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REPORT

"THE CONCEPT OF THE RULE OF LAW" DIFFICULTIES OF ITS PERCEPTION IN THE POST-SOVIET LEGAL CULTURE (UKRAINE'S EXPERIENCE)

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I. Introduction

In autumn 1939, British *The Times* in the article by special reporter elaborated on a possible approach to *the principles and methods on which a new order may be rebuilt when Nazism has been defeated*. The article emphasized that the main task in this regard was to assert the already tested *values of Western civilization* and to give a new life to its cultural inheritance originated in ancient Greece and ancient Rome. The idea was that the pungency of Nazi threat had proved that this inheritance is hard to defend if it is treated as a static ideal and, therefore, there was a call to give this inheritance a *dynamic expression.* For entirely practical reasons the inheritance was supposed to be maintained strictly according to the set of principles that were common to the Western democracies and, in particular, to *the upholding of the rule of law*, both nationally and internationally.[1]

Thus, starting from 1939, the *Rule of Law* in its *practical significance* became an integral part of the European agenda as a goal for the rest of XX century.

Since then the British notion of "the rule of law" has passed through "globalization" (being enshrined in *Universal Declaration of Human Rights*, 1948[2]) and "regionalization" (being declared at the European level as a *value,* which belongs to a *common heritage* or constitutes a *common principle* for European nations and enshrined in a number of European legal instruments starting with the *Brussels Treaty*, 1948,[3] and following with a number of other fundamental documents for the Council of Europe,[4] the European Union[5] and the European Court of Human Rights[6]).

Notwithstanding the fact that the lawyers of different legal systems had already acquainted with the notion of "the rule of law", the period of its "globalization" or initial European "regionalization" was marked by the fact that this notion was still considered as "a phrase of uncertain meaning".[7] Such a treatment significantly undermined practical applicability of the notion for ordinary human being in the society, in particular while facing any injustice or an arbitrary rule.

Even the outcome of the long and thorough efforts of the International Commission of Jurists, which culminated with definition of the notion as

"[t]he principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to

[1] See: "After the War: Another Chance to Rebuild; The Foundations of Federalism". – *The Times*, 17 November 1939.
[2] Universal Declaration of Human Rights. G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).
[3] See Treaty of Economic, Social, and Cultural Collaboration and Collective Self-defence (Brussels Treaty), March 17, 1948. – Source: *American Foreign Policy*, 1950-1955: Basic Documents, Vol. 1 (Department of State Publication 6446; General Foreign Policy Series 117). – Washington, DC: Government Printing Office, 1957.
[4] See Statute of the Council of Europe / Statute du Conseil de l'Europe. London – Londres, 5.V.1945 (*ETS – Nos 1/6/7/8/11).*
[5] See Treaty on European Union. *Official Journal of the European Communities*, C 191, 29 July 1992 (92/C 191/01); Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain related acts / Official Journal of the European Communities, C 340, 10 November 1997; Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (2001/C 80/01); Charter of Fundamental Rights of the European Union. *Official Journal of the European Unio*n (C 346, 18 December 2000); Treaty of Lisbon. *Official Journal of the European Unio*n (C 115, 9 May 2008);
[6] See: European Convention for the Protection of Human Rights and Fundamental Freedoms *(ETS No.5).*
[7] The Rule of Law in a Free Society: a report on the International Congress of Jurists. New Delhi, India. January 5-10, 1959 / prepared by Norman S. Marsh; with a foreword by Jean-Flavien Lalive. – Geneva: International Commission of Jurists, 1959, p. V.

be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men",[8] –

had not provided for an sufficient practical relevance of the "rule of law "concept.

The idea of this paper is to consider certain main obstacles and challenges that some Council of Europe member-states (especially those where post-soviet legal culture still prevails) are facing in the area of *practical* (not philosophical) application of the *Rule of Law*. The considerations presented are built upon professional experience of the author both at national level (being for a long time involved almost into all aspects of legal reforms in Ukraine) as well as at the European level (being for about fifteen years and in different capacities involved into the activities of the Institutions of the Council of Europe).

II. Perception of the rule of law: Key challenges at national level

A. *Constitutional design*

In some European countries, constructed in the national languages the respective formulas appear to be a word to a word translation from the English phrase "*the rule of law*". There are a number of newly emerged democracies in Central and Eastern Europe the constitutions of which contain phrases in their respective official languages which present a word to a word translation from the English phrase "*the rule of law*". Among them – almost all Balkan countries which have proclaimed their independence, previously being a part of communist Yugoslavia.

