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## International and European Norms on the Rule of Law from the Perspective of the Republic of Serbia

- **ABSTRACT:** *This paper examines international and European norms concerning the principle of the rule of law and its implications for the Republic of Serbia's legal order. There is no universally accepted definition of the rule of law, but some common elements can be found in international legislative acts and jurisprudence. The European Union and Council of Europe have substantial legislation on this issue; with their courts' jurisprudence, they have a significant influence on their Member States' comprehension of the rule of law principle. The Republic of Serbia has embraced the principle in its Constitution and developed it in its legislation. It will also accept and include European interpretations of the rule of law in its legislation and judicial and administrative practice by joining the European Union.*
- **KEYWORDS:** rule of law, EU, ECJ, ECHR, Council of Europe, international law, constitution.

### 1. Introduction

Discussions of the rule of law date back to Aristotle. It could be said that the rule is internal in origin, transferred to the international level and then shifted to the legal systems of individual states obligated to respect the rule's international norms and interpretations. In the past century, the European Union (EU) and the Council of Europe (COE) have contributed significantly to the discourse. International law has interpreted and developed the concept through the courts' case law: the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) have resolved some longstanding problems with their interpretation of this principle, shaping its meaning for the future. The courts' decisions have influenced the legal system of numerous states in the international community.

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The Republic of Serbia, which aims to accede to the European Union by 2025, has developed its legislation to be in accordance with international norms and standards. This article analyses some of the fundamental aspects of the rule of law, such as judiciary autonomy and independence and judicial review of state decisions, in the context of Serbia's current legal system to clarify how the rule of law is understood and implemented in Serbia. It concludes with suggestions for possible improvements.

## 2. Definition of the 'Rule of Law'

The rule of law is a universal principle, but there is no precise definition at the international level; 'regardless of the national legal system, it is always left to scholars and judges to flesh the principle out'.<sup>2</sup> Nevertheless, there are several analyses of its concept.<sup>3</sup>

The term itself is usually credited to A. Venn Dicey, the English jurist who used the phrase in his 1885 book. He wrote that rule of law comprises three elements: persons cannot be punished unless they breach the law; the same laws apply to every person in the country; and human rights are vital to the general principles of law.<sup>4</sup> The first element was mentioned as part of the principle of lawfulness and seen as crucial to the rule of law.<sup>5</sup> Other scholars have since agreed that the principle of rule of law exists to protect human rights.<sup>6</sup>

This idea of the rule of law falls in line with the Rechtsstaat ('legal state') tradition of constraining governments' powers by legal means. The Rechtsstaat concept has been described as opposition to an absolutist state with no boundaries.<sup>7</sup> The rule of law is a process, a desire for freedom and justice, not an end product.<sup>8</sup> It should not represent the implementation of one government's laws or one power's norms supported by a state force's monopoly but a generalised and universally applied law.<sup>9</sup>

## 3. The Rule of Law in International Documents

The United Nations has been dealing with the issue of the rule of law for many decades. That body's Millennium Declaration (8 September 2000) promoting democracy and strengthening the rule of law at the national and international level has been endorsed

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2 Pech, 2009, p. 42.

3 Emmert, 2009, p. 554.

4 Dicey, 1915, p. 110.

5 Garrido and Castillo, 2019, p. 10.

6 den Hertog, 2012, p. 211.

7 Jovanovic, 2015, p. 768.

8 Carter, 1991, p. 8.

9 Stanovic, 2006, p. 63.

by all the UN Member States.<sup>10</sup> The UN International Court of Justice has also weighed in on the rule of law, interpreting and applying the UN Charter's rules and general procedures and respecting human rights.<sup>11</sup> The UN Charter set uniform standards that should not be violated, and the global community needs to enforce these effectively.<sup>12</sup> Moreover, the United Nations' *Human Rights: Handbook for Parliamentarians* concentrated on the rule of law and protecting and promoting human rights and democracy.<sup>13</sup> A 2005 Resolution from the UN Human Rights Commission stated that the rule of law consists of the separation of powers, the supremacy of law, and equal protection under the law.<sup>14</sup>

