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The Rule of Law: Constitutional Identity

ABSTRACT: *The rule of law is a cornerstone of justice and societal stability. It ensures that behaviour is governed by laws rather than the arbitrary decisions of individuals. It guarantees that legal frameworks are transparent, consistent and impartial, thereby protecting individuals from abuses of power and safeguarding their fundamental rights. Based on the principles of equality and fairness, the rule of law plays a vital part in maintaining the balance of power between citizens and the state. However, achieving true adherence to the rule of law is complex and fraught with challenges. In many regions, legal systems are plagued by corruption, inefficient enforcement and disparities in access to justice. Additionally, global shifts such as the growth of intergovernmental relations and the rise of international law introduce new layers of complexity. Although the rule of law is vital for social order and human rights, its implementation must continually be evaluated and reinforced to address these evolving challenges and ensure its fundamental role in modern societies.*

KEYWORDS: *Rule of law, EU, Serbia, Constitutional Court.*

1.

Introduction

The rule of law is one of the fundamental principles on which democratic societies are based. It refers to the idea that laws, rather than the arbitrary decisions of those in power, should govern society. This principle ensures that everyone, regardless of their wealth, status or position, is subject to the law and that it is applied fairly and consistently. In such a system, laws are publicly promulgated and transparent, and are applied equally to everyone, ensuring that no one is above the law – not even those in positions of power. Furthermore, the rule of law guarantees that legal rights are respected and that disputes are resolved impartially and justly.

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The rule of law is not just a theoretical concept; it is vital for preserving social order, protecting individual freedoms and maintaining justice in society. It acts as a safeguard against the abuse of power, ensuring that government actions are subject to legal constraints and that individuals have avenues for redress when their rights are violated. Moreover, it provides the structure for a stable society in which citizens can have faith in the fairness and predictability of legal processes. Without the rule of law, societies risk descending into chaos, where the powerful can act with impunity and the rights of individuals are unprotected.

However, the rule of law faces many challenges. In an increasingly globalised world, legal systems must navigate complex issues such as human rights, international law and the balance of power between state sovereignty and international obligations. Furthermore, even in well-established democracies, the principle of the rule of law can be undermined by political corruption, inequality and legal systems that fail to adequately protect vulnerable groups. This article will examine the significance of the rule of law in ensuring justice and equality, explore its role in maintaining social order, and consider the various challenges hindering its realisation in national and international contexts. It will become clear through this exploration that, while the rule of law is a vital pillar of democratic governance, constant vigilance and reform are required to ensure its continued effectiveness and justice.

This article will also focus on the principle of the rule of law in a general way, explaining its origin and significance today. Subsequently, the article refers to the rule of law in the European Union, as one of the most important principles on which the European Union is based. The article also touches on the rule of law in the Republic of Serbia, as well as the challenges that Serbia faces, which are closely related to the rule of law. Finally, the practice of the Constitutional Court of Serbia, as a body that protects the rule of law in Serbia, and the influence that this court has on other, lower courts in Serbia, are presented.

2.

The Rule of Law Principle

According to Henkin, it was in England that the rule of law principle was first established, with the adoption of the Magna Carta Libertatum in 1215.¹ The fundamental principle of the rule of law is the ability to guarantee the enjoyment of the fundamental rights and freedoms enshrined in those regulations, i.e. the assurance that the established rules will be observed and applied equally to all.² Legal security

1 Henkin, 1999, p. 11.

2 Stein, 2009, p. 299.

is necessary for the functioning of all individuals, groups, authorities, states and international organisations. It is therefore essential to ensure legal security and to be prospective.³

A legitimate government based on the rule of law is the only one that meets the strict requirements of a modern democratic state system.⁴ Today, the rule of law is widely recognised as a fundamental legal principle. It requires strict adherence to the constitution and laws by all state, regional or local public bodies, as well as by every individual. It holds anyone who acts contrary to the prescribed rules responsible and punishable, even those in positions of power.⁵ In accordance with this principle, the fundamental rights and freedoms of individuals should be legally regulated and all persons should be equal before the law. It means that equality before the law and legal certainty are the most important elements of the rule of law.⁶ Arbitrariness in decision-making should also be excluded.⁷ Retroactive effects should not be permitted under the law.⁸

The formal aspect of the rule of law focuses on the procedural meaning of this institution. Here, the rule of law is considered crucial for the effectiveness of the legal order. It is reduced to the formal regulation of rules, without taking the content of the regulations themselves into account. This requires all legal rules to be adopted and published in accordance with prescribed procedures, so that individuals can act in accordance with them in advance. Thus, the actions of everyone in society become predictable, which contributes to the safety of individuals in the community.⁹ Conversely, the material aspect of the rule of law is considered a set of ideals, focusing on values and objectives to be realised, promoted or achieved. Therefore, when basing the legal system on moral values, it becomes clear that substantively valuable regulations should be promoted.¹⁰ The term “*rule of law*” is often used today in the following senses: It is used to describe constitutionality and legality in a political context, as well as the limitation of state power. While it is similar to the concept of the rule of law, it is not fully equivalent.¹¹

Neither the Council of Europe’s statute nor the European Convention on Human Rights includes a definition of the rule of law, and the list of principles, standards and values derived from the rule of law varies at a national level. In a report published in 2011, the Venice Commission refers to the rule of law as the basic and common

3 Summers, 1999, p. 1691.

4 Scalia, 1989, p. 1175.

5 Vidaković Mukić, 2006, p. 1284.

6 Dicey, 1982, p. 120.

7 Crawford, 2003, p. 4.

8 Etinski and Tubić, 2016, p. 59.

9 Bourricaud, 1987, p. 57.

10 Lauc, 2016, p. 51.

11 Visković, 2001, p. 76.

European standard for the exercise and limitation of “*democratic power*” and “*an inherent part of a democratic society*”, stating that it “*requires decision-makers to treat everyone with respect, equality and reason, in accordance with the law*”, and that “*everyone should have the opportunity to request a review of those decisions before independent and impartial courts*”.¹²

