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RULE OF LAW IN POLAND – INTEGRATION OR FRAGMENTATION OF COMMON VALUES?

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Abstract

The European Union treats the principle of the rule of law as one of the fundamental values of the European axiological system. The EU as a community of values treats the rule of law as a categorical imperative, which is an obligation for member states, which should respect it in an absolute way. The Treaty as well as the interpretation by EU institutions, particularly the Court of Justice of the EU, refers to this value and the obligation to implement it correctly. The recent Polish experience shows that the principle of the rule of law can be vitiated by governing powers. But this attitude

has caused a reaction of European institutions protecting the principle of the rule of law, which is treated by them as a base for mutual trust.

Keywords: *rule of law, democracy, EU values, infringement procedure, Court of Justice of the EU*

INTRODUCTION

The situation in Poland in period of 2015 to 2019, when the government of United Right with Prawo i Sprawiedliwość (Law and Justice) as the leading party represented by Jarosław Kaczyński, was investigated by the Commission due the breach of the rule of law principle. It was underlined from beginning by independent observers, lawyers and political scientists, that the decision would be crucial for understanding the rule of law as the essence of the European Union, which is not only a political entity but also an axiological international community.

In the Polish political debate, the right-wing sees the EU from the perspective of the so-called theory of intergovernmental cooperation, which reduces the EU to its initial form, i.e. economic cooperation, in order to achieve economic interests of nation states. Only the fraction of Jarosław Gowin, who is Vice Prime Minister in the right-wing government, is an exception in the right-wing coalition. It treats the EU or at least declares that it treats the EU in its proper dimension as a political community. The EU in its current form cannot be reduced to the common economic area. In fact the EU is a political power that has evolved into an axiological community for decades. The canon of values of Europe or, being more specific, EU values become more and more recognized element of actions of EU institutions, member states and people [Kołodziej 2017: 63]. Thanks to this the EU can be found as a real normative power changing international reality. John Richardson outlined the fundamental European values at the beginning of the 21st century. He indicated the following features:

- 1) the rule of law being the basis for social relations;
- 2) the interaction between the democratic process and human rights deep rooted in political decision-making;
- 3) the competitive market economy as the source of increasing prosperity;
- 4) the principle of solidarity among all members of society and the liberty of the individual;
- 5) the principle of sustainable development as well as
- 6) the respect for separate identities and the maintenance of cultural diversity within society (2002: 14).

We can find references to the European system of values in diverse speeches of European politicians as well as in programme documents of European political factions. European People's Party is probably the most significant political power that sees the EU in the axiological context. It defines the EU as a community or union of values, reflected in one legal system. EU law is an independent legal system which significantly affects the understanding and contours of law, legal system and legal norms in all member states [Hamuła, 2014: 120]. However, the texts of treaties, which express the EU system of values and their legal interpretations, are the most important for our consideration. We do not have enough space for a detailed analysis of the evolution of the European Community – from the community of common interests to the axiological community [Florczak & Paczeński 2014: 346]. At this

point, we have to recall Article 2 of the Treaty on European Union (TEU), which clearly defines the EU axiological catalogue. In this article we 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”.

In this paper we would like to present the principle of the rule of law as a pivotal value, considering its meaning for the EU institutions and in general for the European Union itself in the context of the Republic of Poland being accused of breaking that principle. Our analysis is of normative character, however reflecting the structuralism perspective in research of the rule of law [Mentel 2015]. That is why we do not avoid evaluation, referring especially to verdicts and opinions of the Court of Justice of the EU.

1. THE CONCEPT OF THE RULE OF LAW

The normative concept of the rule of law is a result of the lawyers' imagination, which is strictly conducted by the legal system. According to the concept of Brian Tamanaha, the rule of law means that government and citizens are bound by law and limited by law [Tamanaha 2012: 233]. Being asked why people obey the rules, we could say that norms start to be a part of a legal system, then and only then, when they meet strict formal requirements (formal legislation process). According to a strongly normative concept, the law is the source of its normativity. So the relationship between law and action is seen as a relationship of duty. If we regard the norms as the law, it is our duty to follow and obey them [Winczorek, J. 2019].

