

Michał Gierycz / Piotr Mazurkiewicz (eds.)

Faces of the rule of law in Europe



Michał Gierycz, Piotr Mazurkiewicz (eds.): Faces of the rule of law in Europe

Michał Gierycz, Piotr Mazurkiewicz (eds.): Faces of the rule of law in Europe

Michał Gierycz, Piotr Mazurkiewicz (eds.)

Faces of the rule of law in Europe

VANDENHOECK & RUPRECHT

The printing of this book was made possible with support provided by
Cardinal Stefan Wyszyński University in Warsaw.

Bibliographic information published by the Deutsche Nationalbibliothek:
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie;
detailed bibliographic data available online: <https://dnb.de>.

© 2024 by Vandenhoeck & Ruprecht, Robert-Bosch-Breite 10, 37079 Göttingen, Germany,
an imprint of the Brill-Group (Koninklijke Brill BV, Leiden, The Netherlands;
Brill USA Inc., Boston MA, USA; Brill Asia Pte Ltd, Singapore; Brill Deutschland GmbH,
Paderborn, Germany, Brill Österreich GmbH, Vienna, Austria)
Koninklijke Brill BV incorporates the imprints Brill, Brill Nijhoff, Brill Schöningh,
Brill Fink, Brill mentis, Brill Wageningen Academic, Vandenhoeck & Ruprecht,
Böhlau, and V&R unipress.

All rights reserved. No part of this work may be reproduced or utilized in any form or by any
means, electronic or mechanical, including photocopying, recording, or any information
storage and retrieval system, without prior written permission from the publisher.

Proofreading: Kate Bird, Berlin
Typesetting: le-tex publishing services, Leipzig
Cover design: SchwabScantechnik, Göttingen

Vandenhoeck & Ruprecht Verlage | www.vandenhoeck-ruprecht-verlage.com

ISBN 978-3-647-30258-4

Table of Contents

Michał Gierycz, Piotr Mazurkiewicz
Introduction 7

I. The concept of the rule of law

Zbigniew Stawrowski
Sources of the idea of the rule of law. Plato's lesson 11

Sara Lagi
Legal positivism as a limitation of the rule of law 25

Piotr Mazurkiewicz
The rule of law according to the social doctrine of the Church 43

András Zs. Varga
Transformation of the principle of rule of law from legal ideal to
political idol..... 71

II. European traditions of understanding the rule of law

Michel de Villiers
The French tradition of *l'état de droit* 93

Paweł Kaczorowski
The *Rechtsstaat* in German state thought of the nineteenth and
twentieth centuries 113

Bogdan Szlachta
The Polish tradition of the rule of law 141

Iain T. Benson, Jane Adolphe
The Anglo-Saxon Tradition: Australia in times of COVID-19 as a
Case Study..... 175

III. The rule of law in the European Union

Michał Gierycz, Dorin Dobra

Foundations of rule of law – the EU as a community of values 219

José Luis Bazán

Control of the rule of law by the European Union 239

Tomasz Grzegorz Grosse

The rule of law in the European Union – a functional perspective 273

Michał Gierycz, Piotr Mazurkiewicz

Conclusions 301

Notes on Contributors 305

Michał Gierycz, Piotr Mazurkiewicz

Introduction

The current lively discussion on the rule of law, especially in the EU, seems to be developing to a large extent because the terms expressing the idea of the rule of law in different European languages do not convey the same message. *The rule of law*, *der Rechtsstaat*, *l'état de droit*, to name but three linguistic versions, have been coined in different historical contexts and traditions of political thought. The question then arises, to what extent is differentiation in the understanding of the rule of law still legitimate? To what extent must the political integration of the European space be accompanied by a tendency to monopolise scientific debate and, as a result, to dominate this space by the only one correct concept? We look for the answers to these questions in the presented book, whose authors are well-known academics representing different traditions of legal and political thinking, as well as various disciplines in the field of social sciences.

The publication is divided into three parts. The first part explains the concept of the rule of law and outlines its development. Our volume is opened by an article from Zbigniew Stawrowski, who offers a broad overview of the philosophical sources of the very idea of the rule of law. This picture is contrasted by Sara Lagi's text on the issue of legal positivism, perceived as minimalising the idea of the rule of law. In addition, this part includes articles devoted to some theoretical problems connected to the rule of law. The very first is its relation to Christianity, which formed the foundations of European culture. Piotr Mazurkiewicz therefore analyzes the concept of the rule of law from the perspective of Catholic social thought. Another perspective is the current transformation of that legal concept into a kind of political fetish, which is discussed by András Zs. Varga.

The second part is devoted to the various European traditions of understanding the rule of law. In this part of the book, the reader will find an overview of the rule of law from the perspective of three political traditions existing currently in the European Union. The French tradition of *l'état de droit* is analysed by Michel de Villiers, the German *Rechtsstaat* by Paweł Kaczorowski and the Polish rule of law by Bogdan Szlachta. As rule of law should not omit the Anglo-Saxon tradition, those

perspectives are widened by an article on legal positivism in Australia during the times of Covid-19 written by Iain T. Benson and Jane Adolphe.