A wider definition of the rule of law was made by former UN Secretary-General Kofi Annan, who stated that rule of law 'requires, as well, measures to ensure adherence to the principles of supremacy of 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'.<sup>15</sup>

The rule of law has also been espoused by other august regional bodies, such as the COE, the EU, the Inter-American Democratic Charter (IADC), the Constitutive Act of the African Union (CAAU), and the Organization for Security and Co-operation in Europe (OSCE). In accordance with Copenhagen Document, the rule of law is not 'merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value'.<sup>16</sup> On this level, states should strengthen the rule of law in the areas of judiciary independence, the right to a fair trial, access to a court, the accountability of state institutions and officials, and respect for the rule of law in public administration.<sup>17</sup>

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10 United Nations Millennium Declaration, General Assembly Resolution 55/2 of 8 September 2000. See: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/Millennium.aspx> (Accessed: 10 January 2021).

11 Wright, 1946, p. 51.

12 Carter, 1991, p. 7.

13 United Nations Human Rights, Human Rights, Office of the High Commissioner, *Handbook for Parliamentarians* No. 6, Inter-Parliamentary Union, 2016, p. 75. See: <https://www.ohchr.org/documents/publications/handbookparliamentarians.pdf> (Accessed: 12 February 2021).

14 UN Commission on Human Rights, Human Rights Resolution 2005/32: Democracy and the Rule of Law, 19 April 2005, E/CN.4/RES/2005/32, <https://www.refworld.org/docid/45377c40.html> (Accessed: 12 February 2021).

15 United Nations Security Council, The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, 23 August 2004, paragraph 6; Karakamishева-Jovanovska, 2016, p. 7.

16 Organization for Security and Co-operation in Europe, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, 29 June 1990, paragraph 2.

17 Organization for Security and Co-operation in Europe, Ministerial Council, Decision no. 7/08, Further strengthening the rule of law in the OSCE area, 5 December 2008, paragraph 4, <https://www.osce.org/files/f/documents/9/8/35494.pdf> (Accessed: 12 February 2021).

Moreover, the assessment of Organisation for Economic Co-operation and Development (OECD) should not be neglected. The rule of law represents a set of elements that must be taken together, including the protection of human rights, the efficient application of the law, interpretation of law through an independent and impartial judiciary, and equal access of the law for all.<sup>18</sup>

#### 4. The Rule of Law in the European Union

Today, the rule of law is not just a principle but one of the EU's constitutional values,<sup>19</sup> since the Treaty of the European Union (TEU) stated that one of the EU's main principles of the European Union is the rule of law.<sup>20</sup> That is why multiple international bodies have grappled with definitions of the rule of law, what it means, and why is it important. Article 2 of the TEU clearly stated that the EU's foundation was based on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.<sup>21</sup> Additionally, the Court of Justice (Court) played a pivotal role in ensuring that EU law respected 'the existence of mutual trust between the Member States that those values will be recognised'.<sup>22</sup> Any state that breaches Article 2 of the TEU can be sanctioned, according to Article 7 of the TEU,<sup>23</sup> known as the 'nuclear option'.<sup>24</sup> Article 49 of the TEU says that to be a member of EU, a state must respect the rule of law, making a commitment to the rule of law a condition of membership.<sup>25</sup> However, there is no universal law that applies to every country in the same way, which is why various organisations have tried to establish a global understanding of the rule of law.<sup>26</sup>

When an EU state does not respect the principle of the rule of law or breaches human rights, the EU reacts. For example, the European Commission's concerns about Poland's human rights breaches triggered the Rule of Law Framework.<sup>27</sup> The European Commission has undertaken numerous actions to strengthen the rule of law at the international level, and written that future avenues will rest on three pillars: promotion (building knowledge and a common rule of law culture), prevention (cooperation and support to strengthen the rule of law at the national level), and response (enforcement at the EU level when national mechanisms falter).<sup>28</sup> The Commission took actions because

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18 Report on the Rule of Law, European Commission for democracy through Law – Venice Commission, 4 April 2011, paragraph 27.

