). The SCC does not possess the power to review individual complaints on the unconstitutionality of legislative acts, known as *actio popularis*. On constitutional complaints and *actio popularis*, see *ibid.*, pp. 16–19.

<sup>45</sup> PROCHÁZKA, R. *Mission Accomplished: on Founding Constitutional Adjudication in Central Europe*. Budapest and New York: CEU Press, 2002, pp. 13–31.

1990s<sup>46</sup> can be accepted. The second important context for evaluating the SCC's case-law lies in the differences observable between the three tenures of judges who served at the Court.<sup>47</sup> Thirdly, a comparison of the positions of Central European CCs to EU law may be also helpful for identifying country specifics in the decision-making. For instance, one paper applying comparative methodology concludes that a typical choice for a pluralist interpretation of the EU and national legal orders comprises references to the 'national constitutional identities of the Member States.'<sup>48</sup> In this light, adopting a negative position towards EU law and openly rejecting its supremacy in all respects is not the approach CCs of this region choose.<sup>49</sup> However, it is hard for them to find the proper balance and examples of failures of these searches may be observed in Central European countries such as Poland or the Czech Republic.<sup>50</sup> These data allow to preliminarily conclude that Central European CCs have the formal powers and historical traditions necessary to provide own authoritative answers to crucial issues of EU law from the national perspective. At the same time, their exact position often seems to remain unclear.

The analysis which follows strives to confront these conclusions on the Central European level with the Slovak practice to see whether they are applicable also for the SCC. It must be noted, however, that it does not aspire to become a complex assessment of the SCC's position, as such an approach would require the application of a more detailed methodology, such as content and statistical analysis.<sup>51</sup> Even so, due to the lack of sources, especially in other than Slovak language, which would deal directly with the SCC, it may serve as a useful pilot study for in-depth analyses which could potentially use comparative methods as well.

### 3.2. Provisions of statutory law: The Slovak Constitution and EU law

Before turning to the case-law of the SCC itself, a brief overview of Article 7 of the Slovak Constitution, which deals with the relationship between national and EU law, should proceed. According to paragraph 2 of this article 'The Slovak Republic may, by an international

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<sup>46</sup> MALOVÁ, D. The Role and Experience of the Slovakian Constitutional Court. In: Sadurski, W. (ed.). *Constitutional Justice, East and West. Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective*. The Hague: Kluwer Netherlands, 2002, pp. 349–372.

<sup>47</sup> DRGONEC, J. *Ochrana ústavnosti Ústavným súdom Slovenskej republiky*. Žilina: Eurokódex, 2010.

<sup>48</sup> CEBULAK, P. Inherent Risks of the Pluralist Structure. Use of the Concept of National Constitutional Identity by the Polish and Czech Constitutional Courts. *Croatian Yearbook of European Law and Policy*. 2012, No. 8, pp. 501–502.

<sup>49</sup> PIQANI, D. Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration. *European Journal of Legal Studies*. 2007, Vol. 1, No. 2, pp. 20–21.

<sup>50</sup> CEBULAK, P. Inherent Risks of the Pluralist Structure. Use of the Concept of National Constitutional Identity by the Polish and Czech Constitutional Courts. pp. 503–504.

<sup>51</sup> An interesting example of such analysis codes the doctrinal position of CCs on a scale from absolutely nation-centric to maximally Eurocentric and tests hypotheses using this coding. According to this study, the SCC adopted doctrinal position number 2 which is 'asserting core constitutional limits to EU law supremacy.' (DYEVE, A. European Integration and National Courts: Defending Sovereignty under Institutional Constraints? In: *European Constitutional Law Review*. 2013, Vol. 9, No. 1, pp. 139–168). As is stated below, this coding cannot be considered adequate for the SCC, especially after January 2011.

treaty ratified and promulgated in a manner laid down by law, or on the basis of such treaty, transfer the exercise of a part of its rights to the European Communities and European Union. *Legally binding acts of the European Communities and European Union shall have primacy over the laws of the Slovak Republic.* [...]'.<sup>52</sup> While the first norm is important from the view of legislative and executive power which are responsible for approving or ratifying such international treaties, the second one defines the standards for the application of EU and national law in cases they conflict which is predominantly a competence of courts.