The third part of the book deals with the rule of law from the perspective of the European Union. This concerns both substantial and functional questions. The first are tackled by Michał Gierycz and Dorin Dobra who reflect on the EU's foundations for the rule of law, namely the values of European Union. The latter questions touch mechanisms for monitoring the rule of law in the Member States and the applicability of this concept to an international organisation such as the European Union. The first problem is discussed by José Luis Bazán and the second by Tomasz Grzegorz Grosse. The conclusions of the entire publication are presented in the final chapter.

I. The concept of the rule of law

Michał Gierycz, Piotr Mazurkiewicz (eds.): Faces of the rule of law in Europe

Zbigniew Stawrowski

Sources of the idea of the rule of law. Plato's lesson

The rule of law is a term that is nowadays regarded in Western countries as a fundamental determinant of well-functioning political organisms. Within the European Union, there is probably no more serious accusation today than that of a breach of the rule of law, and the states accused of this are pilloried by public opinion as those that exclude themselves from the ranks of civilised nations. Even a cursory observation shows, however, that the criterion of the rule of law is sometimes applied extremely selectively, that similar political actions or institutional solutions are in the case of some states vehemently condemned, while in the case of others – usually the stronger ones – they are tactfully passed over in silence or even treated as irreproachable or even exemplary. In political practice and international relations, the rule of law takes on a worryingly protean shape. It is therefore worth going back to the sources and, leaving aside the analysis of the meanders of current politics, asking the fundamental question: what is the rule of law and in what sense can we speak of it as the foundation of a political community.

The concept of the rule of law contains two elements essential to the functioning of a well-organised political community. On the one hand, there is the governing factor – power; on the other hand, there is the specific order determined by laws, i. e. general regulations that define the way of life of a given community. The two elements are by no means equivalent. While – contrary to the hopes of radical anarchists – it is not even possible to conceive of the lasting existence of a political community without considering some centre of central authority,¹ the opposite case is nevertheless possible – a community whose life would be regulated not by stable laws but by the actual will of the ruler expressed in the form of specific detailed orders. Such an extreme version of an 'order' devoid of fixed laws, the shape of which depends entirely on the whims of the reigning despot or tyrant, is difficult to maintain in the long term and in its pure form does not happen very often.² Ultimately, despots can and usually do prefer to exercise their rule by issuing not

1 As Aquinas (quoting Eccl 4: 9) wrote: "Where there is no governor, the people shall fall." (St Thomas Aquinas, *De regno*, (I, 8)), <https://www.corpusthomicum.org>, (accessed 19 January 2024).

2 It is noteworthy that such a situation could happen not only in ancient satrapies ruled by different "Herods", but also corresponds to the situation of a martial law, described by Carl Schmitt, when legal norms in force in a normal situation cease to apply, and order is maintained by the power of the sovereign and this shows that the existential order of the very existence of a political community is more important and more fundamental than a normative order designated by specific legal regulations.

only detailed orders and instructions, but also by promulgating despotic laws.³ However, such arbitrary regulations, even if they are proclaimed as binding laws and indeed resemble them in their general form, in terms of their content – as profoundly depraved laws – certainly do not merit the name. For the law, including legislation, does not originate solely in the arbitrariness and power of rulers, but, if it is to be law in the strict sense of the word – that is, a reasonable and just law – it must be based on reasonable universal principles.

Such a belief in the rational basis of the laws governing human societies was born and spread as early as in pre-Christian times. It can be found both in the Jewish religious tradition and in the ancient Greek philosophers (and later in the Roman jurists), who introduced the concept of natural law as a measure of the “lawfulness” of the laws in force in the state. The classic formulation of this belief can be found in St Thomas Aquinas, who – following St Augustine,⁴ by the way – expressed it as follows: “Human law is law inasmuch as it is in conformity with right reason and thus derives from the eternal law. But when a law is contrary to reason, it is called an unjust law; but in this case it ceases to be a law and becomes instead an act of violence”.⁵

On the other hand, it should also be added that even the best, most reasonable and just laws established without consistent enforcement by the existing authorities cease to be valid – they seem to be there, but are not. The social order is then destroyed, and a state of anomie emerges and grows. For this reason, it is only by combining these two elements – an order based on rational laws and an effective authority that upholds and successfully protects this order – that the ideal of a properly organised political community is established in our civilisational circle. This ideal has nowadays taken the form of the state ruled by law (*Rechtsstaat*), or – as it is expressed in the Anglo-Saxon tradition – the rule of law, although the two concepts, although similar, are by no means identical. Moreover, for all their merits and undoubted value, as well as their common core, they were formed in a specific place and time and thus correspond to the different historical experiences

3 It is not only about political organisms from past eras. It is worth recalling a fairly recent example of a state in which law was understood as a pure emanation of the will of the rulers: “Law is a system of rules (norms) established by the state to express the will of the dominant class, based on the authority of the state in order to protect, maintain and develop relations and social orders that are approved and beneficial to the ruling class.” А. Я. Вышинский (A. Wyszynski), *Основные задачи науки советского социалистического права (Main Tasks of the Soviet Science of Socialist Law)*, Moscow 1938, 37.

