DOI https://doi.org/10.30525/2592-8813-2024-4-11

THE CONCEPT OF RULE OF LAW IN THE DOCUMENTS OF THE EUROPEAN UNION INSTITUTIONS (THE EUROPEAN PARLIAMENT, THE EUROPEAN COMMISSION AND THE EUROPEAN COUNCIL) AND IN CASE-LAW OF THE CJEU

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Abstract. The article analyzes the concept of the rule of law in European Union law. This concept, known for a long time in treaties, has recently gained importance. It seems that two events were the turning points in the understanding of the rule of law in the EU legal order. The first, strictly legal, was the adoption and entry into force of the Treaty of Lisbon, which established today's Art. 2, which expressly expresses the rule of law as one of the principles on which the European Union is based. The second, this time political, were the results of elections in some Member States, the results of which, in the form of taking power or co-power by groups that were clearly anti-European or highly skeptical about the European Union project, were not liked by the EU left-liberal mainstream, which alternated power in countries such as Austria, and later to an even greater extent Hungary and Poland, was perceived as a threat to the a priori vision of permanently tightening integration.

Key words: European Union, European treaties, rule of law, democracy.

Introduction. In the EU law, in the legal frameworks of the Member States of the Union, as well as in the universal Euro-Atlantic approach to law and legal culture in general, the principal rule of law (in the Anglo-Saxon version) or the state of law (in the continental version) has a well-established meaning and does not entail any divergent interpretations. This primarily concerns the teleological and axiological aspects of the rule of law, or the so-called state under the rule of law. It is indicated that is irrelevant whether this principle is referred to as the rule of law or, as is increasingly the case, lawfulness (P. Marcisz, M. Taborowski, 2017: 101), and the difference is more apparent in Polish than, for example, in English, where the rule of law encompasses both terms.

However, it should be noted that differences in translation do not have to be purely linguistic and may also entail substantive consequences. The distinction between the rule of law and lawfulness is also found in German language. In German, it is made explicit that the two terms are by no means equivalent, and that their denotational scopes overlap, but do not coincide. In view of the above, it is believed that lawfulness is an immanent feature of the rule of law and the state under rule of law, but is not necessarily their inherent feature. These are therefore closely related but certainly not synonymous terms, as is best demonstrated by the difference between *Rechtsstaat* (a state under the rule of law), and *Rechtsstaatlichkeit* (the rule of law) (T. Würtenberger, J.W. Tkaczyński, 2017: 16). This is also the case in French, where terms like the state under the rule of law (*l'État de droit*) and lawfulness (*légalité*) do exist side by side and are by no means used interchangeably. Linguistic differences, as they are found in Polish, German or French, are therefore always relevant, and terminological issues may not be treated as unimportant or secondary, especially since in each case they represent the starting point for interpreting the rules and thus drawing certain conclusions from them. It is highlighted, for example, that the rule of law or the state under the rule of law emphasise the formal dimension, namely the requirement to comply with the law, whereas lawfulness is something more, as it implies respect for the law, indicating the spirit rather than the letter of the law (J. Nowacki, 1977: 65 et al). There is therefore a lack of congruence between the actual rule of law or the state under the rule of law and lawfulness, and this cannot be considered irrelevant. Hence, the assumption, often made under EU law, that the introduction, following German theory of law, of the term “state under the rule

of law" (*Rechtsstaat*) neither adds nor subtracts semantic content from the concept of the rule of law is not true, much less is it merely the result of historical and cultural differences in the process of the development of this principle (namely "the rule of law" in Anglo-Saxon legal system and "the state under the rule of law" in continental and Mennonite legal systems). For these reasons, it is difficult to concur with the view, often articulated in EU law, that concepts such as the rule of law, the state under the rule of law and, importantly, lawfulness, irrespective of linguistic differences, share an obvious and coherent element, while possible other meanings, whether specific to the rule of law or, for example, to the state under the rule of law, are secondary and do not change the essence of the rule of law. This is not the case, as these concepts share a common element, however, each of them also has its own endemic range of interpretation, which is different by definition, emphasising other elements or other components, which constitute the legal construction of Europe that defines so-called democratic constitutionalism. The shared element of each concept, both in terms of their definitions and in terms of the specific directives formulated by the legal norms derived from these concepts, boils down to the assumption that "power must cease to oppress" (*le pouvoir cesse d'opprimer*) (J. Rivero, 1957: 85). The specific way in which it does so, however, is a matter dependent on, among other things, whether the general principle is disguised as the rule of law, state under the rule of law or lawfulness. If this was not the case, using different terms to describe the same situations or conditions would not only be inappropriate, but it would be downright wrong.

