ACTA IURIDICA LEBUSANA VOL. 31
European Dimension of the Constitution
Zielona Góra 2024

EDUARD BÁRÁNY
Slovak Academy of Sciences
ORCID: 0000-0002-3971-361X
e-mail: ak.barany@gmail.com

DOI: https://doi.org/10.59444/2024MONredBis_SER_AILr1

Europeanisation of the Slovak Legal System[1]

Europeanisation of national legal and in particular constitutional systems of EU member states represents an important example and part of legal pluralism, of so called European constitutional pluralism[2] and it is fruitful to study it in this context. It is a complex and developing network of relations between several legal systems and the relations between EU law and national legal orders represent the most visible part of it.

The power background of Europeanisation of national legal and in particular constitutional systems of EU member states is the struggle between EU institutions and national states which has a form of constitutional dispute between judicial institutions.

The whole Europeisation process of law orders in Central Europe is predominantly a technical one, due to the value and cultural similarity of law in the whole EU.

The process of Europeanisation of a national legal system has minimally three lines. The first one is the "Europeanisation" of normative texts, in particular of the Constitution. The second line represents Europeanisation of and by judicial decisions, especially decisions of constitutional courts. The third and most complex line is Europeanisation of day-to-day legal system functioning. This presentation deals only with the first two lines of Europeanisation of the Slovak legal and, in particular, constitutional system.

Europeanisation does not mean only influence of the so-called EU law, but at least also impact of European (regional) human rights law based on the ECHR and case law of Strasbourg court. In recent Slovak history the acceptance of this

[1] This paper is a result pf the project APVV-19-0090: *Legal methodology for the age of legal pluralism*.

[2] P. Craig, de G. Búrca, *EU Law. Texts, Cases and Materials*. 3rd ed., Oxford: Oxford University Press 2003, p. 313: "While the debate over whether there is or can be a final judicial arbiter in Europe remains a live one, different visions of constitutional pluralism are increasingly being proposed as a more attractive alternative to the stalemate of nation-State-centred versus EU-centred monism".

Council of Europe (CoE) law has been the first step of Europeanisation of legal system. There is also strong mutual influence between national legal systems of European states supported by similar legal culture. May be, that it is of almost equal importance as the transposition of EU law.

The still operable Constitution of the Slovak republic (further "constitution") has been adopted even before the split of former Czechoslovakia. The Constitution has been adopted on 1st September 1992 and Czechoslovakia existed until the 31st December 1992. The original wording of the constitution admitted the continuation of Czechoslovak federation. In the turbulent and extremely short preparation and writing of the constitution the possibility of EU and NATO membership has been a distant and questionable future. Only the membership in United Nations and CoE has been a pressing question connected with the "admission" of a new member to the community of states.

The key provision of the constitution regulating the relationship with international law was art. 11 establishing the priority of international agreements (covenants) about human rights before the laws of Slovak republic under the condition, that they secure more rights. This provision has been interpreted extensively, that the international human rights law has precedence before Slovak law including the constitution when it secures more rights or is in any way more advantageous for a person.

There has not been any general regulation of relationship between national and international law in the former wording of the constitution, due to the above-mentioned openness of the constitution to the continuation of Czechoslovak federation.

Slovakia became a member of CoE on 30th June 1993, but it has been bound by Convention for the Protection of Human Rights and Fundamental Freedoms from 1st January 1993. It means, that Slovakia has been bound by this human rights instrument from the moment of its independence and it has been of utmost importance in particular during the 90th Human rights catalogue contained in the second part of the constitution was drafted under the influence of ECHR and UN human rights covenants, but the operability of international human rights instruments supported the establishment of a general practice and atmosphere of respect for human rights. Slovak courts and especially the constitutional court used this human rights instruments and the case law of Strasbourg court in their judgements.

But the most visible part of so called "Europeanisation" of any national legal system occurs in its relations with EU law. Slovakia has signed a standard European Association Agreement on 4th October 1993, earlier than one year after the dismemberment of former Czechoslovakia, but it came into force more than 15 months later on 1st February 1995. It has posed before the country´s parliament,

government, and administration tremendous challenge of implementing the whole corpus of EU legal system. The key piece of legislation in the process of Europeanisation of national legal system has been the constitutional law No. 90/2001 Coll. It established the constitutional framework for quick and efficient Europeanisation of national legal system and new, even more open relation with general international law. The new legal base for relation with international law can be found in Art. 1, para. 2, which reads: *"The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations."*[3] This sentence does not mean any change in Slovak standpoint to international law. It has been absent in the original version of Constitution due to the strange situation consisting in passing the basic law in an unclear and developing environment of last months before the dismemberment of Czechoslovakia. It declares that the state is bound by international law but not, that any part of it is directly binding for its subjects.

