Международное право

International law

УДК 341:342

THE RULE OF LAW PRINCIPLE IN THE CONSTITUTIONAL CASE LAW OF THE FORMER COMMUNIST COUNTRIES: THE DECISIONS ON TRANSITIONAL JUSTICE AND EUROPEAN INTEGRATION

ANGELA DI GREGORIO[a]

[a]*University of Milan, 7 via Conservatorio, Milan 20122, Italy*

The purpose of this paper is to check how the rule of law principle is interpreted in the constitutional case law of the Central and Eastern European Members of the European Union. The goal of this research is twofold. First, these are countries that have experienced a communist past, during which the conception of the rule of law, although not absent, assumed different contents compared to those typical of the Western legal tradition. Second, a survey on the jurisprudential interpretation of the main constitutional values, in this case the rule of law, helps to clarify the cultural and value context of these countries. Considering the heavy rule of law crisis, which took place in Hungary and Poland in recent years, this recognition is particularly important in order to avoid cumulative judgments that could devalue the former communist countries in general, trivializing the harsh path of democratic conditionality that has assisted them in the European application process.

Key words: transitional justice; rule of law; european integration; former communist countries.

Образец цитирования:
Ди Грегорио Анжела. Принцип верховенства права в конституционной юриспруденции бывших коммунистических стран: решения о правосудии переходного периода и европейской интеграции. *Журнал Белорусского государственного университета. Право.* 2018;2:84–96 (на англ.).

For citation:
Di Gregorio Angela. The rule of law principle in the constitutional case law of the former communist countries: the decisions on transitional justice and european integration. *Journal of Belarusian State University. Law.* 2018;2:84–96.

Автор:
Анжела Ди Грегорио – профессор сравнительного публичного права.

Author:
Angela Di Gregorio, full professor of public comparative law.
angela.digregorio@unimi.it

ПРИНЦИП ВЕРХОВЕНСТВА ПРАВА В КОНСТИТУЦИОННОЙ ЮРИСПРУДЕНЦИИ БЫВШИХ КОММУНИСТИЧЕСКИХ СТРАН: РЕШЕНИЯ О ПРАВОСУДИИ ПЕРЕХОДНОГО ПЕРИОДА И ЕВРОПЕЙСКОЙ ИНТЕГРАЦИИ

АНЖЕЛА ДИ ГРЕГОРИО[1)]

[1)]*Миланский университет, 7 via Conservatorio, 20122, г. Милан, Италия*

Подвергается анализу принцип верховенства права в конституционной юриспруденции государств Центральной и Восточной Европы, входящих в Европейский союз. Рассматриваются страны, пережившие коммунистическое прошлое, в ходе которого концепция верховенства права приобретала отличное от западноевропейской правовой традиции содержание. Исследование правового толкования основных конституционных ценностей, в данном случае – верховенства права, помогает прояснить культурный и ценностный контекст этих стран. Тяжелый кризис верховенства права имел место в Венгрии и Польше в последние годы, потому этот обзор особенно важен для того, чтобы избежать общих суждений, которые могут привести к девальвации бывших коммунистических стран в целом и упростить путь демократической условности, которая помогла им в процессе подачи заявок для вступления в Европейский союз.

Ключевые слова: переходное правосудие; верховенство права; европейская интеграция; бывшие коммунистические страны.

Objectives and methodology

In the last seven years, the rule of law narrative has been predominant in the European constitutional law literature. Although the discourse on this topic risks being both used and abused[1], a study of the interpretation of the rule of law principle by the constitutional courts of the former communist members of the EU could be useful in order to highlight the value and cultural context of these countries.

In fact, although there is a general awareness of a deterioration in the state of health of the rule of law (and of democracy and human rights) in Hungary and Poland, it should be underlined that in other former communist countries, because of the support of the constitutional courts, this principle is quite firmly protected. These countries also represent an interesting case of innovation in the field of comparative law, because of aspects such as the emphasis on the rule of law in their constitutions, the influence of German legal doctrine and case law[2], the rich academic debate on fundamental principles, and an extensive constitutional jurisprudence on these principles[3]. 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, a matter internal to the EU member states. Yet, notwithstanding the influence of the Western European models, there are many cultural differences among the "old" and the "new" EU member states, because of a delayed and autochthonous path of constitutionalism in the latter.

The attitude of the constitutional courts to the rule of law is an old issue[4], but it is periodically explored anew, especially in times of transition or crisis[5]. The role of the constitutional courts of the former communist countries in the explanation of the principle is particularly important for two main reasons. First, these courts give an accurate definition of a principle

[1]This topic is very complex and is connected with that of the democratic nature of the state and of the EU. Please refer to G. Palombella, "Beyond Legality–Before Democracy. Rule of Law Caveats in the EU Two-Level System", in C. Closa and D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press 2016) p. 36.

[2]A. F. Tatham Central *European Constitutional Courts in the Face of EU Membership. The Influence of the German Model in Hungary and Poland* (Martinus Nijhoff Publishers 2013).

[3]See for example J. Sovdat (ed.), *Conference proceedings* / International Conference Constitutional Court of the Republic of Slovenia - 25 Years, Bled, Slovenia, June 2016 (Constitutional Court of the Republic of Slovenia 2016), at www.us-rs.si/media/zbornik.25.let.pdf, visited 30 May 2018. Please refer also to the reports published in R. Albert, D. Landau, P. Faraguna, and S. Drugda (eds.), 2016 Global Review of Constitutional Law.

[4]See, for example, the conference organised in 1994 by the Council of Europe on "The Role of the Constitutional Courts in the Consolidation of the Rule of Law", Bucharest, 8–10 June 1994. Proceedings at www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1994)010-e, visited 30 May 2018.

[5]This is evidenced by the subject of the Vilnius 4th Congress of the Constitutional Justice Conference, which was precisely "The Rule of Law and Constitutional Justice in the Modern World". The focus of the conference was quite explicit in this regard, with particular reference to the countries of Central and Eastern Europe. Please refer to www.wccj2017.lt/data/public/uploads/2016/09/questionnaire-wccj-ga2016005-e.pdf, visited 30 May 2018. The topic of the Batumi XVIIth Congress of the European Constitutional Courts ("Role of the Constitutional Courts in Upholding and Applying the Constitutional Principles") was not very different; see www.confeuconstco.org, visited 30 May 2018.

that is vague and rarely defined in constitutions[6]. Second, in countries that have experienced authoritarian rule, the constitutional courts contribute to the creation of distance from the previous legalistic, positivist, and ideological legal interpretations. In the new constitutions, the principle of the rule of law is explicitly emphasized[7], as already mentioned, and it is considered to be a directly applicable principle capable of invalidating acts that are inconsistent with it[8].

