

Eric Stein Working Paper No 2/2010

THE APPLICATION OF EUROPEAN UNION LAW
AND THE LAW OF THE EUROPEAN
CONVENTION OF HUMAN RIGHTS IN THE
CZECH REPUBLIC AND SLOVAKIA - AN
OVERVIEW

Michal Bobek

&

David Kosař

Czech Society for European and Comparative Law • Prague • Czech Republic

The Eric Stein Working Papers
<http://www.ericsteinpapers.eu>

Editor in Chief
Jan Komarek
Jan.Komarek@some.oxon.org

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

Abstract

This paper discusses the application of the European Union Law and the European Convention on Human Rights in the Czech Republic and Slovakia. Instead of a country-by-country analysis, we opted for an integrated approach, dividing the paper by subject matter. This illustrates the divergent applications in the Czech Republic and Slovakia despite their common legal background.

The paper is divided to two main Parts. Part A focuses on European Union Law. Part B deals with the application of the European Convention on Human Rights. Both Part A and Part B consist of four sections. Part A. 1 describes the constitutional bases for domestic application of the EU Law. Part A. 2 discusses the constitutional cases dealing with EU Law. Part A. 3 explains the stance of both constitutional courts on various aspects of preliminary rulings. Part A. 4 examines the application of EU Law by ordinary courts and the jurisprudence of both constitutional courts reviewing of national law for compatibility with the EU law. Part B also starts with the constitutional bases for domestic application of the ECHR (Part B. 1) followed by an analysis of the effects of ECtHR's jurisprudence in both national systems (Part B. 2). Part B. 3 focuses on the application of the ECHR before both constitutional courts. Part B. 4 draws general conclusions on the application of the Strasbourg jurisprudence before ordinary courts. Finally, Part C contains concluding remarks.

Keywords

European Union Law - European Convention for Protection of Human Rights - domestic application - Czech Republic - Slovak Republic - constitution - hierarchy - judicial review - preliminary rulings

Table of Contents

Introduction..... 1

A. European Union Law..... 1

 1) The Constitutional Bases for Domestic Application of European Union Law 1

 2) The Constitutional Cases Dealing with European Union Law 3

 3) Constitutional Courts and Preliminary Rulings 8

 4) Review of National Law on its Compatibility with European Union Law..... 10

B. Law of the European Convention on Human Rights..... 13

 1) The ECHR and Domestic Sources of Law..... 13

 2) The Effects of ECtHR’s decisions in the National Legal Systems..... 17

 3) The ECHR before the Constitutional Courts 18

 4) The ECHR before the Ordinary Courts 21

C. Conclusions 24

Bibliography 25

The Application of European Union Law and the Law of the European Convention of Human Rights in the Czech Republic and Slovakia - an Overview

Michal Bobek* and David Kosař†

Introduction

This paper discusses the application of the European Union Law and the European Convention on Human Rights in the Czech Republic and Slovakia. Instead of a country-by-country analysis, we opted for an integrated approach, dividing the paper by subject matter. This illustrates the divergent applications in the Czech Republic and Slovakia despite their common legal background.

The paper is divided to two main Parts. Part A focuses on European Union Law. Part B deals with the application of the European Convention on Human Rights. Both Part A and Part B consist of four sections. Part A. 1 describes the constitutional bases for domestic application of the EU Law. Part A. 2 discusses the constitutional cases dealing with EU Law. Part A. 3 explains the stance of both constitutional courts on various aspects of preliminary rulings. Part A. 4 examines the application of EU Law by ordinary courts and the jurisprudence of both constitutional courts reviewing of national law for compatibility with the EU law. Part B also starts with the constitutional bases for domestic application of the ECHR (Part B. 1) followed by an analysis of the effects of ECtHR's jurisprudence in both national systems (Part B. 2). Part B. 3 focuses on the application of the ECHR before both constitutional courts. Part B. 4 draws general conclusions on the application of the Strasbourg jurisprudence before ordinary courts. Finally, Part C contains concluding remarks.

A. European Union Law

1) The Constitutional Bases for Domestic Application of European Union Law

The Czech as well as the Slovak legal orders began to implement the European Union law well before the Accession date of 1 May 2004. Both legal systems adopted constitutional amendments, which provided for a broader opening of the national constitutions not just to European Union Law, but also to international law.¹

* Ph.D. Researcher, European University Institute, Department of Law.

† J.S.D. Student, New York University School of Law.

This paper was presented at the workshop "*National Judges and Supranational Laws: On the Effective Application of the EC Law and the ECHR*", held at Sant'Anna School of Advanced Studies, Pisa in January 2010. We are grateful to Jan Kratochvíl, Tomáš Langášek and Ján Štiavnický for their comments and suggestions. Any mistake remains our own.

Abbreviations used: CC (The Constitution of the Czech Republic); SC (The Constitution of the Slovak Republic); CCC (Czech Constitutional Court); SCC (Slovak Constitutional Court); CSC (Czech Supreme Court); SAC (Czech

The “Euro”-amendment of the Czech Constitution² was carried out by the Constitutional Act 395/2001 Coll., which entered into force on 1 June 2002. This amendment not only newly formulated the position of international treaties in the Czech legal order (Art. 10 CC), but it also provided for the possibility of the Czech Republic to become a signatory party to an international organization (Art. 10a CC). It also opened Czech constitutional law to other obligations stemming from international law (Art. 1(2) CC), i.e. customary law or decisions of international organisations, including the decisions of international courts.

None of the new provisions, however, expressly referred to the future Czech membership in the European Union. Thus the question quickly arose: which provision precisely “opens the gate” for European Union law? One view held that that it is Article 10 CC that granted the authorization by providing for international treaties being part of the Czech legal order. A competing opinion held that the actual support for the application of Community law is provided by the competence clause of Art. 10a CC, which states that certain powers of the Czech Republic authorities may be transferred by treaty to an international organization or institution.³

The issue whether the “Euro”-provision is the Art. 10 CC or the Art. 10a CC was authoritatively solved by the Czech Constitutional Court [hereinafter just “CCC”] in its *Sugar Quota III* decision.⁴ The CCC stated that it is the Art. 10a CC which formed the normative basis for the transfer of powers and opened up the national legal order to the operation of Community law.

The Slovak “Euro” amendment to the Constitution was more detailed than that its Czech counterpart. It was carried out by the Constitutional Act no. 90/2001 Coll. and entered into force on 1 July 2001. In contrast to the Czech amendment, which was framed in generic terms, the Slovak constitutional amendment expressly provided for the Slovak accession to the European Union. Art. 7(2) SC thus provided that the Slovak Republic may, by an international treaty, transfer the exercise of parts of its powers to the European Union. The same provision also stipulates that “*Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic.*”

The Slovak provisions were thus much more express in stating what constitutional provision functions as the “gate” for the incoming European Union law and also in openly acknowledging the primacy of European Union law over national law. On the other hand, it would appear that the primacy of European Union law clause in the Art. 7(2) SC was

Supreme Administrative Court); SSC (Slovak Supreme Court); ECHR (European Convention on Human Rights); ECtHR (European Court for Human Rights).

¹ Generally on similar process in the CEE countries, see Albi (2005) 67 and f.

² Constitutional Act No. 1/1993 Coll. of 16 December 1992.

³ The two conflicting opinions were offered by Jiří Malenovský, on the one hand, and Zdeněk Kühn and Jan Kysela, on the other. See Malenovský (2004) 227; Kühn and Kysela (2004) 23.

⁴ Judgment of 8 March 2006, Pl. ÚS 50/04 (“*Sugar Quota III*”), no. 154/2006 Coll., available in English at <http://www.usoud.cz/file/2274> [last accessed 15 December 2009].

designed so as to give EU law precedence over (ordinary) laws only, thus maintaining the primacy of Slovak constitutional laws over the entire bulk of European Union law.

2) *The Constitutional Cases Dealing with European Union Law*

After the Enlargement of May 2004, the CCC dealt with the relationship with the European and Czech law in five “heavy-weight” constitutional litigations. All of these cases were brought by the members of the Parliament (the Chamber of Deputies or Senators). The Slovak Constitutional Court [hereinafter just “SCC”] addressed the relationship between the Slovak constitutional order and European Union law in two constitutional cases.

In March 2006, in the *Sugar Quota III* case,⁵ the CCC generally accepted the EU regulation of the sugar market sector, although the opposition parliamentarians argued that it was a violation of the right to unrestrained business activities. The Court, however, quashed the national implementing measure on procedural grounds. As far as the relationship between the Czech Constitution and European Union law was concerned, the Court rephrased to a great extent the approach of the German Federal Constitutional Court: *“In the Constitutional Court’s view, the conditional nature of the delegation of these powers is manifested on two planes: the formal and the substantive plane. The first of these planes concerns the power attributes of state sovereignty itself, the second plane concerns the substantive component of the exercise of state power. In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state.”*⁶

In the *Sugar Quota III* case, the CCC also accepted the notion that the membership of the Czech Republic in the European Union may cause a national constitutional court to revise its previous case law. In the case at bar, the de facto overruling concerned case law involving production quotas for sugar⁷ and also milk,⁸ cases in which the CCC had previously taken a critical stance towards governmental regulation of these production sectors before the accession to the EU. However, in the *Sugar Quota III* decision, the CCC noted that *“[...] as far as concerns measures of an economic nature pursuing an aim that flows directly from the Community policy of the EC, the Constitutional Court cannot avoid the conclusions which flows directly from the case-law of the ECJ and from which a definite principle of constitutional self-restraint can be inferred.”*⁹ The CCC’s so-called “constitutional self-restraint” in economical matters led it to refrain from any review of the sugar quota regulation based on European Union law.

The CCC’s approach has not been without critique: J. Komárek noted that such drastic self-restraint was not necessary and surely does not follow from the case law of the Court of

⁵ Ibid.

⁶ Ibid., part VI. B.

⁷ Decision of 30 October 2002, Pl. ÚS 39/01 (“*Sugar Quota II*”), no. 499/2002 Coll., accessible online in English at <http://www.usoud.cz/file/2216>.

⁸ Decision of 16 October 2001, Pl. ÚS 5/01 (“*Milk Quota Regulation*”), no. 410/2001 Coll., accessible online in English at <http://www.usoud.cz/file/2203>.

⁹ *Sugar Quota III*, part VI.A-3.