The provision implies that while ordinary Slovak legislation should step back when an issue is entrenched differently in EU law, it is not necessarily the case with the Constitution and constitutional laws as well.<sup>53</sup> Thus, although it is not explicitly stated that these types of legislation retain their supremacy over EU law, the SCC has the room to interpret these provisions in this way. From this brief analysis it can be concluded, that this Article constructs an adequate, but not ideal framework,<sup>54</sup> which is general enough to provide the SCC an opportunity to interpret it in a more or less Euro-friendly way. Even though there was no direct petition to the SCC to provide an interpretation of this provision according to Article 128 which grants it the power to do so, the Court can use the opportunity provided by individual complaints which mention this provision. For that reason, the next section looks at these complaints and the ways they have been resolved by the SCC.

#### 4. THE SCC'S APPROACH: ANALYSIS OF CASE-LAW

When it comes to individual complaints of legal persons according to the Article 127<sup>55</sup> of the Slovak Constitution concerned with the potential violation of human rights and freedoms because of violating some standard of EU law, the case-law of the SCC provides hardly any authoritative opinions which could serve as a basis for a doctrinal approach to the issue. In addition, the decisions of this category did not gain significant media coverage (except the ruling concerned with the Treaty, which is analysed in the next section). Even though, a short overview of the most important cases follows in order to gain an insight into the types of questions to be dealt by the SCC.

Although Slovakia acceded to the EU in 2004, the Article 7 of the Slovak Constitution, stating the primacy of 'legally binding acts of the EU,' entered into force already in 2001. This theoretically offered the room for individuals to submit their complaints in this regard before the accession, but no such case can be identified in the Court's jurisprudence.<sup>56</sup>

<sup>52</sup> The term 'legally binding acts' indicates no difference between primary and secondary sources of EU law.

<sup>53</sup> A reference can be made here by the SCC also to Article 1 (2) of the Constitution, which provides that 'The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations.' See English translation of the Constitution at: <https://www.prezident.sk/upload-files/46422.pdf> (accessed 01-03-2016).

<sup>54</sup> LANTAJOVÁ, D., HRICOVÁ, I. Ústavnoprávne aspekty prednosti „právne záväzných aktov Európskych spoločenstiev a Európskej únie“ pred zákonmi Slovenskej republiky. *Days of Public Law, Conference Proceeding*. Brno: Masarykova univerzita, 2008, pp. 87–98.

<sup>55</sup> The SCC decides on these complaints as a domestic court of final instance, if all other remedies were exhausted.

<sup>56</sup> JÁNOŠÍKOVÁ, M. *Komunitárne právo v judikatúre ústavných súdov SR a ČR*. Trnava: Trnavská univerzita, 2009, pp. 39–40.

#### 4.1. Individual complaints post-accession

After 2004, several cases were concerned with submitting a question for preliminary ruling to the CJEU. Shortly after the accession, the SCC was reluctant to react to complaints that considered the unwillingness of general courts to submit preliminary questions and include the relevant statutes and case-law of the EU into the justification of their decisions (e.g. II. ÚS 90/05, III. ÚS 151/07).<sup>57</sup> Later, it declared the obligation to submit preliminary questions, if the petitioner *justifiably* (italics M.S.) requests that step from the court, but only on the level of courts of last instance. These are, according to the SCC, only the Slovak Supreme Court and the SCC itself.<sup>58</sup> According to one commentary, this interpretation is not supported by provisions of the Slovak Code of Civil Procedure, as sometimes general (e.g. regional or even district) courts serve as courts of last instance.<sup>59</sup> Hence, the decision allowed the SCC to – at least formally – control the submitting procedure of preliminary questions even though it committed itself to the duty to submit them in relevant situations.<sup>60</sup> A somewhat different assessment of Decisions II. ÚS 90/05 and IV. ÚS 206/08<sup>61</sup> considers both as a basis for the construction of a doctrine that if an appellate court does not submit the preliminary question in a relevant case, this forms a sufficient condition to submit an appeal to the higher instance of the judiciary (e.g. the Supreme Court), which is already bound to submit the preliminary question to the CJEU. This argument can be agreed with only in part, because while there is indeed a possibility to appeal to a court of higher instance on the ground of the lower court not submitting a preliminary question on the basis of the case law of the SCC, there are some procedures where neither an ordinary, nor an extraordinary appeal can be submitted according to the Code of Civil Procedure.<sup>62</sup> In other words, a case might emerge where the claimant would not be able to appeal to either the Slovak Supreme Court or the SCC if the district or regional court in the position of a court of last instance does not submit a preliminary question upon her request.

