National and European Courts in search of the rule of law principle

Introductory speech

Good morning everyone and thank you for attending this panel. I would like to start the work immediately, considering the limited time at our disposal.

The panel will focus on a topic that has already been discussed for several years within the European Union and its Member States, namely the respect for the principle of the rule of law. For lack of time, we will not discuss here the theoretical side of the rule of law principle, which would be very useful indeed, considering the great confusion in this regard (everything is included in the rule of law) and the fact that there is both a use and an abuse of the rule of law discourse.

Our goal is more specific, which is to look at the jurisprudential safeguards or interpretations of the principle to complement the debate on the non-jurisdictional mechanisms for the protection of the rule of law. The enforceability mechanisms for the rule of law will be taken into account, starting from the point of view of the Court of Justice of the European Union, then that of the Constitutional Courts of the Member States, and then, in relation to the candidate and associated countries (in the last two cases, we will consider not just the case-law, but the mechanisms for the protection of the rule of law through the strengthening of the courts' independence as well).

The link between the different cases under consideration lies in the fact that, starting from the principle of the rule of law expressly provided for in both the EU Treaty and Constitutions of the countries examined, we will try to highlight how it is interpreted and protected by Constitutional or Supreme Courts and by the European Court of Justice. This is a complex system of Courts and guarantees that allows us to highlight the connection between legal orders which are more or less strictly bound /committed- and according to partially different readings - to the principle of the rule of law.

Our analysis is therefore based on a geographical perspective: From the centre of the Union to the periphery of the same ("rule of law geography"), based on the different levels of integration, which is full for the Member States but is significant for the candidate countries through the mechanisms of democratic conditionality and even for the countries associated of the Eastern Partnership.

At the end of our presentations, we will try to focus on the results of our research, but above all, we will provide space for public involvement.

I therefore immediately give the floor to my colleague Alessandra Lang, Professor of European Union Law at the Department of International Studies of the University of Milan, who will talk about the "The Rule of Law and the Court of Justice of the European Union". Afterwords, in the

order, there will be my presentation on “Constitutional Courts and the Rule of Law in the Member States of the European Union”; the presentation by Tanja Cerruti, professor of Constitutional Law at the University of Turin, Department of Philosophy and Education, on “The Rule of Law and the Role of the Judiciary in the EU Enlargement to the Balkans”; and by Caterina Filippini, professor of Comparative Public Law in my own Department on “Courts and the Rule of Law in the Associated Countries of the Eastern Partnership”.

Constitutional courts and the rule of law in the Member States of the European Union

I will focus on the application of the rule of law principle by the Constitutional Courts of the Member States of the European Union by providing some examples regarding the so-called new members. In fact, although there is a general awareness of the regression in the state of health of the rule of law in Hungary and Poland, it should be underlined that in other countries, thanks to the support of the Constitutional Courts, the protection of this principle is firm. These countries also represent an interesting case of innovation in the field of comparative law, considering aspects such as the emphasis on the rule of law in post-socialist Constitutions, the influence of German doctrine and case-law, the rich scientific debate on the rule of law and other fundamental principles, and extensive constitutional jurisprudence on the principles. In addition, the examination of constitutional case-law helps us to reflect on the fact that the protection of the rule of law is, above all, an internal matter for the Member States.

The Constitutional Courts' attitude towards the rule of law is an old issue (in 1994, the Council of Europe organised a conference on these issues in Bucharest), but periodically, it is again being explored, especially in times of transition or crisis. This is evidenced by the subject of the 4th Congress of the Constitutional Justice Conference, which will be held from 11 to 14 September in Vilnius, and which is precisely "The Rule of Law and Constitutional Justice in the Modern World". The topic of the XVIIth Congress of the European Constitutional Courts ("Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles") that was just held in Batumi was not very different.

The contribution of the Constitutional Courts to the explanation of this principle is particularly important for two main reasons. First, because they give accurate content to a principle which is vague and rarely defined in constitutions (it is a sum of principles rather than a single principle, as evidenced by the literature on the subject). Secondly, because in countries that have experienced authoritarian or socialist rule, Constitutional Courts contribute toward providing distance from the previous legalistic, positivist and ideological legal interpretations. As I said, in the new Constitutions, the principle of the rule of law is explicitly emphasised and is considered, as we can deduce from the analysis of constitutional jurisprudence, as a directly applicable principle capable of invalidating acts inconsistent with it.
The topic is very wide, but due to lack of time in this panel, I will make an assessment based mainly on some aspects or phases of the case-law addressing the rule of law (any text will fill the gaps):

1. The long phase of the **transition to democracy** (in some cases not concluded), and in particular, the issues of **transitional justice** (still present)
2. European legal issues: the rule of law in the **relationship between domestic and European sources of law** or the rule of law as (a legitimation or) a limit on the penetration of European law
3. The **division of state powers,** and in particular, the **independence of judicial power**
4. The different **sub-principles or aspects of the rule of law** highlighted by the Courts

1. Transitional justice and the rule of law. A formal or material concept of the rule of law

Many of the Constitutional Courts of the countries examined have used the parameter of the rule of law to adjudicate measures to come to terms with the past, especially – but not exclusively – at the beginning of their activity. Particularly known in this regard are the judgements concerning the reopening or the removal of the statutes of limitations for offences committed during the communist regime (or during the war, in the case of Croatia) or those on the lustration and restitution of property. Here, we can distinguish three different attitudes.

