International Human Rights Law before Constitutional Court of the Slovak Republic[1]

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International Human Rights Law before Constitutional Court of the Slovak Republic. The aim of the paper is to provide to qualitative analysis of the use of international human rights instruments in the jurisprudence of the Constitutional Court of the Slovak Republic. The matter of analysis are cases decided in abstract review of constitutionality. The paper shows how the Constitutional Court interpreted international instruments, how it applied them and how the status of the international human rights instruments changed in the jurisprudence of the Constitutional Court.

Keywords: *International human rights law, review of constitutionality, constitutional jurisprudence, mirror principle, interpretation of international law, Constitutional Court of the Slovak Republic*

Introduction

The importance of the domestic courts in enforcement of the international human rights law cannot be underestimated. The famous "closer to people" aspiration works not only at the level of political legitimacy but also from the point of view of effective enforceability of law. The role of domestic courts is in this respect often evaluated based on the quantity of references to the international human right instruments. However, the relevance of such an approach regarding the analysis of the role of the courts as potential agents of international human rights law is limited because it does not show *how* they perform. This paper opted for a different approach.

It strives to identify the role and status of international human rights law in jurisprudence of the Constitutional Court of the Slovak Republic with a focus upon the doctrinal approach of the court to the relationship between the international law and domestic law and the way the court interprets and applies the international human rights law. Secondly, its aim is to identify whether Constitutional Court uses the international human rights law correctly. Identification of the extent to which it is correct is measured using the following criteria: (i) appropriate interpretation of the international human rights law instrument, (ii) compatibility with the jurisprudence of the respective international courts or advisory bodies and (iii) lege artis use of the jurisprudence of international courts.[2]

The object of the analysis are all the decisions of the Constitutional Court of the Slovak Republic on merits in an abstract judicial review, i.e. in procedure on the incompatibility of

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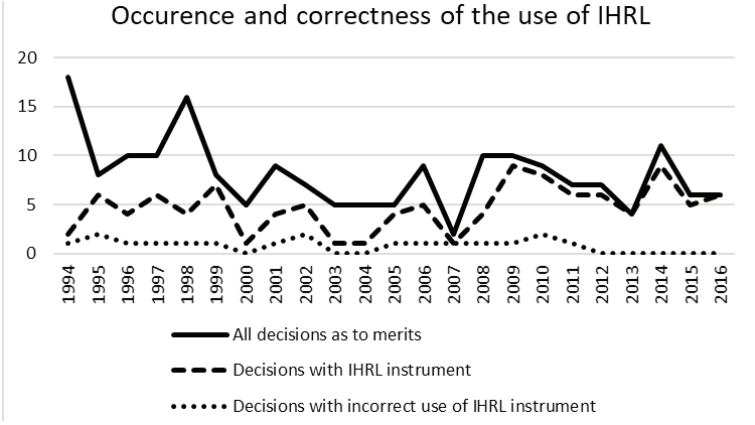
[2] This means e.g. that the court should not use parts of the decisions of the international courts that fit the court's argument and omit those which do not do so.

domestic laws with the Constitution, constitutional laws and international treaties in relation to Art. 125 of the Slovak Constitution, from the establishment of the court in 1993 until 31 December 2016. Based on the Constitution, in this type of judicial review the international human rights treaties serve as the standard of review. As such, in this type of review we can observe how one of Kelsenian constitutional courts – traditionally focused also on the protection of hierarchy and consistency of the legal order – accommodate international human right law in the system.[3]

Bird's eye view

The Constitutional Court issued a total of 514 decisions in abstract review; there were 193 decisions on merits and international human rights law was used in 109 decisions.[4] An overview of the overall performance of the court as to the occurrence and correctness of the use of international human rights law is provided by the following graph, which shows, among others, that even though the court used international human rights instruments in only a small number of cases of abstract review of constitutionality at the beginning of its existence, international human rights law is now referred to in almost every decision on merits. However, the disproportionality might be explained by the types of reviewed cases, because many of the cases in the 1990s dealt with the institutional issues of competences and separation of powers as is typical when a new Constitution is adopted. However, when it came to human rights at the time, the Constitutional Court opted for a welcoming approach to international human rights law, as will be shown.

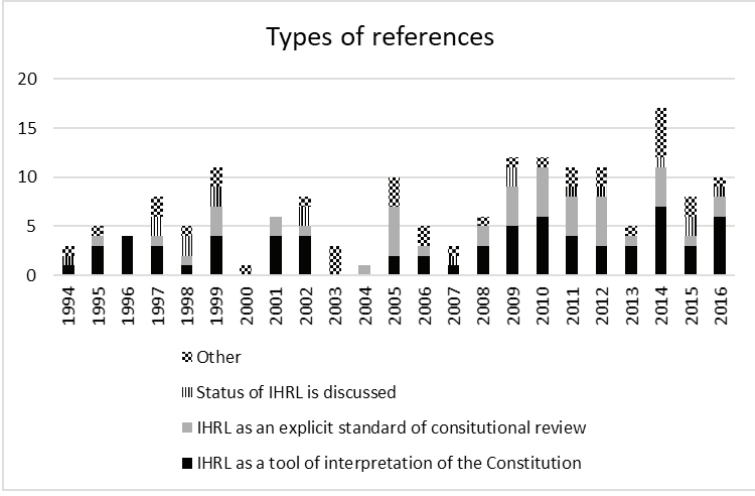


[3] Recently there were two important books published which focused also on Slovakia and the way it dealt with its international commitments: I. Pospíšil and V. Tyč et al. *Mezinárodní lidskoprávní závazky post-komunistických zemí: případy České republiky a Slovenska* [International Human Rights Commitments of Post-Socialist Countries: Czech Republic and Slovakia] (Leges 2016) and H. Smekal and K. Šipulová and I. Pospíšil and J. Janovský and P. Kilian, *Making Sense of Human Rights Commitments: A Study of Two Emerging European Democracies* (Masaryk University 2016).

