Оригиналан научни рад

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THE RULE OF LAW PRINCIPLE: THE EU CONCEPT VS. NATIONAL LEGAL IDENTITY

There is no doubt that the rule of law principle has been recognized as a milestone of modern democratic societies all around the world. The history and evolution of this concept shows that it has passed through significant changes in its it substance and constitutive elements, but also when it comes to differences in its definition in law and political theory. However, these differences seem to be more visible in last decades, due to parallel evolution of the rule of law as a universal value proclaimed by most important international legal and human rights instruments and its developing recognition in numerous national legal orders. The unification processes coming with EU enlargement put a new light on the issue of relationship between international, more precisely, EU concept of the rule law on one side, and variety of concepts that exist in the Member States and candidate countries. While for the first group of states this difference seems to be important from the angle of keeping achieved level of EU values, candidate countries have to pass multilevel crosscheck by EU authorities in order to get confirmation that their normative and institutional framework, but also their functioning in practice provides sufficient guaranties recognized as a EU rule of law constitutive elements. However, complexity of this process is significantly increased due to differences in understanding the rule of law concept among various states with different legal identities, but also still vague definition arising from EU attempts to standardise it.

Key words: *rule of law, European Union, EU, legal identity.*

1. THE HISTORY AND EVOLUTION OF THE RULE OF LAW PRINCIPLE

Popular, but still not so clear- that’s how the rule of law concept could be described. Itcouldn’t be more truth what Kochenov concluded, that it becomes clear that notwithstanding the abundant references to the rule of law, the meaning of it is probably much less articulated than one might presuppose

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at first glance. Popularity and functionality of legal concepts do not go hand in hand.[1]

However, "popularity" in case of the rule of law does not correspond only to its long tradition, but rather to its evolution. The evolutionary process related to this concept has not been so continuous and linear. Periods of stagnation or even a regression, combined with epochs of significant progress made its history rich and interesting. Therefore,if we try to find an initial track of the modern rule of law concept, we should look in the ancient Greece in the late seventh and early sixth centuries B.C. That's the period when the Greeks laws got written form and became publicly accessible. The most important, they were no longer so subject to arbitrary interpretation by a privileged class. Once written down, the Greeks placed significant obstacles in the way of their laws' amendment, and Greek courts were bound to apply the letter of the law even in the face of countervailing equitable considerations.[2] More concrete elements of the rule law known to the ancient Greeks could be found in Pericles's description of a late Athenian state. He stated that "as regards the law, all men are on equal footing so far as concerns their private disputes."The Greeks at least proclaimed thatenactment of laws directed against specific individuals is forbidden.Kellyemphasizes that Greeks relied on mixed government (in which power was split among bodies representing different classes of people) to avoid the concentration of all state power in one entity and forestall absolutism. If that was unsuccessful, the Greeks acknowledged the legitimacy of resistance to tyranny.[3] The very first definition that clearly reflects the rule of law principle like we understand it nowadays, came from Aristotle who provided a theoretical justification for the rule of law. He argued that, because of the inevitable infirmities of rulers, the laws should be sovereign: "We do not permit a man to rule, but the law."[4]

The similar trend existed in the Roman law,[5]where generality of laws was reflected in The Laws of the Twelve Tables (Table IX) which stipulated that"no privileges, or statutes shall be enacted in favour of private persons, to

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[1] D. Kochenov, The EU Rule of Law: Cutting Paths Through Confusion, *Erasmus Law Review,* Vol. 2, No. 1, 2009, 9*,* http://www.erasmuslawreview.nl/tijdschrift/ELR/2009/1/ELR_2210-2671_2009_002_001_002, last accessed on January 10th 2018.

[2] J. Kelly, *A Short History of Western Legal Theory,*Claderon Press: Oxford, 1992, 9.

[3]J. Kelly, *op. cit*., 68-70.

[4]T. J. Angelis, J. H. Harrison, *History and Importance of the Rule of Law*, 2003, 9, https://worldjusticeproject.org/sites/default/files/documents/history_and_importance_of_the_rule_of_law.pdf, last accessed on March 3rd 2018.

[5]According to Kelly, validity of the rule of law in Roman law could be described as situation where law was little more than the will of the ruler, and where rulers were not bound by the written laws. (J. Kelly, *op. cit*., 68-70)

the injury of others contrary to the law common to all citizens, and which all individuals, no matter of what rank, have a right to make use of.“ According to Marcus Aurelius, the general nature of laws was described as “one substance, one law, and one reason common to all intelligent beings, and one truth; as there must be one sort of perfection to all beings, who are of the same nature, and partake of the same rational power.[6] This concept appeared in more sophisticated form in Cicero’s thoughts. He concluded that “as bodies cannot, if deprived of the mind, so the state, if deprived of law, cannot use its separate parts, which are to it as its sinews, its blood, and its limbs. The ministers of the law are the magistrates; the interpreters of the law are the judges; lastly, we are all servants of the laws, for the very purpose of being able to be freemen.”[7] So, in addition to generality and universal application of law, Cicero introduced the rudimental concept of the separation of powers. From the angle of nowadays understanding of separation of powers and generally mandatory character of law, the power of the imperator does not go hand by hand with these principles. However, specificity of this relations that should be seen a stage in the rule of law evolution, is visible from the Justinian Code, written in the 6thcentury, where there isone provision in the Code reads: “What has pleased the prince has the force of law” while another provision reads: “The prince is not bound by the laws”. However, yet another provision of the Code states: “It is a statement worthy of the majesty of a ruler for the Prince to profess himself bound by the laws”.As Tamanaha well noticed, the assertion that the Prince is not bound by the laws, it was generally understood in practice that the Emperor was subject to existing rules within the legal tradition, although he undoubtedly had the power to modify the law if he desired. But even when the Emperor exercised his law-making powers, that was not completely out of objective scope of facts and needs or according to Ulpian, “if law which had been regarded as just for a long time was to be reformulated, there had better be good reason for the change”.[8]

