THE INTERNATIONAL AND SUPRANATIONAL RULE OF LAW IN THE SLOVENIAN LEGAL SYSTEM: 'LESSONS' FROM EUROPEAN COURTS

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ABSTRACT

This paper examines the status of the international and supranational rule of law within the legal system of the Republic of Slovenia. It begins by providing an overview of the evolution of the rule of law concept in constitutional, international, and European Union (EU) law. In the main sections, this article analyses the constitutional provisions governing, first, the status of international law; second, the provisions concerning the status and implementation of EU law; and third, other provisions determining the relationship between the international and supranational and the domestic law in Slovenia. This study scrutinises how issues concerning disparities between Slovenian domestic law and international and supranational law are addressed both in theory and practice. Furthermore, this article investigates the 'lessons' on the international and supranational rule of law conveyed to Slovenia by European courts, such as the European Court of Human Rights and the Court of Justice of the EU. Focusing also on the Constitutional Court's role, the present study aims to determine whether there are instances where this court acts as a guardian of the Slovenian constitutional identity, considering that its interpretation of the rule of law may not always align with the international and supranational understanding of the concept.

KEYWORDS

rule of law
international and supranational rule of law
constitution
legal system
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1. Introduction: An outline of the development of the international and supranational concept of the rule of law

The principle of the rule of law is the cardinal concept of the modern law associated with the rise of the liberal democratic form of government in the West. It can be considered the product of historical developments over centuries that declares the supreme authority of law over power, encompassing the idea that the law should govern society, rather than arbitrary decisions or the will of entities and individuals in positions of power.[2] While the early history of the rule of law might be conflated with the history of law itself,[3] the modern conception of the rule of law (i.e., the Rechtsstaat, *L'État de droit,* stato di diritto, estado de derecho, etc.) originally arose and developed within the framework of the legal order of the early modern liberal state, hand in hand with constitutionalism and with significant differences in the Anglo-American and European legal and cultural traditions.[4]

The origin of the concept, however, dates back to ancient times when the role that law played in society was the subject of philosophical discussions of Greek and Roman thinkers who maintained that laws must be promulgated for the common good and that the government should be subservient to the law.[5] But it was in medieval Europe, a period that was marked by the fragmentation of Europe following the disintegration of the Roman empire, that the rule of law truly began to take shape. The medieval era's major contribution to the development of the concept was to displace the idea that the monarch was above the law that had been inherited from Roman law by giving way to the opposite convention that the sovereign was bound by law. The famous Magna Carta and other historically significant documents of the time are seen by many as protecting not only individuals from the arbitrary will of the monarch but also the predecessors of modern constitutionalism and fundamental rights.[6]

In the late medieval period, the religious wars; Protestant Reformation; Renaissance; gradual separation of church and state; far-reaching social, economic, and

2 | Pavčnik, 2019, pp. 78–83. See also Cejie, 2022, pp. 287–288 and Krygier, 2016, p. 200.
3 | The ancient codifications of written and publicly available laws, such as the Code of Hammurabi from around 1760 BC, were a significant advance toward a legal system. Yet, few would argue that Babylon was governed according to the rule of law in any modern sense. See Chesterman, 2008, p. 4.
4 | Chesterman, 2008, pp. 2–3. See also Cejie, 2022, pp. 292–293.
5 | For instance, Plato's assertion that the government ought to be subservient to the law underwent further refinement by Aristotle who characterised the rule of law as a rational concept, contrasting it with the rule of man driven by passion. to explain why the government should be bound by laws means to prevent arbitrary rule and the abuse of power. The influence of ancient Greek philosophy extended notably to Roman legal thought, as seen in the writings of Cicero who emphasised the necessity for laws to serve the greater good of the community, thereby placing the law under the auspices of justice. Valcke, 2012, p. 4.
6 | As a revolt by the nobility against the crown, the principle that the king was bound by the law was a prominent feature of the *Magna Carta in England and similar historical documents in the continental Europe. Ibid.*

demographic changes; and bourgeoisie desire for greater political influence and legal recognition of their interests set the stage for the Enlightenment and the emergence of liberalism as the core political theory of the new era.[7] These processes placed emphasis on personal liberty and other individual rights (e.g., the freedom to contract, provisions of means to enforce contracts, and protection of property rights) and the rule of law. In the late 18th century, the idea of the rule of law began playing a central role in shaping the architecture of a modern state and society.

The culmination of these processes, which simultaneously marked a new beginning, was the promulgation of the English Bill of Rights, the first modern constitutions (i.e., American and French), the American Bill of Rights, and the French Declaration of the Rights of Man and of the Citizen. In the second half of the 19th century and the beginning of the 20th century, constitutionalism gradually spread across continental Europe and the rest of the world. The idea of the rule of law was at the heart of these developments. On the one hand, it was a product of social processes during the transition from medieval to modern society, while on the other hand, the conceptualisation of the rule of law has been the subject of theoretical discussions, both in England and continental Europe, as well as in the 'New World'.[8]

European thinkers such as English philosopher John Locke, widely regarded as the 'father' of liberalism, alongside his French counterpart Charles de Montesquieu, who introduced theories on the social contract, separation of powers, and the independence of the judiciary as means to prevent governmental abuse, safeguard liberty, and ensure the rule of law, exerted a profound influence on figures like Alexander Hamilton, James Madison, and other framers of the 1787 US Constitution. However, the phrase 'rule of law' only entered common parlance in the 19th century, thanks to the writings of British constitutionalist *Albert v. Dicey*, who argued, *inter alia*, that the rule of law was incompatible with the exercise of wide, arbitrary or discretionary powers of constraint by government officials and that under the rule of law everyone was equal in the eyes of the law.[9] In continental European tradition of the legal thought, the concept of the rule of law was influenced by Austrian legal theorist Hans Kelsen who introduced in his Pure Theory of Law the notion of the 'basic norm' (German: *Grundnorm*) to denote the basic law underlying the entire legal system and helped draft the Austrian Constitution of 1920. According to Kelsen, the rule of law (*Rechsstaat*) requires a hierarchy of norms within the legal order, with the constitution at its apex. All laws are subject to compliance with the constitution, and government action is constrained by this legal framework. Kelsen's formulation also inspired the French legal concept of *état de droit*.[10]

Compared to the Anglo-American tradition, continental Europe developed a slightly different understanding of the concept, with the former placing

7 | Perenič, 2010, p. 17.
8 | Grad et al., 2018, pp. 67–72.
9 | Valcke, 2012, pp. 7–8.
10 | Ibid.

emphasis on judicial process and the latter focusing on the legal nature of the state. An important substantive distinction was the role of constitutionalism: whereas Britain never developed a written constitution, in Europe the establishment of a basic law that constrained state power in general and government in particular came to be seen as axiomatic. This distinction lives on in the different approaches to legal interpretation epitomised by common law precedent-based argument and civil law doctrinal analysis. It also rests in the weight accorded to fundamental rights in civil law as opposed to common law countries, with the US being a prominent exception.[11]

Despite the general consensus that the rule of law should be understood as the antithesis of arbitrary rule and that the extent to which a government adheres thereto is indicative of the degree of its legitimacy, the modern rule of law is the subject of competing theories and definitions.[12] While for some, the concept has a purely formal meaning, for others, it has a wider, more substantive meaning that incorporates ideals of justice and fairness.[13] The concept carries different connotations across countries and their jurisdictions, and even more so, across legal cultures and traditions.[14] The meaning of the concept varies even within the West, notwithstanding that the rule of law is held to be a Western concept. While, accordingly, it seems impossible to find a universal meaning of the concept rule of law, some common core characteristics (elements) of the rule of law can be identified. Considering definitions made by the mainstream legal theory and doctrine,

11 | Chesterman, 2008, p. 8.

