***Przegląd Europejski*, ISSN: 1641-2478**
vol. 2023, no. 2

DOI: https://doi.org/10.31338/1641-2478pe.2.23.1

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

Danuta Kabat-Rudnicka, *Krakow University of Economics (Cracow, Poland)*
E-mail: kabatd@tlen.pl
ORCID ID: 0000-0003-4776-4481

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*.

[1] This publication has been co-financed by a subsidy granted to the Cracow University of Economics, Program POTENCJAŁ nr 076/EEP/2022/POT.

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

public good, and the containment of "the guardians of the law to serve the interests of the law", i.e. the interest of the whole community (Sellers 2014: p. 4–6).

Rule of law vs. *Rechtsstaat* vs. *état de droit*

The notion of the rule of law was first introduced into English law by W.E. Hearn in 1867 (Gosalbo-Bono 2010: p. 253) and later developed by A.V. Dicey. According to Dicey's understanding of the term, nobody could be penalised except where a clear violation of the law that has been established before the ordinary courts. This ensured "equality before the law or the equal subjection of all classes to the ordinary law of the land administered by ordinary law courts, in other words, nobody was above the law and there were no administrative courts" (Dicey 1982[1889]; Arndt 1957; qtd. in: Gosalbo-Bono 2010: p. 254)."The rights of the individual were secured not by guarantees set down in a formal document [...] but by the ordinary remedies of private law available against those who unlawfully interfered with his [or her] liberty, regardless of whether they were private citizens or public officials" (Gosalbo-Bono 2010: p. 254). Also, "according to Dicey, the rule of law was linked to another fundamental constitutional principle, [namely] the principle of parliamentary sovereignty" (Gosalbo-Bono 2010: p. 254). In short, Dicey regarded the rule of law as a distinctive feature of the English state system, based on three principles: the sovereignty of parliament, universal submission to the laws of the land and the legislative role of the judiciary (Studia i Analizy... 2019: p. 97).

Thus, it can be stated that the guiding principles of the English rule of law include the following: equality before the law, normative synergy between parliament and judiciary, where the resolution of cases depends on decisions resulting from two sources, which – if not *de iure* then *de facto* – are equally sovereign, i.e. parliamentary sovereignty and common law remaining in the hands of common courts, and the protection of individual rights (Zolo 2007, p. 7-9). Today the rule of law, similarly to *Rechtsstaat*, "also includes such human rights as the right to life, [...] liberty and security, the right to a fair trial, the right to respect for private and family life, the freedom of thought, conscience and religion, the freedom of expression, the freedom of assembly and association, [...] the protection of property, etc." (von der Pfordten 2014: p. 24). However, the English rule of law differs from the French and German notions in the fact that in the latter cases judges are officials of the state who must apply state law and individual rights are those established by parliament (Gosalbo-Bono 2010: p. 256).

The term *Rechtsstaat,* first coined in Germany in 1798, is a combination of two words: *law* and *state*, with the emphasis placed more on the state than on the judicial process (Gosalbo-Bono 2010: p. 241). However, this combination of law and state may equally well point to the centrality of law, where the legitimacy of the state rests on strictly legal elements (Mockle 1994: p. 833). According to Ricardo Gosalbo-Bono, *Rechtsstaat*, as defined by German jurists (G. Jellinek, O. Mayer, and R. von Jhering), "was based on three elements: the theory of the state's self-limitation, the theory of subjective rights, and the theory of the primacy of the law", i.e. the law was supreme and constituted "a system of impersonal,

abstract, general, and non-retroactive rules governed by the principle of legality" (Gosalbo-Bono 2010: p. 242–243). Today as a formal and substantive concept *Rechtsstaat* has evolved into a constitutional principle, which informs all the state's activities (Gosalbo-Bono 2010: p. 244–245). This fundamental principle, which is enshrined in the German constitution (germ. *Grundgestzt*, Basic Law (BL))[7], includes such organisational principles as the separation of powers, a constitutional review, fair procedure, the principles of legality and legal certainty, the principle of proportionality (Gosalbo-Bono 2010: p. 245); as well as the principles of predictability and the reservation and supremacy of the law – principles that are not only essential to the functioning of legislature, but also to the functioning of the administration and judiciary (Weck 2017: p. 187).

