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DEMOKRACJA, TEORIA PRAWA, SĄDOWNICTWO KONSTYTUCYJNE

Księga jubileuszowa dedykowana profesorowi zw. nauk prawnych

Adamowi Jamrozowi

z okazji pięćdziesięciolecia jego pracy zawodowej

pod redakcją

Macieja Aleksandrowicza, Marty Andruszkiewicz,

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LOST IN TRANSLATION. „RECHTSSTAAT", „PAŃSTWO PRAWNE" AND OTHER FALSE EQUIVALENTS OF „RULE OF LAW" (AND WHAT TO DO ABOUT THEM)

Signatories of the Treaty of the European Union (TEU) affirm that the 'rule of law' is a 'principle' and 'universal value'[4] Actually, the Dutch speakers agree that *'rechtsstaat'* is both a principle and universal value Polish speakers agree that *'państwo prawne'* is[5] French speakers agreed that 'l'État de droit' is[6] And so on The problem is that these terms are not actually direct equivalents, even if they have at times great overlap in meaning and usage, and even if they are routinely meant to serve as equivalents by those who deploy them But nor are these translation errors The EU document does the same as local lawyers, judges, and jurists do in their respective linguistic-legal communities Most interested persons deploy native terms as if they mean more or less the same thing conceptually or in practice as 'rule of law' is generally thought to mean in its English-language political and legal usage That, too, is problematic For, there is also great diversity of meanings of 'rule of law' in the English-speaking legal world

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4 Preamble to the Treaty of the European Union http //eur-lex europa eu/legal-content/PL/TXT/?uri=OJ JOC_2016_202_R_0001 for the Polish version

5 Polish is a declined language and thus *państwo prawne/-go* are different forms of the same word Wherever possible the authors have tried to use the correct Polish form to match the English grammar

6 Ibidem From that website one can view the text in French English Dutch etc The document uses the following terms often interchangeably *rule of law* (EN listed seven times) *rechtsstaat* (NL five of the seven English instances are translated thusly) *l Etat de droit* (FR) and *państwo prawne* (PL)

But at the international level, the TEU mirrors a broad confusion in legal science concerning the identity of a core legal principle Since the 'rule of law' is also a core constitutional value of European legal order, which member states must implement, conceptual clarity is not all that is needed For harmonization of European legal systems to become a reality the practice of the 'rule of law' must, all the more, also be substantially the same For instance, the practice of implementing the 'rechtsstaat' in the Netherlands should bear some marked resemblance in kind to the implementation of 'państwo prawne' in Poland Both of these would need to bear some marked resemblance in kind to the 'rule of law' in English-language legal systems, where the concept originates and along with the practice has been developed Otherwise just what are we implementing when we attempt to follow this principle and universal value? Either the concept or the practice – or ideally both – need to be recognizable as the same thing Let us call the fact of this divergence of terms and meanings the 'rule-of--law problem' Many terms are circulating without an identified doctrine or practice standing behind them, or with too many different practices and divergent doctrines standing in for the 'rule of law'

This chapter uses the cases of Poland and Holland as examples of the rule-of--law problem in practice The authors examine how the preferred concepts for 'rule of law' in each legal system relate to the constitutional governance of each land The backdrop of the discussion and first part of this chapter consists of an overview of the English development of the doctrine of rule of law from Magna Carta in 1215 to contemporary doctrine and practice in English-speaking jurisdictions That original formal doctrine of law's supremacy evolved into a substantive doctrine of 'Rule of Law' (distinguished here with capitals)[7] Today it is affirmed as essential to any just legal order by jurists such as John Finnis, as it was by and the late Lon Fuller, who gave it its contemporary shape[8] Fuller put the doctrine into a lasting formulation of eight procedures of law that taken together allow law to approach justice Meaning they achieve a moral character, a good Neither of these two rules of law, the formal or the substantive, is directly equivalent either to the Dutch rechtsstaat or Polish państwo prawne That presents us with two cases of the rule-of-law problem

Thus, after presentations of the Dutch and Polish practical constitutional situations, we then return to the discussion of the differences in practice which are marked out by various terms that are thought to bear the same meaning as English doctrines of the rule of law, but which have been revealed not quite to be so We then ask whether, for that reason, one not can really speak of the 'rule of law' as

7 This convention of capitalization applies to the discussion of the rule of law in English-speaking lands as well as the Discussion section at the end of the article In the country specific sections below on Poland and Holland this convention is not followed That is because 'rule of law' is the standard way that many concepts are translated into English

8 J Finnis Natural Law and Natural Rights Oxford 2011, p 270 ff L L Fuller, The Morality of Law (The Storrs Lectures) Yale 1964

a fundamental European legal principle and core value in practice We do not offer a direct answer, but suggest why certain routes for further research should be taken, and others to be avoided

We have chosen Poland and Holland, firstly, because each uses a different term as equivalent to the English 'rule of law' and/or 'Rule of Law', secondly, the role the constitution plays in relation to the rest of the legal order differs so greatly between these two lands In Poland, judicial review for constitutionality of legislative acts is baked into the constitution, and in the Netherlands judicial review is forbidden constitutionally In the former, the Polish Constitution is law, as interpreted by the courts All legislation that accords with it could also be law In the latter, the Dutch Parliament is supreme, and what it legislates is assumed to be in principle constitutional Is the Dutch *rechtsstaat* or Polish *państwo prawne* closer to manifesting the European commitment to the 'rule of law'?