The topic is very broad, which means that an assessment must be made mainly on the basis of some aspects or phases of the case law. Having examined a large number of decisions, we decided to focus on those concerning two aspects: the issues of transitional justice (which prevailed during the long phase of the transition to democracy but are still present), and the European legal issues (the rule of law as it appears in the relationship between domestic and EU sources of law[9], or the rule of law as a legitimation or a limit on the penetration of European law)[10].

These are two particularly important issues to clarify the relevance of the rule of law discourse for the development and consolidation of a new democratic legal system. The link between the two issues is not accidental; both the genesis of the new democratic order and the attitude to be taken towards the previous one from one side, and the limitation of state sovereignty in order to be integrated into the community design on the other, have challenged the principle of the rule of law. It was therefore up to the constitutional courts to define the value identity of the new democratic order. In both cases we are talking about issues that are still current. If the path of European integration is a work in progress and the clashes between national and the EU legal systems occur periodically, the relationship with the past also proves to be still painful. In both cases, the rule of law parameter serves to justify certain legislative choices and favour certain values compared to others.

We will not discuss in detail the different sub-principles or aspects of the rule of law in the constitutional jurisprudence[11]. Such an approach could be useful and understandable for the old democracies, while for the new ones one should more carefully reflect on aspects linked to the transformation of the legal culture. Thirty years after the transition to democracy for the former communist countries the question of values and their solidity is still relevant, if we consider that the questioning of certain values threatens to undermine the very foundations of European integration.

Constitutional characteristics of the former communist countries

The countries of Central and Eastern Europe share a common history dating back to the period prior to their birth as states, when they were stateless nations within the Austro-Hungarian, Ottoman, and Tsarist multinational empires. This part of Europe has experienced in its history different transitions between different political systems, which also included complex processes of state building and restructuring, and this explains the high sensitivity to the issues of sovereignty and constitutional identity.

Some of these countries enjoyed experiences of parliamentarianism and the rule of law within the Austro-Hungarian empire and then, in the period between the two world wars, they lived an important season of

[6]The rule of law is a collection of principles rather than a single principle, as evidenced by the literature and by the Rule of Law Check-list of the Venice Commission, available at www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e, visited 30 May 2018. Please refer to A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1885 and subsequent editions); B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press 2004); P. Costa and D. Zolo (eds.), *Rule of Law: History, Theory and Criticism* (Springer 2007); M. Sellers and T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective* (Springer 2010); M. Krygier, 'Rule of Law', in M. Rosenfeld and A. Sajo (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2015) p. 233–249; A. Di Gregorio, 'Lo stato di salute della rule of law in Europa: c'è un regresso generalizzato nei nuovi Stati membri dell'Unione?', 2016 DPCE on-line p. 173–202.

[7]Unlike the older European constitutions, which do not emphasise the principle even though some of them (the German, Spanish, Finnish, Portuguese, Swedish, and Swiss constitutions) make provision for it, as does the US Constitution.

[8]In several cases, the acts or provisions that were challenged were repealed because they were inconsistent either solely with the principle of the rule of law or most importantly with this principle. This happened, for example, in Slovakia, Romania, Bulgaria, Lithuania, and Poland.

[9]Please refer to the Venice Commission Rule of Law Check-list of 2016 (*supra* n. 6), especially point 48. "The principle of the Rule of Law does not impose a choice between monism and dualism, but *pacta sunt servanda* applies regardless of the national approach to the relationship between international and internal law. At any rate, full domestic implementation of international law is crucial. When international law is part of domestic law, it is binding law within the meaning of the previous paragraph relating to supremacy of law (II.A.2). This does not mean, however, that it should always have supremacy over the Constitution or ordinary legislation". Please refer also to D. Žalimas, "The openness of the constitution to international law as an element of the principle of the rule of law", in Sovdat, supra n. 3, p. 141 ff.

[10]T. Evas, *Judicial Application of European Union Law in Post-Communist Countries. The Cases of Estonia and Latvia* (Ashgate 2012); M. Bobek (ed.), *Central European Judges Under the European Influence: The Transformative Power of the EU Revisited* (Hart 2015).

[11]Among the components of the rule of law that are most often highlighted by the constitutional courts of the countries examined are: legal certainty (by far the most used principle), legality, confidence in law and legitimate expectation, predictability of legal acts, non-arbitrariness, and non-retroactivity. From a substantive point of view, the most emphasised are the purposes of the use of the power and substantive justice. A detailed overview of these aspects is included in the questionnaires that the constitutional courts have prepared for the conferences in Batumi and Vilnius mentioned above. Please refer to the websites, *supra* n. 5.

constitutionalism[12]. At the end of the socialist system of government, there was a complex transition to democracy that took place on different levels, including the constitutional one: "learning democracy, moving from dirigism to market economy, avoiding nationalist temptation and, first of all, integrating into Europe: here is an almost superhuman task for countries that are bloodless, demoralized, impoverished"[13].

The first decade after 1989 was characterized by the learning of democracy. Towards the end of this period, the construction of a new society and new democratic political system took precedence over the destruction of the old system, with the emergence of a new pluralistic political culture. The countries in question entered the Council of Europe and adopted new constitutions characterized by the influence of Western models but also of national traditions. The second period (2000–2004) was characterized by the intensification of the preparations to enter the European Union, which also included a series of constitutional amendments (special provisions to allow the limitation of sovereignty were introduced, and the relationship between sources of domestic and international law was clarified). The period after joining the EU was characterized by the strong impact of the economic and migratory crisis that also affected the institutional system.

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

At the time of the collapse of the socialist regime, all the countries of Central and Eastern Europe adopted a series of measures aimed at reckoning with the past, focusing especially on the political-administrative purges. In particular, they needed a new ruling class not compromised with the past and demonstrating a "democratic loyalty" like in the German experience of *wehrhafte* or *streitbare Demokratie*[14]. They introduced the so-called "lustration", namely the removal from high public positions of former members of the communist party and/or – more frequently – of the former officials and collaborators of the secret services, who were perceived as particularly hateful for their covert surveillance activity during the communist regime. The reasons for adopting the lustration legislation and the results of its application vary from country to country[15]. Another important transitional justice measure has been the reopening of the statute of limitations. The Council of Europe, to which the former communist countries were gradually admitted, also dealt with these issues, through a series of guiding principles and criteria elaborated by the Parliamentary Assembly, a series of judgments of the Court of Strasbourg, and the opinions of the Venice Commission[16].

In all the former communist countries, constitutional courts have dealt with various aspects of the measures to come to terms with the past, and have influenced the political agenda on the subject – sanctioning, correcting, or endorsing the choices of the legislator. Many of them used the rule of law parameter to adjudicate these measures, especially but not exclusively at the beginning of their activity. Particular examples of this are seen in the decisions concerning the reopening or removal of statutes of limitation for offences committed during communist regimes (or in wartime, in the case of Croatia) or concerning lustration[17] and restitution of property.

