

# *The Constitutional Court of the Republic of Slovenia and European Union Law*

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The relationship between national constitutional law and European Union law is one of the central constitutional questions subject to intense discussion not only among legal theorists, but also among the constitutional courts of the Member States of the European Union. Its clear definition not only at the level of legal norms, but also at the level of institutions that are called upon to interpret it, and these are the highest national jurisdictions and the Court of Justice of the European Union, can contribute to the predictability of the actions of individuals and legal entities and consequently to greater legal certainty. The implementation of the Charter of Fundamental Rights of the European Union at the level of primary law of the European Union opens additional perspectives in this relationship. This article analyses the position of European Union law in the constitutional order of the Republic of Slovenia. With reference to that, it focuses on positions on individual questions that have already been adopted by the Consti-

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tutional Court of the Republic of Slovenia and indicates possible directions of the future constitutional review.

*Key Words:* European Union law, constitution, the Constitutional court of the Republic of Slovenia, human rights

## 1. Introduction

The relationship between constitutional law and international law is, as a general rule, defined by national constitutions, whereby treaties that regulate human rights and fundamental freedoms (hereinafter: human rights) often have a special position in comparison to other treaties. If there are contradictions between international law norms, including those that regulate human rights, and constitutional law norms, such contradictions are resolved by national courts within the constitutional frameworks. The highest courts, i.e. supreme and constitutional courts, have the final word regarding their interpretation. However, this does not apply when a treaty, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention), establishes a special international judicial institution in order to ensure the observance of the provisions of the treaty. In such a case, a special relationship is necessarily established between institutions that are each called upon to ensure the effectiveness of constitutional norms and/or the norms of the treaty. For this reason only, relationships between norms become complex. When interpreting such treaties, national courts must also take into consideration the case law of the relevant international jurisdiction.

Relationships at the level of norms as well as at the level of institutions become even more complex when joined by European Union (hereinafter: EU) law and a new judicial institution – the Court of Justice of the European Union (hereinafter: CJEU). Thus, a triangle of institutions is formed, consisting of a constitutional court, where there is such a court, as the highest court for the protection of constitutionality and human rights in an individual state from the perspective of the constitutional order, the CJEU as the court competent to interpret primary law and decide on the validity and interpretation of secondary law of the EU, and the European Court of Human Rights (hereinafter: ECHR) as the court which, when resorted to, is the last court called upon to review whether authorities in contracting states respected the human rights stipulated in the Convention when deciding on the rights and obligations of individuals and legal

entities. The discussion below will focus only on some aspects of these relationships, namely on the relationship between national constitutional law and EU law and on the relationship between the constitutional courts of Member States and the CJEU.

Defining relationships at the level of legal norms as well as at the level of institutions that ensure the effectiveness of these norms through their judgments, may contribute to legal certainty, which is an important element of the rule of law, and to the protection of human rights. Neither of them merely serves its own purpose; both are intended to ensure respect for human beings and their dignity and freedom in all areas of life. A court called upon to exercise its competence must have in view such purpose. Virtually every day constitutional court judges are faced with questions arising from the above-mentioned relationships at both the level of norms and the level of institutions while performing their office. The constitution they have sworn to protect significantly co-determines their perspective on EU law.

This article will attempt to address some basic questions that define the relationship between national constitutional law and EU law, and the relationship between an individual constitutional court and the CJEU through a prism of answers that have been provided by the decisions of the Constitutional Court of the Republic of Slovenia (hereinafter: the Constitutional Court). Using an analysis of the constitutional basis for the implementation of EU law in Slovenia and of the existing decisions of the Constitutional Court, the author intends to answer the following questions: What is the fundamental attitude of the Constitutional Court towards EU law and what might be the possible directions of constitutional review in the future? In what manner does the implementation of the Charter of Fundamental Rights of the European Union influence the position of the CC in the performance of one of its fundamental tasks, i.e. the protection of human rights in the state?

The paper first discusses (1) the constitutional regulation of the relationship between constitutional and international law in the Slovene constitutional order and (2) compares the relationship between constitutional law and EU law. Following (3) an analysis of the constitutional basis of the validity of EU law – the European Article of the Constitution, the paper deals with (4) the relationship of constitutional law to EU law through the prism of the decisions adopted by the CC, followed by (5) the relationship between European and national constitutional jurisdictions, in order to find (6) final answers to the questions raised on such basis.

## 2. The Position of International Law in the Constitutional Order and Primary Law of the EU

Arts. 8 and 153 of the Constitution of the Republic of Slovenia (hereinafter: the Constitution) entail a constitutional framework on the basis of which it can be stated that in Slovenia international law is higher than statutory provisions in the hierarchy of legal acts but lower than the Constitution. The constitutional order does not allow the primacy of international law over the Constitution, as the CC explicitly ruled (Rm-1/97 of 5 June 1997). This can be generally stated for treaties. One of the arguments in support of such a statement is a special power of the CC (Art. 160/II of the Constitution) to review the conformity of a treaty with the Constitution in the process of its ratification. The National Assembly is bound by that opinion; if the opinion is negative, it may ratify such a treaty only if it amends the Constitution first. The second argument that confirms that international law does not have primacy over the constitutional order is the possibility of an *a posteriori* review of the constitutionality of a treaty. Namely, the CC may also review its constitutionality indirectly when reviewing the constitutionality of a law on the ratification of that treaty. The CC has several times stressed this (also in Rm-1/97), whereas thus far it has twice reviewed this matter in terms of substance (U-I-147/94 of 30 November 1995, U-I-180/10 of 7 October 2010). However, it has not yet abrogated a law on the ratification of a treaty.<sup>1</sup>

Valid treaties that are part of international law and are incorporated<sup>2</sup> into the national legal order are, in accordance with Art. 8 of the Constitution, applied directly, if the nature of their provisions allows it (i.e. self-executing provisions). Courts must apply it and, when interpreting the sources of law, take into account their hierarchically higher position in comparison to national laws. If inconsistencies between a law and a treaty cannot be remedied by means of interpretation of norms, they must request that a decision be issued by the CC, which has the power to decide not only on the conformity of laws with the Constitution, but also on their conformity with treaties.

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<sup>1</sup> Abrogation of such a law would cause the treaty at issue to cease being in force in the national legal order, whereas from the viewpoint of international law it would entail a violation of the undertaken international obligations.

<sup>2</sup> Incorporation takes place on the basis of a law on the ratification of a treaty. Škrk, referring to Cassese's classification of statutory incorporation into statutory *ad hoc* incorporation of international rules and automatic *ad hoc* incorporation, classifies Slovene practice as automatic *ad hoc* incorporation (Škrk, 2007: 279–280).

The Constitution does not particularly mention treaties that regulate human rights. However, such treaties have the position of a constitutional norm (Up-43/96 of 30 May 2000). Article 15 of the Constitution determines the principles governing the exercise and limitation of human rights. Art. 15/V determines that no human right regulated by the legal acts in force in Slovenia may be restricted on the grounds of the Constitution not recognising that right or recognising it to a lesser extent. The legal acts in force in Slovenia also include treaties that regulate human rights, such as the Convention. Article 53 of the Convention contains the same provision in terms of substance as Art. 15/V of the Constitution. In the event of a collision between a constitutional norm and a treaty norm that regulates human rights, the constitutional norm must yield to the international law norm if the former ensures a lower level of protection of the individual human right than the treaty norm. When the Constitution guarantees better protection of a human right than a treaty, the Constitution naturally prevails. Regarding the above-mentioned, Art. 15/V of the Constitution thus introduces the principle of the maximum protection of human rights, which requires protection either according to the Constitution or according to a treaty depending on which act protects a given human right and on the level of its protection.<sup>3</sup> This must be taken into account by all national courts, as the protection of human rights begins before the courts of first instance. The CC is only the court of last resort in the state and has the power to decide on constitutional complaints stemming from the violation of human rights in court proceedings (section 6, Art. 160/I of the Constitution). The importance of the constitutional protection of all human rights, including those guaranteed by treaties, is thus emphasised.

Primary EU law encompasses the founding treaties with annexes, protocols, and other appendices, treaties amending the founding treaties (e.g. the Treaty of Lisbon) and all accession treaties (Trstenjak, Brkan, 2012: 170). From a formal point of view, primary EU law are treaties. Therefore, the question arises whether from the constitutional law perspective primary EU law has the same position as other treaties. The CC has clearly stated in a recent decision (U-I-17/11 of 18 October 2012) that in the Slovene national legal order the Treaty of Lisbon has the position of a

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<sup>3</sup> Ribičič states that in the field of human rights, we should not speak of »higher« and »lower« regulations, but of their mutually equivalent level and competition; therefore, a regulation that is more demanding from the perspective of the level of protection of a human right should be applied (Ribičič, 2007: 111).

treaty. On such basis, it adopted the standpoint that, in accordance with Art. 8 and Art. 153/II of the Constitution, laws must be in conformity with the Treaty of Lisbon and that, based on section 2, Art. 160/I of the Constitution, the CC is competent to review the conformity of laws with primary EU law. Since this concerns a treaty, the CC could have reviewed its constitutionality even before its ratification by the Slovene National Assembly, if such a review had been required by entitled applicants based on Art. 160/II of the Constitution. However, this type of review was not required.<sup>4</sup>

The standpoint is that the treaty does not entail these concerns, since the CC has already ruled on the issue of the position of primary EU law towards the Constitution. In another recent decision (U-II-1/12, U-II-2/12 of 17 December 2012), the CC has explicitly stated, notwithstanding the fact that it stressed the constitutional importance of ensuring the effectiveness of EU law on the Slovene territory – which the state has undertaken based on Art. 3a/III of the Constitution – that it must not (yet) take a position on whether such a law unconditionally prevails over the provisions of the Constitution due to the principle of the primacy of EU law.

