In Supporting Role Cast: The EU Charter of Fundamental Rights.
Reflection of the EU Charter in the Adjudication of Slovak Constitutional Court*

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Summary: The article deals with the Slovak Constitutional Court's approach to the EU Charter of Fundamental Rights as a potential source of constitutional review. It analyses selected SCC decisions in order to evaluate and generalise the SCC attitude. The main focus is on defining the constitutional status of the EU Charter within the Slovak constitutional order. The up-to-date practice of the Constitutional Court is associated with an inevitable confusion when formally the Charter belongs among the sources of constitutional review, but by applying the doctrine of self-restriction, the SCC uses it only in a subsidiary way or in the form of a soft interpretation instrument to support its reasoning.

Keywords: Slovak Constitutional Court, EU Charter, application, case-law, supporting role.

1. Introduction

On December 1, 2009, the Treaty of Lisbon formally elevated the Charter of Fundamental Rights of the European Union (hereafter EU Charter or simply Charter) to the "level" of the foundational treaties, i.e., to primary EU law. This Charter's re-qualification enhanced its prominence within the Slovak legal system.[1] Suddenly, the Charter become constitutionally relevant. As a formal

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1 Before the Treaty of Lisbon became effective, the SCC's search engine (www.concourt.sk) shows only one case in which the Charter's provisions were invoked. It was an individual constitutional

part of EU law, the Charter has acquired the status of applicable law in national practice and thus also in the practice of Slovak courts. The Charter, as a catalogue of human rights, logically knocks on the gates of the constitutional tribunals. Recently, the EU Charter has been increasingly applied as a direct and indirect instrument of constitutional review in the several Member States[2] including countries from Central Europe.[3] We aim to look at this issue from the perspective of Slovak practice and to reveal the general trends in the approach of the Slovak Constitutional Court (hereafter SCC) to the EU Charter as a binding source of law. The subsequent pages turn to the still-evolving legal position of the EU Charter within the Slovak constitutional system.

So far, the SCC has dealt with the Charter in two types of proceedings. First, after the PL. ÚS 3/09 reasoning, according to which EU primary law is understood as the source of constitutional review in Slovak constitutional practice and with the Charter's promotion to the realm of primary EU law in the Treaty of Lisbon, it became unsurprisingly pertinent in the constitutional review proceedings (article 125 para 1 of Slovak Constitution). Second, the individual applicants started to raise the rights emanating from the Charter, like from any other human rights treaty, in the constitutional complaint proceedings (article 127 of Slovak Constitution). Accordingly, this paper is divided into two subchapters discussing the significant case law concerning the EU Charter.

2. Charter within the judicial (constitutional) review procedure

The SCC has dealt with eighteen instances in which the applicants invoked the Charter's provisions when initiating the judicial review proceedings. The further explanations will only focus on those cases in which the SCC added something

complaint I. ÚS 351/08, decided on October 10, 2008. The Senate dismissed the complaint on national procedural grounds.

[2] See recently published reports in BOBEK, M., ADAMS-PRASSL, J. (eds.) *The EU Charter of Fundamental Rights in the Member States*, Oxford: Hart Publishing, 2020. For

[3] See e. g. HAMUĽÁK, O., SULYOK, M., KISS, L. N. Measuring the 'EU'clidean Distance between EU Law and the Hungarian Constitutional Court – Focusing on the Position of the EU Charter of Fundamental Rights. *Czech Yearbook of Public and Private International Law*, 2019, vol. 2019, no. 1, pp. 130-150; KUSTRA-ROGATKA, A., HAMUĽÁK, O. Keeping the Safe Distance – Chapters from Randomized (Non) Application of the EU Charter of Fundamental Rights before Polish Constitutional Tribunal. *Baltic Journal of European Studies*, 2019, vol. 9, no. 4, pp. 72–107; or HAMUĽÁK, O. Penetration of the Charter of Fundamental Rights of the European Union into the Constitutional Order of the Czech Republic – Basic Scenarios. *European Studies - The Review of European law, Economics and Politics*, 2020, vol. 7, pp. 108–124.

new to the applicability or substance of the Charter. In PL. ÚS 3/09, the SCC distinguished between all subjects that could initiate the judicial review proceedings and the general courts that should follow the Simmenthal doctrine[4]. Therefore, the analysed SCC's adjudication starts with the actors other than general courts and concludes with the situation concerning the general courts.