Formally, *Rechtsstaat* protects and ensures freedom of action via the mechanism of restraining power, by establishing particular formal conditions for statutes, by the principle of the legality of public administration and justice, the principle of legislative reservation, the principle of public accountability, and by the existence of an independent judicial authority. However, the most important element of *Rechtsstaat* "is its transformation from a merely formal concept focusing on organisational and procedural safeguards into a concept based on a substantive ideal of justice" (Tiedemann 2014: p. 174). As regards its substantive elements, the very first article of the BL includes a reference to one of the core constitutional values, which is human dignity[8]. *Rechtsstaat* encompasses the legally binding exercise of state authority in relation to individual freedoms substantiated by fundamental rights and general constitutional principles – substantive legal obligations supplemented by procedural guarantees (Weck 2017: p. 187).

Rechtsstaat, in its form characteristic of German constitutionalism, does not seem to be synonymous with the rule of law. The rule of law focuses on procedural guarantees, whereas *Rechtsstaat* emphasizes the substantive legal obligations of the state; what is more, the predictability of court decisions, in the case of the rule of law, is not guaranteed by statute law but rather by principles developed in judicial practice (Simon 2018: p. 603). And unlike continental legal systems (also referred to as civil law systems) that work with laws (parliament passes laws, judges interpret them and apply them to individual cases) and in which the work of judges is largely interpretive, in common law systems judges think in case groups, they argue for or against the application of earlier determined precedents and in doing so, they are less concerned with a logical, complete system and more with individual cases, i.e. with the rules and principles which can be applied to the problem at hand, and in this way the judge makes law through his or her own judgments – precedents (Simon 2018: p. 603–604).

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7 In Article 28 par. 1 of *Grundgesetz* we can read: „Die verfassungsmäßige Ordnung in den Ländern muß den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaates im Sinne dieses Grundgesetzes entsprechen." (Deutscher Bundestag WWW). This sentence can be translated: "The constitutional order in the Länder must conform to the principles of a republican, democratic and social state governed by the rule of law within the meaning of this Basic Law." (author's translation).

8 In Article 1 par. 1 of *Grundgesetz* we can read: „Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt." (Deutscher Bundestag WWW). This sentence can be translated: „Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." (author's translation).

At the end of the XIX century *Rechtsstaat* was "exported" to the rest of the continent, giving birth, *inter alia*, to the French principle of *état de droit*.

In revolutionary France, the idea of the rule of law was originally associated with the notion of constitutional government introduced by Montesquieu in his *De l'esprit des lois* that was later enshrined in the *Declaration of the Rights of Man and the Citizen*, which equated constitutional government with two elements of the rule of law, namely the principle of the separation of powers and the protection of human rights (Gosalbo-Bono 2010: p. 246). While the term itself was a translation of the German *Rechtsstaat,* its use was limited to public law scholars, and it was only with the establishment of the Constitutional Council (fr. *Conseil Constitutionnel,* CC) and the extension of the mechanism of judicial review to cover legislation that became a part of legal and political discourse (Simon 2018: p. 604–605). *État de droit* requires that the freedom of action of all state organs be limited by the norms of higher law, compliance with which is guaranteed by the possibility of referral to a judge. This subordination of the state to the law is the main objective along with ensuring that such subordination is controlled by an independent authority (Mockle 1994: p. 833). Thus, *état de droit* is associated with the principles of legality and judicial (constitutional) review.