However, it must be taken into account that primary EU law is not a usual treaty that, pursuant to Art. 8 of the Constitution, is subordinate to the Constitution. Further, legal theorists emphasise that, from a formal point of view, the Treaty of Lisbon is indeed only a treaty. However, they at the same time emphasise that it is a legal foundation of the structure and functioning of the EU and it can be construed as a constitution in terms of substance (Grad, 2010: 30, 48).<sup>5</sup> As noted by Van der Schyff, constitutional aspects have always been inherent in the structure of the EU,<sup>6</sup> while the introduction of explicit constitutional concepts, such as citizenship

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<sup>4</sup> The Constitutional Court exercised this power for the first time in Opinion Rm-1/97, by which it decided on the constitutionality of the Accession Agreement to the EU; due to the issued opinion on the partial inconsistency of the Agreement with the Constitution, prior to its ratification Slovenia first had had to amend Art. 68 of the Constitution.

<sup>5</sup> Grad establishes that in the hitherto process of constitutionalisation, the EU has changed from merely an international organisation into some kind of a supra-national organisation, whereby at the same time elements of constitutional regulation have been gaining strength, which today contains the majority of elements of a contemporary constitution of an individual state. Also Avbelj emphasises »that European integration meets the criteria of a constitutional form of a union. Created as an international law treaty regime, its legal and political nature has been subsequently transformed«. (Avbelj, 2011: 835).

<sup>6</sup> See also Walker, 2012: 23.

and the codification of human rights, has extended constitutionalism even further (Van der Schyff, 2012: 583). Such a standpoint is also upheld by the CJEU's perception of the nature of primary EU law. As underlined by Van Rossem, the CJEU, from the very start of the process of European integration, has considered the EU to be separate from the body of public international law (Van Rossem, Willem, 2009: 18). Maduro underlines the same, namely that the CJEU »has long interpreted the Treaties as a constitutional charter, considering that the subjects of the European legal order are not only Member States but also citizens« and that the EU's legal order »has normative bite that is supreme to Member States law (including Member State constitutional law) and directly effective within the Member State's legal orders«. (Maduro, 2012: 96) As proceeds from the judgments in the *Costa/ENEL*,<sup>7</sup> *Internationale Handelsgesellschaft*, and *Simmmenthal* cases, this concerns an autonomous legal order that prevails over national legal orders, including constitutional norms, in the event of a conflict.<sup>8</sup> »Intrinsic to the [CJEU]'s autonomy thesis is that the relationship between the EU and the Member States is not ruled by international norms (...) but by constitutional principles« (Van Rossem, Willem, 2009: 19).<sup>9</sup> The fact that the Treaty Establishing the Constitution for Europe of 2004 (Slovenia ratified the Treaty on 1 February 2005) was rejected should perhaps necessitate that the fundamental acts of the EU are no longer named constitutional acts. However, legal theorists apparently still emphasise that primary EU law, although it was established in the form of a treaty, regulates the substance of certain constitutional issues. This is indeed true from the substantive point of view and therefore it has to have a special position in relation to constitutional law.

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<sup>7</sup> On what qualifies the Treaty of Lisbon as a constitution of an autonomous legal order and not as an ordinary treaty under international law from the perspective of the above-mentioned judgment of the CJEU, see Kumm, 2012: 60–62.

<sup>8</sup> Also, the CJEU judgment in the *Tanja Kreil* case confirms the above-mentioned. It proceeds from this judgment that secondary law (i.e. a directive) prohibits a constitutional provision that does not allow women to use arms. For a commentary along the same lines, see Trstenjak, 2012: 273–274.

<sup>9</sup> This is also confirmed by the position of the CJEU on the relationship between EU law and the treaties that bind Member States, such as the UN Charter. In the well-known and attention-grabbing judgment (see, for example, Posch, 2009: 4) in the *Kadi* case, the CJEU gave precedence to certain fundamental elements of primary EU law, among them especially to certain fundamental rights, over the international obligations of Member States (see also White, 2011: 105).

In the light of the above-mentioned, on one hand the standpoint of the CC in favour of establishing primary EU law as an automatic criterion for constitutional review, equal to treaties in general, can be considered questionable.<sup>10</sup> On the other hand, such a standpoint allows the implementation of the *ultra vires review doctrine*,<sup>11</sup> which proceeds from the fact that the exercise of certain sovereign rights has been transferred to the EU by the treaty and therefore Member States should have the final word regarding the exercise of which sovereign rights have in fact been transferred.

Following the implementation of the Treaty of Lisbon, another very important aspect of the relationship between constitutional law and EU law has arisen. Namely, the Charter has been implemented together with the Treaty of Lisbon, and is a constituent part of primary law (Art. 6/I of the Treaty on the European Union – hereinafter: TEU). The Charter establishes an important catalogue of fundamental rights, some of which are the same or very similar to the human rights ensured by the Constitution and the Convention, e.g. the prohibition of torture (Art. 18 of the Constitution, Art. 3 of the Convention, Art. 4 of the Charter). The Charter regulates certain rights in even more detail than the Constitution, e.g. the right to the integrity of the person (Art. 3 of the Charter in comparison with Art. 35 of the Constitution). For certain rights, especially regarding their possible limitation, the Constitution determines higher standards than the Charter (Art. 7 of the Charter ensures, *inter alia*, privacy of communication, whereas Art. 37 of the Constitution, which ensures privacy of communication in the first paragraph, contains stricter conditions for the admissibility of its limitation in the second paragraph, stricter than stipulated in Art. 8 of the Convention).<sup>12</sup> Certain rights are adapted to the fact that they concern EU law, e.g. the right to vote and to stand as a candidate at elections to the European Parliament (Art. 39 of the Charter). What is more, it also contains certain principles<sup>13</sup> that cannot be equated

<sup>10</sup> The Austrian Constitutional Court, for example, explicitly rejected primary EU law as a criterion for review; see paragraph 4 of judgment U 466/11, U 1836/11.

<sup>11</sup> See Luebbe-Wolff, 2011: 89. On the so-called *Kompetenz-Kompetenz* or on the question of who has the final word on the boundaries of EU competences, see also Craig, 2011: 48–50 and Payandeh, 2011: 14–16 and 19–27.

<sup>12</sup> On the inter-relationship between the EU and the ECHR see also Mole, 2012: 363–368.

<sup>13</sup> On the question of how to distinguish between rights and principles, see Schütze, 2011: 146–147.



with human rights, with regard to which Art. 52/V of the Charter must also be taken into consideration.

Regarding the scope of the application of the Charter for Member States, as determined in Art. 51/I, the primary question that naturally arises is when Member States are to implement EU law.<sup>14</sup> In the cases that concern the implementation of EU law, the Charter promotes the established principle of the maximum protection of human rights, since Article 53 of the Charter contains a similar provision as Art. 53 of the Convention and Art. 15/V of the Constitution. Thus, the question of which act ensures a higher level of protection of human rights does not end with the relationship between the Constitution and the Convention; the Charter must be considered as well. The CC will have to consider this in its constitutional review.

However, Article 52/III & IV of the Charter refers not only to the Convention but also to these rights as they result from the constitutional traditions common to the Member States. Furthermore, national constitutions are particularly mentioned in Art. 53 of the Charter. This does not stipulate that only the texts of national constitutions are taken into account, but particularly stipulates that case law must be mutually respected, which applies to all courts. Thus, the CJEU should consider this when interpreting the Charter. It is nonsense to expect that, when deciding, the CJEU would not bravely use the tools provided by the Charter. To put it metaphorically, such an expectation would be the same as giving a child a toy and instructing him not to play with it. In its decisions, the CJEU has already indicated that the Charter will play an important role in its case law when interpreting EU law.<sup>15</sup> As Barents predicted, it was expected »that the Court will have to decide a number of difficult and politically sensitive questions with respect to the material and personal scope of the Charter«. (Barents, 2010: 720). The CJEU is becoming a court whose essential tasks include protecting human rights regulated in the Charter. Consequently, its case law will necessarily play an important role in the decisions of the courts of Member States when applying EU law<sup>16</sup> or when the courts, pursuant to the principle of loyalty, interpret

<sup>14</sup> This question and the developing case law of the CJEU were presented by Iglesias Sánchez (Iglesias Sánchez, 2012: 1583–1592).

<sup>15</sup> See, e.g., the judgments in the cases *Torsten Hörmfeldt v posten Meddelande AB*, *Fabio Caronna, Health Service Executive v S. C. and A. C.*, and *N. S. and others*.

<sup>16</sup> See, e.g., the judgment in *Joseba Andoni Aguirre Zarraga v Simone Pelz*.

national law in accordance with EU law so that they do not rely on an interpretation of the text of secondary legislation that would be contrary to fundamental rights.<sup>17</sup>

What is the situation concerning national constitutional courts and the Charter? While the Constitutional Court of the Republic of Austria has already taken the position that in proceedings before the Constitutional Court it is allowed to refer to the provisions of the Charter, inasmuch as they regulate rights (and not principles),<sup>18</sup> the Slovene CC has not reached an explicit decision on this issue yet. However, the answer is in fact already provided in Decision U-I-17/11. The Charter is a constituent part of primary EU law and the Constitutional Court has already accepted it as a criterion for review. Regarding constitutional complaints, the CC has fully implemented a doctrine which requires that complainants must claim the protection of human rights already in proceedings before the competent courts. In proceedings before the CC, complainants are thus allowed to refer to the fundamental rights determined in the Charter only if referring to the Charter has not been successful in proceedings before regular courts. Such a *substantive exhaustion of remedies* by claiming a violation of human rights allows a complainant to claim the violation of a fundamental right in its substance and need not cite its correct legal classification, in accordance with the principle *iura novit curia*, the substance of a claim should be correctly legally classified by regular courts as well as by the CC. This necessarily requires that the CC, provided that the condition of the substantive exhaustion of remedies in the cases with an element of EU law is fulfilled, always uses the Charter as a criterion for review if it also guarantees the human right whose violation a complainant alleges in terms of substance even if he or she does not explicitly refer to it.