The SCC brought a degree of coherence to the approach in a ruling from 2010 in which both the SCC and the Supreme Court are obliged to submit the preliminary question on the *justified* request of the claimant. Here, it examined a series of interconnected cases based on individual complaints, which objected towards the approach of the Supreme Court, which did not submit a preliminary question in their case, but had done so earlier

<sup>57</sup> Also SIMAN, M. Vybrané prípady aplikácie komunitárneho práva v rozhodovacej praxi Ústavného súdu SR. In: Pogáčová, J., Siman, M., Slašťan, M. (eds.). *Komunitárne právo na Slovensku päť rokov „po“*. Bratislava: Slovenská asociácia európskeho práva, 2009, pp. 93–99.

<sup>58</sup> Decision IV. ÚS 206/08 (p. 1, 9).

<sup>59</sup> SIMAN, M. Analysis of the judgment No. IV. ÚS 206/08. In: *Slovenská asociácia európskeho práva* [online]. [2016-02-06]. Available at: <[http://www.saep.sk/?q=system/files/Uznesenie%20US%20SR%20%20\\_IV.%20%25DAS%20206-08-50\\_povinnost\\_predlozit\\_PO.pdf](http://www.saep.sk/?q=system/files/Uznesenie%20US%20SR%20%20_IV.%20%25DAS%20206-08-50_povinnost_predlozit_PO.pdf)>.

<sup>60</sup> SIMAN, M. *Vybrané prípady aplikácie komunitárneho práva v rozhodovacej praxi Ústavného súdu SR*. pp. 99–107.

<sup>61</sup> JÁNOŠÍKOVÁ, M. *Komunitárne právo v judikatúre ústavných súdov SR a ČR*. pp. 42–58.

<sup>62</sup> JEŽOVÁ, D. *Prejudiciálne konanie pre Súdny dvorom EÚ*. Žilina: Eurokódex, 2013, pp. 114–115.

in ‘generically identical’ cases.<sup>63</sup> The substantial element of the multi-layered case was that the SCC accepted the objection towards the Supreme Court on not submitting the preliminary question. However, as simultaneously with this case, there was a related relevant case in which the Supreme Court did submit a preliminary question, the SCC had interrupted the proceeding<sup>64</sup> and had waited until that preliminary question was answered by the CJEU.<sup>65</sup> On the basis of this answer, the SCC then declared that the Supreme Court violated the right of the petitioner to a fair trial (Article 46(1) of the Slovak Constitution and Article 6(1) of the European Convention on Human Rights).<sup>66</sup> The pattern of sticking to the obligation of the two courts to submit preliminary questions if there is a *justified* request coming from the petitioner, can be distilled in several later decisions as well.<sup>67</sup> At the same time, this does not diminish the concern regarding the cases where an appeal to either of these courts is not procedurally allowed, and regarding the discretion the two highest Slovak courts enjoy in deciding whether the claimant’s request to submit a preliminary question is justified. In addition, as so far the SCC has not submitted a preliminary question to the CJEU,<sup>68</sup> a large part of the debate about the Court’s position to this instrument remains *in abstracto*.

Another problem related to individual complaints is, that the Constitution in Article 144 (2) entrenches the duty of general courts to interrupt the proceedings and submit a proposal for examining the constitutionality of a law in case they suppose that such law contradicts the constitution, a constitutional law, an international treaty according to Article 7 para. 5 of the Constitution or another ordinary law. Therefore, a general court could face the unresolvable dilemma in case of a potential of contradiction between a domestic legal standard and a provision of primary EU law, as it could (1) postpone the procedure and submit the case to the SCC, (2) decide in favour of primary law by applying the case-law of the CJEU or (3) submit a preliminary question to the CJEU.<sup>69</sup>

The brief overview of the procedure of individual complaints at the SCC in relation to standards of EU law showed, that no clear position of the Court towards EU law can be inferred from its decisions in this type of procedure. One such case, that of the Treaty, is left for the next section, but it will be argued that this judgment does not provide a new and comprehensible position of the SCC either.

<sup>63</sup> Decision IV. ÚS 108/2010. In: *Constitutional Court of the Slovak Republic* [online]. [2016-02-06]. Available at: <[http://portal.concourt.sk/SearchRozhodnutia/rozhod.do?urlpage=dokument&id\\_spisu=411889](http://portal.concourt.sk/SearchRozhodnutia/rozhod.do?urlpage=dokument&id_spisu=411889)>.

