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THE “RULE OF LAW” AND THE “RECHTSSTAAT”: A HISTORICAL AND THEORETICAL APPROACH FROM A GERMAN PERSPECTIVE

1.

In political-legal language, the term “Rule of Law” is almost the only term to have been used exclusively in an affirmative sense. Today, it is not only the so called Western democracies that rely on the Rule of Law; the People’s Republic of China also does so. In the mid-20th century¹, the German term “Rechtsstaat” was even appropriated by National Socialist lawyers in the first years of Adolf Hitler’s dictatorship².

What do we learn from this? Is the Rule of Law a concept without content, a term that anyone can fill with their own content? Such a conclusion certainly goes too far. On the one hand, the concept of the Rule of Law confers legitimacy and states therefore tend to claim it for themselves. On the other hand, the Rule of Law is obviously also something that can never be detached from the political context and the historical experiences of a particular nation.

Though it can be traced back to the 17th century, the Rule of Law in England was not a subject of theoretical discourse until 1885, when the constitutional scholar Albert Venn Dicey (1835-1922) published the first edition of his textbook *Introduction to the Study of the Law of the Constitution*, which subsequently became an influential reference work. In it, he wrote:

„The rule of law is (...) a feature of the United States as of England. (...) That ‘rule of law’ (...), which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

¹ K. Turner, *Rule of Law*, Oxford 2009, pp. 165 *et seqq*; R. Ullerich, *Rechtsstaat*, Baden-Baden 2011, p. 50, and for comparison with the European “Rule of Law” tradition: K. Blasek, *Rule of Law in China*, London 2015.

² Cf. e.g., O. Koellreutter, *Der nationalsozialistische Rechtsstaat*, Berlin 1934, and also the basic research of C. Hilger, *Rechtsstaatsbegriffe*, Tübingen 2003.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of a wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone (...).

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts. (...) there can be with us nothing really corresponding to the ‘administrative law’ (*droit administratif*) or the ‘administrative tribunals’ (*tribunaux administratifs*) of France. (...)

The ‘Rule of Law’, lastly, may be used as a formula for expressing the fact that with us the law of constitution, 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 (...); thus the constitution is the result of the ordinary law of the land”³.

The final point made by Dicey, in particular, addresses the basic difference between Anglo-Saxon and Continental-European constitutional understanding and, with it, the rule of law as a component of the constitution, be it written or unwritten. However, the central idea underlying this term, that “law rules” or – in a normative sense – that “law should rule”, is considerably older and goes back to the earliest traditions of political thought. Aristotle’s *Politics* has a famous dictum against the rule of tyrants:

“(...) it is preferable for the law to rule rather than any one of the citizens, and according to this same principle, even if it be better for certain men to govern, they must be appointed as guardians of the law and in subordination to them (...)”⁴.

The same idea can be found later, not only among Roman jurists of Antiquity and medieval philosophers of natural law, but also in highly developed cultures outside the Occidental-Christian world, such as ancient China⁵. The basic idea that the “Rule of Law” is the absence of arbitrariness is as old as the law itself; in fact, it *is* the law in its core function. It is thus not surprising that the use of the term “Rule of Law” in both past and present is consistently affirmative, unusual though that is in the vocabulary of political ideas.

Until now, it appeared that a common legal-cultural context provided the basis of shared values within the European Union. Now, however, a fierce dispute has broken out over the value of the Rule of Law as laid down in Article 2 of the Treaty on European Union. This dispute is fundamental and unprecedented in the EU’s history. On 20 December 2017, the European Commission for the first

³ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Reprint of the 10th edition 1959, London 1959/1960, Part II, Chapter IV, pp. 200, 202 *et seqq.*

⁴ Aristotle, *Politics*, 1972, p. 265 (Book III, Chapter XI, 1287a).

⁵ K. Turner, *Rule of Law...*, p. 165 *et seqq.*

time initiated proceedings against an EU Member State – Poland – for breach of the fundamental principles of the European Union. In accordance with Article 7 para. 1 of the Treaty on European Union (TEU), it determined “that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2” of TEU⁶. On 12 September 2018, the European Parliament agreed by a two-thirds majority to initiate similar proceedings against Hungary. In principle, these proceedings may ultimately lead to the withdrawal of the voting rights of the Member States Poland and Hungary under Article 7 para. 3 of the TEU. This raises the fundamental and no longer purely academic question of the *concept* of the Rule of Law which is legally binding on all EU Member States and to which *all* parties involved in the current institutional crisis refer. To be clear: this dispute is not, as in the past, about violations of the Rule of Law by individual EU Member States, due to a country-specific lack of human and financial resources (e.g. widespread corruption in the public sector, or an unprofessional or overwhelmed administration or judicial system), but it is about the nature of the Rule of Law itself.

The government in Hungary, which openly promotes the so called “illiberal state”⁷, and the government in Poland, where the leader of the ruling “Law and Justice” (PiS) party, Jarosław Kaczyński, promised that the day will come when “we will have Budapest in Warsaw”, do not consider themselves to be the authors of violations of the Rule of Law. On the contrary, the current Polish President Andrzej Duda believes that the new laws for the judiciary in Poland provide far better protection for the Rule of Law and the freedom of speech than exists, for example, in Germany⁸. By contrast, in its Opinion of 11 December 2017 on Polish judicial reform, the European Commission for Democracy through Law (the so called “Venice-Commission”) states that the “principle of ‘competent judge defined by law’ (in the German tradition ‘gesetzlicher Richter’) may be seen as

⁶ In addition, the European Commission initiated infringement proceedings against Poland on 2 October 2018 for imposing compulsory retirement on Polish supreme court judges based on a Polish law introduced on 3 April 2018, which lowered the statutory retirement age of supreme court judges (European Commission/Republic of Poland, case number C-619/18). On 19 October 2018 the Court of Justice of the European Union issued a temporary order that allows the judges to return to their places of work, at least until the final court judgement is made (ruling dated 19.10.2018, case number C-619/18 R).

