

The Concept of the Rule of Law – Just a Political Ideal, or a Binding Principle?

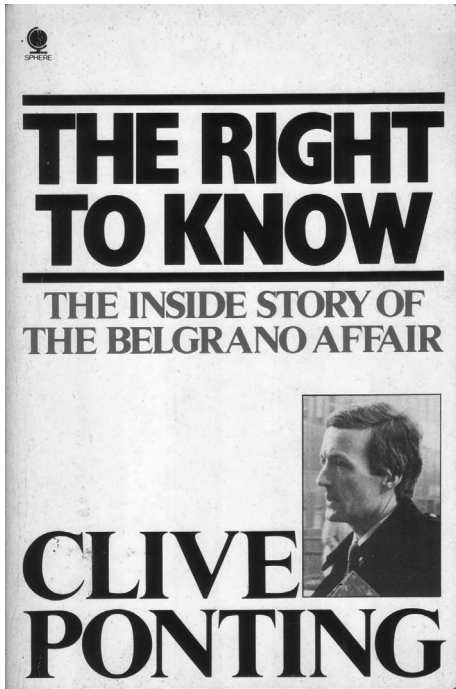
JUHA RAITIO

1. *An attempt to define the concept of the rule of law*

The emphasis in the present article is on the rule *of* law rather than on rule *by* law¹. However, one reason why it is at present particularly interesting to study matters pertaining to the rule of law in the European Union (EU) is that some of its Member States, especially Poland and Hungary, seem to have reverted to some extent to an older, more authoritarian administrative “rule-by-law culture”². The rule of law is a context-bound legal-cultural concept. Because of its nature as an underlying general principle of law, it cannot be defined in a few descriptive formulations³. Further, the rule of law is an English-language concept. For this reason, I will here concentrate on certain British interpretations as well as EU-law ones and not dwell on the interpretation of closely related yet non-identical

concepts such as the German “*Rechtsstaat*”, the French “*État de droit*”, the Italian “*Stato di diritto*” or the Swedish “*rättsstat*”. Finally, it is a very widely used concept. Husa has aptly pointed out that the rule of law has become a kind of legal panacea, which allegedly translates into economic and social improvement⁴. Tuori, in turn, has observed that the rule of law has been treated not only as a legal principle of existing law but also an ideal for a good legal system⁵.

Even so, it may be possible to narrow down its meaning by listing at least a few elements of the rule of law that are not controversial in a European context. First, the essential purpose of the rule of law is to prevent the abuse of power. It sets conditions for the proper exercise of legislative power, for example by banning or restricting retro-spection and by requiring laws to meet reasonable standards of generality, clarity and constancy. Second, the rule of law requires a legal system to exhibit a relatively high



The cover of Clive Ponting's book "The Right to Know"

degree of coherence as a normative system. Third, the rule of law relates to the separation of powers and thus helps to maintain the constitutional order. I agree with Hayek that democracy will not exist long unless it preserves the rule of law⁶.

Given the above, I find that the rule of law cannot be perceived in line with a simple analysis of its component words, which might suggest that it is enough that "the law rules". Hence the rule of law is not merely a formal principle of legality. In fact, the debate over the formal and substantial elements of the rule of law is by no means new. For example, Collins described as far back as in the 1980s how, in Britain, the term "rule of law" has traditionally been understood in different ways by different

schools of legal thought⁷. Legal positivists identify the ideal of the rule of law as one requiring strict observation of established legal rules⁸ and believe that legal reasoning should employ formal logical rationality⁹, that is, apply rules in accordance with their established literal meaning. By contrast, idealists, or natural lawyers, conceive of the rule of law as a substantive principle which embodies the liberal political settlement, with its distribution of institutional responsibilities and the vesting of rights in individual citizens¹⁰.

One proponent of a relatively formalistic interpretation of the rule of law is Craig, who sees this concept as addressing the manner in which the law is promulgated, its clarity and its temporal dimension, meaning that the content of law is immaterial¹¹. Paunio has described how this formalistic stance has been further elaborated by Raz, who has warned against confounding the rule of law with other important virtues that legal systems should possess¹², such as respect for fundamental rights. Paunio continues her analysis by referring to Tuori, who has also noted a danger in inflating certain legal concepts with almost everything that is experienced as positive, because this may turn legal concepts into what Frändberg calls mere «rhetorical balloons»¹³.

