

# СУЧАСНА НАУКА ІНОЗЕМНИМИ МОВАМИ

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## THE ESSENCE OF THE RULE OF LAW

### 1. Introduction

In the nineteenth century determined the law actually one basic material condition: it had adequately protect individual liberty. The law mainly served as the protective function. Today, the law is considered in turn as a tool to achieve certain socio-economic objectives, as well as an instrument of «social engineering», aiming to re-evaluate the current pattern of cultural Judeo-Christian origin. The approach to the law, therefore, lies the fundamental difference between nineteenth-century and contemporary concept of the rule of law. The concept of the rule of law was born in Germany approx., 1832. Fully and was developed in the German-speaking jurisprudence. Has become a principle of constitutional law of Germany by its acknowledgment and expression in the constitution of 1949. Behind the example of the German constitutional legislators have gone some other countries (eg. Spain in 1978.), and recently - virtually all post-communist European countries.

At the outset, consideration will be characterized notion of the rule of law, the concept of the rule of law, the concept of a formal rule of law and the concept of substantive rule of law.

### 2. The concept of the rule of law

By the rule of law in the formal sense is understood as a state whose constitution is based on a written constitution comprising: a tripartite division of authority, independence of the judiciary, the Administration is bound by law and catalog of rights and freedoms.

In other words, the rule of law in terms of a formal system consists of procedures and institutions protecting lawful functioning of the administration, but also to ensure an investigation by the citizens rights. Interests

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almost the entire nineteenth-century science of law focused primarily on the legal and formal side of the rule of law<sup>1</sup>.

The notion of the state were given a different meaning in the past and variously referred to it today. In ancient times it was believed that the state is the result of the social contract, the result of the division of labor or human creation (the concept of Plato). Aristotle emphasized the natural character of the state and its goal of eudaimonia.

Later considered that the State is God's creation, which was to subdue selfishness and punishment for sins. Also believed that the state is a place fullest idea of the sovereignty of the people, or the property of the sovereign. It was argued that the state is the most important ethical ideal or instrument of class rule. It was believed that this is the body connecting community and existing social divisions. Today, there are three basic meaning of the term state<sup>2</sup>.

They are identified with the sovereign power exercised in a particular territory, with organized state apparatus and the global organization of society. The territory of the state is determined by the boundaries, the lines separating the territories of neighboring states. State exercises sovereignty territorial, or supreme authority, the sole and exclusive over a given area and the population inhabiting it. Both citizens and foreigners are subject to the authority and the law of that State<sup>3</sup>.

You, as a special kind of global society organizations, based on formal membership brings together the whole spectrum of social classes and being a member of society to the state is usually a foregone conclusion by the fact of birth.

The entire human community belonging to the state is a community representing the state of its inherent component. Belonging to the State unit is a factor in creating the organization of the state, as well as the collectivity living in the country, constituting the object state action<sup>4</sup>.

<sup>1</sup> Wyraził to wprost F.J.Stahl, jeden z wybitniejszych niemieckich teoretyków państwa prawnego, stwierdzając, że «Rechtsstaat bedeutet überhaupt nicht Ziel und Inhalt des Staates, sondern nur Art und Charakter dieselben zu verwirklichen». Zob. także M. Zmierczak, *Kształtowanie się koncepcji państwa prawnego*( na przykładzie niemieckiej myśli polityczno-prawnej. [w:] *Polskie dyskusje o państwie prawa*, S. Wronkowska (red.), Warszawa 1995, s. 14.

<sup>2</sup> L. Dubel, A. Korybski, Z. Markwart, *Wprowadzenie do nauki o państwie i polityce*, Zakamycze 2002, s. 140.

<sup>3</sup> E. Kustra, *Wstęp do nauki o państwie i prawie*, Toruń 2000, s. 35.

<sup>4</sup> J. Kuciński, *Podstawy wiedzy o państwie*, Warszawa 2003, s. 7.

State brings people together for the purposes, which itself defines and implements imperiously. These targets are solidary interest of the people in the group territorial organized in the state<sup>1</sup>. Territorial Group organized in the state is the highest sovereign organization<sup>2</sup>.