⁷ In July 2014 the Hungarian Prime Minister Viktor Orbán gave what has become known as his “illiberal democracy” speech before an ethnic Hungarian audience in Băile Tușnad, Romania. The Prime Minister said: “(...) the new state that we are constructing in Hungary is an illiberal state, a non-liberal state”. See “Prime Minister Viktor Orbán’s Speech at the 25 Bálványos Summer Free University and Student Camp”, website of the Hungarian Government, 26 July 2014, <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp> (visited February 25, 2019).

⁸ <https://www.gazetaprawna.pl/artykuly/1295299,prezydent-duda-o-sedziach-sadu-najwyzszego.html> (visited February 18, 2019).

an extension of the requirement of an ‘independent and impartial tribunal established by law’ in Article 6 of the European Convention [of Human Rights]”⁹. Who is right here? One suspects that the actors in this dispute are not appealing to the same concept of Rule of Law. This impression is created not only by the dialogue between the European Commission and the Polish and Hungarian governments, but also by the bitter dispute that is ongoing within Polish and Hungarian societies. The Polish legal scholar Bronisław Sitek recently characterised the current political situation in Poland as follows:

“The ongoing discussion in the public sphere reveals the breakdown of discussers into two groups. Both sides of the discussion use specific terminology and logic of the discourse and they are not able to reach agreement”¹⁰.

What we can do, as legal scholars from Europe and the US, is to make attempts to clarify what the Rule of Law actually means in the continental European and in the Anglo-American tradition and see whether we can agree on a single core meaning of the concept. As a German scholar, I see it as my job to present the German approach. The German concept of the Rule of Law, called “Rechtsstaat” in German, is not as old as the Anglo-Saxon “Rule of Law”, but it, too, already has a two-hundred-year tradition.

Today, thanks not only to the German constitution, but also, crucially, to the jurisprudence of the Federal Constitutional Court and the constitutional doctrine in legal scholarship, the concept of “Rechtsstaat” has not only become the core concept of the German legal order¹¹, but also an element of the basic social consensus. We all know that this was not always the case. Germany not only gave birth to the legal concept of the “Rechtsstaat”, it also unfortunately witnessed the actual emergence of an “Unrechtsstaat”, a completely unjust state¹².

2.

In Germany, the concept of the “Rechtsstaat” began with the *Metaphysics of Morals* by Immanuel Kant, published in 1797, where Kant argued for the concept of the “*Idea* of the State, viewed as it ought to be according to pure legal principles (...)”¹³. Whilst Kant himself did not yet use the term “Rechtsstaat”,

⁹ European (Venice) Commission, *Poland. Opinion No. 904/2017*, CDL-AD(2017)031, p. 19.

¹⁰ B. Sitek, *Personal Separation of the Legislative and the Executive Powers as Guarantee of Independence of the Judiciary in Poland*, “Journal of Modern Science” 2017, Vol. 34, No. 3, p. 79.

¹¹ S. Martini, *Pluralität*, Baden-Baden 2009, p. 321.

¹² G. Radbruch, *Gesetzliches Unrecht*, 1946, p. 217.

¹³ I. Kant, *Metaphysik*, 1797, p. 431 (A 165, B 195): „Ein Staat (civitas) ist die Vereinigung einer Menge von Menschen unter Rechtsgesetzen. So fern diese als Gesetze a priori notwendig, d.i. aus Begriffen des (...) Rechts überhaupt von selbst folgend (...) sind, ist seine Form die Form

only one year later he and his followers were dubbed “the critical school or the school of legal scholars of a law-based state (‘Rechts-Staats-Lehrer’)”¹⁴. The “Rechtsstaat” was an expression of a completely new way of thinking in Germany and was directed against the absolutist welfare state of the 18th century, whose ruler was omnipotent and not only educated his subjects like children, but also felt entitled to regulate every aspect of their personal lives. In contrast, from the time of Kant onwards, a distinction began to be made between the state on the one hand, and society on the other¹⁵. An individual person, as part of society, now became responsible for his own well-being and also for dealing fairly with others according to the norms of morality. Meanwhile, the task of the state and the application of its sovereign power was limited to the establishment of a legal state, a “Rechts-Staat”. In the new middle-class thinking, the state was only entitled to guarantee security and order for all its citizens, a much lesser task than establishing justice and well-being. It is precisely this deliberate reduction of the omnipotent state to a “legal state” that, almost two hundred years later, provoked the famous outcry by Bärbel Bohley (1945-2010), a well-known dissident and civil rights activist in the former German Democratic Republic. Frustrated after the reunification of Germany in 1990, she declared:

“We waited for justice, but we have got the ‘Rechtsstaat’”¹⁶.