4 Cf. St Augustine, *De libero arbitrio*, I, 5, 11: “Non videtur esse lex, quae iusta non fuerit” (A law that is unjust does not seem to be a law), http://www.augustinus.it/latino/libero_arbitrio/index2.htm, (accessed 30 December 2023).

5 St Thomas Aquinas, *Summa theologiae* I–II, q. 93, a. 3, ad 2 (quote from John Paul II’s Encyclical *Evangelium Vitae*, 72, https://www.vatican.va/content/john-paul-ii/pl/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html, (accessed 30 December 2023)).

of specific communities and states. It seems, therefore, that also how the issue of the legal state (or rather, state ruled by law)⁶ and the rule of law should be understood in today's Poland does not have to be reduced to a German or an Anglo-Saxon model. Due to the peculiarity of our historical fate, Polish distinctiveness and the specificity of our tradition are also worth taking into account. However, this is a task for a separate study.

In this text, leaving aside the aforementioned differences in the contemporary understanding of what a state ruled by law is, we will go back to the very roots of Western civilisation – to the beginnings of philosophical reflection on the rule of law. The subject of our considerations will be the reflections of Plato, who was the first thinker in history to attempt to formulate and systematically describe this ideal, which he called a just state.⁷

*

Plato's concept of the rule of law was born in sharp disagreement with the widespread – and not only at the time – opinion that human relationships were ultimately determined by force. The proponents of such a belief are represented in Plato's dialogues by the sophists Callicles and Thrasymachus. According to the former: “nature, in my opinion, herself proclaims the fact that it is right for the better to have advantage of the worse, and the abler of the feeble”,⁸ likewise according to the latter: “the just is nothing other than the advantage of the stronger”.⁹ Interestingly, Callicles supports his argument with a quote from Pindar's poem, whose words: “*nomos ho panton basileus*” (law is king of all)¹⁰ could even be

6 The Polish language makes it possible to distinguish between “państwo **prawne**” – a legal state, i. e. a state in which every act of state authority must be legal (have a basis in the constitution or a constitutionally compliant legal act), and “państwo **prawa**” a state of law (or more strongly: a lawful, just state), in which the action of authority must not only be legal, but both this action and the constitution itself, together with derived statutory regulations, must be based on reasonable, lawful premises. In this context, the fact that Art. 2 of the Polish Constitution reads: “The Republic of Poland shall be a democratic state ruled by law (“państwo prawne”) and implementing the principles of social justice” indicates what its authors thought about the state and the law.

7 “Indeed, it is precisely this which constitutes for us ‘political justice,’ which is the object we must strive for”. (Plato, *Laws*, in: *Plato in Twelve Volumes*, Vols. 10 & 11 translated by R.G. Bury. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1967 & 1968, [757c]).

8 Plato, *Gorgias*, in: *Plato in Twelve Volumes*, Vol. 3 translated by W.R.M. Lamb. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1967, [483d].

9 Plato, *Republic*, in: *Plato in Twelve Volumes*, Vols. 5 & 6 translated by Paul Shorey. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1969, [338c].

10 Pindar (518–440) – Boeotian lyric poet. The entire passage quoted by Callicles from this poem reads: “Law the sovereign of all, mortals and immortals (...) Carries all with highest hand, Justifying the utmost force: in proof I take The deeds of Hercules, for unpurchased...” (Plato, *Gorgias* [484b]). Plato refers to the same passage in *Laws* (Plato, *Laws*, [690 b–c]; [715a]). In contrast, this phrase of Pindar's is understood differently by Herodotus, for whom the word *nomos* here means custom

considered the first declaration of the universal rule of law. The point is, however, that the law to which Callicles refers and which he expressly mentions here is the law of nature (*nomos physeos*), understood as the ‘law of the jungle’, according to which the stronger one rightly, i. e. in accordance with nature, ‘devours’ the weaker one. Paradoxically, this probably first-ever record referring explicitly to the law of nature appears to us as the radical opposite of what was later defined in our cultural circle as the concept of natural law.

Plato’s reaction to views that recognise that those with overwhelming power are to rule and impose the rules of social order is emphatically and unequivocally negative – what should always and everywhere rule is reason. But what does it mean – especially in relation to political relations – ‘the rule of reason’? Plato’s answer will prove to be twofold and stretched over time. First, he will find and formulate an ideal version of it; then, in his final work – without forgetting the former – he will leave the world of ideas and, descending a level lower, attempt to adapt this ideal vision to the requirements arising from the conditions and limitations of the empirical world.