Of those advocating a rights-based or substantive conception of the rule of law, the most famous may be Dworkin. The Dworkinian way of interpreting the rule of law has gained acceptance in the contemporary legal literature even in continental Europe. For example, Sellers recently claimed that positive laws promulgated in private interests do not satisfy the rule-of-law test, although they may sometimes represent an advance on otherwise unregu-

lated tyranny¹⁴. Hence it is only natural that Craig referred to Dworkin when attempting to shed light on the ideas of those who oppose the formalist school of thought¹⁵.

However, Dworkinian theory of law can be used as a means to avoid an overly positivistic approach to law. It offers an argument in favour of the claim that valid legal justification can exist outside the positivistic concept of law. Specifically, Dworkin maintained that positivism is defective because it rejects the idea that individuals can have rights against the State whose existence predates the rights created by explicit legislation. To Dworkin, individual rights were political trumps held by individuals that they could play whenever a collective utilitarian goal was not sufficient justification for denying them what they wanted¹⁶.

Dworkin challenged the theory of legal positivism, especially in the Hartian sense that the truth of a legal proposition depends on whether the rules in question have been adopted by specific social institutions and are therefore valid. In this connection, Hart proposed a set of minimum conditions necessary for the existence of a legal system¹⁷. First, there must be primary rules governing behaviour and secondary rules governing the creation of primary rules. Any rules of behaviour that are valid according to such a system's ultimate criteria of validity must be generally obeyed. Second, the rules of recognition, which specify the criteria of legal validity, and the rules of change and adjudication must be effectively accepted as common public standards for official behaviour by the officials of the legal system¹⁸. While Dworkin thus chose the Hartian version of positivism and Hart's rules of recognition as his main target, his challenge to legal positivism¹⁹ also affected Kelsenian legal

positivism and its famous ideas of "*Stufenbau*" and "*Grundnorm*"²⁰.

Even this very short introduction to the debate between legal positivism and idealism shows how closely all definitions of the concept of the rule of law are linked to the ontological and epistemological choices of those who make those definitions.

2. *The rule of law in relation to the State in Britain – the 1985 Ponting case*

MacCormick has described the British concept of the rule of law in relation to the historical development of the notion of State in Britain. Constitutional law in the United Kingdom does not specifically define the State or its functions. In fact, the Kingdom became a State without avowing its changed character through a formal constitution, and it is acknowledged that the separation of powers between the executive (the "Crown"), the legislature and the judiciary is imperfect. In such circumstances, it is no wonder that the term "rule of law" cannot be accurately defined. According to MacCormick, the rule of law has been held to depend on the fact that a single structure of courts is the final arbiter of the legality of every governmental or non-governmental action²¹.

MacCormick claims that the rule of law does not necessarily imply a theory of law as a pure normative order. As a concrete example to illustrate his point of view, he has used the *Ponting case*²².

Clive Ponting, a senior civil servant at the UK Ministry of Defence, had prepared for his ministers a study of the controversial events surrounding the sinking of *General*

Belgrano, an Argentinian cruiser, during the Falklands War of 1982. His study revealed that the previous accounts given to Parliament had been incorrect and that there had been no good reasons of State security for not giving the correct information. Further, Mr Ponting had also drafted answers for use by his ministers in relation to questions that had been raised, in particular, by a Member of Parliament, Tam Dalyell. The ministers Heseltine and Stanley decided not to reveal Ponting's study to Parliament in response to a question posed by Mr Dalyell. However, Mr Ponting sent Mr Dalyell a document containing draft answers for the use of his ministers and a document with advice for the ministers on how to avoid revealing to Parliament what had really happened. Mr Ponting was eventually prosecuted for a breach of Section 2(1) of the Official Secrets Act, under which it was an offence to pass on information obtained in an official capacity unless the communication was to an authorised person or a person to whom one had a duty in the interest of State to give the information. At the trial, the defence argued that Mr Ponting had passed the documents to Mr Dalyell (i.e., to Parliament) in pursuance of a duty in the interest of State. Regarding this argument, the trial judge, Sir Anthony McCowan, directed the jury that it depended on an incorrect interpretation of the law and that the jury should convict Mr Ponting of breaching Section 2(1) of the Official Secrets Act. However, the jury ignored the judge's direction and pronounced a verdict of Not guilty²³.