1. Two rules of law in English legal thought

The rule of law is now understood to be a fundamental principle of the liberal democratic political order[9] The term is 'constantly on people's lips', according to Judge Tom Bingham, who recently wrote a book on the subject[10] Both Barack Obama and Maggie Thatcher have agreed on its singular importance (as they did on little else)[11] So, it is not the province of one wing of politics or one nation The Universal Declaration of Human Rights states that 'human rights should be protected by the rule of law', that is, 'if man is not to be compelled to have recourse, as a last result, to rebellion against tyranny and oppression '[12] So, the stakes are high The 'rule of law' is also mentioned increasingly in national statutes or acts of parliaments, sometimes as an 'an existing constitutional principle'[13] It is understood by legal philosophers to be a standard of justice for any legal system[14]

Yet, even within the English-language debate the rule of law has been described by serious commentators as 'an exceedingly elusive notion [with] rampant divergence of understandings' Like equality, everyone is for it, but many 'have contrasting convictions about what it is'[15] Many definitions abound, but the worry of

9 Many of the citations in the introduction and parts relating to the Anglo-American development of the rule of law were found in or by way of T Bingham The Rule of Law Penguin 2011

10 *Ibidem*

11 The book jacket to Bingham's book quotes a number of world leaders on the topic all glorifying the rule of law

12 Preamble to the UDHR Available in official English version here http //www ohchr org/EN/UDHR/Documents/UDHR_Translations/eng pdf

13 *Ibidem* The British Constitutional Reform Act 2005 in section 1 provides that the Act does not adversely affect (a) the existing constitutional principle of the rule of law

14 Since there is broad agreement there would be too many to list Finnis Raz and Fuller are to hand Each could be brought to bear as an authority on the subject in his respective major works some of which are referenced in these footnotes

15 B Z Tamanaha On the Rule of Law Cambridge 2004 p 3

Joseph Raz resounds 'the rule of law' is often merely shorthand for aspects of a given political (or legal) system that one assesses positively[16] Presumably it would now be applied mostly – or even exclusively – to the preferred liberal democratic constitutional order There could be no talk of the rule of law as practiced in Saudi Arabia, even if Sharia law rules formally, and in a procedurally fair way[17]

However, definitionally the rule of law need not be so limited politically to liberal constitutions existing as modern states For, in its fundamental form, the formal conception of the 'rule of law' requires neither a modern state nor a formalized constitution John Finnis has said the rule of law is '[t]he name commonly given to the state of affairs in which a legal system is legally in good shape'[18] That is more optimistic about there being discoverable content to the concept than Raz's dismissive line But it still does not define the term for us It does, however, indicate that there is openness within the concept to regimes that are law-abiding and law-governed but not constitutionally democratic

The term 'rule of law' is not as old as its contemporary importance might indicate Prof Dicey, a great figure in English law bridging the nineteenth and early twentieth centuries and Vinerian Professor of English law at Oxford, is frequently given credit for popularizing the term, with its contemporary import, in his 1885 book about the laws of the English Constitution[19] The idea might have been known in whole or part earlier, as early as Aristotle in fact, according to one author[20] Aristotle does seem to identify both the need for laws to rule rather than men, i e , the supremacy of law, and that few are good judges in their own causes The former is a near rendering of formal rule of law And Aristotle, too, was unwilling to limit it merely to democratic regimes The latter could suggest that procedures need to be in place to ensure that others, and the right others, can serve as judges

16 J Raz The Rule of Law and its Virtue [in] The Authority of Law Essays on Law and Morality Oxford 1979 p 210

17 Applying the formalistic definition Sharia is a legal system that does away with much arbitrariness But it does not include the protection of the individual in legal procedure as we think is necessary to liberalism Nevertheless that is not seen there as required After all in the afterlife all will be settled Fuller s eight desiderata would probably set Sharia well outside of substantive Rule of Law

18 J Finnis Natural Law , op cit pp 270-273 Although principles of a strong sense of Rule of Law might imply constitutional government (rechtsstaat) according to Finnis (italics original) These relate to the dignity of persons as selves and the need for a subsisting identity over a lifetime which requires an order constituted to such a common good But Rule of Law itself does not mean constitutional government (Rechtsstaat) Separately Finnis uses capitals in his definition i e Rule of Law *for different reasons in order to avoid confusion with a particular norm within a legal system*) We have removed the capitals so as to correspond with the chosen style of this article in distinguishing between the rule of law and the Rule of Law

19 A V Dicey An Introduction to the Study of the Law of the Constitution *1885* p *188* See also T Bingham The Rule of Law op cit p 3 for a discussion of Dicey s role in identifying the rule of law as a legal principle Other earlier sources are listed as The Mersey Docks and Harbour Board Trustees William Gibbs and Others (1866) LR 1 HL 93 110 5 J W F Allison English Historical Constitution Cambridge 2007 130n11 W E Hearn The Government of England Its Structure and Development Longmans Green 1867 ch 3 para 7 6

20 B Z Tamanaha On the Rule , op cit pp 8-9 sees the idea in Aristotle perhaps led *there by modern translators rendering the* Philosopher's text as rule of law Bingham suggests that the passage is better translated as It is better for the law to rule than one of the citizens , and continues so even the guardians of the laws are obeying the laws Translation is from Aristotle s Politics and Athenian Constitution ed and trans John Warrington (J M Dent 1959) book III s 1287 97

Dicey gives three meanings of 'rule of law' in the following order of proximity to its core meaning In the first place, 'that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land '[21] Second 'no man is above the law, every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals ' The third principle is less concise, and typically English the Constitution of England is the result of the actual rulings of law in specific cases Rather than prescriptions and proscriptions listed as general principles in a written constitution, and then legislated therefrom[22]