[4] The database on website of the Constitutional Court of Slovak Republic was used to identify decisions in abstract review in the relevant period but we sorted them manually.

As to the types of references, the Constitutional Court referred to international human rights law (i) when international human rights law served as an explicit standard of review regarding Art. 125 of the Constitution[5], (ii) when it interpreted the Constitution in accordance with international human rights law, and (iii) when it explained the status of international human rights law either out of the context of (i) and (ii) or more comprehensively. The court sometimes also referred to international human rights law in the context of the use of an international instrument specific to the case[6] or merely for rhetorical purposes,[7] as it seemed, or in context out of the above classification.[8] We designate such use as 'other'.

The ratio between the four and the development of the use over time are shown in the following graph.



Lastly, it is also important to comment on the kind of international human rights law used in the jurisprudence of the Constitutional Court. The reason is that interpretation is document-specific. It means that treaties vary as to the methodology typically employed in their interpretation, even if compatible with the Vienna Convention on the Law of

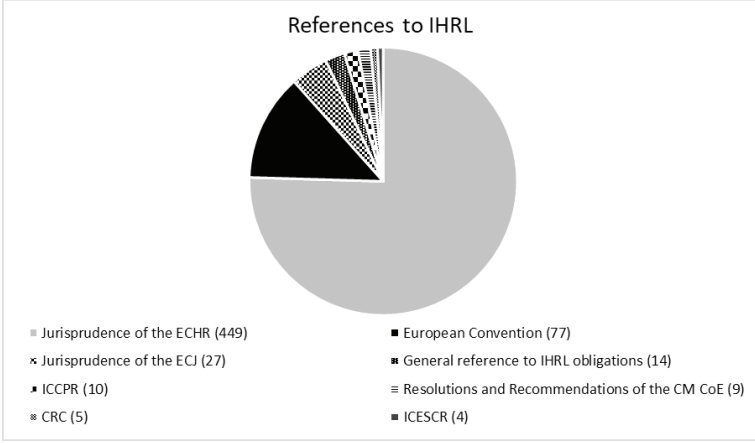
[5] International human rights law served as an implicit standard in many more decisions. The reason is the doctrine of the Constitutional Court on conforming interpretation of the Constitution with international law, mainly the Convention for the Protection of Human Rights and Fundamental Freedoms that we will describe below. Hence, often when international instrument served as the standard of interpretation it naturally served as the (non-explicit) standard of review.

[6] E.g. the court stated that in the "present" case the Constitution provides a higher standard of protection of the right to property in comparison to the European Convention. See decision of the Constitutional Court no. PL. ÚS 42/2015.

[7] E.g. the court claimed that its decision respected international human rights standards (see decision of the Constitutional Court no. PL. ÚS 6/94 – in other contexts a similar formulation might be considered as the conforming interpretation).

[8] E.g. the court stated that there is no need to review conformity of the challenged law with some international human rights law standard (e.g. decisions no. PL. ÚS 3/09, PL. ÚS 11/05, PL. ÚS 15/06).

Treaties.[9] The European Convention is a good example.[10] The European Convention is also the most commonly used international treaty, being referenced in 77 decisions of the Constitutional Court. The jurisprudence of the European Court of Human Rights and the now abolished European Commission of Human Rights are by far the most used case law, with 449 decisions.[11] The use of the jurisprudence of the European Court of Justice might also seem to be quite widespread with 27 references; however, more than half of them are made in a single decision on data retention.[12] The following pie chart indicates the proportion of the use of the instruments, starting with a minimum of 4 uses.[13]



[9] Malgosia Fitzmaurice for example argues that that Art. 31 (3) of the Vienna Convention on the Law of Treaties played role regarding the emergence of evolutive concepts also because the subsequent practise of treaty application should be considered. She also claims that human rights treaties are better accommodated by teleological and evolutive interpretation. Malgosia Fitzmaurice, 'Interpretation of Human Rights Treaties' in D. Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 749.

[10] George Letsas shows that even if the interpreter – an international court – recalls the Vienna Convention rule of interpretation, it does not mean that it follows them in similar way as other bodies do. In the case of the European Convention the European Court of Human Rights promotes a so-called 'moral reading' backed up by specific doctrines of the European Convention as the living instrument (version of the evolutive approach to interpretation) or the doctrine of margin of appreciation and the doctrine of effective and practical rights. George Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) *The European Journal of International Law* vol. 21 no. 3, 509-541

[11] If the decision of the Strasbourg court was referred to more times within the decision of the Slovak Constitutional Court, we still counted it as one use, which was also the case of the European Convention.