The law is not merely a set of established rules that are always applied in a deductive way by a judge who first finds out what the facts are, then subsumes them under appropriate rules and finally draws legal

conclusions accordingly. In this case, one might reasonably think, as the jury may have done, that Mr Ponting protected the highest constitutional authority – Parliament – from being deliberately misled by persons who were subordinate to it in their capacity as ministers. However, even if a judge presents the jury with an unsound conception of the law, the jury is clearly free to ignore that unsound conception and act in accordance with the rule of law²⁴. The verdict pronounced by the jury in *Ponting* suggests that the interest of the State is not necessarily the same as the interest of the political majority or the interest of the government of the day.

MacCormick's presentation of the rule of law is exemplary in that he used a concrete case to clarify the various aspects of the rule of law instead of trying to define that concept. However, I wish to emphasise that the idea that the concept of the rule of law requires a certain concept of democracy, in which the executive is subordinate to the legislature, does not answer all the crucial questions raised by the Ponting case. Specifically, the issue of to whom Mr Ponting was responsible required balancing the requirement of loyalty in civil servants with the traditional British conception of parliamentarianism²⁵. Under the British constitution, ministers are clearly accountable to Parliament. While Mr Ponting was directly accountable to his ministers, one might argue that a primary interest of any State is to safeguard the integrity of its constitution, whether it is written or unwritten. From this perspective, it might be considered that upholding the constitutional order which constitutes the organs of State, and upholding the hierarchical relationships between those organs, is an even more prominent

"interest of State" than is promoting the implementation of the policies that are determined by the duly constituted organs of State²⁶. In addition, one might defend the jury's verdict by referring to the requirement of openness in decision-making. Such openness cannot be achieved if those who are responsible for providing information to Parliament do not present all relevant facts correctly.

To conclude, one might claim that the rule of law requires the resolution of a question of fact in a legal process to operate under the constraints of due process as well as a certain kind of insight as to what is "acceptable"²⁷. To determine what is acceptable in law, or in the circumstances at hand, one needs to refer to the inner morality of law²⁸. Here it might be noted that certain old maxims from Roman law relating to due process – nowadays commonly replaced by references to international human-rights treaties – such as "no-one should be judge in his or her own cause" or "the various sides of the dispute must be heard" may reflect the commonly accepted consequences of applying the rule of law. Like MacCormick, I find that the concept of the rule of law requires that, in judicial decision-making, the acceptability of the substance of the case must be taken into consideration alongside the process-based values of the rule of law. For example, it is essential that basic civil and political rights are respected, and even that certain socio-economical guarantees are safeguarded²⁹.

I think MacCormick's interpretation of the *Ponting* case offers a good starting point for approaching the rule of law in Britain, because he clearly distinguishes the interest of State from the interest of the political majority while at the same time stressing

how important it is that the democratically elected legislature and the independent judiciary should observe the requirements of the rule of law in their respective action. However, he stays at a relatively abstract and theoretical level in his analysis. For example, he seems to assume that civil servants are not influenced by political parties or politicians but remain perfectly neutral, which I think is not necessarily realistic. In the present case, there is a very practical and concrete question that one might well ask: what was the relationship between Mr Ponting and Mr Dalyell? Given that Mr Ponting lacked formal authority to act in the way he did, the question of loyalty may be essential here. My impression is that something relevant is missing from MacCormick's account of the *Ponting* case, and I wonder if the possibly missing part might relate to the facts of the case.

Given that the *Ponting* judgment was delivered almost four decades ago, it might also be worth pointing out that, as an example of the British debate concerning the rule of law, democracy and parliamentarianism, it is not at all outdated. For example, the problems related to the rule of law encountered in the framework of Brexit are quite comparable to those reflected in the *Ponting* case³⁰. Indeed, it was puzzling to see how, during the court proceedings concerning the UK government's prerogative powers in the context of Brexit, the judges were mocked in a tabloid newspaper as enemies of the people after they had merely interpreted the unwritten constitution and defended the status of Parliament³¹. Eventually, the UK Supreme Court confirmed that the UK government cannot trigger an Article 50 TEU procedure without an authorising Act of Parliament – a finding that,

in a way, illustrates the overlapping relationship between the rule of law and parliamentary democracy³².

