
BETWEEN SCYLLA AND CHARYBDIS. REMARKS ON THE “RULE OF LAW”

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Abstract. In contemporary discussions on law, the concept of the rule of law has gained significant attention and has become a widely used term. The concept has been particularly prominent in the Polish public discourse due to the ongoing dispute over judicial reform between Brussels and Warsaw, as well as the primacy of EU law over national law. The rule of law is often discussed in relation to the judiciary’s independence and its role in upholding principles of European, international, and Polish constitutional law. However, the multitude of definitions and the ideological abuse of the concept have raised concerns about its overuse and lack of value. This article explores the essential contestability of the concept of the rule of law and its association with political assumptions. It also examines the instrumentalization of the rule of law and the potential implications of promoting a universalistic interpretation. The article concludes by emphasizing the need for a critical examination of the concept and its application in legal discourse.

Keywords: law; jurisprudence; judgment and decision making; legal theory; Rule of Law

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1. Introduction

In the contemporary reflection on law, the concept of the rule of law is currently one of the trendiest and most frequently referred to notions, both in Europe and in the United States. In his famous essay *Four Puzzles about the Rule of Law: Why? What? Where? And Who Cares?* Martin Krygier even states that “Rule of Law is now an international hurrah term” (Krygier, 2011).

In the Polish public discourse of recent years, the concept of the rule of law has been present primarily as the focal point of the dispute over judicial reform between Brussels and Warsaw and over the primacy of EU law over national law. In this view, the concept of the rule of law has been linked to the specific principles of European law (“principle of effective judicial protection” – Article 19 TEU), international law (“right to a fair trial” – Article 6 ECHR) and Polish constitutional law (“right to a fair and public hearing before a court” – Article 45 of the Polish Constitution). Therefore, it most often appears in the context of the relationship of the judiciary to other authorities, the independence of the courts and the independence of judges. This is because the concept of the rule of law plays, in a way, the role of a standard for the operation of legal institutions in individual states or international organisations such as the European Union. It is thus of practical importance and occupies an honourable place in legal argumentation.

The modern popularity and frequency of evoking the concept of the rule of law coexist with the number of definitions created by historians, politicians, philosophers and lawyers. However, according to some authors,

the plethora of the explanations of this notion in the public discourse and the imprecision of these definitions has led to the overuse and ideological abuse of the concept, and consequently to its having no value today. It is therefore hard not to agree with Martin Krygier's statement: "In the past 20 or so years, the concept has gone from often-derided but more often ignored margins of public concerns to a somewhat hallowed, if also sometimes a hollow centre of many of them." (Krygier, 2011). Another reference that can be made here is to the statement by Joseph Raz of Oxford University, according to whom it has become fashionable to use the concept of the rule of law as "a general stand-in for everything nice one could ever want to say about a political system, or everything good one could want from it." (Dyrda, 2015).

For this reason, I believe that a meaningful definition of the meaning of the concept is only possible after trying to determine whether the term "the rule of law" itself has no political overtone or whether it implicitly contains a pre-determined – and therefore instrumental – way of thinking about the state and the law. For this purpose, let us refer to the idea of essentially contested concepts by Scottish philosopher Walter Bryce Gallie. According to him, the character of such concepts (e.g. social justice, democracy, art etc.) is that they are not unambiguous, but are also not the "confused concepts", i.e. terms where the parties to the dispute only apparently refer to the same notion (Gallie, 1956).

In recent years, in Polish public discourse, both supporters and opponents of the direction and shape of changes within the judiciary system have been referring to the concept of the rule of law to justify their views. It is because a fundamental dispute has arisen among lawyers on whether or not the reforms of the Polish judiciary system have violated the concept of the rule of law. Simultaneously, the conflict has gone beyond a professional dispute (among judges, scholars, officials, representatives of the authorities) and has become a public dispute, in which ordinary citizens are also involved.

Can a dispute be settled based on rational criteria? This question has always been contemplated. Therefore, the medieval Catalan mathematician Ramon Llull undertook the mission of creating a manner of settling disputes which, in principle, would allow the conflicting parties to dissociate themselves from the immediate content of their arguments. At the beginning of the fourteenth century, this was important insofar as there was a religious conflict in the Mediterranean basin at that time, and no Christian could convince a Muslim of their legitimacy based on the criterion of equity. A few centuries later, Gottfried Wilhelm Leibniz wrote a work titled "De arte combinatoria", in which he postulated the creation of a universal language that would be equivalent to the set of principles and rules proposed by Llull (Sopiński, 2017). However, he has not succeeded, and the problem of disputes on the frontier between law and politics has remained until now and continues to bother contemporary researchers as well.

The modern literature accepts that any dispute can be either a genuine dispute or an idle one. A genuine dispute is on a defined thing or concept, and all parties thereto know what the dispute is about. In an idle dispute, the parties think they are arguing about something, but in fact, they are only outtalking each other or are victims to a certain conceptual confusion. Of course, the awareness of the subject matter of the dispute does not necessarily mean that it can be resolved, since even genuine disputes are not always rationally resolvable if the parties run out of sensible arguments. Nevertheless, there is a chance. The situation is different in the case of an idle dispute – no resolution is possible here, because it is not dispute but rather a "différend", defined by Jean-François Lyotard as "a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of judgement applicable to both arguments. The legitimacy of one side does not imply the legitimacy of the other side. However, applying the same rule of judgement to both parties to establish the "différend" a dispute would harm at least one of them (or both, where neither accepts the rule)" (Lyotard, 1983).