The first answer is to be found in *Politeia* – the rule of reason is simply rule by rational people. The ideal solution for combining effective government with the rule of reason, then, would be a political community headed by philosophers:

neither city nor polity nor man either will ever be perfected until some chance compels this uncorrupted remnant of philosophers, who now bear the stigma of uselessness, to take charge of the state whether they wish it or not, and constrains the citizens to obey them, or else until by some divine inspiration a genuine passion for true philosophy takes possession either of the sons of the men now in power and sovereignty or of themselves.¹¹

The Platonic figure of the philosopher-king and the yearning behind it for a just ruler endowed with true wisdom has accompanied us ever since, and there is no

rather than law, and the poet’s quoted words serve to emphasise the decisive role of custom in the formation of people’s ethical convictions (cf. Herodotus, *The Histories*, translated by A. D. Godley. Cambridge. Harvard University Press. 1920, [3, 38]).

11 Plato, *Republic*, [499 b–c]). The same thought, in a more concise form, can also be found in Letter VII: “Wherefore the classes of mankind (I said) will have no cessation from evils until either the class of those who are right and true philosophers attains political supremacy, or else the class of those who hold power in the States becomes, by some dispensation of Heaven, really philosophic.” (Plato, *Letters*, in: *Plato in Twelve Volumes*, Vol. 7 translated by R.G. Bury. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1966. Letter VII, [326b]).

reason to reject or disregard it. After all, each of us would prefer to have wise rather than foolish people as rulers in our state.

Plato's vision of a perfect community guided by reason embodied in rational rulers boils down in *Politeia* essentially to the question of where to get such rulers from.¹² Instead of a detailed presentation of the institutional shape of the rational state, we get a detailed description of the successive stages of the educational enterprise aimed at raising and educating brave and wise people capable of leading the state community. Even if such a solution seems far from sufficient from our perspective today, it is difficult not to agree with Plato that thinking through and working out the right way to educate citizens and to select from among them the best people in terms of virtue and intellect as those who are to watch over the fate of the community is crucial for any rationally organised state.

Although the description of the political institutions of such a state is reduced to a minimum in *Politeia*, two themes raised in it are worth mentioning here. Firstly, Plato points out that in every state, without exception, there is a division into those whose lives revolve essentially around their private affairs and those for whom the main purpose of action is concern for general affairs – concern for the fate of the state. The former are usually far more numerous than those who manage and decide the affairs of the community. Power is therefore by its nature always elitist. In any regime, the few rule over the many.¹³ The question that immediately arises here is whether this will be a group of oligarchs interested only in their own interests, or – as the author of *Politeia* would have it – a government of aristocrats of virtue and mind, who understand power as a service and regard themselves more as guardians than as rulers – guards, watching over the good of the community and the well-being of the people who create it. As Plato teaches us, the basic determinant of any rationally organised political community is, therefore, that those who wield power in it should be distinguished not so much by their rulership as by their willingness

12 At the same time, it is irrelevant whether this perfectly wise ruler will be one or many, whether it will be a monarchy or an aristocracy. Adopting the perspective of the ideal system developed in *Politeia*, every man – in Plato's view, both male and female – who attains the level of wisdom should compulsorily participate in the governance of the state (cf. Plato, *Republic*, [540c]).

13 Plato even suggests that all possible types of political system are ultimately some forms of aristocracy, because in each of them the people who rule are the best (*aristoi*) in some respect, whether they be the aristocrats of reason and virtue, as in an ideal state, or of valour and ambition, as in a timocracy, or, as in an oligarchy (more precisely: plutocracy), the best at acquiring wealth. This applies – paradoxically – also to democracy. According to Plato, democracy is “an ‘aristocracy’ backed by popular approbation” (Plato, *Menexenus*, in: *Plato in Twelve Volumes*, Vol. 9 translated by W.R.M. Lamb. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1925, [238c–d]), in which a particular elite rules (for more information about specific features and competencies of this democratic elite, see: Z. Stawrowski, *Platon o demokracji*, in: idem, *Niemoralna demokracja*, Ośrodek Myśli Politycznej, Krakow 2008, 15–32).

to serve and obedient attitude – willingness to serve towards the members of their own community, and obedient to the guidance of reason, which in the case of the supreme rulers of the state is to act as their internal guardian.

The second important institutional distinction that appears in *Politeia* is the most fundamental division within government itself, which precedes all of its other divisions. The body of guardians of the state is divided into those who make the final decisions – Plato calls them the proper guardians – and those who carry out these decisions by performing auxiliary functions. This is, in other words, the division between the supreme, or sovereign, and the executive authority – the most fundamental division that we find in all times and in all regimes, and which forms the basis of all other functionally distinguished forms of government.