2.1. The submissions from actors other than general courts

The first case in which the SCC invoked the Charter was the decision **PL. ÚS 105/2011**. The claimant, the General Prosecutor[5] ("GP"), challenged several statutory provisions requiring online publication of certain prosecutors' decisions and the public disclosures dealing with the selection procedure for the prosecutors. The GP based his claim on several constitutional provisions, international treaties, Articles 7 and 8 of the Charter. The GP defended the Charter's applicability on the ground of Directive 95/46/EC of the European Parliament and the Council on the protection of individuals concerning the processing of personal data and on the free movement of such data. However, the GP did not explain why precisely the Charter was applicable in this case.[6] The SCC avoided its first opportunity to deal with the Charter's applicability under Article 51 (1). It did not consider this provision at all. The SCC assessed the substantive content of the Charter's provisions only in connection to other human rights international treaties dealing with similar issues. It claimed that the same human rights content was arising from the Charter and other international covenants.[7] The SCC denoted this connection as a "presumption of the sameness" of such provisions. This construction, without appropriate justification, was an immensely imprecise generalisation that could not boost the Charter's legal relevance.

The SCC hit the first milestone in Charter's applicability in **PL. ÚS 10/2014**. The case initiated a group of MPs that challenged several provisions of the Act on Electronic Communications, the Code of Criminal Procedure, and the Act on the Police Forces. These provisions had introduced the obligation of providers to store traffic data, location data and data of communicating parties. The MPs questioned these provisions for their alleged incompatibility with the Constitution,

4 Simmenthal, 106/77, EU:C:1978:49.

5 The SCC procedurally combined this case with another, very similar subject-matter claim initiated by the President of the Republic (PL. ÚS 108/2011).

6 Some commentators claimed that the relationship between the challenged national provisions and EU law was more than contentious (MAZÁK, J., JÁNOŠÍKOVÁ, M. Prienik Charty základných práv Európskej únie do vnútroštátneho práva na príklade Slovenskej republiky. In: *Acta Universitatis Carolinae – Iuridica*, 2016, 2, pp. 14).

7 MAZÁK, J., JÁNOŠÍKOVÁ, M. a kol. *Charta základných práv Európskej únie v konaniach pred orgánmi súdnej ochrany v Slovenskej republike*. UPJŠ: Košice, 2016, pp. 161.

the ECHR, and the Charter. In the decision, finally, the SCC discussed the Charter's applicability based on its Article 51 (1). In the preliminary proceedings, the SCC recognised that the national legislation implemented EU law legislation, i.e., the Data Retention Directive[8]. The SCC discussed the scope of application of EU law quoting the CJ EU's case law while distinguishing three situations in which the Member States act within the scope of EU law. First, when the Member States implement Union law[9]; second, when the Member States' conduct falls under an exception to the application of Union rules permitted by Union law itself (a so-called "ERT exception"[10]); third, when Member States' conduct generally falls within the scope of EU law[11] and a specific link[12] to a substantive EU law rule exists.[13] The SCC declared that the case at hand fitted squarely within the first-mentioned category. Even though the CJ EU's decision in the meantime annulled the disputed Data Retention Direction[14], the SCC continued with its judicial review because the challenged provisions allegedly represented a derogation from the E-Privacy Directive[15]. Therefore, the SCC acknowledged the Charter's applicability in its proceedings[16] based on its Articles 7, 8 and 52 (1). It further explained that *"Although the Charter was not adopted as an international treaty, with the entry into force of the Lisbon Treaty, the Charter became a legally binding part of primary EU law with the same legal force as the Treaties, on which the Union is founded (Article 6 (1) of the Treaty on European Union, as amended by the Treaty of Lisbon). The position of the treaties on which the Union*

[8] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC.

[9] *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft*, 5/88, EU:C:1989:321.

[10] *ERT* v *DEP*, C-260/89, EU:C:1991:254.

[11] *Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio*, C-309/96, EU:C:1997:631

[12] *Karner, C-71/02, EU:C:2004:181; Åklagaren v Hans Åkerberg Fransson, C-617/10, EU:C:2013:280.*

[13] See further HAMUĽÁK, O., MAZÁK J. The Charter of Fundamental Rights of the European Union vis-à-vis the Member States - Scope of its Application in the View of the CJEU. *Czech Yearbook of Public & Private International Law*, 2017, vol. 8, pp. 161–172.