19 Van Elsuwege and Gremmelprez, 2020, p. 8.

20 Treaty of Lisbon (Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union), signed on 13 December 2007, Preamble.

21 Treaty of Lisbon, Article 2.

22 Court of Justice of the European Union, Opinion of the Court, 18 December 2014, para. 168.

23 Treaty of Lisbon, Article 7.

24 Kochenov and Pech, 2015, p. 516.

25 Treaty of Lisbon, Article 49.

26 Florin, 2010, p. 8.

27 Oliver and Stefanelli, 2016, pp. 1080–1081.

28 Wahl and Riehle, 2019, p. 79.

until then there had not been secure processes and instruments to ensure effective reactions to threats to the rule of law.<sup>29</sup> Their actions were set out in a communication to the European Parliament and the Council, ‘A New Framework to Strengthen the Rule of Law’. Their goal was to deal with any possible threat to the rule of law. When the national courts lacked the capacity to protect the rule of law, the New Framework would be activated.<sup>30</sup> The communication stipulated ‘a public, comprehensive conceptualization of the concept by an EU institution’.<sup>31</sup> In the New Framework, the rule of law is seen as the vehicle that ensures compliance with respect human rights.<sup>32</sup>

According to Annex I of the New Framework and the Court’s practice,<sup>33</sup> the rule of law contains the following constitutive principles that are valid within the EU system: ‘the principle of legality,<sup>34</sup> legal certainty,<sup>35</sup> prohibition of arbitrariness of the executive powers, independent and effective judicial review, including respect for fundamental rights,<sup>36</sup> [and] equality before the law’.<sup>37</sup>

The Court of Justice affirmed that the principle of legality is crucial in the EU, stating that ‘in a community governed by the rule of law, adherence to legality must be properly ensured’.<sup>38</sup> The Court wrote that in asserting legal certainty, the enforcement of EU regulation needs to be clear and predictable for its subjects.<sup>39</sup> Moreover, the Court emphasised that in every EU country, relating to prohibition of arbitrariness, ‘any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified’.<sup>40</sup> About independent

29 Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, 19 March 2014, p. 2.

30 Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, 19 March 2014, p. 6.

31 Magen, 2016, p. 1051.

32 *Unión de Pequeños Agricultores v. Council of the European Union*, ECR I-06677, Judgment of the Court, 25 July 2002, paragraph 38.

33 Von Danwitz, 2014, p. 1315.

34 *De Compte v. Parliament*, Case C-90/95, Judgment of the Court, 17 April 1997, paragraph 35; *Conserve Italia v.*

*Commission*, Case C-500/99, Judgment of the Court, 24 January 2002, paragraph 90.

35 *Gebroeders van Es Douane Agenten v Inspecteur der Invoerrechten en Accijnzen*, Case C-143/93, Judgment of the Court, 13 February 1996, paragraph 27; *Belgium v. Commission*, C-110/03, Judgment of the Court, 14 April 2005, paragraph 30.

36 *AM & S v. Commission*, Case C-155/79, Judgment of the Court, 18 May 1982, paragraph 18; *Orkem v.*

*Commission*, Case C-374/87, Judgment of the Court, 18 October 1989, paragraph 32.

37 Communication from the Commission to the European Parliament and the Council, A new framework to strengthen the Rule of Law, Annex 1 and 2, 2014, Brussels, pp. 1, 2. <https://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-158-EN-F1-1-ANNEX-1.Pdf>, (accessed: 13 February 2021).

38 *Commission v. CAS Succhi di Frutta*, Case C-496/99, Judgment of the Court, 29 April 2004, paragraph 63.

39 *Amministrazione delle finanze dello Stato v. Salumi and others*, Joined Cases 212 to 217/80, Judgment of the Court, 12 November 1981, paragraph 10.