Justice.¹⁰ In a comparative prospective, A. Albi stressed that similar “backing-off” of the constitutional courts in the new Member States (not just in the Czech Republic, albeit the Czech *Sugar Quota III* case is a prime example) brought about a substantive drop in the quality of legal protection in the new Member States after the Enlargement.¹¹

In May 2006, the CCC rejected the proposal to annul the Czech implementation of the European Arrest Warrant (*EAW case*).¹² The Parliamentary Members of the conservative Civic Democratic Party criticized the idea of surrendering Czech citizens abroad under the EAW, which was in their view in conflict with Article 14(4) of the Czech Charter of Fundamental Rights, according to which no citizen may be forced to leave his homeland.

In quite a sweeping opinion, the CCC pushed the Euro-consistent constitutional interpretation to its limits. Firstly, the Court distinguished the original post-totalitarian right not to be forced to leave one’s homeland, which was adopted as a reaction to human rights abuses during the Communist era, from cooperation on criminal matters within a group of countries bound by rule of law. Secondly, the Court also raised a “quid pro quo” argument: *“If Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then it is naturally in this context that a certain degree of responsibility must be accepted along with these advantages. The investigation and suppression of criminality which takes place in the European area, cannot be successfully accomplished within the framework of individual Member States, but requires extensive international cooperation. The results of this cooperation is the replacement of the previous procedures for the extradition of persons suspected of criminal acts by new and more effective mechanisms, reflecting the life and institutions of the 21st century. The contemporary standard for the protection of fundamental rights within the European Union does not, in the Constitutional Court’s view, give rise to any presumption that this standard for the protection of fundamental rights, through invoking the principles arising therefrom, is of a lesser quality than the level of protection provided in the Czech Republic.”*¹³

In January 2007, the CCC decided the issue of the national law regulating the prices of medicinal products for human use. Although the senators argued that there was a violation of the national constitution because of the conflict with the corresponding EU law, the CCC rejected this argument; instead, the CCC used EU law as a source of inspiration for the meaning of the national constitution.¹⁴

The last two constitutional decisions concern the compatibility of the Lisbon Treaty with the Czech constitutional order. The *Lisbon I* decision¹⁵ was rendered by a unanimous CCC on 26 November 2008. The lengthy and complex reasoning could, in a nutshell, be

¹⁰ Komárek (2008a) 361 and 362.

¹¹ Albi (2009) 46.

¹² Judgment of 3 May 2006, Pl. ÚS 66/04 (“*EAW Case*”), no. 434/2006 Coll., online in English at <http://www.usoud.cz/file/2276>.

¹³ *Ibid.*, para. 71. Further on the EAW litigating, see e.g. Komárek (2007) or Zemánek (2007).

¹⁴ Judgment of 16 January 2007, case no. Pl. ÚS 36/05 (“*Medicinal Products for Human Use*”), no. 57/2007 Coll.

¹⁵ Pl. ÚS 19/08 (“*Lisbon I*”), no. 446/2008 Coll., an English translation is available at <http://www.usoud.cz/file/2339>.

summarized as a prolonged version of the *Sugar Quota III* holding: the transfer of competence to the European Union by the fiat of Art. 10a CC is possible only to the extent that it would not violate the very essence of the republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic state governed by the rule of law. These conditions form the unalterable core of the Czech Constitution (Art. 9(2) CC), the transfer of which to a different entity is impossible. However, as the European Union after the Treaty of Lisbon is still an international organization with attributed powers, which is not entitled to change its powers at its will, the Lisbon Treaty was said to be compatible with the Constitution.¹⁶

The *Lisbon I* decision was rendered as an opinion of the CCC, through a special procedure which allows *ex-ante* review of the constitutionality of international treaties. Prior to the decision of the CCC, there had been debate over the extent of the powers of the CCC in such a procedure; should the Court examine the compatibility of the international treaty only to the extent argued by the petitioners or should it do a “holistic” review, i.e. review the entire treaty *sua sponte*? In *Lisbon I*, the former view prevailed. The CCC noted that its review was limited only to the points (and potential incompatibilities) expressly put forward by the petitioners.

This fact was picked up in the *Lisbon II*¹⁷ litigation, which was launched by a group of senators about a year later. This time around, a group of senators attacked the Lisbon Treaty as a whole, including also the provisions which were not subject to review in *Lisbon I*. They also added some other selected provisions from the Treaty of Rome, Treaty of Maastricht and the “Irish guarantees” attached to the Lisbon Treaty. The CCC rejected as inadmissible the objections aiming at the previous Treaties in so far as their provisions were not modified by the Lisbon Treaty. It also rejected the review of the parts of the Lisbon Treaty which were already reviewed in the *Lisbon I* decision. The CCC then carried out the substantive review of the other parts of the Lisbon Treaty; here it mostly maintained and elaborated upon its opinion rendered the previous year in *Lisbon I*.

Most of the reasoning of the CCC in *Lisbon II* can be said to be “minimalist”: the CCC did not consider adding much to its previous decision, even if expressly invited by the petitioners to do so. Most significantly, the CCC refused to follow the example of the *Bundesverfassungsgericht* in its Lisbon decision and to define the substantive limits of transferred competence and to set out expressly “the essential requirements of a democratic state governed by the rule of law”, which cannot be transferred onto the European level.¹⁸ The Court opined: “[T]he Constitutional Court does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create

¹⁶ For an analysis of the decision in English, see the case note by Bříza (2009).

¹⁷ Decision of 3 November 2009, Pl. ÚS 29/09 (“*Lisbon II*”), no. 387/2009 Coll., online in English at <http://www.usoud.cz/soubor/2506>.

¹⁸ The petitioners, referring themselves to the decision of the *Bundesverfassungsgericht* on the Lisbon Treaty (Decision of 30 June 2009, 2 BvE 2/08, available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html, para. 252 of the decision) asked the CCC to draw up a similar list of “non-transferable” competences.

such a catalogue of non-transferable powers and authoritatively determine “substantive limits to the transfer of powers”, as the petitioners request. It points out that it already stated, in judgment Pl. ÚS 19/08, that “These limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion” [para. 109]. Responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they have actually been made on the political level.”¹⁹

In contrast to the by now quite rich case law of the CCC on European Union law issues, the number of cases in the Slovak Constitutional Court dealing with EU law remains quite limited. Two cases stand out: the decision on the domestic implementation of the Race Directive and the decision on the Constitution for Europe.

The first decision, which was handed down on 18 October 2005,²⁰ concerned the Slovak implementation of Council Directive 2000/43/EC of 29 June 2000 on the principle of equal treatment of persons irrespective of racial or ethnic origin.²¹ Art. 5 of the Directive allows for positive action by “[...] maintaining or adopting specific measures to prevent or compensate for disadvantages linked to racial or ethnic origin.” This provision was transposed almost verbatim into Art. 8(8) of Slovakia’s Act implementing the Directive,²² having been inserted into the original government proposal by the Slovak Parliament (National Council). The government then challenged the Act before the SCC, arguing that the inserted positive action provision was in violation of Art. 12 SC (equality) and Art. 1 SC (rule of law).

The SCC annulled Art. 8(8) of the Anti-Discrimination Law for two reasons: firstly, it held that the statutory provision to apply affirmative measures, as provided by the law, is too broad, and thus in conflict with the general maxim that any deviation from the principle of non-discrimination should be narrowly drafted. Second, the SCC opined that the Slovak Constitution bans any positive action save those expressly enumerated by the Constitution itself. However, in justifying its opinion, the SCC proved that it largely misses the current European debates in the area of anti-discrimination. The SCC was for instance unable to distinguish between the concepts of formal and substantive equality.²³ Furthermore, the case was perhaps the first example when the SCC tried to use case law of the Court of Justice in order to further justify its reasoning. However, the way the SCC did so appears questionable. The SCC referred to two cases which – in the Court’s opinion – supported its thesis that any derogation from the principle of non-discrimination must be narrowly tailored. However, neither of the cases cited deal with the issue of positive action (both cases related to the right of women to serve in armed forces);²⁴ additionally, in respect of

¹⁹ *Lisbon II*, para. 111.

²⁰ Judgment of the SCC of 18 October 2005, Pl. ÚS 8/04-202, available at <http://www.concourt.sk>.

²¹ OJ [2000] L 180/22.

²² Zákon č. 365/2004 Z.z. o rovnakom zaobchádzaní v niektorých oblastiach a o ochrane pred diskrimináciou a o zmene a doplnení niektorých zákonov (antidiskriminačný zákon).

²³ Pl. ÚS 8/04-202, para. 16.

²⁴ Case C-222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651 and case C-285/98 *Tanja Kreil v. Bundesrepublik Deutschland* [2000] ECR I-69.

one of the cases quoted, the SCC refers to paragraph 43 of the Court of Justice's decision – despite the fact that the case does not include so many paragraphs.²⁵

The second decision of the SCC concerning EU law related to the way in which the Treaty Establishing the Constitution for Europe was supposed to be ratified in the Slovak Republic. After the Constitutional Treaty had been approved by the Slovak Parliament on 11 May 2005, thirteen Slovak citizens and members of the Slovak Conservative Institute submitted a constitutional complaint against the decision of the legislature. Their main claim was that their basic right to participate in the administration of public affairs within the meaning of Article 30(1) SC would be violated if the Parliament were to decide that no referendum will be held on the Treaty.

The SCC announced its decision on 27 February 2008.²⁶ The fact that the SCC actually decided on the merits of the complaint was rather surprising, because following the failed referenda in the Netherlands and France, the question as to how the Constitutional Treaty was to be domestically ratified became purely academic. The reasoning of the SCC limited itself to two points. Firstly, the SCC observed that even if the Constitution for Europe was to be ratified, the European Union would not become a “*Staatenbund*” [štátny zväzok], for the entry into which a referendum would be mandatory under the Slovak Constitution. Secondly, the Constitution for Europe also incorporates the Charter of Fundamental rights; however, the Slovak Constitution (Art. 93(3) SC) expressly excludes holding referenda on fundamental rights and other specified issues, which could occasion the rise of “populist” referenda. In sum, the SCC therefore concluded that the Slovak Parliament did not err in its interpretation of constitutional law if it did not submit the Treaty Establishing the Constitution for Europe to nation-wide referendum.

As the above cases make clear, the Slovak constitutional case law relating to Europe is rather meagre. On the other hand, the Czech cases are quite numerous. This richness of cases, however, brings about certain internal inconsistencies.²⁷ To explain the differences in approach is difficult. Three tentative reasons for the difference could be offered:²⁸ Firstly, as outlined above, the Slovak constitutional amendments relating to Europe are much more detailed, thus perhaps necessitating less litigation with respect to the constitutional position before the constitutional court. Secondly, EU law makes only a very timid appearance before the Slovak courts generally, thus also indirectly influencing the docket before the SCC. Thirdly, a particular feature of constitutional litigation on Europe is its political dimension; in this respect, the greater amount of abstract constitutional review cases before the CCC mirrors the challenges to the EU law made by Czech political players and the President of the Republic. On the other hand, it would appear that the Slovak political forces do not strive for a similarly confrontational course, thus having no need to bring the cases before the SCC.