Even in a Middle age which was, on the first glance, incompatible with the rule of law, a significant progress was made in this regard in legal theory, but also the novelties introduced by *Magna Carta Libertatum*. TheThomas of Aquinasargued that because the power of kings originated with the people (rather than from God), the people retained the power to depose an unjust tyrant and concludes that even rulers should obey the laws’ directives. He addressed the proper purpose of laws, arguing that laws failed to promote equity and

[6]*The Meditations of the Emperor Marcus Aurelius Antonius*, Liberty fund Indianapolis, 2008, 84.
[7]M. T. Cicero, *ProCluentio*, Harvard UniversityPress-London, 1967, par. 146.
[8]See more in: B. Z. Tamanaha, The History and Elements of the Rule of Law*, Singapore Journal of Legal Studies* 2012, 237.

common good were unjust, and thus had "the quality not law, but violence."[9]In addition to these theoretical developments one of the biggest steps toward modern understanding of the rule of law was made by proclamation of guaranties contained in *Magna Carta*, despite the fact that is sometimes criticized as a document that did more to secure baronial privileges than more universal equality.[10]

However, period from the 17th to 20th century has had the decisive influence on the rule of law principle as we know it today. From the English Bill of Rights (1689) where is argued the King James the Second was replaced because, he by the assistance of divers evil counsellors, judges and ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom.[11].The same act stipulates "that the pretended power of suspending the laws or the execution of laws by regal

[9]Thomas of Aquinas, *Moral Philosophy*, 311.
[10]T. J. Angelis, J. H. Harrison, *op. cit*.,12.
[11] English Bill of Rights from 1689, available on: https://www.law.gmu.edu/assets/files/academics/founders/English_BillofRights.pdf, last accessed on February 16th 2018. The Bill of Rights provides for an extensive list of acts committed by King James the Second, that shows in depth understanding of the necessity also for the King to act in compliance with law. In the Bill is listed that incompliance with the law could be committed: By assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament; By committing and prosecuting divers worthy prelates for humbly petitioning to be excused from concurring to the said assumed power; By issuing and causing to be executed a commission under the great seal for erecting a court called the Court of Commissioners for Ecclesiastical Causes; By levying money for and to the use of the Crown by pretense of prerogative for other time and in other manner than the same was granted by Parliament; By raising and keeping a standing army within this kingdom in time of peace without consent of Parliament, and quartering soldiers contrary to law; By causing several good subjects being Protestants to be disarmed at the same time when papists were both armed and employed contrary to law; By violating the freedom of election of members to serve in Parliament; By prosecutions in the Court of King's Bench for matters and causes cognizable only in Parliament, and by divers other arbitrary and illegal courses; And whereas of late years partial corrupt and unqualified persons have been returned and served on juries in trials, and particularly divers jurors in trials for high treason which were not freeholders; And excessive bail hath been required of persons committed in criminal cases to elude the benefit of the laws made for the liberty of the subjects; And excessive fines have been imposed; And illegal and cruel punishments inflicted; And several grants and promises made of fines and forfeitures before any conviction or judgment against the persons upon whom the same were to be levied; All which are utterly and directly contrary to the known laws and statutes and freedom of this realm.

authority without consent of Parliament is illegal."[12]The idea that a government's legitimacy depend upon popular consentwas also the milestone of the Lock's theoretical understanding of the rule of law. He argued that whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad to prevent or redress foreign injuries and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people. He promoted several core rule of law elements such a written and general laws, but also separation of powers, that got its concrete explanation in theoretical views of Montesquieu who should be (and mostly is) seen as an author who made the greatest influence on legal, philosophical and political definitions of the rule of law. According to Montesquieu, "when the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression."[13] It is important to notice that Montesquieu well recognized the third core element of the rule of law in addition to written law (constitution) and the separation of powers- he emphasized importance of theindependent judicial review.

The 20th century brought new issues related to understanding of the rule of law concept. The modern authors opened a discussionon a relationship between formal and substantive nature of the rule of law. The main issue for them was: Is written constitution enough to achieve the rule of law or such a constitution must fulfil some qualitative criteria. That's also visible from the Dicey understandingof the rule of law as: the supremacy of law over arbitrary power; the universal application of law by the courts; and derivation of the rights from the ordinary law of the land, rather than from a written constitution.[14] On the first glance, it is obvious that the third element as defined

[12] J. Locke, *Two Treatises of Government, Book Two*, Chapter IX, par. 131,http://www.yorku.ca/comninel/courses/3025pdf/Locke.pdf, last accessed on February 16th 2018.

[13]C. Montesquieu, *The Spirit of Laws*, Batoche Books, Kitchener, 2001, book XI, Chapter 6, 174.