40 *Hoechst v. Commission*, Joined Cases 46/87 and 227/88, Judgment of the Court, 21 September 1989, paragraph 19.

and effective judicial review, the Court underlined that ‘individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order’.<sup>41</sup> Article 6 of the European Convention on Human Rights (ECHR) affirmed the relationship between a fair trial and the separation of powers, clearly declaring that ‘everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’.<sup>42</sup> The importance of equality before the law can be seen as a general principle of the EU,<sup>43</sup> and it is regulated under the Charter of Fundamental Rights of the European Union.<sup>44</sup>

The first decision regarding the rule of law before EU Court of Justice of the EU stated the following: ‘It must first be emphasised in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty’.<sup>45</sup> Moreover, it was emphasised that Court should guarantee that the law is observed as interpreted and applied in the Treaty.<sup>46</sup>

One landmark case was *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, in which it was asserted that ‘the Community constitutes a new legal order of international law for the benefit of which the [Member] States have limited their sovereign rights,’ expressing the importance of the rule of law.<sup>47</sup>

Additionally, the Viviane Reding, vice-president of the European Commission and EU Justice Commissioner, discussed the issue in a speech on 4 September 2013:

By ‘rule of law’, we mean a system where laws are applied and enforced (so not only ‘black letter law’) but also the spirit of the law and fundamental rights, which are the ultimate foundation of all laws. The rule of law means a system in which no one—no government, no public official, no dominant company—is above the law; it means equality before the law.<sup>48</sup>

41 *Unión de Pequeños Agricultores v. Council of the European Union*, Case C-50/00 P, Judgment of the Court, 25 July 2002, paragraph 39.

42 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950., Article 6, [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf), (accessed: 13 February 2021).

43 *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, Case C-550/07, Judgment of the Court, 14 September, paragraph 54.

44 Charter of the Fundamental Rights of the European Union, *Official Journal of European Union*, 26.10.2012., Articles 21 and 22.

45 *Les Verts v. European Parliament*, Case 294-83, Judgement of the Court, 23 April 1986, paragraph 23.

46 Fernandez Esteban, 1999, p. 104.

47 *Van Gend & Los v. Netherlands Inland Revenue Administration*, Case 26-62, Judgment of the Court, 05 February 1963, p. 11.

48 Viviane Redding *The EU and the Rule of Law – What next?* Centre for European Policy Studies, 4 September 2013. See: [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_13\\_677](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_13_677) (Accessed: 11 February 2021).

The sheer number of cases dealing underscore its importance and explain the EU's efforts to define the principle.<sup>49</sup> For example, the case *European Commission v. Alrosa Company Ltd* case was important because it protected the rule of law in the post-modernisation EU competition law regime.<sup>50</sup> It is broadly accepted as a fundamental concept 'undergirding and legitimating all European constitutional systems'.<sup>51</sup>

The courts' findings have shown that failing to make a decision within a reasonable time can be seen as a breach of fundamental human rights requiring an effective remedy.<sup>52</sup> The courts view human rights violations to be a breach of the rule of law since they consider human rights an 'integral part of [the] rule of law'.<sup>53</sup>

## 5. The Rule of Law in the Council of Europe

Nowadays, constitutional law and the charters of international governance organisations endeavour to establish guidelines and practices that uphold the principles of the rule of law, democracy, and fundamental rights.<sup>54</sup> Thus, the rule of law is one of the pillars of the COE, whose 1949 Statute stated that 'Every member of the Council of Europe must accept the principles of the rule of law'.<sup>55</sup> At a November 2008 meeting, the COE reasserted this:

The rule of law is one of the three core principles of the Council of Europe, along with the enjoyment of human rights and fundamental freedoms and the concept of genuine democracy (1949 Statute, recital 3 of the preamble and Article 3). More particularly, the rule of law is, together with individual freedom and political liberty, referred to as "principles which form the basis of all genuine democracy" (recital 3 of the preamble).<sup>56</sup>

The Preamble of the ECHR affirmed that the governments of European countries should respect the rule of law.<sup>57</sup> Moreover, the rule of law has been systematically referred

49 Pech, 2010, p. 361.

50 Cengiz, 2011, p. 128; *European Commission v. Alrosa Company Ltd*, Case C-441-07, Judgment of the Court, 29 June 2010.

51 Kokott, 1999, pp. 97–102.

52 *Gascogne Sack Deutschland v. Commission*, Case C-40/12, Judgment of the Court, 26 November 2013; *Groupe Gascogne SA v. Commission*, Case C-58/12 P, Judgment of the Court, 26 November 2013; *Kendrion NV v. Commission*, Case C-50/12 P, Judgment of the Court, 26 November 2013.