When the standpoint that the Charter is a major premise for constitutional decision-making is adopted, the question whether the Charter must yield to the provisions of the Constitution if they ensure a higher level of protection immediately arises, due to the principle of maximum pro-

<sup>17</sup> See the judgment in *N. S. and others*.

<sup>18</sup> Judgment U 466/11, U 1836/11. In this judgment the Austrian Constitutional Court clearly stated that in case of doubt in the interpretation of the provisions of EU law, including the Charter, it will continue to make references for preliminary ruling to the CJEU; if such doubts, especially from the perspective of the Convention and the relevant case law of the ECHR do not arise, it will decide without making a reference for preliminary ruling. The judgment has been criticised; see Klaushofer and Palmstorfer, 2013: 8–11.

tection of human rights implemented in both the Constitution and the Charter. In its recent judgment in the *Melloni* case,<sup>19</sup> the CJEU answered this question in accordance with its traditional perception of the principle of the primacy of EU law. The CJEU allows national courts 1) to apply national standards regarding the protection of fundamental rights if that application does not jeopardize the level of protection provided by the Charter, as interpreted by the CJEU, and 2) if that does not interfere with the primacy, uniformity, and effectiveness of EU law. The first condition (both conditions must be fulfilled at the same time) imposed by the CJEU is not disputable from the viewpoint of the Constitution, as such a standpoint would also be required by the principle of the maximum protection of a human right determined in Art. 15/V of the Constitution. A problem arises when secondary EU law determines limitations of human rights that national constitutional law does not allow, while in accordance with the interpretation of the CJEU such limitations are allowed by the Charter.<sup>20</sup> Then, following the above-mentioned interpretation of the CJEU may cause lowering the level of protection of a human right, as determined by the national constitution. Can the CC as the highest guardian of the Constitution and human rights in the state allow that? Regardless of the fact that it appears as if the CJEU consistently follows its perception of the principle of the primacy of EU law, of which the Charter is a constituent part, it is nevertheless questionable whether such an approach, when interpreting human rights, is headed entirely in the right direction. Namely, Art.53 of the Charter explicitly stipulates that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights, which are, *inter alia*, defined in the constitutions of the Member States. Respecting the principle of the maximum protection of human rights requires the CJEU to implement this principle at the level of EU law, so that it always interprets the Charter in that respect as well. On one hand, this would cause the rise of the level of human rights protection throughout the EU, and, on the other hand, it would prevent a duality regarding the level of protection of human rights in individual states. As far as human rights are concerned, it cannot be accepted that they are protected to a lesser extent in areas regulated by EU law than in areas whose regulation has not been transferred to the EU.

<sup>19</sup> See also the judgment in the *Æklagaren* case.

<sup>20</sup> This was precisely the case due to which the Spanish Constitutional Court made a reference for preliminary ruling in the *Melloni* case. For reasons which might have led this Constitutional Court to make first reference to the CJEU, see Torres Pérez, 2012: 121–124.

All the above-mentioned indicates that there is no simple answer to the question of what the position of EU law is in relation to the national constitutional order. It certainly cannot be predicted without considering the constitutional starting-point for defining such a relationship first, which can be found in the *European Article*.

### 3. The Constitutional Basis of the Relationship between the Constitution and EU Law

From the viewpoint of the relationship between national constitutional law and EU law, it is important whether it is at its foundation regulated only by EU law or whether the constitutions of Member States contain any explicit provisions on the constitutional position of EU law (Craig, 2011: 36). In Slovenia, the Treaty of Lisbon has already been given a special position by the Constitution.

Regardless of the fact that the Constitution had been amended because Slovenia was to join the EU, a *European Article* was not added explicitly, such as Art. 23 of the Basic Law of the Federal Republic of Germany and Art. 141a–141d of the Constitution of the Republic of Croatia. The new Art. 3a of the Constitution regulates the transfer of the exercise of part of Slovenia's sovereign rights to international organisations at the abstract level, without clearly stating which international organisations are concerned.<sup>21</sup> Such a treaty must be ratified by a two-third majority vote of all members of parliament, i.e. by the majority needed to amend the Constitution. It should be emphasised that the Constitution does not speak of the transfer of sovereign rights, as it could entail a permanent decision that could not be revoked (Grad, 2010: 198). The Constitution only speaks of the partial transfer of the exercise of sovereign rights. However, attention must be drawn to the fact that in the case of the EU, the position is special in this aspect, particularly when the exclusive competences of the EU are concerned, due to which it must be deemed that it concerns »the transfer of a part of Slovene state sovereignty to the EU until the possible withdrawal of Slovenia« from this organisation (Cerar, 2011: 81). Art. 3a/I of the Constitution allows the transfer of the exercise of part of the state's sovereign rights only to international organisations that are

<sup>21</sup> Regardless of this fact, constitutional theorists do speak of the *European Article* (see Grad, 2010: 197).

based on respect for human rights, democracy, and the principles of the rule of law. The influence of the decisions of the German Federal Constitutional Court on constitutionality of the treaties of the European Communities or EU and the German constitutional *European Article* is recognisable in this provision. This could also be a good reason in favour of proposals that the Slovene Constitutional Court should develop its doctrine regarding the primacy of EU law, too (Jambrek, 2011: 55),<sup>22</sup> which would essentially be the same as the doctrine developed by the German Constitutional Court, first with the *Solange I* and *Solange II* decisions, and finally with the *Lissabon Urteil* decision.<sup>23</sup>

Nevertheless, it must also be taken into account that Art. 3a/III of the Constitution explicitly stipulates that legal acts and decisions adopted within such international organisations shall be applied in accordance with the legal regulation of these organisations.<sup>24</sup> Therefore, where the EU is concerned, it is considered that precisely this provision ensures the direct applicability of EU law and recognises its supremacy over national law (Grad, 2010: 199).<sup>25</sup> This essentially means that EU law prevails over national constitutions, which also applies if a constitution is (only) contrary to secondary law and thus also with constitutional provisions that safeguard human rights (Trstenjak, Brkan, 2012: 209–211).<sup>26</sup> There are, however, different standpoints which, in accordance with the theory of constitutional pluralism,<sup>27</sup> emphasise that the relationship between EU

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<sup>22</sup> Regardless of the fact that the Slovene Constitution does not contain an explicit *eternity clause* that would determine the unchangeable nature of the most fundamental constitutional principles, Jambrek believes that such significance should be given to Art. 3 of the Constitution, which regulates the permanent and inalienable rights of the Slovene nation to self-determination and the fundamental right of the people to transfer and exercise their democratically legitimate power.

<sup>23</sup> See BVerfGE 37, 271, BVerfGE 73, 339, and BVerfG 2BvE2/08.

<sup>24</sup> For similar, see the Constitution of the Republic of Croatia, Art. 141c/II.

<sup>25</sup> Such is in fact also the conclusion of Cerar, who regards the values determined in the first paragraph of the above-mentioned Article as a type of safeguard. However, he does not attribute them the power on whose basis it would be possible to reject the implementation of individual acts or provisions of primary or secondary EU legislation that are contrary to the Constitution. As long as the EU is based on such values, in his opinion, precisely because of Article 3a/III, state authorities and other subjects must consistently respect the legal order of the EU (Cerar, 2011: 78).

<sup>26</sup> With reference to such, Trstenjak and Brkan mostly refer to the CJEU judgments in the cases *Costa v ENEL*, *Internationale Handelsgesellschaft*, and *Tanja Kreil*.

<sup>27</sup> As noted by MacCormick, »It is for European Court to interpret in the last resort and in a finally authoritative way the norms of Community law. But equally, it must be for

law and national law is not hierarchical but heterarchical,<sup>28</sup> as it concerns two equally levelled, independent legal orders and that national law is not subordinate to European law (Avbelj, 2012: 6, 7).<sup>29</sup>

When amending the Constitution, the National Assembly had in mind the EU and the manner of operation of its institutions, regardless of the abstract wording of Art. 3a. Therefore, it is not surprising that Art. 3a/IV stipulates that in procedures for the adoption of legal acts and decisions in international organisations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for these acts and decisions as well as of its own activities. Further, it is stipulated that the National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities.<sup>30</sup> Constitutional theorists stress that, since Slovenia has transferred the exercise of part of its sovereign rights to the EU, the position of the National Assembly and the Government in the mentioned procedures is essentially different from the position which they have in the national parliamentary regulation of state power, whereby the position of the Government in relation to the National Assembly is gaining strength from the perspective of two fundamental functions of the legislature, i.e. legislative and political-supervisory functions (Grad, 2010: 200–207, Grad, 2011: 97–99).

The relationship between the Government and the National Assembly, as formulated in the above-mentioned constitutional provision and its statutory implementation, indicates in what manner EU law changes the national constitutional order in the areas in which the exercise of sovereign rights has been transferred to the EU. The National Council is, for instance, deprived of the most important competence it has in the national legislative procedure – that of a suspensive veto. Similar changes in the

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the highest constitutional tribunal of each Member State to interpret its constitutional and other norms (...); (MacCormick, 1995: 264). On constitutional pluralism see also Kumm, 2012: 63–65, and Maduro, 2012: 68–84. For a different perspective see Barents, 2012: 176–179, 182–183.