Dicey has here identified in his first and second meaning of the 'rule of law' what could be called a formal sense of 'rule of law' This differs from a substantive sense in that it is concerned only with the status of law in the world, and its proper function based on that status[23] The common opposite of the rule of law is the 'rule of man', i e , the rule of one man, the king Tomas Paine, the radical American founding father, offered a precis of the 'rule of law' in practice in the America of his time In 1776 he wrote, 'in America THE LAW IS KING For as in absolute governments the King is law '[24] In the history of the debate in politics it is often another 'man', the corporate agent, that is law's palace thief government going round or pushing through its own laws when it sees fit So, the 'rule of law' is opposed to mob rule or 'the tyranny of majority' (Tocqueville's famous phrase), and also to the tyranny of the lawmakers, whether they are king or parliament Early examples of this can be found in the Bible Daniel was condemned to the lion's den for breach of a royal edict, which could not be altered, even by the king who had made it[25] The general formal ordering is 'law rules' rather than anything else, which is Dicey's second definition Whether this is democratically legitimized, liberal law is not the matter *I its classical formulation* the 'rule of law' is compatible with many constitutions[26]

This doctrine was the continuation of a practice that was thought to have begun on June 15th of 1215 with the signing of Magna Carta Libertatum / The Great Charter of the Liberties by King John of England At the time the powers, legislati-

21 A V Dicey An Introduction op cit p 188

22 This latter principle which is not often mentioned by defenders of the rule of law outside of the English legal profession should not be overlooked It appeals to a deep divide in the way law emerges in time and is imposed or the finding of the law as it is called in Continental systems

23 As a reminder for the formal sense rule of law is being used For the substantive sense *Rule of Law* shall be used unless otherwise noted

24 T Paine Common Sense (originally published in 1776) Oxford 1995 p 34

25 *Daniel Ch 6*

26 In this and other case the double meaning of constitution should be borne in mind a form of government and a way of governance both of the polis and the soul Regime is the word Tocqueville uses for this Politeia and politeuma are words that Aristotle uses to communicate what amount to the same ideas

ve, executive and judicial, were centred in the King, 'the Lord's Anointed' This and other principles of Magna Carta were to constrain King John also by the law (or his successors, really, since he got out of the agreement by dying that same October)[27] It was also to make a certain form of legal process necessary for the detention and processing of suspected criminals Articles 39 and 40 become the foundation of the doctrine of habeas corpus '39 No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land 40 To no one will we sell, to no one deny or delay right or justice'[28] There is a bare sense that law rules even the rulers, and that free persons are subject to the·law that is, a formal rule of the free by law In part, that is not wholly new It was already a ground rule in the Roman Empire for free citizens

But there is also a hint of substantive Rule of Law Free persons -not only personages such as dukes or bishops, but all freemen – cannot be dealt with merely at the pleasure of the ruler, or at the pleasure of the law They must have their day in court, or, more rightly, *habeas corpus*, the court must 'have the body' of the defendant before it And the court is bound by its own law, rather than being a law unto itself These are the rudiments of due process And they are present in Dicey's first definition of rule of law, with a few more centuries of elaboration, namely, following many declarations and statements of rights of Englishmen, including that of 1689

Substantive Rule of Law deals in the 'person of law' At the very least it begins to talk about the specific treatment of persons, rather than merely personages such as 'kings' and 'rulers' In this way, it deals with what sort of regulation would be fitting of rational animals (the most common way that the 'person' has been understood legally) So, it turns on what is meant by 'law' Although the 'Rule of Law' gets its most mature treatment beginning in the mid-twentieth century, the discussion inherits a definition of law that St Thomas Aquinas is most responsible for Law in general is defined by him as 'a certain rule and measure of acts whereby man is induced to act or is restrained from acting'[29] But law, understood as truly obligatory, meaning just, is defined more specifically by him as 'an ordinance of reason for the common good, made by someone who has care of the community, and promulgated'[30]

If law has to meet such a high bar in order to be just and obligatory, one might ask What are the procedural ways to ensure that it can be so? These are proce-

27 T Bingham The Rule of Law , op cit p 12

28 As quoted in ibidem

29 ST I-II 90 1 See Saint Thomas Aquinas On Law Morality and Politics (Hackett) xiii-xxii pp 11-83

30 ST I-II 90 4 Translation from Summa Theologiae Trans Fathers of the English Dominican Province Westminster Christian Classics New York 1981

dures that must achieve a moral character when collected Meaning they ensure that law has as its 'person of law' – him for whom law is written – a rational agent, who can act for his own reasons, by his own reason, not merely by being caused to act or coerced Aquinas gives some clues as to appropriate procedures by mentioning 'promulgation' and 'reason' as part of the definition of (just) law Those would imply procedures such as publishing law in a simple and coherent way and ensuring it is not impossible and not contradictory Lon Fuller answers the question more directly He lays out the essence of the Rule of Law in eight 'desiderata' or procedures (summarized well by Colleen Murphey in an article defending Fuller's account) as

Laws must be general (#1), specifying rules prohibiting or permitting behavior of certain kinds Laws must also be widely promulgated (#2), or publicly accessible Publicity of laws ensures citizens know what the law requires Laws should be prospective (#3), specifying how individuals ought to behave in the future rather than prohibiting behavior that occurred in the past Laws must be clear (#4) Citizens should be able to identify what the laws prohibit, permit, or require Laws must be non-contradictory (#5) One law cannot prohibit what another law permits Laws must not ask the impossible (#6) Nor should laws change frequently, the demands laws make on citizens should remain relatively constant (#7) Finally, there should be congruence between what written statutes declare and how officials enforce those statutes (#8)[31]

It is hard to find a serious jurist in the English-speaking world, on the right or the left, who disagrees with this list as a standard for the Rule of Law[32] Some think it is too focussed on procedures and neglects content (law does not have to be liberal according to these procedures) But whether it be Waldron, Finnis, Raz, or George, there is broad agreement that the Rule of Law means at least the content of these eight requirements

Both the formal 'rule of law' and the substantive 'Rule of Law' are heavily inflected by the English understanding of law and constitutions, and by its particular history with Common law and an unwritten constitution (themes that we return to in the Discussion section below) With that in mind, Tom Bingham cautiously offers a definition of rule of law, that might split the difference between rule of law and Rule of Law, thus making it less trivial and less tied to English legal history 'all persons and authorities within the state, whether public or private, should be bound