12 | Different views on the notion differ to the extent that some declare the concept to have attained the status of a new universally accepted political ideal following the end of the Cold War, others have on the contrary gone as far as to assert that the term has been misused and abused to such an extent that it has become a meaningless phrase, devoid of any true meaning. See Valcke, 2012, pp. 3–4.

13 | In legal doctrine, a distinction is commonly made between the narrow and broad definitions, also referred to as the thin and thick conceptions, of rule of law. The narrow definition focuses on the formal and instrumental aspects, meaning that the content of the law is not relevant. For example, according to the narrow definition, the law must be set forth in advance, public and readily accessible, clear, stable and certain, consistent and applied to everyone according to the terms of transparency and equality. In contrast to the narrow definition, the broader definition (thick conception) contains elements of political morality such as democracy as a form of government, free market economic systems and fundamental rights. See Cejie, 2022, pp. 293–294.

14 | Craig, 2017, pp. 2–24. See also Cejie, 2022, p. 288. Rule of law is often held to be good for everyone. In Western legal traditions, there is an orthodox belief that it serves to enhance liberty and economic development. In contrast to this view (represented by the so-called liberal theory and doctrine), critical Marxist and postmodernist theories proceed from the assumption that modern law is so imbued with the ruling economic and political ideology that it is virtually impossible to recognise the true nature of its bias. In view of the protagonists of these theories, the logic of the 'rule of law' is characterised by social inequalities and unjust relations of economic and political power in society. Human rights and the 'rule of law' are viewed by critical theorists as an ideological ballast and a means of legitimising a sclerotic political and economic regime of power. They also claim that in the coordinates of the liberal concept of human rights, the oppression of unprivileged is incorporated into the meta-narrative of the progressive development of modern society. See Ward, 1997, p. 113 and Edgeworth, 2003, pp. 241–246. See also Flander, 2012, pp. 76–80.

as well as those used by different organisations that pay particular attention to the rule of law, the latter can be understood as a durable and transparent system of institutions and norms that redelivers: the accountability of the government and private actors under the law; clear, publicised, stable, efficient, and just laws which are applied evenly; security of persons, contracts, and property; respect for fundamental rights; open and limited government (i.e., efficient constraints on government powers); and accessible and impartial dispute resolution through an independent judiciary and extrajudicial dispute resolution institutions (meaning that justice is delivered in a timely manner by competent, ethical, and independent representatives of judicial and quasi-judicial entities who are accessible, have adequate resources, and reflect the makeup of the communities they serve). In addition, the rule of law, as commonly understood, implies absence of corruption and a robust legal profession.[15]

Over time, the notion and concept of the rule of law experienced significant progress on the one hand, and underwent unimaginable declines, such as the outbreak of totalitarianisms in the first half of the 20th century, on the other hand. From the end of the Second Word War onward, however, the development of the rule of law gained a new impetus by its internationalisation and supranationalisation through the establishment of universal and regional international organisations and the European Union (EU) and the development of the international and supranational legal orders. The concept has been promoted through a variety of international and supranational legal and political acts, including international declarations and conventions on human rights,[16] and mechanisms such as international and supranational courts and tribunals. Although there has been no consensus on the definition of the 'international rule of law', the majority of international organisations and institutions seem to agree on its notion and define its principles and elements in a similar (albeit not identical) vein.

The United Nations (UN), for example, defines it as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency. The rule of law is an integrated part in the three pillars of the

15 | Cejie, 2022, pp. 293–298 and Chesterman, 2008, pp. 12–15. See also Valcke, 2012. Pavčnik, 2019. Perenič, 2010.

16 | For example, the Universal Declaration of Human Rights, a milestone document in the history of international law, drafted by representatives with different legal and cultural backgrounds from all regions of the world, and proclaimed by the UN General Assembly as a 'common standard of achievements for all peoples and all nations', sets out in the Preamble that ' /.../ it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law'. See the Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 1948, Preamble.

UN: to support the rule of law in domestic settings to establish peace and security, to secure human rights, and to enforce sustainable development.[17]

The Council of Europe (CoE) has referred systematically to the rule of law in major political documents and numerous legal instruments. First, reference to the rule of law is made in the European Convention on Human Rights[18] (hereinafter the Convention). Its preamble famously places the rule of law as an indispensable part of 'the common heritage' of European countries (see below). Other important documents referring to the rule of law include the Vienna Declaration (1993), Strasbourg Final Declaration and Action Plan (1997), and the Warsaw Declaration (2005). In these and numerous other CoE documents, the fundamental principles of the rule of law, such as those of lawfulness, equality, impartiality, proportionality, legal certainty, separation of powers, democratic participation, transparency, prevention of corruption, independence and efficiency of judiciary, respect for human rights, and so on, are identified.[19]

As far as the EU is concerned, the Treaty on European Union (hereinafter TEU) enshrines the rule of law as one of the fundamental values of the EU. The rule of law is a prerequisite for the protection of all the other fundamental values of the Union, including for fundamental rights and democracy. The European Commission defines it as a bedrock of the Union's identity and a core factor in Europe's political stability and economic prosperity. Its annual Rule of Law reports 'take the pulse of the rule of law situation in each Member State and the EU as a whole, detecting and preventing emerging challenges and supporting rule of law reforms'. The Commission examines rule of law developments in Member States under four pillars: justice, anti-corruption, media freedom and pluralism, and broader institutional issues related to checks and balances.[20]

On a large scale, similar to its constitutional version, the international concept of the rule of law imports broader notions of justice and protection from the arbitrary use of public power. It encompasses a range of principles and elements, including, *inter alia*, legal certainty, completeness, predictability, transparency, accountability, and respect for human rights.[21] It also requires not only that the law be enforced impartially and without discrimination but also that legal proceedings be conducted fairly and in accordance with due process. In addition to the above, what is commonly understood as the international rule of law has its own peculiar characteristics. As the founding principle of most international and supranational organisations, it provides a legal structure of relations between states as members of the international community. Regarding the international rule of law, equality before law should also manifest itself in the principle of sovereign equality of states (i.e., all states which come within the scope of a rule of law must be treated equally in the application of that rule to them without any exceptions). The international

17 | United Nations, 2023. See also Ramberg, 2019, p. 334 cited in Cejie, 2022.
18 | The European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14. Council of Europe, 4 November 1950.
19 | Council of Europe, 2023. See also Polakiewicz and Sandvig, 2015, p. 1.
20 | European Union, 2023. See also European Commission, 2023.
21 | Chesterman, 2008, p. 15.

rule of law is a powerful tool not only in human rights protection but also in their effective promotion. Moreover, it possess the merit to serve as a development strategy, an international standard, and a tool of interpretation of international sources of law.

The rule of law has a special place in the practice of numerous international and supranational supervision and advisory bodies established by international and supranational organisations, and in the case law of international and supranational courts, among which the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECHR) are the most important. For example, the latter has stated in its judgements that the principle of rule of law is 'one of the fundamental principles of a democratic society' (*Klass v. Germany*, 8 September 1978, paragraph 55); that it 'inspires the whole Convention' (*Engel v. the Netherlands*, 8 June 1976, paragraph 69); and that it is 'inherent in all the Articles of the Convention' (*Amuur v. France*, 25 June 1996, paragraph 50).[22] The ECHR determined the content and meaning of the whole range of principles and elements of the rule of law, such as legality, foreseeability of and trust in the law, proportionality, procedural safeguards, equality of individuals before the law, control of the executive whenever a public freedom is at stake, and possibility of a remedy before a court and the right to a fair trial (i.e., procedural safeguards of a suspected or an accused person). Some of these principles and elements are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the state power.[23] In its case law, the ECHR also determines the limits of admissibility of interferences with the rights entrenched in the Convention that are inextricably linked to the rule of law.[24]

Although the international rule of law is widely recognised as a key component of good governance and a cornerstone of modern democratic societies, just like its constitutional counterpart, it remains contested. The conception of the rule of law was originally developed domestically, keeping the nation-state as a sovereign entity. In contrast, the international rule of law, and even more so its supranational version enforced by the EU, necessarily entails certain limitations to national sovereignty. As indicated above, the European Convention on Human Rights, for example, maintains in its preamble that 'the governments of European countries

22 | Sicilianos, 2020. Other cases where the ECHR stated that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention, are *Former King of Greece and Others v. Greece* (no. 25701/94, paragraph 79) and *Broniowski v. Poland* (no. 31443/96, paragraph 147).

