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The rule of law in the national and supranational context[1]

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Abstract
In the scholarly literature, we can find three different concepts that have essentially the same meaning, but which are not identical to each other. These are the English *rule of law*, the German *Rechtsstaat* and the French *état de droit.* Each concept is derived from specific historical, social and political context. The aim of this article is to examine the meaning and significance of the rule of law in a national and supranational context, while looking for similarities and differences. The main research problem concerns the question of how the rule of law should be understood in a non-state, i.e. a supranational context. Bearing in mind that in the case of the European Union we are dealing with a non-state context, and despite the fact that the closest concept of understanding of the *rule of law* applied in the European Union is the German *Rechtsstaat*, the author adopts the hypothesis that the most accurate narrative in the present context is the English understanding of the *rule of law*. The considerations and findings are to lead to a better understanding of this concept in the non-state (supranational) context, because compliance with the law, including the rule of law, by all entities (public and private, national, and European) is essential to the further existence of the European Union. The study is analytical, comparative, and explanatory.
Keywords: *Rule of law, Rechtsstaat, État de droit***,** European Union, Court of Justice

Praworządność w kontekście narodowym i ponadnarodowym

Streszczenie
W literaturze naukowej obecne są trzy różne koncepcje, które mają zasadniczo takie samo znaczenie, a jednak nie są tożsame: angielskie *rule of law*, niemieckie *Rechtsstaat* oraz francuskie *état de droit*.

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Każda z tych koncepcji wywodzi się z określonego kontekstu historycznego, społecznego i politycznego. Celem artykułu jest przeanalizowanie znaczenia rządów prawa w kontekście krajowym i ponadnarodowym, poszukując podobieństw i różnic. Główny problem badawczy sprowadza się do pytania, jak należy rozumieć rządy prawa w kontekście niepaństwowym, tj. ponadnarodowym. Mając natomiast na uwadze fakt, że w przypadku Unii Europejskiej mamy do czynienia z kontekstem niepaństwowym oraz pomimo tego, iż rozumienie rządów prawa w Unii Europejskiej jest najbliższe niemieckiemu *Rechtsstaat*, przyjęto hipotezę, że najbardziej odpowiednią narracją będzie ta odpowiadająca angielskiemu *rule of law*. Rozważania i dokonane ustalenia mają prowadzić do lepszego rozumienia kategorii rządów prawa w kontekście niepaństwowym (ponadnarodowym), bowiem przestrzeganie prawa, w tym rządów prawa przez wszystkie podmioty (publiczne i prywatne, krajowe i europejskie) jest niezbędne dla dalszego istnienia Unii Europejskiej. Opracowanie ma charakter analityczno-porównawczy i eksplanacyjny.
Słowa kluczowe: praworządność, *Rule of law, Rechtsstaat, État de droit*, Unia Europejska, Trybunał Sprawiedliwości

In recent years, the rule of law has become one of those issues that has been the subject not only of legal and political debate, but also of in-depth scholarly analysis (Meierhenrich, Loughlin 2021; Kochenov et al. 2016; Magen 2016). This is due to the fact that adequate definition is being sought for analytical category, which is usually understood in the context of a state[2]. Nowadays, however, it is increasingly being used in a non-national (non-state, supranational) context. When we think about the concept of the rule of law and the entire European project, some questions arise:

- what kind of rule of law are we talking about: the one we know from national contexts or some other kind?
- which definition should be applied: the definition adopted in the European Union (EU) context, or in the Council of Europe (CoE), or should we rather turn to well-established interpretations of the rule of law applied in national contexts?

The European Union is an international organisation, albeit of a special kind. It is not a state, for it has neither a constitution in the proper meaning of the term, nor does it possess coercive power. Nonetheless, it can enact legal acts that represent supreme and binding law not only for its Member States, but also for individuals. Some of these acts are directly applicable and have a direct effect. The European Union has legal personality and legal capacity, and it possesses both rights and obligations. The EU maintains relations with third countries and enjoys privileges and immunities. What is more, its institutions perform legislative, executive and judicial functions, and it has own resources at its disposal (Kabat-Rudnicka 2020). Despite being a non-state entity, it performs state-like functions, and even – according to some authors – enjoys a competence-competence. The EU is functioning according to its own principles and regulates situations (occur-

[2] This analytical category, which is (and should be) an inherent feature of a state, is also presented in the context of international organisations, in their founding documents. However, as some authors point out, there is no agreement as to the understanding of the rule of law (see e.g. Gosalbo-Bono 2010: p. 231; Jacobs 2006: p. 7).

rences) involving natural and legal persons and does all these things within circumscribed treaty-based competences.