31 C Murphy Lon Fuller and the Moral Value of the Rule of Law Law and Philosophy 2005 No 24 pp 239-262 Further reading Lon L Fuller Morality of Law rev ed Yale 1969 p 39 46-90 J Waldron Why Law- Efficacy Freedom or Fidelity? Law and Philosophy 1994 No 13 pp 259-284 D Luban Natural Law as Professional Ethics A Reading of Fuller 'Social Philosophy and Policy 2001 and G J Postema Implicit Law Law and Philosophy 1994 No 13 pp 361-387

32 Positivists however demur about the moral character of law They focus on who is in the position to make law and that law is what those in certain positions say it is However not just anything can be or become law Few positivists get away with saying that law is whatever the powerful say it is That claim has been with us at least since Plato records it in an early book of the Republic

by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts '[33] The only caveat that should be noted is his use of the word 'state' This would reflect the standing English-language doctrines more if it were rendered less specifically as 'legal order' (even 'realm' could be preferable to 'state') For, from Magna Carta to Lon Fuller, neither the rule of law nor the Rule of Law requires states, nor do they need formalized constitutions for their efficacy (and Bingham does not mention the word constitution in his definition) Said differently they do not require what the Germans call a *Rechtsstaat* Although, they could be compatible with such an idea of constitutional government Perhaps they might even thrive, as the American model suggests But they are not necessary

2. The Polish Constitution and „Państwo prawne"

In literature, the original concept of the '*państwa prawnego / Rechtsstaat*' is believed primarily to follow the German formula for constitutional government[34] However, included therein are elements of the English conceptions of the rule of law and Rule of Law It is emphasized that the English concept refers only to the 'law' (even if broadly construed), while the German formula points out the union of the law and the state under a constitutional rule For both of these formulae the basis is constituted by various theoretical concepts However, they are all based on common assumptions As their basis, they accept individual human freedom and certain political order which should guarantee these freedoms Historical development of ideas as well as constitutional practice and doctrines have influence on the shape of the normative principles of the rule of law and the „*państwa prawnego*" / „*Rechtsstaat*" The English and German traditions are different in this respect, but not thought by Polish jurists to be contradictory[35] The ideas of the rule of law and the *Rechtsstaat* are based on the same values attributed to the law universality, reliability, availability, predictability[36]

For the Polish Constitution of 1997[37] the German concept of constitutional government (*Rechtsstaat*) was particularly important This concept consists of the formal aspect specifying the state's functioning based on law The main source of law should be the legal act Law binds all organs of public administration Special roles in ensuring the legality of state action belong to the courts, including administrative courts After World War II, the formal concept was supplemented with the material

33 T Bingham The Rule of Law *op cit* p 8

34 Unless otherwise noted in this section *państwo prawne* and the German term *Rechtsstaat* will be used interchangeably The Dutch term *rechtsstaat* used elsewhere in this chapter is always written in the lower case

35 P Tuleja, Konstytucja RP Komentarz t 1 Warszawa 2016, pp 218-219

36 *Ibidem* p 219

37 The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws 1997, No 78, item 483 as amended)

concept, which stated the acceptance of inviolable and inalienable human dignity as the source of constitutional rights and freedoms It recognized these rights as binding in nature, relating them to all public authorities It introduced judicial review of the constitutionality of the acts of public authorities, including the implementation of laws And the Constitution then included the concept of democracy capable of defending itself Therefore, the greatest impact on the material aspects of *państwa prawnego'* is constituted by the principle of constitutionalism In the *Rechtsstaat*, the law is primarily the Constitution It determines not only the limits of the legislator's freedom, but it also determines the way in which the legislator, and other bodies representing and applying the law, should concretize the Constitution A specific order of values is coded in the Constitution[38]

In the time of the Republic of Poland II[39], Polish jurists did not use the concept of *państwa prawnego* Similarly, theoretical works done in exile did not develop a coherent concept of 'rule of law' or 'Rechtsstaat' In the Polish People's Republic there could be no question of the rule of law or a *Rechtsstaat* At the beginning of political transformation (in the amendment of December 29th 1989[40]) without deeper theoretical reflection, Art 1 of the Constitution of the People's Republic of Poland of 1952 was amended It reads as follows „*Rzeczpospolita Polska jest demokratycznym państwem prawnym* /The Republic of Poland shall be a democratic state ruled by law ' This was because of the cut-off from the previous definition of the state as well as changing its previous form as a 'people's democracy' or 'socialist' state[41] Provision of the *Rechtsstaat* (*zasady panstwa prawnego*) was subsequently upheld by the so called 'Small Constitution"[42] and was then transferred to the Constitution of 1997

For the Polish legislator an essential reference point was the term of the *Rechtsstaat* (*państwo prawne*) proposed by K Stern According to him, *państwo prawne* is one in which public power is exercised solely pursuant to the Constitution in order to protect human dignity, freedom, justice and legal certainty Achieving these objectives requires the adoption of the following legal principles the principle of separation and balance of powers, the rules binding fundamental rights expressed in the Constitution which are based on the inviolable and inalienable dignity, the principles of freedom of an individual to self-determination, which, however, is subject to restrictions (designated primarily non-violation substance of the rights and the

38 P Tuleja Stosowanie Konstytucji RP w swietle zasady jej nadrzędnosci (wybrane problemy) Krakow 2003 p 51

39 The name that refers to the country of Poland between the First and Second World Wars

40 Act of 28 December 1989 on amending the Constitution of the Polish People s Republic (Journal of Laws 1989 No 75 item 444)

41 W Sokolewicz M Zubik Artykuł 2 [in] L Garlicki M Zubik (eds) Konstytucja Rzeczypospolitej Polskiej Komentarz 1 Wstęp Art 1-29 Warszawa 2016 p 96