23 | Ibid.

24 | The concept of the rule of law first appeared in the ECHR's case law in the *Golder v. United Kingdom* (1975). In this case, the Court based its broad interpretation of the right to a fair trial (Article 6, paragraph 1 of the Convention), from which it inferred the inherent right of access to the courts, on the reference to the 'rule of law' made in the Preamble of the Convention. According to the Court, it would be a mistake to see the principle of 'rule of law' as a merely 'more or less rhetorical reference', devoid of relevance for those interpreting the Convention. While there is no abstract definition of the rule of law in the Court's case law, the Court has developed various substantive guarantees which may be inferred from this notion. See Sicilianos, 2020.

are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law'. Similarly, the TEU[25] states in Article 2 that the EU is based, *inter alia*, on the values of the rule of law, which are common to all Member States.[26] Over the past decade, these provisions have proven both important and controversial. They determined minimal standards of a democratic government and a just legal system, but it became clear that due to the difference in the historical and political context within which the rule of law evolved, each nation's notion of the concept might not be the same and that in certain countries, the interpretation and practice of the rule of law might not correspond with the international or/and supranational understanding.

In the following sections, the present article explores the status of the international and supranational rule of law within the legal system of the Republic of Slovenia. It analyses, first, the constitutional provisions on the ratification and status of international treaties and other general international laws in the Slovenian legal system; second, the provisions on the status and implementation of EU law; and third, other provisions that determine the relationship between international and domestic law in the Slovenian legal system. The study scrutinises how issues concerning disparities between the Slovenian domestic law and the international and supranational law are addressed both in theory and practice. Furthermore, the article investigates the 'lessons' on the international and supranational rule of law conveyed to Slovenia by European courts, such as the European Court of Human Rights and the CJEU. Focusing also on the Constitutional Court's role, the study aims to determine whether there are instances where this court acts as a guardian of the Slovenian constitutional identity, considering that its interpretation of the rule of law may not always align with the international and supranational understanding of the concept.

2. The international and supranational rule of law in the Slovenian legal system

2.1. The constitutional principle of Rechtsstaat [Pravna država]

Understood as a synonym and equivalent of the principle of the rule of law, the principle of *Rechtsstaat [Pravna država]* is entrenched in Article 2 of the Slovenian Constitution.[27] This provision together with that of Article 1, which defines Slovenia

25 | Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, Official Journal of the European Communities C 325/5, 24 December 2002.

26 | Striving to create a common rule-of-law culture, the European Commission suggests focus on (1) legality, legal certainty, and equality before the law and separation of powers, (2) prohibition of arbitrariness and penalties for corruption and (3) effective judicial protection by independent courts. Cejie, 2022, p. 296.

27 | The Constitution of the Republic of Slovenia (*Ustava Republike Slovenije* [Constitution]), Official Gazette of the Republic of Slovenia nos. 33/91, 42/97, 66/00, 24/03, 69/04, 68/06, 47/13, 47/13, 75/16, 92/21.

as a democratic republic, determines the fundamental constitutional quality of the Slovenian state. It implies several other principles and provisions explicitly stipulated by the constitution. Some of these are the principle of separation of powers; limitations on restrictions of human rights; binding of the executive to legislation; hierarchy of legal acts and norms; principle of legality and prohibition of the retroactive effect of legal norms in criminal law; obligation to publish legal norms; inviolability of human life; protection of personal dignity and prohibition of torture; inhuman or degrading treatment or punishment; protection of personal liberty; principle of equality before the law and prohibition of discrimination on any personal circumstance; protection of privacy; right to appeal and judicial review; right of everyone to have any decision regarding his rights, duties, and any charges brought against him made without undue delay by an independent and impartial court constituted by law; and provisions determining a system of procedural guarantees across the different procedures conducted by organs and other entities of public power.[28]

The constitutional principle of *Rechtsstaat* also entails principles and provisions not expressly stipulated in the text of the Constitution, which have been recognised as such by the Constitutional Court. These principles and provisions are: (a) the principle of proportionality, which means, *inter alia*, that limitations on human rights and fundamental freedoms have to pass a proportionality test; (b) the principle of the protection of trust in the law, which requires that legal regulation be stable and foreseeable, and sets a limit on the de facto retroactive effect of legal norm; and (c) the principle of clarity and coherence of legal norms, which aims at determining legal relationships to a sufficient level of exactness to exclude the arbitrariness of the state organs and other entities of public power.[29]

In Slovenia, as in other countries that belong to the democratic tradition, the principle of *Rechtsstaat* is inextricably linked to the constitutional protection of human rights and fundamental freedoms.[30] The Constitution provides for a comprehensive catalogue of human rights and fundamental freedoms and establishes the duty of the state to protect them. It guarantees equality in the exercise of human rights and provides for structural rules on their exercise and limitation. It also guarantees judicial protection of human rights and restitution of the consequences of their violations. Among the various mechanisms for the protection of human rights, the role of the Constitutional Court is the most important. An individual alleging a human rights violation by a court judgement, administrative acts, and so on, can access the Constitutional Court via a constitutional complaint after other legal remedies have been exhausted.[31]

28 | Bardutzsky, 2019, pp. 701–703. See also Avbelj et al., 2019a, pp. 38–40.
29 | Bardutzsky, 2019, p. 702. See also Avbelj et al., 2019a, pp. 40–49 and Šturm et al., 2010, pp. 59–90.
30 | Avbelj et al., 2019a, pp. 38–39.
31 | Constitution, Articles 14–65.

2.2. Between sovereignty and pluralism: The status of the international and EU law in the Slovenian legal system

The Slovenian Constitution contains several provisions that determine the position of international law and EU law vis-à-*vis* internal law and thus incorporate the international rule of law in the legal system as a whole. Pursuant to Articles 8 and 153 of the Constitution, laws and other general acts must comply with generally accepted principles of international law and international treaties ratified by the National Assembly, whereas general acts except laws must also be in conformity with international treaties ratified by the Government. While the Constitution distinguishes between international treaties that are to be ratified by the parliament and other international treaties, all ratified treaties shall be applied directly. The former also enjoy an elevated position in the hierarchy of legal acts: while they are superior to laws, government regulations, and other general legal acts, they are inferior to and must be in conformity with the Constitution. In this regard, the authors of the new commentary on the Constitution maintain that international law obligations, either from international treaties or international customary law, which would be inconsistent with the Constitution, cannot be implemented, as this would be unconstitutional. According to them, international legal provisions and obligations that are inconsistent with the Constitution are without legal effects.[32]