Thus, in the Constituion of **Croatia** (*Ustav Republike Hrvatske,* 1990*)* "*vladavina prava*" was proclaimed as one of the "highest values of the constitutional order of the Republic of Croatia".[9] Very similar formula was enshrined in the Constitution of **Macedonia** (*Устав на Републике Македонија*, 1991), where "*владеењето на правото*" constitutes one of "the fundamental values of the constitutional order of the Republic of Macedonia".[10] In **Montenegro**, *Устав Црне Горе/Ustav Republike Crne Gore* (1992) initially has proclaimed that "The State is founded on *vladavini prava*",[11] and the Constitution of 2007 has this confirmed.[12] Similar formula is contained in the Constitution of **Serbia** (*Устав Републике Србије,* 2006), proclaiming the Republic as a "state founded on the *владавини права*".[13]

A very special case among Balkan states in this respect presents the experience of constitutional wording in the fundamental law of **Bosnia and Herzegovina** (1995). If we compare its text in four languages, we inevitably meet the different meanings of the same phenomenon expressed in English as "*the rule of law*. Thus, the *English* version of the text in Article 2 ("Democratic Principles") stipulates: "Bosnia and Herzegovina shall be a democratic state, which shall operate *under the rule of law* […]". Its translation in *Serbian* is similar to the wording which was practiced in the Serbian Constitution using for the "rule of law" the phrase "*владавини права*".[14] However, the translations in *Bosnian*[15] and

[8] *Ibidem.,* p. 197.
[9] Article 3: "Freedom, […] *the rule of law* (in Croatian – *vladavina prava*) […] are the highest values of the constitutional order of the Republic […]".
[10] Article 8: "The fundamental values of the constitutional order of the Republic of Macedonia are: […] *the rule of law* (in Macedonian – *владеењето на правото*".
[11] Article 4: "Drzava pociva on *the rule of law* (in Montenegrin – *vladavina prava* ").
[12] Article 1: "Crna Gora je drzava […] zasnovana na *vladavini prava*" ("Montenegro is a state based on *the rule of law*").
[13] Article 1:"Република Србија је држава […], заснована на *владавини права* " ("Republic of Serbia is a state […] founded on *the rule of law* […] (in Serbian – *vladavina prava*)."
[14] Article 2: "Босна и Хецеговина је демократска држава, која функционише на принципу *владавине права* […]".
[15] Article 2: "Bosna i Hercegovina je demokratska drzava koja funkcionuje u skladu *sa zakonom* […]".

Croatian[16] languages raise a serious question as they both in the respective phrases contain the word "*zakon*" (*lex*) instead of word "*law*" (*jus*). In this regard, the issue whether the meaning of word "*zakon*" (*lex*) in these both languages is identical to the meaning of word "*law*" (*jus*) is to be further explored.

But it is rather clear that in those cases where the constitutional texts use the word "law" in their respective national languages as *pravo/pravoto* (e.g. *jus*), we may say that this word connotes "the entire body of rules having the particular character of being 'law'".[17]

In **Ukraine**, which belongs to newly-emerged European democracies, the Fundamental Law embodies the notion of "the rule of law as well. Thus, the Ukrainian Constitution (1996), in particular, stipulates that: "In Ukraine, the principle of the *Rule of Law* (in Ukrainian – *verkhovenstvo prava*) is recognized and is in action.[18]

However, if to compare the constitutional texts of Balkan states and that of Ukraine we can notice that the word "rule" in the respective national languages is translated in quite different connotations: in Ukrainian (*verkhovenstvo*) it has a connotation of *supremacy* (that in hierarchical sense implies the supremacy of one certain category of norms of the legal order over the others), whereas Croatian (*vladavina*), or Serbian (*vladavina*), or Montenegrin (*vladavina*), or Macedonian (*vladenieto*) its meaning can be expressed as "the sovereignty of law".[19]

Majority of national constitutions of the European countries do not contain the exact term "the rule of law". In particular, written in languages other than German or French, they contain formulas that in the respective national languages are very similar to German notion of *Rechtsstaat* (or French notion of *Etat de droit*). This group consists of the constitutions of Germany itself (*Rechtsstaat*) as well as of Czech Republic (*pravni stat*),[20] Poland (*panstwo prawne*),[21] Russia (*pravovoie gosudarstvo*),[22] Slovak Republic (*pravni stat*),[23] Slovenia (*pravna drzava*),[24] Spain (*Estado de Derecho*),[25] Switzerland (*Stato diritto),*[26] etc.