Here we can distinguish three different attitudes. At one end of the spectrum, some courts have expressed a rigidly material-, content-, and value-oriented interpretation of the rule of law. These are the Czechoslovakian and the Czech Constitutional Courts[18], which bring to mind the similar natural law orientation of the German courts in relation to the crimes of the Nazi and communist past. At the other extreme, there are constitutional courts that have adopted a highly legalistic attitude, characterized by a formalistic view of the rule of law (the Hungarian and Polish Constitutional Courts). The Croatian Constitutional Court is in the middle (if the 2015 Hypo case is taken into account), as too are the Romanian and Bulgarian Constitutional Courts, which have criticised retrospective measures by using a mixture of a formal and a material conception of the rule of law.

[12]B. Mirkine-Guetzévitch, *Les Constitutions de l'Europe Nouvelle* (Delagrave 1928 e 1930); Id. *Les nouvelles tendances du droit constitutionnel*, (Marcel Giard 1931); G. Burdeau, *Il regime parlamentare nelle Costituzioni europee del dopoguerra* (Edizioni di Comunità 1950); A. Giannini, *Le Costituzioni degli Stati dell'Europa orientale* (Istituto per l'Europa orientale 1929).

[13]F. Fejtö, *La fine delle democrazie popolari* (Mondadori 1994) p. 5.

[14]On this subject, please refer to A. Di Gregorio, *Epurazioni e protezione della democrazia. Esperienze e modelli di "giustizia post-autoritaria"* (FrancoAngeli 2012).

[15]We can distinguish different models, more or less strict. Please refer to W. Sadurski, "*Decommunisation*", "*Lustration*", *and Constitutional Continuity: Dilemmas of Transitional Justice in Central Europe*, EUI Working Papers, Law, No. 2003/15; K. Williams, A. Szczerbiak, B. Fowler, "Explaining Lustration in Eastern Europe: "A post-communist politics approach"", 12 *Democratization* (2005); R. David, 'From Prague to Baghdad: Lustration Systems and Their Political Effects', 41 *Government & Opposition* (2006).

[16]A survey of the European documentation is available in Di Gregorio 2012, supra n. 14, p. 450–465.

[17]In most cases, they have invalidated all or part of the lustration legislation. Only the Czechoslovak and Czech constitutional courts have endorsed the legislatures' choices without major conditions.

[18]The Constitutional Court of Slovakia also embraces a material conception of the rule of law, not in transitional justice issues but in dealing with the autonomy of the judiciary.

A strictly substantive interpretation of the rule of law. The Czech case. The Czech Constitutional Court is certainly the one that has displayed the most consistent interpretation of the rule of law. There are cultural reasons explaining this position, such as the traditions of the first Czechoslovak Republic, the influence of German jurisprudence, and the strong desire of the Court to distance itself from the interpretation of the law of the communist period. The Court not only expresses a material view of the rule of law, but also does not deny the relevance of the formal rule of law and, at the same time, disagrees with a formalistic interpretation of the law that could lead to sophisticated justifications for an obvious injustice (III. ÚS 127/96). The coherence of this Court has never failed, so much so that the first decision adopted in plenary session is still considered to be a landmark of constitutional law and is periodically recalled. From this milestone, the following case law and the current interpretation of the rule of law – and of other fundamental principles – derive, uniting the rule of law with democracy as foreseen in Article 1, paragraph 1 of the Constitution ("democratic state governed by the rule of law")[19].

This is the judgment of 21 December 1993 (Pl. ÚS 19/93) on the verification of the "Act on the lawlessness of the communist regime" which included criminal law measures, namely the recalculation of the statute of limitations for crimes committed between 1948 and 1989 that were not pursued for political reasons. The Court considered the law to be consistent with the Constitution, criticising the constitutional neutrality over values, which would be associated with positivism and a "legalistic conception of political legitimacy"[20].

The Court dwelt on a complex disquisition on the rule of law principle, refusing to accept a formal definition of legality or to merge legality with legitimacy, the latter notion being contingent on the democratic character of the state ("a political regime is legitimate if accepted as a whole by the majority of citizens"); the fact that some laws from before 1990 continued to be in force did not mean that the old regime was given legitimacy: "Although there is continuity of "old laws" there is discontinuity of values with the values of the old regime". According to the Court, the suspension of the statute of limitations was legitimate, as during the communist period the law was only a tool of the regime. In other words, the Act that was being examined deemed that the statute of limitations was fictitious in the communist period, and carried out an ex post suspension of the limitation period. The Court's discourse in this decision went beyond the case under consideration, giving a broad lecture on constitutional history – with reference to Central Europe between the two World Wars – and on constitutional law, as well as serving as an almost militant ideological break with the past. The Court intended to differentiate its material discussion of the rule of law from the formal and legalistic one that had allowed the emergence of totalitarianism[21].

With regard to the subsequent case law on transitional justice, there are many cases that reiterate the same conception of values and of regime discontinuity and recall the first plenary judgment of 1993. We may mention, among the best known of these: judgment Pl. ÚS 9/01 of 5 December 2001, in which the Court ruled on the extension of the lustration law (where the focus was on the loyalty of public officials to the values of democracy)[22]; judgment I. ÚS 420/09 of 3 June 2009, in which the Court mentioned, in order to distance itself from it, 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; and judgment I. ÚS 517/10 of 15 November 2010, in which the Court again recognised the importance of clarifying the past of public officials[23].

Two cases from 2016 are also worth mentioning. The first was decided by judgment I. ÚS 3964/14 of 13 June 2016, in which the Court censured the formalistic behaviour of the ordinary courts, which had refused to accept the applicant's request for compensation for the property lost by her grandmother following the assignment of Subcarpathian Ruthenia to the USSR. The refusal had been based on the application

[19]On the possibility of conflict between these two values given their different vocation, see P. Rychetský, "The role of the Constitutional Court in strengthening the rule of law in the Czech Republic", in Sovdat, *supra* n. 3, p. 157.

[20]The decision is placed in continuity with the judgment of the Constitutional Court of the Czech and Slovak Federal Republic (Pl. ÚS 1/92) on the Czechoslovak lustration act, which explained why the communist legal order could not be considered "legitimate" even though it was "legal". The basis of the reasoning of both the Czechoslovak and the Czech Constitutional Courts is the so-called "theory of values" which, being different in the communist and democratic legal order, fill the same legal institutions (such as the principles of legal certainty or equality) with different and opposing content. Therefore, the contested act, which implied new values, should not be interpreted as a measure of discrimination against certain categories of persons, as it merely set out, for the future, certain further requirements for the exercise of functions considered to be decisive, or for access to those functions.