Historical reasoning treats the concept of sovereignty of the people of the sovereign, as an entity constituted of all citizens. Thus understood, the people are not just an abstract entity. Can directly manifest his will (in a referendum), not only through their representatives<sup>3</sup>.

The state is a sovereign organization. It is a necessary and indispensable feature of any state. Sovereignty is manifested in two different levels: internal and international external<sup>4</sup>.

Sovereignty means that the state is the supreme authority in the area and can decide on its scope of action<sup>5</sup>.

J. Kuciński while he believed that the internal sovereignty of the territory concerned there is no other power that would be equivalent to or higher than the government. Only the public authority can legitimately use coercion. The situation in which a party is governed by state authorities not mean that the state is not sovereign internally. All entities on the territory of the Member State must submit to the decisions and actions taken by the state. It has, so it inside the territory of the state organization nature of supreme authority<sup>6</sup>.

External sovereignty is manifested in the relationship, in which enters the country with other countries. These relations should be shaped on the basis of equality and freedom<sup>7</sup>.

The concept of external sovereignty is seen also in such a way that the country in the international arena is independent of other countries and international institutions and organizations. In today's world there is total external sovereignty because they are very strong links and relationships between countries.

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<sup>1</sup> G.L. Seidler, H. Groszczyk, A. Pieniążek, *Podstawy wiedzy o państwie i prawie*, Lublin 2003, s. 48.

<sup>2</sup> W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, Warszawa 1980, s. 61.

<sup>3</sup> A. Jamróz, *Demokracja*, Białystok 1999, s. 9.

<sup>4</sup> J. Kuciński, *Podstawy wiedzy o...*, op. cit. s. 9.

<sup>5</sup> K. A. Wojtaszczyk, *Kompendium władzy o państwie współczesnym*, Warszawa 2000, s. 76.

<sup>6</sup> J. Kuciński, *Podstawy wiedzy o...*, op. cit. s. 9.

<sup>7</sup> J. Kowalski, *Wstęp do nauki o państwie i prawie*, Warszawa 1977, s. 76.

Is a sovereign state possessing exclusive in managing and integrating the development of society in a given territory, and a group of state in the country has exclusive rights as in creating and enforcing compliance<sup>1</sup>.

### 3. The concept of the rule of law

The rule of law emerged as the eighteenth-century idea of constitutionalism and its embryos in political thought lay in antiquity. The rule of law was the absolute opposite of the state, a country ruled by force and lawlessness, states that interfere in all spheres of social life and individual. The concept of the rule of law was a reflection of the interests and aspirations of the young bourgeoisie, which their values such as freedom, equality, and property wanted to fix the rules, and on their guard to put a variety of guarantees<sup>2</sup>.

Adopted in the Constitution of the Republic of Poland principle of a democratic state constitutional legislator allows flexibility in practice this rule by general clauses and the case law of the Constitutional Court. Complements the traditional content of the concept of democratic rule of law<sup>3</sup>.

The Constitution in Article 2 lays down the principle of a democratic state, as a fundamental principle of the political system. The provision of «The Republic of Poland is a democratic state ruled by law and implementing the principles of social justice», was introduced to the Polish legal system based on the amendment to the Constitution of the People's Republic of 29 December 1989. This article contains content in its three concepts: «democratic state», «rule of law» and «principles of social justice». The legislature adopting the concept of rule of law gives guidance directions of development of the state. This principle, as an important postulate of systemic contains certain precepts of action for parliament and other state bodies which are entitled, interpret and apply. The introduction of this principle means that the state wants to be governed by the law, wants to ensure the rule of law and sets right over the state<sup>4</sup>.

The concept of democratic rule of law ideal arrangement includes a public authority relationship and the entity. This ideal can not be realized without a normative basis in the Constitution, because the ideal of the rule

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<sup>1</sup> A. Redelbach, S. Wronkowska, Z. Ziemiński, Zarys teorii państwa i prawa, Warszawa, 1992, s. 40.

<sup>2</sup> M. Pietrzak, Demokratyczne świeckie państwo prawa, Warszawa 1999, s. 27.

<sup>3</sup> Ibidem, s. 27.

<sup>4</sup> W. Skrzydło, Ustrój polityczny RP w świetle Konstytucji z 1997 r., Zakamycze 2000, s. 62.

of law is constituted by the Basic Law. The Constitution guarantees that this ideal will be realized<sup>1</sup>.