From the practice of the Court of Justice of the European Union (hereinafter: the EU) and its institutions and bodies, as well as from the acts of the Council of Europe, it is clear that the rule of law is a source of reassuring principles that form an integral part of the legal acquis and arise from the constitutional traditions common to the Union’s member states. Notable principles include the principles of legality and legal certainty, the prohibition of discrimination and equality before the law, as well as specific principles for the judiciary, such as the principles of judicial independence and impartiality, and the right to a fair trial.¹³

Respect for and compliance with legal norms by citizens is also required, even in cases of disagreement. In the event of a conflict of interests, it is essential that they accept the legal determination of their rights and duties. Also, it should be ensured that the law is applied equally to all, so that no one is above the law and everyone is protected by it.¹⁴ The requirement of access is significant for two reasons. Firstly, the law should be accessible in terms of knowledge: it should be a set of rules made public so that people can study them, understand them, work out what they require of them, and use them as a framework for their plans, expectations, and for resolving disputes with others.¹⁵ Secondly, it is considered that legal institutions and their procedures should be made available to ordinary people so that their rights can be upheld, their disputes can be settled and they can be protected against abuses of public and private power.¹⁶ All of this means that the legal system must be independent, government officials must be accountable, public business must be transparent, and legal procedures must be fair.¹⁷

The rule of law was confirmed in international law in the 1948 Universal Declaration of Human Rights. The preamble to this document establishes the concept of the rule of law, where it is stated that it is essential that human rights are protected by the rule of law, so that people are not compelled to resort to rebellion against tyranny and oppression.¹⁸

12 Report of the Venice Commission of 4 April 2011, Study No. 512/2009.

13 Lauc, 2016, p. 54.

14 Grahovac, 2012, p. 41.

15 Corell, 2001, p. 263.

16 Mirašćić, 2014, p. 270.

17 Waldron, 2023, p. 4.

18 Universal Declaration of Human Rights, adopted by Resolution 217A(III), 10 December 1948.

The importance of the rule of law is evident from the fact that the UN adopted a Declaration on the Rule of Law at the National and International Levels in 2012. It states that:

*'We reaffirm our solemn commitment to the purposes and principles of the Charter of the United Nations, international law and justice, and to an international order based on the rule of law, which are indispensable foundations for a more peaceful, prosperous and just world.' Moreover, "We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions. We also recognize that all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.'*¹⁹

3.

The Rule of Law in the European Union

Although the EU (i.e. the European Community) has protected the basic rights of citizens of Member States since its inception, particularly with regard to the four fundamental freedoms (primarily economic), the rule of law was not, for a long time, an issue in relation with external partners, states negotiating membership, and associated states. There are several reasons why the rule of law only appeared on the Union's agenda in the 1990s.²⁰ Firstly, the EU, i.e. the Community, has undergone significant transformation since its inception, evolving from an economic project aimed at ensuring free trade among Member States into a highly complex organisation with supranational characteristics and a wide range of activities. Secondly, the EU Enlargement Policy was created as a separate policy only in the 1990s in response to requests for enlargement to Central and Eastern Europe. Before the fall of the Berlin Wall, the countries of Central and Eastern Europe belonged to the Eastern Bloc, which meant they had a completely different political system. It was the desire of these countries to join the EU that prompted it to establish the Enlargement Policy for the first time, defining a set of accession criteria at the Copenhagen meeting in 1993.

19 Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, adopted by United Nations National Assembly, 19 September 2012, part I.

20 Purić and Milovanović, 2019, p. 27.

The Copenhagen criteria set out the requirement for a country to have a functioning rule of law, in addition to other criteria such as stable institutions that guarantee democracy, human rights, and the protection of minorities.²¹ A third reason for the belated interest in the rule of law in countries with contractual relations with the EU is the existence of regional and international organisations with universal membership that promote and protect human rights at regional and universal levels. This primarily refers to the United Nations (UN), the Council of Europe, and the Organisation for Security and Cooperation in Europe (OSCE).²²

To strengthen the rule of law within the EU, the European Commission presented the EU framework in March 2014.²³ Its aim is to resolve situations involving a systematic threat to the rule of law in Member States more effectively. The framework is intended to supplement the existing measures for safeguarding the rule of law within the EU. This includes initiating infringement proceedings (limited to infringements of specific EU legal provisions) against EU countries and the preventive and punitive mechanisms set out in Article 7 of the Treaty on EU. The framework enables the Commission to work with the relevant EU country to find a solution, as well as to prevent the emergence of a systematic threat to the rule of law.²⁴ It is applied to all EU Member States in the same way and in accordance with the same standards.

One of the basic ideas that pervades the process of preparing states for EU membership is that state building means not only accepting common values, but also implementing common practices when it comes to joining the EU.²⁵ The goal is therefore to build states capable of enacting and applying EU and harmonised national laws, in order to prevent the free movement of goods, services and people within the single market from being undermined.²⁶ The prerequisites for the EU's further economic development are legal security for transnational economic transactions, the ability to enforce contracts and protect intellectual property, and the capacity to make judgements in the economy based on known, regularly applied rules.

The European Commission and other international actors tend to interpret the concept of the rule of law very narrowly, limiting it to the functioning of the judicial system and, more specifically, the criminal court, and even more narrowly still, to corruption-related cases. This interpretation excludes a broader understanding of the concept, according to which the rule of law should also encompass the activities and decisions of all those who exercise power in both the public and private sectors,

21 Pejović, 2016, p. 14.

22 Mišćević, 2009, p. 147.

23 Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final, 11 March 2014.

24 Pech, 2022, p. 113.

25 Čeranić Perišić, 2024, p. 100.