In the most general terms, it is pointed out that the rule of law constitutes an essential element of the legal and cultural heritage of the EU Member States, one that has been shaped over the centuries and which ultimately led to the formation of the democratic constitutional state. It is noted in this context that, irrespective of the endemic conditions for the emergence and subsequent formation of the rule of law or state under the rule of law, this principle fulfils the universal functions of: a) limiting the arbitrariness of power; b) establishing clear principles of governance; c) creating an effective system for the protection of individual rights and freedoms; c) ensuring the respect for human dignity. It is added that these universal and indisputable functions of the rule of law are at the same time the building blocks of the legal orders of the states within the European civilisational circle, as well as the supranational entities that have emerged from it, including, above all, the European Union (L. Pech 2009: 55). Respect for the rule of law is thus a confirmation of participation in the Euro-Atlantic political sphere, as well as a condition for the common and coherent functioning of the European Union, and a boundary condition for the participation of any state in the European Union (P. Marsden 2009: 24 et al). This is evidenced by the recognition of the rule of law not only as some axiological basis for the EU, but as a constitutional principle, strongly articulated in the European Union's primary law. In the latter case, it is noted that the rule of law had been, at its starting point, a principle grounded in the constitutional orders of the Member States, but, through its transposition into the Treaties, it was granted the status of an autonomous principle of Community law.

The rule of law, under Art. 2 TEU, is thus a principle derived from the constitutional orders of Member States, but has acquired an inherent meaning under EU law that should be read and interpreted in the context of integration, which should lead to the development of an autonomous principle of the "rule of law in the Community order", one that is not a simple parallelism of the traditional rule of law, as known from the legal orders of Member States (R. Grzeszczak 2007: 159 et al). This implies that the rule of law introduced into the Community legal order, while initially based on the definitions under the particular Member States' legal orders, has become autonomous over time, so that the Union's understanding of the rule of law is not necessarily the same as that established and recognised in the national legal orders. This autonomisation of the rule of law in the EU is correlated with the process of associating it with the principle of democracy, also expressly indicated in Article 2 TEU. This is of particular relevance to EU law, as there is an emerging synergy in the form of the democratic rule of law, which is regarded not only as a pillar of the EU's internal constitutional order, but also

as a hallmark distinguishing that order in international relations (T. Würtenberger, J.W. Tkaczyński, 2017: 17). This principle, notably at the moment of the mobilisation of the European Union associated with the search for a new place in the architecture of a unifying Europe (J. Szymanek 2020: 1–4), is being operationalised by means of so-called second-order principles. As defined by the European Commission, these principles include, among others, "legality, namely a transparent, accountable, democratic and pluralistic legislative process; legal certainty; prohibition of arbitrariness in the executive powers; independent and impartial judiciary; effective judicial review, with respect for fundamental rights; equality before the law" (COM(2014) 158 final: 40). The principle of separation of powers, sometimes unnecessarily specifically referred to as the principle of tripartite separation of powers (B. Szmulik, J. Szymanek 2020: 65 et al), is also included in the constituent elements of the rule of law, fostering the impression that the rule of law or the democratic state under the rule of law encompasses virtually all possible principles, rules and values that have hitherto been considered in isolation under traditional constitutional law (J. Rivero 1957: 85).

The overemphasis placed on the wording of the rule of law principle that is apparent in the EU legal framework brings about two main effects. The first is the increasing replacement of the rule of law and other named principles (such as the principle of democracy, separation of powers, tolerance or pluralism) with a single principle of lawfulness. The second effect is a departure from the traditional understanding of the rule of law, where it is considered as a meta-principle or umbrella principle, namely a principle that brings together a number of other elements, principles and values that have an independent normative meaning. These elements intertwine with each other and give rise to one big principle, the meaning of which transcends the sum of its constituent elements (L. Pech 2009: 49). In this way, European lawfulness or the rule of law, has become the sum and the synergy that completes the European Union's system.