[14]T. J. Angelis, J. H. Harrison, *op. cit*., 18.

by Dicey differs from definitions common for olderauthors. He emphasized substantive, rather than formal understanding of the legality, which relates to avoiding situation where the laws are just a letter on a paper.[15]Probably the best explanation of the qualitative requirements of the written laws was given by Radbruch in form well-known as the Radbruch Formula (*Radbruchsche Formel*).[16]Analysing the role and competences of the judge in case he deciding in certain case where there is a conflict between a statute and what he perceives as just, Radbruch argued that"the conflict between justice and the reliability of the law should be solved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered "erroneous law". He admitted that is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content, but clearly stated that"where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law', in fact is not of legal nature at all." He concludedthat positive law cannot be defined otherwise as a rule, that is precisely intended to serve justice. Based onRadbruch Formula, numerous modern authors attempted to find a balance between equality before law and justice.[17]In interpretation of Fuller, there are eight requirements of the rule of law. Laws must be general (specifying rules prohibiting or permitting behaviour of certain kinds); Laws must also be widely promulgated or publicly accessible, that ensures citizens know what the law requires; Laws should be prospective (specifying how individuals ought to behave in the future rather than prohibiting behaviour that occurred in the past); Laws must be clear in order to enable citizens to identify what the laws prohibit, permit, or require; Laws must be non-contradictory among themselves; Laws must not ask the impossible; Nor should laws change frequently; Finally, there should be congruence between what written statute declare and how officials enforce those statutes.[18] According to Fuller, law is "the enterprise of subjecting human conduct to the governance of rules".When lawmakers respect the eight principles of the rule of law, their laws can influence the practical reasoning of citizens. Citizens can take legal requirements and prohibitions into consideration when deliberating about how

[15]T. J. Angelis, J. H. Harrison, *op. cit*., 19.
[16]G. Radbruch, *GesetzlichesUnrecht und übergesetzlichesRecht*, Süddeutsche Juristenzeitung, 1946, 107.
[17] See: F. Hayek, *The road to Serfdom*, Routledge Classics, 2001.
[18]C. Murphy,*Lon Fuller and the Moral Value of the Rule of Law*, Law and Philosophy, No.24, 2005, 239–262.

to act. They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke.[19]

2. THE RULE OF LAW AS AN UNIVERSAL VALUE

During the second half of 20th century the rule of law has growth in universal principle. This development was supported by unification processes driven by United Nations, but also the Council of Europe and European Union as entities established to protect, improve and promote universal values. As the EC well noticed, the principle of the rule of law has progressively became a predominant organisational model of modern constitutional law and international organisations (including the United Nations and the Council of Europe) to regulate the exercise of public powers. It makes sure that all public powers act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.[20]As Di Gregorio notices, in recent years several publications have appeared, which are dedicated to the topic of the *international rule of law*[21]. Nevertheless, this 'international' rule of law seems to derive more from a sum of elements of different traditions rather than being a summary or synthesis of them. That brings in the spotlight a several new issues: The first, the issue of understanding the notion and content of the rule of law principle. The main question with this regard refers to attempts to define more or less uniform understanding of the rule of law core elements in order to guide the national authorities over the world to adopt them. In parallel, strengthening of international institutions and mechanisms opened the issue of supremacy and/or

[19]He also considers a moral component of the rule of law, arguing that the rule of law provides some normative grounds for thinking that citizens have a moral, but conditional obligation to obey the law. "Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that does not exist, or is kept secret from him, or that came into existence only after he had acted"(242-243)

[20]COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL, A new EU Framework to strengthen the Rule of Law, 3.

[21] P. Costa, D. Zolo (eds.), *Rule of Law: History, Theory and Criticism*, Netherlands, Springer, 2007; L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09; M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Netherlands, Springer, 2010; M. Krygier, *Rule of Law*, in M. Rosenfeld, A. Sajo (eds.), The *Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2015, pp. 233-249; M. Adams, A. Meuwese, E. Hirsch Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, Cambridge University Press, 2016.

primacy of the international rules and standards over the national legislation. This is of the great importance having in mind differences in legal tradition among various countries, mostly related to historical and cultural heritage, but also to religion and traditional level of commitment to democracy.

2.1. The insufficiency of the purely structural Rule of Law system of governance

It has been already said that theoretical and legislative development during the 19th and 20th century resulted in understanding of therule of law is system of governance based on three mainelements: (1) that legal detriments should only be imposed by law, not on the basis of the personal will or decisions of government officials or private actors (neutrality); (2) that government action should be subject to regulation by rules, and that government officials should not be above the law (universality); and (3) that people should be protected from private violence and coercion (governance).[22]

However, there is a still controversy on relations between structural requirements of law and human rights concept. A formal legality provides predictability through law. As Hayek put it, the rule of law makes "it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge". This allows people to know in advance which actions will expose them to the risk of sanction by the government apparatus.[23]Anyhow, the last decades of legal theoretical thought have brought an opinion that a purely structural conception of the rule of law may be insufficient, mostly in relation with systems where: governments that are absolutist, but not arbitrary; ruled by means of public and general, but unjust, rules; and supported by a powerful majority, but oppressive to a powerless minority.[24]In this sense,Tamanaha argued that, to serve as a bulwark against tyranny, the rule of law must go further and expressly protect individuals' moral and political rights. He reminded on fact that history is filled with examples in which the law served a weapon in the hands of the sovereign or officials, wielded in a draconian fashion to achieve their objectives, facilitated by judges beholden to or afraid of them.[25] Similarly, the Venice Commission analysed the definitions proposed by various authors coming from different systems of law and State organisation, as well as diverse legal cultures. The Commission considered that the notion of

[22]B. Z. Tamanaha,*op. cit*., 237.
[23]F. A. Hayek, *The Road to Serfdom*, Chicago: University of Chicago Press, 1994, 80. (According to B. Z. Tamanaha, *op. cit*., 240)
[24]B. Z. Tamanaha, *op. cit*.,239.
[25]*Ibid.*

the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures. The Commission warned against the risks of a purely formalistic concept of the Rule of Law, merely requiring that any action of a public official be authorised by law. The Commission also stressed that individual human rights are affected not only by the authorities of the State, but also by hybrid (State-private) actors and private entities which perform tasks that were formerly the domain of State authorities, or include unilateral decisions affecting a great number of people, as well as by international and supranational organisations. Consequently, the Commission recommended that the Rule of Law principles be applied in these areas as well. [26]

The definition of the rule of law articulated by the United Nations, for instance, incorporates both human rights and democracy as necessary elements of the rule of law. For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, 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.[27]

However, Tamanaha[28]stated that human rights and democracy should not be part of the rule of law definition because it insists on institutions that match liberal democracies. He refers on John Rawles[29] opinion that so called "hierarchical societies" (which he contrasted with liberal societies) can be legitimate even when they lack democratic institutions, when people are not seen as free and equal and when they "do not have the right of free speech as in liberal societies". According to Rawls, such societies can be legitimate when they are well-ordered and people enjoy minimum rights to sustenance, security, property, formal equality and freedom from forced labor. Rawls added: "The

[26]COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT AND THE COUNCILA new EU Framework to strengthen the Rule of Law, Strasbourg, 11.3.2014,par. 15-16.