3. *How to interpret the concept of the rule of law in EU law?*

The form of democratic government prevailing in the context of the EU tends to be referred to as “liberal democracy” or as characterised by an “open civil society”, not as more authoritarian “illiberal democracy”³³. The concepts of the rule of law, legality, human rights and democracy are intertwined, as is clear even from the wording of Article 2 TEU, according to which the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The pending case against Hungary concerning discrimination against trans- and homosexuals provides a clear illustration of how the values set out in Article 2 TEU can be used to underpin a legal argument in infringement proceedings³⁴. That the EU conception of the rule of law requires respect for human rights can be illustrated by the following quotation from the well-known *Kadi* judgment:

It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community³⁵.

At least, this is what has traditionally been perceived as the main idea of the rule of law in the EU context.

Nowadays, however, the rule of law has begun to be applied relatively often as a legal argument in its own right by the EU courts. One concrete example of this are the cases concerning the independence of judicial systems³⁶. The existence of effective judicial review is an inseparable part of the rule of law³⁷, and each individual’s right to an independent court is laid down in Article 47 of the Charter of Fundamental Rights of the EU³⁸. Even so, judicial review and its relationship with the rule of law did not receive much emphasis in older case-law. By contrast, the connection between judicial review and the rule of law has been given clear expression in the grounds for more recent judgments delivered by the Court of Justice of the EU (CJEU)³⁹. For example, in *Rosneft*, the CJEU stated the following:

It may be added that Article 47 of the Charter, which constitutes a reaffirmation of the principle of effective judicial protection, requires, in its first paragraph, that any person whose rights and freedoms guaranteed by EU law are violated should have the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article. It must be recalled that the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law⁴⁰.

Mention should also be made here of the Venice Commission’s report on the rule of law⁴¹ and the recent Budget Conditionality Regulation⁴², where the rule of law is strongly associated with democracy and with the requirement to respect human rights. The following quotation from the preamble of the Budget Conditionality Regulation may suffice to illustrate how the EU has adopted the definition of the Venice Commission:

The rule of law requires that all public powers act within the constraints set out by law, in accordance with the values of democracy and the respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union [...] and other applicable instruments, and under the control of independent and impartial courts. It requires, in particular, that the principles of legality implying a transparent, accountable democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts; and separation of powers, be respected⁴³.

Against this background, it is clear that, in the EU-level discourse, the concept of the rule of law is inseparable from the democratic society that creates an environment where that concept can be interpreted, from the distribution of power, and from the legal principles and human rights that legitimise the judicial system. In this context, the principle of the rule of law is not merely a "rhetorical balloon" to be inflated with all that is deemed positive in law⁴⁴. Rather, the concept of the rule of law should be seen as a value-based ideal to be used as a yardstick of the degree of development of a society⁴⁵.

4. Concluding remarks

It is essential that the EU legal concept of the rule of law should be interpreted in close association with the principles of democracy and with fundamental and human rights⁴⁶. This is because the concept of the rule of law is an inseparable part of the fundamental values that the EU is based on⁴⁷. As far as the value of democracy is concerned, it seems apt to quote Radbruch's

strong emphasis on the relationship between democracy and the rule of law:

The *Rechtstaat* (rule of law) is like our daily bread, like the water we drink and the air we breathe, and the greatest merit of democracy is that it alone is capable of preserving the *Rechtstaat*⁴⁸.

To conclude, the concept of the rule of law is not merely a rhetorical balloon. I do not consider that there is any justification for the kind of thinking according to which the concept of the rule of law is so ambiguous and vague that it has lost its meaning in legal argumentation. It is worth pointing out that in the contemporary legal literature, especially in the field of EU law, reference is often made to a "thick" conception of the rule of law, which contains both formal and substantive elements⁴⁹. The CJEU has listed a large number of more specific "sub-principles" of the rule of law, which have been interpreted in its case-law and which help to define the rule of law accurately enough. Such sub-principles include those of legality, legal certainty, the prohibition of arbitrariness in the use of executive powers, effective judicial protection and the separation of powers, equality before the law and non-discrimination⁵⁰. Hence the rule of law is not just an ideal or a guiding standard that can never be fully achieved. For example, a Member State whose society is characterised by discrimination cannot be regarded as ensuring the respect of the rule of law within the meaning of that common value⁵¹.