The essence of the rule of law, as the umbrella principle, is to regard it as the tree from which other elements (norms, principles, values) that comprise the rule of law grow out of. From this perspective, the rule of law is a dynamic and yet inclusive principle, as it requires conceptualisation and recognition through a rule of law recognition system, namely a system that identifies the constituent parts of the rule of law on an ongoing basis, by identifying its negative elements (the elements that violate the rule of law) and its positive elements (the elements that favour its implementation) (M. Taborowski 2019: 61, 62). This approach emphasises that the rule of law, which is explicitly referred to in the preamble to the TEU or its Article 2, is not merely a concept found in the legal systems of the Member States, but it also – despite the identical wording – an autonomous concept. Moreover, it is pointed out that, for instance, Article 2 TEU, by regarding the rule of law as a value shared by all Member States, in order to determine the scope and meaning of the rule of law does not refer to the legal systems of the Member States at all, but merely states that this value is shared by them. This gives rise to an assumption that the lawfulness or the rule of law in EU law is independent in its own right, different from the rule of law that adopted in the Member States. This assumption is supported by the established case law of the CJEU, which assumes that, in the absence of an explicit reference to the legal systems of the Member States, terms and concepts in EU law are subject to autonomous interpretation, taking into account their context and purpose (C-140/12, EU:C:2013:565, pt 49).

That does not mean that the rule of law as interpreted by the European Union bodies, including notably the CJEU, cannot contain constituent elements derived from the legal orders of individual Member States. Indeed, the autonomy of the concept of the rule of law, and thus its discretionary interpretation by the CJEU, does not imply absolute freedom to derive meaning from this principle, much less to ignore the existing and established meanings attributed to the rule of law. This is all the more so because the rule of law – as defined in Article 2 TEU – is not only a value of the Union, but one that is shared by all Member States (K. Wójtowicz 2018: 116). It is therefore not possible to extract meaning from the Treaty-based rule of law that is entirely different from, or completely alien

to the meaning of the rule of law adopted in the particular legal orders of the Member States. The very notion of the "community of values" implies that, although the values may be identified differently, they must nevertheless share common and unchanging roots. The constitutional orders of individual Member States and the rule of law concepts developed under them thus provide the building blocks for the EU's interpretation of the rule of law. However, the CJEU, while decoding the meaning of the rule of law, does not simply aggregate the wording of that principle adopted in all Member States but rather considers which parts of it should be included in the rule of law at EU level. This is where the autonomy of the EU rule of law manifests itself. It is not just the sum of the rule of law or state of law concepts developed in the individual Member States' theories of law (M. Avbelj, 2017: 44 et al). Hence, the range of interpretation of the rule of law, according to the guiding principles of the EU, may be different from the range of interpretation applied in the Member States (M. Taborowski 2019: 63).

This gives rise to a possible tension in the relationship between the European Union and the Member State concerning the individual understanding of the rule of law and its meaning, firmly established in the Member State's theory of law. In the long term, this tension does not favour harmonisation, as it may give rise to legal dualism and even a kind of conceptual confusion where, for example, the rule of law will be interpreted differently under Member State law and EU law. The problem will become even more apparent when the Union's pattern of understanding the rule of law will be inconsistently applied to individual Member States, indicating that in some of them this understanding will absolutely have to be adopted, while in others it won't be necessary due to cultural, social or historical differences. The argument of "a different level of civilisational development" must not serve as a pretext for differentiating the mechanism of application of the EU general principles of the rule of law, as this, at the starting point, argues against the thesis of the autonomy of certain concepts, principles and values in the legal order of the European Union. These processes, especially if they proliferate, are particularly dangerous for the European legal order as they contradict its hitherto assumptions, and as a result we are observing the increasing culturalisation and de-hybridisation of EU law instead of the original processes of deculturalisation and hybridisation (J. Boulouis 1991: 97 et al). EU law thus goes against the cultural traditions of individual Member States and contradicts the Treaty-based concept of diversity of legal orders set forth in Article 4 TEU. Pursuant to Article 4(2) TEU "the Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State. As a result, EU law is homogenizing cultural differences while de-hybridizing itself and striving for ever closer unification, which is legitimised by the concept of autonomy of the principles, standards and values articulated in the primary law of the European Union.

Documents of the European Parliament. The principle of rule of law is often defined in the documents of the EU bodies in a lengthy and erratic manner, while following the pattern called ignotum per ignotum. Examples include the Communication from the Commission to the European Parliament and the Council of 11 March 2014, "A New EU Framework for Strengthening the Rule of Law". In this document, the EC stresses that "respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa". At the same time, the EC notes that "Fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process". The communication in question does not actually define the rule of law as it is defined by the principles of democracy and respect