Due to the concept of Niklas Luhmann, the legal system is a special type of social subsystem responsible for communication between other social systems – a cognitively open but operationally closed system [Winczorek, J. 2019]. Contrarily, Max Weber developed a concept of formal rationality of law, which means the law as a subsystem diverse and abstract. For Weber, rationality is predictability and predictability in the legal sense is clarity and certainty of law [Drozdowicz, Z. 2009: 115-132]. Both great thinkers pointed out the specific role of the rule of law principle in the legal system. However, we may ask whether legal clarity and certainty exhaust the features of the rule of law.

According to the opinions of the great social thinker Émile Durkheim, there is also a social role of law, assuming that the legal system defends socially recognized values. Durkheim, being a liberal in the sense of recognizing the autonomy of the individual, at the same time recognized society as a specific social fact, not reduced to institutions and procedures but based on commonly shared values. Therefore, when we consider the issue of the rule of law, we cannot view this concept only as legal positivists do, reducing the importance of the law only to the legal text itself [Oniszczyk 2012: 810-827].

Undoubtedly, the issue of the rule of law and European legal culture is interesting, but at the same time it is very complex. It should be emphasized that the rule of law has become one of the central concepts of modern legal discourse. The essence of the rule of law is based on two principles: holding power by law and limiting power by law. The authorities carry out their activities by applying laws, and at the same time,

they are bound by these laws. It can be concluded that, in the broadest sense the rule of law means that people are obliged to obey the legal system and should remain under its rule.

There are many definitions of the rule of law principle in jurisprudence, but each of them contains the idea of limiting political power by legal norms. Nevertheless, the most valuable effect of this principle is that it enables the autonomy of the individual (every single person). *Ipsa facto*, we can describe it as a mechanism, process, institution, or norm that supports the equality of all citizens before the law, secures a nonarbitrary form of government, and more generally, prevents the arbitrariness of power.

The idea of the rule of law is the main principle and method of managing the state, which emphasizes the crucial role of the legal system and obeying the law. This major role of law, which reflects common desires and fundamental aspirations should be visualized and effectively enforced by the whole community. It is a kind of advanced method of governance which requires the nation to be governed by institutions of law, not by individuals, who have obtained the mandate of social support in elections. Moreover, the law is not influenced by the will of the individual – it is a universal, stable and precise instrument for representing public authority. To sum up, the rule of law principle is the guardian of democracy and liberalism in the contemporary philosophy of law policy [Sandel 1998: 33-48].

Moreover, the rule of law principle included requirements on how law should be implemented into society but also implies certain qualities of the characteristics and the content of the rules themselves. In particular, legal regulations should be precise and clear, have a general form, be universally applicable and be accessible to everyone. Legal requirements must be also certain enough for people to follow them; they cannot impose excessive cognitive or behavioral requirements on people who should follow them. Law should be relatively stable and include requirements that people may become familiar with before taking action – so legal obligations should not be established retroactively. Furthermore, law should remain internally consistent, i.e. it should provide legal methods of resolving the contradictions that may arise [Morigiwa 2011: 125-138].

2. RULE OF LAW AND DEMOCRACY

The concept of the rule of law is one of the most common ideas in contemporary public debate. It is usually mentioned as one of the basic and inseparable elements of democracy [Walker 1988]. Referring to the Anglo-Saxon tradition in supremacy of law, the rule of law principle is a negation of the arbitrariness and prevents discretionary of the rule of man [Tamanaha 2012: 24]. This should be understood as a replacement of fully arbitrary governments based on the will of the executive power by those in which power is limited by clearly formulated and unchanging legal provisions [Pietrzykowski 2014: 24].

The rule of law principle and democracy are desirable attributes of the contemporary political systems. It may be understood as a concept meeting three conditions: subordinating political power to the legal system, holding political power by the legal system, citizens possessing certain subjective rights. Understanding the concept this way emphasizes equality before the law and the predictability of political and legal systems in democratic countries. Undoubtedly, there is a strict relationship between democracy and the rule of law, based on a certain balanced connection between the

legislative, executive and judicial authorities. Judiciary and governments can lead ideological disputes, but even if they are not divided by ideology, politicians and judges want to expand their institutional power [Marwall, Przeworski 2010: 22-23]. Democracy is essentially based on electoral institutions, governments, and legislatures. The law works through courts, judges and specialized state institutions. Concrete institutions responsible for democracy and the legal system are representing concrete values, which may intersect at some point. When legal institutions claim the right to regulate and organise social interactions, democratic governance may be considered as limited. On the other hand, when parliament claims the sovereign power to legislate any law, the status of judicial institutions become secondary – judges become sole executors of concrete orders or may be considered as political actors [Ferejon, Pasquino 2010: 235-236]. It is clear that the efficient functioning of a legal system requires independent courts and autonomous judges. Relations between democratic and judicial power lead to tensions due its character. That is why constitutional courts were introduced into European legal systems, which contributed to the extension of judicial influence into the sphere of political decisions. In some countries, active constitutional courts have had greater involvement in controlling and disciplining the legislative process. In others, however, changes were required in internal legislative debates. The legislative aspect of constitutional judication requires an abstract and a priori revision of the content of legal statutes and the constitution act. It may give rise to associations of quasi-political control. Essentially the constitutional court must consider and choose from various normative rules governing social behaviour.

