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ARTICLES

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THE CONTENT OF LEGALLY UNDERSTOOD CATEGORY OF THE RULE OF LAW AS FUNCTIONING IN THE POLITICAL SYSTEM OF THE EUROPEAN UNION

ABSTRACT

At its current stage of development the European Union is not only an organization for economic cooperation but also a community built around clearly defined values. Due to their importance, part of these values take the form of categories enshrined in law, i.e. the legal rules of EU political system. Hence all the goals of the EU should be pursued in respect of these values and in compliance with their spirit. One of the crucial values in this group is the rule of law or the concept of legal state (*Rechtstaat*). Respect for it is a prerequisite for uniform compliance with all EU law, for uniform implementation of EU solutions, and thus for building the trust of all EU citizens and national bodies in the legal systems of other countries.

And though it may seem that the rule of law should not be in any way controversial, even its content as included in EU regulations still can stimulate

a heated discussion in some member states, and sometimes (like in Poland) becomes the subject of a political dispute. Considering its significance, it is hard to deny that a sound interpretation of the legal category of the rule of law in the EU is necessary.

The above considerations motivated the author to posing a question: How has the definition of the rule of law in the EU been shaping, and in particular, is it homogenous as to the source type, or should it be reconstructed from a variety of sources? The research hypothesis states that the definition of the rule of law developed in several stages, so its reconstruction should be based on a set of sources created at different times and varying in terms of importance.

Keywords

legal state, rule of law, European Union, Court of Justice of the European Union, Article 2 of TEU

Introduction and methodology

It is difficult to debate the opinion that the existing system of shaping public policies in the EU is extremely complicated and thus difficult to understand for a statistical beneficiary of the solutions this system provides. This notion can impact the social reception of specific legislative solutions implemented within the framework of individual public policies as well as of basic solutions indispensable to the cohesiveness of the entire political system of the EU. Thus evaluating and commenting on the phenomena related to the political system of the EU without full and relevant knowledge regarding the actual state of the existing solutions is a common problem, which may lead to numerous misunderstandings and erroneous conclusions that permeate to the public discourse.

This problem is exacerbated by the fact that today the EU is not only an organization for economic cooperation but also a community built around certain clearly defined values. Some of them due to their importance take the form of categories enshrined in law, i.e. the legal rules of EU political system. Hence all the goals of the EU should be pursued in respect of these values and in compliance with their spirit. One of the crucial values here is the rule of law (the concept of legal state)[1]. Respect for it is a prerequisite for uniform compliance with

[1] In Polish discourse, "the rule of law" is also described as the "rule of lawful governance" ("legal state" / "state of law", equivalent to the *Rechtsstaat* concept (see Grzeszczak, 2019, p. 4).

all EU law, for uniform implementation of EU solutions, and thus for building the trust of all EU citizens and national bodies in the legal systems of other countries.

While the rule of law should not be in any way controversial, even its content as included in EU regulations still can initiate a heated discussion in some member states, and sometimes may become the subject of a political dispute. Such is the case of Poland, where at a specific stage of political debate development claims were raised that the rule of law in the EU "is like a yeti" (see Balinowski, 2020). The metaphor was used to express the idea that in the public debate the full shape of this rule is thought to be commonly known, yet actually no one is able to cite its specific content. Considering its significance, it is hard to deny that a sound interpretation of the legal category of the rule of law in the EU is necessary. Achieving this research goal will help understand the current state of the rule of law in Poland and the whole EU, while also anchoring further analyses.

These considerations led the author to formulating a specific research question: How has the definition of the rule of law in the EU been shaping, and in particular, is it homogenous as to the source type, or should it be reconstructed from a variety of sources? The research hypothesis states that the definition of the rule of law developed in several stages, so its reconstruction should be based on a set of sources created at different times and varying in terms of importance.

A starting point for a debate on the definition of rule of law in the EU system

The rule of law was included in the constitutions of individual member states even before their accession to EU structures[2]. The exact content of regulations and norms emerging from the concept of legal state can differ at the state level depending on the constitutional system of each member. What they do share is the understanding that this rule guarantees that all public authorities act within the boundaries defined by law, in accordance with the principles of democracy, and under the control of independent and objective courts (see European Commission, 2014a).