<sup>28</sup> On why we should speak of the primacy of EU law and not of the supremacy of EU law, see Avbelj, 2011a: 750–754.

<sup>29</sup> Avbelj supports the idea that Slovenia should have determined a definite *European Article* in its Constitution, following the example of other states and that the Constitutional Court, which he regards as a latecomer to the European scene, clearly defines the relationship of national constitutional law to EU law (Avbelj, 2011a: 758–763).

<sup>30</sup> This is a similar regulation as contained in the second and third paragraphs of Art. 23 of the German Basic Law. Cf. Art. 141b of the Croatian Constitution.

national constitutional regulation can also be observed in numerous other areas. Thus, one can agree with the standpoint that Art. 3a/III provides for a very broad authorisation for the implementation of EU law without specifying the rules that will enter the Slovene constitutional order in such a manner, neither in terms of time constraints nor in terms of their hierarchical position (Testen, 2011: 91). This at the same time means that the CC, when interpreting the provisions of the Constitution, must have this situation in mind at all times. Primary EU law in relation to national constitutional law cannot be acknowledged only such a position as the Constitution stipulates for other treaties. In fact, it already has a special position based on the Constitution, which also requires that an individual constitutional norm yield to a norm of EU law, not only in the case of primary law, but also in the case of secondary EU law (which is harmonised with primary law). However, the question is whether this unconditionally applies to provisions on human rights that are guaranteed not only by the national constitution but also by the Charter because of the principle of the maximum protection of human rights.

It is evident that the viewpoints of legal theorists on the above-mentioned differ – beginning with the provisions that form a constitutional basis for the implementation of the EU Accession Treaty. The constitutional review of the CC regarding that issue has thus far been modest. One can agree with the standpoint that the CC should take a more courageous position on the relationship between constitutional law and EU law,<sup>31</sup> as we are approaching a decade since Slovenia joined the EU. The CC has already adopted some positions on issues with which every constitutional court of the EU Member States, that has similar powers as the Slovene CC, is inevitably faced.

#### 4. The Relationship between Constitutional Law and EU Law in the Existing Constitutional Court Case Law

The CC declared that it has the power to review the conformity of laws (and consequently, regulations) with primary EU law. However, it has also decided that it does not have the power to review the conformity

<sup>31</sup> See footnote 29.

of national laws with EU directives (U-I-32/04 of 9 February 2006, U-I-238/07 of 2 April 2009).<sup>32</sup> It has already taken a position on the principle of loyal interpretation of national laws in the light of EU law.<sup>33</sup>

The Court has not yet taken an explicit and clear position on the position of EU law in the national constitutional order. In this sense, the Constitutional Court Decision U-I-113/04 of 7 February 2007 remains a fundamental decision, known as the *JATA* case, on the basis of which legal theorists place Slovenia among the states where a *constitutional tolerance* approach can be noticed (Chalmers *et al.*, 2010: 194). This approach means that while the »authority and reach of EU law [are] ultimately for national constitutional courts to decide«, these courts at the same time commit themselves to recognising the special status of EU law, although they do so on the condition that it does not violate certain constraints of national constitutional law (*ibidem*).

In the cited decision, the CC dismissed a petition for the review of constitutionality of a regulation on the Quality, Labelling, and Packing of Feedingstuffs in Circulation whose implementation was based on an EU Directive (Directive 2002/2/EC). The Court proceeded from Art. 3a/I of the Constitution and stressed that it allows the transfer of sovereign rights only to international organisations that are based on the respect of human rights, democracy, and the principles of the rule of law. Thereafter it established that the EU is founded on such principles that are common to all Member States, and respects the fundamental rights guaranteed by the Convention. It furthermore established that the right to property, which includes both the right of ownership and the rights of intellectual property, the right to carry out economic activities, and the four freedoms as recognised by EU law, correspond in terms of substance to the rights determined in Articles 33, 60, 67, 69, and 74 of the Constitution. The CC concluded that the human rights enumerated in the Constitution do not ensure more rights than are protected by EU law. In view of the fact that the substance of the regulation implementing the Directive is completely identical with the Directive, for which the CJEU (judgment in the *ABNA and others* case) has already established was valid, it dismissed the claim as unsubstantiated. Naturally, the question that immediately arises is what

<sup>32</sup> Such a position has been criticised by legal theorists (Accetto, 2011: 25).

<sup>33</sup> It stipulated (Up-2012/08), with reference to the relevant judgments of the CJEU, that in individual proceedings competent administrative bodies and courts must interpret indefinite legal concepts by which the conditions for applying for international protection are determined by law, in accordance with Directive 2004/83/EC.



would happen if the Constitution ensured a higher level of protection of rights than EU law.

Before the CC had issued its final decision in the *JATA* case, it suspended the implementation of the challenged regulation in the case at issue. The decision on the suspension (U-I-113/04 of 8 July 2004) and the final decision regarding the relationship towards EU law constitute a whole. Therefore, the decision on the suspension must also be presented. Upon the proposal of the petitioners, the CC suspended the implementation of the regulation at issue until its final decision. Precisely because the CC had to consider the Directive, which is binding to the extent that it does not allow states any discretion when selecting the means to reach a required result, the Court deemed that the petitioners in fact challenged the Directive. At this point the CC clearly stated, proceeding from Art. 3a/III of the Constitution, that the validity of the Directive was a question that is decided by the CJEU.

The Constitution (Art. 161/I) determines the power of the CC to suspend the implementation of an act whose constitutionality is being reviewed until its final decision under conditions provided by law. The Constitutional Court Act (Art. 39) stipulates that the Court may do so if it establishes that harmful consequences, which are difficult to remedy, could result from the implementation thereof. In the case at issue, however, the CC did not substantiate the suspension by referring to the national legal order, but it decided that in cases which concern the question of validity of a piece of secondary legislation, it should decide on the suspension of the implementation of a regulation based on the rules determined by EU law (judgments in the cases *Factortame and others* and *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest*). The CC established that there was a serious doubt as to the validity of the Directive, due to which it should have referred for preliminary ruling to the CJEU. However, it did not do so. It was satisfied with the fact that the Higher Court of England and Wales (the Queens' Bench Division, Administrative Court) had already referred for preliminary ruling on the validity of the Directive for the same reasons as the petitioners alleged and due to which the CC also had serious reservations regarding its validity. It notified the CJEU of its decision and delayed the final decision until the CJEU issued its judgment.

If both decisions are analysed, on one hand, there is the friendly attitude of the CC towards EU law that emanates from them, as the Court has in fact recognised the primacy of EU law, although it has not said so explicitly. On the other hand, this friendly attitude ends when the protection

of human rights is concerned (Zagradišnik, 2008: 29–33), if the Constitution guarantees a higher level of protection than EU law. An approach by which the CC reviews each human right guaranteed in the Constitution, making sure that EU law ensures it to exactly the same extent as the Constitution, would lead to the same treatment of EU law as that of treaties that regulate human rights. Such an approach requires clear recognition of the fundamental principles of EU law as long as its secondary legislation does not collide with the constitutional provisions on human rights. The Slovene Constitution is a modern constitution and contains an extensive catalogue of human rights; for certain rights it stipulates strict standards for their limitation, stricter than the standards stipulated by the Convention and the Charter (as interpreted by the CJEU – see the judgment in the *Melloni* case).<sup>34</sup> The Constitution also regulates certain rights that are not regulated as human rights by either the Convention or the Charter.<sup>35</sup> In addition, provisions on human rights are in their nature open to interpretation regarding their substance. This becomes clear by considering (dynamic) judicial interpretation of provisions that ensure human rights. However, a review of the admissibility and proportionality of their limitation, which is carried out by the CJEU and national con-

<sup>34</sup> For example, in accordance with Art. 37/II of the Constitution, the right to privacy of communication can be interfered with based on a prior court order only if such is necessary for the institution or course of criminal proceedings, or for reasons of national security; such interferences are also allowed in proceedings for the protection of competition pursuant to Art. 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter TFEU).

<sup>35</sup> For example, Art. 25 of the Constitution has guaranteed the right to appeal against the decisions of courts, which applies to all court decisions. In accordance with the established constitutional case law (Decision U-I-219/03 of 1 December 2005), this right ensures that the principle of appellate review is respected. The Convention guarantees that in Art. 2/I of Protocol No. 7 only against convictions for criminal offences, while this right does not proceed from Art. 6/I for other court proceedings. It is therefore expected that the CJEU will interpret Art. 47/I of the Charter in the same manner. This question is, for instance, relevant in cases in which secondary EU law (e.g. a framework decision on the European arrest warrant) determines very short time limits in which a judicial decision must be rendered in the Member State. The CJEU will have an opportunity to adopt a standpoint on this issue very briefly based on a reference for preliminary ruling made for the first time by the French *Conseil Constitutionnel* (see *Communiqué de presse* 2013-314P QPC). In addition, the right to appeal is, for example, explicitly ensured in Art. 20/II of the Constitution against a court order on detention, which must be decided by a court within 48 hours; detention is regularly ordered precisely with reference to the European arrest warrant. The Slovene legislature ensured this right by an implementing law. However, other questions might be raised that concern a request to decide on surrendering a person within a short time limit, especially with reference to the right to use one's language in proceedings in which a decision on surrender is adopted, etc.

stitutional courts, cannot be precisely predicted. Therefore, the question whether a constitutional provision must yield to EU law and whether the constitutional court can renounce its role as the supreme guardian of the constitution, becomes even more important.

