**The Constitution of the Czech Republic and the Law of the European Union**

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1. **Introduction**

The law deals with values. Every legal order and system of law has values on which it is based and, at the same time, expresses and recognizes them as the basis of the values of the state or other entity of which it is the legal order. When there is a clash of values between different legal systems or different legal orders, it is not possible to measure values separately. What determines their correlation is the relationship of their parent legal orders or the legal system as a mutual whole.

In the member states of the European Union, a fundamental legal issue is the relationship between their national constitutional rules and European law. The outcome may differ from one member state to another, as European law is the same for all of them but their constitutional standards differ. The issue becomes factually relevant when there is a conflict between constitutional and European norms. In such a case, there is not only a legal contradiction, but usually also a political one. Its solution is not and never will be a purely legal problem, but will always be linked to political struggle and the clash of values contained within conflicting legal systems. It is true that nothing is black and white, and that the struggle for values is an expression of what prevails at any given time. However, from the perspective of an observer from a different time, the assessment of the matter may be different as well. Assessing the importance of values in law is fraught with the subjectivity of those in power deciding which legal values to prioritise over others.

1. **European law perspective**

European sources of law, in particular the Treaty on European Union and the Treaty on the Functioning of the European Union, speak nothing of the relationship with national constitutional provisions. This is understandable, although it creates a fundamental problem of the relationship between the system of European Union law and national legal systems. The authors of the treaties wanted to avoid a serious problem when negotiating them. On the other hand, the clear failure to regulate this issue leads to disputes. Therefore, the conflicts which may arise over the substance of European integration should come as no surprise since the authors of the basic treaties themselves did not want to take a position on certain matters. The issues at stake are crucial, not of no importance, and this was not an oversight but a deliberate shift of the dispute from the time of negotiating the treaties to the time of their application.

In concluding the various treaties that are the source of European primary law, the leaders of the member states did not want to deal with this issue. Any textual expression of the regulation of the interaction between European law and constitutional law will raise questions about the very nature of the European Union and the sovereignty of the Member States. Either European law prevails, resulting in the European Union becoming a state and then the sovereignty of the member states ceases to exist, or the national constitution reigns supreme and takes precedence over EU law. However, this does not please those who support the supremacy of the European Union and its legal system over the member states and their legal orders, including their constitutions.

As a result, the primary law of the European Union does not state whether or not European law takes precedence over the constitution of a member state. However, this is not a new issue. At the end of the day, also in a number of federations, the relationship between the federal power and the constitution of the member state of the federation was not clearly resolved. They were often resolved with weapons. The victor then established a clear interpretation of these relations and did not even have to proceed to explicitly amend the constitution. After all, the crux of the 1861–1865 US Civil War was whether a member state could withdraw from the federation, as the US Constitution did not address this issue. The southern states argued that they could because they were free to join the federation and, by analogy, free to leave it and form a looser confederation, the Confederate States of America, leaving sovereignty to the member states. The northern states believed that by freely joining the federation, a member state was committing itself to a permanent state relationship with the other states of the federation from which it could no longer withdraw. And because it was the North who won, not the South, present day US constitutional law textbooks state that the US federation cannot be withdrawn from. If the South had won the war, the opposite would have been taught. The relationship between the centre and the member states was also the sting of the Swiss Civil War in 1847, the last war participated by Switzerland. The proponents of federation also won in this case, although they kept the French and Italian name of the state — the Swiss Confederation, as a consolation prize, even though Switzerland became a federal state.

The aforementioned omission in the European Treaties has not prevented the European Court of Justice from pronouncing on this issue. In its view, European law takes precedence over national law. This position was adopted as early as 1964[[1]](#footnote-1) at the time of the European Economic Community, but it has been applied continuously since the amendment of the original Treaties and the transformation of the Community into the European Union.

It sees this primacy of EU law as an absolute, i.e. European law also takes precedence over the constitution of a member state. Although a constitution contains the most important legal norms of a country, it is part of its legal order and the European Court of Justice makes no exceptions to the principle of primacy of EU law. In general, there is only a terminological dispute as to whether to speak of the primacy or supremacy of EU law. The result is always the same – European Union law prevails and overrides the law of a member state, including its constitution. The European Court of Justice initially ruled against regulations as directly binding provisions of European law on persons, but by introducing the imperfect (in the Court’s view) conversion of directives by a member state into directly binding ones, the Court effectively established the primacy of European Union law as a whole.[[2]](#footnote-2) It had already declared the fundamental treaties (primary European law) to be directly binding.[[3]](#footnote-3)