53 Arnold, 2015, p. 19.

54 Lenaerts, 2020, p. 34.

55 Statute of the Council of Europe, London, 05.05.1949., Article 3. See: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680935bd0> (Accessed: 11 February 2021).

56 Council of Europe, The Council of Europe and The Rule of Law – An overview, 21 November 2008, paragraph 4.

57 Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.11.1950., Preamble, [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) (Accessed: 11 February 2021).

to in the COE's other significant political documents, conventions, and recommendations, such as Resolution Res(2002)12 establishing the European Commission for the Efficiency of Justice (CEPEJ).<sup>58</sup>

Also, the rule of law is named as a priority objective in the Statute of the European Commission for Democracy through Law (hereafter, Venice Commission), which was established in 1990 to provide advisory support and constitutional assistance to states endeavouring to adjust their legal systems to democratic standards in accordance with the European legal tradition. The Venice Commission has become an increasingly consequential authority wielding significant influence in shaping Central and Eastern European countries' constitutions. At its 86<sup>th</sup> plenary session, held in 2011, the Commission adopted its Report on the Rule of Law, which recognised the common elements of the rule of law arrived at by a consensus of scholars, judges, and others on basic elements of the rule of law: (1) legality, including a transparent, responsible, and democratic process of legislation; (2) legal certainty; (3) prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law.<sup>59</sup>

When assessing the rule of law, the Committee of Ministers of the COE stated that 'the foregoing overviews are not sufficient to allow the drawing up of a list of key rules of law requirements accepted by the Council of Europe, let alone a definition'.<sup>60</sup> In 2007, the COE issued Resolution 1594: The Principle of the Rule of Law, in which they pointed out that 'the variability in terminology and understanding of the term, both within the Council of Europe and in its Member States, has elicited confusion': specifically, 'The Assembly emphasises the need to ensure the unification that encompasses the principles of legality and of due process, which has the same basic elements, found in particular in the case law of the European Court of Human Rights, by whatever name this concept is now used in the Council of Europe'.<sup>61</sup>

The COE's Parliamentary Assembly also dealt with the issues of the rule of law and judicial independence in other resolutions. For example, Resolution 2188 (2017): New Threats to the Rule of Law in Council of Europe Member States, focusing on the rule of law in Bulgaria, the Republic of Moldova, Poland, Romania, and Turkey.<sup>62</sup> Reso-

58 Resolution Res(2002)12 establishing the European Commission for the efficiency of justice (CEPEJ), *Adopted by the Committee of Ministers on 18 September 2002 at the 808<sup>th</sup> meeting of the Ministers' Deputies*).

59 Venice Commission, Rule of Law Checklist CDL-AD(2016)007, adopted by the Venice Commission at its 106<sup>th</sup> Plenary Session (Venice, 11-12 March 2016), endorsed by the Ministers' Deputies at the 1263<sup>th</sup> Meeting (6-7 September 2016), endorsed by the Congress of Local and Regional Authorities of the Council of Europe at its 31<sup>st</sup> Session (19-21 October 2016), paragraphs 15-18.

60 Council of Europe, *The Council of Europe and The Rule of Law – An overview*, 21 November 2008, paragraph 22.

61 Report on the Rule of Law, European Commission for democracy through Law – Venice Commission, 4 April 2011, paragraph 22.

62 Resolution 2188 (2017), *New threats to the rule of law in Council of Europe member States: selected examples*, Text adopted by the Assembly on 11 October 2017 (33<sup>rd</sup> Sitting).



lution 1594 (2007) indicated the need to ensure a correct interpretation of the terms ‘rule of law’, ‘*Rechtsstaat*’, ‘*prééminence du droit*’, and ‘*Etat de droit*’, to clarify the variability in terminology and understanding.<sup>63</sup> They concluded that the terms ‘rule of law’ and ‘*prééminence du droit*’ were substantive legal concepts that were synonymous and should be used in documents issued by the Parliamentary Assembly and by Member States in their official translations.<sup>64</sup> The Court of Justice of the European Union (CJEU) has stipulated that the rule of law contains six different principles. The Venice Commission’s Report of the Rule of Law also recognised six, as previously stated.<sup>65</sup>