<sup>64</sup> Decision IV. ÚS 108/2010.

<sup>65</sup> Case C240/09, Lesoochránarske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky. In: *EUR-Lex* [online]. [2011]. Available at: <<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62009CJ0240&from=EN>>.

<sup>66</sup> Decision IV. ÚS 108/2010.

<sup>67</sup> JEŽOVÁ, D. *Prejudiciálne konanie pre Súdny dvorom EÚ*. pp. 119–121.

<sup>68</sup> See e.g. ANGELOVIČOVÁ, A. Inštitút prejudiciálnej otázky v rozhodovacej činnosti Ústavného súdu Slovenskej republiky. *Právni rozpravy 2014*. Hradec Králové, 2014, p. 33; JÁNOŠÍKOVÁ, M. Desiat rokov práva Európskej únie v judikatúre Ústavného súdu Slovenskej republiky. In: Ján Klučka (ed.). *10 rokov v EÚ: Vzťahy, otázky, problémy*. Košice: Univerzita Pavla Jozefa Šafárika, 2014, p. 60.

<sup>69</sup> JÁNOŠÍKOVÁ, M. *Komunitárne právo v judikatúre ústavných súdov SR a ČR*. pp. 63–65.

## 4.2. The two key rulings

So far, in the case law of the SCC, two closest moments for providing a clear and authoritative answer to the nature of the EU and the relationship of the two legal orders can be identified. While the first one stemmed from an individual complaint, the second one had its roots in a submission for reviewing the constitutionality of a law approved by the parliament. Whereas the former virtually tended to ‘force’ the SCC to express its view, for the latter these ‘doctrinal issues’ were of rather marginal importance. The Court, however, caused a surprise to everyone, as it resisted the temptation to answer the questions in its first ruling, but expressed itself (seemingly) very clearly by using the principle of dealing with something ‘beyond that mentioned’ in the second one.

The first case originated in 2005 after the National Council ratified the Treaty Establishing a Constitution for Europe (below: Treaty). Shortly hereafter a group of citizens submitted a complaint according Article 127 of the Constitution, in which they asked the Court to rule on violating their right to participate in the administration of public affairs granted by Article 30 of the Constitution, in connection with Articles 7 para. 1, 93 para. 1 and 2 para. 1.<sup>70</sup> The reason for this was that according to the complainants, after the approval of the Treaty, the EU would become a ‘state union’ and the Article 7 para. 1 of the Constitution requires, that ‘the decision on entering into a state union with other states, or on withdrawal from this union, shall be made by a constitutional law which must be confirmed by a referendum.’ As there was no such referendum (known as obligatory referendum in Slovak constitutional law), they argued that their participation rights were violated and that the ratification procedure of the Treaty contradicted the principle stated in Article 2 para. 1 of the Constitution, namely that ‘State power originates from citizens, who exercise it through their elected representatives, or directly.’ Consequently, the question for the SCC to determine was whether the EU would become a ‘state union’ after the approval of the Treaty.

The answer came no sooner than after three years (February 2008), when the Treaty was already off the agenda at EU level. In its ruling No. II. ÚS 171/05,<sup>71</sup> the Court among others declared that ‘the development in the EU tends to a state union, but for now it is not possible to seriously determine, when it will happen.’ This correctly indicates that the complaint was rejected. A broader perspective demonstrates that the ruling was not helpful for understanding the nature of the EU. Although it became rather clear, that for the SCC the EU in that time was not a ‘state union,’ the Court provided no classification criteria for analysing this issue in the future (such as after the ratification of the Lisbon Treaty). It is therefore not known, which indicators are decisive for the Court to classify an entity as ‘state union’. Moreover, as for the process of European integration which for long resembled the mode of an ‘ever closer Union’,<sup>72</sup> the SCC declared the whole issue to be irrelevant,

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<sup>70</sup> Complaint from July 8, 2005. In: *Konzervativizmus* [online]. [2016-02-06]. Available at: <[www.konzervativizmus.sk/upload/doc/KI\\_staznost\\_euroustava.rtf](http://www.konzervativizmus.sk/upload/doc/KI_staznost_euroustava.rtf)>.

<sup>71</sup> For the text of the ruling, see DRGONEC, J. *Ochrana ústavnosti Ústavným súdom Slovenskej republiky*. pp. 351–386.