In the past, there were various positions of other European constitutional courts and supreme courts that carried out constitutional review regarding the primacy of EU law in relation to national constitutions. These ranged from the position that national constitutional law is always the highest law, which was adopted by the Constitutional Tribunal of the Republic of Poland,<sup>36</sup> to positions that follow the decisions of the German Federal Constitutional Court, which, on one hand, recognise the principle of the primacy of EU law, and on the other, set boundaries for them<sup>37</sup> with reference to fundamental rights, EU competences from the viewpoint of transferring sovereign rights (*ultra vires*),<sup>38</sup> or the identity of the national constitution,<sup>39</sup> and finally to positions that accept the primacy of EU law without setting special constitutional conditions for its implementation, which is also reflected in references for preliminary ruling to the CJEU (e.g. the Austrian Constitutional Court<sup>40</sup>).

Thus, on one hand there is a clear and constant position of the CJEU on the unconditional primacy of EU law also in relation to constitutional norms, due to which the positions in judgments that concern the Charter

<sup>36</sup> See judgment K 18/04 (Accession Treaty).

<sup>37</sup> The President of the German Federal Constitutional Court described in brief its approach as follows: »[T]he Basic Law permits primacy of application 'with its eyes wide open' (...) and at the same time determines its limits: primacy of application only applies to the extent that the inviolable core content of the constitutional identity of the Basic Law is not affected and as long as the 'Solange II constellation' has not occurred.« (Voßkuhle, 2013: 86). It is true, however, that in its deciding this Constitutional Court has hitherto been, regardless of strict boundary setting, relatively inclined towards EU law, if we take into consideration, for example, the judgment in the *Honeywell* case (2 BvR 2661/06), in which it »made clear that *ultra vires* review will be exercised ultra-cautiously« (Luebbe-Wolf, 2011: 89). On the above-mentioned judgment of the German Federal Constitutional Court, see also Payandeh, 2011: 14–16 in 19–27. On the positions of the German Federal Constitutional Court on EU law, see also Chalmers *et al.*, 2010: 190–197 and Craig 2011: 36–44.

<sup>38</sup> See the judgment of the Constitutional Court of the Czech Republic on Slovak pensions PL. ÚS 5/12 of 31 January 2012, in which it established that by its judgment in the *Marie Landtová* case the CJEU exceeded the powers that the Czech Republic transferred to the EU and was *ultra vires*.

<sup>39</sup> See Payandeh, 2011: 16–19.

<sup>40</sup> See paragraph 4 of judgment U 466/11, U 1836/11.

(see the judgment in the *Melloni* case) at first sight seem to be consistent in terms of substance. On the other hand, there is a more or less permanent unwillingness of national constitutional courts to withdraw unconditionally from the bulwarks as guardians of national constitutions and to renounce their final word in cases in which EU law collides with constitutional law. A wise constitutional court judge will not allow setting obstacles that he or she will not be able to overcome in the future. If they once take the position that constitutional provisions must unconditionally give way to EU law, the way back could be closed. Therefore, it is not surprising that even constitutional courts that have accepted the principle of the primacy of EU law in the newly emerged situation of Charter implementation apparently do not wish to unconditionally renounce their role of guardians of human rights, which also proceeds from Austrian judgment U 466/11, U 1836/11.

The decision of the CC in the *JATA* case goes in this direction, too, although it had been adopted before the implementation of the Charter. However, insisting consistently and strictly on the positions in this decision could compromise the principle of the primacy of EU law. Art. 3a/I together with Art. 15/V of the Constitution and Art. 53 of the Charter can be a basis for exceptional cases in which the CC decides on a reserved approach towards the principle of the primacy of EU law. Nevertheless, because of Article 3a/III itself, which stipulates that the Constitution itself requires fundamental principles of EU law to be respected, and thus that it does not proceed only from EU law (Nerad 2012: 382, 383),<sup>41</sup> the CC cannot decide in a manner that would virtually in every individual case question its attitude towards respecting EU law. This particularly refers to cases that do not concern an essential question involving a high level of protection of human rights. This will ultimately depend not only on the CC, but also to what extent the CJEU (when interpreting the Charter) will respect the possibly higher level of protection of human rights in national constitutions and consequently in the constitutional review carried out by national constitutional courts.

The Constitutional Court will certainly not be able to avoid providing an explicit definition of the relationship between the first and third paragraphs of Art. 3a of the Constitution, and developing a clear doctrine

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<sup>41</sup> Nerad believes that the principles of direct applicability and direct effect of EU law and its supremacy over national law are transposed into national constitutional law primarily through this provision; therefore, the principles of EU law are at the same time also national constitutional principles.

regarding its attitude towards EU law that will to some extent correct the starting point of the *JATA* case in favour of EU law. This clarification is important not only because another constitutional court should establish its clear attitude towards EU law in relation to the constitution, but also because it is important for establishing legal predictability as an element of legal certainty, as has already been stressed in article. Citizens and legal entities have the right to know what level of protection of their rights, particularly human rights, they can expect from the CC in areas in which they are at the same time citizens of the EU and in which their conduct is regulated exclusively or also by EU law.

The CC has not yet taken a position on the manner the Charter influences its decision-making. In its decisions, it has several times referred to the provisions of the Charter, but only as an additional illustration in the sense that the Charter also recognises a certain right as a human right, without establishing any connection between such a reference and the reasons for the decision.<sup>42</sup> Occasionally, it refers to its provisions as an additional argument in interpreting the substance of a human right protected by the Constitution.<sup>43</sup> In the latter instance, the Charter is gaining importance regarding the principle of the maximum protection of human rights, since the CC in fact broadens the implementation of the Charter to cases regulated by national law. If the CC continues to do so, it will have to take into account the case law of the CJEU, especially if it is not based on the case law of the ECHR, to which the CC in general refers. This will always be applied in cases when the Charter, as interpreted by the CJEU, has stipulated that the level of protection of human rights, which the Constitution explicitly determines, is higher, or when the level of the human rights protection is the same, but referring to the case law of the CJEU could be used as an additional argument when stating reasons for a decision. Therefore, this approach can be correct provided that the above-mentioned is considered, namely that a uniform level of the protection of human rights in the state is ensured in all areas.

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<sup>42</sup> E.g. in Decision U-I-249/10 of 15 March 2012 regarding the right to collective bargaining and action (Art. 28 of the Charter), Decision U-I-92/07 of 15 April 2010 regarding freedom of thought, conscience, and religion (Art. 10 of the Charter), and Decision U-I-109/10 26 September 2011 regarding the right to human dignity (Art. 1 of the Charter).

<sup>43</sup> E.g. in Decision U-I-146/07 of 13 November 2008, in which it emphasised that the Charter not only expressly prohibits discrimination based on disability (Art. 21/1), but explicitly recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration, and participation in the life of the community (Art. 26).

In the cases that concern the areas in which Member States apply EU law, the CC will inevitably be faced with issues that concern its fundamental attitude towards EU law. After the implementation of the Charter, the Court will necessarily have to face these questions, unless it is able to avoid dealing with them, due to scope of its competences, and leave them to regular courts first.<sup>44</sup>

Thus, Art. 3a/III undoubtedly established the constitutional requirement that the principle of the primacy of EU law is respected, and that respecting it also means respecting the Constitution. In addition, the CC will have to consider this in its constitutional review. In the light of the standpoint adopted in Decision U-I-17/11, the Court, if necessary, would implement the *ultra vires* doctrine, which is consistent with Art. 3a/I that allows the transfer of the exercise of part of Slovenia's sovereign rights to the EU. It does not, however, allow the permanent transfer of sovereignty. This standpoint is also consistent with the constitutional principle of the permanent and inalienable right of the Slovene nation to self-determination, which is laid down not only in Art. 3/I, but also in the Preamble to the Constitution, and thus represents a truly immutable foundation on which the national constitution is based. However, the standpoint that it concerns a doctrine that may be implemented in really exceptional cases must be agreed with, thus its broad application cannot be expected in Slovenia.

Insofar as human rights are concerned, it must be taken into account that EU law recognises the principle of the maximum protection of human rights ensured in Art. 53 of the Charter, which also refers to the constitutions of Member States and has convergent effect together with Art. 4/II

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<sup>44</sup> In Decision Up-690/10 of 10 May 2012, the Constitutional Court in fact stated reasons for its decision not only from the viewpoint of the Constitution, but also from the viewpoints of the Convention and the Charter. It stated that when imposing the sentence of the deportation of an alien or a citizen of another Member State as well as when deciding on a request for the extraordinary mitigation of such a sentence, courts must take into consideration certain circumstances of personal nature and ensure that by their decision the substance of the right to one's family life, the essence of which is the mutual enjoyment of parents and children in a union, is not excessively interfered with. It referred to Art. 7 of the Charter and to the relevant provisions of Directive 2004/38/EC. In the case at issue, the Constitutional Court did not have to deal with EU law in depth, as it deemed the position of the Supreme Court, that the circumstance that the complainant is the father of a child who lives in the Republic of Slovenia, is not at all relevant for deciding on the violation of the right to family life. However, the Supreme Court had to deal with this, as its decision was abrogated by the Constitutional Court decision at issue and the case remanded to the Supreme Court.

of the TEU, according to which the EU respects the national identities of Member States,<sup>45</sup> which is inseparably connected with their fundamental political and constitutional structures. It must be emphasised that neither the third nor the fourth paragraphs of Art. 52 of the Charter diminish the importance of Art. 53 of the Charter. Art. 52/III allows the principle of the maximum protection of human rights in relation to the Convention, which does not prevent, but explicitly allows, a broader scope and level of protection at the EU level. Art. 52/IV cannot be said to simultaneously negate Art. 53 of the Charter.<sup>46</sup> The interpretation of rights in accordance with common constitutional traditions should therefore be applied in cases where there are no explicit constitutional provisions on human rights. However, regarding the level of their protection, the Member States that agreed to transfer the exercise of their sovereign rights, taking into account Art. 53 of the Charter ought to expect that the level of human rights protection determined in their national constitutions should also be respected at the EU level. With reference to that, in cases concerning the level of human rights protection, the only question cannot be the question of national constitutional identity. It used to be a basis that the CJEU took into account and ensured that it was respected without implementation of the principle of the maximum protection of human rights.<sup>47</sup> This principle must have a greater significance regarding the fact that Article 53 of the Charter refers to constitutions and not only to their foundations that are of essential importance for the state's constitutional identity.