²⁵ The SCC referred to paragraph 42 in *Tanja Kreil*. The decision is, however, composed of only 33 paragraphs.

²⁶ II. ÚS 171/05, accessible (in Slovak only) at www.concourt.sk.

²⁷ Critically see Komárek (2008a) 361 and 362.

²⁸ Other comparisons on the domestic application of EU law in, on the one hand, the Czech Republic and, on the other, Slovakia, are offered in the chapters on these two countries co-authored by Michal Bobek and Zdeněk Kühn published in Lazowski (2010).

3) Constitutional Courts and Preliminary Rulings

There are two aspects to this issue: firstly, whether the CCC or SCC would constitute a “court or tribunal” within the meaning of Art. 267 TFEU [ex Art. 234 EC] and, secondly, whether or not the constitutional courts may function as “enforcers” of the duty incumbent on the courts of last instance to make an Article 267(3) TFEU reference to the Court of Justice.

As far as the first question is concerned, neither the CCC nor the SCC have so far actually submitted any request for a preliminary ruling to Luxembourg.²⁹ However, the SCC appears to have accepted that it is not only a court within the meaning of Article 267 TFEU, but also that it would be a court of last instance with a duty to refer. In the already mentioned decision of 18 October 2005,³⁰ the SCC reviewed the national law which implemented the EC Race Directive. In the course of this litigation, the Slovak Parliament suggested to the court to submit a request for a preliminary ruling on the proper interpretation of the relevant provisions of the Race Directive. The SCC refused, as far as the particular case in question was concerned.³¹ However, it generally accepted that it is a court for the purposes of Article 267(3) TFEU.

The position of the CCC remains unsettled, at least formally. In the already mentioned “*Sugar Quota III*” decision, the CCC expressly reserved this issue: “*The Constitutional Court is aware of the delicacy of the question as to whether the Constitutional Court can be considered a court in the sense of Article 234 of the EC Treaty, or in which type of proceedings, and reserves to itself in the future the possibility of adopting an unequivocal answer, in other words, to refer a matter for the adjudication to the ECJ in individual types of proceedings.*”³²

There are, however, some indications that the court might eventually come to the same conclusion as its Slovak counterpart. In a number of applications for a preliminary ruling already submitted to the court in the proceedings on constitutional complaints, the court rejected the applications not because it would have no power to submit, i.e. it would not consider itself to be a court or tribunal within the meaning of Article 267 TFEU, but because it held that the requests were unfounded. One could argue that one does not need to assess the merits of an application (i.e. whether there are genuine grounds for making a reference) if one were incompetent to do so (i.e. if the court would consider itself not to have the power to refer). So far, however, it must be stated that an explicit recognition is lacking.³³

The CCC and the SCC have also declared themselves ready to function as *de facto* enforcers of the last instance ordinary courts duty to submit a request for a preliminary ruling, similar to the approach elaborated in the case law of the German Federal Constitutional Court and the Austrian Federal Constitutional Court.³⁴

²⁹ On the experience with preliminary rulings in the Czech Republic and Slovakia, see Bobek (2008a).

³⁰ Above, n. 20.

³¹ Order of 12 May 2005, PL ÚS 8/04-196, www.concourt.sk.

³² Above, n. 4.

³³ However, this fact has already been recognised by some of the justices of the court writing extra-judicially – see, e.g. Mucha (2004) 166 – 168.

³⁴ Further on this line of case law, see e.g. Solar (2004). For a concise overview, see e.g. Naômé (2007) 46 – 52.

In two parallel decision adopted in the summer of 2008,³⁵ the CCC declared itself ready to supervise the duty of last instance Czech courts to refer, without, however, annulling the attacked decisions. In January 2009, the abstract possibility was turned into practice and the CCC annulled a decision of the Supreme Administrative Court for the violation of the applicant's right to the lawful judge, which consisted in not referring a question for a preliminary ruling to the Court of Justice.³⁶

By its order of 29 May 2007,³⁷ the SCC has, similarly to the CCC, showed itself ready to enforce the duty of the courts of last instance to refer requests for preliminary rulings via the right to the lawful judge. In its decision, the SCC generally admitted that a refusal to make a reference under Art. 267(3) TFEU could amount to the breach of the right to lawful judge and of the right to fair trial. The same readiness to enforce the duty of last instance courts to submit was in general terms confirmed in a later decision of 3 July 2008.³⁸ The case was brought as a constitutional complaint against a decision of an appellate court, which was believed to be the court of last instance in the particular case, as no revision on merits to the Supreme Court was possible. The SCC, however, dismissed the application. In its point of view, the appellants did not exhaust all the remedies open to them, in particular they did not petition the Supreme Court for an extraordinary revision on the grounds of incorrectly composed court, i.e. a violation of the right to the lawful judge and the right to fair trial.

This rejection stirred doctrinal debate between R. Procházka, former Slovak Agent before the Court of Justice³⁹ and the representing attorney in the case, and J. Mazák, the Slovak Advocate General at the Court of Justice,⁴⁰ on the proper interpretation of the ground of extraordinary revision before the Supreme Court in Slovak civil procedure. The debate was later resolved by a legislative intervention, which provided for a new special revision ground in civil procedure in cases in which “*the appellate court was deciding on the submission of a request for a preliminary ruling to the Court of Justice*”,⁴¹ thus expressly providing for the approach implied by the SCC in its second decision. The overall motivation underlying the approach of the SCC and later reflected in the legislative change to the Slovak Civil Procedure is clear: the SCC did not wish to become the direct “appellate court” in EC law matters for all instances. In the new procedural settings initiated by the second decision of the SCC, it will be the job of the Supreme Court to supervise the duty of functionally last instance courts, which may be first instance as well as appellate courts, to submit preliminary rulings to Luxembourg. The SCC will only retain the exclusive control of the Supreme Court itself.

³⁵ Order of 30 June 2008, IV. ÚS 154/08. The same result but with different reasoning was reached in the order of 24 July 2008, III. ÚS 2738/07, both accessible online at <http://nalus.usoud.cz>. For a case note of these decisions, see Komárek (2008b).

³⁶ Judgment of 8 January 2009, II. ÚS 1009/08, accessible online in English at <http://www.usoud.cz/file/2341>.

³⁷ Order of 29 May 2007, III. ÚS 151/07, www.concourt.sk.

³⁸ Order of 3 July 2008, IV. ÚS 206/08, www.concourt.sk.

⁴⁵ Procházka (2008).

⁴⁰ Mazák (2009).

⁴¹ New Art. 239(1)(b) of the Code of Civil Justice.

4) *Review of National Law on its Compatibility with European Union Law*

European Union law became soon after the Czech and Slovak accessions a yardstick for the review of national laws as to their compatibility with European Union law. The first “forerunners” were specialised administrative agencies, such as the Office for the Protection of Competition, which as the first ones set aside national laws incompatible with EU law.⁴²

The ordinary courts (i.e. civil, criminal and administrative) soon joined in. There have already been instances in which the courts dissapplied national law because of its collision with European Union law.⁴³ However, in the practice of the Czech or Slovak courts, there is a clear preference for solving potential conflicts between EU law and the national law by consistent interpretation. A prime example of such direct conflict avoidance could be the already above described constitutional case of the European Arrest Warrant: albeit the Czech Constitution is, as far as the extradition of its own nationals is concerned, worded similar to the Polish or German one, the CCC has preferred to considerably shift the meaning of the Constitution than to recognize a conflict between the Framework Decision and the national Constitution.⁴⁴

Czech and Slovak ordinary courts thus started functioning, slowly but clearly, as Community courts and to review national laws on their compatibility with EU law. An intriguing issue as far as the review of national law with EU law is concerned is posed by the national constitutional law. The question is whether national constitutional rules can serve as a yardstick for the review of national measures implementing EU law.⁴⁵ The question could be subdivided into two specific issues: competence issue and the issue of the yardstick for substantive review.

The competence issue is related to the procedure for the abstract review on constitutionality. Under the Czech and Slovak constitutional systems, as in many other legal systems of the Member States, the courts have the power to refer the issue of constitutionality of laws to the assessment of the constitutional courts. After the accession, a second avenue of some sort of abstract review of laws has been opened in the form of the preliminary ruling procedure, which, in turn, deals with the compatibility of Community law and national law. The question which emerged was as to the relationship of these two procedures.

⁴² Further see Bobek (2008b).

⁴³ For instance judgment of the Regional Court in Ústí nad Labem of 19 July 2007, case no. 15 Ca 184/2006, published as no. 1359/2007 Coll. SAC, or judgment of the Regional Court in Prague of 26 February 2006, case no. 36 C 115/2004, unpublished.

⁴⁴ Another example of this sort would be the Czech cases relating to the Slovak Roma asylum seekers - judgment of the SAC of 19 July 2006, case no. 3 Azs 259/2005, no. 977/2006 Coll. SAC. The cases are in detail described in Bobek (2008b).

⁴⁵ No Czech or Slovak court has, to our knowledge, ever claimed that national constitutional law could serve as a yardstick for the review of primary or secondary EU law, thus calling into question the Court of Justice’s dictum in Case 314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

The answer came in a case involving so-called “golden shares”, which was decided by the CCC in February 2006.⁴⁶ In this case, a request for review of constitutionality was made in September 2004 by the Regional Court in Hradec Králové [*Krajský soud v Hradci Králové*], alleging that national law providing for the possibility of the existence of “golden shares” was incompatible with, firstly, the principle of equality of property, enshrined in Article 11 of the Charter of Fundamental Freedoms of the Czech Republic, and, secondly with EC law, in particular with Article 42 of the Council Directive establishing the equality of share holders.⁴⁷

The CCC rejected the application for procedural reasons; it added, however, a significant *obiter dictum*, in which it observed that as far as the alleged incompatibility of the Czech law with EU law is concerned, it is not for the CCC to decide on the matter, but, following the Czech accession to the European Union, it is for the respective national court, if necessary in cooperation with the ECJ by requesting a preliminary ruling, to adjudicate on the (in)compatibility of Czech law with EU law.