Similar approach (with formula of *pravovoie gosudarstvo*) is applied in the constitutions of most of the post-soviet states which by now are already members of the Council of Europe,

[16] Article 2: "Bosna i Hercegovina je demokratska drzava, koja funkcionira *sukladno zakonu* […] ".
[17] See in particular, *Paul Lasok QC.* The Rule of Law in the Legal Order of the European Community // In: Fundamental values / edited by Kim Economides … [et al.]. Oxford; Portland: Hart, 2000. – P. 91.
[18] Article 8 (para.1) of the Constitution of Ukraine (1996), (*Italics are added by the author*).
[19] *Ibidem*. – P. 92.
[20] Article 1 (para.1): "The Czech Republic is a sovereign, unitary and democratic *pravni stat* […]".
[21] Article 2: "The Republic of Poland shall be a democratic *state ruled by law* […]" (in Polish – *panstwo prawne*).
[22] Article 1 (para. 1): ["…] Russia shall be a democratic federal *law-governed State* […]" (in Russian – *pravovoie gosudarstvo*). The term *pravovoie gosudarstvo* (as a Russian equivalent of the German term *Rechtsstaat* and that is in some cases translated into English term *pravovoie gosudarstvo* became under anathema since the October Revolution in 1917. In the course of *perestroika*, Mikhail Gorbachev, in May 1988, referred to the creation of "socialist *pravovoie gosudarstvo*". Such concepts as *pravovoie gosudarstvo* and *socialist legality* reflect the relationship between state power and law. At the theoretical level, there seems to be little coherent understanding of *pravovoie gosudarstvo* other than the minimum requirement that the state power should be subordinate to the Constitution. – See, in particular: *Hiroshi Oda*. The Emergence of *Pravovoie gosudarstvo (Rechtsstaat)* in Russia. – Review of Central and East European Law. – 1999, Vol..25, No. 3 (373-434).
[23] Article 1 (para.1): "The Slovak Republic is a sovereign, democratic *state governed by the rule of law* […]" (in Slovakian – *pravni stat*).
[24] Article 2: "Slovenia is a *state governed by the rule of law*" (in Slovenian – *pravna drzava*).
[25] Article 1 (para.1): "Spain is hereby established as a social and democratic *Estado de Derecho* […]".
[26] Article 5 has the title :"*Stato di diritto*".

namely, those of Moldova,[27] Georgia,[28] as well as of Armenia (Constitution adopted on 5 July 1995 as amended on 6 December 2015).[29]

Different constitutional wording worth to be mentioned in this regard still embodies the Soviet-type concept of *verkhovenstvo zakona (zakonov)* having nothing in common with the *Rule of Law* notion (or even with the concept of *Rechtsstaat*). Such a phrase is included into the preamble of the constitution of Azerbaijan, according to which the goal of the nation is "to build a law-based state (*pravovoie gosudarstvo*) […] which shall secure the supremacy of the laws (*verkovenstvo zakonov*)".[30] Alongside, in the Article 7(1) it is proclaimed that "the State of Azerbaijan is a democratic *provovaia […] respublica*".[31]

As it is known, the concept of *verkhovenstvo zakona (zakonov)* alongside with the concept of *socialist (soviet) legality* were developed by *Andrei Vyshynsky* as an outcome of his own "theory of state and law", according to which "Law draws its force, and obtains its content, from the state".[32] The *Vyshynsky's* concept of *socialist (soviet) legality* was officially approved by Stalin as an equivalent to *Leninist legality.*[33] The legal term "*verkhovenstvo zakona (zakonov)*", as it is used in Russian, Ukrainian or Belorussian languages would mean in English "the supremacy of the laws/the statutes". Therefore, it is obvious that the language of Lenin, Stalin and Vyshynsky is still present in one of the modern constitutions of the CE member-states. By all means, this type of language constitutes a solid obstacle towards making the Rule of Law effective or operative in this country.

There is also one more particular example of how the constitutional design of a CE member-state might not be a good promoter of the *Rule of Law* transformation from the European value and ideal into an efficient practical legal concept at the national level.

Such an example as well is reflected in the Ukrainian experience.

The Constitution of Ukraine of 1996 demonstrates some kind of dualism in the constitutional design due to the fact that it embodies two "similar but not always synonymous"[34] notions of "*Rechtsstaat*" (in Ukrainian – *pravova derzhava*)[35] and of "*the rule of law*".[36]

Hence, this type of constitutional wording has entailed a dichotomy in contextual interpretation of the Constitution by majority of Ukrainian scholars. In particular, while interpreting the notion of *verkhovenstvo prava/the rule of law* (Article 8) most of them still do not believe that there is a *consensus* about "the necessary elements of the rule of law as