[14] Judgement of 8. April 2014, *Digital Rights Ireland and Seitlinger and Others*, Joined Cases C-293/12 and C-594/12, EU:C:2014:238. For review see: LYNSKEY, O. The Data Retention Directive is incompatible with the rights to privacy and data protection and is invalid in its entirety: Digital Rights Ireland. *Common Market Law Review*, 2014, vol. 51, no. 6, pp. 1789–1811.

[15] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).

[16] The claimants requested the SCC to submit a reference for a preliminary ruling to the CJ EU. The SCC did not accept such demand.

is founded (the Treaty on European Union and the Treaty on the Functioning of the European Union) in the legal order of the Slovak Republic is regulated by Art. 1 par. 2 of the Constitution and Art. 7 par. 5 of the Constitution." In these lines, the SCC justified the legal status of the Charter according to its previous case law. The SCC qualified the Charter as an international treaty, like all other foundational EU treaties (i.e., the primary EU law), even though the National Council had never ratified the Charter as an international treaty. The Charter had gained its EU law prominence via the ratification of the Treaty of Lisbon. The SCC updated its "national ratification" rationale from PL. ÚS 3/09, so it could also apply to the Charter. This justification connected the constitutional Article 1 (2) and its *pacta sunt servanda* principle with the precedence of international human rights treaties over laws enshrined in Article 7 (5). This methodological amalgam enabled to get the Charter "on board" with other EU foundational treaties. The SCC asserted that the Charter was officially a separate reference criterion usable in the judicial review proceedings. Thus, since this decision, the compatibility of national legislation could be reviewed against the Charter.[17] Despite its prior insistence to review the challenged legislation against the Charter, ultimately, the SCC declared the review of the Charter's compatibility unnecessary. The SCC justified its additional unwillingness based on another part of PL. ÚS 3/09 rationale. Under this "self-restricted approach" (also recalled as "doctrine of utility"[18]), the SCC starts its judicial review with the Constitution (coupled with other international covenants) and only if it finds the legislation constitutionally compatible it proceeds to the question of EU law compatibility. Since the SCC found the challenged provisions incompatible with the Constitution and the ECHR, it did not proceed to the Charter.[19] Some commentators correctly pointed out that such an approach could compromise the effectiveness of EU law.[20] In the Melloni decision,[21] the CJ EU declared that Article 53 of the Charter does not create a *"general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when*

[17] MAZÁK, J., JÁNOŠÍKOVÁ, M. Prienik Charty základných práv Európskej únie do vnútroštátneho práva na príklade Slovenskej republiky. In: *Acta Universitatis Carolinae – Iuridica*, 2016, 2, pp. 11.

[18] See BLISA, A., MOLEK, P., ŠIPULOVÁ, K. Czech Republic and Slovakia: Another International Human Rights Treaty? In BOBEK, M., ADAMS-PRASSL, J. (eds.) The EU Charter of Fundamental Rights in the Member States. Oxford: Hart Publishing, 2020, p. 151.

[19] MAZÁK, J. JÁNOŠÍKOVÁ, M. Charta základných práv EÚ v konaní o súlade právnych predpisov: Zatiaľ rutina namiesto doktríny. In *Právny obzor*, 2015, 98, issue 6, pp. 592.

[20] Ibidem. 598.

[21] Judgement of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, EU:C:2013:107. See comments In SARMIENTO, D. Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe. *Common Market Law Review*, 2013, vol. 50, no. 5, pp. 1267–1304.

that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law."[22] Such interpretation would subject EU law to conditions intended to avoid an interpretation that restricts or adversely affects fundamental rights recognised by its constitution. Therefore, the national constitutional measures cannot undermine the effect of EU Law. Nevertheless, *"where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the court, and the primacy, unity and effectiveness of EU law are not thereby compromised "*.[23] Therefore, the SCC should not prioritise the constitutional compatibility of challenged legislative provisions. It is possible to imagine a scenario in which the SCC would declare the national legislation unconstitutional. However, these unconstitutional national provisions would also be correctly implementing EU law. Under the CJ EU's Melloni doctrine, the national constitutional interpretation could not undermine EU law's primacy, unity, and effectiveness. Thus, when EU law is relevant, the SCC should start its judicial review of challenged legislation with the EU law question. Waiting for the judicial review in a constitutionally "self-restricted approach" could effectively result in outcomes incompatible with the EU law.