On the one hand, some Courts have expressed a rigidly material, content and value-oriented version of the rule of law. They are the Czechoslovakian and the Czech Constitutional Courts (the Constitutional Court of Slovakia also embraces this material conception of the rule of law, not in the judgements on transitional justice, but in those on the autonomy of the judiciary, as we shall see) which recall similar readings of a natural law orientation of the German Courts, not just the Constitutional one, in relation to the crimes of the Nazi and Communist past.

At the other extreme, there are Constitutional Courts that have adopted, with regard to the reopening of the statutes of limitations, and therefore, to the principle of the non-retroactivity of criminal law, a highly legalistic attitude marked by a formalistic view of the rule of law (Hungarian and Polish Constitutional Courts). The Croatian Constitutional Court is in a middle position, if the 2015 Hypo case is taken into account. The same applies to the Romanian and Bulgarian Constitutional Courts, which have criticised the retrospective measures using a mixture of formal and material rule of law.

The Czech Constitutional Court is absolutely the one that has provided the broadest and most consistent interpretation of the rule of law. There are cultural reasons explaining this position (the traditions of the First Czechoslovak Republic, the influence of German jurisprudence, the strong desire to distance themselves from the interpretation of the law of the Socialist period, etc.). The coherence of this Court has never failed, so much so that the first decision adopted in a plenary session is still considered to be a hallmark in constitutional law that is periodically recalled. It is the judgement of 21 December 1993 (Pl. US 19/93) on the verification of the "Act on the lawlessness of the communist regime" which also included criminal law measures, namely the recalculation of the statute of limitations for crimes committed between 1948 and 1989 and not pursued for political reasons. The Court intended to differentiate its material discussion of the rule of law from the formal and legalistic one that allowed the emergence of totalitarianism. According to the Court, the suspension of the statute of limitations is legitimate, as during the communist period, the law was only a tool of the regime. The Court considered the law to be consistent with the Constitution, criticising the idea of a constitutional neutrality over values, which would be associated with positivism and a 'legalistic conception of political legitimacy'. The Court dwelt in a complex disquisition on the rule of law principles, refusing to accept a formal definition of legality, and to merge legality with legitimacy, the latter being contingent on the democratic character of the State ("a political regime is legitimate if accepted as a whole by the majority of citizens").

With regard to the subsequent case law on transitional justice, there are many cases, even recent ones, that repeat the same conception of values and of regime discontinuity, recalling the first plenary judgement of 1993 (there were some cases on the restitution of property confiscated during communism or even the German occupation in 2016).

We may mention, among the best known cases, judgement 9/01 of 5 December 2001 in which the Court ruled on the extension of the law of lustration (where the focus is on the loyalty of public officials to the values of democracy), judgement I. US 420/09, in which the Court mentioned, in order to distance itself, the positivist position of Weyr, a

well-known constitutionalist of the first Republic and a member of the Kelsen school of the pure theory of law, judgement 517/10 of 15 November 2010 in which the Court again recognised the importance of clarifying the past of public officials. Two cases from 2016 are also worth mentioning. The first was decided by judgement I. US 3964/14 of 13 June 2016, in which the Court, mentioning the famous 1993 first plenary decision, censured the formalist behaviour of the ordinary courts, which refused to accept the applicant's request for compensation for the property lost by her grandmother following the assignment of Rutenia subcarpatica to the USSR. This refusal was based on the application of a 1959 decree. In this case, the Court reiterated the notion of the discontinuity of values with the previous regime, despite the formal continuity of the old law. The Court again underlined the importance of interpreting restitution norms in light of their sense and purpose in order to alleviate the wrongs caused by former regimes.

As far as Hungary is concerned, both in the old amended Constitution (preamble and Article 2) and in the new Fundamental Law (Article B.1), it is explicitly provided that Hungary is a democratic state based on the rule of law. In both constitutional phases, the Constitutional Court gave its interpretation of the principle, but with partially different readings, because the Fundamental Law adopts an attitude that is clearly punitive against the elite of the communist regime, and therefore, is based on a discontinuity of values.
In the first period after the transition to democracy, the Constitutional Court opted for a formalist view of the rule of law. The most important in this regard is the 11/1992 ruling of 5 March 1992, in which the Court declared the reopening of the limitations period unconstitutional, especially because of its unacceptable vagueness.