[27] Article 1(3): "Republic of Moldova is a democratic *pravovoie gosudarstvo* […]" || www.lex.juste.md/viewdoc.php?id=3114968&lang=2
[28] In the preamble: "The citizens of Georgia whose strong desire is to establish […] a social *pravovoie gosudarstvo*" || https://matsne.gov.ge/ru/document/view/30346
[29] Article 1: "Republic of Armenia is […] a *pravovoie gosudarstvo*" || www.praliament.am/perliament.php?id=constituin&lang=rus
[30] The preamble of the Constitution of Azerbaijan: "The people of Azerbaijan […] solemnly declares its following intentions: […] 4. to build a law-based, secular state (*pravovoie gosudarstvo*) which shall secure supremacy of the laws as an expression of the will of the nation; […]".
[31] www.meclis.gov.az/?/topcontent/67
[32] Vyshynsky Andrei. *The Law of the Soviet State*. Translated from Russian by Hugh W. Babb; Introduction by John N. Hazard. – New York: Macmillan, 1954. – P. 5.
[33] See Strogovich M.S. *Socialist legality, legal order and application of the Soviet law (For the universities of Marxism-Leninism)*. – Moscow: Mysl, 1966. – S. 17-22. (*Sotsialisticheskaya zakonnost, pravoporiadok I primenieniye sovetskogo prava: dlia universitetov marksizma-leninizma*) [in Russian].
[34] See Report on the Rule of Law. Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011). Study No. 512/2009. *CDL-AD(2011)003rev.* (paras.4, 13, 14, 15).
[35] Article 1: "Ukraine is a […] *pravova derzhava*" ("*Rechtsstaat*"/ "*law-besed state*").
[36] Article 8: "In Ukraine, the principle of *verkhovenstva prava (the Rule of Law)* is recognized and is in action".

well as of the *Rechtsstaaat* which are not only formal but also substantial or material (*materieller Rechtsstaatsbegriff*)".[37]

A former justice of the Constitutional Court of Ukraine has argued that Article 1 of the Constitution (referring to the concept of *pravova derzhava/Rechtsstaat*) and Article 8 (referring to the concept of *verkhovenstvo prava/the rule of law*) "have determined legal dualism in the structure of the legal system of Ukraine" because "*pravova derzhava/Rechtsstaat* and *verkhovenstvo prava/the rule of law* are the two, but different from each other, mechanisms of the legal system".[38]

B. *Scientific legal doctrine (Ukraine's experience)*

The gravity of difficulties in promoting the *Rule of Law* in Ukraine and in transforming it into a practical concept is rooted in the number of factors that shape country's modern constitutional developments and majority of which derive from the historically determined legal culture and tradition.

For the period of more than three centuries Ukraine was embraced by Russian absolutism and the Russian version of Marxism. The ideology of the both of them had overall influence over Ukrainian legal culture and tradition. On its turn Russian legal culture and legal tradition was under the lasting influence of German positivism, which was a cradle of positivistic concept of *Rechtsstaat*. Therefore, Russian concept of "*pravovoie gosudarstvo*" is merely a borrowed German notion of *Rechtsstaat* that had being adjusted to the Russian political developments in different historical periods.

Even at the edge of the Soviet Union, its Communist party under the leadership of *Mikhail Gorbachev* so easily accommodated (in 1988) the concept of *sotsialisticheskoie pravovoie gosudarstvo (Socialist Rechtsstaat)* as an official doctrine to be used as a new basis for the "radical strengthening of *socialist legality*" within the framework of *perestroika* process.[39]

While striving for the goals of political reforms in the Soviet Union the leading role in making this concept effective was given to the Communist party. One of the basic principles underlying the concept of *sotsialisticheskoie pravovoie gosudarstvo* was the principle of *verkhovenstvo zakona* (*supremacy of the Soviet statute laws)*. This principle was proclaimed as "an inalienable feature of *sotsialisticheskoie pravovoie gosudarstvo*" in the Soviet practice.[40] Upon the collapse of the Soviet Union in 1991, the concept of *verkhovenstvo zakona* (*supremacy of the Soviet statute laws)* inherited from the Soviet legal doctrine, was replaced by a cognate doctrine of *diktatura zakona (dictatorship of the statute laws)* proclaimed by President Vladimir Putin as an official legal doctrine of the modern Russian state.[41]

Ukrainian legal thought continues its development under the influence of Russian legal thinking, which itself is deficient in the researches on the *Rule of Law* in the light of its traditional interpretation provided by European institutions.

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[37] See *CDL-AD(2011)003rev.* (para.41).
[38] *Kampo V.* Ukraïns'ka doktryna verkhovenstva prava. – Kyiv, 2008. – P. 90 (The Ukrainian doctrine of the Rule of Law – *in Ukrainian*).
[39] See Резолюция XIX Всесоюзной конференции КПСС: О демократизации советского общества и реформик политической системы. *Коммунист*. – 1988. – № 10. – С. 68 [Resolutions of XIX All-Union CPSU Conference: On democratization of Soviet society and the reform of the political system. *Communist*, `1988, No. 10. – P.68 (in Russian)].
[40] See Лившиц Р. З. Право и закон в социалистическом правовом государстве. *Советское государство и право*. – 1989. – № 3. – С. 15 [Livshyts R.Z. Law and the laws in socialisticheskoie pravovoie gosudarstvo (Socialist Rechtsstaat). *Sovietskoie gosudarstvo i pravo*. – 1989. – No. 3. – P. 15 (in Russian)].
[41] See http://president.kremlin.ru/text/appears/2000/01/28883.shtml.