It should be pointed out that the term *état de droit* is almost completely absent from the content of legal norms, and does not appear in the constitution either. Hence, positive law contains no definition of *état de droit* (Derosier 2016: p. 2–3). However, even if positive law is silent and doctrinal definitions differ, it is still possible to identify those core principles indispensable to a legal order for it to be qualified as *état de droit*. These principles include the following: the placement of legal limits on all public activities, compliance with the law, a guarantee of fundamental rights, and the separation (or, at least, division) of powers, in particular the existence of independent judicial review (Derosier 2016: p. 8).[9]

Referring to *état de droit*, it is worth recalling Valery Giscard d'Estaing's speech to the CC in 1977, in which he declared: "when each authority, from the most modest to the highest, acts under the control of a judge who ensures that this authority respects the entirety of formal and substantive rules to which it is subjected, *état de droit* emerges" (qtd. in: Gosalbo-Bono 2010: p. 250). As a consequence, the Fifth Republic maintained two fundamental elements of *état de droit*, namely the review of statutory law by the CC and the limitation of the executive by courts along constitutional lines (Gosalbo-Bono: 2010: p. 250–251). It should be added that in modern French public law doctrine *état de droit* has a twofold meaning, namely the state acts only legally, i.e. it acts by means of the law, and the state is subordinated to the law (Laquièze 2007: p. 261).

As has already been mentioned, the term *état de droit* is a translation of the term *Rechsstaat*. However, these terms are not synonymous. The closest term in French to *Rechtsstaat* is *état legal*, and although both terms refer to laws established by legislators, only *état legal* requires that legislators be democratically elected (Rosenfeld 2005: p. 208). Whilst *état legal* ensures "the legislative supremacy of parliament, *état de droit*

[9] Nonetheless, as this author noted, we can find arguments against such an approach as the one mentioned above.

is designed to protect the rights and liberties of the individual against the arbitrary action of a parliamentary majority" (Gosalbo-Bono 2010: p. 249–250). And by defining parliamentary supremacy as unlimited power in the exercising of legislative functions, it becomes incompatible with *état de droit*, which assumes a constitutional review of laws and the supremacy of constitutional law (Mockle 1994: p. 842). Moreover, while in the case of *état legal* respect for the hierarchy of norms rests on the principle of legality, in the case of *état de droit* it rests on the principle of constitutionality. That is why the constitution becomes the central text, which distributes normative powers under the supervision of a constitutional judge and, thus, prevents the legislator from arbitrarily extending or limiting its powers (Laquièze 2007: p. 278).

Formal and substantive approach to the rule of law

The concept of the rule of law is commonly assigned two meanings: (1) narrow, weak, or formal (also referred to as "thin"), and (2) broader, strong, or substantive (also referred to as material and "thick"). The former stands for any legal system, in which public authority is conferred by the law and exercised in the forms and by means of the procedures prescribed by the law, whereas the latter applies to those systems, in which institutions and bodies of public authority are also subordinate to the law in terms of the content of their decisions. Hence, it indicates a legal and political system, in which all power (including legislative power) is limited by substantive principles usually enshrined in the constitution, such as the separation of powers and fundamental rights (Ferrajoli 2007: p. 323).

Moreover, these two meanings correspond to two normative models:

1) the earlier positivist model of the legal state that emerged together with the modern state and the principle of legality as a criterion for recognising the existence of law;
2) the later positivist model of the constitutional state resulting from the European-wide dissemination of constitutional charters, which specified the criteria for determining the validity of law and provided for a constitutional review of ordinary legislation by a Constitutional Court (Ferrajoli 2007: p. 323).

As regards the formal aspects of the rule of law, it comes down to guarantees of consistent and correct law-making and application of the law, including the following: maintenance of a system of sources of law, a prohibition of retroaction, compliance with the requirements of proper legislation, the promulgation of laws, legality of the actions of the public authorities, respect for a system of checks and balances, guarantees of the right to a fair trial, etc. On the other hand, the substantive (material) side of such order boils down to the following: respect for human dignity, fundamental rights and the principle of proportionality (Studia i Analizy... 2019: p. 100)[10]. It should be said that theories emphasising formal aspects point out the instrumental limitations placed on the exercise of state power. They tend to be minimalist, positivist and are often referred to as "thin"

[10] More on formal and substantive (material) elements of the rule of law see in Werner Schroeder's publication (Schroeder 2021: p. 120-123).

theories as opposed to "thick" theories that include substantive concepts of justice and understand the rule of law more broadly – as a set of ideals associated with human rights protection, specific forms of organised government or specific economic arrangements (Chesterman 2008: p. 340).