There are special provisions regulating the direct applicability of parts of international law on the Slovak territory. I find it useful to distinguish three kinds of directly applicable international law in Slovak republic.

The first one is the preservation or prolongation of former Art. 11 of the Constitution establishing the priority of international human rights treaties (covenants) before the laws of the Slovak republic under the condition, that they secure more rights. This regime has been preserved for the treaties (covenants) on human rights and fundamental freedoms ratified and promulgated before taking effect of the constitutional Act No. 90/2001 Coll. This regime can be called "precedence of law securing more rights".

The second group embraces the greatest and probably also the most important part of general international law. It is based on Art. 7, para. 5 of the constitution which reads: *"International treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly confer rights or impose duties on natural persons or legal persons, and which were ratified and promulgated in the way laid down by a law shall have precedence over laws"*[4].

It can be summarised so, that international treaties which have been approved by Slovak parliament by procedure comparable to the way of passing laws have precedence over laws. To this category belong human rights treaties passed after the effect of constitutional law No. 90/2001 Coll, but it does not include EU law.

There are special provisions concerning the EU law in the constitution and so EU law is a third category of international law with direct effect in Slovakia. The

[3] Art. 1, para. 2 of the Constitution of the Slovak Republic.
[4] Art. 7, para. 5 of the Constitution of the Slovak Republic.

constitutional base for it is Art. 7, para. 2 – the second sentence of constitution declaring: *"Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak Republic"*[5]. It means, that from the point of view of Slovak Republic the precedence of EU law over its legal order is based on Slovak constitution and not on any piece of EU (primary or secondary) law. There is a hidden potential for future conflict between Slovak and EU institutions similar to differences between ECJ and constitutional courts of same EU members states. The word "laws" can be interpreted in more than one way. Does it include the constitution and when yes, then the whole one? One of the most distinguished legal scholars in Slovakia refused the precedence of EU law before the national constitutional law. The third meaning of the second sentence of Art. 7, para. 2 is related to the relationship between EU law and the Slovak Constitution. *"EU law is granted precedence over the laws, however, not over the Constitution of the Slovak Republic"*[6]. The opposite stance of ECJ is notoriously known[7].

This and similar questions are not peculiarities of relations between Slovak constitutional system and EU law, but the third sentence of the abovementioned Art. 7, para. 2 of the constitution is an attempt to avoid the situation that parliament "rubber stamps" EU law without possibility to change it. It reads: *"The transposition of legally binding acts which require implementation shall be realized through a law or regulation of the Government according to Art. 120, para. 2"*[8]. The government regulation means a government decree. Art. 13, para. 1c) opens the door for imposing duties not only by law or on the basis of law and by qualified international treaty but also by government regulation according to Art. 120, para. 2 of the Constitution which reads:

> If laid down by a law, the Government shall also be authorized to issue regulations on the implementation of the European Agreement establishing an Association between the European Communities and their Member States on the one part, and the Slovak Republic on the other part, and on execution of international treaties according to Art. 7, para. 2[9].

In our legal tradition a government regulation (decree) cannot impose new duties on natural or legal persons, but there are strong and compelling arguments for breaking this good tradition in the process of EU law implementation.

In this moment it is useful to mention, that the still valid wording of Art. 120, para.2 is a little bit out of date, because Slovak republic is an EU member state.

---

[5] Art.7 para.2, second sentence of the Constitution of the Slovak Republic.

[6] J. Dragonec, *The EU Law in Fragile Harmony with the Constitutional Law as seen in the Light of the Slovak Constitution. Central and Eastern European Legal Studies*, 2/2013. p. 265.

[7] Case 6/64 Costa v. ENEL (1964) ECR 585, (1964) CMLR 425, ECJ.

[8] Art.7, para.2, third sentence of the Constitution of the Slovak Republic.

[9] Art.13 para.1c of the Constitution of the Slovak Republic.

But despite mentioning the previous pre-membership period it forms even today a legal road for implementation of important parts of EU law.

The idea of implementing parts of EU law imposing new duties on natural and legal persons not in the way of parliamentary legislation but by government decrees is supported by following reasoning. EU member states are obliged to implement parts of EU law without any substantive change and to give them the external form of their own laws. It contradicts the position of any parliament to "rubber stamp" bills prepared by an international organisation without real legal possibility to change or to refuse them. It is probably better to implement them in the form of executive decrees (government regulations).