In Plato's last work, the *Laws*, however, the question about the rule of reason already finds a different, more elaborate answer. The rule of the philosophers – the aristocracy of intellect and virtue – is something we can imagine and dream of, but when designing the shape of a particular political community, it is worth relying on something more permanent than the extraordinary – even divine – character traits of those who lead it. This time we are talking about the rule of reason embodied in existing laws and institutions. This change was brought about by the need to take into account no longer only the ideal perspective, i. e. what people should be, but also what they actually are. Plato writes:

It is really necessary for men to make themselves laws and to live according to laws, or else to differ not at all from the most savage of beasts. The reason thereof is this,—that no man's nature is naturally able both to perceive what is of benefit to the civic life of men and, perceiving it, to be alike able and willing to practice what is best. For, in the first place, it is difficult to perceive that a true civic art necessarily cares for the public, not the private, interest,—for the public interest bind States together, whereas the private interest rends them asunder,—and to perceive also that it benefits both public and private interests alike when the public interest, rather than the private, is well enacted. [875b] And, secondly, even if a man fully grasps the truth of this as a principle of art, should he afterwards get control of the State and become an irresponsible autocrat, he would never prove able to abide by this view and to continue always fostering the public interest in the State as the object of first importance, to which the private interest is but secondary; rather, his mortal nature will always urge him on to grasping and self-interested action, irrationally avoiding pain [875c] and pursuing pleasure; both these objects it will prefer above justice and goodness, and by causing darkness within itself it will fill to the uttermost both itself and the whole State with all manner of evils. Yet if ever there should arise a man competent by nature and by a birthright of divine grace to assume such an office, he would have no need of rulers over him; for no law or ordinance is mightier than Knowledge, nor is it right for Reason to be subject or in thrall to anything, but to be lord of all things, [875d] if

it is really true to its name and free in its inner nature. But at present such a nature exists nowhere at all, except in small degree; wherefore we must choose what is second best, namely, ordinance and law, which see and discern the general principle, but are unable to see every instance in detail.¹⁴

In the *Laws*, Plato leaves aside the ideal system and the dream of perfectly rational rulers, and, accepting that “that a State will probably have a constitution no higher than second in point of excellence”,¹⁵ he considers a concrete matter – a venture to establish a new colony by the Cretans. Adequately taking into account the real requirements of human nature, above all the fact that we are dealing with free, independently thinking individuals, results in a fundamental work – the first systematic and detailed description in the history of mankind of the designing and constitution of a political community, in which it is not people who are to govern, but rational laws.¹⁶ Plato makes the matter very clear:

And those who are termed “magistrates” I have now called “ministers” of the laws, not for the sake of coining a new phrase, but in the belief that salvation, or ruin, for a State hangs upon nothing so much as this. For wherever in a State the law is subservient and impotent, over that State I see ruin impending; but wherever the law is lord over the magistrates, and the magistrates are servants to the law, there I descry salvation and all the blessings that the gods bestow on States.¹⁷

Obedience and service to reason, which are supposed to characterise those who govern in the first place, are now reduced to obedience and service to laws. Of course, not just any arbitrary laws, but rational laws. “We deny that laws are true laws unless they are enacted in the interest of the common weal of the whole State”.¹⁸ Plato, while proposing specific solutions, seeks to justify them rationally,¹⁹ so that the conviction of their general character, of their reasonableness and justice,

14 Plato, *Laws*, [874e–875d].

15 *Ibid.*, [739a].

16 Now it is needful that every man should hold the view, regarding men in general, that the man who has not been a servant will never become a praiseworthy master, and that the right way to gain honor is by serving honorably rather than by ruling honorably—doing service first to the laws, since this is service to the gods, and, secondly, the young always serving the elder folk and those who have lived honorable lives.” (*ibid.*, [762e]).

17 *Ibid.*, [715c–d].

18 *Ibid.*, [715b].

19 Plato regards such rational justification be a necessary introduction to legislation (cf. *ibid.*, [723b–c]).

becomes something common and can unite – in a spirit of friendship – the free inhabitants of such a state.²⁰

Of the vast wealth of specific issues that Plato considers in his work, and which remain consistent with what are today recognised as the important building blocks of the rule of law – the exact presentation of which would require the writing of a separate study²¹ – it is worth mentioning first of all the emphasis on the fundamental importance of the right to property.²² It is from this right that we derive the requirement for a just settlement of matters related to the transfer of property and also to its infringement, all of which we find in the civil and criminal law codes of modern states. Plato also proposes the right way to organise the administration of justice,²³ stresses the importance of the independence of judges,²⁴ which is to be guaranteed, on the one hand, by ensuring that only people of the highest moral standard perform judicial functions, and on the other, by introducing review mechanisms to dismiss and punish unjust judges. We also find in his work a project for the institution of guardians of rights – a prototype of today’s constitutional courts.²⁵

Despite many parallels and similarities, however, Plato’s vision of a just state differs significantly from the contemporary model of the rule of law. It differs above

20 “[...] our idea being that a State ought to be free and wise and in friendship with itself, and that the lawgiver should legislate with a view to this.” (Ibid., [693b]).

21 I have set out some of these propositions of Plato, albeit analysed from a slightly different angle, in more detail in this book: Z. Stawrowski, *Prawo naturalne a ład polityczny*, Instytut Myśli Józefa Tischnera, Kraków, 2018, part I, “Trop sprawiedliwości i rozumu – Platon”, 54–93.