In Art. 15/I, the Constitution has stipulated that human rights shall be exercised directly, based on the Constitution. However, it must be taken into account that there are only a few human rights that can be exercised directly (e.g. the right to life determined in Art. 17 of the Constitution). For the majority of rights the law regulates the manner in which they are

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<sup>45</sup> »[T]he term 'national identities' (...) accepts the legitimacy and guarantees the continuity of the Member States as individual constitutional units against the demands of growing European integration (...) [N]ational identities (...) affirm national constitutional individuality, as the right to differ from the constitutional collective« (Van der Schyff, 2012: 570)

<sup>46</sup> The CJEU will soon have to adopt a standpoint on such, as the Austrian Constitutional Court in the case *Seitlinger et al.* (C-594/12) has already made a reference for preliminary ruling regarding the interpretation of the third and fourth paragraphs of Art. 52 of the Charter and we should hope that the CJEU will devote deeper attention to these questions than in the *Melloni* case.

<sup>47</sup> See, for example, the judgment in the *Anita Groener* case, in which knowledge of the Irish language was a condition for an art teacher.

exercised (Art. 15/II of the Constitution, e.g. the right of access to court and the right to appeal), whereby a law may determine their limitation if there is a legitimate aim, and if it is in accordance with the principle of proportionality. In accordance with Art. 15/III of the Constitution, a legitimate aim of the limitation is also provided in cases determined by the Constitution. Pursuant to Art. 3a/III of the Constitution, the limitation of human rights may also be stipulated in secondary EU law, provided that, according to Art. 15/V of the Constitution, such limitations are regulated so that the principle of the maximum protection of the human right at issue is respected. Therefore, a solution in the future decisions of the CC cannot be sought in strict insistence on the absolute primacy of constitutional provisions regulating human rights, and even less so in establishing a dual level of human rights protection. That would depend on whether a case concerns the application of EU law, or on insisting that the CC has a different attitude towards EU law if a case concerns certain human rights for which it requires the primacy of the Constitution (e.g. the right to personal liberty), while it allows its withdrawal regarding others (e.g. the right to free economic initiative). In this aspect, the attitude towards EU law should be fundamentally uniform, regardless of the fact that the limitation of human rights itself can be varied.

A good piece of advice would be that the CC should first choose an EU law-friendly path. Taking into consideration the presented constitutional provisions, respect for the fundamental principles of EU law, which are simultaneously constitutional principles, should be recognised, whereas the principle of the primacy of EU law requires that individual provisions of the Constitution yield to EU law, even if they concern only secondary law. However, EU law does not require that constitutional provisions, which recognise a higher level of human rights protection than ensured by the Charter and secondary EU law, yield to EU law. On the contrary, Article 53 of the Charter requires the Constitution to be respected precisely in this regard. Thus, the CC should bravely begin to make references for preliminary rulings regarding the interpretation of the provisions of the Charter. By presenting strong arguments in the above-mentioned direction, it should try to convince the CJEU to require from the European legislature to respect the principle of the maximum protection of human rights, as ensured by the Charter and the Constitution. This would establish a new quality in the relationship between the CC and the CJEU. The CJEU will also have to take this into account when interpreting the Charter. It did not devote sufficient attention to that in the *Melloni* and *Åklagaren* cases.



## 5. The Relationship between the Constitutional Court and the CJEU and the Application of the Case Law of the CJEU

The relationship between a constitutional court and the CJEU is a logical consequence of how the CJEU and the respective constitutional court perceive EU law. Such a perception is imposed on the CC by national constitutional norms. With the implementation of the Charter as a constituent part of primary law, it can be established that the EU is founded on the values of respect for human rights (see also Art. 2 of the TEU), which Art. 3a/I of the Constitution sets as the first condition for the transfer of the exercise of sovereign rights. At the same time, the Constitution allows the autonomous legal order established by EU law to function in accordance with the rules of that legal order (Art. 3a/III).

Proceeding from the above-mentioned constitutional regulation, the CC must also establish its attitude towards the CJEU. Recognising the primacy of EU law entails accepting the role thereby given to the CJEU in interpreting the norms of primary law and in deciding on the validity and interpretation of the acts of secondary law. The decision of the CC to deem primary EU law to be a major premise of its constitutional review also indicates its attitude towards the CJEU. The relationship between the CC and the CJEU is most importantly marked by the willingness of the CC to enter into a dialogue with the CJEU by making references for preliminary ruling under Art. 267 of the TFEU.

Regarding the reference for preliminary ruling to the CJEU, the message proceeding from this decision is more important than the question of whether in the *JATA* case (U-I-113/04) the CC proceeded correctly because it did not make a reference for preliminary ruling. The message conveyed is that the CC would make a reference for preliminary ruling if faced with a relevant question when deciding, but this has not happened yet. It is evident, however, that there is an on-going discussion about this issue within the decision-making framework of the CC. It can be understood from a separate opinion in the case U-I-17/11, in which the CC reviewed the conformity of the statutory regulation with the provision of Art. 8/I of the Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality.<sup>48</sup>

<sup>48</sup> The Constitutional Court itself interpreted the provision of the Protocol that is a constituent part of primary law. However, pursuant to item a) of Art. 267/I of the

Therefore, it can be expected that in the future the CC will be faced with the need to make references for preliminary ruling, probably regarding individual provisions of the Charter as well. However, precisely with reference to its interpretation, the CJEU should be aware that there ought to be a dialogue between the courts, based on mutual respect for the case law. While references to national constitutions must be understood as references to the level of protection of human rights as established by national constitutional courts based on national constitutional provisions, the CJEU should consider this when interpreting the Charter, since the Charter implements the principle of the maximum protection of human rights, too. This time it is the CJEU that has only begun to step<sup>49</sup> into the field of human rights protection, where national constitutional courts (especially some of them) have been active for a long time. Such an approach of the CJEU would probably diminish tensions between it and national constitutional courts and enable a creative argumentative dialogue between them. Consequently, it would contribute to the protection of human rights in the EU.<sup>50</sup>

In EU law, the CJEU is established as the court that ought to ensure its effectiveness and its uniform application in the territory of all Member States. CJEU judgments have the nature of precedent.<sup>51</sup> Therefore, all national courts, including the CC, must respect them.

However, there is the question of how to ensure the respect of the CJEU case law. The CC acknowledged the position of established case law for CJEU judgments. In Decisions Up-1201/05 and Up-282/09, the CC em-

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TFEU, the CJEU is competent to interpret such. It proceeds from the separate opinion of the decision at issue that a reference for preliminary ruling on the interpretation of the above-mentioned provision should be made to the CJEU. Judge Sovdat did not agree with the interpretation that the provision of primary law was clear. She was also of the opinion that the Constitutional Court did not substantiate such a position by criteria adopted in the judgment in the *CILFIT* case. What is more, the CJEU should be given an opportunity to correct its strict requirements determined in the above-mentioned judgment and consequently create a dialogue between national constitutional courts and itself more easily; see the dissenting opinion of Judge Sovdat in Decision U-I-17/11.

<sup>49</sup> It is indeed true that even before the implementation of the Charter there had been an unwritten bill of rights that the CJEU developed from the general principles (see Schütze, 2011: 133–141), however, the real shift in this field was caused only by the implementation of the Charter.

<sup>50</sup> See also Torres, Pérez, 2012: 126.

<sup>51</sup> The interpretation of EU law provided by the CJEU in its judgments within the framework of references for preliminary ruling have *erga omnes* effects (Trstenjak, Brkan, 2012: 122).

phased that the departure from the established and uniform case law of the CJEU results in a violation of Art. 22 of the Constitution if reasons for it are not provided. It has not established such a departure in any of its decisions. Through such a position, the CC recognised the precedent effect of CJEU judgments. However, the question is whether it chose the right approach. Lower courts may depart from the established case law, as understood in national law, if they provide compelling reasons for the departure. CJEU judgments by which the Court interprets EU law have a binding power, thus a logical question is whether they can be negated without establishing a new dialogue with the CJEU.

## 6. Conclusion

It is clear from the constitutional regulation that, when amending the Constitution, the National Assembly mostly had the EU in mind, regardless of the fact that it opted for abstract regulation of the fundamental constitutional rules based on which Slovenia may transfer the exercise of part of its sovereign rights to international organisations. The requirement that it should be based on respect for human rights, democracy, and the principles of the rule of law would have been especially important if the CC had been asked for the review of constitutionality of the Treaty of Lisbon before its ratification. However, it was not required. In addition to the above-mentioned requirement, the National Assembly established another important rule for amending the Constitution. Evidently being aware of all the already implemented fundamental principles of EU law, it determined that legal acts and decisions adopted within international organisations – thus also within the framework of the EU, shall be applied in accordance with the legal regulation of such organisations. Therefore, EU law must be ensured the position which was in fact envisaged for it by the Constitution, i.e. respect for the autonomy of such law and most of all respect for the principles of its primacy and direct applicability. Thus, EU law may have important influence on the position and interpretation of other constitutional provisions.