In most cases the translations of the treatises of Western authors into Russian or Ukrainian appears to be inadequate and distorting the substance. Due to the long-standing tradition in the Russian legal culture and, in particular, in legal language, even Russian translation of the fundamental A.V. Dicey's *Introduction to the Study of the Law of the Constitution* published back in 1907, interprets for instance "the rule of law" notion as "*verkhovenstvo zakona (supremacy of the statute laws)*",[42] and the notion of "spirit of law" as "*dukh zakonnosti (spirit of legality)*".[43] The aforesaid observation can be made also with regard to Ukrainian translations of the modern treatises related to the *rule of law* issue (among them: *Theory of Justice* by *John Rawls,*[44] *The Concept of Law* by *H. L. A. Hart,*[45] *The Constitution of Liberty* by *Friedrich A. Hayek*[46]).

The unsatisfactory mode of domestic legal thinking was the determinant for the author to move a motion for a resolution on the issue in the Parliamentary Assembly and to express a great concern regarding the fact that "certain traditions of the totalitarian states [were] still present in theory and practice" in most of the post-Soviet states. In particular, according to the principal trends in legal thinking "the rule of law" is perceived as "supremacy of the rules", or "written rules" set up in the statutes (in Russian: *verkhovenstvo zakona*).[47] The Assembly's report on the matter confirmed that in the states impacted by the Soviet Union "much of the legal-positivist tradition of the Soviet era is still prevailing".[48] Consequently, in its resolution, the Assembly has drawn attention to the fact that understanding the "rule of law" notion as the "supremacy of statute laws" (in Russian – "*verkhovenstvo zakona*") is a formalistic interpretation of this notion and "runs contrary to the essence" of the Rule of Law. Therefore, it was recommended that "*the rule of law*" should be translated into Russian as *verkhovenstvo prava.*[49]

Most of the Ukrainian scholars' developments on this matter published within last 20 years (upon the adoption in 1996 of the Constitution of Ukraine with its "*rule of law/verkhovenstvo prava*" formula) demonstrate that even nowadays the legal-positivist tradition in Ukraine's legal thinking is still prevailing.[50]

The leading trend in this thinking is reflected in the thesis widely supported by Ukrainian scholars that "the Rule of Law (*verkhovenstvo prava*) principle can be implemented only by means of supremacy of the statute laws (*verkhovenstvo zakonu*)" assuming that a "dialectical link exists between the two principles – of *verkhovenstvo prava* and of *verkhovenstvo zakonu*". Following this trend the leading scholars consider and interpret the

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[42] See Дайси А. В. *Основы государственного права Англіи: Введение въ изученіе англійской конституции. Переводъ, дополненный по 6-му англійскому изданію*, О. В. Полторацкой; Под редакцій проф, П. Г. Виноградова. – Изданіе второе. – Москва: ТипографіяТ-ва И. Д. Сытина, 1907. – С. 211. [Dicey A. V. *Introduction to the Study of the Law of the Constitution / Translated and revised from 6th ed. in England* by O. V. Poltoratskaya; edited by Professor P. G. Vinogradov. – 2nd ed. – Moscow: Sytin Publishing House, 1907. – P. 211 (in Russian)].

[43] *Ibidem*, p. 227.

[44] Published in Ukrainian in 2001: the notion of "the Rule of Law" is translated as "*vlada zakonu*" or "*pravlinnia zakonu*" which means in English "*the rule of the laws*".

[45] The title being translated into Ukrainian as "*Concept zakonu (The concept of a law*)".

[46] Published in Ukrainian in 2002: the notion of "the Rule of Law" is translated as "*norma zakonu*" which means "*a rule of a law*".

[47] See The principle of the rule of law. *Motion for a resolution* presented by Mr Holovaty and others. *Doc 10180. 6 May 2004.*

[48] See The principle of the rule of law. Report. Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group. *Doc 1343, 6 July 2007*.

[49] See: The principle of the rule of law. Resolution 1594 (2007). Text adopted by the Standing Committee, acting on behalf of the Assembly, on 23 November 2007 (para.4).