Since formal concepts of the rule of law refer to the way the law is promulgated, the clarity of a given norm, and the time dimension of that norm, they do not make judgments about its content and, as a consequence, they are not interested in whether the law is good or bad (Craig 1997: p. 468; Tamanaha 2004: p. 91). They require that the exercise of power, with limited exceptions, be subject of judicial review to ensure that the exercising of such power was permitted by law – an aspect of the rule of law also known as the principle of legality (Jacobs 2006: p. 7). And while formal theories are focused on the proper sources and forms of legality, substantive theories include requirements regarding the content of the law, namely, that it should be compatible with justice or moral principles (Tamanaha 2004: p. 92).

Rule of law in the supranational context

The term *rule of law* can already be found in the English version of the Treaty of Rome, but it takes on a different meaning, namely that of a legal norm (fr. *règle de droit*, germ. *Rechtsnorm*, it. *regola di diritto*)[11]. The rule of law in the meaning referred to in this article was enshrined in the Treaty on European Union (Maastricht[12] and then Amsterdam[13]). Likewise, the Treaty of Nice includes a reference to the principle of the rule of law, but neither the numbering nor the wording of Article 6 TEU (Amsterdam) involved any major change. However, a significant change occurs with the Treaty of Lisbon, which deems the rule of law to be a value. The importance of the rule of law was manifested in sanctions, which were introduced in the Amsterdam Treaty for violations of such principles as the rule of law. Hence, in Article 7(2) TEU we can find a reference to a serious and persistent breach of principles laid down in Article 6(1) TEU.

Since the rule of law is referred to as a principle at one time and as a value at another, the question arises of what, if any, is the difference between these two concepts? According to Maria Fernandez Esteban, legal principles have a more defined structure and thus are better suited to setting legal rules by way of adjudication (see: Pech 2010: p. 366). On the other hand, according to Armin von Bogdandy, although the principles set out in

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11 In Article 173 of the Treaty establishing the European Economic Community we can read: "The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers." (TEEC 1957: art. 173).

12 The reference to the rule of law can be found in the preamble to the TEU: "CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law." (TEU 1992).

13 In Article 6(1) TEU we can read: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." (TEU 1997).

Article 2 TEU are referred to as values (fundamental ethical convictions), they should be understood as principles (legal norms), because since the values of Article 2 TEU were agreed pursuant to the procedure specified in Article 48 TEU and produce legal effects (e.g. articles 3(1), 7, 49 TEU), they constitute legal norms, and because they are superior and constitutive, they constitute founding principles (von Bogdandy 2010: p. 22). Also par. 1 of Article 21 TEU on the EU's external actions refers to the rule of law as a principle[14]. Moreover, values, as far as they are written in legal texts (Article 2 TEU) refer to doctrinal principles, which guide decision-makers in their structuring of the legal order. They are understood as legal norms that do not define specific rights or obligations but rather are general in nature and require further specification by the legislature, executive and judiciary; and they can be made operable through the adoption of more detailed legal rules (Schroeder 2021: p. 111).

Not only would it be in vain to seek a definition of the rule of law in the above treaties, but it would be an equally fruitless endeavour to find the same, in principle, at the domestic (national) level. Hence, the task of defining this concept has fallen on the Court of Justice. The first attempt was made by the Court in the *Les Verts* ruling. It was the Advocate General (AG) Mancini, who equated this concept with judicial protection: "the obligation to observe the law takes precedence over the strict terms of the written law. Whenever required in the interests of judicial protection, the Court is prepared to correct or complete rules which limit its powers in the name of the principle which defines its mission." (Opinion… 1985: p. 1350). The Court recognised "the right to judicial protection as a general principle of law", which must be guaranteed by national law.[15] When referring to the rule of law, the Court also invoked the principle of legality.[16]

According to Laurent Pech, the Court's initial understanding of this very notion can be described as legalistic and procedural, as it is related to the principles of legality, judicial protection and judicial review. However, this formal ("thin") understanding of the rule of law can be supplemented by substantive ("thick") components by referring to the general principle of the protection of fundamental rights (Pech 2010: p. 372) as exemplified by the *UPA* ruling.[17] However, since a distinction is made in Article 2 TEU between the rule of law

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[14] "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." (TEU 2016: art. 21, par. 1).