Due to its importance, the rule of law was included in the canon of systemic axiology of the entire EU. The first reference to this specific rule was made in

[2] At present this is directly referred to in the preambles to the Treaty on European Union and the Charter of Fundamental Rights of the European Union.

the preamble to the Maastricht Treaty of 1992 (TEU 1992). The Treaty on European Union after the reform introduced by the 1997 Treaty of Amsterdam (TA 1997) refers to the rule of law (legal state) in art. 6(1), which was formulated essentially like the current art. 2 TEU (TEU 2016)[3]. The current regulation states that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Respect for the rule of law principle is to a large degree a condition of compliance with the other values listed in the cited provision of TEU[4].

However, the analysis of this regulation leads to the conclusion that the treaties refer only to a generally worded concept (of the legal state), without specifying how it should be understood in detail. Theoretically this would leave a significant leeway for each member state to establish the rule of law at its own discretion.

Considering this aspect, we should focus on the Court of Justice of the European Union (CJEU), especially its Court of Justice (CJ). Within the scope of its powers, it can interpret EU regulations by determining the way in which they should be understood. In practice, this most often takes the form of the procedure for answering requests for preliminary rulings, which can, or sometimes have to, be directed to the CJ by national courts (see art. 267 TFEU), The requests are made when, in deciding their cases, national courts encounter situations where certain EU provisions are not sufficiently clear as it is necessary to determine the precise understanding of such provisions to resolve such cases.

In the course of its jurisprudential activity in this field, the CJEU has more than once found it necessary to determine how to understand the meaning of provisions that directly or functionally comprised the legal norms falling within the scope of the rule of law category. Such decisions varied as to the level of detail. Sometimes there were more general rulings (such as the one stating that the right to a fair trial includes the right to a court that is in particular

[3] It should be added that today art. 2 TEU is not the only place in the texts of this rank that contains such a catalogue of the basic principles of the EU. The most notable example is the Charter of Fundamental Rights of the EU (CFR), which, by virtue of Article 6 of the TEU, has the force equal to treaty provisions (for more on the CFR, see for example Wróbel, 2012; Bojarski et al. 2014).

[4] It is difficult to imagine e.g. that the principle of non-discrimination based on gender or age can be complied with if a given political system does not observe the rule of law.

independent of the executive branch) (Judgment of the Court of Justice, 2010a, point 17 of justification[5]). In other cases the CJEU referred to very specific solutions and created a practically clear order how to act in a particular situation for the public authorities of a member state (e.g., recognizing that aid granted on the basis of the principle of effective legal protection can include exemption from advance payment of legal costs or representation by a lawyer, and that in this context it can also be invoked by a legal person (Judgment of the Court of Justice, 2010b, point 59 of justification[6]).

Thus by interpreting the provisions of EU law, the CJ shaped their precise understanding, formulating the content of individual elements within the analyzed category. The extensive body of law that has emerged in this way clarifies the most important components of the rule of law[7]. These essential elements

[5] CJ also ruled among others that EU regulations do not preclude a member state from acting simultaneously as legislator, administrator and judge as long as it performs all these functions while respecting the principle of separation of powers that characterizes the functioning of the rule of law (see Judgment of the Court of Justice, 2010b, point 58 of justification).

[6] CJ decided also that the authority supervising state data protection activities does not meet the requirement of remaining independent, articulated in the art. 28 of Data Protection Directive 95/46/EC interpreted in this ruling, if even only its member responsible for managing current affairs is at the same time a member of any federal organ (see Judgment of the Court of Justice, 2012, points 6, 48 of justification). CJ concluded that the independence of the supervisory body required under the second subparagraph of art. 28(1) of Directive 95/46 is aimed at excluding not only direct form of influence from public institutions that takes the form of instructions but also any indirect external influence that might impact the decisions of the supervisory body. Such indirect influence can be exerted if there exists an official relationship between the managing member of this supervisory body (*Datenschutzkommission*, DSK) and the federal body in question (here, the *Bundeskanzleramt*, the Office of the Federal Chancellor) that allows the superior to supervise the activities of this managing member. It is then possible that the evaluation of the managing member of the DSK, prepared by their supervisor who is a member of a federal body in order to support the official promotion of this official, may create some form of "expected obedience" of the subordinate(see Judgment of the Court of Justice, 2012, points 43, 48, 51 of justification).