22 This is where the difference and tension between the ideal and its possible realisation is most revealing. Whereas in *Politeia* it was in private property that Plato saw the source of all evil, in the *Laws* we can read the following words: “No one shall carry or drive off anything which belongs to others, nor shall he use any of his neighbor’s goods unless he has gained the consent of the owner; for from such action proceed all the evils above mentioned—past, present and to come.” (Ibid., [884a]), and also: “no one shall touch my goods nor move them in the slightest degree, if he has in no wise at all got my consent; and I must act in like manner regarding the goods of all other men, keeping prudent mind.” (Ibid., [913a]).

23 “A State, indeed, would be no State if it had no law-courts properly established” (ibid., [766d]).

24 Ibid., [768b].

25 There is another thing, much less glorious, that Plato and many modern advocates of the rule of law have in common – the belief that in a just or rule of law state, its protection need not extend to the most vulnerable, such as disabled new-borns. If Plato accepts this in the name of the good of the community (understood as its strength), which allows for the sacrifice of those who are a burden to others, the modern acceptance of similar behaviour (e. g. abortion and euthanasia) is born out of the cult of the individual and his narcissistic indifference to those who are unable to care for themselves. As one of the classics of modern rule of law and legal equality put it: “Those who have equal power against each other, are equal; and those who have the greatest power, the power to kill, in fact have equal power. Therefore all men are equal to each other by nature.” (Thomas Hobbes, *On the Citizen*, translated by R. Tuck and M. Silverthorne, Cambridge University Press 1998, p. 26 [1,3].

all in that it is a broader concept, taking into account more dimensions. Although the core of what we today consider to be the rule of law is also to be found in Plato, and although it plays an important role in his conception, it is only one of many important elements of a comprehensive view of a reasonably ordered political community.

What is the difference? Well, the dominant conception of the state today – also referred to as the democratic-liberal rule of law – sees the state as a set of institutions that perform a service function in relation to individuals and their individual goals. The state is seen above all as a tool through which individuals are given the opportunity to live in security and freely pursue their life plans, provided that these can be harmonised with the similar actions of others. This is what the rule of law is intended to serve. The basis for such a concept is the modern theory of the ‘social contract’, understood not so much as a description of the genesis of society, but as a thought experiment providing justification and legitimacy, as a result of which people, guided by their own interests, agree to accept the validity and rationality of legal norms binding on all citizens. Plato’s vision, on the other hand, which also recognises such regulations, inscribes them within a broader vision of the state, in which it is the community that comes first in relation to individuals, both in a genetic sense – preceding their existence – and as their overarching goal.

For Plato, but also for Aristotle²⁶ and their continuators – representatives of the republican thought in the classic sense of the word, the political community is not only an external union of contracting parties whose common interest is safeguarding personal safety and fair rules of cohabitation. The state primarily constitutes an ethical community that is a community of people united by a common perception of what is good and what is evil, which is vitally interested in showing concern and supporting the right ethical attitudes of its members. Plato repeatedly

The logical consequence of this position is to exclude from the group of persons (that is, subjects of powers protected by the power of the state) those who, although alive, do not (yet or already) possess sufficient strength to constitute a mortal threat to others.

26 It is worth quoting here the words of Plato’s most eminent disciple, who criticised and rejected such a narrow and limited understanding of the state two thousand years before it became widespread and authoritative in our circle of civilisation: “A state is not merely the sharing of a common locality for the purpose of preventing mutual injury and exchanging goods. These are necessary preconditions of a state’s existence, yet nevertheless, even if all these conditions are present, that does not therefore make a state, but a state is a partnership of families and of clans in living well, and its object is a full and independent life” (Aristotle, *Politics*, in: *Aristotle in 23 Volumes*, Vol. 21, translated by H. Rackham. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1944, (III,5,13 [1280b])).

said that the development of virtue in all its varieties in citizens²⁷ is the most important task of a reasonably organised state. “We differ from most people in not regarding mere safety and existence as the most precious thing men can possess, but rather the gaining of all possible goodness and the keeping of it throughout life.”²⁸ Therefore “the lawgiver must not only write down the laws, but in addition to the laws, and combined with them, he must write down his decisions as to what things are good and what bad; and the perfect citizen must abide by these decisions no less than by the rules enforced by legal penalties.”²⁹ In the creation of the just state, what Plato and his successors are concerned with is a living organism of the community, whose sense of existence and purpose transcends the time of life and the individual interests of individuals, and includes both the memory of predecessors and concern for future generations.

Speaking of a just state, in which laws are to govern and not people, Plato emphasises particularly strongly the normative importance of the act that brings the state into existence. The act of designing and enacting a constitution is what comes first and foremost – the true beginning³⁰ of a reasonably ordered political community. If significant mistakes are made at this decisive moment, they can no longer be corrected, their negative consequences will accumulate over time, and no amount of partial regulation, however right, can stop this. A special power appears before us here – today we call it the constituting power – which, like a demiurge, only brings into being and gives institutional and legal form to a new political community. It is this power that is supreme and superior in relation to all the institutions and governing bodies constituted by its act. The rational project, by a decision of the will of the creator of the new state embodied in the institutional order, constitutes the ultimate point of reference and an inviolable framework for the further functioning of the community. It can be said to become, as it were, the temporal representative of the *ius* – that which is just, the eternal and immutable order of rational laws, vis-à-vis the *lex* – that which is susceptible to change, the remaining detailed norms and regulations established in the community. Therefore, as Plato teaches us, whether or not the state is truly ruled by law is to be judged first and foremost by

27 Plato, *Laws*, [632e]. Aristotle thinks along similar lines: “Thus it is also clear that any state that is truly so called and is not a state merely in name must pay attention to virtue” (Aristotle, *Politics*, (III, 5, 11 [1280b]).