[15] See Case 222/86, where is written: "the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right. As the Court held […] that requirement reflects a general principle of Community law which underlies the constitutional traditions common to the Member States." (Judgment of the Court 1987: par. 14).

[16] See Case C-496/99 P, where we can read: "in a community governed by the rule of law, adherence to legality must be properly ensured" (Judgment of the Court 2004: par. 63).

[17] Case C-50/00 P, where we can read "The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order." (Judgment of the Court 2002: par. 38–39).

and respect for human rights, a narrow understanding of this very concept is equally feasible (von Bogdandy, Ioannidis 2014: p. 62–63). We can therefore speak of a supranational rule of law, which seems to be the most important principle (often referred to as a constitutional principle) promoting the unity of EU law and political integration (Gosalbo-Bono 2010: p. 260). Furthermore, the ability of independent courts to review the decisions of public authorities is key to the EU's understanding of the rule of law (Gosalbo-Bono 2010: p. 262) as exemplified in the *Reynolds Tobacco Holdings* ruling.[18]

Mention should also be made of the 2014 Communication, in which the European Commission identified six key principles constituting the rule of law (European Commission 2014: p. 4) along with the Regulation of the European Parliament and Council, which includes a definition of the rule of law (Regulation 2020/2092). In article 2 of this Regulation we can read that the rule of law "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, provided 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 2020/2092: art. 2, par.(a)).

The rule of law assumes as a necessary and indispensable component of justice and effective legal protection provided by an independent judiciary. Hence, the independence of the courts is a key element of the rule of law (Studia i Analizy... 2019: p. 34). And while the structure, organisation and procedures of the judiciary fall within the competence of the Member States, national laws must respect the principles resulting from the rule of law with regard to independent judiciary (Studia i Analizy... 2019: p. 34). Democracy, the rule of law, and human rights are not only co-constitutive, but also mutually complementary, as none of these values can be realised without the others (Studia i Analizy... 2019: p. 35). Moreover, to the extent specified in Article 2 TEU, there is no discretion on the part of the Member States with regard to national solutions that deviate from these values (Studia i Analizy... 2019: p. 43). Hence, the rule of law becomes a prerequisite for the protection and realisation of all other values.

Recently, the Court's case law in matters relating to the rule of law has acquired exceptional importance. In its ruling on a complaint lodged by the Association of Portuguese Judges – which according to some commentators is the most important ruling since *Les Verts* and the US Supreme Court's decision in *Gitlow vs New York* regarding the principle of effective judicial protection (see: Pech, Platon 2018: p. 1827) – the Court of Justice declared that Article 19 TEU, which gives concrete expression to the value of the rule of law (Article 2 TEU), not only requires the Court to ensure judicial review in the EU

[18] Case C-131/03 P, where we can find: "access to justice is one of the constitutive elements of a Community based on the rule of law and is guaranteed in the legal order based on the Treaty in that the Treaty has established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions." (Judgment of the Court 2006: par. 121).

legal order, but also entrusts this task to national courts and tribunals (Judgment of the Court 2018: par. 32), which in cooperation with the Court, fulfil a duty entrusted to them jointly of ensuring that when interpreting and applying the treaties the law is observed (Judgment of the Court 2018: par. 33). The Member States are therefore obliged, by reason of, *inter alia*, the principle of sincere cooperation set out in Article 4(3) TEU, to ensure the application of, and respect for EU law in their respective territories. In that regard, as provided for by Article 19(1) TEU, the Member States must provide remedies sufficient to ensure effective judicial protection for individual parties in those areas covered by EU law (Judgment of the Court 2018: par. 34).[19]