[21]As the Court pointed out, Klement Gottwald succeeded, in the coup of February 1948, in legitimizing the seizure of power through formal respect for constitutional procedures.

[22]For a general comment on the case law on lustration, see D. Kosař, "Lustration and Lapse of Time: "Dealing with the Past" in the Czech Republic", 4 *European Constitutional Law Review* (2008), p. 460.

[23]In this case, it was necessary to check whether a judge had been affiliated with the communist party of the former Czechoslovakia as a prerequisite for possibly asking for and deciding on his recusal. The Court considered that such membership could affect the judge's decision-making process, because the system of values of the members of the communist party was different from the values of a modern democratic state based on the rule of law (because they included an extreme formalism and legalism, a simple cognitive model of legal interpretation, and a simplistic conception of the sources of law).

of a 1959 decree. In this case, the Court reiterated the necessity for the discontinuity of values and outlined the duty of the courts to reflect on the modern concept of the material rule of law. The Court underlined the necessity of interpreting restitution norms in light of their sense and their purpose of alleviating the wrongs caused by the previous illiberal regimes[24]. In decision I. ÚS 3943/14 of 2 August 2016, the Court dealt with the restitution of confiscated property to the family of a Jewish citizen who had been exterminated in the concentration camps (the property had been requisitioned first by the Third Reich and then by the communists as German property). In this case, the Court even mentioned the Radbruch formula, testifying to its adherence to the material vision of the rule of law in which in certain circumstances substantive justice prevails over legal certainty[25].

A formalistic view of legal certainty by the Hungarian Court, with recent developments. As far as Hungary is concerned, it is explicit in both the old amended Constitution (preamble and Article 2) and the new Fundamental Law (Article B.1) that Hungary is a democratic state based on the rule of law. In both constitutional phases, the Constitutional Court interpreted the principle, but the interpretations are partially different because the 2011 Fundamental Law adopts an attitude that is based on a discontinuity of values.

In the first period after the transition to democracy, the Constitutional Court mostly opted for a formalistic view of the rule of law[26]. The most important in this regard is decision no. 11/1992 of 5 March 1992, in which the Court examined the reopening of the limitation period under the Act of 4 November 1991. The particular intention of the challenged Act was to punish those who had been involved in the suppression of the 1956 revolution. President Göncz refused to sign the law, sending it to the Constitutional Court, which declared it unconstitutional particularly because of its unacceptable vagueness: the expression "on political reasons"[27] was not sufficiently clearly defined to cover a period of more than 40 years.

The Court based its decision on a particular conception of the rule of law: in a constitutional state, "not only the legal provisions and the actions of the state organs must be strictly in conformity with the Constitution, but the values of the Constitution and its conceptual culture must penetrate the entire society". Since the transition to democracy had taken place in a legal way, there should be no distinction between acts approved before and acts approved after the new Constitution[28]. On this basis, the Court applied the principle of legal certainty, a fundamental requirement of the rule of law, by holding that the contested Act was lacking in that regard[29]. According to the Court, the Constitution did not and could not confer a right to substantive justice: "reference to historical situations and the requirement of justice of the rule of law 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 that would, according to its authors, justify the Act. In emphasising "procedural" over "substantive" justice, the Court urged the parliament to reconcile the need for justice with the formal requirements of legality[30].

This decision was acclaimed within the foreign literature, which identified the Court's discourse with the idiom of liberal constitutionalism and of a "civilized" rule of law state, in opposition to an apparently vindictive and populist parliament[31]. This is only one

[24]Before this, in 2015, the Court had dealt with a similar case in the judgment I. ÚS 1713/13 of 23 February 2015, which concerned procedural issues for the exercise of a claim for compensation for property left in Subcarpathian Ruthenia. According to the Constitutional Court, the formalistic tendency of the courts would prevent appeals against administrative acts, to the detriment of the applicant.

[25]Recalling the position of the Czech Constitutional Court on the relationship between law and justice and between formal and material rule of law, the president of this court also refers to the Radbruch formula. See Rychetský, *supra* n. 19, p. 158–160. Another recent decision regarding transitional justice in which the Court continued to be consistent with its past case law is the Pl.ÚS 3/14 of 20 December 2016.

[26]P. Paczolay, "The Hungarian Constitutional Court's efforts for legal certainty", in Sovdat, *supra* n. 3, p. 168, referring in general to the Hungarian constitutional case law, states that this Court "interpreted legal certainty both from its substantial and procedural aspect. However, the Court was criticized for giving priority to formal-procedural elements in case of conflict…The Court was firm in underlying that the basic guarantees of rule of law cannot be set aside by reference to historical situations and to justice…". Following Paczolay, the focus on the formal aspect of the rule of law was very relevant "in changing the former socialist patterns of legislative activity".

[27]The time limits for the limitation period should have begun to run again on 2 May 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".

[28]This was also valid because, in the Hungarian case, there was not formally a new constitution until 2011, and therefore there was a greater sense of legal continuity.

[29]'Legal certainty, based on objective and formal principles has priority over justice that is partial and subjective at all times'.

[30]For a non-positivist view of the principle, see Judge Sólyom's concurring opinion in decision no. 23/1990 (on the death penalty), to which one may add the 'invisible constitution' doctrine. A. Sajó, "Reading the Invisible Constitution: Judicial Review in Hungary", 15 *Oxford Journal of Legal Studies* (1995) p. 253.

[31]For example, S. Zifcak, "Hungary's Remarkable, Radical, Constitutional Court", 3 *Journal of Const. Law in Eastern and Central Europe* (1996) p. 1.

of the many decisions in which the Court curbed the efforts of the centre-right majority to punish former communists. The Czech approach was completely opposite: because the limitation periods were part of a deliberate practice of illegality, one could not appeal to their legality to comply with them.

For the Hungarian Constitutional Court, legal certainty is the fundamental core of the rule of law (see also decisions nos. 56/1991 and 9/1992), from which procedural safeguards, such as the nonretroactive nature of laws and vacatio legis, derive[32]. Legal certainty was the principle applied by the Court in the early years also, in order to give strong protection to social rights (see decisions nos. 43/1995, 44/1995, 45/1995, and 56/1995), to the point where the Court was accused of rediscovering socialism[33].

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[34], although the new constitution seems to have switched to a substantive or material version of the rule of law. In fact, the Fundamental Law no longer pursues formal neutrality in values, because Article U states that a sense of justice in society must be ensured "by making possible the retroactive prosecution of politically motivated crimes committed and not prosecuted during the communist regime"[35]. Article U also provides for collective responsibility, the disclosure of the personal data of former communist leaders, the reduction of these leaders' pensions, and the non-expiry of the statute of limitations for serious crimes committed during communism in the name of the party-state.