[27]*The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General*, UN SC, UN Doc. S/2004/616 at 4)

[28]B. Z. Tamanaha, *op. cit*., 235.

[29]J. Rawls, The Law of Peoples in S.Freeman, ed., Collected Papers, Cambridge: Harvard University Press, 1999, 529.

system of law [must be] sincerely and not unreasonably believed to be guided by a common good conception of justice. It takes into account people's essential interests and imposes moral duties and obligations on all members of society." What he had in mind was a genuinely communitarian-oriented government and society.

2.2. EU Law - Principle of Supremacy and National Identities of the Member States

The EU values, reflected in the EU legislation and legal standards, raising numerous issues related to the supremacy and/or obligatory character of the EU, but also for the status of a national identities of the candidate countries and after the EU membership.

As is stated in the Articles 21, 3(5) and 8 TEU, the Union exports its values outside its territory, with the EU values underlying the international relations of the EU. On the other side of the coin are the national constitutional identitiesof Member States. According to Article 4(2) TEU, the Union must respect Member States' national EPRS identities. This provision sets out a vision of a Union founded on values common to all Member States, but which preserves the diversity of Member States' political and organisational systems. This so called 'constitutional individuality' of the Member States can be reflected inter alia in state-organisational, cultural, including language, and historical heritage aspects. Hence, the common EU values represent limits to the diversity of Member States, reflected in their constitutional identities; limits that Member States have agreed in order to forge mutual trustamong themselves and in their legal systems, for which the observance of the Rule of Law is of upmost importance.

Reflected on the reforms aimed at accession to the EU, the issue of the limiting diversity remains one of the main challenges that determinate a reform scope and dynamics. Not explicitly, but to some extent, the EU law supremacy, limits and its obligatory character are defined, as it was stated by the European Court of Justice (ECJ) in Article 4(3) Treaty of European Union (TEU) which lays down the requirement to ensure attainment of the objectives of the Treaty and also in Article 288 Treaty on the Functioning of the European Union (TFEU) which states that Regulations are binding and are of direct effect. Based on these, the principle of supremacy has developed. In absence of the Constitutional Treaty, its replacement which is Treaty of Lisbon, it only indirectly acknowledges supremacy of EU law under Declaration 17. However, there is a limit to the principle. As seen, Member States have resistance to encroach the principle of supremacy, and it depends on the recognition on EU law into own national legal systems and it varies depending on whether the state is dualist or monist. In essence, it can be said that the effectiveness of the

principle of supremacy is dependent on some form of recognition within national legal systems (depending on dualist or monist state) National courts often accorded the supremacy of EU law on national law rather than ECJ's rulings, and they have expressed their reservations in relation to fundamental rights recognized in own constitutions, and most MS regard themselves as having the ultimate competence and sovereign. As Abvelj well noticed, the principle has carried not a single name, but three, where not a small number of legal commentators have consistently addressed it as supremacy; the majority has referred to it as supremacy or primacy, using both labels interchangeably; while the minority of scholars has stuck to the language of primacy.There have been only two judgments in which the ECJ has employed the language of supremacy,[30] but only in the English translation. In other language versions, as indeed in the ECJ's case-law in general, the principle is addressed as primacy. The same author concludes that the unsynchronized linguistic approach to supremacy or primacy goes beyond semantics and exhibits a conceptual difference. Differences in the linguistic conveyance of the principle tend to presuppose its different nature, which affects all other structural principles of European integration and entail different models of structural principles of EU law.[31]

3. THE EU RULE OF LAW CONCEPT

Due to differences in cultural, political and legal traditions between European countries, there are a variety of understandings of the Rule of Law concept, despite the fact that some states may share common experiences, such as democracy, and share some common governmental institutions. Such differences preclude the construction of a uniform conception of the Rule of Law on which to base a uniform legal system or legal culture across the European Union.[32] The differences between the content of the Rule of Law as understood in virtually any legal system in the world – obviously including all the EU Member States – add to the complexity of discovering what the Rule of Law could mean when transposed into the legal context of the European legal

[30] *Walt Wilhelm and others v Bundeskartellamt*, No. 14/68,Judgment of the Court of 13 February 1969 and*Fratelli Variola S.p.A. v Amministrazioneitalianadelle Finanze*, Judgment of the Court of 10 October 1973.

[31] See. M. Avbelj, Supremacy or Primacy of EU Law—(Why) Does it Matter? *European Law Journal,*Vol. 17, No. 6, 2011, 745-746. and *Member States and the rule of law Dealing with a breach of EU values*, available on: http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/554167/EPRS_BRI(2015)554167_EN.pdf, last accessed on January 30, 2018.