for fundamental rights alone. However, in the communication of the European Commission of 2014, there was already one important element in the definition of the rule of law that proved not only to be enduring, but central to the understanding of the rule of law. It is the association of the rule of law with the assertion of fundamental rights in the courts. This is confirmed by the European Parliament resolution of 25 October 2016 with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights (2015/2254(INL). This resolution is particularly important as it calls for "the development of a shared rule of law culture understood as a universal value by everyone in all 28 Member States and the EU institutions alike". This means that although rule of law is an autonomous concept for EU law, and is not necessarily identical to the interpretation adopted in the constitutional orders of individual Member States whose legal identity is protected by the Treaties (see Article 4 TEU), it seeks – against the spirit of the Lisbon Treaty – to impose a single top-down interpretation of the rule of law and to recognise it as legitimate and therefore the acceptable interpretation subject to the triggering of Article 7 TEU procedure against a Member State, who infringes it (J. Barcz 2020: 523 et al). The resolution of the European Parliament further indicates that the rule of law "is the backbone of European liberal democracy and is one of the founding principles of the Union stemming from the common tradition of constitutionalism of all Member States". The resolution further underlines that "cultural diversity and respect for national traditions should not hamper the application of a uniform and high level of protection of democracy, lawfulness and fundamental rights in the Union", which means, among other things, that the rule of law is inextricably linked to "the efficient and independent justice system" and the judicial enforcement of fundamental rights, which is "the key to creating an environment that fosters citizens' trust in public institutions".

The European Parliament has made several more attempts to define the meaning of the rule of law. In its resolution of 15 November 2017 on the rule of law in Malta (2017/2935(RSP), the EP stated that the rule of law is intrinsically linked to the principle of democracy and separation of powers, the backbone of which is the independence of the judiciary. In its resolution on the rule of law in Malta, the European Parliament also stressed that the rule of law primarily concerns the effective mechanism for the judicial protection of fundamental rights. The Parliament reiterated and developed the above theses in a subsequent resolution on the rule of law in Malta. In the resolution adopted on 18 December 2019 (2019/2954(RSP) the EP noted that upholding the rule of law and respect for democracy, human rights, fundamental freedoms, values and principles enshrined in the EU Treaties constitute main obligations of the EU and its Member States. It also reiterated that the rule of law is an integral part of democracy and the separation of powers, within which the independence of the judiciary must be respected as it is a mechanism for the effective protection of rights and freedoms. A better developed concept of the rule of law was articulated in the resolution of the European Parliament of 14 November 2018 on the need for a comprehensive EU mechanism for the protection of democracy, the rule of law and fundamental rights (2018/2886(RSP). In this resolution, the EP noted that the "rule of law, democracy and fundamental rights interact, strengthen each other and together protect the constitutional core of the EU and its Member States". In this resolution, the EP also stated that compliance with the rule of law in Member States is a rebuttable presumption (*praesumptio iuris tantum*) and that this imposes an obligation on the EU to continuously monitor the state of compliance with the rule of law in Member States. The European Parliament reiterated once again that the rule of law is intrinsically linked to democracy, separation of powers and a high degree of protection of fundamental rights. A position on the concept of rule of law was also included by the European Parliament in its resolution of 16 January 2020 on the rule of law in Poland and Hungary (2020/2513(RSP). However, this position does not involve any new content and merely recapitulates earlier views in which the rule of law is defined by principles such as democracy, fundamental rights or the separation of powers. The European Parliament has consistently reiterated that these princi-

ples are fundamental values in the order of the European Union and its Member States, that they are interdependent and that the mutual trust in the relationship between the EU and its Member States is contingent upon them.

The above implies that the European Parliament has not even attempted to adopt a single, consistent definition of the rule of law. It considers the rule of law as one of the values underpinning the constitutional order of the EU and its Member States, while recognising that it is intrinsically linked to other values such as democracy or the protection of fundamental rights. The European Parliament sometimes also notes that these values are interdependent, so that respecting one of them implies the respect for the other values and vice versa, namely a breach of one triggers the domino effect where all the others are breached. However, the European Parliament has never even attempted to establish a base range of interpretations of the rule of law, in isolation from principles such as democracy, separation of powers or the protection of fundamental rights. Neither did it determine which elements should be considered necessary for the rule of law and which should be considered concurrent. Consequently, a conclusion that emerges from the European Parliament's documents is that the rule of law is democracy, the separation of powers and the protection of fundamental rights, and that striking at any of these individual principles blows back at the rule of law. This closed circle of definitions, founded on the logic behind defining the same by the same and the unknown by the unknown, according to the idea that the rule of law is democracy and democracy is the rule of law, was tentatively broken by the resolution of the European Parliament of 12 September 2018 on the proposal calling on the Council to declare, in accordance with Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL). In the abovementioned resolution, the European Parliament indicated again that the rule of law is democracy and the protection of fundamental rights, and that democracy is the rule of law and fundamental rights, but in addition to this conventional view, the Parliament also indicated areas of concern which, although it is not explicitly stated, appear to determine or shape the rule of law and democracy. However, these areas, indicated in extremely general if not vague terms, are: the functioning of the constitutional and voting system; the independence of the judiciary and other institutions and the rights of judges; corruption and conflicts of interest; protection of privacy and personal data; freedom of expression; freedom of education; freedom of religion; freedom of association; the right to equality; the rights of persons belonging to minorities; the rights of migrants, asylum seekers and refugees; economic and social rights. However, the European Parliament's catalogue of areas that correlate with the rule of law and democracy cannot be regarded as a fitting definition of the rule of law. This means that an elaborate definition of the rule of law that fulfils the scientific criteria is nowhere to be found in the acts adopted by the European Parliament. Although Parliament has not even come up with such a definition, it presupposes that each principle and value underpinning the European Union (Art. 2 TEU) can evolve over time, as each principle and value is not unchangeable, but it is rather a "living process" (2015/2254(INL).