The use of government regulations imposing duties is regulated and limited by law No. 19/2002 Coll. It has introduced the name "approximation regulation" for this kind of government decrees. They can be used only in explicitly enumerated spheres (*e.g.*, bank law, transport), but even in them not for setting limits of human rights. It is expressly prohibited to use them for regulation of state budget and of any question for which the constitution prescribes the form of law passed by parliament.

National Council of the Slovak Republic must be informed in advance, that any piece of this kind of legislation will be passed by government and it can attract the decision of it back to the parliament. A strange practise has developed, that government informs parliament about the intention to issue this kind of government decrees and about the really issued ones twice a year. The committee for constitutional law of the National council of the Slovak republic and subsequently the plenary session take notice of it without using this occasion for discussion and substantive control. The numbers of issued government decrees and the planned ones in practise differ due to the legislative activity of EU and short periods for transposition of same EU legislation.

The total numbers of governmental decrees of this kind are relatively small. For example, the total for a 4-year legislative period 2016–2020 is 91 compared to 444 "normal" laws passed by National Council of the Slovak Republic. Despite an unusually sharp political contradiction between government and opposition in these four years, this kind of government regulations have been generally accepted.

EU law is implemented into the Slovak legal system not only in the form of above-mentioned government regulations but also, or may be even predominantly, by standard laws passed by parliament. Sometimes it is necessary to go deeper to the travaux preparatoires of any law to find the real influence of EU law. It is a serious problem, that a law looking like an emanation of Slovak parliaments will is a hidden piece of EU law. The great advantage of the government regulations implementing EU law is their honesty. It is transparent, that they implement EU law.

The harmonisation of the Slovak legal system with the EU one is constantly achieved by obligatory annexes to any proposed bill. Any bill must be provided with "annex of compatibility with EU law". It is prescribed by Rules of law making passed by resolution of National Council of the Slovak Republic based on §69, section 1 of the law of National Council of the Slovak Republic about the rules of procedure of National Council of the Slovak Republic.

It is difficult to estimate the exact impact of EU law on the national legal system, because there are different routes of getting the content of EU law into it. A specialist in quantitative analyses of legal system surprises, that only 20% of the new law content in the Czech Republic is determined by the pressure from Brussels[10]. Probably the situation is not substantially different in other V4 countries.

The relations of the Slovak legal system to EU law are based not only on legislation but also on judicial decisions. There is a tendency to interpret national law in an EU – law friendly manner and to avoid unnecessary conflicts with EU law. Up to now there has not occurred any great clash between Slovak judiciary and EU courts comparable to Solange decisions of German Constitutional Court or some rulings[11] of the Czech and Polish ones[12]. But there is a hidden stance of the Slovak Constitutional Court to any law outside Slovak legal system contained in an older ruling: "Courts in Slovak republic exist on the base of constitution and laws, that is on the base of the legal order of Slovak republic, and so they are obliged to decide on the base of application of norms of this legal order or norms the use of which this legal order enables"[13].

This ruling has been passed in the frame of a case concerning the position of canon law (normative order of Catholic church) in Slovakia, but it also solves the position of other legal systems. This idea has been confirmed by the constitutional court *e.g.*, in ruling PL. ÚS 10/2014 for the relations between constitution and EU law:

> Constitutional court is under Art. 124 of constitution an independent judicial authority vested with the mandate to protect constitutionality. Due to it also after the accession of the Slovak republic to European union norms of constitutional order of the Slovak republic remain the framework of constitutional courts supervision… The European union law has… impact on the state law in the case when the state regulation belongs to the competence frame of European union law[14].

---

[10] F. Cvrček, *Je teorie práva v krizi?* [in:] Bárány E. (ed.), *A kolektív Zmeny v chápaní práva: pluralita systémov, prameňov, perspektív…*, Bratislava, *Ústav štátu a práva*, 2019, p. 15.

[11] *e.g.* 2 BvG 197/83.

[12] *e.g.* PL. ÚS 5/12 (Constitutional Court of the Czech Republic).

[13] III. ÚS 64/00.

[14] PL. ÚS10/2014.

The idea of this rulings is a simple one. When the courts are organs of the state[15], they must follow the law of the state.

It is possible to read it as a strange version of "Solange". The Slovak courts are ready to apply EU law "so lange" (up to the moment) as the Slovak parliament through the Constitution and laws orders them to apply it and only when the EU regulation belongs to the EU competence. They apply EU law only because constitution commands them to do it. The commandments of the constitution concerning EU law have been analysed in the previous parts of this presentation.