The position of the European Court of Justice is understandable from the point of view of supporters of the federalization of the European Union. It strengthens the power of the European Union as such and, in particular, that of the Court as its body. It decides on the correct interpretation of European law and thus on what takes precedence over the law of a member state, including its constitutional provisions. The fact that the judges of the European Court of Justice have a long-standing positive attitude towards European law and European integration also plays a role here. In general, opponents of the European Union and supporters of national sovereignty do not apply for membership in EU institutions, and this also applies to the European Court of Justice. If we are talking about judges who, as lawyers, dealt with European law before their successor in the Court, the link between these lawyers and the European Union is even stronger. What would they do if EU law ceased to exist? And even if it does not disappear, they do not want to admit that any other law can take precedence over European law.

The interpretation of the primacy of European law has its basis in international law, where it is generally accepted that an international obligation cannot be invalidated because of a conflict with national law. On the other hand, the norms of international law are based on the principle of reciprocity, and the obligations arising from international treaties concern the states that have acceded to them. There is no world legislator who can impose its will on everyone. For the enforceability of international law, the question of state sovereignty and its actual assertion is also crucial.

Coercion in international law can in practice be implemented by force against small and medium-sized states. Inter-state coercion cannot be used against superpowers with nuclear weapons. It can be assumed that other countries will not risk nuclear war by attacking the US, Russia or China. This is why some other states have also sought to possess nuclear weapons (North Korea, India, Pakistan). A state publicly declaring that it has a nuclear bomb will not be attacked by other states, unless we count limited border conflicts (China-India, India-Pakistan).

European law is not the literal equivalent of international law. The fundamental contradiction is that European law can impose new obligations on a member state which were not known when the given member state joined the European Union and to which it did not consent, but which were adopted by a majority decision against its will. There is therefore a difference between European primary law, which consists of international treaties concluded by the member states and to which everyone must always agree, and European secondary law (regulations, directives), which can be adopted against the will of a member state.

1. **Constitution and constitutional acts**

In order to resolve the matter of the relationship between the constitutional law of the Czech Republic and the law of the European Union, it is important to define the scope of what the legal order of the Czechia and Moravia regions consider to be the most important and valuable. Is it only about the Constitution of the Czech Republic[[4]](#footnote-4) or also about all other constitutional acts with constitutional force?

In Czechia and Moravia, i.e. the Czech Republic, the constitution contains the basic legal regulation of the state with the highest legal force. Ever since the time of the Habsburg Monarchy, it has been a tradition that there is not one basic (constitutional) law, but several constitutional acts. The constitution does not mean here a single constitutional act called “the Constitution of the Czech Republic,” but the totality of all constitutional acts with constitutional force, which is also called “the constitutional order.” The Constitution of the Czech Republic is itself a constitutional act, just like other constitutional acts.

The 1993 Constitution of the Czech Republic introduced the concept of constitutional order,[[5]](#footnote-5) which is another name for the term “constitution” but written uncapitalized. That is, the totality of all legal acts having constitutional force. Within this category of legal provisions containing constitutional norms, in the event of a conflict between two norms, the principle of the precedence of the newer provision over the older one and the principle of the precedence of the specific provision over the general one apply. The body of constitutional law is not static (neither the state nor its legal order exists in perpetuity and never will). The constitutional order is supplemented by constitutional acts. A constitutional act is a legal act which, by its very nature, cannot be unconstitutional. If it conflicts with another constitutional law, the principle of age priority or the principle of specific priority shall apply. The exception is unconstitutionality in the process of its enactment.

What is included in the constitutional order is decided by the author of the constitution (in the Czechia and Moravia regions it is the Parliament). In the legal order of the Czech Republic there is no distinction between the constitution and the constitutional act. The constitution itself is a constitutional act.[[6]](#footnote-6) If Parliament now decides to adopt a new constitution, it will find that the creator of constitutional acts is institutionally and procedurally the same as the creator of the constitution.[[7]](#footnote-7) Karel Klíma also makes no distinction between a constitution and a constitutional act: "In the concept of the vertical structure of the legal order, the constitution or an act defined as constitutional is the apex of the system of legal norms.”[[8]](#footnote-8) Similarly, the previous Czechoslovak constitution was a constitutional act,[[9]](#footnote-9) significantly amended by the Constitutional Act of the Czechoslovak Federation.[[10]](#footnote-10)

The adoption of a constitutional act, even if it directly amends the Constitution of the Czech Republic, does not require a special constitutional procedure. There is a difference here with states that not only call the constitution something other than a constitutional act, but more importantly, adopt a stricter (more rigorous) procedure than constitutional acts despite having the same legal force. In such a case, the constitutionality of a constitutional act may be reviewed if it directly or indirectly amends the constitution, in order to determine whether it is an amendment that should have been enacted through a procedurally more rigorous process of a constitutionality review.[[11]](#footnote-11)