It follows from the above that, in principle, the Slovenian internal legal order in relation to the international law preserves constitutional sovereignty. In reality, however, the question of the relationship between both legal corpuses is not so simple. To avoid the situation that the Republic of Slovenia would commit to something in an international treaty that would be in conflict with the Constitution and therefore would be unable to fulfil the accepted obligations according to the principle of *pacta sunt servanda*, the legal order provided for a safeguard. Pursuant to Article 160 of the Constitution, in the process of ratifying an international treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government, or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution (the National Assembly is bound by its opinion). While this preventive type of review of constitutionality solves the problem of new international treaties to which Slovenia would decide to accede, a problem would arise if an international treaty already ratified and valid in Slovenia turned out to be unconstitutional. In such a case, in the light of respecting the principle of *pacta sunt servanda*, a constitutional amendment would be necessary. Another situation in which international law would take precedence over the Constitution can potentially arise in the circumstances provided for in the fifth paragraph of Article 15. This so-called non-enumeration clause opens the Constitution's human rights catalogue by stipulating that no human right entrenched in legal act that is in force in Slovenia may be restricted on the grounds that it is not recognised by the Constitution. This means that if an international treaty provides a higher standard of protection of human rights or the rule of law

32 | Avbelj et al., 2019b, pp. 82–87.

than the Slovenian Constitution, priority should be conferred to the international treaty.[33]

A somewhat different constitutional regime applies to EU law. To provide a legal basis for the accession of the Republic of Slovenia to the EU, a new Article 3.a (the so-called European Article) was adopted by the 2003 amendments to the Constitution.[34] This article places the Republic of Slovenia in a constitutional and legal position, which is significantly different from the one it had before joining the EU. While this article does not refer explicitly to EU, but generically to international organisations, it provides a constitutional basis for transfer of the exercise of part of sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law.[35] So far so good! The problem arises in the paragraph three of Article 3.a, which states that legal acts and decision adopted by the EU institutions shall be applied in Slovenia in accordance with EU law. The fact that this provision misses an explicit and precise determination of the hierarchical position of EU law in relation to domestic law, brought considerable discomfort into the Slovenian legal system.

In Slovenia, in theory and practice, two different views emerged regarding the position of EU law in relation to domestic law in general and the Constitution in particular. Historically speaking, the so-called 'supranational approach' first took hold. In accordance with this view, with the accession to the EU, the Republic of Slovenia partially renounced the constitutional principle of sovereignty and recognised the principle of supremacy of primary sources of EU law. Although the Constitution mentions only the transfer of the implementation of part of sovereign rights, this entails that in Slovenia, the legal rules in the EU treaties should prevail and have supremacy over all legal rules of internal law. Accordingly, the Slovenian authorities would have no ground to refuse the use of individual acts or provisions of primary or secondary EU legislation if they would be found contrary to the Slovenian Constitution. Therefore, the sovereignty in its entirety—as a power to independently make legal decisions—is transferred to the EU. Over time, however, some EU law experts have begun to warn that the practice of the Constitutional Courts of EU Member States, as well as the CJEU alone, has shown that the supranational approach to viewing the relationship between EU law and internal law is not convincing neither on the normative nor on the interpretive level.[36]

In contrast, the 'pluralist approach' emphasises that the leading principle underlying the relationship between the two corpuses of law is the relational principle of primacy. This principle includes two types of conditions—national and supranational—when deciding on the primacy of one or another. While the former are contained in the founding treaties of the EU and their interpretation by the

33 | Avbelj et al., 2019b. See also Ribičič, 2004.
34 | The Constitutional Act amending Chapter 1 and Articles 47 and 68 of the Constitution of the Republic of Slovenia [*Ustavni zakon o spremembah I. poglavja ter 47. in 68. člena ustave Republike Slovenije*], Official Gazette of the Republic of Slovenia, No. 24/03.
35 | Šturm et al., 2010, pp. 72–103; Avbelj at al., 2019a, pp. 66–74.
36 | Avbelj et al., 2019b, pp. 68–69. See also Avbelj, 2012, p. 348.

CJEU, the latter can be found in Article 3.a of the Slovenian Constitution. In the context of this approach, the relationship between the national law and EU law is not strictly hierarchical, but heterarchical. The national law is not subordinate to EU law and to the decisions of EU institutions (including courts), and the effectiveness of this law and these decisions in the territory of the Republic of Slovenia is not unconditional, as it comprises two independent yet interrelated legal systems. In the coordinates of this 'plural sovereignty', the Republic of Slovenia remains sovereign in the usual sense, while the EU has acquired functional sovereignty within the framework of transferred competences.[37]

According to Matej Avbelj, a renowned Slovenian expert on EU law, the theory of plural sovereignty was proved by the German federal Constitutional Court in the Weiss Case in which the Court held that a CJEU judgement was arbitrary and not binding in Germany. He explains that the German Constitutional Court has been building the pluralist doctrine from the 70s onward. Similarly, the Spanish and Czech Constitutional Courts and the Danish Supreme Court also decided not to follow the CJEU judgements. In contrast to these courts, so far, the Slovenian highest courts have not taken a challenging stance towards EU primary sources of law and/or the decisions of the EU institutions. Paraphrasing Avbelj, in the case of a serious conflict between the law/decision of the EU and the Slovenian national law, the Slovenian Constitutional Court as the final defender of Slovene constitutionality should take a position of critical restraint in relation to the EU. The principle of primacy of EU law should apply only if the EU respects the principles of democracy, rule of law, and human rights, and if it operates within the boundaries of transferred powers. If that is not the case, the Constitutional Court could exceptionally decide that EU law should not be applied in Slovenia.[38]

3. International and supranational versus national rule of law: 'Lessons' from the ECHR and the CJEU

3.1. The ECHR

Before 2006, Slovenia[39] was convicted by the ECHR for violating convention rights only six times. After that year, both the number of filed complaints and number of convictions increased sharply. By 2021, 10,136 complaints had been filed with the ECHR against Slovenia, and 9,634 appeals were declared inadmissible

37 | Avbelj et al., 2019a, pp. 67–68.
38 | Avbelj, 2020.
39 | The National Assembly of the Republic of Slovenia ratified the European Convention on Human Rights on June 28, 1994. With the ratification of the Convention, citizens of Slovenia and other individuals were given the opportunity to file a complaint with the ECHR if their Convention rights were violated.

or struck out. The ECHR delivered 392 judgements altogether.[40] While it found no violation in 24 judgements, at least one violation was established in 342 judgements.[41]

My review of randomly selected case law shows that in the vast majority of judgements the ECHR does not explicitly refer to the rule of law. I also separately reviewed 29 cases/judgements that the ECHR Press Unit selected as 'noteworthy cases' that concerned Slovenia. These explicit references to the rule of law were found only in two judgements. However, given that the Court states in several decisions that the rule of law is inherent in all the Articles of the Convention (see above), the violations of convention rights established by the ECHR may also be considered violations of the principle of the rule of law (in a broader sense), even if the Court does not explicitly refer to the violation of this principle. Additionally, it should be noted that in some reviewed judgements, the ECHR refers to principles and components that constitute the principle of the rule of law or are inextricably linked to this principle.

An explicit reference of the ECHR to the principle of the rule of law can be found, for example, in the *Case of* Šilih *v. Slovenia*.[42] The applicants complained that their son had died as a result of medical negligence and that their rights under Article 2 (right to life) and several other articles of the Convention had been breached by the inefficiency of the Slovenian judicial system in establishing responsibility for his death. More particularly, the applicants complained that the

40 | ECHR, 2022. A comparison with countries in the region shows that 17,491 complaints were filed against neighbouring Croatia; 16,540 complaints were declared inadmissible or struck out, while the ECHR delivered 530 judgements; 25,352 complaints were filed against Hungary; 23,775 complaints were declared inadmissible or struck out and the ECHR issued 931 judgements; and 34,858 complaints were filed against Serbia. Among these, 32,786 complaints were declared inadmissible or struck out and the ECHR delivered 880 judgements. The highest number of complaints were filed against Poland (75,599); 72,164 complaints were declared inadmissible or struck out and the ECHR issued 1,246 judgements, which is more than anywhere else in the region; 14,016 complaints were filed against the Czech Republic, of which 13,612 were declared inadmissible or struck out and the ECHR delivered the lowest number of judgements among all countries in the region (287); 9,576 complaints were filed against Slovakia, and 8,910 were declared inadmissible or struck out and the Court issued 448 judgements.