European Commission documents. The European Commission has come up with far more specific findings on the meaning of the rule of law. According to the Commission, the rule of law interpreted in the context of Article 2 TEU encompasses several more specific principles, including: 1) legality; 2) legal certainty; 3) prohibition of arbitrariness of the executive powers; 4) independence and impartiality of the judiciary 5) separation of powers and 6) equality before the law (A. Megan 2016: 1050). In the Communication from the Commission "A New EU Framework for Strengthening the Rule of Law" (COM/2014/0158 final), the European Commission indicates that the rule of law is the "backbone of any modern constitutional democracy" and is also stands as one of the "fundamental principles stemming from the common constitutional traditions of all EU Member States and thus one of the core values on which the Union is founded". The Commission notes that the rule of law "has gradually become the prevailing organisational model of contemporary constitutional law and

international organisations (...) for regulating the exercise of public authority", as it guarantees that "all public authorities act inside the law, in accordance with the values of democracy and fundamental rights and under the control of independent and impartial courts". The Commission also mentions that "the exact wording of the principles and norms derived from the rule of law may vary at national level depending on the constitutional system of each Member State". It is nevertheless possible to formulate "a definition of the fundamental importance of the rule of law as a common value of the EU under Article 2 of the Treaty on European Union". Within this definition, the rule of law essentially encompasses legality, namely "a transparent, accountable, democratic and pluralistic legislative process; legal certainty; prohibition of arbitrariness in the executive powers; independent and impartial judiciary; effective judicial review, including the monitoring of the respect for fundamental rights; and equality before the law". The Commission notes here that the listed component parts of the rule of law "do not constitute purely formal and procedural requirements". In the communication of the Commission, the rule of law was referred to as a "constitutional principle sharing both formal and substantive elements". Further in the document, the EC repeats this specific logical train of thought, arguing that "respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa". The Commission adds, elaborating on this thought, that "fundamental rights are effective only if they are justiciable. Democracy is protected if the fundamental role of the judiciary, including constitutional courts, can ensure freedom of expression, freedom of assembly and respect of the rules governing the political and electoral process". The Commission, when concluding its comments on the rule of law, pointed out that the rule of law is of particular importance in the EU. Furthermore, it is a necessary condition for the protection of all the fundamental values listed in Article 2 TEU, and it is also a sine qua non of the observance of all rights and obligations under the Treaties and international law.

Others suggest that such a broad approach to the rule of law, corresponding to the perception of the European Parliament that rule of law is associated with democracy and fundamental rights and vice versa is inappropriate. If, as they argue, Article 2 TEU names principles such as democracy or the protection of fundamental rights in addition to the explicitly indicated rule of law, the legislator undoubtedly intended the rule of law to be narrowly defined (A. von Bogdandy, M. Ioannidis 2014: 62 et al). After all, a rational legislator should not employ different terms to name the same things. The Rule of law cannot therefore be seen as just another way of expressing values such as democracy or the protection of fundamental rights. Each of these principles or values has its own inherent meaning. It cannot be therefore assumed that one of them defines the others. This is without prejudice to the otherwise valid assumption that a better or comprehensive understanding of each of the principles individually enshrined in Article 2 TEU requires them to be interpreted in conjunction with the other principles which constitute the axiological continuum on which the legal order of the European Union is based (J. Barcik 2019: 108). It is not the case that the guiding principle is or should be the rule of law. It is pointed out that, in fact, Article 2 TEU puts the principle of human dignity on top of the list. This implies that it is the value to which all other values listed in the Article 2 TEU are attributed. As a result, the principle of human dignity comes first, as a distinctive "principle of principles" in the legal order of the European Union, and all of the other rules are consequential and complementary to it. This eminently humanistic perspective on the interpretation of Article 2 provides a slightly different insight into the rule of law. This is because it recognises that all the principles and values under Article 2 TEU have a "subordinate, internal rather than external position in relation to the protection of human dignity" (J. Barcik 2019: 109). This principle comes first and the meaning of the other principles and values should be discovered in its context. This leads to the conclusion that the purpose of the European Union is to ensure the protection of individual rights. It is also a fundamental driver of the autonomous interpretation of principles such as the rule of law or democracy, which does not