In Austria, a qualified majority in the National Council is normally required to approve a constitutional act, but constitutional acts limiting the powers of the Austrian states also require the approval of the Bundesrat, and a constitutional amendment requires an optional referendum if requested by at least one third of the members of the National Council or the Bundesrat, or a mandatory referendum, if it is a general (fundamental) amendment of the Austrian Constitution.[[12]](#footnote-12) In this case, it is permissible for the Austrian Constitutional Court to review whether a certain constitutional act passed in a simpler manner should not have been passed in a qualified, more rigorous manner. This was the case when the Austrian Constitutional Court overruled the constitutional norm.[[13]](#footnote-13) This was a transitional constitutional statement that the provisions of the Austrian state acts on public procurement are valid for the period 1 January 2001 – 31 August 2002 in accordance with the Constitution, although the same provision at the federal level has already been declared unconstitutional by the Austrian Constitutional Court. The reason why the constitutional provision was repealed by the Austrian Constitutional Court was that it had been adopted as an ordinary constitutional act, and the Court concluded that it should have been adopted in a more rigorous manner because it constituted a substantive constitutional amendment if the constitutionality of state laws was exempted from review by the Austrian Constitutional Court. Even a small change in scope can be of significant constitutional significance.

The Constitutional Court of Ukraine declared the constitutional amendment unconstitutional on procedural grounds.[[14]](#footnote-14) In Hungary, the Easter Constitution created a new group of organic acts adopted by a 2/3 majority of all deputies, with a higher legal force than an ordinary act adopted by a majority of the deputies present, but with a lower legal force than a constitutional act adopted by the same 2/3 majority of all deputies.[[15]](#footnote-15)

The Constitutional Court of Moldova declared an article of the constitution itself unconstitutional when it entered into a purely political dispute over the definition of the official language. The problem was not the language itself, but its name. In the 1991 Declaration of Independence of the Republic of Moldova,[[16]](#footnote-16) Romanian, written in the Latin alphabet, was designated as the state's official language. In Soviet times, the language was labelled as Moldavian and written in Cyrillic. Constitution of 29 July 1994 again changed the name of the state’s official language to Moldovan written in the Latin alphabet.[[17]](#footnote-17) The definition of this language has become the subject of an internal political dispute. It was, at the request of deputy Ana Gutu, resolved by the Constitutional Court of Moldova in 2013, which found that the national language is Romanian.[[18]](#footnote-18) The Constitutional Court proceeded from the premise that the Declaration of Independence is the very source of the creation of the sovereign Moldovan state, it was not explicitly amended by the Constitution and is referred to in the very preamble of the Moldovan Constitution, which states in no uncertain terms that the interpretation of the Constitution that is consistent with the preamble should be applied. The Constitutional Court linked the legal force of the Declaration of Independence not to its designation as a law enacted by Parliament, but to the essence of the creation of the new state, and, therefore, to its normative core, since the Declaration was approved by the Grand National Assembly before it was enacted by Parliament as a law. The Constitutional Court defined the Declaration of Independence as immutable and the principle that a younger legal provision invalidates an older legal provision of equal force cannot be applied to it. The Constitutional Court, therefore, concluded that the content of the Declaration of Independence should be used to determine the official language of Moldova. This is an example of the judiciary encroaching on the constitutional powers of parliament. The choice of official language is primarily a political issue – e.g. Czechoslovak in the first Czechoslovak Republic 1918–1938 versus the distinction between Czech and Slovak after 1938, similarly the former Serbo-Croatian and today’s Serbian, Croatian, Bosnian.