[12] See decisions of the Constitutional Court no. PL. ÚS 10/2014, where the Act on Electronic Communication was challenged. This means that the change of affinity from the Strasbourg to the Luxemburg, as expected by Procházka, did not happen. Cf. Radoslav Procházka, 'Európsky dohovor o ľudských právach v slovenskom ústavnom poriadku' [Eng. The European Convention on Human Rights in the Slovak Constitutional Order] (2002) *Časopis pro právní vědu a praxis*, 3/2012, 219.

[13] Among those which did not make it to the chart are e.g. the European Social Charter and revised European Social Charter (3 uses), General Comments of the Committee on Economic, Social and Cultural Rights (3 uses), General Comments of the Human Rights Committee (2 uses) or Charter of Fundamental Rights of the European Union (2 uses). Many others were used only once.

The role and status of international human rights law

The Constitutional Court of the Slovak Republic formed its doctrine on the status of international human rights law and its role in the very first decision where it dealt with the topic – in a decision on free textbooks as part of the right to education.[14] As will be shown, the practice was later changed but the decision is still sometimes used. The legal basis of the position of international human rights instruments in domestic law at the time merely stated the conditional priority of human rights treaties[15] and the fact that the incompatibility of domestic law with all human rights treaties may be challenged before the Constitutional Court. The ratio of the opinion of the court was its understanding of the process of drafting the Constitution, as the Constitutional Court quoted part of the explanatory memoranda to the draft of the Constitution:

The protection of constitutional rights and freedoms stems from international treaties [and conventions on the protection of human rights[16]] and fundamental freedoms which were acceded to and ratified by the Czech and Slovak Federal Republic. They were already complexly embedded into the legal system by the Charter of Fundamental Rights and Freedom – Constitutional Act No. 23/1991 Coll. Draft of the Constitution takes over the regulation of the fundamental rights and freedoms of the Charter and evolves it.

The Constitutional Court inferred that there are 'neither legal nor factual reasons'[17] to interpret the right to free education differently from the existing binding international treaties. Even here and in the years following the doctrine practically meant that the court resigned the autonomous interpretation of the Constitution if there was a similar right or freedom in human rights treaties. There was only one condition – that there should exist 'an internationally accepted interpretation which can be identified by methods of interpretation of the international law of treaties. The use of a sole 'domestic interpretation' of a term that is also used by a binding international treaty could, on the contrary, lead to a breach of the treaty and to the possible international responsibility and liability of the Slovak Republic.'[18] The proper method of interpretation of human rights treaties according to this decision was to be found in Art. 31 – Art. 33 of the Vienna Convention on the Law of Treaties. Hence, the Constitutional Court did not hesitate about whether the interpretation based on Vienna Convention was indeed suitable for this type of treaty.[19]

[14] Decision of the Constitutional Court no. PL. ÚS 5/93.

[15] The Slovak Constitution adopted in 1992 opted for a different regulation of relationship of international law and domestic law than federal constitutional order in the Charter of Fundamental Rights and Freedoms. Art. 11 of the Constitution stated: 'International treaties on human rights and fundamental freedoms ratified by the Slovak Republic and promulgated in a manner laid down by law are binding and they have primacy over the laws if they provide a higher standard of fundamental rights and freedoms.' This meant that human rights treaties were no longer generally binding, and their primacy became conditional.

[16] Added by the author as the Constitutional Court simply omitted these words of the Memoranda for unknown reason.

[17] The exact meaning of this phrase is not clear; it is especially hard to imagine what the Constitutional Court had in mind under factual reasons, even if the quotation is repeated in PL. ÚS 18/95.

[18] Decision of Constitutional Court no. PL. ÚS 5/93.

[19] In literature it has been argued that fragmentation of international law now goes hand in hand with fragmentation of interpretive methods regarding fields of international law (even within respective fields or

However, the Constitutional Court later never explicitly checked whether the results of the interpretation of the international bodies were reached by the method established by the Vienna Convention on the Law of Treaties. It would have been absurd, in the end, to repeat the entire process of interpretation just to see if it fits the Vienna Convention on the Law of Treaties. It seems that our Constitutional Court simply assumed that interpretations by the respective judicial bodies like the European Court of Human Rights are compatible with the Vienna Convention.

The fundamental point here is that without any reference to international law 'being part of' domestic law, which was nowhere to be found in Slovak law at the time, the Constitutional Court in practice reached almost full monism in the field of human rights and freedoms - the interpretational authority and creation of the content of 'twin rights' was given to international bodies.[20] The tricky parts of the approach of the Constitutional Court used mainly in the nineties might become clearer when discussed on the background of James Crawford's description of the process of application of international law, which should be helpful in identifying the position of the international law better than a discussion on international law being or not being a part of domestic law.[21] Based on this process we can see that the Constitutional Court identifies international law as law, not as a fact; even so, it relies on other bodies with its interpretation. Secondly, the Constitutional Court infers authority from the Constitution. Thirdly, regarding the consistency of the international norm with the domestic norm as a condition of the applicability of the former, we can sometimes see that the Constitutional Court explicitly reviewed such compatibility[22] but most of the time it did not. Moreover, if we are about to judge the consistency of the norms of international law and your domestic law, the national norm must naturally have

between tribunals). Cf. Joseph H. H. Weiler, 'The Interpretation of Treaties – A Re-examination. Preface' (2010) *The European Journal of International Law* vol. 21 no. 3, 507; Michael Waibel, 'Uniformity Versus Specialisation: A Uniform Regime of Treaty Interpretation?' (2013) University of Cambridge, Faculty of Law Legal Studies Research Paper No. 54/2013, 2, 13 and following, Available at https://ssrn.com/abstract=2353833. Beside the difference in approaches, Waibel claims that the Vienna Convention is general enough to form common ground for interpretation but international tribunals sometimes still only claim that they are following it while in fact doing otherwise. Ibid. 6, 12.