Whilst the origins of the concept of the “Rechtsstaat” in early-19th century Germany were inextricably linked with the demands of liberalism – the demand of political liberalism, on the one hand, to be freed from state paternalism in personal affairs, and the demand of economic liberalism, on the other, for the abolition of economic constraints imposed by feudal lords in the principalities and by the guilds in the cities – the term “Rechtsstaat” was, from the very beginning, characterised by two peculiarities.

The first is that the propagation of the “Rechtsstaat” was by no means limited to representatives of political liberalism, such as Robert von Mohl (1799-1875)¹⁷. Whilst the term “Rechtsstaat” was initially coined by political liberals, it was soon taken up by other political factions, for instance by the political philosopher Adam Müller (1779-1829), a representative of the rather reactionary German political romanticism, who made his mark as a harsh critic of political and economic

eines Staats überhaupt“, nämlich als Staat mit „drei Gewalten in sich“, aufgeteilt in diejenige des „Herrschergewalt (...) des Gesetzgebers, die *vollziehende Gewalt* (...) und die *rechtsprechende Gewalt* (als Zuerkennung des seinen eines Jeden nach dem Gesetz (...)).“

¹⁴ J. W. Placidus, *Litteratur*, Strasburg 1798, § 7, p. 73.

¹⁵ Cf. J. W. Placidus, *Litteratur*..., § 2, p. 5 footnote 3, who already made a distinction between the spheres of “state” and “society”.

¹⁶ See Bärbel Bohley’s personal homepage, which has remained unchanged since her death: <https://baerbelbohley.de/zitate.php> (visited December 6, 2018).

¹⁷ R. v. Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates*, Tübingen, 1832/1833. The fact that von Mohl used the term “Rechtsstaat” in the title of his two-volume work, was highly conducive to its dissemination throughout the German-speaking world.

liberalism¹⁸. Around the mid-19th century, the term was also adopted by those opponents of political liberalism who, together with the liberals, formed a common front against the forces of late feudalism; for instance, the Christian-conservative right-wing thinker Friedrich Julius Stahl (1802-1861) who demanded that “a state” must be a “Rechtsstaat”¹⁹.

Closely linked with this development is the second peculiarity of the term “Rechtsstaat” in Germany: its de-politicisation with respect to any demand for political participation. Towards the mid-19th century, as the concept of the “Rechtsstaat” became accepted even beyond the – increasingly marginalised – camp of political liberalism, it lost its liberal-political impetus and, instead, was reduced to mean mere formal legal protection in civil and administrative matters²⁰. In any case, from the outset, the German concept of “Rechtsstaat” had relatively little political connotation in terms of the demand for political participation. After the failed revolution of 1848/49, the links between the concept of “Rechtsstaat” and the demand for political participation, let alone democracy, completely disappeared. None of the well-known protagonists of the “Rechtsstaat” in 19th-century Germany, even those on the liberal wing, were democrats. Being a democrat in Germany at that time amounted to much the same as being a communist during the McCarthy era in the 1950s in the United States. In other words, there was no integral connection between the concept of “Rechtsstaat” in 19th-century Germany and the idea of democracy.

Without this political dimension, the term “Rechtsstaat” became accepted by all political factions in Germany in the second half of the 19th century. In this sense, the legal demand for a “Rechtsstaat” not only remained alive in Germany at this period, but led, after 1860, to the emergence, in some German states, of independent courts to control the state administration. This situation did not essentially change with the Weimar Constitution of 1919 and the introduction of democracy in Germany and the concept of “Rechtsstaat” lost even more importance in the German constitutional doctrine during the interwar period. What had previously been the main task of the state, the protection of security and property from monarchical arbitrariness, had fallen away after the replacement of the monarch by the people. The constitutional state was understood at the time

¹⁸ K. Sobota, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates*, Tübingen 1997, pp. 275-283.

¹⁹ F. J. Stahl, *Die Philosophie des Rechts*, Tübingen 1878, § 36, p. 137: „Der Staat soll Rechtsstaat seyn (...). Er soll die Bahnen und Gränzen seiner Wirksamkeit wie freie Sphäre seiner Bürger in der Weise des Rechts genau bestimmen und unverbrüchlich sichern und soll die sittlichen Ideen von Staatswegen, also direkt, nicht weiter verwirklichen (erzwingen), als es der Rechtssphäre angehört (...).“

²⁰ M. Stolleis, *Rechtsstaat*, (in:) *Handwörterbuch zur deutschen Rechtsgeschichte (HRG) IV*, Berlin 1990, column 371.

in a purely formal manner by legal scholars like Hans Kelsen²¹. It did not offer any protection against the will of the people. In particular, it did not offer any protection against the electoral successes of the National Socialists. One of the first measures they introduced in 1933, based on the new legislation and the alleged will of the people, was to remove Jewish and so called liberal and communist judges and civil servants from the civil service.

This worst break with civilised culture in the history of modern times, perpetrated by National Socialist Germany, led after the war to a modification of the concept of the "Rechtsstaat". The traditional, so called "formal elements" of the "Rechtsstaat", such as separation of powers, independence of courts, legality of administration and legal protection against acts of public authority, were supplemented by the so called "material elements"²². Some examples of these are the attachment to the constitution of the democratic legislature as a higher normative order, the fundamental rights of the individual and the principle of proportionality²³. Additionally, the German constitutional legislation of 1949 declared the "Rechtsstaat" to be a core principle of the German constitution, together with human dignity, the principle of democracy and federalism, and, like them, forever unalterable. In other words, the German constitution now restricts the sovereignty of Parliament. No declared will of the people, no parliamentary majority is entitled to abolish constitutional principles such as the "Rechtsstaat". German constitutional law provides an "Ewigkeitsgarantie"²⁴ or "eternal guarantee" of these core provisions. Of course, everybody is aware of the fact that this kind of "eternity" will last only as long as the constitution is respected.