Since the CJEU has always had, and will continue to have, a very important role in ensuring the effectiveness of EU law, the significance of the CJEU's case law for the application of EU law before national courts is huge. Therefore, it is reasonable to expect that the CC in exercising its powers establishes a dialogue with the CJEU, if necessary. It includes

making references for preliminary ruling regarding the interpretation of primary law, and validity and interpretation of secondary law of the EU, insofar as relevant to the Court's decision-making.

In Slovenia, treaties that regulate human rights have, regardless of the fundamental relationship of the primacy of constitutional law over international law, a constitutional position. This proceeds from the principle of the maximum protection of human rights, which is implemented not only in the Constitution but also in the Convention and the Charter. This principle determines that a constitutional norm must yield to the provision of a treaty that ensures a higher level of protection of a human right than the Constitution. The CC has implemented this principle in its existing case law mostly regarding the relationship towards treaties that regulate human rights, and particularly regarding the relationship towards the Convention. The latter relationship is special because of the existence of the ECHR, which is called upon to interpret convention provisions. However, in determining the relationship between national constitutional law and EU law, the CC is still quite at the beginning. It has not taken an explicit and clear position on the fundamental question of the position of EU law in relation to the constitutional order yet. It would be far too soon to conclude what its final positions on these issues might be based on only one decision that tackled the relationship between EU law and constitutional rights.

The CC will have to interpret clearly the first and third paragraphs of the constitutional *European Article* as well. If the first paragraph of this Article can be a basis for a reserved position towards EU law in exceptional cases, then the third paragraph of this Article is a basis for the situation where the possible doubt is not raised all the time and in each individual case. This is because EU law recognises the principle of the maximum protection of human rights also in relation to national constitutions. Therefore, a creative, argumentative dialog between the CC and the CJEU must necessarily be established in order to achieve a high level of human rights protection in the EU. One would expect that next steps of the CC would lead in this direction. However, such expectations can also depend on the degree to which the CJEU, when interpreting provisions of the Charter, will show willingness to respect the principle of the maximum protection of human rights with regard to the level of protection already established by national constitutional courts, including the Slovene Constitutional Court.

## References

- Accetto, Matej (2011) (Ustavno)sodna presoja in predhodno odločanje v pravu EU. *Pravna praksa* 11(30): 24–26
- Avbelj, Matej (2012) Ustavni pluralizem v EU in Sloveniji. *Pravna praksa* 12(21): 6–8
- Avbelj, Matej (2011) Theory of European Union. *European Law Review* 36(6): 818–836
- Avbelj, Matej (2011a) Supremacy or Primacy of EU Law – (Why) Does it Matter? *European Law Journal* 17(6): 744–763
- Barents, René (2010) The Court of Justice After the Treaty of Lisbon. *Common Market Law Review* 47(3): 709–728
- Barents, René (2012) The Fallacy of European Multilevel Constitutionalism. In: Avbelj, Matej, Komárek, Jan (Eds.) *Constitutional Pluralism in the European Union and Beyond*. Oxford: Hart Publishing Ltd
- Cerar, Miro (2011) Komentar k členu 3a Ustave. In: Šturm, Lovro, (Ed.) *Komentar Ustave Republike Slovenije, Dopolnitev – A*. Ljubljana: Fakulteta za državne in evropske študije
- Chalmers, Damian, Gareth Davies, Giorgio Monti (2010) *European Union Law, Cases and Materials*. Cambridge: Cambridge University Press
- Craig, Paul (2011) The ECJ, National Courts and the Supremacy of Community Law, [www.ecln.net/elements/conferences/bookrome/craig.pdf](http://www.ecln.net/elements/conferences/bookrome/craig.pdf)
- Grad, Franc (2010) *Evropsko ustavno pravo, prvi del, Ustavno pravo Evropske unije*. Ljubljana: Uradni list Republike Slovenije
- Grad, Franc (2011) Komentar k členu 3a Ustave. In: Šturm, Lovro (Ed.) *Komentar Ustave Republike Slovenije, Dopolnitev – A*. Ljubljana: Fakulteta za državne in evropske študije
- Iglesias Sánchez, Sara (2012) The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights. *Common Market Law Review* 49(5): 1565–1611
- Jambreč, Peter (2011) Komentar k členu 3 Ustave. In: Šturm, Lovro (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A*. Ljubljana: Fakulteta za državne in evropske študije
- Klaushofer, Reinhard, Rainer Palmstorfer (2013) Austrian Constitutional Court Uses Charter of Fundamental Rights of the European Union as Standard of Review: Effects on Union Law. *European Public Law* 19(1): 1–12
- Kumm, Matthias (2012) Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism. In: Avbelj, Matej, Komárek, Jan (Eds.) *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart Publishing Ltd
- Luebbe-Wolff, Gertrude (2011) Who Has the Last World? National and Transnational Courts – Conflict and Cooperation. *Yearbook of European Law* 30(1): 86–99

- MacCormick, Neil (1995) The Maastricht-Urteil: Sovereignty Now. *European Law Journal* 1(3): 259–266
- Maduro, Poiares Miguel (2012) Three Claims of Constitutional Pluralism. In: Avbelj, Matej, Jan Komárek (Eds.) *Constitutional Pluralism in the European Union and Beyond*, Oxford: Hart Publishing Ltd
- Mole, Nuala (2012) The Complex and Evolving Relationship Between the European Union and the European Convention on Human Rights. *European Human Rights Law Review* 2013(4): 363–368
- Nerad, Sebastian (2012) Recepcija prava Evropske unije v nacionalno ustavno pravo: ustavno sodišče med pravom Evropske unije in Ustavo. In: Kaučič, Igor (Ed.), *Pomen ustavnosti in ustavna demokracija*, Znanstveni zbornik Dvajset let Ustave Republike Slovenije. Ljubljana: Ustavno sodišče Republike Slovenije
- Payandeh, Mehrdad (2011) Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice. *Common Market Law Review* 48(1): 9–38
- Posch, Albert (2009) The *Kadi* Case: Rethinking the Relationship Between EU Law and International Law?, *The Columbia Journal of European Law Online*, available at [www.cjel.net/wp-content/uploads/2009/03/albertposch-the-kadi-case.pdf](http://www.cjel.net/wp-content/uploads/2009/03/albertposch-the-kadi-case.pdf)
- Ribičič, Ciril (2007) *Evropsko pravo človekovih pravic*, Izbrana poglavja. Ljubljana: Pravna fakulteta v Ljubljani
- Shütze, Robert (2011) Three 'Bills of Rights' for the European Union. *Yearbook of European Law* 30(1): 131–158
- Škrk, Mirjam (2007) Odnos med mednarodnim pravom in notranjim pravom v praksi Ustavnega sodišča. *Pravnik* 62(6–8): 275–311
- Testen, Franc (2011) Komentar k členu 3a Ustave. In: Šturm, Lovro (Ed.), *Komentar Ustave Republike Slovenije, Dopolnitev – A*. Ljubljana: Fakulteta za državne in evropske študije
- Torres, Pérez, Aida (2012) Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door; Spanish Constitutional Court, Order of 9 June 2011, ATC 86/2011. *European Constitutional Law Review* 8(1):105–127
- Trstenjak, Verica, Maja Brkan (2012) *Pravo EU, Ustavno, procesno in gospodarsko pravo EU*. Ljubljana: GV Založba
- Trstenjak, Verica (2012) The Principle of Primacy in EU Law and the Role of the Constitutional Court. In: Kaučič, Igor (Ed.) *Pomen ustavnosti in ustavna demokracija*, Znanstveni zbornik Dvajset let Ustave Republike Slovenije. Ljubljana: Ustavno sodišče Republike Slovenije
- Van der Schyff, Gerhard (2012) The Constitutional Relationship between the European Union and its Member States: The Role of National Identity in Article 4(2) TEU. *European Law Review* 2012(5): 563–583
- Van Rossem, Jan Willem (2009) Interaction Between EU Law and International Law in the Light of *Intertanko* and *Kadi*: The Dilemma of Norms Binding

- the Member States but not the Community. The Haag: T. M. C. Asser Institute Voßkuhle, Andreas (2013) *The Cooperation Between European Courts: The Verbund of European Courts and its Legal Tool box*. In: Rosas, Allan, Levits, Egils, Bot, Yves (Eds.) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*. The Haag: Asser Press
- Walker, Neil (2012) *Constitutionalism and Pluralism in Global Context*. In: Avbelj, Matej, Komárek, Jan (Eds.) *Constitutional Pluralism in the European Union and Beyond*. Oxford: Hart Publishing Ltd
- White, C. A. Robin (2011) *A New Era for Human Rights in the European Union*. *Yearbook of European Law* 30(1): 100–130
- Zagradišnik, Renata (2008) *How to be Good: Slovenian and Czech Constitutional Doctrine on Primacy of EU Law*, LLM Disertation. The London School of Economics and Political Science, Academic year 2007/2008