26 Vukadinović, 2012, p. 170.

including governments and public administrations, as well as their oversight by administrative and constitutional courts. More broadly, it can be said that the rule of law is not actually related to law *per se*, but to the willingness to respect the law. The narrow approach overlooks the rule of law's most important function: its social role as a mechanism for resolving social and political conflicts. This is particularly important in societies still burdened by deep ethnic and social divisions.²⁷ Therefore, in the near future, the EU will need to define the political criterion of the rule of law more precisely. In other words, the EU would need to adopt a broader definition based on desired outcomes rather than easily measurable means.²⁸

Article 2 of the Treaty on EU states that:

*'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'*²⁹

The EU conceptualises the rule of law as a foundational value, comprising several interrelated principles that ensure the effective functioning of democratic governance and the protection of individual rights. At its core lies the principle of legality, which requires that all actions undertaken by public authorities are grounded in and comply with the law. Closely related is the principle of legal certainty, mandating that legal norms be clear, predictable, and applied consistently, thereby enabling individuals and institutions to organise their behaviour in a stable legal environment. The prohibition of arbitrariness serves as a safeguard against the abuse of state power, ensuring that governmental actions are neither arbitrary nor discriminatory.³⁰ Moreover, the rule of law guarantees access to justice, obligating states to provide effective judicial remedies before independent and impartial courts. The separation of powers further reinforces the rule of law by maintaining institutional checks and balances between the legislative, executive, and judicial branches. Finally, the protection of fundamental rights, as enshrined in the Charter of Fundamental Rights of the EU, ensures that civil, political, and social rights are upheld across all Member

27 Nicolaidis and Kleinfeld, 2012, p. 36.

28 Čeranić and Glintić, 2016, p. 297.

29 The Treaty on European Union, Official Journal of the European Union C 326/13, 26 October 2012, Art. 2.

30 Blokker, 2021, p. 25.

States. Collectively, these principles form the backbone of the EU's commitment to democratic governance and the uniform application of law.³¹

The importance of the rule of law in the process of European integration is evident in the Enlargement Strategies presented by the European Commission to the European Parliament and the European Council every few years. While these strategies are not legally binding, they provide further guidance on the Union's approach to enlargement policy.³²

Through its case law, the Court of Justice consistently highlights the significance of the rule of law within the EU. In the 1978 judgement *Granaria v. Hoofdproduktsschap*, the Court acknowledged the relevance of the rule of law as a guiding principle.³³ Subsequently, in the case *Les Verts*, it underscored that the European Community is founded upon the rule of law, asserting that neither Member States nor EU institutions are exempt from judicial scrutiny regarding whether their actions align with the Union's foundational legal framework – the Treaty.³⁴ This position was reaffirmed in *UPA v. Council*, where the Court stated that the institutions of the European Community are subject to legal oversight to ensure that their decisions conform to the Treaty as well as to the overarching legal principles, including the protection of fundamental rights.³⁵

4.

The Rule of Law in the Republic of Serbia

The principles on which the rule of law in Serbia is based are set out in the Constitution of the Republic of Serbia (hereinafter: Serbia).³⁶ Article 1 of the Constitution states that Serbia is a state of the Serbian people and of all citizens living within its borders. It is founded on the principles of the rule of law and social justice, civil democracy, human rights and freedoms, and adherence to European principles and values.³⁷ The rule of law is also a fundamental principle of the Constitution, based on inalienable human rights. It is achieved through free and direct elections, constitutional

31 Closa and Kochenov, 2016, p. 17.

32 Prelić, 2019, p. 9.

33 Case 101/78, *Granaria BV v. Hoofdproduktsschap voor Akkerbouwprodukten*, Judgement of 13 February 1979, para. 5.

34 Case 294/83, *Parti écologiste 'Les Verts' v. European Parliament*, Judgement of 23 April 1986.

35 Case C-50/00, *Unión de Pequeños Agricultores v. Council*, Judgement of 25 July 2002, para. 38.

36 Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006 and 115/2021.

37 *Ibid.*, art. 1.

guarantees of human and minority rights, the separation of powers, an independent judiciary and the subordination of authorities to the Constitution and the law.³⁸

The legal order in Serbia is unique in that the organisation of power is based on the division of powers into the legislative, executive and judicial. The relationship between these three branches is based on mutual checks and balances, with the judicial branch being independent.³⁹

The judicial power belongs to the courts, which are independent. This power is unique to the territory of the Republic of Serbia. Judicial decisions are made on behalf of the people. A judicial decision may only be reviewed by a competent court in a procedure prescribed by law, or by the Constitutional Court based on a constitutional complaint.⁴⁰

Everyone is equal before the constitution and the law. Everyone is entitled to equal legal protection, without discrimination.⁴¹

The Constitution protects human and minority rights, stipulating that everyone has the right to judicial protection if any such right is violated or denied. This includes the right to have the consequences of the violation removed. Citizens also have the right to turn to international institutions for protection of the freedoms and rights guaranteed by the Constitution.⁴²

In light of the fact that some constitutional provisions were merely theoretical and had no practical application, Serbia amended its constitution in line with EU recommendations in order to close another chapter in the negotiations for EU accession. Serbia's accession to the EU is a complex, ongoing process that represents one of the country's most important strategic goals.⁴³ It reflects a broader effort to integrate the Western Balkans into the European community, promote stability in the region, and align political, economic, and legal systems with EU standards. As of 2025, Serbia has opened 22 out of 35 chapters, with two provisionally closed. However, the pace of negotiations has slowed in recent years. The EU has reiterated its commitment to enlargement in the Western Balkans, but it has also emphasised that accession is a merit-based process – meaning Serbia must fulfil all criteria before membership.

On November 8, 2023, the EU adopted the 2023 Enlargement Package.⁴⁴ The report focuses on the progress in implementing fundamental reforms and provides clear guidance on reform priorities in different countries, such as Serbia. It states that:

38 Ibid., art. 3.

39 Ibid., art. 4.

40 Ibid., art. 142.

41 Ibid., art. 21.

42 Ibid., art. 22.

43 Knežević Bojović and Ćorić, (2022), p. 53.

44 European Commission (2023), 2023 Enlargement package, 8 November 2023.

*'Serbia continued the implementation of EU accession related reforms, including in the area of rule of law. Serbia started implementing the 2022 constitutional amendments to strengthen the independence of the judiciary and adopted new media legislation. The implementation of the latter can significantly improve the regulatory environment. However, further amendments will be needed to be fully in line with the EU acquis and European standards. Serbia needs to improve, as a matter of priority, its alignment with the EU's common foreign and security policy, including restrictive measures and statements on Russia. Further work and political commitment are also needed to implement reforms in the area of rule of law. The Commission's assessment remains that Serbia has technically fulfilled the benchmarks to open cluster 3 (competitiveness and inclusive growth).'*⁴⁵

In this article, we will outline the most significant constitutional amendments adopted based on EU recommendations.