3.

In reaction to the historical experience of the terror waged by the German state in the Nazi period, the "Rechtsstaat" has now become a central concept of German constitutional law that impacts every other area of law. As part of the so

²¹ According to Hans Kelsen's "Pure Theory of Law", "every state" was a "Rechtsstaat". This meant that the term had a theoretical meaning for jurisprudence but no longer for the legal practice of law, see S. Martini, *Pluralität...*, p. 209.

²² R. Hofmann, *Die Bindung staatlicher Macht*, (in:) R. Hofmann, J. Marko, F. Merli, E. Wiederin (eds.), *Rechtsstaatlichkeit in Europa*, Heidelberg 1996, p. 4; W. Heintschel von Heinegg, *Rechtsstaatlichkeit in Deutschland*, (in:) R. Hofmann, J. Marko, F. Merli, E. Wiederin (eds.), *Rechtsstaatlichkeit in Europa*, Heidelberg 1996, pp. 108-111; R. Grote, *Rule of Law, Rechtsstaat and „État de droit"*, (in:) C. Starck (ed.), *Constitutionalism, Universalism and Democracy – a Comparative Analysis. The German Contribution to the Fifth World Congress of the International Association of Constitutional Law*, Baden-Baden 1999, pp. 285-291.

²³ S. Martini, *Pluralität...*, p. 307.

²⁴ R. Hofmann, *Die Bindung...*, p. 8.

called “Ewigkeitsgarantie” in German Basic Law, i.e. the constitutional guarantee that certain principles will never be changed, it even stands over and above the concept of democracy, in a way that is quite unique. However, this “German special course”²⁵ cannot just be transferred to the European sphere. Granted, numerous linguistic and intellectual borrowings in other continental European legal systems are linked to the German term “Rechtsstaat” (e.g. “État de droit”, “Stato di diritto”, “Estado de Derecho”, “państwo prawa”)²⁶. However, this should not distract from the fact that national concepts of the “Rechtsstaat” are by no means identical, not just amongst the Member States of the Council of Europe, but also amongst the Member States of the European Union, and that some, in fact, differ significantly from the others²⁷.

The greatest difference lies between the German concept of “Rechtsstaat” and the older Anglo-Saxon tradition of the “Rule of Law”²⁸. Unlike in Germany, with its National Socialist history, there was and still is no reason for a fundamental mistrust in the legitimacy of the will of the parliamentary majority in Westminster Democracy. Admittedly, the “Rule of Law” is, to this day, an unwritten principle of British constitutional law, factually subordinated to the theoretically unlimited supremacy of parliament and its legislation (“Westminster system”)²⁹. In contrast, the concept of “Rechtsstaat” forms – along with the principles of democracy, federalism and welfare – the core legal principle in the German constitution, with numerous sub-principles based on and derived from the “Rechtsstaat” principle by jurists in practice and academia³⁰. It is even “eternally” exempted, by explicit constitutional provision, from the decisional power of the democratic legislature. In addition, it is completely justiciable by courts in all areas of German law. However, differences exist not only between Anglo-Saxon law and continental European laws, but also among the rules of law in different continental European legal systems themselves. To this day, “État de droit” in France has not been able to develop a normative impact on the French legal system that could be in any way compared to the German concept of “Rechtsstaat”. The constitutional core concept in France that serves as a higher benchmark for parliamentary legisla-

²⁵ R. Ullerich, *Rechtsstaat...*, p. 44.

²⁶ R. Ullerich, *Rechtsstaat...*, p. 53 points out that the vast majority of translations of the Treaty on European Union linguistically follow the German term “Rechtsstaat”, rather than “Rule of Law”, which has not been taken up outside of the realm of Common Law.

²⁷ R. Grote, *Rule of Law...*, pp. 281, 292, 295; S. Martini *Pluralität...*, pp. 306-322.

²⁸ By contrast, D. N. MacCormick, *Rechtsstaat und die rule of law*, “Juristenzeitung”, 1984, pp. 65 *et seq.*, sees the fundamental differences “between the concept of ‘Rechtsstaat’ and the British-American concept of ‘Rule of Law’ as solely resulting from their historical development”.

²⁹ E. Denninger, „Rechtsstaat“ oder „Rule of law“ – was ist das heute?, (in:) C. Prittwitz et al. (eds.), *Festschrift für Klaus Lüdersen. Zum 70. Geburtstag am 2. Mai 2002*, Baden-Baden 2002, p. 43; S. Martini, *Pluralität...*, p. 341.

³⁰ K. Sobota, *Rechtsstaat...*, pp. 27-252, 254-257 lists 25 “norms that can be identified as elements of the “Rechtsstaat” and 142 features of the “Rechtsstaat”.

tion is not the concept of rights ("droit"), but rather the concept of law ("loi") and the "principe de légalité". Because there is no such instrument as a constitutional objection in France and because parliamentary legislation, once promulgated, along with certain government acts, does not come under the control of the French constitutional court ("Conseil constitutionnel"), the basic principle that is such a fundamental part of the German constitution, that all public powers are bound by the constitution³¹, has not yet been fully established in France³².