## Legal Sources

- Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 21 July 2010, Federal Law Gazette I p. 944
- Charter of Fundamental Rights of the European Union, OJ C 326
- Communiqué de presse 2013-314P QPC, available at [www.conseil-constitutionnel.fr](http://www.conseil-constitutionnel.fr)
- Constitutional Court Act, Official Gazette RS 64/07
- Constitution of the Republic of Croatia, Official Gazette RC 85/10
- Constitution of the Republic of Slovenia, Official Gazette RS 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, 47/13
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304
- Decision U-I-147/94 of 30 November 1995, Official Gazette RS 3/96
- Decision U-I-219/03 of 1 December 2005, Official Gazette RS 118/05
- Decision U-I-32/04 of 9 February 2006, Official Gazette RS 21/06
- Decision Up-1201/05 of 6 December 2007, Official Gazette 117/07
- Decision U-I-92/07 of 15 April 2010, Official Gazette RS 46/10
- Decision U-I-146/07 of 13 November 2008, Official Gazette RS 111/08
- Decision U-I-238/07 of 2 April 2009, Official Gazette RS 32/09
- Decision Up-2012/08 of 5 March 2009, Official Gazette RS 22/09
- Decision U-I-109/10 of 26 September 2011, Official Gazette RS 78/11
- Decision U-I-180/10 of 7 October 2010, Official Gazette RS 73/10

- Decision U-I-249/10 of 15 March 2012, Official Gazette RS 27/12
- Decision Up-690/10 of 10 May 2012, Official Gazette RS 42/12
- Decision U-I-17/11 of 18 October 2012, Official Gazette RS 87/12
- Decision U-II-1/12, U-II-2/12 of 17 December 2012, Official Gazette RS 102/12
- Directive 2002/2/EC of the European Parliament and of the Council of 28 January 2002 amending Council Directive 79/373/EEC on the circulation of compound feedingstuffs and repealing Commission Directive 91/357/EEC, OJ L 63
- Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158/77
- Judgment BVerfGE 37, 271 of 29 May 1974, available at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)
- Judgment BVerfGE 73, 339 of 22 January 1986, available at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)
- Judgment BVerfG 2BvE2/08 of 30 June 2009, available at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)
- Judgment 2 BvR 2661/06 of 6 July 2010, available at [www.bundesverfassungsgericht.de](http://www.bundesverfassungsgericht.de)
- Judgment K 18/04 of 11 May 2005, available at [www.trybunal.gov.pl](http://www.trybunal.gov.pl)
- Judgment of 15 July 1964 in case *Costa v ENEL*, 6/64, ECR 585
- Judgment of 17 December 1970 in case *Internationale Handelsgesellschaft*, 11/70, ECR 1125
- Judgment of 9 March 1978 in case *Amministrazione delle finanze dello Stato v Simmenthal*, 106/77, ECR 629
- Judgment of 6 October 1982 in case *CILFIT*, 283/81, ECR 3415
- Judgement of 28 November 1989 in case *Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee*, C-379/87, ECR 3967
- Judgment of 19 June 1990 in case *Factortame and others*, 1990, C-213/89, ECR I-2433
- Judgment of 21 February 1991 in case *Zuckerfabrik Suderdithmarschen and Zuckerfabrik Soest*, C-143/88 and C-92/89, ECR I-415
- Judgment of 11 January 2000 in case *Tanja Kreil*, C-285/98, ECR I-69
- Judgment of 6 December 2005 in case *ABNA and others*, C-453/03, C-11/04, C-12/04 and C-194/04, ECR I-10423
- Judgment of 3 September 2008 in case *Yassin Abdullah Kadi and Al Barakaat International Foundation*, C-402/05 and C-415/05, ECR I-6351
- Judgment of 22 December 2010 in case *Joseba Andoni Aguirre Zarraga v Simone Pelz*, C-491/10, ECR I-14247
- Judgment of 22 June 2011 in case *Marie Landtova v Česki spava socialnihoo zabezpečení*, C-399/09



- Judgment of 21 December 2011 in case N. S. and others, C-411/10 and C-493/10  
Judgment of 26 April 2012 in case Health Service Executive v S. C. and A. C.,  
C-92/12  
Judgment of 5 July 2012 in case Torsten Honfeldt v Posten Meddelande AB,  
C-141/11  
Judgment of 28 July 2012 in case Fabio Caronna, C-7/11  
Judgment of 26 February 2013 in case Melloni v Ministerio Fiscal, C-399/11  
Judgment of 26 February 2013 in case Aklagaren v Hans Akerberg Fransson,  
C-617/10  
Judgment PL. ÚS 5/12 of 31 January 2012, available at [www.usoud.cz](http://www.usoud.cz)  
Judgment U 466/11, U 1836/11 of 14 March 2012, available at [www.vfgh.gv.at](http://www.vfgh.gv.at)  
Opinion Rm-1/97 of 5 June 1997, Official Gazette RS 40/97  
Order U-I-113/04 of 8 July 2004, Official Gazette RS 83/04  
Order U-I-113/04 of 7 February 2007, Official Gazette RS 16/07  
Order Up-43/96 of 30 May 2000, OdlUS IX, 141, available at [www.us-rs.si](http://www.us-rs.si)  
Order Up-282/09 of 24 November 2009, available at [www.us-rs.si](http://www.us-rs.si)  
Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality, OJ C 83  
Separate Opinion of Judge Jadranka Sovdat to Decision U-I-17/11, available at  
[www.us-rs.si](http://www.us-rs.si)  
Treaty on European Union, OJ C 326  
Treaty on the Functioning of the European Union, OJ C 326

## THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA AND EUROPEAN UNION LAW

### *Summary*

*Primary EU law emerges from the treaties, and its substance is constitutional. Such is also the view of the Court of Justice on its legal nature. The relationship between EU law and national constitutional law is thus more complex than the relationship between international law and constitutional law. The Slovenian Constitution stipulates that legal acts and decisions adopted within the EU shall be applied in accordance with the legal regulation of the EU. Thus, it acknowledges constitutional value to the fundamental principles of EU law. The Slovenian Constitutional Court shall therefore interpret the Constitution taking the above-mentioned principles into consideration. In accordance with the principle of primacy of EU law, in a collision between a constitutional provision and a provision of EU law, the constitutional provision must, as a prevailing rule, yield to the provision of EU law, if the former is not in conformity with EU law. It should not unconditionally apply to constitutional norms that provide a higher level of the protection of human rights than determined in EU law. In accordance with the principle of the maximum protection of human rights enshrined in the Slovenian Constitution and the Charter of Fundamental Rights of the EU, the Luxembourg Court should interpret the Charter so as to provide a uniform and high level of human rights protection throughout the EU. The Slovenian Constitutional Court has not explicitly adopted an attitude towards EU law yet. Based on a decision issued before the Lisbon Treaty was implemented, it can be concluded that it acknowledged the principle of primacy of EU law inasmuch as the level of human rights protection provided by the Constitution was not lowered. However, in a recent decision, the Constitutional Court explicitly reasoned that it must not take a position on whether EU law unconditionally prevails over the provisions of the Constitution yet. Therefore, it can be expected that the Constitutional Court will adopt a view thereon in the future. Furthermore, it is expected that the Court will interpret constitutional provisions, as a prevailing rule, with due respect to the primacy of EU law and that it will start a creative dialogue with the Luxembourg Court, using a reference for preliminary ruling in order to achieve an interpretation of the Charter friendly to the constitutional provisions on human rights.*

**Key Words:** *European Union law, constitution, the Constitutional court of the Republic of Slovenia, human rights*

## USTAVNI SUD REPUBLIKE SLOVENIJE I PRAVO EUROPSKE UNIJE

### Sažetak

Primarno pravo EU temelji se na ugovorima i ima ustavni karakter. Takvo je i mišljenje Suda EU (Luksemburgu) o njegovoj pravnoj naravi. Stoga je odnos između europskog prava i nacionalnog ustavnog prava pojedinih zemalja članica složeniji od odnosa međunarodnog prava i ustavnog prava. Slovenski ustav propisuje da se propisi i odluke usvojene u EU primjenjuju u skladu s pravnom regulacijom EU. Na taj način, Sud je priznao ustavnu vrijednost temeljnih načela prava EU. Slovenski ustavni sud stoga tumači ustav uzimajući u obzir spomenuta načela. Prema načelu prvenstva europskog prava, ako se razlikuje neka ustavna odredba i odredba europskog prava, ustavna odredba mora se, u pravilu, podvrgnuti odredbi prava EU ako s istim nije u skladu. To se ne bi trebalo bezuvjetno primjenjivati na one ustavne norme koje štite ljudska prava u većoj mjeri od propisa EU. U skladu s načelom maksimalne zaštite ljudskih prava, koje je ugrađeno u ustav Republike Slovenije i Povelju o temeljnim pravima EU, Sud u Luksemburgu trebao bi tumačiti Povelju tako da pruža podjednaku i najveću moguću zaštitu ljudskih prava u cijeloj Uniji. Ustavni sud Slovenije još nije usvojio službeni stav prema pravu EU. Na temelju odluke koju je donio prije primjene Lisabonskog ugovora, može se zaključiti da je primjenjivao načelo prvenstva prava EU ako se njegovom primjenom ne bi smanjivala razina zaštite ljudskih prava koju pruža ustav Slovenije. Međutim, u jednoj od nedavnih odluka, Sud je izričito naveo da još ne smije zauzeti stav o pitanju prevladava li pravo EU beziznimno nad odredbama ustava. Može se očekivati da će se Sud u budućnosti očitovati o tome. Nadalje, očekuje se da će Sud u pravilu tumačiti ustavne odredbe poštujući načelo prvenstva prava EU te da će započeti dijalog sa Sudom u Luksemburgu koristeći referiranje na prvostupanjsku presudu kako bi postigao da se Povelja o temeljnim pravima tumači tako da se prihvaćaju ustavne odredbe koje štite ljudska prava u širem smislu od nje.

Gljučne riječi: pravo Europske Unije, ustav, Ustavni sud Republike Slovenije, ljudska prava