[20] This approach was taken since the very beginning of the existence of the Constitutional Court. The reason might be also the fact that international law instruments were seem as a way of westernisation of the legal order that can open the doors to European union for example. The Constitutional Amendment from 2001 (Constitutional Act No. 90/2001 Coll.) which supposed to favour monism did not really have impact on the jurisprudence of the Constitutional Court as the monism was already present in it. If fact, interestingly, the more autonomous reading of Constitution was used by the Constitutional Court since millennium.

[21] Veronika Fikfak sums up James Crawford's position in such a way that we should distinguish between 'judicial knowledge, with which judges acknowledge the existence of international law as law, not fact; judicial authority, which gives courts the power to acknowledge international law as relevant (binding) law; judicial integration, during which judges decide whether the international rule is consistent with domestic law, and, therefore, can be given force; and finally, judicial precedent, where courts consciously apply the international rule not as a domestic rule but as a rule of international nature.' Veronika Fikfak, 'International Law Before English and Asian Courts: Finding the Judicial Role in the Separation of Powers', 276. Orig. James Crawford, 'International Law in the House of Lords and the High Court of Australia 1996-2008: A Comparison' (2009) 28 *Australian Year Book of International Law* 1 at 6.

[22] See decisions of the Constitutional Court no. PL. ÚS 18/95, PL. ÚS 16/95, PL. ÚS 33/95 and PL. ÚS 40/03.

autonomous content that does not depend on the international one. But this was theoretically not the case of the constitutional human rights norms according to the concept of decision no. PL. ÚS 5/93. Lastly, as to the application of the norm, the Constitutional Court's doctrine is built on the view that the application of a domestic norm is the application of international law. So, domestic law is applied, but we know[23] that it is only international human rights law dressed up as the Constitution.

Moreover, if we consider Lord Bingham's formulation of the mirror principle and Lady Hale's criticism of it[24] the approach of the Constitutional Court becomes even more eye-catching. In the United Kingdom, the core of the discussion is whether *the same text* (Human Right Act and European Convention) should have the same or the different meaning. In the case of the Slovak Republic and the Constitutional Court the core of court's position was that *different texts* (Constitution and binding human rights treaties) shall have the same meaning.[25] Perhaps we can doubt that the Constitutional Court deeply contemplated the consequences of the position it took. Another issue was that through such interpretation the international human rights law became the standard for review – even if the applicant challenging the law did not claim its inconformity with human rights treaties, the Constitutional Court reviewed it anyway.[26] This stayed partially the same even after the change of the doctrine that occurred in 1998. However, the route for changing the standard based on differences in the Constitution and international human rights standards was open, as the Constitutional Court started to interpret the Constitution more autonomously. As a matter of fact, the new doctrine is not the only one, as we identified three slightly different versions used, probably based on judicial philosophy or simply the habits of the respective justices.[27]

[23] We know this also because it is/should be interpreted based on methods from the Vienna Convention and not domestic ones (at least based on the doctrine of the Constitutional Court). The absurd consequence then is that if the content of the Constitution is dependent on binding treaties, then the content of the Constitution is established based on the methods of international law – the Vienna Convention on the Law of Treaties.

[24] The mirror principle as formulated in Ullah judgement of 2004 merges the national standard of protection of human rights (as embedded in Human Rights Act) with international standard in the case of the European Convention. It is obvious that it leaves the door open higher level of protection on the domestic level, but such higher level should not be product of interpretation of Convention. Lady Hale criticises this approach by focusing on role of judges in United Kingdom and role of the Supreme Court itself. She believes that the Parliament intended the judges to interpret the Convention in the light of British values and conditions hence she advocates the more autonomous approach towards jurisprudence of the Strasbourg. Cf. Brenda Hale, 'Argentoratum Locutum: Is Strasbourg or the Supreme Court Supreme?' (2012) *Human Rights Law Review*, 12 (1), 65–78.

[25] Such meaning is beyond the control of the Constitutional Court and it can also be formed by the practice of states that use the treaty. The Constitutional Court was probably aware of this as it elaborated on the Vienna Convention.

[26] See e.g. Decisions of the Constitutional Court no. PL. ÚS 18/95, PL. ÚS 16/95, II. ÚS 94/95, PL. ÚS 38/95 and practically almost all the others until the sneaky change of its jurisprudence.