The European Union and the Council of Europe, however, formulate a common European "Rule of Law" on the basis of both continental European and Anglo-Saxon legal traditions. This indicates that the substantial differences between the German "Rechtsstaat", the English "Rule of Law", the French "État de droit", and the Polish "państwo prawa" are not so essential, at least on the highest abstract level of general concepts. Reading the report of the Venice Commission of the Council of Europe on the recent reform of the judiciary in Poland, the true problems seem to be rather in the details beyond the general wordings of the national constitutions and European treaties. What does "judicial independence" mean if the Minister of Justice can dismiss the Presidents of the Courts at his discretion? What does the "legal judge" mean, if the Presidents of the Court Chamber have vast discretion in defining the composition of the judicial panels? And what does the "legal judge" mean, if the Minister of Justice is competent to set detailed rules on the assignment of cases to particular judges? What does the "protection of legitimate expectation mean" if legally valid judgments can be systematically reviewed and revoked after many years? Is this all compatible with the Polish "Rule of Law" (zasadą praworządności)? These questions must be answered by Polish courts and Polish jurisprudence.

However, that is no longer the end of the matter. Because states such as Poland and Hungary are not just Member States of the Council of Europe³³, but also Member States of the European Union, the basic "values" of the European Union set out in Article 2 first sentence of the TEU also apply to them and these values explicitly include the Rule of Law. The fact that these "values" are more than just non-binding notions but, in fact, fundamental principles of the European Union, is shown by Article 7 of the TEU, which sets out the sanctions that can be put in place by the EU in the case of a "serious and persistent breach" of the values by a Member State³⁴. The verification and enforcement of these values within

³¹ Cf. Art. 1 para. 3 and Art. 20 para. 3 of the German Basic Law.

³² S. Martini, *Pluralität...*, p. 317.

³³ Moreover, as stipulated in the Statute of the Council of Europe, each of its members accepts the "principles of the Rule of Law" (Article 2 para. 1 of the Statute of the Council of Europe of 5th May 1949). The preamble to the "Convention for the Protection of Human Rights and Fundamental Freedoms", which was signed by all members of the Council of Europe, also mentions the enforcement of the "Rule of Law".

³⁴ Article 7 para. 1 section 1 and para. 2 of the TEU.

the Member States by the institutions of the European Union is not an impermissible intrusion upon their national sovereignty but a direct consequence of their sovereign commitment, at the moment of their accession to the European Union, to uphold the values. The European Union, which, according to its self-conception as set out in the treaty, is not just an internal market but also a community of values that go beyond economic cooperation³⁵, is even obliged to ensure that these basic values are upheld by the Member States. A Member State cannot withdraw from this community of values as referred to in Article 2 of the TEU by simply changing its government; this can only be achieved by a Member State leaving the European Union.

However, the current problems in connection with the values set out in Article 2 of the TEU do not occur so much on the level of the abstract concept of the Rule of Law, which, incidentally, is not contested in principle by any of the Member States of either the European Union or the Council of Europe. Even Russia and Turkey after the failed coup of 2016, both of which have evolved into authoritarian systems without any effective protection of the separation of powers and of human rights³⁶, still today claim to be fully observing and enforcing the Rule of Law. The real questions, therefore, occur more in the area just below the highest abstract level of general commitment to the principle of the Rule of Law. The practical question, currently being hotly debated in the literature on European law, of what legal and political measures can be put in place to ensure that all Member States of the European Union commit to upholding the Rule of Law³⁷, is obscuring another, more theoretical question that should be answered first: how can one differentiate between the basic values of the European Union, which are outside of the national sovereignty of the Member States, and the decisions that remain subject to national sovereignty, such as those pertaining to the justice system and the media? The treaty texts themselves, which mention the “Rechtsstaat” or Rule of Law, provide no further information on the subject. Whilst the “values” set out in Article 2 of the TEU have a normative content, they do not establish “any enforceable duties as such”³⁸.

The wording of Article 2 of the TEU is as follows:

³⁵ C. Calliess, *Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?*, “Juristenzeitung” 2004, pp. 1036, 1038-1045.

³⁶ See e.g., F. Cede, *The Development of the Rule of Law in Russia: Justice, Human Rights and Civil Society*, (in:) G. Hinteregger, H.-G. Heinrich (eds.), *Russia – Continuity and Change*, Wien 2004, pp. 391-397.

³⁷ Cf. M. Blauberger, *Europäischer Schutz*, 2016, pp. 280-301; A. v. Bogdandy, *How to protect*; A. v. Bogdandy, M. Ioannidis, *Defizit*, 2014, pp. 291-328; B. Bugarič, *Protecting Democracy*, 2016, pp. 86-101; C. Closa, D. Kochenov, *Reinforcement*, 2016, pp. 173-196; C. Hillon, *Overseeing*, 2016, pp. 64-81; Hofmeister H., *Polen*, 2016, pp. 869-875; J.-W. Müller, *Protecting*, 2016, pp. 206-224; K. Tuori, *From Copenhagen*, 2016, pp. 225-246.

³⁸ C. Möllers, L. Schneider, *Demokratiesicherung in der Europäischen Union*, Tübingen 2018, pp. 47, 126.

“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”³⁹.