The Court of Justice does not refer to the rule of law merely as a formal and procedural requirement, but also emphasises its substantive value, stating that a "Union based on the rule of law" means that EU institutions are subject to judicial review of the compatibility of their acts not only with the Treaty, but also "with the general principles of law which include fundamental rights" (European Commission 2014: p. 4, fn. 11; see also: Judgment of the Court 2002: par. 38; Judgment of the Court 2008: par. 316).[20]

The rule of law in the EU, which applies both to EU institutions and the Member States,[21] is a meta-principle because it creates the foundations for an independent judiciary and justifies subjecting public authority to formal and substantive legal restrictions with the aim of guaranteeing the primacy of an individual and his or her protection against the arbitrary and unlawful exercise of public power (Pech 2010: p. 373). And if an individual becomes the main object of a reference and the subject of its protection, then the EU can justifiably be called a polity, or at least a very special kind of international organisation.

Findings, discussion and conclusions

There is no single, recognised definition of the rule of law, but those we have highlight the importance of the following elements: power that is not exercised arbitrarily, the supremacy and independence of the law, a law that applies to all equally and offers equal protection, and which ensures respect for human rights – a definition which emphasises both formal and substantive elements.

As we can also see, alongside the elements they have in common, there are also differences between the *rule of law*, *Rechtsstaat* and *état de droit,* and hence some observations are required. Firstly, there is a difference between the *rule of law*, on the one hand, and *Rechtsstaat* and *état de droit,* on the other, as in the latter cases the concept of the state is placed at their core. Although the state as a source of law is competent to

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19 See also par. 36: "The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law."

20 In par. 316 we can find a reference not to the general principles of law but to the EC treaty: "the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system." (Judgment of the Court 2008: par. 316).

21 "The EEC Treaty established the Court of Justice as the judicial body responsible for ensuring that both the Member States and the Community institutions comply with the law." (Order of the Court 1990: par. 16).

define its own competences, the state can only act within the law. Hence, a state that is a source of law is at the same time a subject of law. And unlike *Rechtsstaat* and *état de droit,* which refer to constitutional statehood, the *rule of law* emphasises equality, i.e. the equal application of the law by state organs and the courts (Kötter, Schuppert 2014: p. 75). Secondly, whereas *Rechtsstaat* and *état de droit* refer to both formal and substantive elements, the *rule of law* tends to emphasise formal ones. However, there is one central material difference regarding the protection of human dignity, namely the English legal tradition "does not explicitly include the protection of human dignity as such, but only some main applications of it" (von der Pfordten 2014: p. 28), e.g. it prohibits torture or slavery, as does the French tradition. Thirdly, in the case of the *rule of law* and *état de droit* the issue of parliamentary supremacy emerges. As Daniel Mockle rightly points out, the primacy of law over ordinary laws does not conform to the traditional legicentric model characteristic of British and French law (Mockle 1994: p. 901), for the essence of the rule of law is the limitation of power. And finally, as Michel Rosenfeld notes, *état de droit,* unlike the *rule of law* or *Rechtsstaat* does not refer to law as a whole, but rather to fundamental rights which have the force of law (Rosenfeld 2001: p. 38).

Table 1 a), b). *Rule of law*, *Rechtsstaat, État de droit* – main features.

a)

	constitution	formal/material	reference to state
Rule of law (English legal tradition)	--	+ / + *	--
Rechtsstaat (German legal tradition)	art. 28(1) BL	+ / +	+
État de droit (French legal tradition)	--	+ / +	+
European Union (common/European legal tradition)	art. 2 TEU**	+ / +	--

* rule of law tends to emphasise formal elements
** treaties as a constitutional charter

b)

	parliamentary supremacy	reference to the whole legal system	reference to human dignity
Rule of law (English legal tradition)	+	+	--
Rechtsstaat (German legal tradition)	--	+	+
État de droit (French legal tradition)	+	-- * (see: Rosenfeld 2001: p. 38)	--
European Union (common/European legal tradition)	--	+	+