41 | Ibid. As regards violations by Article, the Court found that by far most frequently violated rights are the right to an effective remedy (267 violations) and the right to a fair trial due to the length of proceedings (263 violations). The Court also found 25 violations of the right to a fair trial for other reasons than length of proceedings, 21 violations of the prohibition of inhuman or degrading treatment, 12 violations of the right to respect for private and family life, 8 violations of protection of property, 6 violations of the right to liberty and security, 6 violations of the authorities' obligation to carry out an effective investigation in cases concerning the prohibition of inhumane or degrading treatment, 3 violations of freedom of expression, and 3 violations of the prohibition of discrimination. The ECHR established that in 3 occasions domestic courts decisions have not been implemented by the Slovenian authorities. Last but not least, the Court established 3 violations of the obligation to carry out an effective investigation in cases concerning the right to life but found no violation of the right to life (i.e., it found no deprivation of life). The ECHR found no violation whatsoever with regard to other convention rights.

42 | Šilih v. Slovenia, no. 71463/01, 9 April 2009.

criminal and civil proceedings they had instituted did not allow for the prompt and effective establishment of responsibility for their son's death. The ECHR held, *inter alia*, that if in the specific sphere of medical negligence there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law. It found that there had been a violation of Article 2 of the Convention in its procedural limb.

Another example is the *Case of Ribič v. Slovenia*.[43] In this case, the ECHR held that the overall prison sentence of 30 years imposed on the applicant by the judgement of a national criminal court was in breach of the principle of legality enshrined in Article 7 of the Convention. The Court noted that the provisions of the Criminal Code were deficient and that the domestic courts interpreted them by resorting to the canons of interpretation that were clearly to the detriment of the applicant and led to the conclusion that the provisions should be understood as imposing a sentence of 30 years. The domestic courts did so despite the fact that such a penalty was heavier than the maximum sentence explicitly provided for in the applied legal provision and that, having regard to the actual wording of that provision, it was clearly to the detriment of the applicant. Accordingly, the Court concluded that the domestic courts failed to ensure the observance of the principle of legality enshrined in Article 7 of the Convention. It further found that the overall penalty imposed on the applicant was in violation of both the principle that only the law could prescribe a penalty and the principle of retrospectiveness of the more lenient criminal law. The Court states, *inter alia*, that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction, and punishment (the Court referred to the cases of *Del Río Prada v. Spain* and *Vasiliauskas v. Lithuania*).

In the case of *Benedik v. Slovenia*,[44] the ECHR found a violation of Article 8 of the European Convention on Human Rights because the Slovenian criminal procedure law, which provided that the police could obtain information on the owner or user of a certain means of electronic communication from the Internet service providers without a court order, was *not* compatible with principles of the rule of law. More particularly, the Court found that the provisions upon which the law enforcement authorities had relied to request the relevant subscriber information without having obtained a court order contained no rules on adequate safeguards and effective guarantees against abuse. I will delve into this case in greater detail since, in the specific circumstances of this case, the principle of the rule of law is interpreted differently by the ECHR than by the Slovenian Constitutional Court.

Based on the data obtained by the Swiss police regarding a group of Internet users who owned and exchanged child pornography in the form of pictures or

43 | Ribič v. Slovenia, no. 20965/03, 19 October 2010.
44 | Benedik v. Slovenia, no. 62357/14, 24 April 2018.

videos, the Slovenian police requested the Slovenian Internet service provider to disclose the data regarding the user to whom it assigned an IP address recorded by the Swiss colleagues. The police based its request on the paragraph 3 of Article 149b of the Criminal Procedure Act[45] (hereinafter the CPA) requiring the operators of the electronic communication networks to disclose to the police the information on the owners or users of a certain means of electronic communication whose details are not publicly available. In response, the Internet service provider gave the police the name, surname, address, and telephone number of the user to whom the IP address was assigned. Upon finding that the person in question was the applicant's father, the police obtained an order issued by the investigating judge and carried out a house search of the applicant's family home in which they seized four computers and made copies of their hard disks. Reviewing the hard disks, the police found that one of them contained files with pornographic material involving minors. The court of first instance found Mr. Benedik guilty of the criminal offence of displaying, manufacturing, possessing, and distributing of pornographic material and sentenced him to a suspended prison term of eight months with a probation period of two years.[46]

Confirming that the first-instance court had correctly established the facts of the case, the appellate court dismissed the applicant's appeal holding that the data on the applicant's father's IP address concerned solely the name of an owner or user of electronic communication; thus, the data that could be obtained, according to the provisions of the CPA, without a court order. The applicant challenged the appellate court's decision, arguing that the Swiss police should not have obtained his father's dynamic IP address without a court order and neither should the Slovenian police have obtained the data on the identity of his father to whom the IP address had been assigned without such an order. He argued that such data should be considered as traffic data constituting circumstances and facts connected to the electronic communication and attracting the protection of privacy of communication. The Supreme Court dismissed the applicant's appeal on points of law with the reasoning that, given the general accessibility of websites, such communication could not be considered private and thus protected by Article 37 of the Constitution. Moreover, in the Supreme Court's view, the Slovenian police had not acquired traffic data about the applicant's electronic communication, but only data regarding the user of a particular computer through which the Internet had been accessed.[47]

The applicant lodged a constitutional complaint reiterating the arguments adduced before the regular courts. The Constitutional Court dismissed the complaint, holding that his constitutional rights had not been violated. The Constitutional Court pointed out that in addition to the content of communications, the Constitution also protects traffic data, that is, any data processed for

45 | The Criminal Procedure Act (*Zakon o kazenskem postopku* [CPA -UPB16], Official Gazette of the Republic of Slovenia, No, 176/21 – officially consolidated text.
46 | See Decision of the Constitutional Court of the Republic of Slovenia No. Up-540/11, dated February 13, 2014. See also *Benedik v. Slovenia*.
47 | Up-540/11.

the transmission of communications in an electronic communications network or for the billing thereof, which included the IP address. However, given that the applicant had not hidden in any way the IP address through which he accessed the internet, and neither was access to the peer-to-peer network used by him in any way restricted, in the Constitutional Court's view, the applicant had not clearly expressed his intention that he wanted to keep his communications and identity private. On the contrary, he had established an open line of communication with an undetermined circle of strangers using the Internet worldwide who had shown interest in sharing certain files. Therefore, according to the Constitutional Court, the applicant's expectation of privacy was not legitimate and the fact that the Swiss police had obtained his IP address did not interfere with his right to communication privacy, so a court order was not necessary to access it.[48]

Final decision on the matter was issued by the ECHR. In contrast to the Slovenian Constitutional Court, the Strasbourg Court held that there had been a violation of Article 8 (right to respect for private and family life) with regard to the failure of the Slovenian police to obtain a court order before accessing subscriber information associated with a dynamic IP address. The ECHR assessed that 'not hiding a dynamic IP address, assuming it is possible to do so, cannot be decisive in assessing whether there is a reasonable expectation of privacy in relation to a person's identity'. It maintained that 'the assigned dynamic address, even if visible to other users of the network, could not be traced to the specific computer without the internet service provider's verification of data following a request from the police', and the online activity of the applicant was in fact found to carry a high degree of anonymity. It concluded that Mr. Benedik's interest in having his online activity protected fell within the scope of the notion of 'private life' under Article 8 of the Convention. The Court also assessed the measure's compliance with Article 8 by questioning whether the police's interference with the applicant's rights had been 'in accordance with the law'. To meet this condition, the legal provisions on the police measures ought to have basis in domestic law which is *compatible with the rule of law standards*. The domestic law also ought to be accessible and the person affected had to be able to foresee the consequences of his or her actions.[49]