[32] D. Mineshima, The Rule of Law and EU Expansion, *Liverpool Law Review,* Vol.24, 2002, 73–87.

order with a view to making the best possible contribution to its functioning and development.[33]

The uniformity, supremacy and universality of the EU law, as well as the earlier mentioned increasing influence of the Rule of Law on the accession processes require more or less uniformity and common understanding on what the Rule of Law is. According to Kochenov, having a large number of different approaches to scope and meaning for the concept of the Rule of Law does not mean that any attempt to find the underlying core of these concepts discoverable in all its diverging manifestations are bound to be futile. On the contrary, it is believed that such generalisations are possible. Attempts to outline such a meta-concept of the Rule of Law have been made since the middle of the previous century, as lawyers have tried to produce a common vision of the Rule of Law on a world scale.[34]

That had been recognized a few decades ago and numerous attempts have been made in order to identify common elements of this principle on the European, mostly the EU level.

The Rule of Law is mentioned in the Preamble to the Statute of the Council of Europe as one of the three "principles which form the basis of all genuine democracy", together with individual freedom and political liberty. Article 3 of the Statute makes respect for the principle of the Rule of Law a precondition for accession of new Member States to the Organisation (CDL-AD(2016)007, par. 11). Along with democracy and human rights, the Rule of Law is also one of the three pillars of the Council of Europe and is endorsed in the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

An important role in making distinction, but also explaining the Rule of Law principle in relation with other core principles of the Council of Europe-democracy and human rights, has had the European Court of Human Rights through different expressions: "democratic society subscribing to the Rule of Law", "democratic society based on the Rule of Law" and, more systematically, "Rule of Law in a democratic society". The achievement of these three principles - respect for human rights, pluralist democracy and the Rule of Law - is regarded as a single objective - the core objective - of the Council of Europe (CDL-AD(2016)007, par. 11).

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[33] Originally citied in: D. Kochenov, The EU Rule of Law: Cutting Paths Through Confusion, *Erasmus Law Review,* Vol. 2, No. 1, 2009,http://www.erasmuslawreview.nl/tijdschrift/ELR/2009/1/ELR_2210-2671_2009_002_001_002, last accessed on January 10th 2018.

[34] D. Kochenov, *op. cit.,* 9.

As was noticed by the EC,[35] the Rule of Law is the backbone of any modern constitutional democracy and one of the founding principles stemming from the common constitutional traditions of all the Member States of the EU and, as such, one of the main values upon which the Union is based. This statement of the EC is the logical consequence of the fact that the Article 2 of the Treaty on European Union (TEU), as well as by the Preambles to the Treaty and to the Charter of Fundamental Rights of the EU, recognize the Rule of Law as the of one the pillars. This is also why, under the Article 49 TEU, respect of the Rule of Law is a precondition for EU membership. Additionally, the Commission is the guardian of the Treaties and has the responsibility of ensuring the respect of the values on which the EU is founded and of protecting the general interest of the Union. It must therefore play an active role in this respect.

In order to establish and uphold certain level of universality and uniformity among the Member states legal systems, the EU has made numerous steps: In 1997, Amsterdam Treaty was signed, bringing the Article 7 sanctioning mechanism for violation of rule of law,fundamental rights and other basic principles is established. In 2000, bilateral sanctions against Austria were imposed in response to the arrival in government of theFreedom Party (FPÖ). In 2009, Lisbon Treaty was adopted, and the EU values are introduced into the Treaties, replacing the previous'principles'. In the period 2010-2012, a several Member States were under scrutiny for possible rule of law violations (France, Romania, Hungary). In March 2013, the Commission presented the EU Justice Scoreboard, including statistics on thejustice systems in the Member States and data on the relationship between compliance withthe rule of law and the functioning of the internal market. In March 2013, the Letter from the Foreign Affairs Ministers of Denmark, Finland, Germany and theNetherlands to the Commission President, was sent calling for a new mechanism to safeguardfundamental values in the EU.In March 2014, the Commission adopts a Communication on a Rule of Law Framework as an earlierphase, complementary to the Article 7 TEU mechanisms.In December 2014, the Council decides to hold an annual 'dialogue' in the General Affairs Council on the 'rule of law' in Member States. In January 2016, the European Commission launches structured dialogue with Poland.[36]

In spite of differences, the main point and meaning of the Rule of Law principle is to ensure that all public powers act within the constraints set

[35]COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT AND THE COUNCIL,A new EU Framework to strengthen the Rule of Law, Strasbourg, 11.3.2014, COM(2014) 158 final,2.

[36]See more on: https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en, last accessed on January, 14th 2018.

out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.[37]Commenting the fact that in recent years several publications have appeared, which are dedicated to the topic of the *international Rule of Law*[38], Di Gregorioconcluded that this 'international' Rule of Law seems to derive more from a sum of elements of different traditions rather than being a summary or synthesis of them.[39]From the Kochenov point of view, it is obvious that any true legal system will adhere to the basic minimalist Rule of Law idea, and the EU is not an exception. In other words, instead of guiding the development of the system and enriching the legal realities of the EU, the Rule of Law functions merely as a term referring to everything and to nothing. To say, for instance, that supremacy and direct effect as formulated by the ECJ became the cornerstones of the EU Rule of Law is not to say anything, because they simply constituted the Community/Union legal system as we know it. Thus, what is the practical use of the term 'the Rule of Law' in such a context? The Rule of Law is a genuinely important legal principle with a potential to explain the ongoing process of legal-political development of European integration as well as to improve people's lives. To use it merely as a tag, not as a tool, seems to be a waste of its potential.[40]However, in so doing rule of law promoters should better recognise and address diversity and resistance on the receiving side. Any reform produces winners and losers. National and international donors are not well positioned to address these types of local political contests. Mandates, but also information of local situations should be improved, and one-size fits all approaches prevented.[41]

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[37]COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT AND THE COUNCIL,A new EU Framework to strengthen the Rule of Law, Strasbourg, 11.3.2014, COM(2014) 158 final, 3.