28 Plato, *Laws*, [707d].

29 *Ibid.*, [823a].

30 “For, as the saying goes, ‘well begun is half done’, and every man always commends a good beginning; but it is truly, as I think, something more than the half, and no man has ever yet commended as it deserves a beginning that is well made.” (*ibid.*, [753e–754a]). “For the Beginning that sits enshrined as a goddess among mortals is the Savior of all, provided that she receives the honor due to her from each one who approaches her.” (*Ibid.*, [775e]).

looking at the solutions adopted in the constitution itself, whether they reasonably and justly correspond to the requirements determined by human nature.

While on the genesis of the various political communities Plato would probably agree with his pupil Aristotle that they arise and develop naturally from smaller communities – the family, the lineage – on the question of the establishment of a rational State – a State governed by just laws, Plato is convinced that it must be a conscious creation combining will and reason³¹ – that is, an overall rational project consistently implemented by someone who has the mandate, means and power to do so.³²

A holistic perspective on thinking about the rule of law can also be seen in the fact that, in Plato's view, the constitutional act that brings a new state into existence does not amount merely to the establishment of binding norms, however just, but also to the establishment of appropriate institutions or authorities to safeguard both the laws themselves and the permanence and proper functioning of the entire state organism in the full dimension of its communal life. Moreover, no institutions will function properly unless the human factor – the one who will guard and supervise them – is also reasonably taken into account: "It is a fact clear to everyone that, the work of legislation being a great one, the placing of unfit officers in charge of well-framed laws in a well-equipped State not only robs those laws of all their value and gives rise to widespread ridicule, but is likely also to prove the most fertile source of damage and danger in such States."³³ For this reason, the people in charge of state institutions must be appointed in such a way that, by their moral standard, they can guarantee the proper way of performing their functions: "that those who rightly undertake official functions should in every case have been fully tested—both themselves and their families—from their earliest years up to the time of their selection; (...) those who are to be the selectors should have been reared in law-abiding habits and be well trained for the task of rightly rejecting or accepting those candidates who deserve their approval or disapproval."³⁴

This brings us finally to the question of a reasonably designed political system, which begs the question of what kind of people – or all people? – can and should exercise the various functions of power within it. Nowadays, democracy is widely regarded as the most rational and just system. Liberal democracy or, in other words,

31 "Whenever the greatest power coincides in man with wisdom and temperance, then the germ of the best polity is planted; but in no other way will it ever come about" (ibid., [712a]).

32 It was precisely this "constructivist" approach, which creates the state entirely from scratch, that found its modern-day continuators not at all among conservative thinkers – Plato is usually counted among them, after all – but among those who, seized by the ideas of the Enlightenment, became the forerunners and creators of modern revolutions and constitutions.

33 Ibid., [751b–c].

34 Ibid., [751c–d].

the democratic state under the rule of law, is today considered to be the motherland and almost synonymous with the rule of law. But is this approach correct? After all, democracy as such does not refer by its name to anything other than the rule of the people. There is no reference to reason, justice, or the law. Of course, what we today not very accurately call a democratic political system contains many rational and valuable elements. The point is that the very name is misleading, as these elements have a decidedly non-democratic origin. For those in search of a rational political system, Plato's lesson is all the more worth considering.

Almost everyone knows about the critical attitude of the author of *Politeia* towards democracy. What is less well known, however, is that his assessment of this system evolved, while his final position turned out to be quite balanced.³⁵ In *Laws*, Plato recognises the necessity for a rational state to take into account the fact that its citizens are free individuals and therefore have the right to decide not only their private affairs but also the fate of their community. Recognition of the importance of liberty, which implies the granting of a political mandate to all adult citizens and is rightly associated with the democratic element, must nevertheless be inscribed within the framework of a lasting legal order, the establishment and maintenance of which requires people of the highest moral and intellectual qualifications. Hence Plato's first ever concept of a mixed system, in which the various essential elements of the state are brought together in a harmonised whole so that they can work best together for the good of the whole community:

There are two mother-forms of constitution, so to call them, from which (...) all the rest are derived. Of these the one is properly termed monarchy, the other democracy (...); the rest are practically all, as I said, modifications of these two. Now it is essential for a polity to partake of both these two forms if it is to have freedom and friendliness combined with wisdom. (...) a State which does not partake of these can never be rightly constituted.³⁶

The monarchical element here is a symbol of unity based on reason, which is to be the sole ruler of such a just state; the democratic element is an expression of the freedom enjoyed by its inhabitants. But the key element – not explicitly mentioned in this passage, though constantly present in the *Laws* and all Plato's political works – remains the aristocratic element. In every well-ordered and well-governed just state, a moral and intellectual elite is indispensable, on which depends above all that spirit of friendship which pervades such a state and builds unity and a sense of community among all its citizens.