42 Constitutional Act of 17 October 1992 *on mutual relations* between the Legislative and Executive of the Republic of Poland and on the local government (Journal of Laws 1992 No 84, item 426 as amended)

principle of proportionality), the principle of equality, the principle of judicial protection of human rights[43]

Article 2 of the Constitution states that 'Rzeczpospolita Polska jest demokratycznym państwem prawnym, urzeczywistniającym zasady sprawiedliwości społecznej / The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice' Fusion of *państwa prawnego* with a democratic and just state means therefore complementing the formal character of the rule (widely understood legalism) with certain material elements[44] As the Polish Constitutional Tribunal states 'The principle of the democratic *państwo prawne* refers to the non-legal values and principles In the process of its interpretation ( ) generally accepted standards of *państwo prawne* should be taken into account, and the shape (model) of law the Polish constitution has adopted should be considered, because even irreproachable standards from the legislative drafting point of view do not sufficiently explain the essence of *państwo prawne* These standards must fulfil the basic assumptions underlying the constitutional order in Poland as well as pursue and protect the values which the Constitution expresses ( )"[45]

As pointed out by L Garlicki, despite the importance of democratic *państwa prawnego* for the correct reading of the characteristics of the state and society that are written in the Constitution, there is neither a universal definition of the model of the state nor did the Constitutional Court ever create one with its own case law Since it is very general and vague and lacks sharp contours, the formula of the democratic *państwa prawnego* remains open to interpretation by the bodies tasked with directly applying the Constitution Hence, there is a lot of flexibility in explaining the meaning of this rule The interpretation may change in subsequent judgments of the Constitutional Tribunal, extracting from the Constitution explicitly expressed principles and derivatives of new rules (or implied principles), employed to meet the needs of a present case or deployed expediently by the ingenuity of the bench[46]

The Constitutional Tribunal has also repeatedly emphasized the general nature of the provision of *państwa prawnego*[47] As indicated by E Morawska, the content of

43 E Morawska Klauzula panstwa prawnego w Konstytucji RP na tle orzecznictwa Trybunału Konstytucyjnego Torun 2003

44 W Sokolewicz M Zubik Artykuł 2, [in] L Garlicki M Zubik (eds) Konstytucja Rzeczypospolitej Polskiej Komentarz I Wstęp Art 1-29 Warszawa 2016 p 103

45 Judgement of the Constitutional Tribunal of 12 April 2000 (K 8/98) p 411 Zasada demokratycznego państwa prawnego odwołuje się do wartosci i zasad pozaprawnych W procesie jej wykładni nalezy brac pod uwagę ( ) powszechnie przyjęte standardy panstwa prawnego a takze rozwazyc jaki kształt (model) panstwa prawnego konstytucja polska przyjęła Nawet bowiem menagarne z punktu widzenia techniki legislacyjnej stanowienie norm nie wyczerpuje istoty panstwa prawnego Normy te muszą realizowac podstawowe założenia leżące u podstaw porządku konstytucyjnego w Polsce oraz realizowac i strzec tego zespołu wartosci ktory konstytucja wyraza ( )

46 W Sokolewicz M Zubik Artykuł 2 [in] L Garlicki M Zubik (eds) Konstytucja *op cit* p 96

47 Judgement of the Constitutional Tribunal of 25 November 1997 (K 26/97) Judgement of the Constitutional Tribunal of 10 July 2000 (SK 21/99)

this clause is not strictly and clearly defined, and may be *de facto* determined in the process of its application However, it is not explicitly written in the Constitution[48]

The discussion on the Rechtsstaat / *państwa prawnego* / rule of law has been taking place in Poland ever since 1989 T Biernat says that in the case of Poland there is a specific phenomenon that can be defined as the relative weakness of the doctrine in relation to practice Said differently a doctrine of *państwa prawnego* is not the starting point for interpretation of adherence to *państwa prawnego* In his view, doctrine should be a point of reference for the law, whereas the opposite is true This case-law of the Constitutional Tribunal, and especially the content of justification of the verdicts, is the starting points for doctrinal analysis[49]

M Wyrzykowski notes that an attempt to find a universally acceptable definition of *państwa prawnego* is doomed to fail Depending on the starting point, historical experience, the field of research or the nature of the constitutional norm in the structure of the constitutional order, there is a variety of definitions of the term '*państwo prawne*'[50] He also indicates that representatives of science more often represent the qualities which should correspond to *państwa prawnego* than propose a definition of it M Pietrzak lists, for example, the following features of *państwa prawnego* (1) constitutionalism, (2) sovereignty of the nation, (3) separation of powers, (4) Statute as the primary source of law, (5) independence of the judiciary, (6) self-government, (7) constitutional rights and civil liberties[51] Neither of Wyrzykowski's qualms should in principle prevent an *acceptable* definition from emerging John Finnis combats similar arguments against attempting a definition of 'law' He offers a 'focal' meaning of 'law' as a workable definition[52] There is no reason that the same modest approach should fail with '*państwa prawne*'

Państwo prawne overlaps with other regulations expressed in the Constitution, with the principle of legality, as expressed in Art 7 'The organs of public authority shall function on the basis of, and within the limits of, the law', the principle of supremacy of the Constitution of Art 8 „The Constitution shall be the supreme law of the Republic of Poland", and the principle of respect for international law as expressed in Art 9 Additionally, the Constitution contains other guarantees of *państwa prawnego*, including, inter alia, the right to have access to courts (Art 48 of the Constitution)[53] These are partially a fulfilment of the *Rechtsstaat*-idea, but also elements of the formal

48 E Morawska Klauzula *op cit* p 342

49 T Biernat Zasada the rule of law a definiowanie panstwa prawa [in] M Aleksandrowicz A Jamroz L Jamroz (eds) Demokratyczne panstwo prawa Białystok 2014 pp 26-27