- ¹ This article is part of a project financed by the Riksbankens Jubileumsfond. In line with the requirements of Riksbankens Jubileumsfond, this article is published in open access under the CC BY licence.
- ² In Poland, the Law and Justice Party enacted legislative changes undermining the independence of the Constitutional Court. For this reason, the EU initiated the procedure under Article 7 TEU; see Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, OJ L 217, 12.8.2016, p. 53. In addition, the government of Hungary has already for years been weakening the independence of the Constitutional Court and undermining the freedom of the media and of civil society.
- ³ In EU law, this has been confirmed, for example, in the judgment of 6 April 1962 in case 13/61, *Bosch*, ECLI:EU:C:1962:11, ECR (special English edition, 1962:45), especially p. 52 (legal certainty), and in the judgment of 23 March 1993 in case C-314/91, *Weber*, ECLI:EU:C:1993:109, especially p. 8 (rule of law).
- ⁴ See J. Husa, *Advanced Introduction to Law and Globalisation*, Cheltenham, Edward Elgar, 2018, p. 50.
- ⁵ See K. Tuori, *Ratio and Voluntas. The Tension Between Reason and Will in Law*, Farnham, Ashgate, 2011, pp. 210–211. See also, similarly, Å. Frändberg, *From Rechtsstaat to Universal Law-State. An Essay in Philosophical Jurisprudence*, Dordrecht, Springer, 2014, p. 6, in which he states that the core of his law-state thinking is that the individual enjoys legal protection against violations caused by the exercise of power on the part of the public power.
- ⁶ See F.A. Hayek, *The Constitution of Liberty*, London, Routledge & Kegan Paul, 1960, p. 248.
- ⁷ See H. Collins, *Democracy and Adjudication*, in N. MacCormick and P. Birks (edited by), *The Legal Mind. Essays for Tony Honore*, Oxford, Clarendon Press, 1986, pp. 68–69.
- ⁸ See J. Raz, *The Authority of Law. Essays on Law and Morality*, Oxford, Clarendon Press, 1979, p. 217. The rule of law applies to judges primarily in the form of their duty to apply the law.
- ⁹ See H.L.A. Hart, *The Concept of Law*, Oxford, Clarendon Press, 1997², pp. 155–184, or M. Weber, *Economy and Society. An Outline of Interpretative Sociology. Volume 2*, edited by G. Roth and C. Wittich, New York, Bedminster Press, 1968, pp. 656–657.
- ¹⁰ See R. Dworkin, *Political Judges and the Rule of Law*, London, Oxford University Press, 1980, pp. 259–287, and D. Lyons, *Ethics and the Rule of Law*, Cambridge, Cambridge University Press, 1984, pp. 74–78, where the author describes the views of natural lawyers and especially Fuller's conception of the inner morality of law.
- ¹¹ See P. Craig, *Constitutional Foundations, the Rule of Law and Supremacy*, in «Public Law», 2003, pp. 92–111, especially at p. 96.
- ¹² See E. Paunio, *Legal Certainty in Multilingual EU Law. Language, Discourse and Reasoning at the European Court of Justice*, Farnham, Ashgate, 2013, pp. 54–55, and Raz, *Authority of Law* cit., p. 211.
- ¹³ See Å. Frändberg, *Begreppet rättsstat*, in F. Sterzel (edited by), *Rättsstaten – rätt, politik, moral*, Gothenburg, Rättsfonden, 1996, pp. 21–46, and Tuori, *Ratio and Voluntas* cit., p. 211.
- ¹⁴ See M. Sellers, *What Is the Rule of Law and Why Is It So Important?*, in F.A.N.J. Goudappel, E.M.H. Hirsch Ballin (edited by), *Democracy and Rule of Law in the European Union*, The Hague, T.M.C. Asser Press, 2016, p. 7.
- ¹⁵ See P. Craig, *Constitutional Foundations, the Rule of Law and Supremacy*, in «Public Law», 2003, pp. 92–111.
- ¹⁶ R. Dworkin, *Taking Rights Seriously*, Cambridge, Harvard University Press, 1978, pp. xi and xiii of the Introduction.
- ¹⁷ See Hart, *Concept of Law* cit., pp. 79–99.
- ¹⁸ Ivi, p. 116.
- ¹⁹ See N. Jääskinen, *Eurooppalaistuvan oikeuden oikeusteoreettisia ongelmia*, Helsinki, Yliopistopaino, 2008, pp. 95–97.
- ²⁰ See H. Kelsen, *Pure Theory of Law*, Berkeley, University of California Press, 1970, pp. 221–222, and H. Kelsen, *Reine Rechtslehre*, Wien, Österreichische Staatsdruckerei, 1960, p. 228. Kelsenian theory of law requires that legal norms must be separated from the norms of universal morality or religion, because the validity of a legal norm can be derived from another legal norm of higher status in the *Stufenbau* (or hierarchy), where, for example, decrees, statutes and the constitution are of progressively higher status. The *Grundnorm* (or basic norm) represents the highest reason for the validity of norms created one in conformity with the other to form a legal order in its hierarchical structure.
- ²¹ See D.N. MacCormick, *Questioning Sovereignty. Law, State and Nation in the European Commonwealth*, Oxford, Oxford University Press, 1999, pp. 28–29, and J. Raitio, *The Principle of Legal Certainty in EC Law*, Dordrecht, Kluwer Academic Publishers, 2003, pp. 139–142.
- ²² See *R. v Ponting* (1985) Crim. L.R., pp. 318–321, Raitio, *Principle of Legal Certainty in EC Law* cit., pp. 140–146, and J. Raitio, *What is Meant by Legal Certainty and Uncertainty?*, in «Rechtstheorie», vol. 37, Berlin, Duncker & Humblot, 2006, pp. 394–395, 403.
- ²³ See MacCormick, *Questioning Sovereignty* cit., pp. 29–30.
- ²⁴ Ivi, pp. 29–33.
- ²⁵ Regarding the British (or Lockean) conception of parliamentarism, see M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, London, Sweet & Maxwell Ltd., 1994⁶, pp. 139–141.
- ²⁶ See MacCormick, *Questioning Sovereignty* cit., pp. 39, 41–42.
- ²⁷ Ivi, p. 45. According to MacCor-