[27] Ján Štiavnický identified seven possible approaches to the Strasbourg case-law in the jurisprudence of the Constitutional Court while he focused on all types of motions before the court: (i) an automatic mirror principle, (ii) a mechanical mirror principle, (iii) a mirror principle and above – hard to say, (iv) a mirror principle confirmed by Strasbourg, (v) a below mirror standard decision, (vi) an above mirror standard decision, (vii) a mirror principle in regard to domestic law with a margin of appreciation and (viii) … because an opinion I authentically trust has said so. Ján Štiavnický,'… lebo Štrasburg tak povedal … Niekoľko poznámok o vzťahu

Firstly, in 1998 the Constitutional Court stated that Art. 11 of the Constitution is a general command of the Constitution addressed to all public authorities of the Slovak Republic that guarantee the protection of human rights and fundamental freedoms, which are part not only of international but also national legislation. The Constitutional Court also stated that Art. 11 simply assumes the parallel existence of international and domestic legislation on human rights or freedoms, thus implying two standards.[28] Then in series of decisions, the Constitutional Court stated that international human rights law has only a *supportive role* in the interpretation of the Constitution and cannot prevail over it.[29] In parallel to this, the Constitutional Court stated that constitutional human rights must be interpreted and applied *in the spirit of* international treaties on human rights[30] or that international human rights law should be *taken into account*.[31] In such cases, the Constitutional Court usually explicitly explained that it has decided to take the international standard into account.

Secondly, we can still find a reference to the conforming interpretation of constitutional protection of human rights with international human rights law.[32] In such cases, the Constitutional Court tended to merge the standard in the Constitution with the international standard.

Thirdly, there is an upgrade of the conforming interpretation that should lead to the best possible realisation of rights.[33]

Currently, the difference in approaches leads to the different identification of the standard of the review. Now it is usually not a simple mirror of the respective instrument of human rights law, mostly the European Convention. Hence, in PL. ÚS 40/03 the Constitutional Court recognised that the level of protection of Art. 20 of the Constitution and Protocol no. 1 par. 1 of the European Convention (both the right to privacy) is different in regard to prospective victims. As to the Protocol, municipalities cannot be applicants because of their general public authority character – the European Court of Human Rights does not distinguish a municipality as a public authority and a municipality as a private natural person. However, this is not the case of Art. 20 of the Constitution. Thus, mirroring the European Convention would lead to a lower standard of protection of the right to privacy of municipalities.

On the other hand, in the case of prisoner voting rights, the Constitutional Court found an incompatibility of the general suspension of the right to vote for prisoners (following Hirst[34]) only in the case of an election to the National Council and to the

autorít Slovenskej republiky k autorite ESĽP' [Eng. … because Strasbourg has Spoken… Notes on the Relationship of the Authorities in the Slovak Republic to the Authority of the ECHR] 116-125.

[28] See decision of the Constitutional Court no. PL. ÚS 12/97. The Constitutional Court also stated that decisions of the European Court of Human Rights against the Slovak Republic are binding and hence the Constitutional Court has a duty to refer to them in its case law.

[29] See e.g. decisions of the Constitutional Court no. PL. ÚS 15/98, PL. ÚS 22/00, PL. ÚS 3/09.

[30] See e.g. decisions of the Constitutional Court no. PL. ÚS 17/00, PL. ÚS 10/2014, PL. ÚS 19/2014.

[31] See e.g. decisions of the Constitutional Court no. PL. ÚS 12/01, PL. ÚS 6/08, PL. ÚS 19/09. The source of this obligation is according to PL. ÚS 12/01 Art. 1, Art. 7 par. 5 and Art. 154c of the Constitution.

[32] See e.g. decisions of the Constitutional Court no. PL. ÚS 59/97, PL. ÚS 22/06, PL. ÚS 111/2011.

[33] See decision of the Constitutional Court no. PL. ÚS 2/09.

[34] Hirst v. UK (No 2), judgement of the Grand Chamber of 6 October 2005, application no. 74025/01.

European Parliament. The Constitutional Court mirrored Hirst case and the European Convention regarding the condition of 'people in the choice of the legislature' (Protocol 1 par. 3). However, there is no such condition in the 'twin' provision in Art. 30 of the Constitution. Hence, the challenged suspension of the right to vote in municipal elections was considered compatible with the Constitution and the European Convention, even if the background philosophy from Hirst is applicable there.

The difference in the standard or type of testing Convention's violation was also recognised for example in PL. ÚS 19/06. There the Constitutional Court stated that the test of legality is different in the context of decision-making of the Strasbourg court and in the context of the Constitutional Court. Also, in decision no. PL. ÚS 23/06 the Constitutional Court found that in the present case the standard of Protocol 1 par. 1 is higher than in Art. 20 par. 4 of the Constitution. In PL. ÚS 206/2011 the Constitutional Court stated that it is bound by the European Convention only in respect to the Convention being the minimal standard of protection. Therefore, the European Convention cannot prevent the Constitutional Court from providing better protection of human rights than the one in the jurisprudence of the European Court of Human Rights.[35] As it was already mentioned, the amendment of the Constitution of 2001 did not seem to influence the case law of the Constitutional Court in the analysed field. It seems that regarding the proposed monism the trend is going the other way around in comparison to the expectation. The Constitutional Court used to significantly lean on international human rights standards in the 1990s, merging the Constitution and those standards, while nowadays it is more self-confident in the interpretation of the Constitution and instruments of international human rights law. The existence of the very pro-international human rights law doctrine of the Constitutional Court might be reasonably explained through the political situation in the county in the 1990s, when the Constitutional Court wanted to be the authority that linked the constitutional culture of the Slovak Republic to the West, and so it helped the Constitutional Court to maintain legitimacy in hard times or 'in a less charitable mood; however, one could also point out that substituting their own interpretive efforts by those of the European Court of Human Rights lifted from the justices the burden of constructing a constitution of their own'.[36]