[50] For the comparative analysis of the prevailing trends in the contemporary legal writings on this subject see: Serhiy Holovaty. The Rule of Law: Reiterating the devious paths in Ukrainian legal thought. – *Pravo Ukraïny* . – 2010. – No. 4. – P. 206-219; N. 5. – P. 64-76.

concept of *the rule of law* (*verkhovenstvo prava*) as merely "*an element*", or only as "*one of the principles*", or even only as a "*a part of the featuring characteristics*" of Ukrainian *Rechtsstaat* (*pravova derzhava*). According to such an approach, the authors perceive *the rule of law* only as a fraction of the concept of *Rechtsstaat,* which in their view is greater (or as general) phenomenon.

This perception derives from the positivistic concept of *Rechtsstaat* ("formal" *Rechtsstaat*) embracing the "canonical" thesis about *Rechtsstaat* as a state which is "bound by its statute laws". The followers of the above mentioned approach consider modern *Rechtsstaat* as a "state, in which the rule-of-law principle is supreme" in the way that it is a "state, in which the statutory laws have their supremacy".

According to another thesis "the rule-of-law principle and the principle of the supremacy of statutory laws are of the same substance within the *Rechsstaat* concept". Ultimately, such a mode determines confusion by Ukrainian authors of the idea of "supremacy of statutory laws" with the concept of "rule of law".

According to aforesaid way of thinking the trend prevailing in the interpretation of *the rule of law* (*verkhovenstvo prava*) concept suggests to explore its substance by "partitioning" the phrase "*the rule of law (verkhovenstvo prava)*", in particular, to deal with the meaning of the word "*law (pravo)*" first and afterwards to identify the meaning of the word "*rule (verkhovenstvo)*". Some authors suggest to apply to the concept of the "*rule of law (verkhovenstvo prava)*" the "etymological interpretation" (emphasizing that this notion "is a combination of two words different by their meaning – "*verkhovenstvo/rule*" and "*pravo/law*", and that only "the separate analysis of each of them could lead to the integral result").

The others suggest to apply the so-called "element-by-element analysis", according to which two words – the "rule" and the "law" – are different elements of "the phenomenon of the rule of law". In this case, they also suggest to start with analyzing "the first element" (presented by the word "*law*") aiming to finally find out "*what* is ruling?"

However, all the authors, who suggested to apply any of the method mentioned above, are common in understanding of the concept of *law*; they still consider *law* as "the aggregate of the norms and rules of conduct adopted and sanctioned by the state" (or as "the aggregate of normative acts", or as "the system of legislation" etc.).

Interpretation of the *rule of law* concept in the way that is fostering the *rule by law* concept is definitely a manifestation of the mechanistic (positivistic) approach that in Ukrainian (or Russian) case establishes very favorable conditions for the *autocratic rule*.

Consequently, such theoretical approach leads to the doctrinal deadlock and impedes the *action of the Rule of Law* concept in practical terms.

C. *Official legal doctrine: constitutional jurisprudence (Ukraine's experience)*

A positivistic approach of current Ukrainian scientific doctrine which has derived from the Soviet law schools consequently has been further developed and confirmed by the Constitutional Court in its jurisprudence.

The Court, dealing with the notion of the "rule of law", in fact, in its first judgment (2003) on the subject, following the approach of leading Ukrainian scholars and combining two different

concepts has stated that "*pravna derzhava*[51] (*Rechtsstaat*) is that one in which the principle of the Rule of Law is recognized and is effective".[52]

Another way of perception of the Rule of Law notion is reflected in the Judgment No. 15-рп/2004 of 2 November 2004, in which the Court has stated:

> "***The rule of law*** *means the* ***supremacy of law in society***. *The rule of law demands that the State should embody it into law-making and law-enforcement activities, in particular, into the statutes (zakony), which by their substance should be permeated above all by the* ***ideas of social justice****, freedom, equality etc. One of the manifestations of the rule of law is that* ***law itself is not limited only to the legislation as one of its forms but also includes other social regulators, such as norms of morals, traditions, customs etc., which are legitimized by the society and conditioned by the historically achieved level of society's culture****. All these* ***elements of law*** *are united by the quality which conforms with the ideology of justice and the idea of law, which to large extent is reflected in the Constitution of Ukraine*".[53]

As the Court itself has underlined in this case, such understanding of the notion of the "rule of law" was based fully on the above cited understanding of the notion "law".[54]

So, Judgment No. 15-рп/2004 implies that the key to the **understanding of the notion "Rule of Law" lies first of all and foremost in the understanding of the meaning of the notion "law"**.