50 M Wyrzykowski Zasada demokratyczengo panstwa prawnego – kilka uwag [in] M Zubik (red) Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego Warszawa 2006 pp 234-235

51 M Pietrzak Odpowiedzialnosc konstytucyjna w Polsce Warszawa 1992 p 8

52 J Finnis Natural Law *op cit* p 266 277 ff

53 W Sokolewicz M Zubik Artykuł 2 [in] L Garlicki M Zubik (eds), Konstytucja *op cit* p 109

and substantive rules of law As mentioned above, the Constitutional Tribunal derives rules from the Constitution concerning the principles of *państwo prawne* These include the principles of trust (loyalty), legal certainty, protection of vested rights, *lex retro non agit*, the order of applying the appropriate *vacatio legis*, and proper legislation

Immediately below the focus is only on particular issues related to *państwa prawnego*, namely the primacy of the Constitution and constitutionalism, and some mechanisms which guarantee compliance with the basic law According to M Wyrzykowski, constitutionalism assumes that the Rechtsstaat (*zasada państwa prawnego*) requires the existence of the constitution in the formal sense, namely a constitutional document the content of which is in force as a normative basis for exercising state power This document has the highest rank among all the written rules and takes precedence in case of conflict with other standards The Constitution is the basis of the entire legal system of the state[54] According to Art 8 para 1 of the Polish Constitution the Constitution shall be the supreme law of the Republic of Poland[55] This provision reflects the primacy of the Constitution that holds the highest rank in the system of sources of law, giving it a binding nature for all authorities It is a manifestation of the modern concept of a constitutional state connected with the idea of the formal rule of law[56]

Three characteristics of the Constitution result from the literal wording of that provision First, the Constitution is the source of law in the positive legal sense, a normative act of the state, endowed as the first catalogue of normative acts specified in Chapter III of the Constitution The substance of the normative character of the Constitution is that it sets generally applicable rules and standards It also specifies of values (axiology) of law, in particular by the content of its rules (which are legally binding), and the direction of the provisions' interpretation and their application Secondly, Art 8 declares the Constitution has the highest legal force in the legal system The highest legal effect derives from the overall relationship between the norms of the Constitution and the norms of other sources of law This is a fundamental category of doctrinal analysis of normative acts and the norms within them Thirdly, the Polish Constitution is the fundamental law (*ustawą zasadniczą*) of the Republic of Poland It was passed by the Polish nation, specifically, in its name and on its behalf by the National Assembly and accepted by the people in a popular vote[57]

The legal force of the Polish Constitution is defined by the Constitution itself, which also defines the relation between constitutional norms and legal norms

54 M Wyrzykowski Zasada op cit pp 234-235

55 An open question of the authors is whether Hans Kelsen s Grundnorm played or continues to play a role here

56 Ibidem p 240

57 W Sokolewicz M Zubik Artykuł 2 [in] I Garlicki M Zubik (eds) Konstytucja , op cit p 258-259

that are in force in Poland According to the Constitution, the legal force of the Constitution means the attribute (characteristic) of legal norms contained in the Constitution This defines their relationship to other legal norms These might be norms of legal acts or other legal norms in force in the country It determines variously the place occupied by them in hierarchical system of legal norms This ordering depends on many factors, but mainly is determined by the position of the authority issuing the normative acts and the mode of changing them But this is the constitutional norm that defines the powers and procedure of the legislative bodies, the content of the legal order based on the Constitution, and the rules for the application of the law The Constitution has the power of derogation (partial suppression of lower law) in the event of non-compliance of other legal norms with the Constitution For these reasons, the Constitution has the highest power in the legal system[58]

The highest legal force, however, refers in the first place to the position of the Constitution in relation to the Act and to the legislative function of the Parliament The highest legal force of the Constitution is the warrant of implementation of the Constitution and the prohibition of its violation[59] The first obligation is expressed in the warrant of exercising the 'command' of the Constitution in the legislative activity of the parliament and the form of its acts, which is formulated in the Constitution The prohibition of violating the Constitution means prohibition of issuing any law or any other act contrary to it This extends to all public authorities and any acts they produce[60]

As pointed out by A Jamróz, a significant general feature of constitutionalism is respect for the institutional protection of the Constitution This means guaranteeing a place in the political system (and the Constitution) for an institution which will ensure constitutional compliance It might mean entrusting by the very words of the constitution a chief authority with the power to interpret the constitution (legal interpretation), plus the existence of an institution entrusted with ruling on the compliance of other legislation with the constitution, including laws[61] Furthermore, Jamróz indicates that it is becoming more and more evident that in a democratic country, to protect compliance with the constitution, there must be a body set up to rule on the constitutionality of other acts which seem inconsistent with the constitution[62] The existence of a constitutional judiciary is not only a formal guarantee of compliance with the constitution, in its ability to control the parliament, but it is thus a stabilizing factor for protecting the constitutional separation of powers[63] The

58 Ibidem p 260-261

59 Ibidem p 262

60 K Działocha Konstytucyjna koncepcja op cit p 266

61 A Jamroz Demokracja współczesna Wprowadzenie Białystok 1993 p 136

62 Ibidem p 137

63 Ibidem

primacy of constitutional norms is a fundamental prerequisite for testing the constitutionality of legislation[64] The doctrine of constitutional law focuses on the problem of testing the constitutionality of legislation This role of legislative acts stems not only from the socio-political significance of the issues regulated by those acts, i e statutes and decrees with the force of law, but also the position of these acts in the system of sources of law[65] Above all, all acts of lower rank must thus comply with the legislative acts Consequently, the compatibility of laws with the constitution creates the possibility of effective and proper control of the entire structure of the law[66]

In Poland the Constitutional Tribunal's functioning is based on Articles 188-197 of the Polish Constitution as well as the Constitutional Tribunal Act[67] Article 188 paragraphs 1-3 of the Constitution regulates the hierarchical control of the norms and provides that the Constitutional Tribunal shall adjudicate the conformity of statutes and international agreements to the Constitution, the conformity of statutes and international agreements to the Constitution, the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes

One of the premises of the controlling norm is the hierarchical structure of the legal system The essence of hierarchical control of the norms' compliance is to investigate whether the norm contained in the hierarchy of sources of law at a lower position and constituting a subject of control is compatible with the norm at a higher position, forming the control pattern The control of Art 188 paragraphs 1-3 is therefore of vertical nature The Constitutional Tribunal does not resolve inconsistencies between the norms of the same legal power[68]

The jurisdiction of the Constitutional Tribunal includes not only the content of the substantive laws, but also the examination of legislative activities, e g abidance of the legislative enactment Paragraph 1 of Article 188 of the Constitution examines the compatibility of laws with the Constitution As indicated earlier, the reason for the establishment of a constitutional court was the need to examine the constitutionality of laws The Constitution, however, is the model for the control of all normative acts belonging to the legal system As a consequence, it is the superior in the legal system Each provision of the Constitution can be seen as a model of

64 E Zwierzchowski, *Sądownictwo konstytucyjne* Białystok 1994 p 17

65 The system of the sources of law is regulated in Chapter III of the Polish Constitution art 87 determines universally binding laws in Poland which shall be the Constitution statutes ratified international agreements and regulations and enactments of local law issued by the operation of organs in the territory of the organ issuing such enactments

66 Ibidem p 21

67 Act of 22 July 2016 ('Journal of Laws 2016 item 1157)

68 A Mączynski J Podkowik Art 188 Konstytucja RP, Komentarz t 2 Warszawa 2016 p 1137

control It is the duty of the applicant to indicate the provision of the Constitution from which a certain freedom, a personal right or principle derives, as well as the justification stating that this provision can be considered as the textual basis for interpreting the constitutional status of a specific legal rule[69] All judgments of the Constitutional Tribunal are universally binding and are final (Art 190 para 1 of the Constitution)

As indicated above, one of the derived principles of *państwa prawnego* is 'loyalty', which refers to the mode and form of legislation This principle concerns the prohibition of legal traps, formulating empty promises or sudden state's withdrawal from the promises or established rules of conduct This principle involves the duty to publish officially a universally-binding, normative Act before it enters into force[70] From the democratic *państwa prawnego* derives the requirement to provide adequate *vacatio legis*[71]

Undoubtedly, the existence of the Constitutional Tribunal, which examines the compliance of laws with the Constitution, is an expression of the principle of constitutionalism The doctrine, however, concentrates on the role of the Constitutional Tribunal, which is no longer just a 'negative legislator', but is far more active Its role also no longer fits into the concept of 'reconstructive interpretation of the norms of the Constitution '[72] Although, this is part of the current debate and 'constitutional crisis' in Poland As a result the role of the Constitutional Tribunal could be changing

The ideas of the rule of law and the Rule of Law were established on the basis of another system of sources of law But its individual projects overlap with those formed on the concept of a democratic state ruled by law, a *Rechtsstaat* Similarities, borrowings, and even a partial overlap should not lead to a complete identification of both principles[73] But there is not yet a distinct enough native doctrine of *państwa prawnego* to present it independently of borrowed concepts and practices The same holds in its relation to the English doctrine of substantive Rule of Law But, as it stands, *państwa prawnego* contains a doctrine of the formal rule of law in its constitutional judicial review

69 *Ibidem*, p 1160

70 W Sokolewicz M Zubik, Artykuł 2 [in] L Garlicki M Zubik (eds) Konstytucja *op cit* pp 127-128

71 Judgement of the Constitutional Tribunal of 4 January 2000 (K 18/99) Judgement of the Constitutional Tribunal of 15 February 2005 (K 48/04)

72 K Działocha Konstytucyjna koncepcja prawa i jego zrodeł w orzecznictwie Trybunału Konstytucyjnego [in] M Zbik (red) Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego Warszawa 2006 p 313

73 W Sokolewicz M Zubik Artykuł 2 [in] L Garlicki M Zubik (eds) Konstytucja Rzeczypospolitej Polskiej , *op cit* pp 123-124

3. The 'Rechtsstaat' and the Dutch Constitution

In the Netherlands there is a certain competition between the *rule of law* and the idea of the *Rechtsstaat*[74] For, *rule of law* and *Rechtsstaat* are not quite identical[75] The Dutch borrow the term *'rule of law'* from the English without translating it, *'Rechtsstaat'* is a Dutch word with obvious German relations and influences, but it is not synonymous with the German meaning Definitions differ but in general it is assumed in the Dutch context that *'rule of law'* refers to precisely formulated rules which guarantee fundamental liberties, the independence of the judiciary, separation of powers etc Those also are part of the *'Rechtsstaat'* which also includes unwritten rules and principles, as well as a written constitution Thus the first is positivistic, whereas the second is an open, yet internally coherent system The competition arises from the fact that the Dutch Constitution contains formulated rules, but it also forbids checking the constitutionality of statutes made by parliament, to see if they violate the rules of the Constitution. Parliament is the ultimate application of the rule of law The repeated urge to allow this judicial review, nevertheless, is the expression of the ideal of the *Rechtsstaat*, namely, that law and justice are more than the sum of positive rules, that the judiciary may have an unwritten right and duty to check the constitutionality of statutes In the German idea of the *Rechtsstaat*, that point is obvious

The point of departure is therefore this prohibition of judicial review, which dates from 1848[76] It is currently laid down in a new formulation in art 120 Const 2008, where the principle is extended to forbid judicial review of international treaties[77] The question is whether defence of such constitutional cross-checking is compatible with the wish for the full development of either the *rule of law* or the *Rechtsstaat*-idea In view of the great amount of literature on this it can only summarily treated here[78] The prohibition was not always part of the Constitution The Constitution of 1840 still had merely the statement that bills, accepted by the king and the parliament, have force of law[79] The defence was added in the Constitution of 1848[80] Subsequent constitutional reforms retained it In the latest constitutional review of 1983 it was reformulated and extended