The message the CCC sent to the courts of general jurisdiction was clear: matters of Community law are not to be submitted to us, but to Luxembourg. The CCC thus upheld the “decentralised” review of compatibility of national law with EU law, stating it to be matter for the ordinary courts acting alone, if necessary by disapplying national laws.⁴⁸

This clear message was, however, later somewhat eroded by another decision of the CCC, which concerned *Medicinal Products for Human Use*.⁴⁹ The already mentioned case was brought as an abstract constitutional review initiated by a group of senators. They demanded the CCC to quash the national regulation on the prices of medicinal products for human use because of the alleged conflict between the national law and the corresponding EU directive.⁵⁰ In January 2007 the CCC, providing only little argument in this respect, rejected the thesis that EU law forms part of the Czech constitutional order. The CCC also stated, however, that the conflict between EU law and the national law, no matter how clear, cannot establish unconstitutionality of the national law. It can only provide an important

⁴⁶ Plenary order of 21 February 2006, Pl. ÚS 19/04, published in *Soudní rozhledy*, 2006, no. 5, pp. 173 – 177.

⁴⁷ Second Council Directive 77/91/EEC of 13 Dec. 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent O. J. 1977, L 26/1.

⁴⁸ This approach was confirmed by a recent plenary order of the CCC of 2 December 2008, n.y.r., accessible online at www.usoud.cz (in Czech only). The CCC rejected a submission made by the Municipal Court in Prague arguing that a Czech Law on Telecommunication was incompatible firstly with EU directives and, secondly, with the Czech Constitution. The CCC noted that the Municipal Court should first decide, on its own, on the compatibility of the national implementing law with EU law.

⁴⁹ Judgment of 16 January 2007, case no. Pl. ÚS 36/05 (“*Medicinal Products for Human Use Case*”), no. 57/2007 Coll., no English translation available.

⁵⁰ Council Directive 89/105/EEC of 21 December 1988 relating to the transparency of measures regulating the prices of medicinal products for human use and their inclusion in the scope of national health insurance systems, OJ 1989 L 40/8.

supportive argument to conclude that the law is in conflict with the national constitution,⁵¹ typically much broader constitutional rights such as fair trial, equality etc.

The approach chosen by the CCC invited criticism. One of the authors of this chapter noted that, although the conclusion of the CCC can be accepted, the role of EU law in the *Medicinal Products for Human Use Case* was far from inspirational.⁵² The case, which was in substantive terms a direct conflict between EU law and national law, was rephrased as a conflict between a national law and a very vague provision for effective legal protection provided for in the Czech Charter of Basic Rights and Fundamental Freedoms. On the other hand, it was also quite clear why the CCC framed the conflict in this way and not openly as a conflict between EU law and the national measures. If the CCC were to openly acknowledge that it has the power to strike down incorrect national implementing measures, it would firstly invite a number of applications of this sort and, secondly, it would itself become *de facto* bound the EU law and the case law of the Court of Justice. On the other hand, stating that the CCC is only competent to review compatibility of Czech laws with the national constitution gives the CCC much more liberty, but at the same time, it makes cases of a similar sort unpredictable. Whether or not the CCC will, in the individual case brought before it, allow EU law to “substantively define” the rights guaranteed by the Czech Constitution is entirely dependent on the CCC’s discretion.

The CCC thus appears to be torn between centralizing and decentralizing the review of the compatibility of national law with EU law. On the one hand, when faced with constitutional submissions from the ordinary courts, the CCC took a “hands-off” approach, inviting the courts, in line with the *Simmenthal* line of case law,⁵³ to act independently and to assess the compatibility of EU with national law on their own motion. On the other hand, in direct actions on abstract review of constitutionality, the CCC rejected, *prima facie*, substantive review of national implementing measures on their compatibility with EU law. As far as the substance is concerned, the CCC annulled national implementing measures incompatible with EU law, stating, however, that the annulment was due to their incompatibility with national constitution, the content of the constitutional right was, however defined by extensive reference to EU law and case law. However, to be fair, the different views were taken within different procedural framework: the former one in cases of judicial submissions, the other one in direct actions.

The SCC has so far not addressed these issues in its case law; it would however appear that it will soon be called to do so. In a case currently pending before the SCC,⁵⁴ the Attorney General of the Slovak Republic launched an abstract review of some provisions of the Slovak Labour Code on its compatibility with, firstly, EU law prohibition on the discrimination of part-time workers⁵⁵ and, secondly, on the prohibition of discrimination provided for in Art. 36(b) of the Slovak Constitution. The decision is pending; it is clear,

⁵¹ *Medicinal Products for Human Use Case*, para. 35.

⁵² See Bobek (2007a).

⁵³ See Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA*, [1978] ECR 629.

⁵⁴ Petition of the Attorney General of 18 February 2009, application number RVP 260/09.

⁵⁵ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC, O.J. of L 14/9 of 20 January 1998.

however, that the SCC will have to position itself with respect to the potential review of national measures implementing EU law.

B. Law of the European Convention on Human Rights

1) The ECHR and Domestic Sources of Law

The Czech and Slovak Federal Republic ratified the ECHR including its Protocols on 18 March 1992. Both newly emerged states, the Czech Republic and Slovakia, acceded to the ECHR on 30 June 1993 and are bound by the ECHR retroactively from 18 March 1992, the date of the accession of the Federal Republic. Both countries have ratified all the substantive Protocols to the ECHR with one exception. Both the Czech Republic and Slovakia signed Protocol No. 12 (general prohibition of discrimination) but neither of them ratified it. Therefore, we may conclude that the legal basis for application of the ECHR has been the same for both countries.⁵⁶

Examining the domestic application of the ECHR in both countries two common themes emerge. First, both the Czech Republic and Slovakia have initially inserted the special category of “international human rights treaties” into their constitutions and this decision has haunted them ever since. Second, although the so-called “Euro”-amendments (see Part A above) have been adopted in both countries primarily for reasons related to the expected accession to the European Union, these amendments have also had profound impact on the status of the ECHR.

The (Czechoslovak) Federal Charter of Fundamental Rights and Freedoms (Federal Charter),⁵⁷ adopted in January 1991, stipulated that “[i]nternational treaties on human rights [...] ratified and promulgated by the [Federal Republic] are [...] generally binding and have priority over statutes” (Art. 2). The Federal Charter thus singled-out a specific category of international treaties (“international human rights treaties”) and gave them application priority.⁵⁸ This solution, albeit a pragmatic one, created a lot of potential problems in practical application of this provision. Given the short existence of the Czechoslovak Federation after 1989, the Federal Constitutional Court, which was active for just a little less than one year, has not had opportunity to clarify the concept of the “international human rights treaties”.

After the dissolution of the Federal Republic, both the Czech and the Slovak constitutions introduced provisions similar to Art. 2 of the Federal Charter. The Czech Constitution⁵⁹ reproduced the abovementioned provision of the Federal Charter almost verbatim and provided that “[r]atified and promulgated international treaties on human rights [...], by

⁵⁶ On the position of the ECHR in both states in general, see chapters of M. Blaško (on Slovakia) and M. Hoffmanová and D. Jílek (on the Czech Republic) in Blackburn and Polakiewicz (2001) pp. 241-258 (the Czech Republic) and pp. 755-780 (Slovakia). On Slovakia, see also M. Krzyzanowska-Mierzewska, The Reception Process in Poland and Slovakia. In Stone-Sweet and Keller (2008) 531-602.

⁵⁷ Constitutional Act No. 23/1991 Coll. of 9 January 1991.

⁵⁸ The application priority of international treaties means that the international human rights treaties were supposed to be applied instead of statutes but were not granted a higher legal force.

⁵⁹ Constitutional Act No. 1/1993 Coll. of 16 December 1992.

which the Czech Republic is bound, are immediately binding and have priority over statutes” (Art. 10 CC). Art. 10 CC should be read in conjunction with Art. 87(1)(a) CC (before the “Euro”-Amendment) which stipulated that “[the CCC] has jurisdiction ... to annul statutes or individual provisions thereof if they are in conflicts with the constitutional act or international treaty under Art. 10” (emphasis added).

Art. 87(1)(a) CC thus made clear that international human rights treaties (including the ECHR) enjoyed higher legal force than statutes and the CCC could annul statutes *solely* for their lack of conformity with such a treaty. This provision also suggested that if ordinary courts find that a statute violates an international human rights treaty, they should not apply the treaty by themselves, but they should refer this issue to the CCC under the concrete review of constitutionality.⁶⁰ However, the Constitution did not address whether these treaties have the same legal force as the Constitution, i.e. whether they belong to the “constitutional order”. Not surprisingly, the CCC carefully avoided expressing its view on this issue.⁶¹

The Slovak Constitution⁶² stipulated in Art. 11 SC that “[i]nternational treaties on human rights [...] [ratified and promulgated by the Slovak Republic] have priority over statutes, insofar as [these treaties] provide for greater protection of basic rights...” (emphasis added). Therefore, it retained a specific category of “international human rights treaties”, but it also developed a concept of “conditionally prioritized treaties”.⁶³ It means that the ECHR is applicable instead of the statute if and only if the ECHR provides for greater protection of basic rights. This “conditionality” criterion raised a heated academic debate,⁶⁴ but we can summarize the status of the ECHR in Slovakia before the “Euro”-amendment as follows.

First, the ECHR was not considered a part of the “constitutional order”. It stood “merely” in between the Constitution and the statutory law.⁶⁵ Second, the Slovak Constitution (in contrast to the Czech constitution) did not contain obligation of the ordinary courts to refer a clash between an applicable statute and the ECHR to the SCC under the concrete review of constitutionality. Third, the constitutional complaints (*ústavné sťažnosti*⁶⁶) based *solely* on the ECHR were dismissed by the SCC for a lack of jurisdiction of the SCC since Art. 127 SC (before “Euro”-amendment) did not include the ECHR among reference norms for the CCC

⁶⁰ On the concrete review of constitutionality before the CCC, see Kosař (2008a).

⁶¹ See Wagnerová (2006) 117. Legal academia was, not surprisingly, divided on this issue; see e.g. Hoffmanová and Jílek in Blackburn and Polakiewicz (2001) 250-251.

⁶² Constitutional Act No. 460/1992 Coll. of 1 September 1992.

⁶³ Poláková (2006) 168. See also Blaško in Blackburn and Polakiewicz (2001) 760; and Drgonec (2007) 1148-1150.

⁶⁴ See *ibid.*; Repík (1996) 372-373; and Procházka (2002) 215-219.

⁶⁵ See Decision of the SCC of 16 December 1999, II. ÚS 91/99, available at <http://www.concourt.sk>; see also below, n. 80-81.