The Court examined the Law of 4 November 1991, according to which the time-limits for the limitations period should have begun to run again from May 2 1990 for crimes of betrayal, voluntary murder and the infliction of wounds that caused death, but only in cases in which the "State failure to prosecute these crimes was based on political reasons".

The Court based its decision on a particular conception of the rule of law: Since the transition to democracy had taken place in a legal way, there should be no distinction between laws approved before and after the new Constitution. On this basis, the Court applied the principle of legal certainty, a fundamental requirement of the rule of law, by holding that the contested law was lacking in that regard.

Following the Court, the Constitution did not and could not confer a right to substantive justice. In the words of the Court, "[r]eference to historical situations and the rule of law's requirement of justice could not be used to set aside legal certainty as a basic guarantee of the rule of law". It therefore considered it impossible to appeal to "the unique historical circumstances of the transition" and refused to suspend the constitutional requirements on the basis of the exceptional nature of the circumstances which would justify the law, according to its authors. In emphasising "procedural" compared to "substantive" justice, the Court urged the Parliament to reconcile the need for justice with the formal legality requirements.
I remember that the decision was acclaimed by the foreign literature, which identified the Court's discourse with the idiom of liberal constitutionalism and of the "civilized" state of law in opposition to an apparently vindictive and populist parliament. It is only one of many decisions in which the Court curbed the efforts of the center-right majority to punish former communists. The Czech approach was completely opposed: Because the limitations periods were part of a deliberate practice of illegality, one could not appeal to the legality requirement to comply with them.

For the Hungarian Constitutional Court, therefore, legal certainty has been the fundamental core of the rule of law. As a result, procedural safeguards such as the prohibition of the retroactivity of laws and vacatio legis are fundamental.

After the entry into force of the 2011 Fundamental Law, the formal interpretation of the principle has continued to be crucial in the Hungarian case-law, although the new Constitution seems to have switched to a substantive or material version of the rule of law. However, the formalist and positivist interpretation, which had its reason for being in the first post-transition phase, turned out to be unfortunate in light of the political-constitutional events of the last seven years. In addition, formal legal certainty is in crisis because a series of constitutional rulings during the period 2011-2014 have not been fully respected by the legislature and the Government.

The Fundamental Law no longer pursues formal neutrality over values, but in contrast, Article U states that the sense of justice of the society must be ensured "by making possible the retroactive prosecution of politically motivated crimes committed and not prosecuted during the communist regime". Article U also provides for collective responsibility, the disclosure of the personal data of former Communist leaders, the reduction of their pensions, and the expiry of the statute of limitations for serious crimes. The contradiction is evident in the fact that the new framers used the rule of law to their advantage. It is a historical nemesis out of time, and therefore, I would say 'ahistorical'.

The Constitutional Court tried to switch to a more substantive discussion of the rule of law in Decision 45/2012: The Court believed that it is incompatible with the notion of rule of law for the constitutional provisions to constantly be the subject of the Court's scrutiny, thus making the Constitution an uncertain parameter; yet the Court emphasised that constitutional legality is not based solely on requirements of a procedural nature, but also on those of a substantive nature. An interesting reference to the material conception of the rule of law is contained in this judgement, which also makes reference to conventional international law (the so-called ius cogens). In Case 61/2011, the Court had also held that ius cogens in international law, including fundamental rights under the ECHR, could form an inalienable part of Hungarian constitutionalism: With reference to international human rights law, the Court has thus sought to overcome the difficult succession of constitutional orders with its loss of power and with the cancellation of the previous case-law.

As far as the Polish Constitutional Tribunal is concerned, we can mention the September 1991 ruling on the statute of limitations and the 2007 ruling on the lustration law. In both cases, the Tribunal declared the challenged acts to be inconsistent with the constitutional principles regarding the rule of law. However, in the lustration case, the decision was accompanied by 9 dissenting opinions.
As for Croatia, I already mentioned the 24 July 2015 decision on war profiteering involving former Prime Minister Ivo Sanader (the Hypo and INA-MOL cases). In that case, with reference to the constitutional amendment of 2010, which established that "[t]he statute of limitations shall not apply to the criminal offences of war profiteering" and others....,

"...nor any criminal offences perpetrated in the course of economic transformation and privatization and perpetrated during the period of the Homeland War and peaceful reintegration, wartime and during times of clear and present danger to the independence and territorial integrity of the state, as stipulated by law, or those not subject to the statute of limitations under international law. Any gains obtained by these acts or in connection therewith shall be confiscated".

the Court tried to balance the formal and material rule of law and interpreted the new paragraph so that it could allow, in the future, unlimited temporal possibilities for the criminal prosecution of the perpetrators of the said crimes, provided that the offences in question were not barred by the statute of limitations on the day of the entry into force of the constitutional amendment (16 June 2010). In this manner, "the CCC interpreted the constitutional amendments in accordance with the well-

known and accepted legal principles of legal certainty and legality, barring the prolongation of statute of limitations in cases where it had already expired". The ruling was widely criticised and accused of politicisation.