[7] This state of affairs should not be equated with creating a definition of the category of the rule of law at the level above the national one, which would include a literal definition of every single element included in the rule of law in its broadest sense. Due to the specificity of multi-level EU system this does not have to be, and even should not be, a full definition. As emphasized by Agnieszka Grzelak, the EU system must allow for some flexibility with regard to the specific legal systems of individual member states. The way in which the basic principles falling under the concept of the rule of law are

are: legality, which means a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrary executive action; independent and impartial courts; effective judicial review, including review of respect for fundamental rights; and equality before the law (European Commission, 2014a, pp. 1–3). In this way the CJ created a reference point for understanding the rule of law category in the perspective of EU legal system (see European Commission, 2014a; Bogdanowicz, 2018, pp. 24–28).

However, this has not prevented disputes as to the application of the rule of law. The allegations of the lack of clarity of its content in the acts of EU law were a significant element of these debates. This denied the ability of the Court of Justice to make binding interpretations of EU regulations (which over time became another area of dispute regarding compliance with the rule of law in the EU).

It turned out at the same time that the current safeguards of compliance with the rule of law were not very effective. The adopted model of protecting the observance of this principle gave a lot of leeway for successive member governments to continue changes to own political systems that seemed to move them increasingly away from the model of the rule of law adopted in the EU. A clear example here are the actions of the government of Hungary as well as of post-2015 Poland regarding the functioning of broadly understood judiciary. In the case of Poland, the most questionable actions were those concerning the Constitutional Tribunal (Trybunał Konstytucyjny, TK) and the National Council of the Judiciary (Krajowa Rada Sądownictwa, KRS), which led the European Commission to formulating reservations and recommendations in its subsequent opinions, to which the Polish government responded (see Szyndlauer, 2018, pp. 25–42; Potorski, pp. 150–158; Cianciara, 2018, pp. 110–113). As the attempts to resolve the issue in this way failed, this triggered the procedure under Article 7 of the TEU, which can even lead to the suspension of a member state's voting rights within the Council of the European Union (CJEU) (Grzelak, 2018a, pp. 57–72; Taborowski, 2018, pp. 45–50). However, the procedure did not progress to an ultimate resolution as there was no vote on the issue in the European Council (EC) due to uncertainty whether all member states would support declaring Poland in violation of the rule of law. The situation in this area remains thus a stalemate.

implemented must be referred to individually, not only in relation to the laws in force in a given country, but also to the national practice of their application and the legal and political culture (Grzelak 2018b, p. 218).

EU secondary law as the source of the content of the rule of law

It would be difficult to overlook that, as it turned out in practice, a new model was necessary to protect the fundamental values on which the EU had been built, especially as claims still could be heard that the EU system still lacked a precise interpretation of the rule of law. Hence, all actions of EU institutions supposedly had no legal basis and were only a cover for political aspirations to interfere in the internal systems of states (Gójska, 2020).

Thus, to ensure compliance with this fundamental principle of the EU, an additional solution had been proposed for some time, clearly intended as a significant instrument for putting pressure on countries that, according to the EC, violated the rule of law. The instrument was to make the granting and disbursement of aid funds from the EU budget conditional on how a given state respected EU values, in particular the principle of legal state (European Commission, 2018a; Grzeszczak, 2019, pp. 18–19).