[38] Referring to: C. P. Zolo, D. (eds.), *Rule of Law: History, Theory and Criticism*, Netherlands, Springer, 2007; L. Pech, *The Rule of Law as a Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09; M. Sellers, T. Tomaszewski (eds.), *The Rule of Law in Comparative Perspective*, Netherlands, Springer, 2010; M. Krygier, *Rule of Law*, in M. Rosenfeld, A. Sajo (eds.), The *Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2015, pp. 233-249; M. Adams, A. Meuwese, E. Hirsch Ballin (eds.), Constitutionalism and the Rule of Law*: Bridging Idealism and Realism*, Cambridge, Cambridge University Press, 2016.

[39] See: A. Di Gregorio*, Rule of law crisis in the new EU Member States,*https://www.academia.edu/32646202/Rule_of_law_crisis_in_the_new_EU_Member_States, last accessed on January 6th 2018.

[40]D. Kochenov, *op. cit*., 23.

[41]A. Nollkaemper, *The Nexus Between the National and the International Rule of Law*, Amsterdam Center for International Law, University of Amsterdam,http://worldjusticeproject.org/sites/default/files/the_nexus_between_the_national_and_the_international_rule_of_law_nollkaemper.pdf, last accessed on January 31 2018.

It ispossible, however, to outline certain key features of the Community legalsystem that allow one to regard the Community as a Rule of Law entity.Such an exercise has recently been performed by Temple Lang[42], who focusedon fourteen EC features that safeguard the Rule of Law in the Community:1. Every measure must have an identifiable legal basis;2. Every measure must include a statement of reasons for its adoption;3. All EC measures must comply with all the relevant EC rules of both substantiveand procedural law;4. If an EC measure infringes some fundamental or overriding rules, theCommunity may have to pay compensation;5. Community institutions may tie their own hands as to how they will exercise69 Art. 52 EU, Art. 313 EC. 6. EC powers must not be used for purposes other than those for which they wereintended;7. The EP may bring a case in the ECJ to assert or defend its prerogatives;8. All EC measures must comply with fundamental rights principles;9. The European Commission has no power to create new obligations;10. No EC action may be taken which is not legally authorised;11. EC measures may sometimes be invalid if they are contrary to rules of publicinternational law binding the Community;12. Community measures must be adopted in accordance with EC procedures andsafeguards;13. Private parties can take the Commission to Court under Art. 232 EC if it fails toadopt an act addressed to them;14. There is a right of judicial review of all EC measures. [43]

4. THE RULE OF LAW AS THE EU MEMBERSHIP CRITERIA

As earlier mentioned, the rule of law principle plays the double role as the EU value in the accession negotiations process and later on, when a country became a Member State.

In order to ensure monitoring of reform processes in candidate countries but also to prevent and react upon regressive actions in the field of Rule of Law in the Member States (e.g. cases of Hungary and Poland and their reforms in the field of judiciary and media laws)[44], the EU but also the CoE bodies[45] trying to identify the core common standards, values, elements and principles of the Rule

[42]J. T. Lang, Checks and Balances in the European Union: The InstitutionalStructure and the "Community Method",*European Public Line,*2006, 128.

[43]D. Kochenov, *op. cit*., 20-22.

[44] See more in: D. Kochenov, A. Magen, L. Pech, *Introduction: The Great Rule of Law Debate in the EU*, Journal of Common Market Studies, Vol. 54, No. 5, 2016, 1045-1049 https://www.academia.edu/29810031/Introduction_The_Great_Rule_of_Law_Debate_in_the_EU, last accessed on January 10th 2018.

[45]The case law of the Court of Justice of the European Union ("the Court of Justice") and of the European Court of Human Rights (ECtHR), as well as documents drawn up by the Council of Europe, especially by the Venice Commission.

of Law. Attempt to formulate uniform definition of the Rule of Law is based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded' (EU:C:2014:2054: §§ 167-168). According the EC, those principles include:legality- which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of theexecutive powers; independent and impartial courts; effective judicial review includingrespect for fundamental rights; equality before the law.

On the same track is the Venice Commission. The Commission considered that the notion of the Rule of Law requires a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures. The Commission warned against the risks of a purely formalistic concept of the Rule of Law, merely requiring that any action of a public official be authorised by law.[46] In its report[47], the Commission concluded that, despite differences of opinion, consensus exists on the core elements of the Rule of Law as well as on those of the *Rechtsstaat* and of the *Etat de droit*, which are not only formal but also substantive or material.

According to the Commission, these core elements are: Legality, including a transparent, accountable and democratic process for enacting law; Legal certainty; Prohibition of arbitrariness; Access to justice before independent and impartial courts, including judicial review of administrative acts;Respect for human rights; Non-discrimination and equality before the law.

Dicey outlined three main elements of the Rule of Law. The first is absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, [which] excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. The second is equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts. Lastly, Dicey concluded that with us under the law of the constitution,

[46] Venice Commission, *Rule of Law Checklist* CDL-AD(2016)007, Adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) Endorsed by the Ministers' Deputies at the 1263th Meeting (6-7 September 2016) Endorsed by the Congress of Local and Regional Authorities of the Council of Europe at its 31st Session (19-21 October 2016), par. 15-18.

[47] At its 86th plenary session (March 2011), the Venice Commission adopted the Report on the Rule of Law (CDL-AD(2011)003rev). This report identified common features of the Rule of Law, *Rechtsstaat and Etat de droit*. A first version of a checklist to evaluate the state of the Rule of Law in single States was appended to the Report CDL-AD(2016)007.

the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts.[48]

Similarly, both the Court of Justice and the ECtHR confirmed that those principles are not purely formal and procedural requirements. They are the vehicle for ensuring compliance with and respect for democracy and human rights. The Rule of Law is therefore a constitutional principle with both formal and substantive components.[49] According to the case law of the Court of Justice of the European Union, the Rule of Law includes the supremacy of law, the institutional balance, judicial review, (procedural) fundamental rights, including the right to a judicial remedy, as well as the principles of equality and proportionality (CDL-AD(2016)007, par. 41).