As far as Bulgaria is concerned, there are many decisions on transitional justice in which the Court deemed the challenged acts to be contrary to the rule of law principle. One of the more interesting is judgement no. 12 of 13 October 2016 (case 13/2015), in which the applicant (the Attorney General of the Republic) had challenged an amendment to the Criminal Code of 2015 which introduced new cases of elimination of the statute of limitations for a series of offences (with reference to the respective articles of the Criminal Code) committed during the communist period. The statute of limitations was completely removed for these offences as for crimes against humanity.

This Court considered that the retroactive removal of the statute of limitations for crimes committed under communism and not punished is not permissible in light of the constitutional principle of the rule of law. It also considered that the crimes in question could not be assimilated to crimes against humanity, as the human rights associations affirmed. This is a decision different from that of the Czech Constitutional Court adopted in 1993. At the same time, the position of the Bulgarian Court is not comparable to that of the Hungarian Constitutional Court in 1992, because the former considered that, in the abstract, it was possible for the legislature to abolish the prescription for crimes other than crimes against humanity, especially if they were committed in the totalitarian period. However, it censured the way in which the law pursued the goal, because it was in conflict with several elements of the rule of law (lack of clarity; specifically, the type of crimes or the guilty persons were not well defined, because of the indeterminacy of the wording used). Therefore, the Bulgarian Court essentially adopted a mixed version, both formal and substantive, of the rule of law and considered this principle to be violated in the first instance. In fact, the law was invalidated solely for the breach of this principle.

As far as Romania is concerned, the Constitutional Court rejected the draft law on lustration in its entirety in Decision no. 820 of 7 June 2010. The Court considered the draft law unconstitutional for breach of both Article 1, paragraph 3 const. on the rule of law, which had been called down by the applicants (29 senators), and of other constitutional provisions (including those specifying the different components of the rule of law, such as the non-retroactivity of the law, non-discrimination, etc.). In this case, as in the Bulgarian Constitutional Court's decision on the statute of limitations discussed above, the purpose of the law was not considered wrong, although after so many years, it no longer made sense to conduct lustration; above all, the Court criticised the lack of clarity of the law.

The Courts of the Baltic States also considered lustration provisions, which were mainly contained in acts regarding the disclosure of political police files, electoral laws or laws on citizenship, consistent with the Constitution. For Lithuania, see the judgement of 4 March 1999 (references to the rule of law were mainly made by the applicants, who asked for the repeal of the law in its entirety).

The different attitude of the Constitutional Court, especially in decisions regarding dealing with the past, evidences the relevant role of the cultural context and the mentality, which goes beyond the abstract interpretation of principles and values (the Czech Constitutional Court further insisted on culture and context, becoming more militant than the German one).

With regard to transitional justice measures, and above all, the adoption of lustration laws, the latter have been an attempt, perhaps unsuccessful, to cope with the social need for the cleansing of the

communist past, but at the same time, to uphold the principles of the rule of law. The synthesis of these two needs seems to have been almost impossible. As noted by German dissident Bärbel Bohley, "we were expecting justice, but we got the rule of law". The main dilemma, as seen in the analysis of constitutional case-law, is the confrontation between different constitutional values, and therefore, between the lustration (and other measures) and the general principles of law (equality before the law, non-retroactivity, individuality of guilt, res judicata, etc.). The requirements of "legitimacy" and "legality" have frequently and inevitably been found in a conflict situation. The principles of the rule of law, under the conditions of the transition to democracy, could strengthen the position of positive law, paradoxically becoming a "barrier" to the rapid democratic transformation of the state and the society: Legitimate purposes could therefore be more easily imposed in a situation of "state and law discontinuity". This certainly applies to the period immediately following the transition, but many years later, the adoption of such measures is no longer explainable with reference to the rule of law.

2. Rule of law and European integration (the relationship between the source of law and the counter-limits/safeguards)

The reference to the rule of law is a recurrent point in the case-law of the Constitutional Courts of the new Member States when dealing with the penetration of European law into domestic law. This reference is used mainly to dictate the limits of that penetration but also to justify European integration. The most significant judgements are those of the Czech Constitutional Court and the Supreme Court of Estonia, but some inspiration also comes from the Latvian and Romanian Constitutional Courts. Unlike the decisions examined above, in this case, the Courts did not consider the principle of the rule of law to be violated.