The European Commission even prepared a draft regulation on the matter (see Proposal for a Regulation of the European Parliament and of the Council, 2018). The first official stances of the member states on the matter were contained in the conclusions from the extraordinary European Council meeting held on 17–21 July 2020, intended to finalize the budget negotiations for the years 2021–2027 (European Council, 2020a). Specifically, point 23 of Annex to the conclusions is worded thus: "(…) a regime of conditionality to protect the budget and Next Generation EU will be introduced. In this context, the Commission will propose measures in case of breaches for adoption by the Council by qualified majority. The European Council will revert rapidly to the matter" (European Council, 2020b), while point 22 of EC conclusions contains the following provision: "The Union's financial interests shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Article 2 TEU". Although it was not expressed overtly, by linking the protection of the EU's financial interests with EU principles, the former was also linked to the rule of law.

The relevant regulation of the European Parliament and of the Council was adopted on 16 December 2020 and entered into force on 1 January 2021 (Regulation on General Conditionality Regime hereafter referred to as Regulation (EU) 2020/2092). It introduced a clear definition of how the category of the rule of law should be understood. According to its art. 2(a), "'the rule of law' refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making

process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU" (Regulation (EU) 2020/2092, art. 2(a)).

The regulation determined what could be considered indicative of breaching the principles of the rule of law, in particular "failing to prevent, correct or sanction arbitrary or unlawful decisions by public authorities, including by law-enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interest", as well as directly expressed "endangering the independence of the judiciary" (Regulation (EU) 2020/2092, art. 3(a,b)).

Breaches of the rule of law that justify the suspension of disbursement of funds in accordance with a relevant procedure described in subsequent articles of Regulation (EU) 2020/2092 must regard one of the elements of the functioning of state's legal system that are clearly defined in the document. This first and foremost concerns "the proper functioning of the authorities implementing the Union budget, including loans and other instruments guaranteed by the Union budget, in particular in the context of public procurement or grant procedures; the proper functioning of the authorities carrying out financial control, monitoring and audit; the proper functioning of effective and transparent financial management and accountability systems; the proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union" as well as the "effective judicial review by independent courts of actions or omissions by the authorities" referred to above (Regulation (EU) 2020/2092, art. 4 section 2 (a-d))[8].

[8] Other breaches of the rule of law that justify the suspension of disbursement of funds include "prevention and sanctioning of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union, and the imposition of effective and dissuasive penalties on recipients by national courts or by administrative authorities; the recovery of funds unduly paid; effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with EPPO in their investigations or prosecutions pursuant to the applicable Union acts in accordance with the principle of sincere cooperation; other situations or conduct of authorities that are relevant to

Furthermore, other mechanisms protecting the rule of law began to permeate other spheres of the functioning of EU political system, bringing with them explicit legislative provisions that can provide clear guidance on understanding the various components of the rule of law. For this analysis, the most significant example is the socioeconomic reconstruction of member states after the crisis caused by the COVID-19 pandemic. The legal basis for this task was the Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility. In compliance with this, each member state adopted a national recovery and resilience plan, a policy document determining the goals related to the reconstruction after the pandemic crisis and introducing reforms conducive to the implementation of these aims. On the basis of these documents, states can apply for support from the EU Recovery and Resilience Facility (RRF) (European Commission, n.d-a).

While preparing individual national recovery and resilience plans, the EC established together with each state government specific milestones to be achieved before disbursement of each subsequent tranche of allocated funds (European Commission, n.d.-b).In the case of some states, such as Hungary and Poland, the conditions for the payment of means for the implementation of national recovery plans included e.g. introduction of changes in the functioning of judiciary (ensuring its independence from other authorities), change of the system of disciplining judges and increasing their independence, as well as the ability of courts to supervise public institutions. These provisions, proposed by the member states (while the EC only accepted them), can be considered as the guidelines for interpretation of specific fragments of the rule of law.

In the case of Poland, the adoption of the National Recovery and Resilience Plan (*Krajowy Plan Odbudowy*, KPO) took place on 1 June 2022, when the document was accepted by the EC (European Commission, 2022).One of the goals was to improve the conditions for investments and thus ensuring the efficient implementation of the plan. The specific milestones were set, such as objective F1 concerning the judiciary, where Poland made a commitment to introduce a reform strengthening the independence and impartiality of the courts (objective F1.1.) as well as a reform to remedy the situation of judges affected by rulings of the Disciplinary Chamber of the Supreme Court in disciplinary cases and judicial immunity (objective F1.2.) (Ministerstwo Funduszy i Polityki Regionalnej, 2022, p. 346).