<sup>72</sup> Cf. DINAN, D. *Ever Closer Union: An Introduction to European Integration*. 4<sup>th</sup> edition. Basingstoke: Palgrave Macmillan, 2010.

when it stated that the requirement to organize an obligatory referendum in context of possible further agreements between the EU member states could never appear. This is problematic as the Constitution in Article 93 (1) stipulates that ‘a constitutional law on joining a union with other states or the secession from it, shall be confirmed by a referendum.’ As a consequence, if the member states would, for instance, agree on a treaty that would establish the EU explicitly as a ‘state union’,<sup>73</sup> this approach of the SCC would create a situation evidently contradictory to the Constitution, at least from the grammatical and logical point of view. There were some other problematic elements in the verdict such as the unconstitutionality of the obligatory referendum because of human rights issues which are touched upon in the Treaty (human rights cannot be a subject of referendum in Slovakia) or the relationship between those articles of the Constitution which classify the types of international treaties and conventions.<sup>74</sup>

After another three years, in January 2011, the SCC delivered a ruling PL. ÚS 3/09 about the constitutionality of the limits of profit of health insurance companies. Apparently, the ruling was a result of a different proceeding than the one on the Treaty, because it was submitted by several Slovak MPs according to Article 125 para. 1 of the Constitution. A specific characteristic of the submission was that the MPs claimed that the legislation is not only contrary to the Constitution, but also to provisions of the Lisbon Treaty, i.e. a source of EU law. The SCC used a number of arguments to justify its decision, in which the law went contrary to relevant provisions of these higher sources of law, including violations of property rights.<sup>75</sup> Generally and *pro futuro*, the most important was the statement, according to which ‘[B]ased on the principle of primacy of EU law, all public bodies, not only general courts, are obliged *ex officio* not to use domestic law, which in their opinion contradicts EU law, while general courts also have the possibility to verify such legal opinion by submitting a preliminary question to the Court of Justice of the European Union according to Article 267 of the Treaty on the Functioning of the European Union. Accordingly, [...] general courts and all public bodies are obliged to exclude the application of such national law *ex offio*.’<sup>76</sup>

It must be noted that the collocation ‘all public bodies’ includes the SCC itself. Consequently, it can be argued that the SCC ‘fully approved the interpretation of the primacy of community law in the understanding of the CJEU, i.e. the primacy of EU law before any norm of national law, including the Constitution.’<sup>77</sup> This is confirmed by the President of the Constitutional Court (in office until 2019) when she argues that the SCC has committed itself to the doctrine of primacy of EU law, without any reservations.<sup>78</sup> In other words,

<sup>73</sup> See the example in JÁNOŠÍKOVÁ, M. *Komunitárne právo v judikatúre ústavných súdov SR a ČR*. Trnava: Trnavská univerzita, 2009, pp. 72–73.

<sup>74</sup> GYÁRFÁŠ, J. Ústavný súd a Zmluva o ústave pre Európu: Niekoľko poznámok k argumentácii ústavného súdu. *Právny obzor*. 2009, Vol. 92, No. 2, pp. 192–194.

<sup>75</sup> Ruling PL. ÚS 3/09. In: *Constitutional Court of the Slovak Republic* [online]. [2015-05-12]. Available at: <[http://portal.concourt.sk/Zbierka/2011/3\\_11s.pdf](http://portal.concourt.sk/Zbierka/2011/3_11s.pdf)>.

<sup>76</sup> *Ibid.*

<sup>77</sup> LALÍK, T. Ústavnoprávna povaha Európskej únie. In: Ľubor Cibulka (et al.). *Ústavné právo Slovenskej republiky (Štátoveda)*. Bratislava: Práv UK, 2013, pp. 250–252.

<sup>78</sup> MACEJKOVÁ, I. Právo Európskej únie v judikatúre Ústavného súdu Slovenskej republiky. In: Bárány, E. (ed.). *Ako právo reaguje na novoty*. Bratislava: VEDA, 2015, pp. 208–213.



it is likely to have chosen European constitutional monism from the three theoretical positions,<sup>79</sup> and acknowledged the hierarchical character of the relationship between national and EU law. This result went contrary to many expectations according to which the SCC or other Central European CCs, preserve the dominance of national law in limited ways, the ‘material core’ of the constitution, etc.<sup>80</sup> One question that remains open is whether this ruling was enough for establishing a new doctrine to which the Court will stick in other difficult cases of potential conflicts between national and EU law.