As for the Czech Republic, I can only refer to some very well-known decisions in which the Court referred to the democratic State ruled by rule of law, taking a stand against European law and envisaging limits to its penetration. We must note that these decisions should be read in connection with those regarding the limits on the constitutional amendments (the constraints on constitutional amendments and the limits on the penetration of European law coincide, as the Court has stated in the ruling on the early termination of the legislature, 27/09 of 10 September 2009). The Romanian Constitutional Court, in its judgement no. 80 of 16 February 2014, also considered that the rule of law principle is implicitly included within the constitutional amendments' limits under Article 152 const.

The two most relevant decisions are the so-called Sugar Quotas III (of 8 March 2006) and the first decision on the Lisbon Treaty (26 November 2008). In the first case, the Court established the limits and conditions for the penetration of EU law: Although the Constitution allows for the delegation of certain powers of the Czech authorities to an international organisation, such delegation is only conditional and may exist "in so far as the delegated powers are exercised in a manner compatible with State sovereignty and the *substance of the material rule of law"*. According to Art. 9 par. 2 of the Constitution of the Czech Republic, the essential attributes of a democratic state governed by the rule of law remain beyond the reach of the Constituent Assembly itself. Here, the Court again mentioned the first plenary decision of 1993 Pl. US 19/93.

The discussion of the principle of the rule of law in the first decision on the Lisbon Treaty of 26 November 2008 is equally wide. "The transfer of powers of bodies of the Czech Republic to an international organization under Art. 10a of the Constitution of the Czech Republic (the

"Constitution") cannot go so far as to violate the very essence of the republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic state governed by the rule of law (Art. 9 par. 2 in connection with Art. 1 par. 1 of the Constitution)".
The judgement of the Supreme Court of Estonia of 12 July 2012 on the European Stability Mechanism is also worthy of consideration. The Supreme Court, although considering that the mechanisms provided for by the contested provision violated some important constitutional principles, including the rule of law principle (which is formally provided for in Article 10 of the Constitution but is also implicit in other articles, namely 1, paragraphs 1 and 3, paragraph 1), in the end established that this violation was not serious. In this case, the reference to the rule of law was used more by the applicant and by the dissenting judges than by the Court, which in the end, did not consider the principle 'significantly' violated (very ambiguous) because it must be balanced with other constitutional principles. Finally, by linking the ESM mechanism to EU law (which, in my opinion, was inevitable and clear from the outset), the Court finally established *the possibility* of triggering the counter-limits / reservations:

"...the Supreme Court *en banc* is of the opinion that the CREAA does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. Therefore, it is primarily the *Riigikogu* which must, upon a change in any founding treaty of the European Union and also upon entry into a new treaty, deliberate separately and decide whether the amendment to the founding treaty of the European Union or the new treaty leads to a deeper integration process of the European Union and thereby an additional delegation of the competence of Estonia to the European Union, and thus also a more extensive interference with the principles of the Constitution. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again. These requirements are to be considered also if the Treaty leads to amendments to the TFEU and TEU."

As for Latvia, we remember the judgement on the Lisbon Treaty of 7 April 2009 (the Court considered the Treaty consistent with the Constitution, but established some conditions): "…the delegation of competencies cannot violate the rule of law and the basis of an independent, sovereign and democratic republic. Likewise, the EU cannot affect the rights of citizens to decide upon the issues that are essential to a democratic State".
For Romania, decision No. 80 of 16 February 2014 of the Constitutional Court should be mentioned, which ruled on the broad draft of constitutional reform, declaring it unconstitutional. In several respects, the Court found that the proposed amendments violated the principle of the rule of law. For example, regarding the modification of Article 148, paragraph 2, which would have introduced the supremacy of European law also over the Constitution, the Court considered the amendment to be inconsistent with the principle of the rule of law referred to in Article 1, paragraph 2 const. This is because constitutional provisions are not declaratory but binding, and therefore, the supremacy of European law cannot be established at the constitutional level, as the Constitution itself, in a series of articles (1, 3 and 5, 20, paragraph 2), clearly provides a sub-constitutional rank for international treaties.

"By establishing that the European Union law applies without any circumstantiation within the national legal order, the fact of making no distinction between the Constitution and the other domestic laws equals to placing the Basic Law in the background compared to the legal order of the European Union. From this perspective, the Court holds that the

country's Basic Law - the Constitution - is the expression of the people's will, which means that it cannot lose its binding force through the simple existence of a non-concordance between its provisions and European ones. Likewise, the accession to the European Union cannot affect the Constitution's supremacy over the entire legal order (see, to the same purpose, Ruling of 11 May 2005, K 18/04, issued by the Constitutional Tribunal of the Republic of Poland) ... Therefore, the Court, unanimously, finds that the amendment of the provisions of Article 148 (2) is unconstitutional, since it violates the limits of the revision referred to by Article 152 (2) of the Constitution."