In February 2022, the National Assembly of Serbia passed the Act on Amendments to the Constitution,⁴⁶ following a referendum on 16 January 2022 in which the majority of citizens declared their agreement with the implementation of constitutional changes. The adopted amendments aimed at strengthening the independence of the judiciary, one of the EU's key requirements for accession. The amendments abolished the three-year probationary period for judges and stipulated that judges and court presidents should be elected by the High Judicial Council. This reduces the direct influence of the National Assembly on judicial functions and judicial decision-making during the probationary period of the judicial term. The guarantee of judicial independence is also strengthened by the permanent nature of the judicial role, the method of selecting judges, and the provision of irremovability.

Article 4 paragraphs 2 and 3 of the Constitution stipulates that power is organised based on a division into the legislative, executive and judicial branches, and that these branches are in balance with each other and subject to mutual control. However, given that the categories of independence and mutual control were excluded, the word "control" was replaced by "verification" in the constitutional amendment. It seems that the framers of the Constitution intended to reconcile the independence of the judiciary with the need to define the relationship between the three branches of government in a milder and more neutral way.

Amendment No. 6 deals with the independence of the judiciary and stipulates that courts shall judge on the basis of *'the Constitution, ratified international treaties,*

45 Ibid., pp. 5–6.

46 Act on Amendments to the Constitution, Official Gazette of the Republic of Serbia, No. 16/2022.

laws and generally accepted rules of international law, as well as other general acts adopted in accordance with the law'.⁴⁷ It should be noted that, although the framers of the Constitution listed legal acts in the same order as before, it remains unclear why they chose this sequence, placing generally accepted rules of international law after the law. Article 194 of the Constitution of Serbia states that the laws and other general acts of the Republic of Serbia must not conflict with ratified international treaties or generally accepted rules of international law.⁴⁸ This could lead to inconsistent judicial practice.

Article 149, paragraph 2 of the Constitution states that influencing a judge in the performance of their judicial duties is prohibited.⁴⁹ This provision aims to prevent influences that might cause a judge to deviate from the principle of legality, basing their decisions on the expectations of political power holders or private interests instead. However, the amendment prohibits any undue influence on a judge when performing their duties. The previous solution might have been preferable, as the word "inapplicable" could relativise this prohibition and raise questions about its interpretation. Unfortunately, this constitutional prohibition does not provide any sanctions for judges in violation, nor is there an obligation to regulate it more specifically by law.

Amendment No. 9 relates to the irremovability of judges. Previously, the constitution addressed the issue of the transfer and assignment of judges differently. At that time, it was stipulated that judges had the right to perform judicial functions in the court for which they were elected and that they could only be transferred or assigned to another court with their consent. Furthermore, the constitution provided for an exception whereby a judge could be transferred or assigned permanently or temporarily to another court only if the court or the majority of its jurisdiction was abolished in accordance with the law. The amended constitutional provision stipulates that a judge may only be permanently transferred or temporarily assigned to another court with their consent, except in cases provided for by the constitution. In the event of a court being abolished, the constitution provides that a judge shall be transferred to the court taking over its jurisdiction. In the event of the abolition of a court's predominant jurisdiction, a judge may be permanently transferred or temporarily assigned to another court of the same level taking over its predominant jurisdiction, even without their consent.⁵⁰ Another important novelty is that when a judge is permanently or temporarily assigned to another court, they have the right to retain the same salary they had before the transfer or assignment, if this is more

47 Ibid., amendment no. 6.

48 Constitution of the Republic of Serbia, op.cit., art. 194, para 2.

49 Ibid., art. 149 para. 2.

50 Ibid., art. 147.

favourable. This suggests that the framers of the constitution intended to ensure the financial security of judges.

These are just some examples of amendments that have brought judicial independence in Serbia closer to European standards. Now, judges are elected only by the High Judicial Council, a body intended to ensure autonomy and professionalism, just as in EU countries such as Italy and Spain. Serbia has also adopted the practice of judges electing judges, reflecting best European standards for protecting judges from political influence in their selection and work. The elimination of the three-year probationary term for judges indicates that Serbia has gone a step further in this area, as it has relied on the advice of the Venice Commission to find a constitutional solution. Serbia has also adopted the European Court of Human Rights' standard that judges cannot be removed from office except through a strict and transparent disciplinary procedure. These constitutional innovations demonstrate that Serbia has adopted key reforms to strengthen the independence of the judiciary by accepting the recommendations of the Venice Commission and the European Commission.

It is important to note that the EU has published a report on the state of the rule of law,⁵¹ not only in its Member States, but also in countries that may join the EU in the future. The report also addresses the rule of law in Serbia, particularly in light of the constitutional amendments of 2022. According to this report, the High Judicial Council and the High Prosecutorial Council were established in Serbia, in order to follow amendments of the Constitution of 2022 to make judicial independence stronger.⁵² However, it also stated that there are significant concerns regarding pressure on judges and prosecution by politicians.⁵³

One of the EU's initial impressions regarding the amendments is that there are many vacancies in the court and prosecutors' offices. This has resulted in significant delays in judicial appointments, which have had a serious impact on the judicial system. Furthermore, although some of the amendments relate to the selection of judges and public prosecutors, concerns remain about the pressure these individuals face, primarily from politicians and state officials. Therefore, their independence is still questionable.

The implementation of the 2022–2026 Strategy on Human Resources in the Judiciary is ongoing. However, the efforts made out to date have primarily concentrated on identifying and analysing existing issues, while concrete follow-up measures are still pending. Enhancing the appeal of judicial careers remains necessary. Both initial and ongoing training for judges is provided by the Judicial Training Academy, which employs suitable quality control procedures throughout the entire training process.