## 5. WHAT LIES BENEATH: THE SCC’S CHOICE AND ITS IMPLICATIONS

It is largely clear at this point that the SCC has refused to apply the concept of constitutional pluralism to the relationship between Slovak and EU law. However, two more polemic questions remain. The first concerns the causes of this outcome. Why has the SCC declared the virtually unconditional primacy of acts of primary EU law, even over its own judgments and in this way distinguished itself from other constitutional courts in the region? What factors could be at play here? The second one relates to the impact of the SCC’s decision. Does it even matter for the practical, day-to-day relations between Slovakia and the EU, and/or for the protection of human rights of individuals subject to jurisdiction of Slovak state and public institutions? If so, is the effect likely to be positive or negative? Of course, this latter question, in contrast to the previous ones, cannot be separated from the normative domain of constitutional pluralism, i.e. whether it is desirable that this form of relations between the legal orders gradually prevails, but still it may be worth hypothesizing possible scenarios in greater detail.

### 5.1. Causes of the SCC’s choice

So far only one analysis by Tomáš Dumbrovský tried to look at the causes of the SCC’s approach.<sup>81</sup> However, it is argued here that some of its conclusions need to be updated because of the developing case law. According to Dumbrovský, instead of fostering dialogue after accession, the Czech and Slovak constitutional courts engaged in bargaining that ‘diminished cooperation, thus endangering the very essence of constitutional pluralism.’<sup>82</sup> This bargaining includes avoiding clashes with the CJEU via transforming questions important from the EU law perspective into questions important from the national constitutional law perspective, and ‘dragging the European legal order into [the states’] national orders.’<sup>83</sup> Given that the analysis was written prior to the SCC’s decision PL. ÚS 3/09, it quite correctly identifies the degree of uncertainty in the position of the SCC in the first

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<sup>79</sup> See Section 2.2 above.

<sup>80</sup> E.g. JÁNOŠÍKOVÁ, M. *Komunitárne právo v judikatúre ústavných súdov SR a ČR*; PIQANI, D. *Constitutional Courts in Central and Eastern Europe and their Attitude towards European Integration*.

<sup>81</sup> DUMBROVSKÝ, T. *Constitutional Pluralism and Judicial Cooperation in the EU after the Eastern Enlargements: A Case Study of the Czech and Slovak Courts*. In: Topidi, K., Morawa, A. H. E. *Constitutional Evolution in Central and Eastern Europe. Expansion and Integration in the EU*. Farnham: Ashgate, 2011, pp. 89–116.

<sup>82</sup> *Ibid.*, p. 90.

<sup>83</sup> *Ibid.*, p. 105, 112.

six years after the accession of Slovakia to the EU. However, while the thesis on the absence of constitutional pluralism in the case law of the SCC<sup>84</sup> still holds, the bargaining model that aspires to justify it, does not. Indeed, the acceptance of the unconditional primacy of EU law over national law does not leave much room for bargaining between the two courts at all, definitely not without changing this precedent in subsequent case law of the SCC towards some kind of cooperative model.

Furthermore, Dumbrovský's explanation offered for the rejection of constitutional pluralism by the SCC – the tradition of the Kelsenian, hierarchical and thus monist character of legal order<sup>85</sup> – is not fully satisfactory either. While there is certainly such a tradition, stemming from the Austrian part of the Austro-Hungarian empire, of which today's Czech Republic was a part, the legal system in place in Slovakia for centuries was that of Hungary, which is of polycentric origin, acknowledging the coexistence of various sources of law.<sup>86</sup>

Three other possible factors might thus complement the possible influence of tradition on the rejection of constitutional pluralism. Firstly, the fact that while several scholars writing on constitutional pluralism have served as judges or advocates-general of the CJEU,<sup>87</sup> their 'visions' do not seem to have permeated the Court, which still very much relies on the doctrine of supremacy of EU law, that seems to exclude the option of constitutional pluralism already at the EU level.<sup>88</sup> The SCC thus might act as the 'good student' and instead of experimenting, as some other constitutional courts do, stick to the 'safe and sound' option of respecting the CJEU. Secondly, after the resignation of the second President of the SCC, Ján Mazák, there is no judge sitting on the bench who would have a demonstrably in-depth interest in academic debates on EU law. As constitutional pluralism is a concept that has to a large extent been developed by academia and has numerous interpretations, without detailed study it could easily happen that it is misunderstood as an advocate of primacy of supranational over national law (as has been demonstrated via some academic texts above).