The Constitution is the highest law in a democratic state, is the basis for the construction of a democratic rule of law. Specifies the powers and functioning of the highest state authorities. Sets how to create and execute law creates a legal framework and establish guidelines for the activities of a diverse team of state authorities. Specifies the legal ways of taking power in the country, as well as sets the boundaries of state interference in the right to freedom of the individual<sup>2</sup>.

Article 2 of the Constitution pointing directly to the principle of «democratic rule of law»<sup>3</sup> and therefore determines the state system and the basic institutions characteristic of this system. In Poland, these institutions are: the Constitutional Court, the State Court, the Ombudsman, the Supreme Administrative Court<sup>4</sup>.

Nowadays accept the concept of the rule of law based on the assumption that the state should be governed in accordance with the law. The concept is not clearly understood. In the doctrine of the law distinguishes between two concepts of law or rule of law, it is in the sense of formal and material<sup>5</sup>.

#### **4. The concept of a formal rule of law**

In a formal sense, the rule of law is a state organization detached from the material, based on the laws. In this approach does not specify inch of the state or of moral values, but only the form (standard procedure) realization of order in the society. In this sense, the state is only a formal organization whose activity is related to the written laws of; organization based on the principles laid down in the Constitution; especially the principle of separation of powers and their mutual control is<sup>6</sup>.

The rule of law is considered a state based on the principles of separation of powers, legality, or binding judicial and administrative acts, the admissibility of state intervention in the sphere of freedom of property of citizens only under the authority of the law, judicial review of the actions

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<sup>1</sup> S. Wronowska, *Zasada demokratycznego państwa prawnego w Konstytucji RP*, Warszawa 2006, s. 49.

<sup>2</sup> M. Pietrzak, *Demokratyczne świeckie państwo...*, op. cit., s. 33.

<sup>3</sup> *Konstytucja Rzeczypospolitej Polskiej*, Dz. U. 1997, Nr 78, poz. 483.

<sup>4</sup> S. Wronowska, *Zasada demokratycznego państwa...*, op. cit., s. 109.

<sup>5</sup> J. Krukowski, *Wstęp do nauki o państwie i prawie*, Lublin 2002, s. 17.

<sup>6</sup> *Ibidem*, s. 17.

of the executive and the activity of damages. The formal elements of the law organizing the state and social life. Only formal is a state which respects these formal elements in the sphere of legal technique, not respecting the standards system of higher order. Purpose and nature of the formal rule of law is to create organizational and procedural reasons hindering the abuse of power against citizens. Abuse of power is as a result of those rules organizationally and procedurally less likely<sup>1</sup>.

Formal rule of law implies that public authorities respect the law and the law implemented by them are characterized by certain formal features, which the normative system in general would have been deprived of basics to qualify as legal. In a formal sense of the rule of law, a state ruled by law, where the law is above state and foundation by commanding the rule of law, not the people.

In that country the government is obliged to respect the law that set itself, both in terms of regulation and the application. Bound state law involves the formal rule of law which incorporates the idea of legalism. According to this principle all the authorities in the country are required to demonstrate the legitimacy in the exercise of any authority in connection with which the organization, functioning and characteristics of all the activities of the authorities should be based on the law and legally justified. This leads to the application of the rules under which state authorities can do only what the law is allowed, and the citizens everything that is not forbidden them.

In a conception of the state, each state action must have a basis in the Constitution or existing law, which is the point of reference for all aspects of the exercise of power in the state<sup>2</sup>.

Today puts the concept of rule of law, which covers from the formal assumptions:

1. That every human individual is the subject of fundamental rights and freedoms of man and citizen, where the state is the guarantor;
2. The principle of separation of powers of the state, which involves the separation of three sovereign authorities: legislative, executive, judicial, which should be mutually control and work together for the common good of the human person;
3. Compliance with the rule of law<sup>3</sup>.

<sup>1</sup> S. Wronowska, Zasada demokratycznego państwa..., op. cit., s. 145.

<sup>2</sup> J. Nowicki, Studia z teorii prawa, Zakamycze 2003, s. 21.