Also in Slovakia, the constitution differs from constitutional acts only in name and takes the form of a legal provision in the form of a constitutional act.[[19]](#footnote-19) It is up to the creator of the constitution to decide when to exercise constitutional competence.[[20]](#footnote-20) The Slovak Constitutional Court in Košice declared that: *“*There are no legal differences in the process of deliberation, enactment and promulgation of the Constitution and constitutional acts (...) If the Constitution had a higher legal force than constitutional acts, then amending the Constitution by a constitutional act would have to be illegal.”[[21]](#footnote-21) The words of Slovak constitutional judge Ladislav Orosz are characteristic of the Slovak school of constitutional law: “constitutional acts are acts of constitutional power (...) and thus cannot be non-compliant with the constitution or unconstitutional, while at the same time they cannot in principle be subject to judicial review, unlike ordinary laws.”[[22]](#footnote-22)Radoslav Procházka rejects the attempt to divide constitutional law into “peripheral” and “core,” possibly constitutional and supra-constitutional law or simple and qualified constitutional law. Procházka criticises the attempts made by Pavel Holländer, a proponent of the theory of the material core of the constitution, to justify the division of constitutional law[[23]](#footnote-23) by means of concepts such as “metaphysical correlate” and “constructive metaphysics” as well as to seek supremacy over the constitution author. Procházka said about Holländer that“it is significant that Holländer lacks such a distinction not in constitutional regulation but in constitutionalism; in the latter, the »metaphysical correlate« as a tool of »constructive metaphysics« is certainly easier to find than in what the constitutionalist has actually agreed upon.”[[24]](#footnote-24)

However, the Slovak Constitutional Court also succumbed to its desire for constitutional supremacy, annulling by way of a ruling of 30 January 2019, EN ÚS 21/2014, certain provisions of the Slovak Constitution which were adopted as a result of its amendment by Constitutional Act No. 161/2014 Coll. It did so in order to protect judges from security lustration, even though the president could only remove judges at the request of the Judicial Council after review by the Constitutional Court. In doing so, it divided constitutional norms into those of higher and lower rank, whereas the Slovak Constitution itself does not distinguish between them in this way.

German literature theoretically mentions the possibility of repealing a constitutional act, but in practice this has never happened.[[25]](#footnote-25) The German Federal Constitutional Court did deal with applications for the repeal of constitutional norms, but in 1953 it even dealt with an apparent contradiction between two provisions of the Basic Law at the request of the court. In this case and in two others,[[26]](#footnote-26) which concerned the constitutional regulation of wiretapping, the Court held that the provisions in question were constitutional with the perpetuity clause of the German Basic Law.[[27]](#footnote-27) It is true that the German Constitutional Court recognizes its jurisdiction to assess the constitutionality of laws amending the Basic Law with the eternity clause, i.e. with the fundamental constitutional principles.[[28]](#footnote-28) However, no direct analogy can be drawn with the situation in Czechia and Moravia here as well, because while in the Czech Republic the constitution is a constitutional act, in Germany there is a difference between the enactment of the Basic Law which is regarded as an expression of constitutive (establishing) power, and its amendment, which is already regarded as an expression of constituted (established) power.[[29]](#footnote-29) The original Basic Law was passed by the parliaments of the German states, among others, while its amendments are passed only by the Bundestag and the Bundesrat.

Vladimír Klokočka also distinguishes between the constitution and constitutional acts on the basis of Emmanuel-Joseph Sieyès' theory of the distinction between constitutive and constituted power. Klokočka believes that the constitution is a product of constitutive power belonging to the people, and constitutional acts are a product of constituted power exercised in accordance with the constitution by the relevant public authorities.[[30]](#footnote-30) But then constitutive power and a true constitution only arise from a legal revolution. It is only Act No. 11/1918 Coll. on the Establishment of the Independent Czechoslovak State in conjunction with the Declaration of Independence of the Czechoslovak Nation that fulfils such a revolutionary material condition of a constitution as a constitutive power.[[31]](#footnote-31) All other constitutions issued on the basis of the previous constitution are expressions of constituted power, i.e. constitutional acts.

The content of constitutional provisions in Czechia and Moravia is determined by the parliament. From the point of view of democracy, only a body democratically and directly elected by the people can be endowed with the power to determine what should be most important in the state and what will, therefore, be regulated by the constitutional norms of the state. The decision of a democratically-elected Parliament determines the content of the Constitution. Once the democratic legislature has determined what the content of a state’s constitutional provisions are, no other body can divide constitutional norms into those of greater and lesser value. They are equal in the way they are adopted and in their legal force. In relation to European Union law, it is, therefore, necessary to assess all constitutional acts as a whole, including the constitutional law of the Constitution of the Czech Republic, which does not differ from that whole in its legal nature.

1. **Relationship of the provisions of the Constitution of the Czech Republic to the law of the European Union**

There is no explicit reference to the European Union in the provisions of the Constitution of the Czech Republic. In general, under an international agreement it is possible to transfer certain competences of the authorities of the Czech Republic to an international organization or institution.[[32]](#footnote-32) This provision, adopted prior to accession to the European Union, was used as a constitutional basis for accession to the European Union, but can also be applied to other international organizations or institutions in an analogous manner. If the Constitution makes no mention of the European Union at all, it shall be presumed not to refer to the law of the European Union (European law).