mick, the question of whether or not a conduct has been conformable to law «has to be resolved under constraints of due process and natural justice».

²⁸ See L.L. Fuller, *The Morality of Law*, revised edition, New Haven and London, Yale University Press, 1969, pp. 33–94.

²⁹ See MacCormick, *Questioning Sovereignty* cit., p. 46.

³⁰ See, for example, J. Raitio, H. Raulus, *The UK EU referendum and the move towards Brexit*, in «Maastricht Journal of European and Comparative Law», 2017, pp. 25–42. The UK government argued forcefully that it had a royal prerogative to trigger Article 50 TEU. Such a royal prerogative is often used for matters relating to international affairs, but in this case, it was questioned whether there might be constitutional restraints based on the very core of the concepts of parliamentary sovereignty and even the rule of law. As a result, several court proceedings were raised to protect Parliament's right to be involved.

³¹ See the front page of the *Daily Mail*, 4 November 2016. The headline «Enemies of the People» referred to the three High Court judges who had ruled that the UK government would require the consent of Parliament to give notice of Brexit. Considering that the *Daily Mail*'s website also initially described one of those judges as an «openly gay ex-Olympic fencer», the judges received extraordinary criticism, which was alarming from the perspective of the independence of the judiciary.

³² See Judgment given on 24 January 2017, *R (Miller and Dos Santos) v Secretary of State for exiting the European Union* [2017] UKSC 5.

³³ See, for example, B. Bugarič, *Protecting Democracy inside the EU. On Article 7 TEU and the Hungarian Turn to Authoritarianism*, in C. Closa, D. Kochenov (edited by), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge,

Cambridge University Press, 2016, pp. 82–101.

³⁴ See case C-769/22, *European Commission v. Hungary*, action brought on 19 December 2022 (OJ C 54, 13.2.2023, pp. 16–17). This case is about prohibiting children from accessing content which promotes or portrays sex reassignment, homosexuality or gender identities that do not correspond to the sex assigned at birth. According to the Commission, Hungary has infringed Directive 2000/31/EC on electronic commerce, Directive 2006/123/EC on services, Directive 2010/13/EU on audio-visual media services, Article 56 TFEU and certain articles of the Charter of Fundamental Rights of the EU as well as Article 2 TEU.