Case law before the ECHR often deals with the rule of law. One of the most relevant provisions in this regard is the ECHR’s Article 6, which enumerates the essential features of a fair trial, a key component of the rule of law. These include the right to be heard promptly before an independent and impartial tribunal that pronounces its judgment publicly, the presumption of innocence, the right to be informed in detail about the nature of the charges, and the right to be defended with legal assistance.<sup>66</sup> Also, the Court has also asserted the right to court access, with a direct reference to the principle of the rule of law: ‘one can scarcely conceive of the rule of law without there being the possibility of having access to the courts’.<sup>67</sup> In another case, the Court addressed the rule of law in relation to the principles of legality, the separation of powers, and equality before the law.<sup>68</sup> Elements of the rule of law can be found in other articles of the ECHR, such as Article 3, which prohibits torture and inhuman and degrading treatment; Article 5, which guarantees the right to liberty and security; Article 7, which prescribes the principle of legality; and Article 14, which guarantees the equality of individuals before the law, an essential element of the rule of law.<sup>69</sup>

## 6. The Rule of Law in the Republic of Serbia

The Constitution of the Republic of Serbia mentions the rule of law. Article 1 defines the Republic of Serbia as a ‘state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values’.<sup>70</sup> Article 3

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63 Resolution 1594(2007), The Principle of the Rule of Law, Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2007, Article 3.

64 Ibid., Article 6.1.

65 Report on the Rule of Law, European Commission for democracy through Law – Venice Commission, 4 April 2011, paragraph 21.

66 Article 6 of the ECHR.

67 Case of *Golder v. The United Kingdom*, Application no. 4451/70, Judgement of the Court, 21 February 1975, paragraph 34.

68 Case of *Iordachi and Others v. Moldova*, Application no, 25198/02, Judgment of the Court, 14 September 2009, paragraph 37.

69 Schukking, 2018, p. 156.

70 Constitution of the Republic of Serbia, Article 1. See: <https://www.srbija.gov.rs/tekst/en/130144/constitution-of-serbia.php> (Accessed :10 February 2021).

is devoted to the rule of law, calling it a fundamental prerequisite for the Constitution based on inalienable human rights. ‘The rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary, and observance of Constitution and Law by the authorities’.<sup>71</sup> These words clarify that the rule of law requires direct and free elections and respect for human rights (including minority rights). Thus, Article 1 names the rule of law as an autonomous principle on which the state is based, and Article 3 lists its constitutive elements.

The Republic of Serbia’s Judicial Development Strategy for 2020–2025 establishes that developing the judiciary represents one of the country’s key strategic priorities, along with continuing to modernise and adapt the judiciary to meet the needs of the state and society, uphold the rule of law, and increase legal certainty.<sup>72</sup>

The separation of powers is one of the basic principles of a democratic society and the rule of law. It allows mutual control of state organs to moderate state authority. In common law, it is known as ‘checks and balances’. Article 4 of the Constitution of Serbia stipulates that ‘the government system shall be based on the division of power into legislative, executive, and judiciary’ and adds that the relationship among the ‘three branches of power shall be based on balance and mutual control’.<sup>73</sup> The same article provides that judiciary power shall be independent.<sup>74</sup>

Article 145 stipulates that ‘Court decisions shall be obligatory for all and may not be a subject of extrajudicial control’.<sup>75</sup> Mutual control does not mean that court decisions can be subject to the control of the legislative or executive power; this formulation was criticised by the Venice Commission in 2018 when it presented its comments on the draft version of the amendments to Serbia’s Constitution. It proposed that instead of mutual control, the constitutional provision should be based on checks and balances.<sup>76</sup>

The EU Commission’s Serbia 2020 Report devoted many pages to the rule of law. Fore example, Section 2.1 covered the functions of democratic institutions and public administration reform. Section 2.2, which covered the rule of law and fundamental rights. The Report emphasised that the EU’s founding values include the rule of law and respect for human rights. It reiterated the importance of an effective judicial system

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71 Ibid., Article 3.