Finally, it might be that some judges are familiar with constitutional pluralism but their doctrinal views remain monistic. A good example is the acting President of the SCC, who in a conference contribution on pluralism of law and power wrote about the 'the unity of law' as the ideal condition, attempted to be achieved by the legal system, which in practice comes more or less closer to this condition.<sup>89</sup> If monism of law is seen as the desirable

<sup>84</sup> Ibid., p. 113.

<sup>85</sup> Ibid.

<sup>86</sup> PROCHÁZKA, R. *Mission Accomplished: on Founding Constitutional Adjudication in Central Europe*. pp. 49–52. Of course, the communist regime, especially its second part from the 1960s, could have effectively 'killed' any such tradition within the Czechoslovak (socialist) Republic. On the transformation of the communist legal order in the 1960s cementing legal formalism and the hierarchy of legal sources, see KÜHN, Z. *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Leiden, Boston: Martinus Nijhoff, 2011, pp. 26–31 *et passim*.

<sup>87</sup> For example, Koen Lenaerts, Miguel Maduro, Christiaan Timmermans.

<sup>88</sup> Christiaan Timmermans shares this view, when he states that 'the CJEU shows no pluralist inclinations, continuing to insist, as it does, on the unconditional validity of the primacy principle.' TIMMERMANS, Ch. *The Magic World of Constitutional Pluralism*, p. 352.

<sup>89</sup> MACEJKOVÁ, I., KANÁRIK, I. Monizmus právneho poriadku Slovenskej republiky v podmienkach pluralizmu. In: Lengyelová, D. (ed.): *Pluralizmus moci a práva*. Bratislava: Ústav štátu a práva SAV a BVŠP, 2009, p. 339.

condition to be achieved, and is directly connected to the ‘unity of the state,’<sup>90</sup> the next logical step is resistance to constitutional pluralism, even when that means acknowledging the primacy of EU law over domestic legal order.

## 5.2. Possible consequences of the SCC’s choice

Whatever the reasons for rejecting constitutional pluralism by the SCC, this choice is not without consequences. Two of them are discussed here. The first concerns potential cases of human rights violations, in which the scope of protection guaranteed by EU law and domestic law differs, with domestic law providing more extensive guarantees of a particular right. In lieu of the SCC’s approach, it seems that in such cases EU law provisions would ‘trump’ national law instead of the SCC adopting a pluralist approach by, for example, referring to the general principle of EU law, at the core of which is the protection of individual human rights.<sup>91</sup>

The second consequence might arise in case a specific provision of the Slovak Constitution or of law with constitutional statute is contested from the perspective of conformity with EU law. If the unconditional primacy of EU law applies and no conform interpretation is possible, it can be expected that such constitutional provision would not be applied to regulate the particular legal relationship. This would again open up an intense debate over the legitimacy of the EU, the origin of the European legal order and the pluralist versus monist approaches.<sup>92</sup>

## 6. CONCLUSION

This article aimed to answer the question what is the position of the SCC towards European integration and the relationship between sources of national and EU law ten years after the accession of Slovakia into the EU. In order to be able to set the relevant case law of the SCC into proper context, the main theoretical approaches to this relationship and the relevant provisions of Slovak legislation have been analysed.

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<sup>90</sup> Ibid., p. 338.

<sup>91</sup> See Article 2 of the Treaty on European Union: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ One field where the adjustment of ordinary legislation to these values is being debated, is asylum law, where some critics have accused certain EU institutions (especially the Council of the EU) of pursuing a ‘race to the bottom’ in human rights protection in the name of economic efficiency. See RIPOLL SERVENT, A., TRAUNER, F. Do supranational EU institutions make a difference? EU asylum law before and after ‘communitarization’. *Journal of European Public Policy*. 2014, Vol. 21, No. 8, pp. 1142–1162.

<sup>92</sup> None of these could be addressed in greater detail in this paper. A central dilemma, however, apparently rests in the question whether EU constitutional law (a phrase generally used in EU law scholarship today) attained constitutional status via democratic means. This would bring us to the question of constituent power at the EU level, its origin, nature and presence as a source of legitimacy of the legal order of the EU. One view on this, based on the analysis of Jürgen Habermas’ works, is provided in STEUER, Max: A Dual Legitimacy for a Democratic European Community? Jürgen Habermas and Constituent Power in the European Union. In: *International Centre for Democratic Transition Paper Series* [online]. 1. 6. 2015 [2016-02-01]. Available at: <[http://www.icdt.hu/documents/publications/Steuer\\_ICDT-Paper.pdf](http://www.icdt.hu/documents/publications/Steuer_ICDT-Paper.pdf)>.