The Hungarian Constitutional Court tried to switch to a more substantive discussion of the rule of law in decision no. 45/2012 (XII. 29), "On the unconstitutionality and annulment of certain provisions of the transitional provisions of the Fundamental Law of Hungary". The Court stated that if the constitutional provisions were constantly subject to the Court's scrutiny, thus making the constitution uncertain, this was incompatible with the notion of the rule of law. However, the Court emphasised that constitutional legality is not based solely on procedural requirements but also on substantive ones. In this decision, an interesting reference is made to international law (*ius cogens*) enriching the material conception of the rule of law[36]. In decision no. 61/2011, the Court had also held that international law, including fundamental rights under the European Convention on Human Rights, could form an inalienable part of Hungarian constitutionalism. With reference to international law, both customary and conventional, the Court has thus sought to reconcile the difficult succession of constitutional orders with its loss of power and with the cancellation of the previous case law.

From the above, a paradox is clear in the Hungarian case. Until 2010–2011, neither the constitutional text nor the constitutional jurisprudence explicitly referred to a discontinuity of values between the old and the new regime, even though this discontinuity was implicit in the proclamation and implementation of democratic principles (and despite the "legalistic" view of the Constitutional Court). With the adoption of the Fundamental Law of 2011, the discontinuity of values is used to limit, in fact, the rule of law and the democratic achievements of the post-communist legislatures[37]. The hypocrisy of the value discontinuity proclaimed in the text is evident; it is a historical nemesis outside time, and therefore "ahistorical".

An intermediate version of the rule of law: the cases of Croatia and Bulgaria. The Constitutional Court of Croatia also dealt with transitional justice issues, although Croatia did not adopt a lustration law after the transition from communism, particularly because of the imminent threat of war. There are, however, interesting decisions on the restitution of property and the punishment of the criminal activities defined as "war profiteering" and "crimes related to ownership transformation and privatization". Significant for

[32]An attitude similar to the Hungarian one, that is, a formal interpretation of the rule of law, was held by the Polish Constitutional Tribunal both in the decisions concerning the reopening of the statute of limitations (for example the decision of 25 September 1991 case No. 6/91, OTK ZU 1991) and in the best known judgment of 11 May 2007, K 2/07 on the lustration law. On the jurisprudence of the first few years of the Constitutional Tribunal, please refer to Tatham, *supra* n. 2, p. 175 ff.

[33]A. Sajó, "How the Rule of Law Killed Hungarian Welfare Reform", 1 *East European Constitutional Review* (1996) p. 31.

[34]See, for example, decisions nos. 2/2013, 13/2013, 20/2014, 34/2014, 34/2015, and 1/2017. In decision no. 4/2013, the Court deleted a provision of the criminal code on the public use of totalitarian symbols because it defined the type of conduct subject to criminal sanction too broadly and vaguely. That provision was therefore in breach of the principle of the rule of law and of legal certainty.

[35]In addition, Art. R, para. 3 of the Fundamental Law stipulates that "The provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution".

[36]"Constitutional legality has not only procedural, formal and public law validity requirements, but also substantial ones. The constitutional criteria of a democratic state under the rule of law are at the same time constitutional values, principles and fundamental democratic freedoms enshrined in international treaties and accepted and acknowledged by communities of democratic states under the rule of law, as well as the *ius cogens*, which is partly the same as the foregoing. As appropriate, the Constitutional Court of Hungary may even examine the free enforcement and the constitutionalization of the substantial requirements, guarantees and values of democratic states under the rule of law".

[37]For a survey of the recent case law, please refer to "Hungary. Developments in Hungarian Constitutional Law", in *2016 Global Review of Constitutional Law*, p. 77–81.

the purpose of this review is certainly the decision of 24 July 2015 on war profiteering that involves former Prime Minister Ivo Sanader (No. U-III-4149/2014). In this case, generally known as the Hypo and INA-MOL case, with reference to the constitutional amendment of 2010 in which Article 31 was supplemented by a new paragraph 4 that excluded the statute of limitations for a series of serious offences[38], the Court tried to balance the formal with the material rule of law. The Court interpreted the new paragraph as allowing, in the future, unlimited time for the criminal prosecution of perpetrators of these 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 Croatian Constitutional Court interpreted the constitutional amendments in accordance with the well-known and accepted legal principles of legal certainty and legality, barring the prolongation of the statute of limitations in cases where it had already expired"[39]. The ruling was widely criticised, and the Court was accused of politicization.

As far as Bulgaria is concerned, there are many decisions on transitional justice in which the Court deemed the acts under challenge to be contrary to the principle of the rule of law. An example is the decision of 21 January 1999 (judgment no. 02/99), in a case in which a wide-ranging amendment to the Act on Administration adopted in May 1998 was challenged before the Court. The amended Act would have prevented all former senior officials of the communist party, or officers or employees of the security services, regardless of category, from holding senior governmental or public administration offices for five years. The Court, answering an application from a group of deputies, deemed the law to be contrary to the principle of the rule of law (Articles 4, 6.2 and 38 of the Constitution), stating that the guilt and responsibility must be individual and not collective. These lustration provisions were also at odds with a number of international documents and instruments to which Bulgaria was a party.

One of the most interesting decisions is order no. 12 of 13 October 2016 (case 13/2015). The applicant (the Attorney General of the Republic) had challenged an amendment to the criminal code of 2015 that had introduced new cases for which the statute of limitations was completely removed for a series of offences committed during the communist regime, in the same way as for crimes against humanity. The Bulgarian Constitutional Court considered that the retroactive removal of the statute of limitations for crimes committed but not punished under the communist regime was not permissible in light of the constitutional principle of the rule of law. It also considered that the crimes in question could not be assigned to the category of crimes against humanity, as had been argued by the human rights associations.

This decision is different from that of the Czech Constitutional Court of 21 December 1993. At the same time, the position of the Bulgarian Court is not comparable to that of the Hungarian Constitutional Court in the decision of 5 March 1992, because the Bulgarian Court concluded that it was possible, in principle, for the legislature to abolish the statute of limitations for crimes other than crimes against humanity, especially if the crimes were committed during the totalitarian period. However, it censured the way in which the act pursued this goal, because it was in conflict with several elements of the rule of law (there was a lack of clarity or, specifically, the types of crimes or the guilty persons were not well defined, because the wording was indeterminate). Therefore, the Bulgarian Constitutional Court essentially adopted a mixed interpretation of the rule of law, both formal and substantive, and annulled the act being contested solely for the breach of this principle[40].