However, some important and practical questions remain open. One of them is whether the judge of an ordinary court who finds out that a specific law she supposed to apply is incompatible with international human rights law, e.g. a treaty, should: (i) apply the treaty that takes precedence over domestic laws or (ii) lodge a petition before the Constitutional Court asking it to strike down the problematic law. The Constitutional Court has spoken in favour of the latter[37] but because it itself has applied international human rights law preferentially and it sometimes has asked ordinary courts to do the

[35] The variety of approaches is also clear from the classification proposed by Ján Štiavnický (see footnote no. 27).

[36] Radoslav Procházka, *Mission Accomplished – on Founding Constitutional Adjudication in Central Europe*. 257-258.

[37] See decision of the Constitutional Court no. PL. ÚS 14/98.

same,[38] the proper process is unclear. In our opinion it is important to stress that establishing a higher standard of protection in international human rights law does not per se equal to incompatibility – e.g. if domestic laws do not provide for a right while international human rights law does. In such a case, they do not genuinely contradict one another and the prospective unconstitutionality (violation of the treaty) is, so to speak, outside of domestic laws – in its missing parts. In such cases, the ordinary court should apply an international standard that has primacy over domestic law. Then the international instrument sort of adds to the text of the law. In circumstances when the application of international human rights law would contradict the text of the domestic law, there is a need to lodge a petition before the Constitutional Court.

Interpretation of international human rights law

As has already been indicated, the Constitutional Court did not feel confident in interpreting international human rights instruments itself.[39] Such an approach surely also has a positive side – a lower risk of breaching international law because of an interpretation that was not supported by the relevant international body. However, in cases where the results of the interpretation of the international instrument are simply missing the Constitutional Court had to interpret the instrument itself. As we have stated, the Constitutional Court seems to be a proponent of the interpretation of international human rights treaties according to the Vienna Convention of the Law of Treaties.

The first instance of the interpretation in which the method notably occurred was the case no. PL. ÚS 8/96 (the right to use one's mother tongue in communication with public authorities). The Constitutional Court stated that the right to information and the freedom of expression do not automatically have a so-called language aspect, as the use of the language of minorities is established by separate provisions of the Constitution of the International Covenant on Civil and Political Rights. The court then stated that this trend was confirmed by the Framework Convention for the Protection of National Minorities, where Art. 9 is *legi speciali* to Art. 7. This is a systematic interpretation with the use of *a contrario* argument. Such interpretation fits the Vienna Convention on the Law of Treaties.

In decision no. PL. ÚS 14/05 the Constitutional Court autonomously interpreted the Convention on the Rights of the Child and claimed that the interpretation of the protection of children under the Constitution and the Convention on the Rights of the Child should not be interpreted restrictively. In the respective case, this meant that the protection – the judicial standard of the decision – should cover both the separation of the child and parents and the allocation of the child to the care of others. Hence, in case of alternative parental care, a separate judicial decision is needed.

[38] E.g. in decision of the Constitutional Court no. I. ÚS 100/04.

[39] The same is often claimed by the judicial bodies that interpret the treaty. In this case, decision of the Constitutional Court no. PL. ÚS 25/01 confirmed that the European Convention as an international treaty is subjected to the rule of interpretation of the Vienna Convention on the Law of Treaties and not domestic rules. It also confirmed that the Strasbourg has the sole competence to interpret the European Convention (with binding effect).

The Constitutional Court was bravest in its constitutional review of the act on the termination of pregnancy in decision no. PL. ÚS 12/01. Firstly, the court also tried to interpret the case law of the European Court of Human Rights looking for background justification. It stated that the Strasbourg probably did not opt for the approach of the same rights for the foetus, as it would unreasonably restrict the right to life of the woman in the European Convention. Secondly, the Constitutional Court provided a literal interpretation of Art. 2 par. 2 of the European Convention, claiming that it is not applicable in the case of the foetus because if so, no abortion could be allowed even if the life of the pregnant woman is threatened. Thirdly, the Constitutional Court interpreted Art. 6 and 7 of the International Covenant on Civil and Political Rights directly using the history of the drafting of the treaty exploring *travaux préparatoires* relatively thoroughly. Hence, the Constitutional Court did not follow the rules of the Vienna Convention on the Law of Treaties here.[40] Fourthly, the Constitutional Court interpreted Art. 1 and Art. 6 par. 1 of the Convention on the Rights of the Child, claiming that a child is born a human being, thus tracing the intent of the drafter even against the text of the Preamble. The last genuine autonomous interpretation where the method is to be found occurred in decision no. PL. ÚS 113/2011 (shifts of some healthcare workers). The Constitutional Court interpreted the Convention Concerning Forced or Compulsory Labour no. 29, mainly it's Art. 4 par. 1, firstly working with the text that provided a definition of what does not count as forced labour and then investigating the *travaux préparatoires*, where the Constitutional Court found another restriction of the prohibition of forced labour – work for private individuals.