The Court found that provision upon which the law enforcement authorities had relied to request the relevant information without having obtained a court order contained no rules covering the link between a dynamic IP address and subscriber information and no adequate safeguards and effective guarantees against abuse. In the Court's view, the Constitutional Court's finding that it had not been necessary for the police to obtain a court order, as the applicant had effectively waived his right to privacy by revealing his IP address and the contents of his communications on the file-sharing network, was not reconcilable with the scope of the right to privacy under the Convention. According to the Court, the law enforcement authorities should and could have obtained a court order. Moreover, the Court detected at the time a lack of regulations on retaining relevant data, a lack of safeguards against abuse by State officials in the procedure of accessing

48 | Up-540/11.
49 | Benedik v. Slovenia.

and transferring them, and a lack of independent supervision of the use of the police's powers with regard to obtaining information from the Internet service providers.[50]

Assuming that the obtaining by the police of the subscriber information associated with the dynamic IP address had a basis in domestic law (the CPA provided that the police could obtain information on the owner or user of a certain means of electronic communication from the Internet service providers), the Court concluded that this law was not compatible with principles of the rule of law. The ECHR pointed out that compatibility with the rule of law required that domestic law provided adequate protection against arbitrary interference with the right to private and family life from Article 8. According to its own words, the Court must be satisfied that there exist adequate and effective guarantees against abuse, its assessment depending on all the circumstances of the case, such as the nature, scope, and duration of the possible measures, as well as the grounds required for ordering them; the authorities competent to permit, carry out, and supervise them; and the kind of remedy provided by the national law.[51]

To summarise, in *Benedik versus Slovenia*, the ECHR's, in contrast to the position of the Slovenian Constitutional Court, held that the Slovenian legislation (i.e., the provisions of the CPA concerning a particular covert investigation measure) did not provide adequate safeguards and guarantees pertaining to the rule of law under the European Convention on Human Rights.

In the presented and other cases of established violations of convention rights, the ECHR interpreted the principle(s) of the rule of law differently from the Slovenian authorities (in the *Benedik* case, also differently from the Constitutional Court). Obviously, the ECHR interpreted the (international) rule of law in such a way that it established more strict standards of this principle than those provided by the Slovenian judicial and other authorities. It should be also noted that, with rare exceptions, Slovenia has been consistently enforcing the judgements of the ECHR and even in the public and professional discourse, with rare exceptions, the decisions of the ECHR in general and the Court's understanding of the rule of law in particular have not been seriously challenged. In addition, until now Slovenia did not take advantage of the possibility of appealing the judgements at the Grand Chamber of the ECHR. The above indicates that Slovenia recognises the ECHR's full sovereignty, within the scope of its powers under the Convention.

3.2. The CJEU

During the two decades of Slovenia's membership in the EU,[52] dozens of court proceedings were held at the CJEU against or in connection with Slovenia, which in most cases did not end in Slovenia's favour. Most often, cases were brought against Slovenia by the European Commission due to delays in the implementation of

50 | Benedik v. Slovenia. See also Chatzinikolaou, 2018.

51 | Benedik v. Slovenia.

52 | Slovenia has been a full member of the EU since 1 May 2004. With the membership, Slovenia transferred the exercise of part of its sovereign rights to the EU institutions including the CJEU.

directives and non-fulfilment of obligations from the European treaties. Several cases before the CJEU took place on the basis of requests for a preliminary ruling by the CJEU. Only rarely cases were brought to the CJEU by Slovenia, corporations, or individuals against an act or failure to act of the European Commission.[53]

My review of four randomly selected preliminary ruling cases (Detiček No. C-403/09, Omejc No. C-536/09, Pelati No. C-603/10, and Grilc No. C-541/11) revealed that the CJEU did not explicitly refer to the rule of law in any of them. The first request for a preliminary ruling by the CJEU was made in 2009 in the Detiček case (No. CC-403/09). This reference for a preliminary ruling was made in the course of proceedings between two litigants concerning custody of their daughter. Filed by the appellate court, the request concerned the interpretation of Article 20 of Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (OJ 2003 L 338, p. 1). Since joining the EU, all the Slovenian courts have submitted to the CJEU 39 requests for a preliminary ruling in total, of which no less than 24 were lodged by the Supreme Court, and 4 by the Constitutional Court. Among first-instance courts, only the administrative court has made four references.

An explicit reference to the rule of law was found in the judgement delivered by the CJEU on 17 December 2020 in the case C-316/19 Commission versus Slovenia.[54] The judgement resulted from a dispute between the European Central Bank (ECB) and Slovenia on the interpretation of the concept of EU archives and the proper application of Protocol No 7 on the Privileges and Immunities of the EU[55] (hereinafter the Protocol on privileges and immunities) in the national legal order of a Member State. The Grand Chamber of the CJEU held that Slovenia infringed the inviolability of the ECB's archives by unilaterally seizing documents connected to the tasks of the European System of Central Banks (ESCB) and the European System at the premises of Slovenia's national central bank (Bank of Slovenia). The Court also ruled that Slovenia did not sincerely cooperate with the ECB after that seizure to remedy this violation. In this judgement, the rule of law is one of the key concepts referred to by the CJEU.[56]

The case relates to the fallout of the financial crisis of the late 2000s when Slovenia saved banks with taxpayers' money, which revealed sharp divergences regarding the allegedly overly high cost of those bank bail-ins and related questions of responsibility of national authorities. In an attempt to gather evidence from the Bank of Slovenia in criminal proceedings related to those bail-ins, national law enforcement authorities carried out house search in the Bank of Slovenia. The investigation sought national documents as evidence in the prosecution of certain members of staff including the governor in his national capacity. The Bank of Slovenia claimed that the investigation was not admissible because

53 | See, for example, Case No. T-187/09.
54 | Judgement of 17 December 2020, Commission versus Slovenia C-316/19, EU:C:2020:1030.
55 | Protocol (No. 7) on the privileges and immunities of the European Union, *OJ C 326, 26.10.2012, pp. 266–272.*
56 | Commission v. Slovenia C-316/19. See also Croonenborghs, 2021.

it interfered with the ECB's archives protected by the Protocol on privileges and immunities, to which the Slovenian authorities were not to have access without the express agreement of the ECB. Ignoring the arguments of the Bank of Slovenia, upon prior court authorisation, the Slovenian law enforcement authorities carried out the search and seizure of documents without involving the ECB.[57]

The CJEU ruled that, by unilaterally seizing documents connected to the performance of the tasks of the ESCB and of the European System and, as regards the period after that seizure, by failing to cooperate sincerely with the ECB on that matter, the Republic of Slovenia had failed to fulfil its obligations under Article 343 of the Treaty on the Functioning of the European Union (TFEU); Article 39 of the Protocol on the ESCB and ECB; Articles 2, 18, and 22 of the Protocol (No 7) on privileges and immunities; and Article 4(3) of the TEU.[58] In its arguments, Slovenia referred several times to the rule of law and so did the CJEU in the reasoning of its judgement.