72 *Strategija razvoja pravosuđa za period 2020–2025. godine* (Eng. Judicial Development Strategy for the 2020–2025 period), *Official Gazette RS*, No. 101/2020.

73 Constitution of the Republic of Serbia, Article 4, Paragraph 3.

74 Ibid., Article 4, Paragraph 4.

75 Ibid., Article 145, Paragraph 3.

76 European Commission for Democracy through Law (Venice Commission), Serbia – Opinion on the Draft Amendments to the Constitutional Provisions on the Judiciary. Adopted by the Venice Commission at its 115<sup>th</sup> Plenary Session (Venice, 22–23 June 2018), Opinion No. 921/2018, Strasbourg, 25 June 2018, CDL-AD(2018)011, para. 14:

(that is, independent, high-quality, and efficient), anti-corruption efforts, and respect for fundamental rights in the law and in practice.<sup>77</sup>

The Report also stated that Serbia needed more preparation to apply the EU *acquis* and the European standards in the area of the judiciary, and ‘very limited progress was made overall’. The Report noted that the constitutional reforms to strengthen the judiciary were on hold until after the 2020 parliamentary elections, which delayed the adoption of the judicial legislation necessary to safeguard judicial independence. The Report stated its concerns about the scope for continued political influence over the judiciary: ‘Overall, corruption remains an issue of concern’.<sup>78</sup>

Vis-à-vis the judiciary, the Report specified two things Serbia needed to accomplish in the coming year: one, ‘strengthen the independence of the judiciary and the autonomy of the prosecution, including through amendments to constitutional and legislative provisions related to the appointment, career management, and disciplinary proceedings of judges and prosecutors’; and two, ‘amend the laws on High Judicial Council and the State Prosecutorial Council so that they are empowered to fully assume their independent role to proactively defend judicial independence and prosecutorial autonomy in practice in line with European standards.’<sup>79</sup>

## 7. The Rule of Law in the Process of Accession of the Republic of Serbia to the European Union

The Republic of Serbia is in the process of accession to the EU and has ratified the Stabilisation and Association Agreement (SAA).<sup>80</sup> This is an international treaty that entered into force on 1 September 2013, granting the Republic of Serbia the status of an associated country to the European Union.<sup>81</sup> The Preamble of SAA confirmed that all the parties are committed to respecting human rights and the rule of law as common values.<sup>82</sup>

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77 Commission Staff Working Document – Serbia 2020. Report Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions 2020 Communication on EU Enlargement Policy, p. 18.

78 Ibid., p. 5.

79 Ibid., p. 18.

80 Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Serbia, of the other part, *Official Journal of the European Union*, L 278, Volume 56, 18 October 2013.

81 The European Parliament ratified the Stabilisation and Association Agreement with Serbia on 19 January 2011, while the ratification process in the Member States of the European Union concluded on 18 June 2013 after Lithuania’s ratification. National Assembly of the Republic of Serbia ratified SAA on 9 September 2008, prior to which the National Assembly of the Republic of Serbia adopted the Resolution on association to the European Union on 13 October 2004.

82 Ibid., Preamble.

Article 1 of the SAA stated that one of the aims of this association was to support Serbia's efforts to strengthen its democracy and the rule of law.<sup>83</sup> Article 2 emphasised that the basis of the domestic and external policies of the Parties and the essential elements of the agreement were these:

Respect for democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Convention for the Protection of Human Rights and Fundamental Freedoms, in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for principles of international law, including full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation.<sup>84</sup>

The SAA's statement provides additional proof that the EU legal order is strongly connected with international legal norms on human rights and the rule of law. Article 80 of the SAA dealt with the 'Reinforcement of Institutions and Rule of Law', stating the following:

[T]he Parties shall attach particular importance to the consolidation of the rule of law and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation shall notably aim at strengthening the independence of the judiciary and improving its efficiency, improving the functioning of the police and other law enforcement bodies, providing adequate training, and fighting corruption and organised crime.<sup>85</sup>

State candidates aiming to adjust their judiciary to the basic principles contained in the phrase 'rule of law' as defined by the EU must negotiate with the EU in accordance with the Conditions for Membership and the Chapters of the *Acquis*. The European Commission's Screening Report: Serbia focused on the *Acquis's* Chapter 23: Judiciary and Fundamental Rights. That condition relates to the judiciary reform, the fight against corruption, and basic rights. It reiterated that according to Article 2 of the EU's charter, the European Union was 'founded on the principles of human dignity, freedom, democracy, equality, the rule of law, and the respect for human rights'.<sup>86</sup> Those principles were common to all the Member States, and candidates for accession were likewise required to uphold them.