The rule of law and limits to European integration. The Czech and Estonian cases. As regards the EU integration, the democratic conditionality processes were developed precisely in view of the "great" enlargement to Central and Eastern Europe, experimenting mechanisms later applied also to the countries of the Eastern and Mediterranean partnership. The application process was much more complex than the previous ones and placed emphasis on specific issues of democratic compatibility. Apart from the fulfilment of the so-called Copenhagen criteria, there was also the problem of national sovereignty, a principle very much emphasized in the constitutions for reaction to the previous limited or absent sovereignty. However,

[38]Stating that "The statute of limitations shall not apply to the criminal offences of war profiteering, 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".

[39]S. Barić, *The Transformative Role of the Constitutional Court of the Republic of Croatia: From the ex-Yu to the EU* (Analitika 2016) p. 19.

[40]A similar approach was held by the Romanian Court, which rejected the draft law on lustration in its entirety in decision no. 820 of 7 June 2010. The Court considered the draft law to be unconstitutional because it breached both Article 1, paragraph 3 of the Constitution on the rule of law, and 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 with 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 criticized the law's lack of clarity.

notwithstanding the fear of "sovereignism", the constitutional practice has averted this danger, not having subjected these countries to more barriers than was the case for the old Union members. Moreover, the new constitutions have been equipped, from the beginning or in subsequent constitutional amendments, to face the impact of external law by providing special clauses for the transfer or delegation of certain sovereign powers and related safeguard clauses. The contribution of these constitutional courts to the debate on national sovereignty and the limits to the penetration of EU law has given rise to interesting developments, although we can notice a sort of paradox in these states desire to defend their fundamental constitutional values while the entry into the EU has been seen just as a guarantee of the continuation of democratic choice[41].

References to a "rule of law state" (or "democratic law-based state" and the like) are recurrent in the case law of the constitutional courts of the new member states when they are dealing with the penetration of European law into domestic law. These references are used mainly to dictate the limits of that penetration (as in some old member states of the EU), but also to justify European integration. The most significant decisions 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 on transitional justice issues, the courts in these cases did not consider the rule of law to have been violated.

As regards the Czech Republic, there are many decisions in which the Constitutional Court has taken a stand against European law, seeing limits to its entry into the domestic legal order. In general, one can observe that, except for the Holubec-Landtová case[42] (whose rationale, as many local scholars have noticed, can be explained in light of the domestic confrontation between the Constitutional and the Supreme Administrative Courts[43]), the attitude of the Czech Constitutional Court has been favourable to European integration[44] while setting clear – but reasonable – limits to how far European law can go[45]. Its assessment of legal globalization and its postmodern vision of sovereignty are far more open than those of the German Constitutional Tribunal, which in general has always inspired the countries of the Visegrad group. Moreover, one can consider the opinion of A. Albi to be perfectly understandable; according to this, the fixing of limits should not be considered as an anachronistic and closed sign of a belief in sovereignty, but rather as an attempt to put the focus on individuals and their fundamental rights[46].

Here we can refer to some well-known decisions in which the Czech Constitutional Court made reference to the democratic state based on the rule of law, but we highlight that these decisions should be read in connection with those regarding the limits on constitutional amendments (the constraints on constitutional amendments and the limits on the penetration of European law coincide, as the Court stated in its judgment on the early termination of the legislature, Pl. ÚS 27/09 of 10 September 2009)[47].

[41]W. Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford University Press, 2012), p. 20–209. See also A. Di Gregorio, "Riforme costituzionali ed integrazione europea: il caso dei nuovi membri dell'Est", 4 *Diritto pubblico comparato ed europeo* (2004) p. 2067–2093.

[42]Pl. ÚS 5/12 of 31 January 2012.

[43]J. Komárek, 'Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, Slovak Pensions XVII', 8 *European Constitutional Law* (2012) p. 323; M. Bobek, "Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure", 10 *European Constitutional Law Review* (2014) p. 54; J. Přibáň, "*Constitutional Sovereignty in Post-sovereign Jurisprudence of the Czech Constitutional Court: From the Lisbon Judgments to the Landtová Ultra Vires Controversy*", in Bobek 2015, *supra* n. 10, p. 323.

[44]This can especially be seen in the decision about the 5% threshold of the European electoral law. Please refer to H. Smekal and L. Vyhnánek, "Equal Voting Power under Scrutiny: Czech Constitutional Court on the 5 % Threshold in the 2014 European Parliament Elections: Czech Constitutional Court 19 May 2015, Pl. ÚS 14/14", 1 *European Constitutional Law Review* (2016) p. 148.

[45]On the topic, in general, see P. Molek, 'The Czech Constitutional Court and the Court of Justice: Between Fascination and Securing Autonomy, in M. Claes, M. de Visser, P. Popelier, C. Van de Heyning (eds.), *Constitutional Conversations in Europe* (Intersentia 2012).

[46]A. Albi, "Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism". Parts I and II, 9 (2) and 9 (3)", *Vienna Journal of International Constitutional Law* (2015) p. 151 and p. 291. By the same author, please refer to "Supremacy of EC Law in the New Member States. Bringing Parliaments into the Equation of "Co-operative Constitutionalism", 3 *European Constitutional Law Review* (2007) p. 25 and 'An Essay on How the Discourse on Sovereignty and on the Co-operativeness of National Courts Has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU', in Claes, de Visser, Popelier, Van de Heyning, *supra* n. 45.

[47]In this decision, the first one in which the Court considered the constitutionality of a constitutional act, the Court affirmed that the principle of the generality (abstract nature) of the law is an essential requirement of a democratic state based on the rule of law, under Art. 9, para. 2 of the Constitution, and therefore that it is part of the material core of the Constitution. While the legislature may derogate under certain conditions from the principle of the generality of the law, constitutional acts may be adopted for a specific case only in exceptional circumstances (state of war, natural disaster, and other cases not provided for by the Constitution, or a constitutional act on security), in order to protect the material core of the Constitution. The Romanian Constitutional Court, in its decision no. 80 of 16 February 2014, also decided that the principle of the rule of law is implicitly included within the limits of the constitutional amendments under Article 152 of the Constitution. The Constitution Court of Lithuania, in its rulings of 24 January 2014 and 11 July 2014, stated that it is forbidden to adopt constitutional amendments that could be contrary to the international obligations of the country. This is also deduced from the constitutional principles of the rule of law and *pacta sunt servanda*.