51 European Commission (2024), *The Rule of law situation in the European Union, 2024 Rule of law Report*, Brussels.

52 *Ibid.*, p. 12.

53 *Ibid.*, p. 13.

The Academy has the potential to further enhance its capabilities and in-house expertise, particularly in expanding its capacity to deliver training on EU law.

Additionally, one of the major problems that Serbia faces is the length of criminal, civil and commercial proceedings. A large number of complaints concerning the violation of the right to a trial within a reasonable time have been filed with the European Court of Human Rights, and a similar number of proceedings have been brought before Serbian courts in which parties file a suit against Serbia for violating this right. Serbia is then obliged to compensate the parties for the damage incurred. However, the EU believes that there has been a positive trend in Serbia regarding the reduction of the average duration of these proceedings.⁵⁴

In the context of digitalisation, an increasing number of European countries are introducing various digital solutions that could strengthen the judicial system and improve accessibility. However, Serbia, along with Albania and North Macedonia, has only taken limited steps in this direction and the idea has yet to take root.⁵⁵ In some judicial processes, the option of submitting certain documents, lawsuits and appeals electronically is available. However, unlike in some other EU countries, there are no recorded trials and no possibility of holding the main hearing online.

It is also worth noting that corruption is one of the major problems in Serbia, and that the country has passed anti-corruption laws based on EU recommendations.⁵⁶ Some of these laws are the Law on Prevention of Corruption,⁵⁷ the Law on Financing Political Activities,⁵⁸ the Law on Seizure and Confiscation of the Proceeds from Crime,⁵⁹ and Law on the Liability of Legal Entities for Criminal Offences.⁶⁰ The Anti-Corruption Agency of Serbia was established and started operations on 1 January, 2010. The EU holds that cooperation and communication with the European Public Prosecutor's Office is a way of reducing corruption in countries. However, Serbia has not yet established any such cooperation. The number of those found guilty of high-level corruption has been on the increase in the past year. But more improvements are needed to make sure that investigations, charges and convictions are performed adequately.

In addition to the problem of judges being influenced, the media also feels pressured by politicians and state officials, which is a major setback in itself. However, the

54 Ibid., p. 15.

55 Ibid., p. 16.

56 Ibid., p. 18.

57 Law on Prevention of Corruption, Official Gazette of the Republic of Serbia, No. 35/2019, 88/2019, 11/2021 – authentic interpretation, 94/2021 and 14/2022.

58 Law on Financing Political Activities, Official Gazette of the Republic of Serbia, No. 14/2022.

59 Law on Seizure and Confiscation of the Proceeds from Crime, Official Gazette of the Republic of Serbia, No. 32/2013, 94/2016 and 35/2019.

60 Law on the Liability of Legal Entities for Criminal Offences, Official Gazette of the Republic of Serbia, No. 97/2008.

media also struggles to maintain their professional standards due to the daily pressures they face. The EU believes that this is one of the issues Serbia must address.

Moreover, Serbia has adopted other laws to align its legal and institutional framework with the European Union's *acquis communautaire*. These include the Law on the Protection of Whistle-blowers,⁶¹ the Law on Personal Data Protection,⁶² the Law on Gender Equality,⁶³ and the Law on Consumer Protection.⁶⁴

5. Constitutional Court of the Republic of Serbia and the Rule of Law

The numerous competencies of the Constitutional Court, including those listed in Article 167 of the Constitution⁶⁵ and those “scattered” throughout the constitutional text, can be classified into the following groups:

- Control of constitutionality and legality;
- Competence disputes;
- Election disputes;
- Ban on the work of political parties, trade union organisations and religious communities;
- Constitutional appeal;
- Special appeals provided for by the Constitution;
- Decision on the violation of the Constitution by the President of the Republic of Serbia.

Taking into account the control of legality and constitutionality, we can conclude that, in recent years, the Constitutional Court has issued a significant number of rulings determining that certain acts, laws, etc. are unconstitutional and must be amended. In case No. IUo-161/2023, for example, the Constitutional Court ruled that the tourist organisation of the municipality of Surdulica had surpassed its powers by deciding on the amount, method of calculation and payment of fees for the use of a protected area.⁶⁶ Regarding constitutionality, the Constitutional Court ruled that Article 131, paragraph 1(2) of the Law on Civil Servants of the Republic of Serbia is not in accordance with the Constitution. The Court found that the aforementioned provision,

61 Law on the Protection of Whistle-blowers, Official Gazette of the Republic of Serbia, No. 128/2014.

62 Law on Personal Data Protection, Official Gazette of the Republic of Serbia, No. 87/2018.

63 Law on Gender Equality, Official Gazette of the Republic of Serbia, No. 52/2021.

64 Law on Consumer Protection, Official Gazette of the Republic of Serbia, No. 88/2021.

65 Constitution of the Republic of Serbia, *op.cit.*, art. 167.

66 Constitutional Court of the Republic of Serbia, Decision of 5 December 2024, No. IUo-161/2023.

in the part that reads: *'has been sentenced to a suspended sentence of imprisonment of at least six months, regardless of the probationary period, for a criminal offence that renders him unfit to perform the duties of a civil servant'*, is not in accordance with the principle of unity of the legal order under Articles 4(1) and 194(1) and Article 131(2) of the Constitution. The Court therefore invalidated this part of the provision.⁶⁷

In practice, the Constitutional Court designates itself as a subsidiary body.⁶⁸ Therefore, in accordance with the theoretical consideration of the principle of subsidiarity, the Constitutional Court should protect human rights and, when necessary, intervene in the decisions of regular courts to direct their work. This maintains the coherence of the legal system for the protection of human rights while leaving regular courts free to act conscientiously within their powers.