In a democracy, when the opposition is weak and the credibility of the legal system and courts is low, the ones in power decide to confront independent courts, when they enjoy broad public support. Then the probability of success is high, and the risk of retaliation is limited. In such circumstances, the institutions of the rule of law are portrayed as something contrary to democracy. This kind of situation took place in Argentina during the presidency of Carlos Saül Menem, who due to high social support, changed the composition of the Supreme Court, appointing politically loyal judges [Marwall, Przeworski 2010: 262]. Such a situation can also currently be observed in Poland, where the ruling party, Law and Justice, implements a policy of subordinating the judiciary to the executive branch, under the guise of reforming the judiciary.

3. RULE OF LAW AS A EU VALUE AND THE CASE OF POLAND

According to fundamental principles of the EU, the rule of law is one of the values, which are pre-conditions of membership, but may also be reviewed by the Commission anytime there is doubt about the failure of a Member State. As stated in Article 2 TEU, 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. Under the rule of law, all public powers always act within the confines set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts.

The evaluation and review process is reflecting the system of EU shared values (EU, 2019a), which had been developed in safeguarding in the last years, and is based on:

- 1) The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European Parliament, the Council and the Commission in Nice in 2000 [Fridrich 2008].
- 2) The fundamental values of the European Union are enshrined in the EU treaties and in the Charter of Fundamental Rights of the EU. The Charter has been legally binding since 2009.
- 3) On 17 July 2019, the European Commission adopted a Communication on the measures it intends to adopt in order to reinforce the implementation of the rule of law within the Union. The most important new procedure is an annual monitoring cycle to review rule of law developments in the member states, resulting in an annual rule of law report.

As stated in these documents, EU values are common to EU countries in a society in which inclusion, tolerance, justice, solidarity and non-discrimination prevail. These values are an integral part of the European way of life. This means, that the member states are obliged to continuously enshrine these values. The problem lays in the missing unified characteristics, benchmarks or the system of evaluation in its implementation.

As FRAME analysis states, the concepts of democracy, the rule of law and fundamental rights may be said to be dynamic if not 'famously elusive' concepts, whose boundaries may remain relatively unclear (FRAME 2014: 3). In the European Treaties, these concepts are usually mentioned together, which at the very least shows their interconnection and interdependence in the context of the EU legal framework. Accordingly, any debate on how to strengthen Member States' compliance with Article 2 TEU should start from the premise that democracy, the rule of law and fundamental rights are mutually reinforcing principles, whose relationship may be described as triangular [EP 2013: 59]. There is, however, some disagreement among stakeholders concerning which of these three values may be considered the most fundamental one. For the European Union Agency for Fundamental Rights, human rights should be considered the overarching concept. For the Commission's DG Justice, the overarching concept would appear to be the rule of law, while other stakeholders may feel that democracy is the glue that binds the three elements together [FRA 2014]. The new Rule of Law Framework established by the European Commission, however, considers the values of Article 2 TEU from the perspective of the rule of law [EC 2014: 3-4].

Different mechanisms and processes exist at EU level to promote, protect and safeguard EU values laid down in Article 2 TEU, in particular, democracy, the rule of law and fundamental rights. These include legally binding mechanisms stated in Article 7 TEU, which allows EU institutions to act in situations where there is 'a clear risk of a serious breach' of EU values by a Member State or where there is a serious and persistent breach of EU values laid down in Article 2 TEU. The legally binding mechanisms for enforcement of the EU values includes also the traditional infringement procedure set out in Articles 258 to 260 TFEU. There are also non-binding or soft law tools, in the form of annual reports prepared by EU institutions covering matters related to Article 2 TEU. In 2014, both the European Commission and Council introduced two new additional mechanisms: the Commission adopted a new Rule of Law Framework (EC 2014) and the Council committed itself to organising a new annual rule of law dialogue between Member States (CoEU 2014), according to which the rule of law should be evaluated as the foundation for proper implementation and it should enshrine EU values.