<sup>3</sup> J. Krukowski, Wstęp do nauki..., op.cit, s. 17–18.

### **5. The concept of substantive rule of law**

J. Krukowski believes that in the material sense of law means something more than a purely formal sense, namely, that the activities of the State based not only on legal norms, but also has the values (goals) that are superior to statutory law.

The concept of the rule of law in the material sense, because I direct your attention to the content posed by law. Indicates the relationship of law to a specific set of values, which take into account the axiological context.

When theorists of law in the nineteenth century have laid emphasis on its proposals on the nature and systemic nature of the state, a contemporary of his analysts engaged exclusively conceptions of law<sup>1</sup>.

In the nineteenth century determined the law actually one basic material condition: it had adequately protect individual liberty. The law mainly served as the protective function. Today, the law is treated in turn, as a tool to achieve certain socio-economic objectives, as well as an instrument of «social engineering», aiming to re-evaluate the current pattern of cultural Judeo-Christian origin. The approach to the law itself lies, therefore, a fundamental difference between nineteenth-century and contemporary concept of the rule of law.

The concept of substantive rule of law is to enrich and develop the existing formal rules of the new features of the content of the law<sup>2</sup>.

Foundation and an essential precondition for substantive rule of law is a series of formal elements.

It is necessary to their combination of elements, which include namely freedom based on fundamental rights; democratism based on the creation of power in periodic elections; social aspect, based on the principle of the social state; aspect of judicial reinforced by the judicial authority, which authority was also in control in terms of compliance with the Constitution.

Substantive rule of law carries out certain requirements from the sphere of its content, and provides them in particular by binding the legislature constitutional norms, control rights and civil liberties. It im-

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<sup>1</sup> L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 2000. Por. także: J. Stelmach, *Filozoficzne aspekty dyskusji o państwie prawnym*. [w:] *Prawo w zmieniającym się społeczeństwie*, Kraków 1992.

<sup>2</sup> J. Kuciński, *Podstawy wiedzy o...*, op. cit., s. 135.

plements the requirements in the sphere of its content and ensures them by binding the legislature constitutional norms<sup>1</sup>.

For substantive understanding of the rule of law are the following legal and constitutional principles: guarantee by the state civil rights and freedoms; the primacy of the written laws of the other orders of normative; the primacy of the Constitution and the laws in the system of sources of law of that State; institutional and procedural safeguards individual rights of citizens.

Material conception of law is a series of substantive and qualitative requirements relating to the content of the actions of the state. Specifies the legal situation of the citizen to the state, and expands the system institutional guarantees of subjective rights of citizens<sup>2</sup>.

The concept of the rule of law material focuses on the content of the law and the rule of law makes not only comply with the law and fulfill the formal conditions as well as the inclusion of specific value to the existing regulations. Compliance with the law is an integral part of any understanding of the rule of law, formal and material.

### **Completion**

Summarizing the above considerations should be noted that the rule of law is the foundation of modern democracy. The law plays a role regulating the activity of the state, which is an activity that can not be arbitrary. Rule of law in general way indicate how it should look. Are also the boundaries of state activity.

According to the original, formal interpretation of the «rule of law» all of its activities against its own citizens should be anchored in the law; and citizens should be guaranteed legal certainty, legal security and to refrain from state interference with their personal freedom.

The overall objective of the rule of law is achieved by fulfilling three requirements: be bound by state authorities, in particular the state administration bodies in their relations with the public laws (principle of legality), guaranteeing the right of citizens to the court, as in the case of conflict of public administration, the strict delimitation of competences of individual state bodies, through the implementation of the so-called best. division («thirds») authorities<sup>3</sup>.

<sup>1</sup> G. L. Seidler, H. Groszczyk, A. Pieniążek, Podstawy wiedzy o..., op. cit., s. 107.

<sup>2</sup> Ibidem, s. 109.

<sup>3</sup> W. Sokolewicz, Państwo prawne jego cechy i kryteria, Warszawa 1992.

It should also be noted that the historical experience twentieth century. Proved that the «rule of law» can serve completely opposite ideological purposes, may take the form of a democratic state as a totalitarian state. The legal order based solely on the law constituted, proved to be susceptible to degeneration, the main cause of this pathology has become torn off the moral order.

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