necessarily lead to the same understanding of these principles as in the particular legal orders of the Member States. This has also led to a reorientation in the EU's interpretation of the rule of law, which for a long time in EU law was perceived in formal terms. The rule of law under Article 2 TEU procedural guarantees has been long understood as a formal approach that should be the basis for legality and procedural guarantees (D. Kocherov 2009: 24). In addition, under EU law, the principle of rule of law was referred to the separation of powers between Member States and the Union. Hence, anticipating the later transformation, it was postulated to open for its ethical dimension by adopting the assumption that it should be interpreted in accordance with the principle of human dignity. Otherwise, the rule of law would be perceived as an empty and useless value (I. Ward 1998: 953 et al). The approach to the rule of law has evolved over time. It has gradually adopted ethical and political characteristics, to the point where it has become the hallmark of the EU's moral face and, consequently, its specific export product (P.C. Westerman 2017: 171 et al). The correlation of the rule of law with human dignity has fostered this shift in the approach to the rule of law. The rule of law rule of law seen from this perspective started to be associated with democracy and the protection of fundamental rights, which has become a constant theme in the way the European Parliament defines the rule of law. Consequently, the rule of law under Article 2 TEU is seen today primarily from the angle of adequate safeguards for the assertion of individual rights and freedoms in the event of their violation, which is the primary task of the courts. This leads to the even more far-reaching conclusion that adherence to the rule of law is a condition for the protection of all the principles and values on which the EU is founded (COM/2014/0158 final). This leads to a conclusion that the rule of law implies that law and justice are protected by the independent judiciary, and respect for these two values is a core element of the rule of law (J. Barcik 2019: 111). This understanding of the rule of law must be evaluated in the category of obligation *erga omnes partes* (R. Baratta 2016: 361).

Rule of Law in the case law of the Court of Justice. The above shift in the EU's approach to the rule of law and embedding it in the human dignity on one side and the due protection of fundamental rights on the other would not have been possible without the position of the Court of Justice of the European Union, which at a certain point began to actively resort to the rule of law while abandoning the assumption of its merely formalistic nature. This, among other factors, contributes to the aforementioned "awakening" of the transnational system of the European Union (M. Taborowski 2019: 19 et al). There is no denying that this awakening has given a strictly political stimulus to evaluate political parties labelled as populist, which in some Member States (Austria, Hungary, Poland) have assumed power as a result of a democratic transition of power, which has been opposed by the liberal and left-wing elites of the EU, who regard allegedly populist voices in the Member States as a threat to the unity of the European Union.

However, the Court directly referred to the rule of law principle for the first time as early as 1986, before Article 2 TEU was adopted in the current wording. In the Case C-29483, the CJEU noted that the rule of law principle underpins the community, therefore both the Member States and the common institutions are subject to review of the compliance of their legal acts with the Treaties forming the constitutional basis of the EU (ECLI:EU:C:1986:166, par. 23). Even earlier, in 1979, the CJEU held that respect for the rule of law entails that those subject to EU law enjoy the right to enforce their claims in the courts (ECLI:EU:C:1979:38, par. 5). Whereas previously the rule of law was attributed an outstandingly formalistic meaning and invoked only occasionally, nowadays the principle is increasingly utilised by the CJEU, with more and more meaning being extracted from it. The CJEU held in the judgment in Case C-72/15 that, among other things, "the very existence of an effective judicial review to ensure respect for the principles of EU law is intrinsically linked to the rule of law" (ECLI:EU:C:2017:236, par. 73). By contrast, in Case C-477/16 PPU, the CJEU held that the term "judicial protection" refers to the judiciary, which "must be distinguished, in line with the principle of separation of powers that characterises the functioning of the rule of law, from the exec-