The Rule of Law principle creates additional obligations of the State to guarantee that individuals under their jurisdiction have access to effective legal means to enforce the protection of their human rights. Thus, the Rule of Law creates a benchmark for the quality of laws protecting human rights: legal provisions in this field have to be, inter alia, clear and predictable, and non-discriminatory, and they must be applied by independent courts under procedural guarantees equivalent to those applied in conflicts resulting from interferences with human rights by public authorities. This principle also deals with the distribution of powers among the different State institutions adjusted through a system of checks and balances (CDL-AD(2016)007, par. 35 &39).

Considering the all abovementioned, it is clear that proper understanding of the all elements included in the Rule of Law principle is of the key importance for measuring both: the progress made by candidate countries, including Serbia within its accession to EU, but also the rule of law implementation in the Member States. That's arising also from the fact that the EU values enjoy two-fold protection. First, since the 1993 Copenhagen European Council, they form part of the accession criteriafor candidates for EU membership (Article 49(1) TEU). Second, Member States must, following their accession, observe and promote the EU values.Article 7[50] of the Treaty on

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[48]A.V. Dicey, *Introduction to the Study of the Law of the Constitution,*London/NewYork: Macmillan and Co. 1907 (Originally citied in: D.Kochenov, The EU Rule of Law: Cutting Paths Through Confusion, *Erasmus Law Review,* Vol. 2, No. 1, 2009,http://www.erasmuslawreview.nl/tijdschrift/ELR/2009/1/ELR_2210-2671_2009_002_001_002, last accessed on January 10th 2018.)

[49]COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT AND THE COUNCIL,A new EU Framework to strengthen the Rule of Law, Strasbourg, 11.3.2014, COM(2014) 158 final, 4.

[50] The Article 7(1) includes the preventive mechanism that can be triggered by one third of Member States, by Parliament or by the Commission. The Council has to adopt a decision by a majority of four fifths of its members after having received Parliament's consent.

European Union establishes a procedure to sanction a Member State which does not uphold the values[51], through the suspension of membership rights.[52] Formally and practically, Enlargement Strategy from 2006[53] introduced the concept that should make the reform processes more substantial. That is reflected in introduction of pretty vague final criteria for the membership in the EU, formulated as "once it fulfils the necessary conditions". However, assessment of fulfilment of a "necessary conditions" is not completely free of criteria. For that purpose, the EC introduced opening, interim and closing benchmarks. The starting point when assessing a progress is state of play of legislation, administrative and institutional capacities on the bilateral screening day. Beside these novelties related to accession procedure, the significant change was introduced in the last years in relation with strengthening influence of reforms relevant for the Rule of Law that became some kind of criteria for assessing an overall reform context in candidate countries. On the practical level, that means an early opening and late closing negotiations for chapters 23 and 24 dealing with justice reform. The Rule of Law became the main horizontal principle, shaping justice reform, but also justice systems unification processes.[54]

Parliament's consent requires a two-thirds majority of the votes cast and an absolute majority of all Members (Article 354(4) TFEU). In parallel, the sanctions mechanism is independent of the preventive one, meaning that it is not necessary for a Member State to be subject first to a decision under the preventive mechanism in order to be sanctioned for a persistent breach of EU values. It may be triggered by one third of Member States or the Commission, but not by the EP.

[51]The first concerns about the compliance with democratic values within the EU arose, as is well known, in connection with the electoral success of a far-right party in Austria in the 1999 parliamentary elections. In this case, as for Italy, France and Greece, concerns have faded away because of electoral turnover, or the shelving of the more controversial projects. However, the question remains unresolved for Hungary and Poland. (See more in: A. Di Gregorio, *Rule of Law crisis in the new EU Member States*, https://www.academia.edu/32646202/Rule_of_law_crisis_in_the_new_EU_Member_States , last accessed on January 6th 2018)

[52]COMMUNICATION FROM THE COMMISSION TO THE EUROPEANPARLIAMENT AND THE COUNCIL,A new EU Framework to strengthen the Rule of Law, Strasbourg, 11.3.2014, COM(2014) 158 final.

[53] Enlargement Strategy and Main Challenges 2006 – 2007,https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2006/nov/com_649_strategy_paper_en.pdf , last accessed on January 5, 2018.

[54] In addition to justice reform, the rule of law is important for public administration reform but also for economic reforms, having in mind importance of the legal certainty for investments.

5. STANDARDIZED AND/OR TAILOR-MADE NATIONAL LEGISLATION

A degree of unification in EU legal system ranging from complete - in areas regulated by *acquis,* to framework-based on EU standards. Depending onparticular field, these frames can be extremely wide forming a "scale" of permissible or desirable, within which candidate countries could opt to be on the basic level (just to satisfy the requirements), or to pose themselves on mid-level or even in the top. In some areas the scope of permissible is extremely narrow, and the process for harmonization with standards closely resembles the process of transposing the acquis.[55]

EU decision on the required level of unification is basically decision to regulate some field by *acquis* or by (wider or narrow) standards, depends on several factors. One of the key criteria is importance of the subject area for the functioning of the EU. Issues of the essential importance for the EU dealing with its competences had been ruled by *acquis* at an early stage of Union's life. Another important criterion concerns the sensitivity of certain issues in the context of readiness of candidate countries to renounce their own traditions. Constitutional regulation of key state institutions' competences and functioning, particularly the judiciary, undoubtedly represents one of the areas in which it is difficult for a country to waive heritage. In this sense, absence of *acquis* is not a peculiar specificity of the Chapter 23 that deals, *inter alia*, with judicial reform. Except for procedural safeguards, there is a just few issues regulated by EU legislation that imply alignment with European standards. Seemingly, this resembles the mitigatory circumstance, since instead of strictly prescribed solutions that candidate countries are obliged to pass into their legal system, there is a kind of acceptable full scale of solutions within which a candidate country for EU membership should select the one that best suits her. However, this scale represents only an illusion, caused by the fact that the "freedom of choice" has being continuously challenged by selective application of the standards. Furthermore, their selective application has been approved by Venice Commission as well as by the European Commission (hereinafter EC) and became a tool for pre-sorting particular country in one of the two possible