The actual consequences of this for the controversial changes to the constitutions, justice systems and media laws in Hungary and Poland, however, cannot be gleaned directly from the Treaty on European Union. The list of “values” of all Member States⁴⁰, which was introduced into European Primary Legislation with the Maastricht Treaty of 1992, has remained blurry, at least from a legal point of view⁴¹. Nor did this change in 1997, when the Treaty of Amsterdam – in view of the then foreseeable accession of the eastern Member States – introduced Article 7 of the TEU, which for the first time set out a mechanism of legal sanctions in case of a breach of the “values”⁴².

The uncertainty surrounding the actual purview of the “values” listed in Article 2 of the TEU is further exacerbated by the fact that the “values” can contradict each other⁴³, for instance, in terms of the relationship between democracy and the Rule of Law, when democratically elected governments with an unquestionable political majority in parliament⁴⁴, and in the case of Hungary even a majority that allows for constitutional amendments, abolish or erode basic principles which, according to the other Member States and, incidentally, also according to the political minorities that have been overruled in the Member States concerned, are part of the inviolable core area of the Rule of Law. How does European law solve such legal contradictions, which have at their core deeper socio-political antagonisms, both within the Member State concerned and between different Member States and the societies they represent? Does prevailing European law perhaps assume a societal homogeneity among the Member States, which might have provided a basis for shared legal values in 1992, but which, since the accession of the eastern Member States, whose societies have been shaped by the completely different experiences and influences of the period

³⁹ Article 2 of the Treaty on European Union, published in the Official Journal of the European Union, 26.10.2012, C 326/17.

⁴⁰ C. Möllers, L. Schneider, *Demokratisierung...*, pp. 35, 38 *et seqq.*

⁴¹ *Ibidem*, pp. 124 *et seqq.*

⁴² *Ibidem*, pp. 39, 45.

⁴³ *Ibidem*, p. 126.

⁴⁴ Cf. P. H. Huber, *Europäische Verfassungs- und Rechtsstaatlichkeit in Bedrängnis. Zur Entwicklung der Verfassungsgerichtsbarkeit in Europa*, “Der Staat” 2017, issue 56, pp. 397-399 on the topic of Hungary, Poland, Russia and Turkey justifying breaches of the principles of the rule of law with the notion of the “democratic will of the majority” and even denying the existence of such breaches based on the will of the majority.

of totalitarianism, no longer exists?⁴⁵ Whilst these questions, going far beyond the standards of the “Rechtsstaat” principle, cannot be answered as part of this juristic discussion, they must be taken into account when formulating the theoretical definition of the principle of the Rule of Law which is binding for all EU Member States. Below the highest, abstract, non-justiciable level of the Rule of Law principle as a common “value” of all EU Member States, if the *social* consensus on particular versions of the Rule of Law principle is lost, or possibly did not really exist at the moment of accession, the *juridical* question of the actual purview of the Rule of Law principle, to which all Member States are bound in law through their accession to the TEU, becomes more urgent. In their criticism of discussions so far on the applicability to Hungary and Poland of the sanction mechanisms named in Article 7 of the TEU, Christoph Möller and Linda Schneider quite rightly point out that “far too little attention has been paid” to the even more important question of the extent to which the “values” named in Article 2 of the TEU are legally binding⁴⁶.

This is even more important because direct reference to concrete national versions of the principle of “Rechtsstaat” in the different Member States of the EU does not take the discussion further, given that there are fundamental differences – as we have seen – even between the English model of the “Rule of Law”, the French principle of the “État de droit” and the German model of the “Rechtsstaat”, due to different national historical experiences and types of constitution⁴⁷. How can one criticise the – politically regrettable – interference in the work of the Polish constitutional court from a juristic point of view and, in line with the Venice Commission, declare it a breach of European legal “standards”, when in some of the other Member States, for instance the UK, there is no constitutional jurisdiction whatsoever⁴⁸ and in others, like France, it is only very limited – compared with Germany – and affords no opportunity of judicial review of the constitutionality of prevailing law?⁴⁹ In European law, the only “standard” which can be applied to interpret and enforce the “values” contained in Article 2 of the TEU is the consensus on the “values” which prevailed amongst the Member States of the EU at the moment when the currently applicable Lisbon Treaty was ratified. However, even the rulings made to date by the European Court of Justice are only of limited use for identification of this consensus with regard to the concept of the Rule of Law, since the Court of Justice has limited jurisdiction over the application of European law

⁴⁵ The statement made in Article 2 second sentence of the TEU that the “values are common to the Member States”, according to C. Möllers, L. Schneider, *Demokratisierung...*, p. 126 “is first and foremost a factual claim which in 2018 appears rather doubtful”.

⁴⁶ C. Möllers, L. Schneider, *Demokratisierung...*, p. 125 fn. 3.

⁴⁷ See also footnote 26.

⁴⁸ D. N. MacCormick, *Rechtsstaat...*, p. 67.

⁴⁹ Therefore, there is also disagreement in the field of jurisprudence, as to whether the existence of constitutional jurisdiction is an indispensable component of a state’s rule of law, see S. Martini, *Pluralität...*, p. 210, footnote 118.

in the individual Member States and, in fact, rarely refers to the Rule of Law⁵⁰. In accordance with the procedures of Article 7 of the TEU, which is the only provision in the treaties of the union that includes the internal affairs of the Member States, the Court of Justice is limited by Article 19 of the TEU and Article 269 of the TEU to verifying the formal preconditions for the initiation of proceedings.⁵¹ According to Article 7 para. 2 of the TEU, the identification of a “serious and persistent breach by a Member State of the values referred to in Article 2” does not, in fact, lie within the jurisdiction of the Court of Justice,⁵² but falls under the competence of the European Council, which comprises the heads of state or government, and the European Parliament, both of which are political authorities.