⁶⁶ On the distinction between the two types of constitutional complaint (*ústavná sťažnosť* under Art. 127 and *podnet* under Art. 130(3) of the Slovak Constitution) in Slovakia, see Krzyzanowska-Mierzewska in Stone-Sweet and Keller (2008) 559-560.

in the individual constitutional complaints procedure.⁶⁷ Therefore, the ECHR could have been invoked by individuals before the SCC *only* in conjunction with a provision in the Slovak Constitution.⁶⁸ Fourth, the SCC “relaxed” the impact of the abovementioned “conditionality” of precedence of international human rights treaties stipulated in Art. 11 SC and held that the Slovak Constitution should be interpreted in light of these treaties⁶⁹ and that the ECHR and ECtHR’s case law operate as an interpretative guideline of the Slovak Constitution.⁷⁰

The “Euro”-amendments adopted in both countries have influenced the status of the ECHR. The Czech “Euro”-amendment was more sweeping since it completely abolished the specific category of “international human rights treaties” and replaced old Art. 10 CC with the following wording: „*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something else than the statute, the international treaty shall apply*“ (emphasis added). In addition to amending Art. 10 CC, the reference to international treaties in Art. 87(1)(a) CC was deleted. Its revised wording reads as follows: “[The CCC] *has jurisdiction ... to annul statutes or individual provisions thereof if they are in conflicts with the constitutional order*”. This was supposed to mean that the Art. 10 CC treaties are no longer reference norms for the Constitutional Court.⁷¹

The Czech “Euro”-amendment thus established a general clause that gave priority to all international treaties, provided that they fulfil the criteria mentioned in Art. 10 CC. As a result, the “international human rights treaties” was supposed to cease to exist as a separate category of international treaties. Furthermore, it clarified the issue of whether the ECHR belongs to the constitutional order. It clearly said no, *all* international treaties under Art. 10 CC, including international human rights treaties, enjoy “only” the application priority. Finally, it made clear that the CCC no longer has the power to review the conformity of statutes with the international human rights treaties. It became the task of ordinary courts to apply the international treaties instead of the statute if conditions under Art. 10 CC were met.

However, the CCC completely reinterpreted this part of the “Euro”-amendment. In a landmark Judgment of 25 June 2002 (Pl. ÚS 36/01), the CCC held that “[t]he *inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the [CCC], that no amendment to the Constitution can be*

⁶⁷ Decision of the SCC of 16 December 1999, II. ÚS 91/99, available at <http://www.concourt.sk>. Cf. Art. 87(1)(a) of the Czech Constitution discussed above.

⁶⁸ For further details, see Procházka (2002) 215.

⁶⁹ See e.g. Judgment of the SCC of 18 May 1994, Pl. ÚS 5/93, available at <http://www.concourt.sk>.

⁷⁰ See e.g. Judgment of the SCC of 19 December 2001 (I. ÚS 49/01) or Judgment of the SCC of 20 December 2001 (I. ÚS 3/01), both available at <http://www.concourt.sk>. See Procházka (2002) 216-217 for further examples.

⁷¹ This conclusion is firmly supported by the debates on the “Euro”-amendment in the Czech Parliament. The original proposal of “Euro”-amendment included the international human rights treaties among the reference norms for the Constitutional Court (but even in this proposal, the international human rights treaties were not given a constitutional status), but this provision was subsequently revised and reference to the international human rights treaties was omitted.

interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms” (emphasis added). Therefore, the CCC concluded that the international human rights treaties have *retained* their constitutional status.⁷² However, what happened in fact was that the CCC ‘constitutionalized’ the international human rights treaties, including the ECHR. Furthermore, the CCC held that the ordinary courts still must refer a clash between an applicable statute and the ECHR to the CCC under the concrete review of constitutionality. This judgment of the CCC was met not only with fierce criticism from the legal academy⁷³ and the Czech Agent before the ECtHR,⁷⁴ but also with occasional resistance from ordinary courts.⁷⁵ But despite this criticism the CCC has repeatedly upheld its position,⁷⁶ and thus the ECHR enjoys a higher position in the national hierarchy of sources than envisaged by the text of the Czech Constitution.

In practice, the CCC re-read the specific category of the “international human rights treaties” into Art. 10 CC and treats Art. 87(1)(a) CC as if its wording had not changed. There are two possible motivations for this move of the CCC: (1) “power-aggrandizing” rationale; and (2) “deep-distrust-of-ordinary-courts” rationale. Under the first rationale, the CCC *had to* accord constitutional status (i.e. to stipulate that these treaties are part of the constitutional order) to the international human rights treaties since otherwise it would not have jurisdiction under the revised Art. 87 CC to ascertain the conformity of domestic law to these treaties. The CCC obviously did not want to lose this power since the Czech Charter of Fundamental Rights and Freedoms does *not* contain all the rights that are enshrined in the ECHR and other international human rights treaties. Under the second rationale, the CCC simply did not trust the ordinary courts in their application of, among others, the ECHR and did not want to lose a grip upon them.⁷⁷

The Slovak “Euro”-amendment chose a different path. It created two categories of international treaties and, at the same time, retained the special category of the international human rights treaties. The former Art. 11 SC was deleted and replaced by Art. 7(5) SC and Art. 154c SC. The new Article 154c(1) SC provides that “[i]nternational treaties on human rights [...] that were ratified by the Slovak Republic and promulgated in a manner laid down by law before this constitutional law comes into effect are a part of its legal order and have primacy over the law, if that they provide greater scope of constitutional rights and freedoms” (emphasis added). This provision is applicable, among others, to the ECHR and, therefore, the status of the ECHR in the Slovak legal system has not been affected by the “Euro”-amendment.⁷⁸

⁷² Note that, in fact, the international human rights treaties had *never* had the constitutional status before. See Wagnerova (2006) 117; and Schorm (2004) 74-75.

⁷³ See e.g. Filip (2002) 12; Kühn and Kysela (2002) 199-214. For an opposing view, see Malenovský (2002) 917-932.

⁷⁴ See Schorm (2004) 68-79.

⁷⁵ See below in Part B. 4.

⁷⁶ See e.g. Judgment of the CCC of 15 April 2003, I. ÚS 752/02, available in English at <http://www.usoud.cz/file/2229> [last accessed 15 December 2009].

⁷⁷ Vice-President of the CCC (Wagnerova, (2006) 121) and the Czech Agent before the ECtHR (Schorm (2006) 74-75) seem to concur to this conclusion.

⁷⁸ For further details, see Drgonec (2007) 1148-1150.

However, the new Art. 7(5) SC also addresses the position of international human rights treaties. It stipulates that “[i]nternational treaties on human rights [...], *international treaties whose executions does not require a law and international treaties which directly establish rights or obligations of natural persons or legal persons and which were ratified and promulgated in a manner laid down by law shall have primacy over the laws*” (emphasis added). As a result of this dichotomy, the status of an international human rights treaty depends on the date of its ratification and, consequently, each category of such treaties has a different status in the Slovak legal order.⁷⁹

As to the ECHR, the SCC held that it enjoys precedence over statutes, but not over the Slovak Constitution.⁸⁰ This is also a dominant view in academic circles.⁸¹ However, the “Euro”-amendment also revised Art. 127 SC, which now allows the individuals to lodge a constitutional complaint (*ústavná sťažnosť*) based not only on the alleged violations of their basic rights guaranteed by the Slovak Constitution, but also on “*the violations of their basic rights guaranteed an international treaty ratified by the Slovak Republic and promulgated in a manner laid down by law*”. As a result, the individual constitutional complaints based *solely* on the ECHR can no longer be dismissed by the SCC for a lack of jurisdiction of the SCC. Put differently, complainants before the SCC can invoke the ECHR separately without the necessary link to a provision in the Slovak Constitution.⁸²

2) The Effects of ECtHR’s decisions in the National Legal Systems

Both countries enacted procedures for reopening domestic cases after a judgment of the ECtHR. However, the scope and procedural aspects of these procedures differ significantly. While Slovakia allows for reopening of both criminal and civil cases,⁸³ only criminal cases can be reopened in the Czech Republic.⁸⁴ The power to reopen a procedure subsequent to a decision of the ECtHR is vested in the ordinary courts in Slovakia,⁸⁵ whereas the Czech Republic opted for a special procedure before the Constitutional Court.⁸⁶

As to the effects of the judgments of the ECtHR, they are not conceived of as sources of law in the Czech Republic and Slovakia. Despite this fact, both the Czech and the Slovak courts seem to accept that the judgments of the ECtHR are binding for national courts in the *same* case.⁸⁷ However, the Slovak ordinary courts sometimes fight back even in these cases and

⁷⁹ Krzyzanowska-Mierzewska in Stone-Sweet and Keller (2008) 541; see also Poláková (2006) 165-166. For further consequences of this dichotomy, see Drgonec (2007) 134-135.

⁸⁰ See Decision of the SCC of 16 December 1999, II. ÚS 91/99, available at <http://www.concourt.sk>. For further details, see Drgonec (2007) 130-131.

⁸¹ Repík (1996) 371-372; and Procházka (2002) 217. For the opposing view, see e.g. Poláková (2006) 173.

⁸² Procházka (2002) 215-216.

⁸³ For further details, see Krzyzanowska-Mierzewska in Stone-Sweet and Keller (2008) 582-583; or Pirošíková (2005) 1188-1198.

⁸⁴ For further details, see Malenovský (2004) 953-972; or Wagnerová (2007) 538 and ff.

⁸⁵ See Art. 394(4) of the Code of Criminal Procedure; and Art. 228(1)(d) of the Code of Civil Procedure.

⁸⁶ See Arts. 119-119b of Act No. 182/1993 Coll., on the Constitutional Court. This procedure is, however, very rarely used in practice, as these provisions are very restrictive.

⁸⁷ See e.g. Decision of the CCC of 26 February 2004, II. ÚS 604/02.

refuse to revise its previous position subsequent to the judgment of the ECtHR.⁸⁸ To answer the question of whether and to what extent judges feel bound by ECtHR's decisions that are addressed to *other* states is more difficult. The Czech and Slovak courts sometimes simply utter that these judgments are binding only *inter partes* and fail to address them properly.⁸⁹ In other cases, this question does not arise and the courts apply the Strasbourg case law without discussing its effect. In sum, the Czech and Slovak courts show a significant willingness to use also ECtHR's decisions addressed to other states, but they avoid any sophisticated elaboration on the degree to which they feel bound by them.⁹⁰

Finally, as to the impact of the Strasbourg jurisprudence on national legislation, we are not aware of any *constitutional* amendment or divergence among national judges caused by the case law of the ECtHR. Both states amend the *statutory* law subsequent to a decision of the ECtHR, if necessary,⁹¹ but these amendments react always to decisions taken by the ECtHR against them and not against the third contracting state to the ECHR.