Examining the cases dismissed as inadmissible by the Constitutional Court would undoubtedly lead us to conclude that it is a subsidiary body. Thus, cases that ended in dismissal mostly comprehended the following reasoning:

*'In the previous procedure, the Constitutional Court determined that the applicant of the constitutional complaint had requested the Court to examine the legality of the contested decision as a court of first instance. The Constitutional Court states that a constitutional complaint cannot be considered a legal remedy for examining the legality of decisions made by regular courts. In the procedure for constitutional protection of human and minority rights and freedoms guaranteed by the Constitution, the Constitutional Court only determines whether an act or action by a state body or organisation with public authority has resulted in a violation or denial of these rights and freedoms. As the submitted constitutional complaint does not provide reasons linked to a violation or denial of rights or freedoms guaranteed by the Constitution, the Constitutional Court is required to act as a court of first instance when assessing the legality of the contested decision made in civil proceedings. The Constitutional Court dismissed the constitutional complaint because it is not competent to decide.'*⁶⁹

Conversely, in line with international institutions' interpretation of human rights, the Constitutional Court is authorised to review the decisions of regular courts in exceptional cases involving violations of human and minority rights as guaranteed by the Constitution of the Republic of Serbia. The interplay and delicate balance between positive and negative obligations under the principle of subsidiarity is most evident in

67 Constitutional Court of the Republic of Serbia, Decision of 31 October 2024, No. IUo-56/2023.

68 Manojlović, 2013, p. 164.

69 Constitutional Court of the Republic of Serbia, Decision of 15 September 2011, No. 2258/2011, para. 3.

the Constitutional Court's intervention in cases of violations of the right to a fair trial, as set out in Article 32 of the Constitution, particularly with regard to the "*manifestly arbitrary application of substantive law*".⁷⁰

The aspect of arbitrariness, or the "*arbitrary application of substantive law*" as designated by the Constitutional Court, will be established if:

*'There has been a violation or denial of rights guaranteed by the Constitution, and the application of procedural and/or substantive law has been arbitrary or discriminatory. This indicates obvious arbitrariness and unfairness in the proceedings and decisions of regular courts, to the detriment of the applicant for a constitutional complaint. According to the Constitutional Court, obvious arbitrariness and unfairness in the proceedings and decisions of regular courts, and consequently a violation of the right to a fair trial, will always exist where regular courts apply substantive law arbitrarily, to the detriment of the applicant for a constitutional complaint. In such cases, the Constitutional Court will establish a violation of the right to a fair trial under Article 32, paragraph 1 of the Constitution.'*⁷¹

Unlike international institutions, the Constitutional Court explicitly incorporates the concept of "*arbitrary application of substantive law*" into the framework for guaranteeing the right to a fair trial. It also uses the expressions "*erroneous application of substantive law to the detriment of the applicant for a constitutional complaint*"⁷² and "*arbitrary application of substantive law*".⁷³ This is a significant deviation.

We analysed the case to clarify the circumstances justifying the Constitutional Court's interference in the jurisdiction of regular courts. This clarifies the Constitutional Court's actions within the limits of its subsidiary jurisdiction. In the case of *Lidija Gvozdić*, the Constitutional Court ruled that the courts had applied substantive law arbitrarily because they had based their decisions on an interpretation of Article 68a of the Law on Labour Relations in State Bodies that was unacceptable under the Constitution.⁷⁴ In the case of *Miroslav Mladenović*, the Constitutional Court also ruled that Article 32 of the Constitution had been violated.⁷⁵ According to the Constitutional Court, the entry of an execution in the real estate register as an enforcement action must be deleted *ex officio* by suspending the enforcement procedure. In the case of the *Serbian Orthodox Church*, the Constitutional Court found a violation of Article

70 Constitution of the Republic of Serbia, op.cit., art. 32.

71 Constitutional Court of the Republic of Serbia, Decision of 6 June 2013, No. 224/2013, para. 8.

72 Constitutional Court of the Republic of Serbia, Decision of 28 November 2013, No. 1772/2011.

73 Constitutional Court of the Republic of Serbia, Decision of 4 July 2013, No. 2390/2012.

74 Constitutional Court of the Republic of Serbia, Decision of 6 June 2013, No. 3677/2013, para. 9.

75 Constitutional Court of the Republic of Serbia, Decision of 18 July 2013, No. 1868/2013.

32, paragraph 1 of the Constitution on the grounds that the position of the second instance court was arbitrary in its application of substantive law.⁷⁶ The case in question concerned the Serbian Orthodox Church's legal standing as a constitutional appellant in proceedings before regular courts. The second-instance body adopted a position based on the relevant regulations, which the Constitutional Court did not agree to. In the *Dauti case*, the Constitutional Court concluded that the Court of Appeal in Niš's interpretation of Article 42, paragraph 2 of the Expropriation Act was not "*constitutionally acceptable*".⁷⁷

Furthermore, it is clear that the application of this aspect of the right to a fair trial is not exceptional; rather, it appears to be becoming the norm and is expanding relentlessly. Thus, the Constitutional Court has extended the concept of "*arbitrary application of substantive law*" to its own area of jurisdiction. In the *Milovan Tmušić* case, the Court concluded that the right to a fair trial can be violated or denied by the misinterpretation or incorrect application of substantive law.⁷⁸ The incorrect application of substantive law occurred when the regular courts failed to resolve the conflict between the right to freedom of expression and the right to privacy, as entailed by the guarantees of the right to a fair trial. Therefore, the Constitutional Court concludes that, by failing to respect the human right to freedom of expression, the regular courts violated the constitutionally guaranteed right to a fair trial. The same approach seems to have been upheld by the Constitutional Court in the *Vesna Ivković* case, where it was emphasised that the guarantee of a fair trial aims to ensure that human rights and freedoms guaranteed by the constitution are respected in the judicial process and that, through the European Court of Human Rights, one of these freedoms is the right to a home.⁷⁹ Deliberating upon the violation of the right to a fair trial, the Constitutional Court moves on to consider the violation of the human right to property. In the context of legality, the Court concludes that the substantive law was applied arbitrarily, and therefore the right to a fair trial was violated. The violation of the right to a fair trial is based on the violation of the right to property.