35 Cf. Z. Stawrowski, *Platon o demokracji*, 15–32.

36 Plato, *Laws*, [693 d–e].

Bibliography

- Aristotle, *Politics*, in: Aristotle in 23 Volumes, Vol. 21, translated by H. Rackham. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1944.
- St. Augustin, *De libero arbitrio*, http://www.augustinus.it/latino/libero_arbitrio/index2.htm, (accessed 30 December 2023).
- Herodotus, *Histories*, Herodotus, with an English translation by A. D. Godley. Cambridge. Harvard University Press, 1920.
- Hobbes, Thomas, *On the Citizen*, translated by R. Tuck and M. Silverthorne, Cambridge, Cambridge University Press, 1998,
- John Paul II, *Encyclical Evangelium vitae*, https://www.vatican.va/content/john-paul-ii/pl/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae.html, (accessed 30 December 2023).
- Plato, *Laws*, in: Plato in Twelve Volumes, Vols. 10 & 11 translated by R.G. Bury. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1967 & 1968,
- Plato, *Gorgias*, in: Plato in Twelve Volumes, Vol. 3 translated by W.R.M. Lamb. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1967.
- Plato, *The Republic*, in: Plato in Twelve Volumes, Vols. 5 & 6 translated by Paul Shorey. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1969.
- Plato, *Letters*, in: Plato in Twelve Volumes, Vol. 7 translated by R.G. Bury. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1966.
- Plato, *Menexenus*, in: Plato in Twelve Volumes, Vol. 9 translated by W.R.M. Lamb. Cambridge, MA, Harvard University Press; London, William Heinemann Ltd. 1925.
- Stawrowski, Zbigniew, *Platon o demokracji [Plato on Democracy]*, in: idem, *Niemoralna demokracja [Immoral Democracy]*, Ośrodek Myśli Politycznej Krakow, 2008, 15–32.
- Stawrowski, Zbigniew, *Prawo naturalne a ład polityczny [Natural Law and Political Order]*, Instytut Myśli Józefa Tischnera, Krakow, 2018.
- St Thomas Aquinas, *De Regno*, <https://www.corpusthomicum.org>, (accessed 19 January 2024).
- St Thomas Aquinas, *Summa theologiae*. <https://www.corpusthomicum.org>, (accessed 19 January 2024).
- ВЫШИНСКИЙ, А. Я. (Wyszynski, A.), *Основные задачи науки советского социалистического права [Main Tasks of Soviet Science of Socialist Law]*, Moscow, 1938.

Michał Gierycz, Piotr Mazurkiewicz (eds.): Faces of the rule of law in Europe

Sara Lagi

Legal positivism as a limitation of the rule of law

1. Introductory remarks

The title of this paper needs two explanations. The objective of this essay is not to investigate the whole tradition of legal positivism in relation to the issue of the rule of law, but rather to focus on some crucial aspects of such a concept within the scholarly work of one of the leading representatives of European 20th-century legal positivism: Hans Kelsen. This choice depends on two interrelated elements. In the first instance, on the objectively important role that Kelsen has played in the history of legal positivism. Secondly, because it is precisely his definition of the rule of law that challenges the way of theorising the relationship between “power and law”, representing the “core” of the European tradition of the rule of law itself.¹

Kelsen developed a formalist understanding of State, law and rule of law, which also implied a critical re-consideration of the late 19th-century German school of legal positivism. By the term “formalism”, applied to Kelsen’s legal positivism, I am referring in the first instance to the idea that the validity of legal norms depends neither on their content nor on some sort of peculiar value they contain nor on their effectiveness. Their validity rather derives from the way in which they have been produced. In this sense, the focus shifts from the *legitimacy* of law to the *legal* validity of law. Kelsen’s legal formalism implied a likewise precise interpretation of legal science as concentrated on the analysis of the legal system *as it is* and *not as it should be* in the name of a particular meta-juridical principle, content, ideal or value. For Kelsen, legal science had to *know* rather than *valu*ing.²

Already in the early 20th century, Kelsen’s legal theory gave rise to a profound intellectual controversy, chiefly in Weimar Germany. There was a vivacious “anti-formalist” reaction, which however was not necessarily a reaction against legal positivism *per se*, led by prominent scholars embodying a diversified political spectrum. The jurist and social-democratic militant Hermann Heller interpreted

1 P. Costa, D. Zolo (eds.), *The Rule of Law. History, Theory and Criticism*, Springer Verlag, Dordrecht, 2007; I. Flores, K. Himma (eds.), *Law, Liberty and the Rule of Law*, Springer Verlag, Dordrecht, 2012.

2 H. Kelsen, *Die Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*, Mohr Siebeck, Tübingen, 1911.