In **PL. ÚS 2/2016**, the GP and the Ombudsman challenged several provisions of the Voting Act as they allegedly restricted the right to vote of prisoners sentenced for committing serious crimes and the right to vote to all legally incapacitated persons regardless of the severity of their incapacitation. The applicants disputed these restrictions in the nationwide elections because of their asserted incompatibility with the Constitution, the ECHR, other international covenants, and Article 39 (1) (2) of the Charter.[24] The claimants struggled to explain the Charter's applicability. They invoked its relevance in connection to the European Parliament elections. They also raised the PL. ÚS 10/2014 rationale qualifying the Charter as an international treaty according to Article 7 (5) with precedence over laws. In the decision, the SCC briefly discussed the Charter's importance, even mentioning its Article 51 (1) but not elaborating on the issue further. The SCC reiterated another general statement from PL. ÚS 10/2014 to demonstrate the relevance of the Charter in this proceeding ("*the Member States shall take all measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions*

[22] Ibidem, para 56.

[23] Ibidem, para 60.

[24] For more details see ĽALÍK, T., BARANÍK, K., DRUGDA, Š. Slovakia: The State of Liberal Democracy. In: *2017 Global Review of Constitutional Law*. Boston: Clough Center for the Study of Constitutional Democracy, 2018, pp. 252.

of the Union"). The SCC also mentioned the CJ EU's case-law that linked the Charter's applicability under Article 51 (1) with the elections to the European Parliament (*Thierry Delvigne v.Commune de Lesparre Médoc a Préfet de la Gironde, C-650/13, EU:C:2015:648*). In the substantive part of the decision, the SCC did not follow the PL. ÚS 3/09's "self-restricted approach". Instead, it treated the Charter as any other duly ratified international treaty. Thereby the SCC fused human rights protection on national, international and EU law levels. Its human rights analysis started with the Constitution and then considered the ECHR and other relevant international covenants. At the last spot, it mentioned the compatibility of challenged legislation with the Charter. However, this time the SCC did not review these documents in an escalating sequence as in PL. ÚS 3/09. The substantive deliberations tied the constitutional, international and EU law human rights aspects. In this decision, the SCC focused on its previous case law and the ECtHR's doctrines primarily. The SCC declared that the affected rights did not have an absolute meaning and, therefore, they were subject to the constitutional limitations and other restrictions stipulated in the Charter.[25] However, it did not clarify that if a national measure implementing EU law fails to respect the essence of a fundamental right emanating from the Charter, the CJ EU will set aside such measure.[26] Therefore, not the SCC's proportionality analysis, but the rules distilled from the CJ EU's case law ultimately decide if a specific measure stands or fails. The SCC's formulation indicates that it saw itself capable of reviewing such limitations. Such a view, without appropriate clarification, was inadequate at best. Ultimately, the decision held that the pertinent statutory provisions breached the Constitution, ECHR, and the Charter's Article 39 (2). The SCC announced the breach of the Charter's right as a pure supplement to its reasoning. That suggests that the SCC started to consider the Charter as another international treaty subjected to national constitutional limitations.

In **PL. ÚS 23/2019**, the group of MPs requested a judicial review of several provisions of the Civil Procedural Code dealing with the proceedings on the return of a minor from abroad in matters of abduction or detention based on their alleged incompatibility with several provisions of the Constitution, the ECHR, various international covenants, EU regulation and the Charter. The applicants justified the Charter's relevance via the applicability of the secondary EU legislation[27]. The SCC, invoking its ambiguous reasoning from PL. ÚS 8/2010,

[25] PL. ÚS 2/2016, para 74.

[26] LENAERTS, K. Limits on Limitations: The Essence of Fundamental Rights in the EU. *German Law Journal*, 2019, 20, pp. 779–782.