3. Rule of law and the separation of powers. In particular, the autonomy of judicial power.

Another important aspect of the rule of law in the constitutional case-law of the New Members is the separation of powers, with particular reference to the independence of judicial power. The independence of the judiciary is a topic that has begun to develop in recent years; in the first years after the transition to democracy, the Constitutional Courts were dealing with the politically active powers. Indeed, the principle of the division of powers is not always covered in the principle of the rule of law, but in any case, it is emphasised in the post-communist constitutions**.**

Here, I mention only the relevant case-law, namely some decisions of the Constitutional Court of Slovakia and Slovenia.

In its decisions regarding the independence of the judiciary, the Slovak Constitutional Court has adopted an openly substantive or material conception of the rule of law (but with a different profile than the Czech cases). For example, in judgement PL. US 17/08 of 20 May 2009, in which the Court considered the foundation of special jurisdictions as unconstitutional because it contradicts the substantive rule of law principle (referring to Czech case law and literature), the Court ruled that "[t]he material rule of law is not based on an apparent observance of the law or on the formal respect of its content in a way that feigns compatibility of legally relevant facts with the law. The essence of the material rule of law lies in placing the applicable law into conformity with the core values of a democratically organised society and subsequently in consistent application of the law in force without exceptions based on purposive reasons." In this case, the Slovak Court admitted the possibility of repealing the act solely for the violation of the rule of law principle in "the situation where the breach of the principles of material rule of law is so serious that in itself it must lead to a decision on nonconformity of the law with the Constitution".

The establishment of a state body that by its nature lies outside the standard organization of public authorities in the state, without there being any compelling reason justifying the establishment of such a state body, in itself seriously threatens the essence of the material rule of law. For that reason the establishment of such a body is incompatible with the protection guaranteed by Art. 1 sec. 1 of the Constitution within the scope of the principles of the rule of law (accordingly e.g. PL. ÚS 6/04)."

The same, that is, the repeal of an act contested on the basis of a direct breach of the rule of law principle had already happened in judgement PL. ÚS 12/05 of 28 November 2007, concerning the status of judges and their salaries, which had been reduced because of the economic crisis (the act contested "is not consistent with Article 1 para. 1 of the Constitution of the Slovak Republic together with Article 144, para. 1 of the Constitution").

"It is undisputed that the principle of judicial independence is one of the essential elements of a democratic state governed by the rule of law (Art. 1 sec. 1 of the Constitution), stemming from the neutrality of judges as a guarantee of fair, impartial and objective court proceedings. This principle contains a number of aspects which together create the

conditions enabling the courts to perform their tasks and duties primarily in protecting the fundamental rights and freedoms of citizens. It is based on the independence of courts (Art. 141 sec. 1 of the Constitution) and of judges (Art. 144 sec. 1 of the Constitution). The independence of judges in a broader sense, however, must also be understood as their material independence." Furthermore, "[a]n integral part of the rule of law principles guaranteed by the Article 1, para. 1 of the Constitution is also the principle of legal certainty and legitimate expectations of all legal subjects in the legal order". Considering all this, it considered the rule of law principle to be largely disregarded.

Coming to Slovenia, in the UI-159/08 judgement of 11 December 2009, the Constitutional Court ruled on the independence of the judiciary as part of the principle of the separation of powers, which is, in turn, considered to be related to (but not part of) the principle of the rule of law. In particular, the Court was called upon to adjudicate the economic aspect of that autonomy (adequacy of the salary, reduction of the same based on the economic crisis). Almost all the contested provisions were considered inconsistent with the Constitution. The Court hereby ruled: "The principle of the separation of powers is a fundamental principle of the organisation of the state power. Due to the fact that this is one of the fundamental principles of the constitutional system, its full effect, especially from the viewpoint of the position and functions of the judicial power, must be understood in connection with other fundamental constitutional principles, such as the principle of democracy (Article 1) and the principle of a state governed by the rule of law (Article 2).
In the Decision No. U-I-60/06 of 7 of December 2006, the Slovenian Constitutional Court faced the defence of the role of the Constitutional Court, again referring to the rule of law and the separation of powers (a similar decision was also adopted by the Constitutional Court of Croatia in 2014):

"The principles of a state governed by the rule of law (Article 2 of the Constitution) and the principle of the separation of powers (the second paragraph of Article 3 of the Constitution) require, inter alia, that each of the branches of power performs their powers and can be held to account for the (non)performance of such. If the legislature does not respond to the Constitutional Court decision, which is binding on the legislature (the third paragraph of Article 1 of the CCA), within the period of time determined by the Constitutional Court for it to remedy the established inconsistencies and does not try to remedy the inconsistencies, the legislature thereby violates Article 2 and the second paragraph of Article 3 of the Constitution. The legislature responded to the Constitutional Court decision by adopting a new statutory regulation. Therefore, such does not evidence a violation of the above-mentioned constitutional provisions merely from this point of view. The new statutory regulation is the subject of the constitutional review at issue – i.e. the review of its consistency with the Constitution. However, it is evident that also this time the legislature regulated individual issues inconsistently with the Constitution, which the Constitutional Court is hereby establishing by this decision".