Thus, in the *Dauti Daut* case, the Constitutional Court concluded that there had been a violation of Article 32, paragraph 1 of the Constitution, establishing the violation of Article 58 of the Constitution concerning the right to property.⁸⁰ In the *Novaković et al.* case, the Constitutional Court concluded that the applicant's claims of a violation of the right to property, guaranteed by the provision of Article 58,

76 Constitutional Court of the Republic of Serbia, Decision of 22 March 2012, No. 6785/2011.

77 Constitutional Court of the Republic of Serbia, Decision of 3 April 2013, No. 3824/2011.

78 Constitutional Court of the Republic of Serbia, Decision of 21 January 2010, No. 290/2007, para.10.

79 Constitutional Court of the Republic of Serbia, Decision of 17 January 2013, No. 5084/2011, para.5.

80 Constitutional Court of the Republic of Serbia, Decision of 3 April 2013, No. 3824/2011.

paragraph 1 of the Constitution are based on allegations of a violation of the right to a fair trial.⁸¹

In the *Novograp* case, the Constitutional Court ruled that a violation of the right to property could only be established by proving that the contested court decision had denied the right to the peaceful enjoyment of property in an arbitrary and unjust manner.⁸² However, it seems that the assessment of the violation had to follow the opposite sequence, precisely because of the exceptional nature of entering into the merits of regular court decisions. It could only be justified to consider a violation of the right to a fair trial in a situation where there were no grounds for the violation of other rights guaranteed by the Constitution and where there were obvious errors in the conduct of the procedure itself. Conversely, it appears that the Constitutional Court equates the condition of legality with the conditions of admissibility of interference with certain human rights, as set out in Article 32, paragraph 1 of the Constitution. This is not in accordance with the interpretation of international institutions, which require a formal and legal basis in law. Following this logic, there would be almost no need for different human rights as they would all be subsumed by the right to a fair trial.

The issue of the Constitutional Court's arbitrary application of substantive law – an occurrence that seems more regular than rare – stems not only from its extensive use, which clearly exceeds the Court's legally defined jurisdiction, but also from its reliance on ambiguous and undefined terminology to support such decisions. As previously noted, the Court often justifies these interventions by assessing whether the reasoning of the lower courts is *constitutionally acceptable*. However, this phrase lacks an explicit definition or clear explanation in the Court's rulings. This ambiguity gives the Court broad discretion to label any legal interpretation with which it disagrees as *constitutionally unacceptable*, regardless of its foundation in existing law. This effectively gives the Court the power to interpret all legal norms in Serbia, which is a clear overreach of its constitutional mandate.

Furthermore, the Court uses other ambiguous expressions, such as decisions being “*to the disadvantage of the constitutional complainant*”. Naturally, any adverse outcome in the lower courts would be detrimental to the complainant – otherwise they would not have pursued constitutional redress. In contrast, international legal standards emphasise that the right to a fair trial is judged by the outcome rather than by subjective dissatisfaction with the result. Litigation inherently involves two opposing parties, and what one perceives as unjust, the other may view as just. Therefore,

81 Constitutional Court of the Republic of Serbia, Decision of 8 May 2013, No. 4639/2012, para. 10.

82 Constitutional Court of the Republic of Serbia, Decision of 15 December 2011, No. 454/2009, para.6.

dissatisfaction with a verdict does not, in itself, constitute a violation of the right to a fair trial.

6. Conclusion

In conclusion, we have seen how this principle operates within broader global frameworks, as well as in specific regional and national contexts. In the EU, for example, the rule of law is fundamental to the Union's cohesion, serving as both a guiding principle and a key membership criterion. The EU emphasises the importance of legal equality, human rights protection and the rule of law as essential components for ensuring stability, democracy and respect for citizens' rights across its Member States. However, challenges remain, particularly when national legal systems are plagued by corruption, political interference, or ineffective enforcement, underscoring the need for continuous reform and vigilance.

Turning to Serbia, the implementation and safeguarding of the rule of law presents unique challenges. While significant efforts have been made to align with EU standards, persistent issues such as political interference in the judiciary, corruption and inequalities within the legal system have hindered the full realisation of the rule of law. While Serbia's ongoing legal and institutional reforms have been vital in shaping a more transparent and accountable system, the process remains far from complete. Against this backdrop, the jurisprudence of the Constitutional Court of Serbia plays an important role in navigating the intricate intersection of constitutional law, human rights, and political dynamics. The Court has played a key role in safeguarding citizens' rights and reinforcing the constitutional framework. However, its decisions are frequently subject to political pressure, highlighting the tension between legal principles and political realities.

While the decisions of the Constitutional Court contribute to strengthening the rule of law, they also reveal the complexities inherent in balancing the legal framework with societal and political challenges. As Serbia continues on its path towards EU integration, the need for robust judicial independence, transparent legal processes and adherence to the rule of law becomes ever more pressing. The Court's role in ensuring constitutional adherence and safeguarding rights will be crucial in helping Serbia meet EU expectations and international legal standards.

Ultimately, the rule of law is neither a static nor easily achievable ideal. Rather, it requires constant attention, adaptation and reform. As we have seen in various regions and jurisdictions, implementing the rule of law requires a commitment to transparency, fairness, accountability and protecting rights. For both the EU and Serbia, strengthening the rule of law is essential for building a stable and just society. For Serbia in particular, progress in this area is essential for both its EU aspirations

and ensuring the long-term stability, justice and fairness of its legal system. The experience of Serbia's Constitutional Court highlights that, although challenges to the rule of law will persist, it remains a vital force in protecting individual rights and promoting democratic values. It has the potential of shaping a more just and more equitable future for the nation.