The rule of law[3], which in the Lisbon Treaty is treated as a value, is an inherent feature of any state, and it is usually enshrined in constitutions[4]. Nowadays, however, it is also present in the constitutive documents of international organisations (TEU 2016: art. 2; Statute of the Council of Europe 1949: preamble, art. 3). Hence, the question arises: what similarities and differences exist in the rule of law that today extends beyond national contexts.

The aim of the article is to draw attention to the different ways, in which the concept of the rule of law is understood at state and EU level. The field of research is circumscribed by the European legal tradition, i.e. the Member States of the EU and the CoE. The main research problem concerns the question of how the rule of law should be understood in a non-state, i.e. a supranational context. The following research questions are also addressed:

- which similarities and differences can be observed between the concepts of the *rule of law*, *Rechtsstaat,* and *état de droit*?
- which elements does the EU 'borrow' from national legal traditions?
- which concept is closest to that employed in the EU?

For the purposes of this study, the hypothesis is adopted that in the case of the EU the English understanding of this term constitutes the most accurate narrative.

The analysis will begin with introductory remarks on the EU and the rule of law, followed by a presentation of the three different understandings of the rule of law, as well as an introduction to the formal and substantive approaches to this concept. After this, the rule of law in the supranational context will be analysed. The discussion will end with some final conclusions.

Research methodology

With the deepening crisis of the rule of law in the EU, a lot of material providing insight into the concept of the rule of law has appeared on the publishing market (e.g. Elósegui et al. 2021; Wacks 2021; Taborowski 2019). However, in our considerations, we will be primarily interested in those that concern the theoretical dimension of the rule of law itself.

When conducting research, references will be made to primary and secondary sources, i.e. on the one hand, to official documents of the institutions (such as: treaties,

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[3] In Article 2 TEU we can read: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[4] The rule of law, however, is not always enshrined in a constitution, and if it is the case, it is not necessarily defined therein. The exceptions include the Spanish constitution, where in article 1 we can read: "España se constituye en un Estado social y democrático de Derecho, que propugna como valores superiores de su ordenamiento jurídico la libertad, la justicia, la igualdad y el pluralismo politico" (Constitución Española 1978: art. 1), what can be translated: "Spain is established as a social and democratic state, subject to the rule of law, which advocates liberty, justice, equality and political pluralism as the highest values of its legal order" (author's translation).

regulations, communiqués, judgments and court opinions), and on the other hand, to scientific publications (such as books and articles, as well as to less formal ones, such as working papers or websites).

The discussion will be based on a content-based analysis of rulings, legal acts, and the specialist literature, as well as on comparative analysis. The used methods will be descriptive and interpretative, as well as comparative. The descriptive method will be applied in all these instances where different understandings of the concept of the rule of law will be discussed. The interpretative method will be used when discussing the rationale for adopting in the case of the EU, a more universal approach to the *rule of law*. In turn, the comparative approach will be applied whenever different understandings of the rule of law will be juxtaposed.

Next to theoretical considerations there will also be a practical element. Namely, the article will examine the Court of Justice's case law to demonstrate how the concept of the rule of law has been applied and interpreted in practice.

European Union and the rule of law

There are at least two reasons why the EU has sought to adopt and apply the rule of law: (1) the fact that this international entity emulates most national systems, and (2) because compliance with the law and its proper enforcement is inherently connected with respect for the rule of law. As regards the former, the EU is an international organisation, but a special kind of organisation, whose institutions carry out legislative, executive, and judicial functions. Hence, the constitutive treaty should include such constitutional principle as the rule of law. As for the latter, meeting undertaken commitments is, among other things, tantamount to respect for the rule of law. That is why so much importance is attached to this concept.