To sum up, the Constitutional Court basically does not offer an autonomous interpretation of international human rights law. If it does so, it interprets treaties mostly following the Vienna Convention on the law of treaties. Instead of autonomous interpretation the Constitutional Court mostly quotes a sentence or two of the case law while providing the context very rarely (e.g. in decision no. PL. ÚS 19/09). However, we will show that even when quoting decisions, the Constitutional Court makes mistakes and repeats them.

The application of the international human rights law – the incorrect use

The incorrect uses of international human rights law we have identified may be divided into four groups with the above-mentioned mistakes in the quotation of decisions of international bodies belonging to the first:

1. Incorrect quotation of international human rights instrument and bad translation that does not influence the verdict of the Constitutional Court and does not distract from the coherence and consistency of the argument of the Constitutional Court (9 decisions),

[40] As to the Vienna Convention on the Law of Treaties, the intent of the parties comes into play only conditionally (Art. 32), so according to the Vienna Convention it is only supplementary. Cf. O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties*: *A Commentary* 842. However, the Constitutional Court used it as a main interpretative tool.

2. A lack of the context in referencing the case law of the international judicial body that influences the level of understanding of the decision and its ability to persuade – this also distracts from the coherence of the argument (1 decision),
3. Misinterpretation of the international instrument, misleading use of the instrument and taking a "what fits" approach that influences a decision (6 decisions) and
4. Major *vitium artis* prospectively influencing the decision (e.g. skipping necessary steps in review) (3 decisions).

As to the first group a good example is a decision no. PL. ÚS 6/94. The Constitutional Court claimed that its judgment respected the Decision of the Committee of Ministers of the Council of Europe from 29 June 1967 (Resolution (67)) DH 1 in the case Grandrath and it quoted a part of it. However, the Constitutional Court, in fact, quoted Report 31 of the Commission (Plenary) from 12 December 1966.[41] A bad translation is to be found e.g. in decision no. II. ÚS 94/95 explaining the restrictions under Art. 8 of the European Convention. The Constitutional Court quoted from Gillow v. United Kingdom judgment: 'In addition, the extent of the restriction of the right used by the national authorities should depend not only on the aim of the restriction but also on the nature of the restricted right.' However, this sentence loses meaning, as the European Court of Human Rights spoke about a margin of appreciation, not about the permissible 'extent of the restriction'.[42] This quotation is often repeated with the mistake.

The incorrect use in the second group occurred only once, though had we been strict, the frequent style of quotation of sentences from decisions of the Strasbourg and their compilation would not count as correct use either. In decision no. PL. ÚS 23/98 the Constitutional Court dealt with a challenged law on restitution – the conformity of the deadline for restitution claims. The Constitutional Court let the scope of the right to property in the Constitution depend on the scope of Protocol 1 par. 1 of the European Convention. The Constitutional Court referred to 6 decisions of the European Court of Human Rights respectively decisions of the Commission starting with the Marckx case, which should have proven that Protocol 1 par. 1 does not apply to the right to acquire property. In the end, all the decisions[43] that the Constitutional Court mentioned were taken from the decision on admissibility in Brežný v. Slovak Republic in such a way that the paragraph in the decision of the Constitutional Court practically quoted one paragraph of the decision of the European Commission. Even though the separate references to decisions are correct, the context they had in the decision of the Commission is missing. The point is that the issue of restitution was discussed by the Commission against the background of the *ratione temporis* of the European Convention. Hence,

[41] http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=001-73650&filename=GRANDRATH%20v.%20GERMANY.pdf, par. 40, p. 34.

[42] Originally: 'In addition, the scope of the margin of appreciation enjoyed by the national authorities will depend not only on the nature of the aim of the restriction but also on the nature of the right involved.' Gillow v. United Kingdom*,* judgement of 24 November 1986, application no. 9063/80, par. 55.

[43] The Marckx case, series A, no. 31/1978, Van der Mussele case, series A, no. 70/1983, Brežný v. Slovak Republic, no. 23131/1993, decision from 4 March 1996, D.R. 85-B, Pine Valley Developments Ltd. and others v. Ireland, series A, no. 222/1991, Pressos Compania Naviera S. a. and others v. Belgium, series A, no. 332/1995 and X.Y. and Z. v. Federal Republic of Germany, no. 7655-7657/76, decision from 4 October 1977, D.R.12.

the first reference to the fact that Protocol 1 par. 1 does not protect the right to acquire a possession fits because the respective deprivation of ownership happened before the European Convention came into force (or before the respective countries became signatories). So, the seizure itself was not covered by time. In this context, the quotation of one sentence from Brežný v. Slovak Republic[44] makes sense only if it shows that the violation of the right to property does not extend in time to match the *ratione temporis* of the European Convention. But none of this is clear from the quotations alone. Moreover, the Constitutional Court was called to decide based on the Constitution, but it did not discuss the *ratione temporis* of the Constitution. In our opinion, it would have been better to simply state that establishment of conditions of a claim for restitution, time-limits including, cannot be in inconformity with sole constitutional protection. The reason is that those provisions establish the condition under which such protection would be afforded.[45] Then it would be simple to recall the difference between the position of the claimant and the owner in Brežný v. Slovak Republic.