A month later (on 1 December 2004) in a new judgment the Court has repeated the above cited interpretation, has used it as a basis, and in some way has developed it, stating that formula of the Article 8(1) of the Constitution on the rule of law[55] implies protection of the person's interests "not only by **a law** (a statute)**, but also by the objective law**[56] **as a whole** which **is supreme in the society**".[57]

In general, by these judgments the Court has created the basis for the official doctrine of interpretation of the "Rule of law" within the Ukrainian constitutional order stemming out from the Article 8(1) of the Constitution and according to which **the rule of law is to be understood as supremacy of the objective law in the society**. And very soon such a kind of the Court's interpretation of the "Rule of Law" has been qualified by Ukrainian academicians as "an official standard of the interpretation of the rule-of-law principle".[58]

The Court has used one of its original formulas from the Judgment No. 15-рп/2004 (in particular: "***The rule of law*** *means* ***the supremacy of law in society***. *The rule of law demands that the State should embody it into law-making and law-enforcement activities, in particular, into the statutes (zakony), which by their substance should be permeated above*

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[51] Ukrainian *pravna derzhava* is an equivalent to Russian *pravovoie gosydarstvo* and German *Rechsstaat.*
[52] CCU Judgment No. 22-рп/2003, 25 December 2003 (Case No. 1-46/2003).
[53] CCU Judgment No. 15-рп/2004, 2 November 2004 (Case No. 1-33/2004).
[54] *Ibidem*, para 4.1.
[55] Article 8(1) of the Constitution of Ukraine: "In Ukraine, the principle of the rule of law is recognized and is effective".
[56] The meaning of "*objective law*" in countries with post-soviet legal culture is rather similar to that one which was formulated by Andrei Vyshynsky yet in 1930-es. In general terms nowadays it is still treated as "an aggregation of binding legal norms which are established or sanctioned and enforced by the State ".
[57] CCU Judgment of the Constitutional Court of Ukraine No. 18-рп/2004, 2 November 2004 (Case No. 1-10/2004), para 3.4.
[58] *Рабінович П.* Верховенство права в інтерпретації Страсбурзького Суду та Конституційного Суду України // Вісник Конституційного Суду України. – 2006. – № 1. – С. 45.

*all by the **ideas of social justice**, freedom, equality etc.*") in three cases more.[59] Later on, the Court referred to the concept of "the rule of law" in a number of cases in such a way:

- interpreting it in a very broad sense as "[…] adherence to basics of justice is a component of **the principle of the rule of law**, enshrined in the Article 8(1) of the Constitution of Ukraine"[60] and alongside stating that "one of the manifestation of this principle [of the rule of law] in a tax sphere is the creation of an **efficient system of taxation** which is to be based on the balance of interests of the state, territorial communities and tax payers";[61]
- citing the ECrtHR judgment in *case of Ponomariov v. Ukraine,*[62] the Court has referred to "**the principle of legal certainty**" as to "**one of the fundamental aspects of the rule of law**",[63] or referring to the ECrtHR judgment in case of *Yeloiev v. Ukraine,*[64] the Court referred to "**the principle of legal certainty**" as to "**one of the elements of the rule of law**",[65] or qualifying "**the legal certainty of the provisions of the laws (statutes) and of the other normative acts**" as "**one of the elements of the rule of law**"[66]
- extending the list of "elements of the rule of law", thereby including to it the following: "**the principles of equality and justice, of legal certainty, of clarity and precision of a legal norm**";[67] "**efficiency of the aim as well as of the methods of legal regulation, reasonableness and logics of a law** (a statute)";[68] "**justice, reasonableness, logics of a law** (a statute)"[69]
- referring to "**the principle of proportionality**" as to "**an element of the rule of law**",[70] or to the "**proportionality between the interests of an individual and society**" as to "**an element of the rule of law**".[71]

III. General conclusions

Since the notion of the "rule of law" was put into the statutory documents of the European institutions the time has been changed. Now we are all familiar with the substance of the *Rule of Law,* notwithstanding how it is presented: either as one of the *values,* on which the "[European] Union is founded",[72] as one of the *principles* "which form the basis of all genuine democracy",[73] or as a *fundamental principle* of the European Convention "permeating it all and bonding it together"[74] *etc*. In particular, during the most recent years it was done a lot to reach a common understanding or to find a consensual definition of the