Developments in some Member States have led to criticism regarding the ability of the EU to act upon serious threats or breaches of EU values by Member States. Relevant examples include the situation of Roma minority rights in France in the summer of 2010, the measures adopted by Viktor Orbán's government in Hungary concerning, for example, the independence of the judiciary, as well as the non-respect for constitutional court judgments in Romania in 2012 [Reding 2013].

Despite the body of EU instruments and processes to uphold values described in Article 2 TEU, serious concerns remain with respect to their effectiveness. The Commission's Rule of Law Framework was activated for the first time in response to the constitutional crisis in Poland [Brunsden 201].

4. POLAND "RULE OF LAW" CRISIS

Poland is the first country against which the European Commission has started proceedings under its Rule of Law Framework. Poland is the first member state of the EU ever to become subject to the measures described in Article 7 of the Treaty on European Union (TEU) and subject to the decisions of the Court of Justice of the EU. The case against the Polish government has started in 2016. The European Commission initiated its Rule of Law Framework proceedings on 13 January 2016. [Niklewicz 2017]. This was done in response to both the assault on Poland's Constitutional Tribunal by the ruling Law and Justice party (Prawo i Sprawiedliwość, PiS) and the new legislation on public service broadcasters, which gave the government political control over the public media (European Commission 2016c). While both areas are equally important, it is the Constitutional Tribunal issue that, understandably, raised the most concerns. In December 2015, the PiS majority in parliament, acting under the pretext of seeking political pluralism in the composition of the Tribunal, passed a new law concerning its functioning and the nomination of its judges (European Commission 2016a). Before being effectively crippled, the Tribunal managed to rule on 9 March 2016 that the law of 22 December 2015 had been unconstitutional (Poland, Constitutional Court 2016). The Polish government under the majority of PiS simply refused to publish that ruling, claiming that it had no legal standing. In the following months, the president and the vice-president of the Tribunal were replaced by lawyers close to PiS, and additional judges were nominated, despite the fact that the previous (unpublished) ruling of the Tribunal had deemed such actions unconstitutional (Poland, Constitutional Court 2016).

The European Commission's initial assessment was that there was the possibility of a threat to the rule of law in Poland (European Commission 2016a). This was validated by the official opinion of the European Commission for Democracy through Law, known as the Venice Commission. In its March 2016 opinion, the Venice Commission stated that PiS's actions endangered not only the rule of law, but also the functioning of Poland's democratic system. It warned that PiS undermined all three basic principles of the CoE: democracy, human rights and the rule of law [European Commission for Democracy Through Law 2016: 24]. The Polish government waved the Venice Commission's opinion aside, as it did the European Commission's initial findings.

As the situation in Poland deteriorated, the European Commission's Rule of Law Framework proceedings continued, albeit at a relatively slow pace. On 1 June 2016, almost half a year after the dialogue with the Polish government started, the Commission adopted its formal opinion, effectively concluding the first stage of the

procedure [European Commission 2016a]. The next stages took place in July and December 2016, and then in July 2017 the Commission issued formal recommendations to the Polish government [European Commission 2016b, 2017]. The third and most recent recommendation covers a relatively new, additional issue: legislative proposals in the area of court organisation that would limit the judicial independence of ordinary courts. In the European Commission's view, this further increases the systemic threat to the rule of law in Poland [European Commission 2017].

While adopting the third Rule of Law recommendation, the European Commission explicitly warned that it was finally ready to launch the sanctions procedure under the framework of Article 7 of the TEU [European Commission 2017].

The Commission has finally brought infringement proceedings against the Republic of Poland under Article 258 TFEU for failing to fulfil its obligations under the combined provisions of the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union, on the grounds that, first, national measures lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) appointed to that court before 3 April 2018 infringe the principle of irremovability of judges, and second, national measures granting the President of the Republic discretion to extend the active mandate of Supreme Court judges upon reaching the lowered retirement age infringe the principle of judicial independence [EC, 2019].