In 1990, in an attempt to mitigate this lack of an independent authority, separate from the political institutions of the European Union, for providing legal interpretation of the “values” referred to in Article 2 of the TEU, the Committee of Ministers of the Council of Europe established the European Commission for Democracy through Law. By the standards of the Rule of Law, this solution is not particularly satisfactory, because the Commission, which is generally referred to as the “Venice Commission” because it meets in Venice (Italy), is not, in fact, an institution of the European Union, but “an advisory body of the Council of Europe, composed of independent experts in the field of constitutional law” from over 60 Member States of the Council of Europe as well as a number of non-European states. In 2016 the “Venice Commission” published a “Rule of Law Checklist” which was based on the “common features for the Rule of Law, Rechtsstaat and État de droit”⁵³. The opinions on the reforms of the Polish constitutional court and justice system that formed the legal foundation for the proceedings initiated by the European Commission and the European Parliament on the basis of Article 7 of the TEU were also compiled by the “Venice Commission”⁵⁴. The original impetus for the founding of the “Venice Commission” in 1990 was to create an advisory body to assist the central and eastern European states in drafting their constitutions after the fall of the Iron Curtain. The key role which the “Venice Commission” is currently playing, factually if not in terms of law, in initiating the proceedings of the European Commission and the European Parliament against Poland and Hungary on the basis of Article 7 of the TEU, has no legal basis in the Union Treaties.

However, even from the point of view of content, it is not always clear, when reading the opinions compiled by international experts, what they are basing their

⁵⁰ R. Hofmann, *Rechtsstaatsprinzip...*, pp. 323-336.

⁵¹ C. Möllers, L. Schneider, *Demokratiesicherung...*, p. 47.

⁵² *Ibidem*, pp. 47, 89 *et seqq.*

⁵³ European (Venice) Commission, Rule of Law, CDL-AD(2016)007.

⁵⁴ Cf. European (Venice), Opinion No. 833/2015, CDL-AD(2016)001; European (Venice) Commission, Poland. Opinion on the Act of 15 January 2016, CDL-AD(2016)012; European (Venice) Commission, Opinion No. 860/2016, CDL-AD(2016)026; European (Venice) Commission, Poland. Opinion No. 904/2017, CDL-AD(2017)031.

statements on when they claim to have used “European standards”⁵⁵ as a benchmark against which to judge national laws. This also applies to the grave accusation of endangering the independence of the courts, which is at the core of the rule-of-law infringement proceedings taken against Poland. There may, indeed, be substantial arguments, from the point of view of constitutional politics, against the planned politicisation of the National Council of the Judiciary (NCJ) in Poland, which is responsible, in particular, for the appointment of new judges. In future, the judicial members of the NCJ will not be “elected by their peers, but receive their mandates from Parliament”, which will mean that all members of the NCJ will be appointed either by the Polish Parliament or by the elected President⁵⁶. Nevertheless, this will not constitute a failure to apply “European standards”, resulting in a breach of the “Rule of Law” under Article 2 of the TEU, given that a diverse range of processes for appointing judges exists in other Member States. In English law, the judges of the House of Lords, which is instrumental in the evolution of common law, are still selected by the Lord Chancellor and appointed by the Queen at the request of the Prime Minister, who bases this request upon the Lord Chancellor’s recommendation⁵⁷. Prevailing German law allows for three very different basic models of appointing professional judges at federal and state level, including the model where judges are appointed and promoted by ministers of justice and the entire elected government respectively. Incidentally, this model is considered by its advocates in Germany to be “not only constitutionally unproblematic in terms of the democratic legitimisation of the judges thus appointed, but also preferable from the point of view of legal policy”⁵⁸. Moreover, the European Court of Human Rights explicitly stated in various judgements in the 1990s that the fact that judges were selected and appointed by the government or parliament of certain Member States of the Council of Europe alone could not justify the misgivings with regard to the judges’ independence⁵⁹.

A completely different case, however, is the proposed review of court judgments, dating back as far as twenty years, with simple reference to their lack of “social justice”, which forms part of the Polish justice reforms⁶⁰. Such or similar provisions, which characteristically existed “in many former communist coun-

⁵⁵ European (Venice) Commission, Poland. Opinion No. 904/2017, CDL-AD(2017)031, p. 7.

⁵⁶ *Ibidem*.

⁵⁷ G. Sydow, *Parlamentssuprematie und Rule of Law. Britische Verfassungsreformen im Spannungsverhältnis von Westminster Parliament, Common-Law-Gerichten und europäischen Einflüssen*, Tübingen 2005, pp. 41 et seqq.

⁵⁸ F. Wittreck, *Die Verwaltung der Dritten Gewalt*, Tübingen 2006, pp. 126-128.

⁵⁹ F. L. Müller, *Richterliche Unabhängigkeit und Unparteilichkeit nach Art. 6 EMRK. Anforderungen der Europäischen Menschenrechtskonvention und spezifische Probleme in den östlichen Europaratsstaaten*, Berlin 2015, pp. 41 et seqq, 44 et seqq.