In the judgment on the European Arrest Warrant (Pl. ÚS 66/04 of 3 May 2006), there was only limited reference to the rule of law. More explicit was the judgment Pl. ÚS 50/04 of 8 March 2006, the so-called Sugar Quotas III decision, which dealt with the limits and conditions for the penetration of EU law. According to the Court, there are no provisions of international or EU law that could be superior to the Constitution in the Czech constitutional order. 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 only exist "so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state". According to Article 9, paragraph 2 of the Constitution, the essential attributes of a democratic state governed by the rule of law remain beyond the reach of the constituent assembly itself. The Court again mentioned the first plenary decision Pl. ÚS 19/93 and expressly declared that "in the framework of this Constitution, the constitutive principles of a democratic society are placed beyond the legislative power and are thus ultra vires the Parliament… Should, therefore, these delegated powers be carried out by the EC organs in a manner that is regressive in relation to the existing conception of the essential attributes of a democratic law-based state, then such exercise of powers would be in conflict with the Czech Republic's constitutional order, which would require that these powers once again be assumed by the Czech Republic's national organs. In the specific case before the Court, however, such a situation was not generally present…"

The discussion of the principle of the rule of law in the first decision on the Lisbon Treaty (Lisbon I), of 26 November 2008, is equally broad[48]. In its petition, the Senate referred to Articles 1 and 9 of the Constitution and therefore to the principle of the rule of law. The Court established that the rule of law is an obstacle to limitations on sovereignty that may lead to a violation of the fundamental principles of the democratic state governed by the rule of law, reiterating the same concepts expressed in its judgment Pl. ÚS 50/04. However, according to the Court, sovereignty today can no longer be understood as having an absolute nature because it is more a practical notion. In this regard, "the Treaty of Lisbon is consistent with the untouchable principles protected by the Czech constitutional order and European law is based on fundamental human and democratic values, common to and shared by all EU states". As far as the second decision on the Lisbon Treaty (Lisbon II), of 3 November 2009, is concerned[49], the group of senators who had filed the appeal envisaged a violation of the principle of the democratic state based on the rule of law, that is, of Article 1, paragraph 1 of the Constitution. However, the Court did not rule on this aspect of the application, considering its previous judgment on the topic sufficiently clear.

The judgment of the Supreme Court of Estonia of 12 July 2012 on the European Stability Mechanism (ESM) is also worthy of consideration[50]. The Supreme Court, although considering that the mechanisms created by the contested provision violated some important constitutional principles including the rule of law principle (which is formally enshrined in Article 10 of the Constitution but is also implicit in other articles, namely Article 1, paragraph 1 and Article 3, paragraph 1), ultimately decided that this violation was not serious. In this case, the reference to the rule of law was used more widely by the applicant and by the dissenting judges than by the Court, which, in the end, did not consider the principle to have been 'significantly' violated (a very ambiguous phrase) because it must be balanced with other constitutional principles.

The Court considered that "§ 1(1), § 3(1) and § 10 of the Constitution express the principle of a democratic state subject to the rule of law. The principle of a democratic state subject to the rule of law means that the general principles of law that are recognised in the European legal space are valid in Estonia (judgment of the Constitutional Review Chamber of the Supreme Court of 17 February 2003 in case no. 3-4-1-1-03, point 14)". The Court linked the principle of the rule of law to the democratic principle (in the same way as the Czech Constitutional Court)[51].

The Court acknowledged that by the ratification of the ESM Treaty, the parliament restricted its own future possibilities, and those of future parliaments,

[48]Pl. ÚS 19/08: Petition from the Senate of the Parliament of the Czech Republic, seeking review of whether the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community is consistent with the constitutional order of the Czech Republic.

[49]Pl. ÚS 29/09: Petition from a group of senators of the Senate of the Parliament of the Czech Republic for review of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community for conformity with the constitutional order.

[50]No. 3-4-1-6-12. The applicant, the Chancellor of Justice, considered Art. 4(4) of the Treaty establishing the European Stability Mechanism, signed on 2 February 2012 in Brussels, to be in conflict with the Constitution.

[51]"The principle of democracy is aimed at the legitimacy of the public authority, containing formation, legitimation and supervision of public bodies, and affecting all stages of formation of a political will. The principle of a democratic state subject to the rule of law, on the other hand, governs the content, extent and manner of the functioning of political authority".

in relation to budgetary actions. The Court recognized these considerations as valid, and noted that the article of the Treaty that was being challenged interferes with the principle of the democratic state subject to the rule of law and the principle of sovereignty that come from the preamble and Article 1 of the Constitution. However, it clearly stated that "the economic and financial sustainability of the euro area is contained in the constitutional values of Estonia as of the time Estonia became a euro area member state" and that, in the 2003 EU entry referendum, the people had already agreed to these subsequent developments (an assertion doubted by the dissenting judges).

Among the most obscure points of the judgment is that the Court considered that the ratification of the Treaty did not interfere *seriously* with some fundamental constitutional principles such as the rule of law and sovereignty but, at the same time, that the measures to implement the Treaty, including the way in which the funds required by the ESM would be paid, could cause such a violation. For this reason, the Court intended to monitor the implementation measures. Finally, by linking the ESM mechanism to EU law (which seems to be clear from the outset), the Court established *the possibility* that counter-limits/reservations could be triggered[52].

A comparison between the case law of the two courts suggests that while in the Czech case constitutional values – and the rule of law in particular – constitute an imperative limit both to the limitation of sovereignty and to the constitutional amendments, the Estonian Supreme Court seems to follow a more flexible approach because the need to respect its international commitments can justify some limited violations of the rule of law. In balancing two values equally deserving of protection, in both cases the courts, however, have raised the possibility of activating the counter-limits for possible violations of constitutional values although in the specific cases addressed they did not recognize the risks of a serious breach.

Concluding remarks. The rule of law in a transitional context with its value and identity peculiarities

The constitutional courts of the new EU member states refer broadly to the principle of the rule of law when addressing a wide spectrum of issues. Some believe that the reference to the principle prevailed in the period immediately following the transition to democracy[53]. Nevertheless, an analysis of more recent case law shows that the rule of law continues to be a point of reference in an extensive series of issues (among them, in analysing the division of powers, and especially the independence of the judiciary).

Apart from the formal aspects of the principle, that is, the features of the law (legal certainty[54], 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 widely examined, concern two aspects. These are measures of transitional justice and European integration.

In the first case, the adoption of transitional justice measures has been an attempt, which has perhaps been 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 the German dissident Bärbel Bohley, "we were expecting justice, but we got the rule of law"[55]. The main dilemma, as seen in the analysis of the constitutional case law, is the confrontation between different constitutional values. The requirements of "legitimacy" and "legality" have frequently and inevitably resulted in a conflict situation. As the Czechoslovak Constitutional Court, and then the Czech Constitutional Court, considered,

[52]"…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".