Before one can refer to the dispute at all, they need to know its essence and internal structure. Thus, the current dispute between Warsaw and Brussels on Poland's compliance with the rule of law may be regarded as an essential contestation, since its complexity stems from the fact that the very concept of the rule of law is contestable in the light of the idea of abovementioned essentially contested concepts.

2. The rule of law as an essentially contested concept

The idea of seeing the rule of law in terms of its contestability is not new. In his famous 2002 essay with the telling title “Is the rule of law an essentially contested concept (in Florida)?”, Jeremy Waldron – as he discussed the dispute over the concept of the rule of law after the controversy surrounding the 2000 US presidential election and the victory of G.W. Bush – argued that the concept of the rule of law as an essentially contested concept consists of two components:

- the core essence of the concept as a fixed set of rules relating to the questions referred to by that name;
- actual (and therefore contestable) specification of these rules as a reference to the system that could realise them best (Waldron, 2002).

The American author stated that Galli’s conceptual system may be utilised to analyse the concepts appearing in real political disputes, including the rule of law concept. Having adopted the hypothesis of Jeremy Waldron that the concept of the rule of law is an essentially contested concept, I argue that its fixed core is the “internal conditions of law’s morality” as described by L.L. Fuller:

- the generality of law (so that law could be impartial);
- the openness of law (transparency);
- the principle *lex retro non agit*;
- the clarity of law;
- the capability of law to be obeyed by its subjects;
- the conformity of law;
- the stability of law over time;
- the consistency of actions and declarative norms of the governments.

Of course, this standard definition of the formal content of “the rule of law” was made by L.L. Fuller, and therefore it is more or less arbitrary (Fuller, 2004).

Upon the acceptance of Jeremy Waldron’s hypothesis that, in the case of “the rule of law”, the essential contestability of exemplification of these requirements as a reference to the system which could best realise them, the concept gains a strong evaluative sense. It is because it assigns a value to a system X (usually an already existing one) due to the opinion of a group of people that it best realises the elements of the fixed conceptual core (essence) of the rule of law.

Thus, a question arises here: does the attempt to make a change within such a system or to reform it institutionally breach the conceptual core of the rule of law? And can one speak of violating the rule of law at all in such a case? Many lawyers answer “yes”, and thus confer universality to a particular system implementing the elements of the fixed conceptual core of the rule of law. In my view, however, the concept of the rule of law cannot be regarded this way, because it is highly associated with political – and therefore particularistic – assumptions underlying specific legal institutions that are supposed to do their best to implement a set of conditions of the internal morality of law. Therefore, the rule of law concept understood as a task of the realisation of that morality within a system has an implicit political overtone, as it is historically linked to many conceptions of democracy and law.

For example, according to Judith Shklar, one of the most famous Anglo-Saxon conceptions of the rule of law by A.V. Dicey (assuming that the fundamental features of the rule of law are elements of the British institutional order) is archaic, as “both trivialized as the peculiar patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it.” (Shklar, 1998). Notwithstanding this view, according to Martin Krygier, contemporary lawyers “often follow Dicey’s example, whether influenced by him or not, and identify the rule of law with what they like about their own legal orders.” (Krygier, 2011).

Nowadays, the most general definition of the concept of the rule of law is considered to be that “the rule of law means that government and citizens are bound and constrained by law.” (Tamanaha, 2012). Then, with reference to the English constitutional tradition, the concept of the rule of law denies the arbitrariness and discretion of the rule of men. The adoption of such a definition of the rule of law entails the subordination of the whole range of activities of the state, its bodies and citizens to clear and predetermined rules established by law. In contemporary legal theory, in particular in the continental tradition, it is therefore predominantly stated that the concepts of the rule of law and the stated ruled by law (Rechtsstaat, État de droit, Estado del Derecho, Stato di diritto) are not so much synonymous expressions as they are their equivalents (Kmieciak, 2016).

All that means that, an *a priori* assumption is made at the normative level, arising from the constitutionalist tradition, namely the assumption that the concept of the rule of law is associated with the concept of democracy. The best example of the modern understanding of the notion of democracy which is considered not only as an attribute or a dimension to understanding “the rule of law”, but as the concept that is synonymous thereto – is the concept of a “democratic state under the rule of law”, which belongs to the principal concepts of constitutionalism.

However, in my view, although the concepts of the rule of law and democracy are easily equated, the relationship between them is at best merely declarative, since the answer to the question “who is to govern?” is separate from the question “by virtue of what and within what limits?” I, therefore, believe that the modern concept of the rule of law is primarily a product of the imagination of lawyers. I agree with Martin Krygier, according to whom “the extent to which where we stand in relation to the rule of law often depends on where we sit” and “the concept has today become so protean, partly because people can have so many reasons for being interested in it.” (Krygier, 2011).