⁶⁰ European (Venice) Commission, Poland. Opinion No. 904/2017, CDL-AD(2017)031, pp. 12-13.

tries", as the Venice Commission rightly emphasizes⁶¹, would be a clear violation of the "Rule of Law", even if the judgments were indeed unjust. Here it is not only the German principle of "Rechtsstaat" that follows the principle of *res iudicata*, which dates right back to Roman law and is one of the core elements of the guarantee of legal certainty. In so far as it concerns the current term of office of acting judges, the reduction of the retirement age of the judges would also be a violation of the "Rule of Law", not only according to the German constitution⁶². The same would apply, to an even greater degree, if, after the justice reform, the President of Poland is given the power to grant an extension to a Supreme Court judge's term of office, beyond the legal retirement age, at the request of the judge in question⁶³. The threat to the independence of the judges is very obvious in this case, since the discretion granted to the president means that judges will cease to be free in their dispensation of justice even *prior to* a potential later application for an extension of their term of office. This applies notwithstanding any national peculiarities of the Member States' justice systems and is thus one of the core areas of the "Rule of Law" that can be substantiated as a "value" in the sense of Article 2 first sentence of the TEU.

However, in clarifying the concept of the Rule of Law and the "values" pursuant to Article 2 of the TEU, something else is even more important. Let me close with a famous statement by the former German constitutional judge Ernst-Wolfgang Böckenförde, which has entered German constitutional doctrine as the "Böckenförde dilemma". It reminds all of us, in Poland, Germany and the US, of something even more important than our constitutions. Böckenförde said about the democratic, law-based state: "The freedom-oriented secularised state lives by prerequisites which it cannot guarantee itself"⁶⁴. In other words, no so called "eternal guarantee" in the German constitution, no Venice Commission, and no procedure under Article 7 of Treaty on European Union can really avoid the destruction of the Rule of Law and democracy. Thus it is up to all of us to guarantee the conditions for democracy and the Rule of Law in our countries.

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⁶¹ *Ibidem*, p. 12.

⁶² *Ibidem*, p. 11.

⁶³ *Ibidem*, p. 12.

⁶⁴ E. W. Böckenförde, *Staat, Gesellschaft, Freiheit*, Frankfurt am Main 1976, p. 60.

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Summary

The Rule of Law, understood in its most general and original meaning as an absence of arbitrariness in state power, is not merely one legal principle amongst many, but has been the core of law itself in political philosophy since classical Antiquity.

Although the Rule of Law has been given substance to in various different ways since the modern era, the Member States of the European Union (EU) have contractually agreed in Article 2 first sentence of the Treaty on European Union (TEU) on a Rule of Law that is an expression of the community of values within the EU. This is now not just politically but legally binding for all EU Member States, regardless of changing political majorities or national legislative acts within the Member States.

However, with the recent initiation of proceedings against Poland and Hungary, to investigate the potential “risk of serious breach” of EU values according to Article 7 para. 1 of the TEU, it has become very clear that there is no longer political consensus

amongst the governments of the EU Member States with regard to how the principle of the Rule of Law should be given substance to in practice.

It will thus be the task of jurisprudence, not of politics, to ascertain how far-reaching the legal obligation with regard to the "value" of the "Rule of Law" on the basis of Article 2 of the TEU is and where – beyond the scope of European Law – the political prerogative for Member States to act in accordance with their own national circumstances begins.

KEY WORDS

Rule of Law, Rechtsstaat, arbitrariness, judicial independence, Lisbon Treaty, "Venice Commission"

Streszczenie

Praworządność, rozumiana w swoim najbardziej ogólnym i oryginalnym znaczeniu jako brak arbitralności władzy państwowej, nie jest tylko jedną z wielu zasad prawnych, ale od czasów starożytnych stanowi rdzeń prawa w filozofii politycznej.

Chociaż w czasach nowożytnych praworządności nadawano różne definicje, to państwa członkowskie Unii Europejskiej (UE) uzgodniły w art. 2 zdaniu pierwszym Traktatu o Unii Europejskiej (TUE), że praworządność jest wyrazem wspólnoty wartości w Unii Europejskiej. To uzgodnienie ma nie tylko znaczenie polityczne, ale także jest prawnie wiążące dla wszystkich państw członkowskich UE, niezależnie od zmieniających się większości politycznych, czy krajowych aktów ustawodawczych w samych państwach członkowskich.

Jednak wraz z niedawnym wszczęciem postępowań przeciwko Polsce i Węgrom w celu zbadania potencjalnego „ryzyka poważnego naruszenia” wartości UE zgodnie z art. 7 ust. 1 TUE, stało się jasne, że nie ma już politycznego konsensusu między rządami państw członkowskich UE w odniesieniu do tego, w jaki sposób zasada państwa prawa powinna być rozumiana i stosowana w praktyce.

Zadaniem orzecznictwa, a nie polityków, będzie zatem ustalenie, jak daleko idący jest obowiązek prawny w odniesieniu do praworządności na podstawie art. 2 TUE i gdzie – poza zakresem prawa europejskiego – zaczyna się prerogatywa polityczna państw członkowskich do działania zgodnie ze specyficznymi okolicznościami, które w nich zachodzą.

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praworządność, państwo prawa, arbitralność, niezawisłość sędziowska, Traktat Lizboński, „Komisja Wenecka”