Since European primary law consists of treaties, and the Constitution itself recognizes that the act that can transfer the competences of the state bodies of an organization to an international institution is a treaty, the general relationship of Czech law to treaties is decisive for the relationship between the constitutional law of the Czech Republic and the law of the European Union.

Traditionally, the relationship between international law and domestic law has been considered within the framework of monism with the primacy of international law or the primacy of state law or within the dualism of the two legal systems. The Czechoslovak approach to international law was dualistic. This means that national law and international law are separate legal systems.

Since 1993, the Constitution of the Czech Republic has introduced the supremacy of treaties ratified by Parliament over state acts. These treaties are commonly referred to as presidential treaties as they are negotiated by the President of the Czech Republic, who has not delegated their negotiation to the government, as is the case with government treaties, or to individual members of the government, as is the case with presidential treaties. These treaties must also be ratified by the President. These presidential treaties in the Czech Republic include treaties that constitute the primary law of the European Union (the Treaty on European Union and the Treaty on the Functioning of the European Union). They, therefore, take precedence over state acts.

Precedence over state acts includes precedence over regulations subordinate to acts issued by the executive or local government. However, acts and constitutional law are different concepts, and constitutional law is superior to acts in the hierarchy of legal regulations. Thus, precedence over an act says nothing about the relationship of treaty to constitutional acts. If the authors of the Constitution had wanted international agreements to take precedence over constitutional law, they would have written that into the Constitution. The Constitution does not include treaties in the constitutional order – the body of constitutional provisions. The fact that the principle of primacy of treaties applies only to acts means that, from the point of view of the constitutional law of the Czech Republic, the principle of dualism still applies in the relationship between constitutional provisions and treaties.

1. **Sovereignty issue**

If there is a dualistic relationship between the constitutional law of the Czech Republic and European law, i.e. there is no relationship of priority of one law over the other, other circumstances and values should be used to resolve the conflict between European law and constitutional law of the state.

The state places its core values in constitutional acts and through them defines itself as a state. A state is the organization of the power of a society within a defined territory. It is, therefore, about the fundamental values of the people who make up this society. The solution to the problem is determined by which community within the territory has the final say, what unlimited sovereign power means within the state, whether the community (population) of a member state, or the population of the entire European Union. A community with sovereignty and its own legal order is essential to regulate the lives of people in a territory.

The primacy of constitutional and European law is determined by whether or not a state loses sovereignty when it joins the European Union. If it loses it, the law of the European Union takes precedence over the legal order of the state, including its highest norms — constitutional norms — because it is no longer the legal order of the sovereign in a given territory. If a state retains its sovereignty even after joining the European Union, the consequence of that sovereignty is the dominance of its legal order within its territory.

This does not mean that a sovereign state cannot, within its own territory, give precedence over its own laws to the legislation of an international organization or institution. This also applies to the law of the European Union. However, it is always its own decision, which can be appealed, and it always determines the extent of that priority, and its decision in no way has any legal effect on the resolution of the issue in other member states.

As a rule, the state places its core values in constitutional provisions. Thus, if the Czech Republic has recognized the primacy of treaties over its own acts, it also recognizes this primacy in favor of European law, both primary law and the secondary law of the European Union issued on its basis, over laws and legal acts of a lower order. However, it has not established this precedence over its constitutional acts. In case of conflict between European law and the constitutional law of the Czech Republic, the constitutional law of the Czech Republic shall prevail in the territory of Czechia and Moravia.

It is appropriate that international law, and as part of it – European law – takes precedence over acts. If a state joins an international organization, it is obliged to abide by its decisions. However, when it comes to the fundamental values from which constitutional acts derive, the state and its laws must take precedence within its territory. From this point of view, in the Czech Republic, the law of the European Union takes precedence over national law, but not over the constitutional law of the Czech Republic.

1. **Position of the Constitutional Court of the Czech Republic**
   1. **Sugar quotas**

The Constitutional Court has repeatedly addressed the question of the relationship between European and constitutional law, and its legal opinions have evolved. It first encountered the issue of European law in the context of several sugar quota arrangements. In 2006, the court stated: *“Thus, although the frame of reference for review by the Constitutional Court, even after 1 5. 2004, are still the norms of the constitutional order of the Czech Republic, the Constitutional Court cannot entirely disregard the influence of Community law on the creation, application and interpretation of domestic law, in so far as legislation whose origin, functioning and purpose are directly linked to Community law is concerned. In other words, the Constitutional Court interprets the constitutional law in this respect taking into account the principles deriving from Community law.”[[33]](#footnote-33)*