Fundamentally, this case presents the Court with the opportunity to rule, for the first time within the context of a direct action for infringement under Article 258 TFEU, on the compatibility of certain measures taken by a Member State concerning the organisation of its judicial system with the standards set down in the second subparagraph of Article 19(1) TEU, combined with Article 47 of the Charter, for ensuring respect for the rule of law in the Union legal order. (2) It also raises some important questions concerning the material scope of the second subparagraph of Article 19(1) TEU in relation to that of Article 47 of the Charter and the relationship between the procedures of Article 258 TFEU and Article 7 TEU [Tanchev 2019].

The European Commission in its press release stated, that the activation of Article 7 TEU is focused on protection of the rule of law in Europe. With reference to Poland it was pointed out, that judicial reforms in this country led to the political control over the judicial power. "In case of missing courts' independence there arise serious doubts on EU law implementation, from the protection of investments to the mutual recognition of judgements in various areas, as from the disputes on children's care to European Arrest warrant." [EC 2019]

The European Commission had issued the additional (fourth) recommendation related to the rule of law, identifying steps, which Polish authorities may take towards the settlement of the current situation. Once Polish authorities implement recommendations properly, the European Commission after consulting the European Parliament and the Council may reconsider its submission to the Court. The European Commission confirmed that it has the intention to leads a constructive dialogue with Polish authorities to consensually settle the situation.

However, in the Commission's statement, it was expressed, that Polish authorities had adopted more than 13 laws, which influence the whole structure of judicial power in Poland and have serious influence on the Constitutional Court, the Supreme Court, courts of general jurisdiction, the National Judicial Council, the prosecutor's office and the National Judicial School. Its common characteristics is, that legislative

and executive power may systematically interfere with the content, competences, administration and work of justice. “The new disciplinary regime undermines the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control, as required by the Court of Justice of the European Union” [EC 2019].

The Court of Justice of the EU ruled, that, first, by providing that the measure consisting in lowering the retirement age of the judges of the Sąd Najwyższy (Supreme Court, Poland) is to apply to judges in post who were appointed to that court before 3 April 2018 and, secondly, by granting the President of the Republic the discretion to extend the period of judicial activity of judges of that court beyond the newly fixed retirement age, the Republic of Poland has failed to fulfil its obligations under the second subparagraph of Article 19(1) TEU [CJ EU 2019: C619/18].

After this decision, all member states and EU institutions should learn the lesson from the judgement and start preparing modifications both to Article 7 TEU, which includes a sanction mechanism, and to the European Commission’s Rule of Law Framework, so that the EU’s internal defences are strengthened for future needs. It has to be clearly interpreted, that activating Article 7 TEU is called as “nuclear option” due its consequences and as such it should prevent different approach between Member States in this sensitive matter.

The different treatment of Poland and Hungary by the EU was presented by offering a purely legalistic explanation: While “concerns about the situation in Hungary are being addressed by a range of infringement procedures and pre-infringement procedures, and that also the Hungarian justice system has a role to play”, the situation of Poland would allegedly be different to the extent that the main issue is “the fact that binding rulings of the Constitutional Tribunal are currently not respected”, which “is a serious matter in any rule of law-dominated state” [EC 2016]. To prove the equal evaluation of situations in different members states, the Court of Justice should use some applicable quantitative statistic methods [Mentel 2002] to prove beyond doubt the transparency in the procedure and the same treatment with all member states, which threaten the fundamental principle.

CONCLUSION

Strengthening the rule of law in the European Union, has already been on the European Union agenda for several years and it is still a top priority, which was strongly worded in the content of communication from the European Commission to the European Parliament, The European Council and the Council, dated on 3 April of 2019 [EU 2019]. The document says in its first sentence, that the rule of law is one of the founding values of the European Union [TEU 2009: article 2], as well as a reflection of our common identity and common constitutional traditions. We can further read, that under the rule of law, all public powers always act within the constraints set out, by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes, among others, principles such as legality, implying a transparent accountable democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts and effective judicial review [TEU 2009: article 19; CJ EU, 2017] including respect for fundamental rights; separation of powers; and equality before the law. [Commission 2014]

In the judgement of 24 June 2019 on the infringement procedure launched against Poland in October 2018, the Court of Justice of the European Union ruled that Poland has failed to fulfil its obligations under Article 2 of the Treaty of European Union. [CJEU 2019: C-619/18] This judgment confirmed the jurisdiction of the Court of Justice of the EU to check compliance with judicial independence by national courts under Article 19 (1) Treaty of European Union. In the judgment, the court underlines the significance of respecting the common values upon which the European Union is founded – to respect the rule of law principle in order to maintain mutual trust [Bachmaier 2019: 120-126].

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