Bibliography

- Blokker, P. (2021) *The Democracy and Rule of Law Crises in the European Union*. Bologna: Reconnect Europe. <https://doi.org/10.17645/pag.v11i1.6532.2>
- Bourricaud, F. (1987) 'Legitimacy and Legitimization', *Current Sociology*, 35(2), pp. 57–67.
- Čeranić, J. and Glintić, M. (2016) 'Vladavina prava u Evropskoj uniji: Preispitivanje koncepta u kontekstu proširenja EU', *Pravni život*, 2016/12, pp. 295–307.
- Closa, C. and Kochenov, D. (2016) *Reinforcing Rule of Law Oversight in the European Union*. Cambridge: Cambridge University Press. <https://doi.org/10.1017/CBO9781316258774>
- Corell, H. (2001) 'The visible college of international law: Towards the rule of law in international relations', *American Society of International Law*, 2001/95, pp. 262–270.
- Crawford, J. (2003) 'International Law and the Rule of Law', *Adelaide Law Review*, 24(1), pp. 3–12.
- Dicey, A. (1982) *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Classics. <https://doi.org/10.1017/9781139236249.003>
- Etinski, R. and Tubić, B. (2016) 'International law and the rule of law', *Belgrade Law Review*, 64(3), pp. 57–74.
- European Commission (2024) *The Rule of Law Situation in the European Union: 2024 Rule of Law Report*.
- Grahovac, M. (2012) 'Pojam i društveni značaj demokratske pravne države i vladavine prava', *Škola biznisa*, 2012/3, pp. 38–42.
- Henkin, L. (1999) 'The Age of Rights' in Henkin, L., Neuman, G.L., Orentlicher, D.F. and Leebron, D.W. (eds.) *University Casebook Series*. New York: West Academic.
- Lauc, Z. (2016) 'Načelo vladavine prava u teoriji i praksi', *Pravni vjesnik*, 32(3–4), pp. 45–67.
- Manojlović, K. (2013) *Postupak i obim ispitivanja ustavne žalbe*. Beograd: Foundation Public Law Centre. <https://doi.org/10.1093/oxfordhb/9780199578610.013.0040>
- Mirašić, Dž. (2014) 'Narodni suverenitet i princip vladavine prava u savremenoj državi naciji', *Zbornik radova Vladavina prava i pravna država u regionu*, 2014, pp. 268–297.
- Mišćević, T. (2009) *Pridruživanje Evropskoj uniji*. Beograd: Službeni glasnik.
- Nicolaidis, K. and Kleinfeld, R. (2012) *Rethinking Europe's 'Rule of Law' and Enlargement Agenda: The Fundamental Dilemma*. Place of publishing: OECD Publishing. <https://doi.org/10.1787/5k4c42jmn5zp-en>
- Pech, L. (2022) 'The Rule of Law as a Well-Established and Well-Defined Principle of EU Law', *Hague Journal on the Rule of Law*, 2022/14, pp. 107–138.

- Pejović, A. (2016) 'Vladavina prava u politici prijema u Evropsku uniju', *Matica*, 2016/66, pp. 7–24.
- Prelić, M. (2019) 'Vladavina prava u pregovorima o pristupanju Republike Srbije Evropskoj uniji', *Evropsko zakonodavstvo*, 2019/69, pp. 5–18.
- Purić, N. and Milovanović, I. (2019) *Politika proširenja Evropske unije i fundamentalni značaj vladavine prava*. [online], Available at: https://www.researchgate.net/publication/338007610_Politika_prosirenja_Evropske_unije_i_fundamentalni_znacaj_vladavine_prava (Accessed: 14 November 2025).
- Scalia, A. (1989) 'The Rule of Law as a Law of Rules', *University of Chicago Law Review*, 56(4), pp. 1175–1188.
- Schimmelfennig, F. and Sedelmeier, U. (2005) *The Europeanisation of Central and Eastern Europe*. Ithaca – New York: Cornell University Press.
- Stein, R. (2009) 'Rule of Law: What Does It Mean?', *Minnesota Journal of International Law*, 18(2), pp. 293–303.
- Summers, R. (1999) 'The Principles of the Rule of Law', *Cornell Law Review*, 74(5), pp. 1691–1712.
- Vidaković Mukić, M. (2006) *Opći pravni rječnik*. Zagreb: Narodne novine.
- Visković, N. (2001) *Teorija prava i države*. Zagreb: Birotehnika.
- Vukadinović, R. (2012) *Uvod u institucije i pravo Evropske unije*. Kragujevas: Udruženje za evropsko pravo – Centar za pravo EU.
- Waldron, J. (2023) *The Rule of Law*. *The Stanford Encyclopedia of Philosophy*. [online], Available at : <https://plato.stanford.edu/entries/rule-of-law/> (Accessed: 15 November 2025).

Legal documents

- 'Act on Amendments to the Constitution' (2022) Official Gazette of the Republic of Serbia, No. 16/2022.
- 'Constitution of the Republic of Serbia' (2006, as amended 2021) Official Gazette of the Republic of Serbia.
- 'Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels' (2012).
- 'Law on Financing Political Activities' (2022) Official Gazette of the Republic of Serbia.)
- 'Law on Prevention of Corruption' (2019), as amended Official Gazette of the Republic of Serbia.
- 'Law on Seizure and Confiscation of the Proceeds from Crime' (2013), as amended Official Gazette of the Republic of Serbia.

The Rule of Law: Constitutional Identity

- ‘Law on the Liability of Legal Entities for Criminal Offences’ (2008) Official Gazette of the Republic of Serbia.
- ‘Treaty on European Union’ (2012) OJ C 326/13, art. 2.
- ‘Universal Declaration of Human Rights’ (1948).
- European Commission (2014) ‘A new EU Framework to strengthen the Rule of Law’ COM(2014) 158 final.
- Venice Commission (2011) Study No. 512/2009.

Case-law

- Case 101/78 *Granaria BV v Hoofdproduktschap voor Akkerbouwprodukten*, 13 February 1979.
- Case 294/83 *Parti écologiste “Les Verts” v European Parliament*, 26 September 1984.
- Case C-50/00 *Unión de Pequeños Agricultores v Council*, 25 July 2002.
- Constitutional Court of the Republic of Serbia (2010–2024) Document of Selected decisions (N. 290/2007; 454/2009; 2258/2011; 6785/2011; 3824/2011; 1772/2011; 5084/2011; 1868/2013; 2390/2012; IUo-56/2023; IUo-161/2023).

ARTICLES