In Decision No. 80 of 16 February 2014, in which it assessed (mainly negatively) the challenged constitutional amendment (already outlined above), the Romanian Constitutional Court ruled, among other things, that there was a violation of the rule of law principle in providing that the decisions of the National Security Council will be binding on all public institutions and public administration authorities, without any differentiation. From this perspective, the National Security Council becomes a legislative forum, whose acts are equally binding on all public administrative authorities and public institutions and the mandatory nature imposed at the constitutional level confers upon them effects similar to those of laws. However, such assimilation "is inadmissible in a state governed by the rule of law, which is organised in accordance with the principle of the separation and balance of powers within a constitutional democracy, where Parliament is the highest representative body of the Romanian people and the sole legislative authority of the country".

Again, with regard to the division of powers, see judgement 972 of 21 November 2012 of the Romanian Constitutional Court concerning a conflict between the judicial authority and the Senate, which voted negatively on the enforcement of a judgement of the High Court of Cassation and Justice, although the judgement confirmed, irrevocably, the state of incompatibility of certain roles of Senator Mircea Diaconu. The Court ruled in favour of the applicant (the President of the Superior Council of Magistracy), stating that "to deprive a final and irrevocable judgement of its enforceability is a violation of the legal order of the rule of law and of the good operation of justice". In the end, the Court stressed the relevance of the proper functioning of the rule of law and of cooperation between State powers, which should be manifested in the spirit of the norms of constitutional loyalty, with the loyal behaviour being an extension of the principle of the separation and balance of powers.

4. The different contents of the rule of law

Among the most highlighted components of the rule of law by the Constitutional Courts of the countries examined are: legal certainty (by far the most used principle), legality, confidence in law and legitimate expectations, predictability of legal acts, non-arbitrariness, and non-retroactivity. From a substantive point of view, the most emphasised are the purposes of the power's use and substantial justice, etc.

For the Czech Constitutional Court, the components include the right to judicial and other kinds of protection; the formal features of the law, such as order, predictability, non-arbitrariness, equality in law and legal certainty; and the right to a fair trial. Both the principles of non-retroactivity and the predictability of the law (its understandability and the absence of internal contradictions) derive from the rule of law principle. The first derives also from the principle of the protection of citizens' trust in the law.

In Slovakia, we can identify the following contents of the rule of law: legal certainty (which is part of the material rule of law), minimum procedural standards for the adoption of laws, nulla poena sine lege, the right to a fair trial, proportionality, and legality. In individual petitions in general, the principle of the rule of law is called upon in relation to the violation of a specific individual right. The Slovak Constitutional Court, unlike that of the Czech Republic, seems to link indissolubly, but also, ambiguously, the formal and material version of the rule of law: "Constitutional principles and democratic values, which taken as a whole form the concept of the material rule of law (Art. 1 sec. 1 first sentence of the Constitution), stress the requirement to respect constitutionality and legality, legal certainty as well as the requirement of effective and accessible protection of fundamental rights and freedoms".

As discussed above, for the Hungarian Constitutional Court, legal certainty is the fundamental core of the rule of law (no ambiguity of law and predictability of institutions) from which the procedural safeguards, such as the protection against retroactive laws and the importance of vacatio legis, derive. Legal certainty is the principle with which the Court was always measured in the early years in assessing the issues of security / social rights, to an increasing extent, to the point of being accused of rediscovering socialism. After the entry into force of the FL, the formal interpretation of the principle continues to be a hallmark of Hungarian constitutional case-law.

The Court of Latvia has also accorded particular importance to the principle of legal certainty as a component of the rule of law which, inter alia, requires that executive judgements not be called into

question. Another aspect is legal stability, which not only requires legal proceedings to be well regulated but also their conclusions to be legally lasting. Other aspects that are emphasized are the supremacy of law, which also applies to public administration, the fair outcome of legal proceedings, which can be censured only by an independent judicial power, and the principle of legitimate expectations. As for the substantial rule of law, the principle of justice (the fair and non-formal behaviour of the public administration/public service) is highlighted.

In Lithuania, the constitutional principle of a state under the rule of law is especially broad and comprises a wide range of various interrelated principles and imperatives, which have gradually been disclosed by the Constitutional Court in its jurisprudence: the hierarchy of legal acts, proportionality, justice, legitimate expectations, legal certainty and legal clarity, legal security, various requirements for the legislature, requirements for the application of law, etc. It should be noted that compared with all the other constitutional principles, petitioners have most often challenged the compliance of a legal regulation with the constitutional principle of a state under the rule of law.