[27] Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000.

reminded that it did not possess the power to review the national legislation against the secondary EU law. Nevertheless, to secure a consistent interpretation of the contested national provision with the EU law, the SCC still recognised the Charter's relevance based on the indirect effect of EU law.[28] Second, it mentioned a potential "zone of convergence" that connected some provisions of the Hague Convention on the Civil Aspects of International Child Abduction and substantially equivalent parts of the pertinent EU regulation. Thus, the SCC first declared it did not have the power to review the national legislation against EU regulation and then it implied it could still somehow have it by linking the Charter's provisions and the EU secondary regulation with human rights protection emanating from international treaties. This "pall-mall" methodology mixed secondary EU law, the Charter, international law, and national law without distinguishing their respective applicability. Such a connection is confusing and may produce results incompatible with the CJ EU's caselaw or expectations stemming from international law. Despite all mentioned substantial connections, the SCC declared that it would not consider the EU law issue because it dismissed the case on national procedural matters. These shallow formulations in which the SCC frequently twisted the lines of its reasoning and dodged to develop any meaningful concept of the correlation between different human rights protection systems again did not do any good to strengthen the foreseeability of its further decision-making.

2.2. The submissions from general courts

The PL. ÚS 3/09 "EU rationale" excluded the general courts from initiating the judicial review proceedings when the compatibility of national legislation with the EU law was at stake. The SCC instructed judges of all general courts to apply EU law directly or submit a reference for a preliminary ruling to the CJ EU. Therefore, the effective application of the Charter became an implicit duty of all Slovak judges.[29] The SCC, however, quickly abandoned its staunch commitment to the fundamental CJ EU's case law. In 2016, the SCC started to accept the judicial review challenges from the general courts based on the possible Charter's incompatibility of national legislation. So far, the SCC accepted the Charter's challenges only when coupled with the alleged constitutional incompatibility.

[28] See also HAMUĽÁK, O., KERIKMÄE, T. Indirect Effect of EU Law under Constitutional Scrutiny – the Overview of Approach of Czech Constitutional Court. *International and Comparative Law Review*, 2016, Vol. 16, No. 1, pp. 69–82.

[29] See also MAZÁK, J. JÁNOŠÍKOVÁ, M. Charta základných práv EÚ v konaní o súlade právnych predpisov: Zatiaľ rutina namiesto doktríny. *Právny obzor*, 2015, 98, issue 6, pp. 599.

In **PL. ÚS 8/2016**, for the first time, the SCC overruled its own "Simmental standard" from PL. ÚS 3/09 when it accepted a preliminary question from the Supreme Court. In this decision, the SCC reviewed the compatibility of a provision of the Act on Asylum and a provision of the Act on Residence of Aliens that restricted legal aliens' right to become acquainted with classified information vital to their adequate defence in the proceedings that revoked their application for permanent residence in the Slovak Republic. The Supreme Court challenged such statutory limitation on an alleged breach of the fundamental procedural rights arising from the Constitution, the ECHR, and Article 47 of the Charter. It invoked the Charter as another nationally approved international human rights treaty ratified under Article 7 (5). It followed the national judicial review procedure and submitted the case to the SCC. The Supreme Court's petition represented another imperfect national fusion of EU law with an international human rights treaty. The SCC reviewed the Charter's applicability under Article 51 (1). Following the PL. ÚS 10/2014 rationale, the SCC invoked the "implementation of EU law" category. The SCC declared that since a common policy on asylum, including a Common European Asylum System, is a constituent part of the EU objective of establishing an area of freedom, security and justice (a harmonised field), the Charter applied. The substantive reasoning reiterated the PL. ÚS 2/2016 rationale, in which it merged the content of constitutional, international and EU law human rights protection. It again suggested that it could review a proportional legislative limitation of human rights at stake.[30] Ultimately, the SCC struck down the contested legislation for its incompatibility with all objected documents.

In **PL. ÚS 17/2017** and **PL. ÚS 4/2019**, the Supreme Court invoked *inter alia* the Charter's provisions (Articles 47, 49 (2), 51) to challenge the statute stipulating the essential preconditions for serving as a judge. The request emanated from the doubt whether a person convicted of committing an intentional criminal offence in another Member State could continue serving as a Slovak judge.[31] The petitioner did not even try to prove the EU law link to make the Charter relevant. Suppose there was a relevant EU law connection under PL. ÚS 3/09, the Supreme Court should have either directly applied EU law or referred a question to the CJ EU. Instead, it followed the national constitutional procedure, treated the Charter as another international treaty, and submitted the reference question for the constitutional review. The SCC did not even consider the EU law relevance and rejected the proposal on purely national procedural grounds.