It ought to be pointed out that the treaties themselves provide no definition of the *rule of law*. What is more, depending on the language used, Article 2 of the Treaty on the European Union (TEU), includes such notions as the *rule of law*, *état de droit*,[5] and *Rechtsstaatlichk*eit.[6] This fact raises the following questions: do the concepts cited above have the same meaning or do they tend to differ from each other, and if so, how? Moreover, whenever the treaties refer to *Rechtsstaatlichkeit* or *état de droit,* how is the EU to be treated in such situations – as an organisation, a polity, or a state-like entity?

With regard to the last issue, in the *Les Verts* ruling the Court of Justice referred to the Community as being based on the *rule of law* understood as fr. *communauté de droit,* or germ. *Rechtsgemeinschaft* (see: Judgment of the Court 1986: par. 23), and then – to

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5 French language version of the first sentence of Article 2 TEU: «L'Union est fondée sur les valeurs de respect de la dignité humaine, de liberté, de démocratie, d'égalité, de l'État de droit, ainsi que de respect des droits de l'homme, y compris des droits des personnes appartenant à des minorités.»

6 German language version of the first sentence of Article 2 TEU: „Die Werte, auf die sich die Union gründet, sind die Achtung der Menschenwürde, Freiheit, Demokratie, Gleichheit, Rechtsstaatlichkeit und die Wahrung der Menschenrechte einschließlich der Rechte der Personen, die Minderheiten angehören."

the European Union based on the *rule of law* understood as fr. *Union de droit,* or germ. *Rechtsunion* (see: Judgment of the Court 2010: par. 44). It would suggest that this term did not imply any notion of statehood, i.e. a state in the proper meaning of the word, and that the term itself was borrowed from national traditions for translation purposes only. But are these terms synonymous, or do they differ in some way? According to Laurent Pech, Article 2 TEU refers, depending on the language used, to different notions simply in order to confirm that the EU is a polity governed by a principle common to the Member States, i.e. the principle, pursuant to which the exercise of public power is subject to legal limitations (Pech 2010: p. 364–365). On the other hand, according to Sven Simon, even if the very notions of *Rechtsstaatlichkeit* and *état de droit* are no more than translations (expressed in another language) of the *rule of law* – the value upon which the EU is founded, their interpretation may vary depending on the legal culture (Simon 2018: p. 603).

This meta-legal principle, marked by different constitutional traditions, political history and practice, is linked to, and at the same time, is a product of the formation of a modern state (Loughlin 2009: p. 2–3). While the English rule of law was a consequence of an attempt to give a concrete and highly formalised interpretation of the commitment of common law to modern constitutionalism, while the German *Rechtsstaat* evolved from tensions between authoritarianism and liberalism, the French concept was introduced as a normative principle highlighting some shortcomings in post-revolutionary governing arrangements (Loughlin 2009: p. 9; Costa, Zolo 2007). Moreover, continental lawyers developed a slightly different understanding of the role of law in ensuring order in society, putting more emphasis on the state rather than on the judicial process, which was reflected in the notions of *Rechtsstaat* and *état de droit* and in the role of constitutionalism (Chesterman 2008: p. 336). And while the United Kingdom (no longer a member of the EU, but still a member of the CoE) never drafted its own written constitution, in continental Europe the creation of law designed to limit the power of government was fundamental – a distinction that is present in different approaches to the interpretation of law (common law precedent-based arguments *vs.* doctrinal analysis of civil law) and in the relative weight given to fundamental rights in civil law unlike in the common law countries (except for the United States) (Chesterman 2008: p. 336–337).

Regardless of the different approaches and traditions, the fundamental importance of the rule of law comes down to the fact that all public authorities must operate within the limits of the law, they are bound by legal norms which are beyond their control. In other words, the rule of law is a legal principle that organises relations between a community and its governing institutions, while subjecting the latter to legal and judicial control (Schroeder 2021: p. 117). Moreover, the rule of law expresses the idea that the ultimate source of authority is no longer a sovereign (e.g. a monarch), but rather certain values or principles that are an integral part of a well-functioning legal system (Jacobs 2006: p. 61–62). Hence, law itself becomes the ultimate sovereign. It is law alone, the legal system itself, which is charged with the task of guaranteeing the rights of the individual and, thus, imposing restrictions on the arbitrary actions of political power. As such, the rule of law means the empire of laws and not of men, the subordination of arbitrary power to laws made and enforced for the