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83 Ibid., Article 1.

84 Ibid., Article 2.

85 Ibid., Article 80.

86 Screening report, Serbia, Chapter 23 – Judiciary and fundamental rights, Commission, WP Enlargement + Countries Negotiating Accession to EU, MD 45/14, 15.05.14, p. 2. See: <http://www.europa.rs/upload/2014/Screening-report-chapter-23-serbia.pdf> (Accessed: 8 February 2021).

On 5 July 2016, the Council's Working Party on Enlargement and Countries Negotiating Accession to the EU sent a communication to the Permanent Representatives Committee stating that the Working Party had reached an agreement on a draft EU common position on Judiciary and Fundamental Rights.<sup>87</sup> The communication summarised its requirement for Serbia's judiciary reform. To strengthen the independence of its judiciary, Serbia agreed to comply with the EU's recommendations, including these: adopt new constitutional provisions in line with the Venice Commission's recommendations and European standards and based on a wide and inclusive consultation process; amend and implement the Laws on the Organisation of Courts, on Seats and Territorial Jurisdiction of Courts and Public Prosecutors' Offices, on Judges, on Public Prosecutor's Office, on the High Judicial Council, on the State Prosecutorial Council, and the Law on Judicial Academy; provide an adequate administrative capacity to the Judicial and Prosecutorial Councils and provide them with their own budget; and establish an effective mechanism allowing the Councils to react against political interference.<sup>88</sup>

## 8. Conclusion

During the second half of the twentieth century, the rule of law developed into a universal principle supported by the unification efforts of the United Nations, the Council of Europe, and the European Union, which were founded for the protection, improvement, and promotion of universal values and jurisprudence. The rule of law principle has become the primary organisational model of modern constitutional law and international organisations to regulate the exercise of public powers. This principle provides that all branches of government act within the limits established by law in accordance with democratic values and basic rights and under the control of independent and impartial courts.

The European Union considers the rule of law an essential common value for all Member States and a prerequisite for accession. Adherence to the rule of law means that the law applies equally to all: all public powers must always act within the constraints of the law, in accordance with the values of democracy and fundamental rights, under the control of independent and impartial courts. The rule of law includes such principles as legality, implying a transparent, responsible, accountable, democratic, and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; access to justice and effective judicial protection by independent and impartial courts, including effective judicial review of administrative acts; respect for fundamental human rights; separation of powers; and non-discrimination and equality before the law. These principles have been recognised by the ECJ.

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87 European Union – Chapter 23: Judiciary and Fundamental Rights, Common position on judiciary and fundamental rights, Brussels, 5 July 2016 (OR.en), 10074/16, ELARG 78.

88 *Ibid.*, pp. 3–4.

The rule of law is one of the three pillars of the COE, along with democracy and respect for human rights. Every state and member of the COE must accept the principles of the rule of law and accept that all persons within its jurisdiction enjoy human rights and fundamental freedoms. The ECHR played a critical role in distinguishing and explaining these terms; its judgments have contributed significantly to the efforts to closely determine the content of the phrase ‘rule of law’, helping to clarify its elements. The Court’s decisions indicate that legal predictability and the harmonisation of case law to protect judiciary independence are a precondition for all the other elements in the rule of law.

The Republic of Serbia’s Constitution accepts the rule of law as a universal principle. In the process of its accession to the EU, Serbia is obligated to respect the EU legislation and the case law of the ECJ. Serbia’s current legislation closely accords with international standards. However, it must enact certain modifications regarding the judicial branch of government. When it accomplishes the necessary judiciary reforms, it will have met all the EU’s requirements for accession and conform to other international organisations’ understanding of the rule of law.

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