3) *The ECHR before the Constitutional Courts*

Both the CCC and SCC have been considered champions in the application of the ECHR in their countries as both rely heavily on the ECtHR case law when interpreting their constitutions.⁹² They quote the Strasbourg jurisprudence on a regular basis and in an extensive manner. This trend is not surprising since the catalogues of human rights adopted in both countries were to a significant degree influenced by the ECHR. In fact, several definitions of human rights in the Czech Charter of Fundamental Rights and in the Slovak Constitution mirror almost word by word their equivalents in the ECHR.⁹³ Another motivation for the "pro-ECHR" stance of the SCC has been suggested by Procházka, who claimed that the ECHR served as a "shield" for Justices of the SCC against disagreeing politicians since it is more difficult for politicians to attack the reasoning based upon the ECHR.⁹⁴

In general, case law of both constitutional courts has been very "ECHR-friendly".⁹⁵ For instance, the SCC held that "*all public authorities of the Slovak Republic must respect and promote, in their decision-making or other activities, protection of human rights [...] regulated by international law*"⁹⁶ and that the ECHR and ECtHR case law operate as an interpretative

⁸⁸ See e.g. Decision of the SSC of 13 June 2007 (no. 3 Tz 22/2005), where the SSC refused to follow reasoning of the ECtHR in *Klein v. Slovakia* (judgment of 31 October 2006, Appl. no. 72208/01).

⁸⁹ See e.g. Decision of the CSC of 26 August 2003 (no. 25 Cdo 789/2003), <http://www.nsoud.cz/>.

⁹⁰ This practice has been criticized by Zdeněk Kühn. See Kühn (2005) 1-7.

⁹¹ See e.g. Krzyzanowska-Mierzewska in Stone-Sweet and Keller (2008) 579-580.

⁹² For a more detailed account of the specific cases see the literature referred to in note 56 and the relevant law journals in both countries.

⁹³ See Čiř (2002) 239 (on Slovakia); and Kosař (2008a) 349 (on the Czech Republic).

⁹⁴ Procházka (2002) 218.

⁹⁵ For this reason, we could not trace any opposition to the more activist approach shown recently by the ECtHR. Both constitutional courts seem to be "touchy" only if the ECtHR criticizes *their* practice. See e.g. reaction of the CCC to the ECtHR's ruling in *Krčmář and Others v. the Czech Republic* (judgment of 3 March 2000, Appl. no. 35376/97), described in Malenovský (2001) 1241-1242.

⁹⁶ Judgment of the SCC of 22 June 1998, Pl. ÚS 14/98, available at <http://www.concourt.sk>.

guideline of the Slovak Constitution.⁹⁷ The CCC arrived to similar conclusions. Due to their “ECHR-friendly” approach, both constitutional courts also carefully avoided or brushed away any potential conflict between the Constitution and the ECHR. Instead, they tried to read the ECHR into the national constitutional orders and, if necessary, stretched the human rights provisions in their constitutions to their limits. The SCC went as far as saying that “[the ECHR and ECtHR’s case law] represent [...] binding *interpretative guidelines for interpretation and application of statutory rules on the relevant aspects of the right to a fair trial*” (emphasis added)⁹⁸ and that the Slovak Constitution cannot be interpreted so as to violate the international human rights treaty ratified by the Slovak Republic.⁹⁹ In reaction to these judgments, one Slovak commentator even lamented that the SCC deprives the Slovak Constitution of any autonomous meaning.¹⁰⁰ In the Czech Republic, any potential conflict between the ECHR on the one hand, and the Constitution or the Charter on the other, is further complicated by the fact that the ECHR enjoys a constitutional status.

In other cases, the constitutional courts quashed the decisions of the ordinary courts with the use of highly contestable conclusions based on a very expansive reading of the ECHR and ECtHR’s case law. For instance, the CCC in its Judgment of 13 July 2006 (I. ÚS 85/04¹⁰¹) literally “created” the right to monetary relief for non-pecuniary injuries (in this case the injury at stake was an unlawful deprivation of liberty).¹⁰² This is not an uncommon move for a European constitutional court.¹⁰³ However, the CCC did not rely on the Czech Charter of Fundamental Rights at all. Instead, it arrived at this conclusion *solely* on the ground of interpretation of Art. 5(5) ECHR¹⁰⁴ and argued that the notion “an enforceable right to compensation” (*droit à réparation*) in Art. 5(5) ECHR has an autonomous meaning which entails the right to compensation for both pecuniary and non-pecuniary injury. Unfortunately, the ECtHR has, to our knowledge, never held so.

The CCC has also addressed the relationship between the ECHR and other, non-human-rights, international treaties.¹⁰⁵ In Judgment of 15 April 2003 (I. ÚS 752/02) the CCC faced a conflict between the obligations stemming from the ECHR on the one hand, and the European Convention on Extradition on the other. It relied on its earlier judgment in Pl. ÚS 36/01 (cited above) and held that the ECHR must prevail as it is a human rights treaty.¹⁰⁶ In sum, the CCC again confirmed its generous “pro-ECHR stance”. However, the CCC has not had to deal with more difficult cases such as conflicts between the ECHR and the UN Security Council Resolutions. Under the logic of the CCC reasoning, the ECHR should prevail

⁹⁷ See above, n. 70.

⁹⁸ Judgment of the SCC of 19 December 2001, I. ÚS 49/01, available at <http://www.concourt.sk>.

⁹⁹ See e.g. Judgment of the SCC of 7 January 1998, II. ÚS 48/97; or Judgment of the SCC of 11 March 1999, Pl. ÚS 15/98, both available at <http://www.concourt.sk>.

¹⁰⁰ Procházka (2002) 216.

¹⁰¹ Available in English at <http://www.usoud.cz/file/2274> [last accessed 15 December 2009].

¹⁰² For a detailed discussion of this judgment, see Bobek (2006) 415-422.

¹⁰³ See e.g. a famous *Princess Soraya* case of the German Federal Constitutional Court (34 BverfGE 269, 1973). Cf. Kommers (1997) 124-128.

¹⁰⁴ And with the use of comparative argumentation “read into” Art. 5(5) ECHR.

¹⁰⁵ We are not aware of any ruling of the SCC that would explicitly address the conflict between the ECHR and the other (non-human-rights) international treaty.

¹⁰⁶ For further details, see Wagnerova (2006) 122-123.

over *any* “non-human-rights treaty” which is not only a problematic position vis-à-vis Art. 103 UN Charter, but also a more generous reading of the ECHR than by the ECtHR itself.¹⁰⁷

Where the CCC and the SCC seem to diverge is their degree of trust vis-à-vis the ordinary courts. While the SCC emphasised on several occasions that “[ordinary courts are] *primary defenders of constitutionality*”¹⁰⁸ and that “*the ordinary courts are primarily responsible for the observance of the rights and fundamental freedoms guaranteed by [...] international treaties*”,¹⁰⁹ the CCC has been far more reluctant to do so. This difference cannot be explained by more regular use of the ECHR and ECtHR’s in Slovakia. Both tentative research into the case law of ordinary courts in the Czech Republic and Slovakia (see Part B. 4 below) and statements of Slovak commentators¹¹⁰ amply reject this account.

Finally, as to derogation powers, both the SCC and the CCC now have (i.e. after the “Euro”-amendments) powers to strike down a statute solely for non-compliance with the ECHR, even if there is no equivalent provision in the Slovak Constitution or in the Czech Charter of Fundamental Rights. However, there are two differences between the Czech Republic and Slovakia. First, the ECHR has a different position in the hierarchy of sources of law. In the Czech Republic the ECHR enjoys constitutional status.¹¹¹ In Slovakia, it stands “merely” in between the Constitution and the statutory law in Slovakia.¹¹² Second, a legal basis for these derogatory powers differs as well. In Slovakia, the derogatory powers of the SCC to strike down a statute for inconsistency with the ECHR are stipulated in Art. 125(1) of the Slovak Constitution. In the Czech Republic, the derogatory powers of the CCC were “created” by the CCC itself in its landmark Judgment of 25 June 2002, Pl. ÚS 36/01 (see above Part B. 1).

Interestingly, the actual use of these derogatory powers diverges as well. The CCC has struck down several statutes for their non-conformity with the ECHR¹¹³ or with other international human rights treaties,¹¹⁴ whereas the SCC has done so, to our knowledge, only once.¹¹⁵ One would expect the opposite practice, since SCC’s derogatory powers stand on firmer grounds due to their explicit stipulation in the Slovak Constitution. Nevertheless, we are not aware of any case, where the CCC or the SCC openly overruled its earlier position

¹⁰⁷ See *Behrami v. France* (Appl. no. 71412/01), and *Saramati v. France, Germany and Norway* (Appl. no. 78166/01), admissibility decisions of the ECtHR (GC) of 2 May 2007.

¹⁰⁸ Judgment of the SCC of 21 August 2002, III. ÚS 79/02, available at <http://www.concourt.sk>.

¹⁰⁹ Decision of the SCC of 22 March 2000, I. ÚS 9/00, available at <http://www.concourt.sk>.

¹¹⁰ Blaško in Blackburn and Polakiewicz (2001) 765.

¹¹¹ See Judgment of the CCC of 25 June 2002, Pl. ÚS 36/01, discussed above.

¹¹² See Decision of the SCC of 16 December 1999, II. ÚS 91/99, available at <http://www.concourt.sk>; see also above, n. 80-81.

¹¹³ For example, the CCC struck down Art. 146(2) of the Code of Criminal Procedure *solely* for inconsistency with Art. 6(1) ECHR (Judgment of the CCC of 30 November 2004, Pl. ÚS 15/04); and Art. 241(2) of the Code of Criminal Procedure *solely* for inconsistency with Art. 5(4) ECHR (Judgment of the CCC of 22 March 2005, Pl. ÚS 45/04). See also Judgment of the CCC of 13 July 2006 (I. ÚS 85/04) cited above, where the CCC quashed the *decision* of the ordinary court *solely* for (alleged) violation of the ECHR.

¹¹⁴ See for instance Judgment of the CCC of 9 April 1997 (Pl. ÚS 31/96), where the CCC repealed Art. 171(l)(d) of the Criminal Code *solely* for inconsistency with the Convention on the Rights of the Child.