A good example of the misleading use of international human rights law in the third group is decision no. PL. ÚS 17/08. In that case, the Act on a Special Court was challenged, while one of the reasons was supposed to be the violation of the principle of equality and prohibition of discrimination. Judges of the Special Court were paid significantly better than other judges of ordinary courts. The Constitutional Court quoted the case of Evans v. UK (application no. 6339/05, § 73) as to what is discrimination[46], what is a legitimate aim and proportionality. The quotation came from the Chamber decision, not the Grand chamber decision which has been out for more than a year, but it seems that the Constitutional Court did not know that as it used the reference as if there was only one decision in Evans. This would surely count as a formal problem, that repeated mistaken Evans quotation from decision no. PL. ÚS 22/06. But the problem was that then the court used test of discrimination not only outside the connection to other rights but also with no reference to anti-discriminatory status (ground of prohibited discrimination), which is a standard procedure of testing. Moreover, in Evans, there were both. The violation of Art. 14 of the European Convention was there connected with a right under Art. 8, as stated in par. 72 (!) just one paragraph above the referenced one. The comparator and ground of prohibited discrimination were also present in par. 74 of the decision. Hence, the Constitutional Court took out only par. 73 and not par. 72 and par. 74. The testing without them resulted in a verdict on non-conformity with the principle of equality and prohibition of discrimination. The testing with those conditions

[44] 'Deprivation of ownership or another right in rem is in principle an instantaneous act and does not produce a continuing situation of „deprivation of a right".'

[45] Cf. see A. Grgic, Z. Mataga, M. Longar and A. Vilfan, *The Right to Property under the European Convention on Human Rights A Guide to the Implementation of the European Convention on Human Rights and Its Protocols* Handbook no. 10 (Council of Europe 2007) 33.

[46] '(...) treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.'

probably would have led to a different result as prima facie the proper ground of prohibited discrimination is missing.

In the last group of incorrect uses – major *vitium artis* – there are 3 decisions. In two of them, the Constitutional Court did not perform a test of proportionality even if it should have, both as to the jurisprudence of the Strasbourg and the Constitutional Court itself. One of the two was a case in which the only incompatibility with the European Convention was challenged; there was no other referenced domestic standard.[47] The case concerned the time limit for decisions of ordinary courts in matters of protection of the right to privacy in the modality of the good name or reputation and the time limit for the proof of truth by the defendant. The Constitutional Court extensively quoted the jurisprudence of the European Court of Human Rights, but it did not perform a test of proportionality of the restrictions of the freedom of expression in regards to the standard Strasbourg test. It merely stated that the legislator *in abstracto* favoured the right to privacy over the freedom of speech and hence there is an incompatibility with the European Convention. The second case concerned time limit for the challenge of paternity.[48] The Constitutional Court extensively quoted the jurisprudence of the Strasbourg but did not perform a proper test of proportionality. It struck down a law based on the lack of a general fair balance only. In decision no. PL. ÚS 10/08 the Constitutional Court reviewed the conformity of the condition of registration of churches and religious societies (20,000 believers) with Art. 9 of the European Convention. It came to the conclusion that the condition of registration in no way restricts rights in Art. 9, as those rights are individual and they are in no way restricted by the prospective absence of a registered church. However, even if the rights in Art. 9 of the European Convention are individual, the victim of violation may be even legal persons – e.g. an organisation that unsuccessfully applied for registration.[49] And their rights were restricted for sure.

Conclusion

The role the international human rights law plays in the jurisprudence of the Constitutional Court of the Slovak Republic is significant. However, our analysis showed that the most important is the jurisprudence of the international judicial bodies. The real significant other for the Constitutional Court is the European Court of Human Rights.

Using the vocabulary of Game of Thrones (or similar genre) we can claim that at the beginning of its existence the Constitutional Court, being the new character in the drama, did not really want to play by itself. It only repeated the moves of its foreign international allies. At the same time, the court claimed that there is only one big game with one set of rules, even though there exist many books of rules which have different wording. Despite its best efforts, the Constitutional Court made formal mistakes while repeating the moves

[47] Decision of the Constitutional Court no. PL. ÚS 25/01.

[48] Decision of the Constitutional Court no. PL. ÚS 1/2010.

[49] See Council of Europe/European Court of Human Rights, *Guide to Article 9* (2015) 42 available at http://www.echr.coe.int/Documents/Guide_Art_9_ENG.pdf.

mechanically. This limited the results in the protection of human rights, leaving us with doubt as to whether the Constitutional Court possessed an in-depth understanding of the rules of the game. Some say, that the court could not have played it better, as there were too many battlefields.

Later, at the turn of the millennium, the court showed its awareness as to the importance of its own book of rules and the need to be autonomous in its interpretation. Thus, even if there was a change in the book (amendment of 2001) that prima facie encouraged the court to consider the bigger game, the Constitutional Court was unable to do so, as it had already done much more. In fact, court's tendency was more of the opposite – to be more confident and self-reliant. This led it to at least few more autonomous interpretations of its own book and of the books of rules of its international allies. However, sometimes it seemed that the head did not coordinate the movements of all parts of body so the performance in relation to the allied significant others was slightly different: on one hand claiming that court needs to mirror the international moves in the game, while on the other claiming that court could do more (despite sometimes not even delivering up to the standard of the significant others in practise).

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