There are three main and two additional conclusions arising from this investigation. Firstly, CCs of EU member states can, basically, adopt one of three different positions towards EU law. Either they acknowledge a hierarchical monist relationship (with EU law being dominant over national law or vice versa) or they focus on the constant interaction of the legal orders (either cooperative or conflicting) by applying the view of constitutional pluralism. Secondly, Slovak statutory law provides only a general framework for clarifying this relationship and lets more than enough room for legal interpretation by the judicial institutions.

Finally, although the SCC did not have many cases which explicitly required dealing with challenges of EU law, it usually resigned on dealing with the basic, but most important questions in those few cases which would have required it. As a result, it has not provided its own view on the nature of the EU and until 2011 also on the relationship between the European and domestic legal order. With little exaggeration, it may be stated that the Court quite successfully adopted a ‘doctrine of avoiding the questions of Community law,’<sup>93</sup> although such an approach could hardly be considered as a doctrine at all. This reluctance to deliver an opinion seemingly disappeared in January 2011, when the Court via its ruling adopted the position of the doctrine of European constitutional monism, i.e. acknowledged the dominance of EU law over domestic law and bound all public bodies including itself to apply predominantly EU and only then national law. Thus, the SCC decided for the monist interpretation and showed no preference for constitutional pluralism. This position was, though, not confirmed in another ‘hard case’ which would imply a conflict between the legal orders.

Additionally, the debate on the causes and consequences of the SCC’s approach, without aspiring to demonstrate causality mechanisms, pointed to a mixture of reasons, why the SCC could have moved in this direction, including the tradition of legal monism cemented in communist times, and the specialization and doctrinal views of the judges of the SCC. Rejecting constitutional pluralism can stimulate the need for one of the orders to prevail if they differ in the scope of protection of a certain fundamental right, and raise challenges with the conformity of certain constitutional provisions with EU law.<sup>94</sup>

<sup>93</sup> JÁNOŠÍKOVÁ, M. *Komunitárne právo v judikatúre ústavných súdov SR a ČR*.

<sup>94</sup> One case seems to be in development already, concerning Article 4 of the Slovak Constitution. Originally, the article stipulated that ‘mineral resources, caves, underground waters, natural healing sources and streams are a property of the Slovak Republic.’ See English translation of the Constitution at <https://www.prezident.sk/upload-files/46422.pdf> (accessed 01-03-2016). However, Constitutional Act No. 306/2014 Coll. amended this article by adding a second section, which, in the first part of its first sentence, provides that ‘the transportation of water taken from water supplies located in the territory of the Slovak Republic through the borders of the Slovak republic with means of transport or pipelines shall be prohibited (...)’ (authors’ own translation due to absence of the amended English-language version). The European Commission already investigates the conformity of this provision with the free movement of goods in the EU. From what is publicly available, the Slovak government aims to defend the regulation, among others, with the peculiar argument that ‘water does not count as common goods, it is a strategic raw material which deserves to be protected in the Constitution.’ See Minister Žiga: Slovakia defends ban on water exports. In: *Slovak Spectator* [online]. 3. 2. 2016 [2016-02-06]. Available at: <<http://spectator.sme.sk/c/20086280/minister-ziga-slovakia-defends-legal-ban-on-water-exports.html>>. A more coherent argument from the EU law perspective is that the constitutional provision is in line with EU law since it strikes a balance between the protection of water as natural heritage and market freedoms by not limiting the export of water altogether, only in a form that would result in the water being packed or bottled outside the territory of Slovakia (as the owner of the natural resource) without permission. See MASLEN, M. *Právna úprava starostlivosti o vody v Slovenskej republike*. Praha: Leges, 2017, pp. 103–106.

Signs of a more sophisticated and active approach to these issues, which would help overcome some challenges of European integration for Slovakia, have not been observed in the SCC's jurisprudence. It remains to be seen whether the Court will stick to its previous reasoning and create a stable doctrine by means of its upcoming decisions and whether the adopting of this 'simpler solution' with a rather general and vague reasoning will have a norm setting effect among other judicial and political institutions operating in the Slovak constitutional system.