*“However, in the opinion of the Constitutional Court, this lending of part of the powers is only conditional, since the original bearer of sovereignty and the powers derived from it remains the Czech Republic, whose sovereignty is still constituted by Art. 1 sec. 1 of the Constitution. According to it, the Czech Republic is a sovereign, unitary and democratic state based on respect for human and civil rights and freedoms. In the opinion of the Constitutional Court, the conditionality of the delegation of these powers manifests itself on two levels: formal and material. The first of these levels concerns the attributes of power, which is the sovereignty of the state itself, while the second plane concerns the substantive components of the exercise of state power. In other words, the delegation of part of the powers of state authorities may continue as long as these powers are exercised by the EC authorities[[34]](#footnote-34) in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic and in a way that does not threaten the very essence of the substantive rule of law. If one of these conditions for the implementation of the transfer of competences were not fulfilled, i.e. if developments in the EC or the EU would threaten the very essence of state sovereignty of the Czech Republic or the fundamental elements of the democratic state under the rule of law, it would be necessary to demand that the national authorities of the Czech Republic re-accept these competences, with the Constitutional Court being called upon to protect constitutionality (Art. 83 of the Constitution).”[[35]](#footnote-35)*

Thus, with its ruling on sugar quotas, the Constitutional Court accepted the primacy of the application of European law over national law. It did not explicitly address the issue of constitutional provisions. However, it rejected the primacy of European law if it would threaten the foundations of the Czech Republic’s state sovereignty or the fundamental elements of a democratic state governed by the rule of law. It is not clear from this ruling whether the Constitutional Court protected the primacy of all constitutional provisions or only selected ones.

* 1. **European Arrest Warrant**

Also in 2006, when examining the part of the Code of Criminal Procedure and the Criminal Code introducing the European Arrest Warrant,[[36]](#footnote-36) the Constitutional Court unexpectedly took a step towards the dominance of EU law over constitutional law. The Constitutional Court stated that: *“because of the CJEU (Court of Justice of the European Union) doctrine on the primacy of Community law, the Constitutional Court can only exercise its jurisdiction over norms of Community law in certain circumstances. According to the CJEU, in areas which are exclusively governed by Community law, that law takes precedence and cannot be negated by the reference criteria of national law, even at constitutional level. According to this doctrine, the Constitutional Court has no jurisdiction to rule on the constitutionality of European law norms, even if they are contained in the laws of the Czech Republic. Its competence to assess the constitutionality of Czech norms is therefore limited in the same sense.”[[37]](#footnote-37)* Three constitutional judges, Stanislav Balík, Vlasta Formánková and Eliška Wagnerová, filed separate opinions against the ruling. The Constitutional Court recognized the common law provisions introducing the possibility of surrendering a citizen to a European Union member state for the purpose of prosecution on the basis of a European Arrest Warrant, despite the fact that the constitutional provision of the Charter of Fundamental Rights and Freedoms states that: “a citizen cannot be forced to leave their home country.”[[38]](#footnote-38)

* 1. **Lisbon Treaty**

In its 2008 ruling on the compatibility of the Lisbon Treaty with the constitutional order of the Czech Republic, the Constitutional Court stated that: *“in case of a clear conflict between the state’s Constitution and European law that cannot be resolved by any reasonable interpretation, the constitutional order of the Czech Republic, in particular its substantive core, must prevail.”[[39]](#footnote-39)* The court ruled on the compatibility of the Lisbon Treaty with the constitutional order of the Czech Republic, stating that if two interpretations of a constitutional norm are possible, the interpretation in line with European law is preferable to the interpretation leading to a conflict with EU law, but in the case of an irresolvable conflict, the constitutional order of the Czech Republic shall be final, not EU law.

* 1. **Slovak retirement pensions**[[40]](#footnote-40)

A very interesting case was the dispute between the Constitutional Court, on the one hand, and the Supreme Administrative Court and the Court of Justice of the European Union, on the other, concerning Slovak retirement pensions. In this case, the Constitutional Court took the strongest stance towards the Court of Justice of the European Union and refused to apply EU law in areas resulting in unconstitutional consequences for the state.

It was about a special group of pensioners in connection with the division of Czechoslovakia. The distribution adopted the principle that the retirement pensions of future pensioners would be paid for the period of their working activity during the existence of Czechoslovakia by the successor state – the Czech Republic or the Slovak Republic – on whose territory the employer was based at the date of the dissolution of the Czechoslovak state on 31 December 1992.[[41]](#footnote-41) However, these employers often operated throughout the whole of Czechoslovakia. Thus, it happened that some pensioners in Czechia and Moravia received their retirement pensions from the Slovak Republic in Slovak korunas, despite the fact that they worked in the territory of Czechia and Moravia, because the plant they were employed at was located there, while the company was registered and seated in Slovakia.