Contending that it did not infringe the principle of the inviolability of the archives of the Union, Slovenia argued that it resulted from both international law and the case law of the CJEU, as well as from the fundamental values of the EU such as the principles of transparency, openness, and the rule of law, that the concept of 'privileges and immunities' must be strictly interpreted and that, far from being of an absolute nature, the exercise of those privileges and immunities was restricted in functional terms to the extent necessary to guarantee the functioning of the EU and its institutions to achieve their objectives. It argued that the investigation and the independent and impartial execution of criminal proceedings, which fell within the competence of the Member States, constituted a 'fundamental premiss of the rule of law' and that the principle of the rule of law took precedence over the privileges and immunities of the EU.[59]

In its findings, the CJEU agreed with Slovenia that although the functional immunity of international organisations constituted a legitimate public interest, it was not absolute and must be reconciled with the other public rights and interests. These include, in particular, the principle of the rule of law and, more specifically, the need to guarantee the independent and impartial investigation and persecution of criminal offences, in addition to avoiding the impunity of persons against whom criminal investigations are conducted, including the governors of national central banks. However, according to the CJEU, the existence of privileges and immunities for international organisations and their institutions is not in itself contrary to the principle of the rule of law. Hence, in the CJEU's view, the fact that Article 2 of the Protocol on privileges and immunities precludes, in principle, the seizure of documents by the authority of a Member State where those documents are part of the archives of the Union and the institutions concerned have not agreed to such seizure does not deny the rule of law.[60]

57 | Commission v. Slovenia C-316/19. See also Croonenborghs, 2021 and Avbelj, 2020.
58 | Commission v. Slovenia C-316/19, paragraph 130.
59 | Commission v. Slovenia C-316/19, paragraphs 52 and 54.
60 | Commission v. Slovenia C-316/19, paragraphs 52 and 54.

Avbelj rightfully assessed this judgement of the CJEU as clearly wrong. Admitting that immunities and privileges are common in international law, he claims that it is obvious that they are in principle incompatible with a constitutional system based on the rule of law. Privileges and immunities are an exception to the requirement of the rule of law, that we are all equally subject to the law, that there are no special rules for anyone, except in exceptional, narrow cases, if they are convincingly justified. Avbelj is convinced that the existence of privileges and immunities is an aberration in the allegedly constitutionalised autonomous legal order of the EU. For him, it was inconceivable that any entity could act in a constitutional manner, using international legal mechanisms such as immunities and privileges when it suited them. Slovenia, in his opinion, convincingly and correctly warned that the CJEU's interpretation transcended what was stipulated in international law, that it opposed the trend of narrowing the functional immunity of international organisations, which was also confirmed by the ECHR, and that it was inherently incompatible with the supposed constitutional nature of EU law.[61]

We should also be critical of the way in which the CJEU defined the archive. According to Item 75 of the CJEU's judgement, the term archive, which has never been defined in EU law, represents 'all documents of any kind, regardless of their date, form and physical medium, created or received by institutions, bodies, offices or agencies of the Union, or their representatives or officials during the performance of their functions and which relate to the activities of these entities or are related to the performance of their tasks'.[62] As Avbelj argues, it is clear from this that the CJEU has defined the archive not only broadly but also extremely broadly. According to the interpretation of the CJEU, the archives of the EU institutions, especially in today's digital age, are omnipresent. They are practically everywhere, residing in the computers and smart phones of Member State's ministers (as representatives of the EU Council), Prime Ministers (as representatives of the European Council), and ministers (as representatives of the EU Council), and in general, of all public administration officials of the Member States who deal with EU affairs and documents. All these documents and their holders are consequently inviolable, as they enjoy immunities and privileges under EU law. In relation to them, national criminal prosecution is no longer possible in the Member States without the permission of EU institutions.[63]

With such a broad interpretation of the term 'archive', Slovenia could not succeed with its arguments also because the Court retroactively applied the Latvian case of Rimševics C-202/18. In February 2019, the CJEU ruled that the ECB and the national central banks formed a unified construct, that they were in some way united and that therefore national central banks had become subsumed under the EU institution. Even if the CJEU is right here, the undisputed fact remains that

61 | Avbelj, 2020. Interpreting privileges and immunities as broadly as the CJEU does in its judgement in the case C-316/19 means a departure from the established jurisprudence of the CJEU and the entire telos of European integration, which advocates for the enforcement of the fundamental values of the rule of law and democracy, a necessary part of which is the transparency of the functioning of institutions. See ibid.
62 | Commission versus Slovenia C-316/19, paragraph 75.
63 | Avbelj, 2020.

the Slovenian law enforcement authorities conducted the investigation in 2016 and the Rimševics case was issued in 2019. They searched for national documents and they certainly could not have known the CJEU's decision from the Rimševics case, as it did not exist.[64]

4. The international and supranational rule of law in the Constitutional Court's case law

In a research project within the framework of the Central European Professors' Network which was carried out in 2021, I analysed 30 cases of the last 10 years.[65] The study revealed, *inter alia*, that in my sample of case law the Constitutional Court made references to the international treaties[66] and decisions of the ECHR and CJEU,[67] as well as to constitutional and general legal principles. In particular, the Constitutional Court made several references to the specific principles and elements of the international principle of the rule of law.[68] Searching the Constitutional Court's case law database furthermore, one can find numerous decisions where the Constitutional Court addresses the substantive meaning of or simply refers to important parts of the so-called constitutional material core (i.e., principles of democracy, the rule of law, the separation of powers, of human dignity, personal liberty and privacy in a democratic state, etc.) by making references not only to the constitutional but also to the international and supranational rule of law.

64 | Ibid. Avbelj also points to the fact that the Court actually departs from its established case law, according to which the European Commission bears the burden of proof of a violation of EU law. However, as the archive has not been defined in EU law yet, and since the ECB has not yet defined the criteria by which its documents could be separated from the national ones, the European Commission was also unable to define the documents that have been seized illegally. The court solved this by saying that Slovenia seized so many documents that the ECB's archives must have also been among them. Since, according to the CJEU, an archive is everything that an EU institution and its staff creates or receives, inviolability is absolute and no longer functional.

65 | The research aimed at providing a record of the common features of the constitutional adjudication in fundamental rights cases, and the methods and techniques of legal interpretation that are used by the Slovenian Constitutional Court.

66 | Most references were made to the European Convention on Human Rights, while significantly less frequently the Constitutional Court referred to the Charter of Fundamental Rights of the EU, TEU, TFEU, and other international treaties and legal instruments.

67 | In the decisions from my sample of case law, the Constitutional Court made no reference to judicial practice of other international courts.

68 | For example, in Decision no. U-I-24/10, when interpreting the meaning of the principle of legal certainty as a component of the principle of the rule of law, the Constitutional Court referred to the general legal principle of *res iudicata*. The Constitutional Court stated that '/.../ according to the ECHR, ensuring legal certainty requires respect for the principle of *res iudicata* or finality of court decisions, from which it follows that a party cannot, in the absence of special circumstances, request re-examination of such decisions /.../'.