[53]In the answers to the questionnaire on the Supreme Court of Estonia that was prepared for the 2017 Vilnius Conference (www.wccj2017.lt/data/public/uploads/2017/01/estonia-supreme-court-en.pdf, visited 30 May 2018) p. 7, it is stated that "At present the Supreme Court does not have to deal very often with the questions of whether the state follows the basic requirements arising from the rule of law…it had to address such questions particularly after the Republic of Estonia regained its independence and after the change in the legal order in the 1990s, when the Supreme Court was also re-established. However, the legal order has developed over time and the need for such decisions has gradually decreased".

[54]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 legislatures, and hence, from the shortcomings of legislative drafting.

[55]Reported in A. J. McAdams, "The Honecker Trial: The East German Past and the German Future", 58 *The Review of Politics* (1996) p. 53. According to Jon Elster, new democracies can solve the dilemma of the contrast between procedural and substantive justice (emphasised by the Radbruch formula in criminal matters) in three different ways: claiming to respect fundamental legal principles; openly agreeing on the necessity, in an unprecedented situation, of violating those principles; or trying to achieve both things. See J. Elster, *Closing the Books. Transitional Justice in Historical Perspective* (Cambridge University Press 2004).

by echoing the German case law[56], while the principle of legality is based on the idea of the continuity of the state and its laws, the development of democracy would instead require a line of separation between the totalitarian state and its legal system on the one hand and the new democratic state and its legal system on the other. The principles of the rule of law, when a transition to democracy is occurring, could strengthen the position of the positive law, paradoxically becoming a "barrier" to the rapid democratic transformation of the state and society. Legitimate purposes could therefore be more easily imposed in a situation of "state and law discontinuity"[57]. This certainly applies to the period immediately following the transition, but many years later the adoption of such measures can no longer be explained by referring to the rule of law. At the same time, the role of constitutional courts in transitional circumstances is highly sensitive and significantly different from other cases, especially in the former communist countries where for example these courts are not adequately respected – and their relevance not fully understood – by politicians and general public[58].

In the EU integration issues, a possible violation of the principle of the rule of law has been invoked by applicants, but the courts have mostly upheld – under certain conditions – the validity of European law, while references to the rule of law have been used to threaten the activation of the counter-limits or safeguards.

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[59]. If these aspects were more evident in the first years after transition, as states distanced or defended themselves from a past that was only recently abandoned, after them there are the remains of that past and previous decisions that continue to be seen as the hallmarks of constitutional law or, paradoxically, the principles are invoked by courts defending themselves from European interference. The emphasis on the rule of law has not diminished over time, and this means either that there is a greater primary sensitivity to these values, or that these democracies are still partially in transition[60].

After so many years following the transition to democracy, can we still categorize these countries in a single nucleus, or can we extend the comparisons in a transverse way as various different authors suggest?[61] Indeed, as we have seen, the challenges faced by these countries, and therefore by these constitutional courts, are obvious (especially the emphasis on values and regime discontinuity), although they have different nuances. At the same time, if the issues stemming from the past are peculiar to these countries, other issues, such as the defence of constitutional identity, are now widespread among all the EU members. Indeed, both these courts[62] and the courts of the older EU member states have referred to the same values when they have established boundaries on the penetration of EU law. 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 west to east, but also the opposite, although the scientific discussion on the latter aspect has been

[56]In a case decided by a judgment of 24 October 1996, the first instance court focused on the principle of the non-retroactivity of criminal law. In that regard, as in the post-Nazi period, the court chose to give precedence to substantive justice or *Gerechtigkeit*, considered to be one of the fundamental principles of the rule of law. In the words of the court, the GDR put in place "an extreme state injustice" (*extremes staatliches Unrecht*); the subordination of the right to life of the individual to the national interest to prevent the crossing of the border put the written law behind the demands of political opportunity. It was therefore the most serious substantive injustice (*material schwerstes Unrecht*).

[57]J. Malenovský, "Les lois de "lustration" en Europe centrale et orientale: une "missione impossibile"?", 13 *Revue québécoise de droit international* (2000) p. 188.

[58]As noted, "In all of the so-called states in transition, there namely existed – to a greater or lesser extent – social and political realities that were different than the one in which the first constitutional courts were established after 1920 and in which the constitutional judiciary spread throughout Western Europe following the Second World War". See E. Petrič, "The role of Constitutional Courts in the implementation of the rule of law in states in transition", in Sovdat, *supra* n. 3, p. 172.

[59]As stated by T. von Danwitz, "The Rule of Law in the Recent Jurisprudence of the ECJ", 37 *Fordham International Law Journal* (2014) p. 1311 ff., the older member states have never been concerned about the protection of a principle that they took for granted, making a serious mistake because the protection of this principle is always at risk even in established democracies, and there is a need for strong judicial protection for it.

[60]For example, when considering the stability of institutional relations, as the Slovak Constitutional Court affirmed in a 2014 decision (PL. ÚS 102/2011 of 7 May 2014): "...we still find ourselves in a transitional or post-transitional democracy, since we are still building and rebuilding the institutional system of public authorities...in times of post-transitional democracy it must be acknowledged that the legislator still seeks the optimal model of public authorities by identifying and correcting the shortcomings of the previous one..." The Court expressed a clear self-restraint towards the executive and legislative powers: "In times like these, the Constitutional Court must in a way exercise more self-restraint in interfering with the powers of the legislative assembly from its position of a negative legislator (even more so when the Court acts in the position of a positive legislator). This does not mean that the Court should renounce its role of the guardian of constitutionality; it merely means that the Court should in a sense be more prudent".

[61]See Bobek 2015, *supra* n. 3.

[62]Which were much more euro-friendly before they entered the EU; some years later, they began to defend themselves.

limited[63]. In the end, the analogies among the courts of these countries are today perhaps less important (with exceptions) than the analogies existing among the old and the new courts, especially with reference to EU integration matters.

It is worth expressing some final thoughts on the rule of law and the EU. If one does not materialize it into a concrete rule, the principle of the rule of law is hardly justiciable at the European level, although this is theoretically possible[64]. On the other hand, the constitutional case law of the new member states indicates that the 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.

Статья поступила в редколлегию 20.06.2018.
Received by editorial board 20.06.2018.

[63]For example, see H. W. Micklitz, "Prologue: The Westernisation of the East and the Easternisation of the West", in Bobek 2015, *supra* n. 10.

[64]With regard to principles such as the rule of law, which are vague and subject to the assessment of national legal orders, the Court of Justice has always followed a rigid self-restraint. This is evident, for example, in the decisions on infringement proceedings against Hungary, where the reasoning was very technical and did not encourage the discovery of values, although all the debate around the proceedings was rich in disquisitions of a highly constitutional level. The Court of Justice's approach to the rule of law at the European level is therefore necessarily different from that of the national constitutional courts. Please refer to von Danwitz, supra n. 59.