3. Promoting the Rule of Law: the lure of instrumentalization

In the contemporary world, one can increasingly observe the phenomenon of new secular “evangelisation”, consisting in presenting and promoting the rule of law as the supreme value determining the framework in which individual societies function. This quasi-religious, even fideistic approach to the rule of law, that has developed in recent years, finds many zealous followers, who are ready to give their own lives to convince the world that the meaning of the rule of law is genuinely universalistic, and not merely value-laden and particularistic. It is of no surprise then that Martin Krygier has ironically stated that: “benighted parts of the world are likely to be visited by numerous international rule of law promoters, for it has become fashionable to believe (...) that the rule of law is a necessary means to achieve various valuable ends beyond the rule of law itself.” (Krygier, 2011). In the literature, this approach is sometimes referred to as the “rule of law consensus”, equated with “the administration of justice” and consisting of the belief that “(...) the rule of law is essential to virtually every Western liberal foreign policy goal – human rights, democracy, economic and political stability (...)” and “the belief that international interventions, be they through money, people, or ideas, must include a rule-of-law component.” (Call, 2007).

Another problem with the fideistic approach to the rule of law is related to the belief that the requirement of a universalistic interpretation of the concept constitutes a practical task for lawyers governing a given society. Thus, according to T. Ginsburg, “‘Rule of law’ programming has become shorthand for all interventions targeting legal institutions, a synonym for work on the ‘the justice sector’.” It means that the contemporary public discourse blurs the fundamental difference between the rule of law and the rule of lawyers, as the aggregate of actions of the latter may be described as “programming the rule of law.” (Ginsburg, 2011).

Indeed, modern lawyers are not only those appointed to be guardians of the meaning of the concept of the rule of law. On the contrary, more and more frequently they act as guardians, jealously guarding the proper sense, understanding and the possible scope of application of the concept of the rule of law. It is especially the case when one uses the concept in public discourse as a certain ideal, against which the existing institutions and legal solutions are compared and then ascertained whether or not they meet a certain standard. Thus, I agree with Martin Krygier’s opinion that “the link between what rule of law promoters promote and the rule of law is too often assumed rather than demonstrated or even questioned.” (Krygier, 2011).

In the case of the Polish dispute on the judicial reform evaluation, the concept of the rule of law (which was referred to by all parties to the conflict) has related primarily to the independence of the courts and judges as standard indicators of the rule of law. However, as Martin Krygier notes, “unless independence is assumed a priori to be good for the rule of law, the relationship between indicator and indicatee is altogether more problematic than it may seem at first blush.” (Krygier, 2011). It means that, from that perspective, the concept of the rule of law has a strongly value-laden aspect and assumes tacitly the obvious truth of the statement that the more independence judges have, the more there is rule of law.

A threat leading to the instrumentalization of the rule of law concept is, for instance, the lawyers’ use of their familiar legal reasoning and methods of interpretation, whereby new principles – which contain duties or powers to defend particular political positions – are derived from the rule of law principle entirely ad casum (Sopiński, 2017; Sopiński, 2020). In such cases, the concept of the rule of law is devoid of its original value related to ensuring law and order and becomes just another argument used by lawyers in political disputes.

William Shakespeare’s “The Merchant of Venice” may serve as a case in point here. However, is it possible to talk about the relationship between law and literary fiction at all? Conclusions from the reading of Act IV of the drama should convince us that it is not only worthwhile but even necessary, especially from the point of view of the theory and philosophy of law, namely the phenomenon of instrumentalization of law, which in Poland is also described as “falandisation” (named after Polish lawyer Lech Falandysz).

A fragment of “The Merchant of Venice” may serve as a reference to the problem of the instrumentalization of law, in particular the scene of the hearing before the Duke. It has been studied many times, and so has been the validity of Shylock’s motivation. However, readers of “The Merchant of Venice” rarely notice that the courtroom proceedings are a complete farce in the Shakespeare’s drama. The author has treated the law without any realism: not only in terms of formal procedures but also in regard to the essence of law. The alleged doctor of law who decided the dispute was not only an impostor, Portia in disguise, but has a vested interest in the trial, so he should not have ruled according to the principle of exclusion - *nemo iudex in causa sua*. Besides, the parties had no attorneys, there were no professional judges in Venice, and the civil case ended with a criminal verdict. Moreover, Portia’s reasoning itself was a political impudence circumventing the proper legal problem, namely the exceptions to the principle of *pacta sunt servanda*. However, the audience greeted it with applause, combined with the odium of foreign authority. Therefore, the whole thing is a caricature in terms of instrumental application of the law. Luckily, it is only literary fiction.

4. Summary and conclusions

To sum up, I regard the “rule of law” as an essentially contested concept (this means that I believe that any possible disputes over the material understanding of the rule of law are unresolvable rationally). I also believe that the lawyers’ sweeping universalization of the rule of law depreciates its proper meaning, and therefore, it constitutes a quasi-religious instrumentalization of the concept.

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