Although there was originally parity between the Czech and Slovak korunas, the Czech koruna strengthened very quickly, retirement pensions were valorized differently and retirement pension law differed, for example, on the issue of early retirement. Recipients of the Slovak pension actually received a lower retirement pension for the same period of paying social security insurance and the same salary than pensioners to whom the retirement pension was paid by the Czech Republic. On the basis of citizens’ complaints, even before the accession of the Czech Republic to the European Union, the Constitutional Court ruled that the Czech Republic must make up the difference for its disadvantaged citizens[[42]](#footnote-42). The Czech Social Insurance Administration then started to pay a compensatory allowance to this citizen group.

However, the Supreme Administrative Court opposed the decisions of the Constitutional Court after the accession to the European Union[[43]](#footnote-43). The Constitutional Court, however, overturned its various decisions.[[44]](#footnote-44) The Supreme Administrative Court argued for European Union law and the need to apply Council Regulation (EC) No. 1408/71, which was rejected by the Constitutional Court. The essence of the dispute was that the Constitutional Court granted a compensatory allowance to citizens of the Czech Republic with permanent residence in the Czech Republic and Moravia who had a lower retirement pension due to their employer being registered and seated in Slovakia, taking into account the citizens’ legitimate right to material security in old age[[45]](#footnote-45) and the principle of equality of citizens. The Supreme Administrative Court argued that not only Czech citizens working for employers based in Slovakia during the Czechoslovak period could receive such compensation, but all citizens of the European Union, due to the principle of non-discrimination.

The Supreme Administrative Court then took the opportunity, in another similar case, to refer two preliminary questions to the Court of Justice of the European Union.[[46]](#footnote-46) The governments of the Czech Republic and the Slovak Republic as well as the European Commission all pronounced on the case, stating unanimously that the decision of the Constitutional Court was contrary to EU law. The Czech Government’s position was motivated by the fact that the state budget would save money if the practice of paying compensatory allowances was discontinued.

Interestingly, the Court of Justice of the European Union has not accepted the initiative opinion issued by the Constitutional Court. In a letter of 25 March 2011, the Head of the Registry Office of the CJEU, on the instructions of the President of the Fourth Chamber of the CJEU, returned the submission to the Constitutional Court on the grounds that: “in line with the established practice the CJEU members do not exchange correspondence with third parties in cases considered by the CJEU.”[[47]](#footnote-47)

In its Judgment, the Court of Justice of the European Union further declared that the decision of the Constitutional Court in Brno was contrary to EU law, since it linked the condition for compensation to nationality and permanent residence in the territory of a member state.[[48]](#footnote-48)

The Supreme Administrative Court, supported by the Court of Justice of the European Union, then ruled again contrary to the decision of the Constitutional Court, stating that no compensation can be granted if the right to a retirement pension has arisen after 1 May 2004, when the Czech Republic became a member of the European Union.[[49]](#footnote-49) It was obvious that another solution, whereby the Czech Republic would provide compensation to all citizens throughout the European Union if their retirement pension was lower than under the Czech Republic’s legislation, was clearly nonsensical and unrealistic.

The Constitutional Court did not yield to the Supreme Administrative Court and the Court of Justice of the European Union, upheld its decision and used a constitutional complaint in a different but similar case to respond to the judgment of the Supreme Administrative Court and the judgment of the Court of Justice of the European Union and overturn the contested judgment of the Supreme Administrative Court.[[50]](#footnote-50) It described the actions of the Court of Justice of the European Union as beyond its competence, stating that: *“in the context of the impact of the CJEU Judgement of 22 6. 2011 No. C-399/09 to similar cases, no other conclusion can be drawn than that in this case we deal with a situation of an EU body going beyond the competence which the Czech Republic had delegated to the European Union on the basis of Art. 10a of the Constitution, a situation in which the scope of the competence assigned to it was exceeded, a ultra vires procedure.”* It further stated: *“to make no distinction between the legal conditions resulting from the break-up of a state with a single social security system and the legal conditions resulting, in the field of social security, from the free movement of persons within the European Communities or the European Union is to disregard European history and to compare things which are not comparable.”*[[51]](#footnote-51)Furthermore, the Constitutional Court accused the Court of Justice of the European Union of rejecting its claim, stating: *“in this context, the Constitutional Court would like to recall that the CJEU[[52]](#footnote-52) regularly makes use of the institution of amici curiae in preliminary ruling procedures, in particular in relation to the European Commission. In a situation in which the CJEU was aware that the Czech Republic, as a party to the proceedings on whose behalf the government was acting, had in its letter rejected the legal opinion of the Constitutional Court which was the subject of the examination, the CJEU’s finding that the Constitutional Court represented a ‘third party’ in the case at hand cannot be regarded as anything other than a departure from the principle of audiatur et altera pars.”[[53]](#footnote-53)*