References

Craig P., Búrca de G., *EU Law. Texts, Cases and Materials*. 3rd ed., Oxford: Oxford University Press 2003.

Cvrček F., *Je teorie práva v krizi?* [in:] Bárány E. (ed.), *A kolektív Zmeny v chápaní práva: pluralita systémov, prameňov, perspektív…*, Bratislava, Ústav štátu a práva, 2019.

Dragonec J., *The EU Law in Fragile Harmony with the Constitutional Law as seen inthe Light of the Slovak Constitution* Central and Eastern European Legal Studies, 2/2013.

Reschová J., Kindlová M., Grinc J., Preuss O., Antoš M., *Státověda: Stát. Jednotlivec. Konstitucionalismus*, Walters Kluwer ČR, Praha 2019.

Europeanisation of the Slovak Legal System

Summary: Europeanisation of a national legal system represents an example of legal pluralism. It occurs in the context of mutual cultural influence between European countries and power relations between European union and member states. There is also the important influence of Council of Europe law. This process has minimally three lines: the Europeanisation of normative texts, judicial decision, and day to day legal life.

The constitutional regulation of relations of the Slovak legal order with international law and EU one has developed and nowadays it is open to EU law. The core constitutional provision is Art. 7, para. 2, second sentence, which reads: "Legally binding acts of the European Communities and of the European Union shall have precedence over laws of the Slovak republic". There is a potential for conflict with EU institution in the interpretation of the word "laws". Does it also include constitution and when yes, then the whole one?

EU law is implemented into the Slovak legal order in many ways, but the two ones are the most important. The first one is the standard law making by parliament and the second one is the "government legislation" based on the connection of Art. 7, para. 2 with Art. 120, para. 2 of constitution. Slovak government can implement EU law by government regulations (decrees) imposing obligations on natural and legal persons under "supervision" of parliament.

The position of Slovak judiciary to EU law is very friendly, but in some court decisions there is also a deeper layer. Slovak courts are ready to apply EU law up to the moment (so lange) as the Slovak parliament through the constitution and laws orders them to apply it and only when the EU regulation belongs to the EU competence.

Keywords: EU law, Europeanisation, the European Union

[15] Reschová J., Kindlová M., Grinc J., Preuss O., Antoš M., *Státověda: Stát. Jednotlivec. Konstitucionalismus*, Walters Kluwer ČR, Praha 2019, p. 374.

Europeizacja słowackiego systemu prawnego

Streszczenie: Europeizacja słowackiego krajowego systemu prawnego jest przykładem pluralizmu prawnego. Występuje w kontekście wzajemnych wpływów kulturowych między krajami europejskimi oraz relacji władzy między Unią Europejską a państwami członkowskimi. Istotny jest również wpływ prawa Rady Europy. Proces ten przebiega co najmniej w trzech kierunkach: europeizacja tekstów normatywnych, orzeczenie sądowe i codzienne życie prawne.

Rozwinęła się konstytucyjna regulacja relacji słowackiego porządku prawnego z prawem międzynarodowym i unijnym, która obecnie jest otwarta na prawo unijne. Podstawowym przepisem konstytucyjnym jest art. 7 ust. 2 zdanie drugie, które brzmi: „Prawo wiążące akty Wspólnot Europejskich i Unii Europejskiej mają pierwszeństwo przed ustawami Republiki Słowackiej." Istnieje możliwość konfliktu z instytucją UE w interpretacji słowa „ustawy". Czy obejmuje również konstytucję, a jeśli tak, to czy całą?

Prawo UE jest implementowane do słowackiego porządku prawnego na wiele sposobów, ale dwa z nich są najważniejsze. Pierwszym z nich jest standardowe stanowienie prawa przez parlament, a drugim „ustawodawstwo rządowe" oparte na związku art. 7 ust. 2 z art. 120 ust. 2 Konstytucji. Rząd słowacki może wdrażać prawo UE poprzez rozporządzenia rządowe (dekrety) nakładające obowiązki na osoby fizyczne i prawne pod „nadzorem" parlamentu.

Stanowisko słowackiego sądownictwa wobec prawa unijnego jest bardzo przyjazne, ale w niektórych orzeczeniach sądowych jest też głębsza warstwa. Słowackie sądy są gotowe stosować prawo UE do momentu (tak długo), jak słowacki parlament poprzez konstytucję i ustawy nakazuje im jego stosowanie i tylko wtedy, gdy rozporządzenie UE należy do kompetencji UE.

Słowa kluczowe: europeizacja, Unia Europejska, prawo unijne