As for Estonia, priority is given to legal certainty; legal clarity; the principle of legitimate expectations; the vacatio legis principle; the nullum crime nulla poena sine lege (certa) principle; and the ne bis in idem principle. In the Vilnius Conference Report, p. 13, it was written that the Supreme Court "has sometimes made decisions where the infringement of fundamental rights is not treated (although this would be possible), but only the rule of law is addressed". An example is the judgement 3-4-1-29-13 in which the Supreme Court examined the Courts Act in relation to who may administer justice: Subsection 146(1) of the Constitution was substantially considered as the specification of the rule of law.

As far as Bulgaria is concerned, the most commonly mentioned rule of law profiles are: legal certainty; access to justice in independent and impartial courts; non-discrimination and equality before the law; proportionality; non-inconsistency, acquired rights, legal security; clear, precise and unambiguous texts in legislation; any legislation that impedes law enforcement or is internally contradictory is not to be tolerated by the Constitution, as it clashes with the principle of a state committed to the rule of law.

As for Romania, there are many decisions concerning the formal features of the law, particularly legal certainty.

Final Remarks

The Constitutional Courts of the new Member States of the EU refer to the principle of the rule of law broadly and in addressing a wide spectrum of issues. Although some believe that the reference to the principle prevailed in the period immediately following the transition to democracy, the analysis of more recent case-law shows that the rule of law continues to be a reference for an extensive series of issues, both abstractly and in relation to individual complaints.

Apart from the formal aspects of the principle, i.e. the features of the law (legal certainty, non-retroactivity, clarity and non-contradiction, proportionality, legitimate expectations), from the substantive point of view, the more sensitive issues, such as those in which the interpretation and analysis of the principle are examined in a wide and sometimes even exclusive manner (as seen above, in several cases, legal provisions have been invalidated based solely on the violation of this principle), concern two aspects, namely measures of transitional justice (which have not been

definitively settled, as one can see from the case-law of the Czech Constitutional Court in 2016) and the European integration. A third important aspect is the separation of powers, particularly the independence (including economically) of the judicial power. However, not every country's case-law and literature have considered the principle of the division of powers as naturally entering into the democratic state based on the rule of law (see Slovenia, Croatia). In general, the need for legal certainty prevails. This is partly explained by the desire to break away from the past, but also from the mistakes of the new legislators, and hence, from the limitations of legislative drafting.

The emphasis on values such as human dignity, freedom and justice and on principles such as popular sovereignty, the rule of law and representative democracy is more important for these courts than for those of the oldest democracies. If these aspects were more evident in the first years after the transition, to distance or defend themselves from a past that was just abandoned, thereafter there are the remains of that past (the restitution of property, a new Hungarian Constitution based on the explicit repudiation of the past, the reopening of statutes of limitations, etc.) and previous decisions that continue to be seen as the hallmarks of constitutional law or, paradoxically, these principles are invoked to defend themselves from European interference. The emphasis on the rule of law over time has not diminished, and this means either that there is a greater genetic sensitivity to these values, or that these democracies are still partially in transition. The differences between the jurisprudence of the Constitutional Courts help us to understand the development in their respective countries of the culture of the rule of law and the models that have followed. In fact, although the content of the rule of law is inspired by European models (international standards, the German model), in some ways, the resemblance is only formal, covering deeper, not necessarily negative, cultural differences.

After so many years, can we still distinguish these countries in a single nucleus, or can we extend comparisons in a transversal way as different authors suggest? Indeed, the issues common to these countries, and therefore, to these Constitutional Courts, are obvious, as we have seen (the emphasis on values and regime discontinuity, questions of transitional justice, the division of powers, judicial autonomy, the defence of constitutional identity or counter-limits) with different nuances. At the same time, if the issues stemming from the past are peculiar to these countries, others are now widespread among all the EU members as the defence of constitutional identity. Indeed, both these courts and those of the older member States of the EU have referred to these values when they have established the boundaries on the penetration of EU law. One must be aware that the EU is not a political or constitutional community, despite all the efforts. All the members have asked for changes in perspective. Moreover, with the EU's enlargement to the East, there has not only been a translation of principles, rules and models from the West to the East, but also the opposite, although the scientific discussion on this last aspect has been limited. For all these Constitutional Courts, it is worth observing that they were much more Euro-friendly before they entered the EU; some years later, they began to defend themselves. In the end, the analogies between the Courts of these countries are today perhaps less important (with exceptions) than those existing between the old and new Courts.

Let me express some final thoughts on the respect of the rule of law principle and the EU: if you do not materialise it into a concrete rule, the principle of the rule of law is hardly justiciable at the European level, although theoretically possible. To activate an infringement procedure, there must be a breach of a provision of secondary law. On the other hand, the constitutional case-law of the

new Member States indicates that respect for this principle, even considered alone, is still crucial, because they have not overcome the post-communist syndrome, or because they still consider the protection of the principles to be relevant for their democratic consolidation.