[30] PL. ÚS 8/2016, para 102–103.

[31] MAZÁK, J., JÁNOŠÍKOVÁ, M. a kol. *Charta základných práv Európskej únie v konaniach pred orgánmi súdnej ochrany v Slovenskej republike.* UPJŠ: Košice 2016, pp. 127.

In **PL. ÚS 14/2017** and **PL. ÚS 13/2018**, the Supreme Court requested the review of several provisions of the Code of Criminal Procedure, and the Act on the Police Forces and its implementing regulation against *inter alia* the Charter's provisions arguing that the challenged provisions interfered with some of the central constitutional procedural guarantees (e.g., the right to a lawful judge, the independence of the judiciary). It seems that the Supreme Court supplemented its assertions with the Charter's provisions just to make its requests more sophisticated. However, again it did not justify the Charter's relevance with any meaningful explanation. The SCC did not mention the relevance of the Charter in its considerations and procedurally dismissed both petitions as unfounded.

In **PL. ÚS 19/2019**, which dealt with a nearly identical subject matter as the previous decisions, the SCC resurrected its now almost forgotten PL. ÚS 3/09 reasoning. It emphasised the central distinction between the two types of petitioners. In contrast to all other petitioners of judicial review, it reiterated that the general court should not be capable of initiating the judicial review proceedings before the SCC. This PL. ÚS 3/09 revival was purely hypothetical as this appeal to the Simmenthal doctrine did not cause the rejection of the petition. The SCC dismissed it on other solely national procedural grounds.

3. Charter within the constitutional (individual) complaint proceedings

Another type of procedure before the SCC that has highlighted the importance of the Charter in legal practice has been the constitutional complaint proceedings. In this procedure, the SCC reviews the decisions of other state organs on the violations of fundamental rights. Therefore, its role is auxiliary. However, this power has been of immense importance as the SCC can interpret human rights' scope, altering their practical appeal in everyday usage. The Charter had become a relevant source of this type of proceedings immediately after it became legally binding.

The SCC deals with individual complaints in three-member Senates. So far, the SCC's Senates considered hundreds of individual complaints[32] in which the petitioners invoked the Charter's provisions. Ultimately, the SCC decided only about fifty of those cases on the merits. In none of the researched decisions, the

[32] The search engine on the official SCC's website showed 945 decisions on 21 June 2021. Undoubtedly, this search engine cannot be considered infallible. Therefore, the overall number of the SCC's decisions in which the petitioners invoked the Charter is somewhat indicative.

petitioners did not plead the Charter as a sole source of their human rights. They have routinely invoked the Charter's provisions as a human rights' supplement, often without further justification of its applicability (e.g., IV. ÚS 117/2021). Similarly, the SCC also treated the Charter as a mere complement to other sources of fundamental rights (especially the Constitution and the ECHR).[33] The Senates' methodological approaches to the Charter's provisions have been far from coherent. The text discusses some of the most visible trends in recent decisions that the Senates decided on merits[34].

In the first type of decision, the Senates reviewed the Charter's applicability in the light of EU law application (e.g., III. ÚS 139/2021). In other words, the Senates acknowledged the Charter's relevance when the EU law was applicable. In III. ÚS 106/2021, the Senate declared: *"Considering the Charter's provisions and the Explanations to the Charter, the application of the Charter, in this case, is justified. ... The Charter applies to the institutions and bodies of the Union. In the Member States, including the Slovak Republic, it is binding only if the state organs act within the scope of Union law. Since the Union's policy is to ensure a high level of consumer protection (Article 38 of the Charter), the Constitutional Court accepted the applicant's request to the extent it called for a violation of her fundamental rights guaranteed by the Charter."*[35]

In III. ÚS 465/2020, the Senate also declared that Article 47 of the Charter was applicable because the EU law was relevant. Ultimately, the Senate declared the infringement of Article 47. It did not explain the motives, nor did it support its decision by any relevant CJ EU's case law. It presumably connected the declared infringement of the constitutional and the ECHR's procedural rights with the breach of a pertinent Charter's provision. Even though this first "general" approach to the Charter has not been ideal, it discussed its applicability and reviewed its substantive relevance in general courts' decisions.