¹¹⁵ See Judgment of the SCC of 7 November 2002, Pl. ÚS 25/01, where the SCC struck down Art. 200i(4) of the Code of Civil Procedure *solely* for inconsistency with Art. 6(1) ECHR. See also Judgment of the SCC of 17 May 2006, III. ÚS 84/06, where the SCC quashed the *decision* of the ordinary court *solely* for violation of the ECHR.

due to the development in the ECtHR's case law, despite the fact that some commentators argued in this direction.¹¹⁶ Therefore, we can conclude that while both constitutional courts prefer the "ECHR-conforming" interpretation of the national human rights provisions,¹¹⁷ the CCC has taken a more activist stance since it has not been shy of repealing statutes solely for their non-conformity with international treaties.

4) *The ECHR before the Ordinary Courts*

In contrast to the constitutional courts that tend to be perceived as "good guys", the ordinary courts in the Czech Republic and Slovakia have been often portrayed as "bad guys" that apply the ECHR only reluctantly, if at all. Although this description might have been accurate in 1990s, the situation is far from being black-and-white today. At least all three "top" ordinary courts¹¹⁸ have significantly improved their performance. As to "lower" ordinary courts, we would caution against inferring any far-reaching conclusions, since the vast amount of their case law is not publicly available and no in-depth study on the use of the ECHR before the ordinary courts has been undertaken in the Czech Republic and Slovakia.¹¹⁹ For these reasons, we will focus primarily on the application of the ECHR before the abovementioned "top" ordinary courts. However, most of the general conclusions we mention are, in principle, applicable to the courts of all levels.

In general, both the Czech and the Slovak ordinary courts have three options for to handle the inconsistency of a statute with the ECHR. Firstly, they can adopt the "ECHR-conforming" interpretation of an applicable statute. Secondly, they can give the application priority to the ECHR and apply the ECHR instead of a statute, while leaving this statute as such intact.¹²⁰ Thirdly, they can refer the clash of the relevant statutory provisions with the ECHR to the respective Constitutional Court under the concrete review of constitutionality.¹²¹ The actual use of these three options in both countries varies from one judge to another. Some judges are keen on referring any problematic issue related to the ECHR to the CCC or the SCC. Some judges tend to put the ECHR-related issues under carpet hoping that their case will not eventually reach the constitutional court. In between are more sophisticated judges who distinguish between three types of situations: (1) if they

¹¹⁶ See e.g. Kosař (2008b) 482-486.

¹¹⁷ Whether they use the domestic law or the ECHR as a primary yardstick in the "ECHR-conforming" interpretation is an open question as the dividing line between the two has been blurred.

¹¹⁸ It means the Supreme Court of the Czech Republic, the Supreme Court of Slovakia and the Supreme Administrative Court of the Czech Republic. Note that there is no "Supreme Administrative Court" in Slovakia. The judicial review of administrative acts is carried out within the ordinary courts by specialized administrative chambers.

¹¹⁹ Furthermore, some decisions of the lower courts apply the ECHR and ECtHR's in a sophisticated way. See e.g. Judgment of the Regional Court in Prague of 5 June 2008, no. 36 C 8/2008 (*"Judicial Mafia I"*) on free speech.

¹²⁰ See e.g. Judgments of the SAC of 21 March 2005 (no. 2 Azs 75/2005), of 4 August 2005 (no. 2 Azs 343/2004), and of 14 June 2007 (no. 9 Azs 23/2007); all available at <http://www.nssoud.cz>. See also Decision of the CSC of 30 October 2008, no. 1 Skno 10/2008, and Judgment of the SAC of 11 July 2007, no. 6 As 55/2006, discussed below.

¹²¹ These cases are numerous but the ECtHR is usually invoked in conjunction with the Czech Charter of Fundamental Rights. None of the two judgments of the CCC referred to above in n. 113 resulted from the concrete review of constitutionality.

find the “ECHR-conforming” interpretation of an applicable statute, they will opt for it; (2) if an applicable statute in a *particular* case does not provide a remedy required by the ECHR, they will give the application priority to the ECHR and apply the ECHR instead of an applicable statute, while leaving this statute as such intact; and (3) only if they firmly believe that an applicable statutory provision is *in general* inconsistent with the ECHR, they will refer this inconsistency to the CCC or the SCC under the concrete review of constitutionality. Unfortunately, these “sophisticated judges” are still in the minority in both countries.

In addition to the abovementioned generalization we must also mention an occasional reluctance of both Czech top courts to follow the judgment of the CCC (Pl. ÚS 36/01) that ‘constitutionalized’ the ECHR. Both the CSC and SAC sporadically refuse to refer the clash of the statutory provisions with the ECHR to the CCC even if they find this statutory provision as such inconsistent with the ECHR. Instead, they put the national law aside and apply the ECHR and thus circumvent the case law of the CCC.¹²² For instance, the CSC has recently found one provision of the Act No. 7/2002 Coll., on Procedures with Judges and Prosecutors, inconsistent with a principle of *ne bis in idem* guaranteed by Art. 4(1) of Protocol No. 7 to the ECHR.¹²³ It gave priority to the ECHR and simply ignored the case law of the CCC, even though the petitioner (Minister of Justice) has explicitly mentioned this obligation of the CSC in his appeal. The SAC went even further. Not only did it apply the ECHR instead of the conflicting statute instead of referring this statute for review by the CCC, but it also openly discussed and eventually rejected the judgment of the CCC (Pl. ÚS 36/01) as unsubstantiated and running against the clear textual instruction of the Constitution.¹²⁴ As the ECHR has not been ‘constitutionalized’ in Slovakia, these problems do not arise here.

It has been suggested that the Czech Supreme Court cites the case law of the ECtHR more often in criminal cases than in civil cases.¹²⁵ Interestingly, a short survey into the case law of the Slovak Supreme Court available on its website¹²⁶ conducted for this paper shows that a different trend since the Slovak Supreme Court cites the ECtHR most frequently in civil cases, followed by administrative cases and only then by criminal cases, and finally by commercial cases. However, it is the SAC that has been by far most willing to refer to the Strasbourg case law in its jurisprudence. As to the citation of substantive provisions of the ECHR in the case law of the Czech Supreme Court, Art. 6 ECHR ranks first, followed by Art. 5 ECHR and only then by other provisions.¹²⁷ We are not aware of any similar research conducted in Slovakia, but we expect similar results.

¹²² The CCC has no powers to change this practice (at least in criminal and administrative law cases) since the applicant wins against the State before the ordinary court and thus she has no reason to lodge a constitutional complaint, and the “state organs”, according to the case law of the CCC, cannot (with narrow exceptions) lodge a constitutional complaint.

¹²³ Decision of the CSC of 30 October 2008, no. 1 Skno 10/2008, <http://www.nssoud.cz/>.

¹²⁴ Judgment of the SAC of 11 July 2007, no. 6 As 55/2006, available at <http://www.nssoud.cz/>.

¹²⁵ See Kühn, Bobek, Polčák (2006) 91-92.

¹²⁶ See <http://nssr.blox.sk/> [last accessed 15 December 2009]. Please note that not all decisions of the Slovak Supreme Court have been made available online and, therefore, these conclusions are only tentative.

¹²⁷ For more details, see Kühn, Bobek, Polčák (2006) 91-96.

As far as the general aspect of the work with the case law of the ECtHR is concerned, four points can be mentioned. First, the quality of application of ECtHR's case law varies significantly. Some judgments discuss the relevant Strasbourg jurisprudence exhaustively, while other use the Strasbourg case law as a mere façade. Second, both the Czech and Slovak courts tend to cite only those cases that "support" their conclusions and conceal any potential divergences or opposing judgments.¹²⁸ Third, the so-called "block citations" are a common phenomenon in both countries. Under the "block citation" practice the courts clearly "copy and paste" the reference to the ECtHR (usually a whole paragraph or two of reasoning) from its previous judgments. This practice is not objectionable *per se*, but it often leads to citation of obsolete cases of the ECtHR and/or to mechanic application of the ECtHR's case law on issues that require different argumentation. Fourth, ECtHR's case law is sometimes misused to arrive at conclusions that would be simply impossible under national law. For instance, the Czech Supreme Court interpreted a principle of *ne bis in idem* guaranteed by Art. 4(1) of Protocol No. 7 to the ECHR so as to prohibit a disciplinary proceeding against a judge who was also criminally prosecuted for having plagiarised hundreds of pages from criminal law textbooks and published them as his own articles.¹²⁹

From a more formal point of view, the Czech and Slovak courts fail to cite to the Strasbourg jurisprudence properly. They often omit important information such as date of the ruling, application number, form of the ruling (decision or judgment) and/or deciding panel of the ECtHR (Chamber or Grand Chamber). Furthermore, they only rarely refer to a particular paragraph of the ECtHR's reasoning. This practice significantly complicates the verification of the conclusions inferred from the Strasbourg case law. A related problem is an excessive anonymization in judicial decisions that reached its apex in the database of the CSC, which anonymizes not only names of the applicants in the cited ECtHR cases, but also the names of the Governments. This practice sometimes makes the tracing of the cited ECtHR's decision impossible.

In sum, the judges of ordinary courts are willing to apply the ECHR. However, their use of the Strasbourg jurisprudence faces certain limits: (1) insufficient education on Strasbourg case law; (2) language barrier; (3) overloading; and (4) underusing the ECHR and ECtHR's case law by parties themselves. The first three limits are to a certain extent relaxed before the "top" ordinary courts since they have lower caseload, they have special analytical departments capable of undertaking a thorough research on the Strasbourg jurisprudence if requested by judges, and their judges can hire young assistants (law clerks)¹³⁰ who speak foreign languages.

¹²⁸ For a rare exception to this trend, see Judgment of SAC of 31 October 2008 (no. 5 Afs 9/2008, Part III.d, available at <http://www.nssoud.cz>), where the SAC identified two diverging positions in the case law of the ECtHR on the principle of *ne bis in idem* and justified its conclusion to opt for the position that had been followed in majority of the most recent ECtHR's cases.

¹²⁹ Decision of the CSC of 30 October 2008, no. 1 Skno 10/2008, <http://www.nssoud.cz/>. Cf. Judgment of the CCC of 13 July 2006 (I. ÚS 85/04) discussed in Part B. 3.

¹³⁰ Note that only judges of the top courts can hire *personal* legal assistants in the Czech Republic. Lower court judges have to share few law clerks assigned to each court at best. In Slovakia, even judges of the Supreme Court do not have personal law clerks.