³⁵ See judgment of 3 September 2008 in joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat*, ECLI:EU:C:2008:461, p. 284, where reference is made to the judgment of 12 June 2003 in case C-112/00, *Schmidberger*, ECLI:EU:C:2003:333, p. 73.

³⁶ See, for example, judgment of 27 February 2018 in case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117, pp. 30, 36 (the Portuguese Judges case), judgment of 25 July 2018 in case C-216/18 PPU, *LM*, ECLI:EU:C:2018:586, p. 48 (concerning Poland), and judgment of 24 June 2019 in case C-619/18, *Commission v. Poland*, ECLI:EU:C:2018:910, p. 21.

³⁷ See judgment of 28 March 2017 in case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, p. 73, and judgment of 27 February 2018 in case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117, p. 36.

³⁸ See judgment of 24 June 2019 in case C-619/18, *Commission v. Poland*, ECLI:EU:C:2018:910, p. 20.

³⁹ See judgment of 18 December 2014 in case C-562/13 *Abdida*, ECLI:EU:C:2014:2453, p. 45, judgment of 6 Octo-

ber 2015 in case C-362/14, *Schrems*, ECLI:EU:C:2015:650, p. 95, and judgment of 28 March 2017 in case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, p. 73.

⁴⁰ See judgment of 28 March 2017 in case C-72/15, *Rosneft*, ECLI:EU:C:2017:236, p. 73.

⁴¹ See European Commission for Democracy Through Law (Venice Commission), *Report on the Rule of Law*, adopted by the Venice Commission at its 86th plenary session, Venice, 25–26 March 2011, Strasbourg, 4 April 2011, Study No. 512/2009, CDL-AD(2011)003rev; in paragraph 41 of its report, the Venice Commission concludes that «it seems that a consensus can now be found for the necessary elements of the rule of law» (in its substantive version) and goes on to list those elements as «(1) Legality, including a transparent, accountable and democratic process for enacting law; (2) Legal certainty; (3) Prohibition of arbitrariness; (4) Access to justice before independent and impartial courts, including judicial review of administrative acts; (5) Respect for human rights; (6) Non-discrimination and equality before the law» (italics in the original).

⁴² Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ L 433I, 22.11.2020, p. 1).

⁴³ Ivi, preamble, p. 3.

⁴⁴ See Å. Frändberg, *Begreppet rättsstat* cit., pp. 22–23.

⁴⁵ See R. McCorquodale, *Defining the International Rule of Law: Defying Gravity?*, in «International & Comparative Law Quarterly», part 2, 2016, pp. 284–285.

⁴⁶ See Article 2 TEU and, for example, judgment of 3 September 2008 in joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat*, ECLI:EU:C:2008:461, p. 284.

⁴⁷ See A. Rosas, L. Armati, *EU Con-*

stitutional Law. An Introduction, Oxford, Hart Publishing, 2010, pp. 41-43.

⁴⁸ See G. Radbruch, *Rechtsphilosophie*, Stuttgart, K.F. Köhler, 1950, p. 357 («Der Rechtsstaat ist wie das tägliche Brot, wie Wasser zum Trinken und wie Luft zum Atmen, und das Beste an der Demokratie ist, daß nur sie geeignet ist, den Rechtsstaat zu sichern»).

⁴⁹ See, for example, L. Pech, *Promoting the rule of law abroad. On the EU's limited contribution to the shaping of an international understanding of the rule of law*, in D. Kochenov, F. Amtenbrink (edited by), *The European Union's Shaping of the International Legal Order*, Cambridge, Cambridge University Press, 2013, pp. 108-129, at 118: «[...] EU publications tend to illustrate a "substantive/thick" rather than "formal/thin" understanding of the rule of law», or McCorquodale, *Defining the International Rule of Law* cit., pp. 284-285: «The definition offered in this article of the international rule of law is a "thick" one and includes the following elements or objectives: legal order and stability; equality of application of the law; protection of human rights; and the settlement of disputes before an independent legal body».

⁵⁰ See judgment of 16 February 2022 in case C-156/21, *Hungary v. European Parliament and Council*, ECLI:EU:C:2022:97, p. 236.

⁵¹ Ivi, p. 229.