In the second category of decision (e.g., I. ÚS 444/2020, III. ÚS 205/2020, IV. 380/2020, I. ÚS 381/2020), the SCC's Senates did not review the Charter's applicability at all. They considered the Charter in connection to other rights emanating from the Constitution or international treaties, mostly the ECHR.[36] However, such an approach of a human rights mixture could diminish the EU

[33] BLISA, A., MOLEK, P., ŠIPULOVÁ, K. Czech Republic and Slovakia: Another International Human Rights Treaty? In: BOBEK, M., ADAMS-PRASSL, J. *The EU Charter of Fundamental Rights in the Member States.* Bloomsbury Publishing, 2020, pp. 149.

[34] The decisions in which the Senate procedurally dismissed the case rarely discussed the Charter.

[35] III. ÚS 106/2021, para 13.

[36] The petitioners often claimed a breach of "the right to a public hearing within a reasonable time". In that regard, the SCC frequently connected Article 48 (2) of the Constitution, Article 38 (2) of the Charter of fundamental rights and freedoms, Article 6 (1) ECHR, and Article 47 of the Charter (see also II. ÚS 159/2021).

law effectiveness. It considers the Charter a mere supplement to constitutional human rights protection. Additionally, it does not discuss the specific nature of human rights protection arising from different sources of law.

Other approaches of the SCC's Senates did not mention the invoked Charter's provisions in their reasoning but somehow automatically declared their violation when they acknowledged infringement of disputed rights emanating from other human rights documents (e.g., III. 446/2020). Many times, the SCC's Senates considered the Charter's applicability as manifestly unfound without any explanations (I. ÚS 366/2020, I. ÚS 355/2020, I. ÚS 356/2020).

4. Conclusions

After reviewing the numerous SCC's decisions, it is now possible to conclude with some trends inferred from the Charter's application in the Slovak constitutional order. So far, the SCC has not adequately addressed the constitutional status of EU law. It has accepted the applicability of the primary EU law in its proceedings but excluded the same effect to the secondary EU law. This formal distinction stems principally from the textual imperfection of article 7 para 2 of the Slovak Constitution. This old-fashioned methodological approach prevented considering the Charter's relevance before it entered into force with the Treaty of Lisbon.[37] Since then, the Charter has become a part of primary EU law and officially legally binding. Even though the Slovak Republic never ratified the Charter, the SCC managed to update its hierarchical position and twisted the constitutional text to pronounce it a duly ratified international treaty under Article 7 para 5 of the Slovak Constitution. That was another "fantasy move" in the realm of textual interpretation, where anything is possible if the legal text somehow permits it. Therefore, mechanical jurisprudence has been enormously influential even at the apex of the Slovak legal order.

Since late 2009, when the Treaty of Lisbon became effective, the SCC started to consider the Charter a solid legal foundation for its proceedings. The SCC acknowledged its applicability in the judicial review proceedings and the individual constitutional complaint proceedings. Its approach to the Charter's application

[37] The Slovak courts have been traditionally overfocused on the bipolar (formalistic) logic of binding and non-binding sources of law (See BOBEK, M., KÜHN, Z. Europe Yet to Come: The Application of EU Law in Slovakia. In LAZOVSKI, A. (ed.) *The Application of EU Law in the New Member States – Brave New World.* T.M.C. Asser Press and Cambridge University Press, 2009, pp. 357).

mirrors its attitude to EU law in general.[38] Some critical differences emanate mainly from the Charter's subject matter.

On its surface, the Charter seems like another international human rights treaty. However, it cannot be applied as freely. The CJ EU has gradually developed its application rules. The supra-national instructions and not the national interpretation doctrines have been driving the Charter's application. Thus, the Member States must observe the inner logic of these rules and should not fabricate their national analogies. The SCC's decision-making seemed to understand it when it analysed Article 51 and the relevant CJ EU's caselaw in several cases. However, in more recent cases, the SCC hardly recognised these requirements, and in some cases, it utterly disregarded them. There were also situations when the SCC linked the Charter's application to other international human rights documents simply because of the substantive similarities of respective provisions. Therefore, the SCC's coherence towards the Charter's applicability was shaky at best.