[59] CCU Judgments: No. 8-рп/2010. 11 March 2010 (Case No. 1-1/2010), para 3.2; No. 17-рп/2010. 29 June 2010 (Case No. 1-25/2010), para 3.2; No. 3-рп/2012. 25 January 2012 (Case No. 1-11/2012), para. 2.2.
[60] CCU Judgment No. 5-рп/2010. 16 February 2010 (Case No. 1-5/2010).
[61] *Ibidem*, para. 3.5.
[62] ECrtHR, Case of *Ponomariov v. Ukraine* (3 April 2008).
[63] CCU Judgment No. 8-рп/2010. 11 March 2010 (Case No. 1-1/2010), para 3.1.
[64] ECrtHR, Case of *Yeloiev v. Ukraine* (6 November 2008).
[65] CCU Judgment No. 17-рп/2010. 29 June 2010 (Case No. 1-25/2010), para 3.2.
[66] CCU Judgment No. 3-рп/2016. 8 June 2016 (Case No. 1-2/2016), para 2.4.
[67] CCU Judgment No. 23-рп/2010. 22 December 2010 (Case No. 1-34/2010), para 4.1.
[68] CCU Judgment No. 16-рп/2011. 8 December 2011 (Case No. 1-19/2011), para. 5.
[69] CCU Judgment No. 16-рп/2012. 29 August 2012 (Case No. 1-1/2012), para. 5.2.
[70] CCU Judgments: No. 20-рп/2011. 26 December 2011 (Case No. 1-42/2011), para 2.1.; No. 3-рп/2012. 25 January 2912 (Case No. 1-11/2012), para. 2.2; No. 3-рп/2015. 8 April 2015 (Case No. 1-6/2015), para
[71] CCU Judgment No. 16-рп/2012. 29 August 2012 (Case No. 1-1/2012), para. 5.2.
[72] Consolidated version of the Treaty on European Union (Article 2). *Official Journal of the European Union (C 115/13, 9 May.2008)*.
[73] Statute of the Council of Europe (Preamble and Article 3) *(ETS – Nos. 1/6/7/8/11).*
[74] *The Hon. Chief Justice Emeritus Prof. John. J. Cremona*. The Rule of Law as a Fundamental Principle of the European Convention of Human Rights // In: A Council for all Seasons: 50th anniversary of the Council of Europe. – [Valetta]: Ministry of Foreign Affairs (Malta), 1999. – P. 124.

"rule of law" notion both within the European Union[75] and within the Council of Europe institutions, in particular, the Parliamentary Assembly,[76] the Committee of Ministers,[77] and the Venice Commission.[78]

Even though the consensual understanding has been reached that "the Rule of Law does constitute a fundamental and common European standard to guide and constraint the exercise of democratic power"[79] we have to admit that for the number of European countries to activate this standard appeared to be more challenging task than it was expected at the initial stage of their accession to the Council of Europe. Instead of becoming a practical concept, for the numerous cases the *Rule of Law* still remains as a *might-have-been-principle*.

One of the serious obstacles towards making the *Rule of Law* effective or operative in many cases may be seen in the field of translation this English phrase into national languages, including Ukrainian.

Another is the issue of legal culture and tradition. For the period of more than three centuries Ukraine was embraced by Russian absolutism and the Russian version of Marxism. The ideology of the both of them had overall influence over Ukrainian legal culture and tradition.

Even by now Ukrainian legal thought still continues its development under the influence of Russian legal thinking, which itself is deficient in the researches on the *Rule of Law* in the light of its traditional interpretation provided by European institutions. Due to the fact that much of the legal-positivist tradition of the Soviet era is still prevailing, it leads very often to the confusion by Ukrainian authors of the idea of "supremacy of statutory laws" with the concept of "the rule of law".

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[75] See Conclusions [of the] Conference "The Rule of Law in a Democratic Society" (Noordwijk, The Netherlands, 23 and 24 June 1997). *Doc. PC-PR (97) misc 1.*; Council conclusions on the follow-up to the Noorwijk conference: the rule of law // Europe. EU Official Documents. Bulletin EU 5-1998.

[76] See The principle of the Rule of Law: Report of the Committee on Legal Affairs and Human Rights. Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group. *Doc. 11343, 6 July 2007*; Resolution 1594 (2007). The principle of the rule of law. *Text adopted by the Standing Committee*, acting on behalf of the Assembly, on 23 November 2007 (see Doc. 11343).

[77] See The Council of Europe and the Rule of Law – An Overview, CM (2008)170, 21 November 2008.

[78] See Report on the Rule of Law. Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011) on the basis of comments by Mr Pieter van Dijk (Member, Netherlands), Ms Gret Haller (Member, Switzerland), Mr Jeffrey Jowell (Member, United Kingdom), Mr Kaarlo Tuori (Member, Finland). Study No. 512/2009. *CDL-AD(2011)003rev.*; Rule of Law Checklist. Adopted by the Venice Commission at its 106th plenary session (Venice, 11-12 March 2016) on the basis of comments by Mr Sergio Bartole (Substitute Member, Italy). Ms Veronika Bilkova (Member, Czech Republic), Ms Sarah Cleveland (Member, United States of America), Mr Paul Craig (Substitute Member, United Kingdom), Mr Jan Helgessen (Member, Norway), Mr Wolfgang Hoffmann-Riem), Mr Kaarlo Tuori (Member, Finland), Mr Pieter van Dijk (Member, Netherlands), Mr Jeffrey Jowell (Former Member, United Kingdom).Study No. 711/2013. *CDL-AD (2016) 007.*

[79] *AD(2011)003rev.*, para.70.