[55] M.Kolaković-Bojović, Organizacija pravosuđa u Republici Srbiji i Poglavlje 23[OrganisationofJudiciaryinthe Republic ofSerbiaandChapter 23], *Evropske integracije i kazneno zakonodavstvo (Poglavlje 23- norma, praksa i mere harmonizacije)* [*European Integrations and Penal Legislations (Chapter 23- law, practice and measures of harmonization)*], Serbian Society for Criminal Law Theory and Practice, Intermex, Zlatibor-Belgrade 2016, 99.

"quality" groups[56]well/known as an old and young democracies, based on (non)existence of their obligation to meet relevant standards as a precondition for EU membership, but also based on way to address them in their legal orders.[57]The only question that remains unanswered is, who is the ultimate authority competent to decide and based on what criteria, on division of European countries in two "qualitative groups"?[58]Additionally, it's not clear where are the border line where progressive or regressive actions of a state can result in moving from one to the other qualitative group. In this context, it is interesting concept so called *socialist rule of law*, which, according to Di Gregorio continues to influence to some measure former communist countries. She sees this specificity visible in"post-communist constitutional engineering" and well concludes that, certain choices, which were appropriate for a transitional context in which *Checks and balances* were still fluid, proved to be unsustainable in the current super-majority scenery.[59]

6. CONCLUSIONS

There is no doubt that evolution of the rule of law principle resulted in its growth in an international or even more- universal value. However, despite significant efforts made by legal theory and various international bodies, such EC or Venice Commission, the content and/or list of elements of the rule of law still vary, even among the EU Member States and candidate countries. These differences should not be necessary considered negative, having in mind

[56]M. Kolaković-Bojović, Constitutional Provisions on Judicial Independence and EU Standards, *AnaliPravnogFakultetaUniverziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, No. 3, 2016, 192-196.

[57]Beside that difference, the approach of the Venice Commission as well as the EC differs when it comes to definition of the border line between constitutional, and guaranties of judicial independence prescribed by law. This "discriminatory" approach was clearly articulated in 2007, through the Venice Commission's Opinion CDL-AD(2007)028 (par. 5-6). The Commission admitted that in some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. At the same time, the Commission stated that such systems may work well in practice and allow for an independent judiciary because the executive is restrained by legal culture and traditions, which have grown over a long time. Contrary, the new democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse (CDL-AD(2007)028, par. 45).

[58]The status of "those who need to meet EU standards" is obtained by every single country through the Venice Commission's opinions on constitutional, or amendments to judicial legislation.

[59]See more in: A. Di Gregorio*, Rule of Law crisis in the new EU Member States*, https://www.academia.edu/32646202/Rule_of_law_crisis_in_the_new_EU_Member_States , last accessed on January 6th 2018)

specificities in legal tradition, cultural and political contexts as well as economic factors. Processes of unification and standardization within EU include the rule of law field, but mostly at the level of vague standards and sometimes, in the close relationship with actual political issues. In light of recent trends in some of Member States, that have been assessed as regressive by the EC, it became more obvious that certain level of adjustment with national specificity has to be kept in order to ensure stability and continuity that are under risk in cases of unconditional transposition of general or particular rules created based on "one size fits all" principle or simply transposed from other legal and social context. However, keeping a reasonable measure of differences and specificities does not prevent following the basic rule of law elements and guaranties that serves as a backbone of any democratic society, but also as a milestone of functioning of the EU.

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ПРИНЦИП ВЛАДАВИНЕ ПРАВА: ЕУ КОНЦЕПТ *VERSUS* НАЦИОНАЛНИ ПРАВНИ ИДЕНТИТЕТ

Нема сумње да је принцип владавине права препознат као камен темељац модерних демократских друштава широм света. Историја и еволуција овог концепта, показују да је прошао кроз изузетне промене, како на нивоу појмовног одређења и конститутивних елемената, тако и по питању начина дефинисања у правној и политичкојтеорији. Ипак, ове разлике постају све видљивије последњих деценија, услед паралелне еволуције владавине права као универзалне вредности прокламоване најзначајнијим међународним инструментима којима се штите основна права, и његовог препознавања у оквиру све већег броја индивидуалних правних система. Тренд унификације који је са собом донео процес проширења ЕУ, бацио је ново светло на однос између међународног, прецизније, ЕУ концепта владавине права на једној страни, и многобројних схватања овог принципа међу државама чланицама ЕУ, али и земљама које су кандидати за чланство. Док је за прву групу држава ова разлика важна из угла њихове обавезе да сачувају достигнути ниво европских вредности, земље кандидати су у обавези да прођу више нивоа провере од стране органа ЕУ, пре него добију потврду да су њихов нормативни и институционални оквир, али и њихово функционисање у пракси, такви да пружају довољан ниво гаранција садржаних у оквиру појма владавине права. Ипак, сложености овог процеса значајно доприносе разлике у одређењу појма и садржине владавине права у различитим државама чији се правни идентитети међусобно разликују, али и даље недовољно прецизна дефиниција овог концепта, проистекла из многобројних покушаја институција ЕУ да је стандардизују.

Кључне речи: *владавина права, Европска унија, ЕУ, правни идентитет.*

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