C. Conclusions

No revolution, just gradual evolution. This would perhaps be the most apt summary of about 17 years of domestic application of the ECHR and the case law of the ECtHR and of more than 5 years of the European Union law in the Czech Republic and Slovakia. There is, however, a difference in the judicial treatment of both European legal systems, in quantitative terms as well as with respect to the various judicial players concerned.

The advent of the ECHR has been gradual and moderate; the Constitutional Courts in both countries soon embraced the Convention and the case law of the ECtHR. They quote the Convention and the case law of the ECtHR regularly and often. They both provide a welcomed source of external authority and inspiration. The ordinary courts and especially the public administration have been more reserved in their embrace; the position of ordinary courts is, however, also changing and especially administrative courts in the Czech Republic tend to rely more often on the law of the ECHR.

In contrast, the advent of European Union law was considerable and quick, reaching into all areas of the domestic legal systems and aiming at all levels of judicial and administrative hierarchy. It becomes evident that in quantitative terms, the law of the ECHR is being heavily overshadowed by its younger European brother. European Union law also finds quite some sympathy in ordinary courts as well as administrative bodies, less so before Constitutional Courts. This is not surprising: the law of the ECHR empowers the Constitutional Courts while keeping their competences, especially the monopoly of constitutional review, intact. European Union law, on the other hand, decentralises the competence of abstract as well as concrete review of the compatibility of national laws with European Union law. Thus, after the accession, all the national ordinary courts as well as national administrative authorities became de facto “*constitutional courts*”, gaining powers formerly centralised. For them, engaging with EU law means more competence, should they wish it. For Constitutional Courts, it means loss of uniqueness.

This might also be one of the reasons why there appears to be different openness to the European Union law on the one hand and to the ECHR law on the other between Constitutional Courts and the ordinary courts. Other reasons might also include the issue of languages; one may sometimes harbour doubts about the quality of the translations of European Union legislation and case law,¹³¹ but it is, after all, available in all the official languages of the European Union. It thus grants direct access to all the national players, whereas the case law of the ECHR continuously faces language barriers on the national level, with judges and administrators rarely being versed in English or French.

¹³¹ Further see Bobek (2009) and Bobek (2007b).

Bibliography

A. Albi, *EU Enlargement and the Constitutions of Central and Eastern Europe* (Cambridge, 2005)

A. Albi, "Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums" [2009] 15 (1) *European Law Journal* 46

R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe: The ECHR and Its Member States, 1950-2000* (Oxford, 2001)

M. Bobek, "Ústavní soud: Má srovnávací argumentace přednost před českým zákonodárcem, judikaturou i doktrínou anebo je císař nahý?" (The CCC: Has the Argumentation based on the Comparative Law Priority Before the Czech Legislator, the Case Law and the Doctrine or Is the Emperor Naked?) [2006] *Soudní rozhledy* 415

M. Bobek, "Ústavní soud ČR a přezkum vnitrostátní implementace komunitárního práva: „Poslouchej, co říkám a nekoukej, co dělám“?" (The Constitutional Court of the Czech Republic and the review of the national implementation of community law: "Listen to what I am saying and do not look what I am doing"?) [2007] *Soudní rozhledy* 173 (Bobek 2007a)

M. Bobek, "The Binding Force of Babel. The Enforcement of EC Law Unpublished in the Languages of the New Member States" [2007] 9 *Cambridge Yearbook of European Legal Studies* 43 (Bobek 2007b)

M. Bobek, "Learning to Talk: Preliminary Rulings, the Courts of the New Member States and the Court of Justice" [2008] 45 *Common Market Law Review* 1611 (Bobek 2008a)

M. Bobek, "Thou Shalt Have Two Masters; The Application of European Law by Administrative Authorities in the New Member States" [2008] 1 *Review of European Administrative Law* 51 (Bobek 2008b)

M. Bobek, "Corrigenda in the Official Journal of the European Union: Community Law as Quicksand" [2009] 34 *European Law Review* 950

P. Bříza, "The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008" [2009] 5 *European Constitutional Law Review* 143

M. Čiř, "Interaction between the ECHR and the Protection of Human Rights and Fundamental Freedoms in the Legal System of the Slovak Republic", In Mahoney, P. et al. (eds.), *Protection des droits de l'homme: la perspective européenne: mélanges à la mémoire de Rolv Ryssdal* (Köln, 2000) 239

J. Drgonec, *Ústava Slovenskej republiky: komentář* (Constitution of the Slovak Republic: Commentary). 2nd ed. (Šamorín, 2007)

J. Filip, “Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem” (Judgment no. 403/2002 Coll. As a Gauntlet Thrown to the Constitutional-Maker by the CCC) [2002] *Právní zpravodaj* 12

J. Komárek, “European Constitutionalism and the European Arrest Warrant: In Search of the Limits of “Contrapunctual Principles””, [2007] 44 *Common Market Law Review* 9

J. Komárek, “Vztah práva Evropské unie a právního řádu ČR očima tří rozhodnutí Ústavního soudu” (The Relationship of the European Union law and the Legal Order of the Czech Republic through the Eyes of Three Decisions of the Constitutional Court). [2008] 10 *Soudní rozhledy* 357 (Komárek 2008a)

J. Komárek, “Podávání předběžných otázek obecnými soudy jako otázka ústavnosti” (The Submission of Requests for a Preliminary Ruling as a Question of Constitutionality), [2008] 10 *Soudní rozhledy* 374 (Komárek 2008b)

D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*. 2nd ed. (Durham, 1997)

D. Kosař, “Conflicts between Fundamental Rights in the Jurisprudence of the Czech Constitutional Court”. In E. Brems (ed.), *Conflicts Between Fundamental Rights* (Antwerp, 2008) 347 (Kosař 2008a)

D. Kosař, “Lustration and Lapse of Time: ‘Dealing with the past’ in the Czech Republic” [2008] 4 *European Constitutional Law Review* 482 (Kosař 2008b)

Z. Kühn and J. Kysela, “Je Ústavou vždy to, co Ústavní soud řekne, že Ústava je?” (Is the Constitution Always What the CCC Says that the Constitution Is?) [2002] *Časopis pro právní vědu a praxi* 199

Z. Kühn and J. Kysela, “Na základě čeho bude působit komunitární právo v českém právním řádu?” (What provides the basis for EU law in the Czech legal order?) [2004] 12 *Právní rozhledy* 23

Z. Kühn, “K otázce závaznosti rozhodnutí Evropského soudu pro lidská práva pro domácí soudnictví” (On Binding Nature of ECtHR’s Decisions for Domestic Judiciary) [2005] *Právní rozhledy* 1

Z. Kühn, M. Bobek and R. Polčák (eds.) *Judikatura a právní argumentace: Teoretické a praktické aspekty práce s judikaturou* (Case Law and Legal Reasoning: Theoretical and Practical Issues Relating to the Use of Case Law) (Praha, 2006)

A. Lazowski, A. (ed.), *The Application of EU Law in the New Member States - Brave New World* (Cambridge, 2010)

J. Malenovský, "Obnova řízení před Ústavním soudem v důsledku rozsudku Evropského soudu pro lidská práva" (Reopening the Procedure before the CCC for Reasons of Judgment of the ECtHR) [2001] *Právník* 1241

J. Malenovský, "Postavení mezinárodních smluv o lidských právech v českém právu po 1. červnu 2002" (Status of International Human Rights Treaties in the Czech Law After 1 June 2002) [2002] *Právník* 917

J. Malenovský, "Tápání v bludišti vztahů mezinárodního a ústavního práva" (Groping around Labyrinth of Relationships Between International and Constitutional Law) [2004] *Právník* 953

J. Malenovský, "Ve věci ústavního základu působení komunitárního práva uvnitř ČR nebylo řečeno poslední slovo" (No final word has been said in the matter of constitutional basis of functioning of EU law in the national legal system), [2004] 12 *Právní rozhledy* 227

C. Naômé, *Le renvoi préjudiciel en droit européen* (Paris, 2007)

J. Mazák, "Hľadanie odpovede na prejudiciálnu otázku v praxi ústavného súdu" (The Search for an Answer to the Preliminary Ruling in the Praxis of the Constitutional Court) [2009] 61 *Justičná revue* 90

J. Mucha, "The Presentation of the Czech Experiences". In: *Proceedings of the International Conference "The Position of the Constitutional Courts Following Integration into the European Union"*, (Bled, Slovenia 2004) 163

M. Pirošíková, "Výkon rozsudku ESĽP formou obnovy konania" (Execution of Judgments of the ECtHR by Reopening the Domestic Proceeding) [2005] *Justičná Revue* 1188

A. Poláková, "Postavenie medzinárodných zmlúv a miesto Dohovoru o ochrane ľudských práv a základných slobôd v právnom poriadku Slovenskej republiky" (Status of International Treaties and a Place of the ECHR in the Legal Order of Slovak Republic) [2006] *Právny obzor* 168

R. Procházka, "Európský dohovor o ľudských právach v slovenskom ústavnom poriadku" (The ECHR in the Slovak Constitutional Order) [2002] *Časopis pro právní vědu a praxi* 215-219

R. Procházka, "Prejudiciálna otázka v judikatúre ústavného súdu" (Preliminary Ruling in the Case law of the Constitutional Court) [2008] 60 *Justičná revue* 1399

B. Repík, "La place de la Convention européenne des droits de l'homme dans l'ordre juridique interne de la république slovaque". In: Tavernier, P. (ed.), *Quelle l'Europe pour les droits de l'hommes* (Brussels, 1996) 372

V. A. Schorm, "Evropský soud pro lidská práva, Ústavní soud a Nejvyšší soud" (The ECtHR, the Constitutional Court and the Supreme Court), In V. Hloušek and V. Šimíček (eds.), *Dělba soudní moci v České republice* (Brno, 2004) 74

N. Solar, *Vorlagepflichtverletzung mitgliedstaatlicher Gerichte und ihre Sanierung* (Wien, 2004)

A. Stone-Sweet and H. Keller (eds.), *The Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford, 2008)

E. Wagnerová, "The Direct Applicability of Human Rights Treaties". In Venice Commission: *The status of international treaties on human rights* (Council of Europe Press, 2006) 117

E. Wagnerová et al., *Zákon o Ústavním soudu s komentářem* (Commentary on Act No. 182/1993 Coll., on the Constitutional Court) (Brno, 2007)

J. Zemánek, "The Emerging Czech Constitutional Doctrine of European Law", [2007] 3 *European Constitutional Law Review* 418