utive" (ECLI:EU:C:2016:861, par. 36). The CJEU embraced a similar view in Cases C-452/16 PPU (ECLI:EU:C:2016:858, par. 35) and C-279/09 (ECLI:EU:C:2010:811, par. 28), holding that the separation of powers, and thus the separation of the judiciary from the executive, is an element of the rule of law. In these cases, the CJEU took a consistent view that the protection of fundamental rights in the rule of law must be effective, thus it must be carried out by the judiciary, the independent bodies based on the system of separation of powers. In the latter case, besides the demand for judicial protection of fundamental rights, the CJEU also pointed out that the effective application of the law constitutes an integral part of the rule of law. The CJEU reiterated this view in a more pronounced way in Case C-447/17 R (ECLI:EU:C:2018:255), in which, referring to the logging activities in the Białowieża Forest, it concluded that the effective application of the law is intrinsically linked to the rule of law.

Several conclusions emerge from the CJEU case law cited above. The first indicates that the rule of law should be interpreted as a principle of legality, i.e. as a requirement to act on the basis and within the law. The second is that the CJEU links legality with the principle of legal certainty, which calls for the clarity of the regulations and their predictability for the addressees (D. Kornobis-Romnowska2018: *passim*). The third conclusion is to correlate the rule of law with the effectiveness of judicial protection (J. Maliszewska-Nienartowicz 2010: 200, 201). This aspect of the rule of law has appeared most frequently in the CJEU's judgments and has been directly related to the subsequent issues that, in the CJEU's view, determine the content of the principle of rule of law. These include the separation of powers as the basis of the rule of law and the consequent principle of the autonomy and independence of the judiciary. The CJEU considers the principle of separation of powers in a somewhat twisted way, as it views it "from the angle of a court that is independent, particularly from the executive" (M. Taborowski 2019: 64) failing to recognise the other issues that the principle of separation of powers reveals. Finally, the last element of the rule of law as interpreted by the CJEU is the principle of equality before the law, which stands as a guarantee of an effective, and therefore judicial way to enforce claims associated with violations of fundamental rights.

The judgments of the CJEU with regard to the rule of law support the claim that the rule of law in the EU has evolved from a formalist principle to a more materialist one, which emphasises the content of the law and, above all, an effective set of procedures to guarantee due respect for it. From the perspective of the paradigm of due process, this is of paramount importance, as it proves that due process is inherently connected with the rule of law, being the materialisation of the general principle of rule of law. This is why this element is so strongly emphasised in the case law of the CJEU, to the point that a separate principle of broadly defined legal security is sometimes extracted from it (J. Maliszewska-Nienartowicz 2010: 204 et al). This principle, in line with the terminology used, is a principle directly related to due process, which is ought to be compliant with the law, in both formal and substantive terms, and rulings should be based on the criteria of law, equity and justice, which is, after all, the quintessence of the rule of law.

The principle of rule of law thoroughly dissected in the case law of the CJEU, is related to the elements that delineate the meaning of due process. It is primarily a matter of an effective mechanism for the assertion of individual rights and freedoms. This mechanism is understood as a judicial procedure, which in turn must be designed in a way rendering the judiciary independent of political influence, which translates into a separation of powers that prevents any unauthorised influence on the judicial authorities, particularly by the executive. This fairly consistent and coherent case law of the CJEU, augmented by the individual right to a trial (A. Marcisz-Dynia 2018: 290 et al), stems from the assumption that, in the interpretation of the principles and values that underpin the EU, the key principle is the principle of human dignity, and all other principles and values, including the rule of law, must be interpreted in the context of human dignity. Therefore, the mechanism for the effective protection of fundamental rights should be created (which is surprising, as it entails, pursuant to the wording of Article 2 TEU, the interception of the principle human dignity as opposed to the rule of