In Decision No. U-I-64/22, U-I-65/22,[69] for example, the Constitutional Court referred to both the constitutional and international and supranational rule of law in connection to the prohibition of the retroactive effect of legal acts. It states that the first paragraph of Article 155 of the Constitution prohibits the retroactive effect of legal acts by providing that laws, other regulations, and general acts cannot have a retroactive effect. The purpose of this constitutional prohibition is to ensure an essential element of the rule of law, that is, legal certainty, and thus to preserve and strengthen confidence in the law Article 2 of the Constitution. However, according to the Constitutional Court, the prohibition determined by the Constitution is not absolute. An exception thereto is determined by the second paragraph of Article 155 of the Constitution, in accordance with which only a law may establish that certain of its provisions have a retroactive effect, if this is required in the public interest and provided that no acquired rights are infringed thereby.[70]

The Constitutional Court then refers to the prohibition of retroactivity, as enshrined in the Convention. It maintains that Article 6 of the Convention, unlike Article 7, does not provide for a prohibition of retroactivity; however, both provisions have in common that they are based on the principle of legality, which is a general legal principle of the Convention. It is clear from the case law of the ECHR that one of the elements of the principle of legality is the foreseeability of legal rules, which entails that a legal rule must be clear, precise, and general, and it must not have a retroactive effect. While the legislature is not prevented from adopting new and retroactive rules of civil law that entail a legislative interference with open judicial proceedings with a view to influencing the outcome of the proceedings, the principle of the rule of law and the right to a fair trial determined by the first paragraph of Article 6 of the Convention require that the interference by the legislature be justified on compelling public interest reasons.[71]

With regard to EU law, the Constitutional Court has stated that the prohibition of retroactivity is based on the principles of the protection of legitimate expectations and legal certainty, which are part of the EU legal order. They must therefore be respected by EU institutions, as well as by the Member States, when exercising the powers conferred thereon by EU law. The principle of legal certainty requires that rules of law be clear, precise, and predictable in their effect, especially where they may have negative consequences for individuals and undertakings, so that persons may unequivocally ascertain what their rights and obligations are and may take steps accordingly. The Constitutional Court also makes a reference to the CJEU case law by stating that, according to the CJEU, the principle of legal certainty precludes a new legal rule from applying retroactively, namely, to a situation established prior to its entry into force. The principle also requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation

69 | U-I-64/22, U-I-65/22, dated 17 November 2022.
70 | Ibid.
71 | Ibid. Here, the Constitutional Court also makes reference to Lautenbach's The Concept of the Rule of Law and the European Court of Human Rights (Oxford University Press, Oxford 2013, pp. 54 and 70–79).

obtained, the new rules thus being valid only for the future and also applying, save for derogation, to the future effects of situations that have come about during the period of validity of the old law.[72]

Another illustrative example among many can be found in Decision No. U-I-79/20.[73] Addressing the principle of legal certainty in the context of the statutory regulation of interferences with human rights in exceptional circumstances of a state of emergency or crises, the Constitutional Court has stated that the requirement that the statutory regulation of interferences with human rights in exceptional circumstances be specifically determined also follows from the case law of the ECHR. With respect to several Convention rights, the ECHR stresses that from the provisions of the Convention, in accordance with which interferences with human rights must be prescribed by law, there follows not only that the requirement that interferences be regulated by national law but also that this law corresponds with the principle of a state governed by the rule of law, which entails that it attains some quality criteria. The Constitutional Court stated that according to this principle, the statutory regulation of interferences with human rights must be sufficiently clear, formulated with sufficient precision, accessible, and foreseeable.[74]

Analysing the Constitutional Court's case law, I attempt to establish whether there are instances where its interpretation of the rule of law does not align with the international and supranational understanding of the concept and where this court acts as a guardian of the Slovenian constitutional identity. I found out that in all cases under scrutiny the Constitutional Court's references to the international and supranational rule of law were aimed at strengthening its argument, that is, its interpretation and understanding of the constitutional concept/principle of the rule of law, human rights provisions, and other constitutional provisions, while ruling that the challenged statutory provisions were unconstitutional. So far, the Slovenian Constitutional Court as the final defender of Slovenian constitutionality (and constitutional identity)[75] has not taken a position of critical restraint in relation to the ECHR and CJEU and to the international and supranational concept of the rule of law.

72 | Ibid.

73 | U-I-79/20, dated 13 May 2021.

74 | Ibid. In this decision, the Constitutional Court also makes reference to the Council of Europe Report 'The Impact of the COVID-19 pandemic on human rights and the rule of law'.

75 | The concept of constitutional identity has only begun to develop in Slovenian constitutional theory and is, at the moment, still very modest. According to Bardutzky, in addition to the national identity (*Slov. samobitnost slovenskega naroda*), the essentially European constitutional tradition is one of its important components (Bardutzky, 2022, pp. 190–191). Perhaps this explains, partly at least, why the Slovenian Constitutional Court, in explaining and understanding the rule of law, has so far not come into conflict with the international and European understanding of the concept.

5. Conclusion

The rule of law has become almost universally supported at the national and international level, in both the formal (institutional) and informal (theoretical and political) discourse. As to the latter, it has been embraced across the political spectrum: while the right placed it at the heart of development policy,[76] the left (i.e., the Marxists) called it an 'unqualified human good'.[77] As Chesterman vividly maintains, 'it is a term endorsed by both the World Social Forum and the World Bank'. He opines, however, that the widespread support for the rule of law is possible precisely because of widely divergent views of what it means not only in practice but also on a conceptual level. While at times the term is used as if synonymous with 'law' or 'legality,' on other occasions, it appears to import broader notions of justice. Nevertheless, in other contexts, it refers neither to rules nor to their implementation but to a kind of political ideal for a society as a whole.[78]

In contrast to the constitutional concept of the rule of law, which developed domestically, keeping the nation-state sovereign, the post-war development of the international and supranational rule of law introduced certain limitations to national sovereignty. The present study of the status of the international and supranational (rule of) law within the legal system of the Republic of Slovenia shows that, in principle, the Slovenian internal legal order in relation to international law preserves constitutional sovereignty. A different constitutional regime applies to EU law: in the absence of an explicit constitutional rule on the hierarchical position of EU law in relation to domestic law, two different views emerged regarding the position of EU law in relation to domestic law. Gradually, at least in theory, the 'supranational approach' recognising the principle of supremacy of primary sources of EU law is replaced with the 'pluralist approach' and the relational understanding of the principle of primacy where the relationship between the national law and EU law is not strictly hierarchical but heterarchical.

With special regard to the concept/principle of the rule of law, the study explored the 'lessons' on the international and supranational rule of law conveyed to Slovenia by the two most important European courts. In all cases under scrutiny, the domestic interpretation and understanding of the rule of law differed, to a greater or lesser extent, from the international and supranational one; however, I noticed an important difference between the judgements of the ECHR and CJEU. The ECHR interpreted the (international) rule of law in such a way that it established more strict standards of this principle than those provided by the Slovenian judicial and other authorities, and neither by the authorities nor by legal experts, its decisions have not been seriously disputed in Slovenia. In contrast, in one of the

76 | See Hayek, 1969, pp. 220–233 cited in Chesterman, 2008, p. 2.
77 | While most Marxist scholars and critical legal theorists offered scathing criticism of the liberal concept of the rule of law, E. P. Thompson, a prominent Marxist historian, argued that even if the rule of law serves an ideological function it must promote values that are, in fact, valuable and capable of being at least partially realised. See Waldron, 1995, pp. 21–25 cited in Chesterman, 2008, p. 2.
78 | Chesterman, 2008, pp. 2–3.

reviewed judgements, the CJEU interpreted the rule of law in such a way that it was at odds not only with the interpretation and understanding by domestic courts but also with the established international standards of the rule of law. However, once the judgement was issued, the Slovenian courts or other national authorities did not challenge it in any way.

Finally, analysing the Slovenian Constitutional Court's references to the international and supranational rule of law, I endeavour to establish whether there are instances where this Court's interpretation of the rule of law does not align with the international and supranational understanding of the concept and where it acts as a guardian of the Slovenian constitutional identity. I found out that so far the Slovenian Constitutional Court had not taken a challenging position in relation to the ECHR and CJEU and the international and supranational concept of the rule of law. When it comes to the CJEU case law, at least, some Slovenian European law experts suggest that in the future, the Slovenian Constitutional Court, as the final defender of Slovene constitutionality and constitutional identity, should strive to align itself with more 'courageous' national constitutional courts and, if/when necessary, take a more critical stance in relation to EU law and the decisions of EU institutions.

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