The Constitutional Court has, therefore, taken a very harsh stance towards the Court of Justice of the European Union, even though it formally overturned the decision of the Supreme Administrative Court. In a way it became a war of the courts in the Czech Republic — Constitutional Court v. Supreme Administrative Court. The Constitutional Court has repeatedly come into conflict with the Supreme Court and imposed its will on it, systematically overturning its decisions when the Supreme Court initially refused to accept the Constitutional Court’s decisions.[[54]](#footnote-54) In this decision, the Constitutional Court refused to give precedence to European Union law over the constitutional provisions of the Czech Republic. In the end, the European Union did not react to this.

The Supreme Administrative Court tried to oppose this and again referred three new preliminary inquiries to the Court of Justice of the European Union to assess the compatibility of the Constitutional Court’s decision with EU law. The third inquiry was the most important, in which the Supreme Administrative Court, with the help of the Court of Justice of the European Union, wanted to rid itself of the binding nature of the decisions of the Constitutional Court, which is a direct constitutional imperative.[[55]](#footnote-55) The inquiry was: *“Does European Union law preclude a national court, which is the highest court of the State in the field of administrative justice and against whose decisions there is no judicial remedy, from being bound under national law by legal assessments made by the Constitutional Court of the Czech Republic if those assessments do not appear to be compatible with European Union law as interpreted by the Court of Justice of the European Union?”*[[56]](#footnote-56) However, the claimant, whose cassation appeal was pending before the Supreme Administrative Court, withdrew its appeal and the preliminary ruling procedure ended without a decision on the merits.

In fact, the legislator resolved this dispute by an explicit statutory regulation introducing a compensatory allowance, which was no longer linked to the condition of Czech citizenship, but to the acquisition of 25 years of social security insurance in Czechoslovakia, at least one year of social security insurance in the Czech Republic between 1993 and 1995 and the simultaneous receipt of a pension from both the Czech and Slovak Republics.[[57]](#footnote-57) In this way, the conditions were defined in such a way that they actually applied only to citizens of the Czech Republic, without this fact being explicitly stated. The economic situation has also changed, Slovakia has adopted the euro and has strengthened its exchange rate against the Czech koruna, so that Slovak retirement pensions have sometimes already exceeded those paid at the same time in the Czech Republic.

1. **Summary.**

The relationship of the law of the European Union to the law of the Czech Republic is set out in the Constitution of the Czech Republic, which provides for its primacy as treaties or acts resulting from the implementation of treaties (regulations, directives) over acts. Its relationship to constitutional acts is linked to the question of state sovereignty.

If we recognize state sovereignty, European law does not take precedence over the constitutional norms of a member state, unless that member state explicitly declares otherwise. In the Czech Republic, the Constitution does not place European law above constitutional law. All constitutional acts of the Czech Republic are valid without exception on the territory of the Czech Republic and take precedence, even if they contradict the law of the European Union.

The basic European treaties do not regulate the relationship between European law and the constitutional law of a member state. The theory of the primacy of European Union law, including directives and regulations adopted by majority vote against the will of a member state, over the legal order of the member state as a whole, including constitutional law, is based on the practice of the Court of Justice of the European Union.

However, with regard to constitutional law of member states, this primacy can only exist if a member state has lost sovereignty as a result of its accession to the European Union. A sovereign state cannot be subordinated to any authority except through voluntary self-restriction. Its constitution cannot be subordinated to another, foreign legal system.

As the content of the referendum on the accession of the Czech Republic to the European Union was the transfer of certain competences of the Czech authorities to the European Union and not the transfer of sovereignty, the law of the European Union does not take precedence over the constitutional acts of the Czech Republic. However, it cannot be ruled out that a supporter of the loss of member state sovereignty as a result of accession to the European Union will have a different opinion. This is a purely political issue in which a member state’s position will depend on the extent to which its head of state, government and parliament are made up of people advocating one approach or the other. At the same time, the issue of the extent to which the European Council will decide to enforce the alleged primacy of European Union law enforced by the Court of Justice of the European Union will be a highly political one. When a member state joined the European Union and signed the successive amendments to the basic treaties, it was never explicitly stated that this was the moment when the sovereignty of the member state was lost.

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