Source: author's elaboration

When it comes to the rule of law in the EU, it is important to point out that the definitions devised by EU institutions and the Court of Justice emphasise formal and substantive aspects of this concept. Since the supremacy of parliament does not apply in the EU, a supranational (non-state) entity, the German concept of *Rechtsstaat* comes closest to the understanding of the rule of law applied in the EU. However, *Rechtsstaat* by definition refers to a state, which the EU is not, so we should adopt a more universal approach. Thus, in our narrative we should refer to a broader concept, namely the *rule of law,* which seems to be more appropriate for a supranational, non-state context. As Nicholas Barber rightly notes, in contrast to *Rechtsstaat*, the *rule of law* does not seek to find a link between law and the state, which makes it better suited to supranational law, with its emphasis on predictability and legal certainty. He also makes us aware of another essential feature, namely that the rule of law may shift our attention beyond the limits of state power, because governance by law rather than by men may require more than simply limiting state power (Barber 2003: p. 452).

As has been demonstrated above, similarities and differences can be observed not only between the *rule of law*, *Rechtsstaat,* and *état de droit,* but also between the understanding of these concepts and the notion of the rule of law adopted in the EU. On the one hand, the rule of law as it is understood in the EU emulates to some extent the concept of *Rechtsstaat*. On the other hand, bearing in mind that we are dealing with a non-state (supranational) context, it seems more appropriate to adopt a more universal perspective and refer to the English understanding of this concept, the more so as the EU already shares with it such features as the non-arbitrary exercising of power, equality before the law, and respect for individual rights.

Regardless of what has been said here, the EU, just like the CoE, shapes a common European rule of law based on European traditions (continental and non-continental), which would indicate that the fundamental differences between *Rechtsstaat*, the *rule of law*, and *état de droit* are not so significant, at least at the highest abstract level of general concepts (Mecke 2019: p. 37). And even if these concepts developed along different lines[22] and in different historical circumstances, they are nevertheless still part of our common European legal tradition.

Danuta Kabat-Rudnicka – PhD, D.Sc., lawyer and political scientist, university professor at the Cracow University of Economics. Research interests: federalism, constitutionalism, constitutional and international courts, international organisations, international law, European law, European Union politics, theory of international relations, political systems, international security. Published monographs: *Zasada federalna a integracja ponadnarodowa. Unia Europejska między federalizmem dualistycznym a kooperatywnym* (Kraków 2010), *Konstytucjonalizacja Unii Europejskiej a sądownictwo konstytucyjne – wielopoziomowa współpraca czy rywalizacja?* (Warszawa 2016).

[22] Although the opposite view is also presented in literature: "The twin notions of rule of law, adopted in common law countries, and legal state, prevalent in European and other civil law jurisdictions, appear to have developed along similar lines and to serve essentially the same ends." (Charlow 2014: p. 251).

Danuta Kabat-Rudnicka – doktor habilitowana, prawnik i politolog, profesor nadzwyczajny Uniwersytetu Ekonomicznego w Krakowie. Zainteresowania naukowo-badawcze: federalizm, konstytucjonalizm, sądownictwo konstytucyjne i międzynarodowe, organizacje międzynarodowe, prawo międzynarodowe, prawo europejskie, polityki Unii Europejskiej, międzynarodowe stosunki polityczne, teoria stosunków międzynarodowych, systemy polityczne, bezpieczeństwo międzynarodowe. Opublikowane monografie: *Zasada federalna a integracja ponadnarodowa. Unia Europejska między federalizmem dualistycznym a kooperatywnym* (Kraków 2010), *Konstytucjonalizacja Unii Europejskiej a sądownictwo konstytucyjne – wielopoziomowa współpraca czy rywalizacja?* (Warszawa 2016).

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Received: 28.12.2022. Accepted: 24.08.2023.