law, which is derivative and subsidiary in relation to dignity). The rule of law, and in fact the principle of human dignity (which is often overlooked in the documents of the EU institutions and in the case law of the CJEU because of its Christian connotations, and replaced by the supposedly modern and liberal Enlightenment-era rule of law), provides, as evidenced by the case law of the CJEU, for the protection of the fundamental rights of the individual, which is what the courts are best equipped to do. This is why the courts must be safeguarded against any unauthorised influence of authorities of other separated powers (J. Barcik 2019: 111). Such an assumption, which is correct in principle, presupposes, however, one controversial element, namely the idea that the judiciary is not an equal power in the concept of separation of powers, but rather – in some sense – stands above the legislature and the executive. This assumption, implicit in the judgments of the CJEU, was directly expressed by the European Commission, which stated in the communication on a new EU framework to strengthen the rule of law that the rule of law is the principle according to which "all public authorities act inside the law, in accordance with the values of democracy and fundamental rights and under the control of independent and impartial courts" (COM/2014/0158 final). The promotion of a concept envisioning the primacy of the judiciary over the other separated powers stands in contrast to the traditional approach to the doctrine of the separation of powers, which stemmed from the principle of distrust of one power over the others, and which was altogether seen in the idea of balancing the separated powers, so that no power would rise above the others and the idea of equilibrium (B. Szmulik, J. Szymanek 2020: 7 et al) would be preserved. The theses formulated by the EU institutions stand in opposition to this idea, promoting the alien concept of absolute trust in the judiciary and limited trust in the other powers, which in a sense subverts the current premise that the powers should be separated (R.M. Małajny 2001: *passim)*.

In **conclusion**, the principle of the rule of law in the supranational legal order of the European Union has evolved over the years. It should be noted that in the 1970s and 1980s this principle was not defined and the CJEU merely referred to the fact that the Communities were based on the rule of law. In this case, the rule of law was referred to the institutional order of the Communities with no reference to the particular legal orders of the Member States. The rule of law has been gradually extended to include content relating to Member States and their constitutional systems. The elements such as the prohibition of retroactive application of the law, legal certainty, control of the legality of the law, protection of the rights of the individual and the right to a trial has emerged and saturated the rule of law (J. Maliszewska-Nienartowicz 2010: 200 et al). However, the correlation of the rule of law with the guarantee of the separation of powers, the autonomy and independence of the judiciary, the effective assertion of rights and freedoms has acquired a dominant status in the interpretation of EU law since 2000. It has become increasingly prevalent to associate the rule of law with the right to a jury and thus the effective assertion of fundamental rights on the one hand, and with the independence of the judiciary on the other, as a consequence of the separation of powers. This has led to correlating the interpretation of the rule of law with the general call for a fair trial, which implied the need to establish institutions and procedures that guarantee respect for the right to a trial.

Two developments seem to have shaped the understanding of the rule of law in the EU legal order. The first, strictly legal, was the adoption and entry into force of the Treaty of Lisbon, which laid foundation for the present-day Article 2 expressing explicitly the rule of law as one of the principles on which the European Union is based. The second, this time political, were the results of the election in several Member States, where power was taken over, either on their own or jointly with other political forces, by groups that were explicitly anti-European or highly sceptical of the EU project, to the dislike of the EU's leftist and liberal mainstream, who perceived the change of power in countries such as Austria, and later to an even greater extent Hungary and Poland, as a threat to the vision of permanently tightening EU that had been assumed a priori. Today, in turn, Slovakia is such a country, which, since the parliamentary elections in the fall of 2023 and the change of power, has been

increasingly referred to as a country violating the European standard of the rule of law. In January 2024, the European Parliament adopted a resolution questioning Slovakia's ability to fight corruption and protect the EU budget with 496 votes in favour, 70 votes against and 64 abstentions. Furthermore, the resolution included already existing references to the failure to uphold the rule of law in Slovakia. Members of the European Parliament indicated in the resolution that they were particularly concerned about the unjustified use of a fast-track procedure for the criminal code reform and the dissolution of the Special Prosecutor's Office, that handles corruption cases and serious crimes, which was perceived as an attack on the rule of law.

The two events or rather two groups of events indicated were topped by another, apparently fundamental, factor. It is a kind of orphan syndrome of the European elites after the failure of the European Constitution. The Treaty of Lisbon, adopted as a replacement for the postulated Constitution for Europe, included many of the solutions planned for the constitutional project, including Article 2 with its flagship principle of rule of law. The European community's opposition against the idea of the federalisation of the European Union pacified ideas of going further and deeper with the integration for a while. The federalisation was to be fulfilled by adopting a Treaty establishing a Constitution for Europe. The Treaty of Lisbon was intended to be a modus vivendi between centripetal and centrifugal thinking in a united Europe, and by adopting some of the provisions of the proposed Constitution it was intended to accommodate the supporters of closer integration, while by not adopting the variant of the Constitution for Europe it was intended to satisfy those opposed to closer integration of the continent. Such an agreement, situated at the starting point of the Treaty of Lisbon, has been increasingly undermined over time. Eventually, thinking about the European Union became dominated by a belief in the need for ever more far-reaching integration, so that in the Treaty of Lisbon started to be interpreted in the spirit of the Constitution for Europe, despite the fact that the it was only the Treaty that was interpreted, not the Constitution.

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