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the sound financial management of the Union budget or the protection of the financial interests of the Union" (Regulation (EU) 2020/2092, art. 4 section 2 (e-h)),

In particular, as pointed out in the provisions of KPO, the reforms should be made in the Polish legal system, which upon entering into force will:

a) determine the scope of jurisdiction of a chamber of the Supreme Court, other than the Disciplinary Chamber, relevant in all cases regarding judges including disciplinary matters and immunity revocation; such chamber must meet the requirements emerging from art. 19 section 1 of TEU, i.e. ensure that cases are heard by an independent and impartial court established by law;
b) ensure the unlimited right of Polish courts to submit preliminary questions to the CJEU, and such a question will not constitute grounds for disciplinary proceedings against a judge;
c) establish that while judges can still be held accountable for professional misconduct, the content of court decisions does not constitute disciplinary misconduct;
d) ensure that it will be possible for the competent court to initiate through judicial proceedings (in accordance with Article 19 of the TEU) a verification of whether a judge meets the requirements of independence and impartiality if a serious doubt arises in this regard, and such verification will not qualify as disciplinary misconduct;
e) strengthen procedural guarantees and the rights of parties in disciplinary proceedings involving judges (Ministerstwo Funduszy i Polityki Regionalnej, 2022, p. 346).

The actual implementation of these goals is a separate issue, requiring an in-depth analysis, and will be the subject of later research on European law and political sciences.

Conclusions

As the concept of the rule of law may be differently understood in individual member states, this could result in a distortion of the essence of integration over the years to come. Citizens of a given state and those of other member states pursuing their life goals on its territory could be effectively deprived of the protection due to such differences in interpretation. Member states' governments would be able to effectively limit the rights to a fair trial by a court of law or the certainty of judicial independence and impartiality, which would be crucial if a citizen entered into a dispute with the state.

Besides, the process of implementing subsequent EU solutions could be blocked by the governments of successive countries, which could use for this purpose the judiciaries subordinated to them. It should be remembered that national courts simultaneously act as EU courts, before which one can pursue the protection of one's own rights under EU law subject to implementation in national legal systems. Thus, national courts become additional guarantors of the implementation of such laws.

As regards European integration, which currently is at an advanced stage, destabilization of this process in one country can have adverse effects on the functioning of the entire system. Hence, it became increasingly important to introduce a clear and unambiguous interpretation of the rule of law.

This was achieved by gradually clarifying the content of the rule of law in subsequent sources within the EU system. Initially, there were only very general treaty provisions, to which the rulings of the Court of Justice were added over time. Then explicit clarification was made through the relevant secondary legislation.

This study has shown that there is now a clear definition of the rule of law within the EU system. It is embodied in documents categorized under different levels of EU legislation, which constitute both primary law (the treaties) and secondary law (regulations). In addition, a not insignificant role in the interpretation of individual principles comprising the rule of law should be attributed to the case law of the CJEU, which is also counted among the sources of the EU *acquis*. Thus it should be concluded that the research hypothesis that the definition of the rule of law developed in stages and hence should be reconstructed from various sources, created at different times and of different hierarchy, has been verified positively.

Observing the current public debate on the rule of law in the EU, and especially in Poland, we can be tempted to make a certain prediction even though it goes beyond the assumed framework of this study. It seems reasonable to conclude that although the definition of the rule of law within the EU legal system has been established clearly, doubts as to its content will continue to be raised (Al Shehabi, 2023), motivated by considerations of political struggle that ebbs and flows according to national electoral calendars. In this regard, we face a kind of fundamental challenge to the process of creating public policies in the EU as well as to the integration process as a whole. This particular aspect of the rule of law in the EU political system should undoubtedly become the subject of further analysis.

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