The SCC initially followed PL ÚS 3/09 rationale in the judicial review proceedings in connection to the Charter (PL. ÚS 10/2014 and PL. ÚS 2/2016). It ruled that the general courts should follow the Simmenthal doctrine and apply EU law directly. Since 2016, however, the SCC implicitly defied this rationale by accepting the petitions from the general courts. It seems that the distinction between the two categories of petitioners no longer stands. The SCC has placed the Charter within the same review "basket" like other international human rights treaties, especially the ECHR. When invoking the ECHR compatibility, the petitioners usually just add the Charter as another source of their human rights. The SCC, however, should always, immediately in the preliminary proceedings, consider the Charter's applicability.[39] Only the precise and predictable requirements could establish a coherent Charter's applicability doctrine within the Slovak legal order.

After the Charter's applicability is established, its EU law effect should trump any legislation within the national legal order. Therefore, when the Charter is applicable, the SCC should always consider it first or at least it should always contemplate its effects. Otherwise, the SCC could cause, even unintentionally, the breach of EU law. An obligation to constantly consider the Charter would also be beneficial for developing the SCC's attitude towards EU law. For a long time, the SCC has evaded its essential responsibility of clarifying the EU law constitutional status. Applying a "self-restricted approach" caused the EU law

[38] BLISA, A., MOLEK, P., ŠIPULOVÁ, K. Czech Republic and Slovakia: Another International Human Rights Treaty? In: BOBEK, M., ADAMS-PRASSL, J. *The EU Charter of Fundamental Rights in the Member States.* Bloomsbury Publishing, 2020, pp. 149.

[39] MAZÁK, J., JÁNOŠÍKOVÁ, M. a kol. *Charta základných práv Európskej únie v konaniach pred orgánmi súdnej ochrany v Slovenskej republike.* UPJŠ: Košice 2016, pp. 128–129.

question to be rarely critical in judicial review proceedings.[40] Since the SCC does not want to speak out on the EU issues, it significantly impoverished its inter-systemic constitutional doctrine.[41]

The SCC considers the Charter applicable also in the constitutional complaint proceedings. So far, that has been mainly a mere theoretical declaration without practical relevance. The attitudes of the SCC's Senates have been even more incomprehensible than in the judicial review proceedings. It seems that the Senates' inquiry into the Charter's applicability has been the most sophisticated methodology, at least in recent years.

Based on these thoughts, it is possible to declare that the Charter's application in Slovakia has been far from adequate. That does not mean that the other Member States have not struggled with the very same issue.[42] The SCC's attitude could be described as reluctant, trying to avoid the Charter's provisions effectively. The SCC acknowledged the Charter's importance, but so far only as an addendum in the judicial review proceedings and as if it was another international treaty in the individual complaint proceedings.

Slovakia has never been a shining example of a fully compatible EU law Member State. The potential conflict zones between the EU law and the Constitution have not been revealed, not because they have never existed but because the EU law has not yet permeated into the deep layers of the Slovak constitutional system. The Constitution does not refrain from such fusion. Nevertheless, it seems that the state organs responsible for the EU law application have been confused and could not imagine how such legal cohabitation would be possible. Thus, in Slovakia, the crystallisation of a coherent constitutional position of EU law, including the EU Charter, still looks like a long-distance project.

[40] Likewise, almost 20 years ago, Procházka spoke about "a selective literalism" concerning the SCC's deferential attitude to exercise some of its competencies. (PROCHÁZKA, R. Mission Accomplished. On founding Constitutional Adjudication in Central Europe. *CEU Press,* 2002, pp. 249–253).

[41] Similarly BLISA, A., MOLEK, P., ŠIPULOVÁ, K. Czech Republic and Slovakia: Another International Human Rights Treaty? In: BOBEK, M., ADAMS-PRASSL, J. *The EU Charter of Fundamental Rights in the Member States.* Bloomsbury Publishing, 2020, pp. 151.

[42] Unfortunately, the CJ EU's caselaw has been far from crystal clear. See FONTANELLI, F. The Implementation of European Union Law by Member States Under Article 51(1) of the Charter of Fundamental Rights. *Columbia Journal of European Law,* 2014, 20, 2, pp. 194–247.

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