74 In German law the same word is used with a similar meaning However the German constitution has a very different relation to its legal order than the Dutch Constitution does

75 Since the Dutch use the English rule of law to talk about their *Rechtsstaat* it will be used in this section in the lower case with italics and without quotation marks When referring to the English doctrines of rule of law or Rule of Law single quotation marks will be used

76 The so-called *toetsingsverbod*

77 Art 120 Const 2008 De rechter treedt niet in de beoordeling van de grondwettigheid van wetten en verdragen / The judiciary does not judge the constitutionality of statutes and treaties

78 See A W Heringa T Zwart De Grondwet, Zwolle 1987 p 233

79 *Const 1840 Artikel 120 Alle voorstellen van wet door den Koning* en de beide Kamers der Staten-Generaal aangenomen verkrijgen kracht van wet en worden door den Koning afgekondigd

80 Const 1848 Artikel 115 Alle voorstellen van wet door den Koning en de beide Kamers der Staten-Generaal aangenomen verkrijgen kracht van wet en worden door den Koning afgekondigd De wetten zijn onschendbaar (All bills of law accepted

The wording of the final sentence in art 115 Const 1848, 'De wetten zijn onschendbaar / The statutes are inviolable', immediately baffled the constitutional – and liberal – lawyer Thorbecke when the bill was published In the wake of the revolutions in Europe early that year, the King, having turned in one night, as he said, on March 17th of 1848 from conservative to liberal, appointed a committee to reform the Constitution, with Thorbecke as president[81] On April 11th Thorbecke presented its draft But the conservative Schimmelpenninck-government later changed his draft in several places, then presenting it on June 19th as bill to Parliament Thorbecke published a pamphlet with his objections to the bill[82] In art 113 of the bill (the later art 115) the government had added the sentence in question, Thorbecke was not convinced by the arguments to do so According to the government it served a threefold purpose It put statutes 'above suspicion' (the phrase said that literally 'Zij plaatst de wet boven alle verdenking'), it protected it against violation of both the executive and the judiciary who had to respect any statute, and of lower authorities which have merely authority to issue local bylaws Thorbecke wondered Suspicion? Who would 'suspect' a statute? If 'criticism' was meant it was senseless, since one may always criticise a statute That it has force of law? But as long as the constitutional requirements are fulfilled, a statute always has legal force Or should it shield an unconstitutional law against rejection? Yet, in that case the unity of the Constitution would be broken Against violation by the executive and judiciary? Yet, here, good law on accountability should be the answer, not this sentence When it comes to respect, everybody has to respect the law and as such the phrase is superfluous[83]

But it is not the only place where the word 'onschendbaar' turns up Art 53 Const 1848, which introduced the political ministerial accountability, says 'De Koning is onschendbaar, de ministers zijn verantwoordelijk / The King is inviolable, the ministers are accountable '[84] The reason that this has to be worded thusly is that the executive power lies with the king (art 54), and that the king together with parliament exercises the legislative power (art 104) The executive power is formally with the king, but due to the ministerial accountability, it is a mere formality All royal decrees and decisions also have to be signed by a minister (art 73 Const 1848) This was not, as since 1983[85], also prescribed for statutes Art 69 Const 1848 gave the king the right even to reject a bill, proposed by parliament Statutes are worded so as to be acts of the king

by the King and both Chambers of the States-General acquire force of law and are promulgated by the King The statutes are inviolable)

81 According to the British envoy Sir Edmund Disbrowne five of the greatest radicals of this country

82 J R Thorbecke Bijdrage tot de herziening der Grondwet Leiden 1848

83 Ibidem pp 60–63

84 The penal accountability of ministers had already been introduced in the Constitution of 1840 art 75 and the expression of this the ministerial contraseign in art 76

85 Presently art 47 Const 2008

The sentence in question follows the conditions according to which a bill acquires force of law through acceptance by the king and both chambers of parliament The government may have feared that the fact that statutes were passed with the indispensable consent of the king and promulgated in the name of the king might lead to the idea that the king, or both king and parliament, were accountable for them and not parliament alone Ministerial accountability is only recorded in the title on the executive In 1848 the system where ministers need the confidence and support of a parliamentary majority in order to function, also with regard to proposals of statutes, was not yet established And whereas ministerial accountability was put in part onto executive power in Chapter Two, the legislative power was dealt with in Chapter Three One might argue, with some reason, that this accountability did not cover bills '*Bedenking*' is in meaning wider than Thorbecke suggests[86] Contrary to the executive power, one might be tempted to impute to the king personal accountability regarding statutes, notwithstanding that parliament would have assented To insert, however, a parallel sentence like 'The king is inviolable, the parliament is accountable' for statutes would suggest a reduced power of the king here as well[87] From that point of view, the phrase '*De wetten zijn onschendbaar*' would make sense since it avoids the sensitive problem

But it soon started to lead its own life The Constitution of 1848 said in art 118 '*De Grondwet en andere wetten zijn voor het Rijk in Europa verbindende, tenzij het tegendeel daarin wordt uitgedrukt* /The Constitution and other statutes are binding for the Realm in Europe, unless the contrary is expressed in them' By that a potential conflict between a statute and the Constitution was created Theoretically a statute could neutralise a constitutional right Thorbecke gave an example of this His draft acknowledged the right to convene with no other exception than regulations to assure public order The government had changed this into with the exception of a statute, regulating its exercise in the interest of public order Thorbecke criticised this the exercise was now generally restricted by a statute, it made the constitutional right no longer constitutional, it could now be reduced to nil[88]

Thorbecke argued still on basis of the bill of law Later criticism would be based differently, namely on the potential conflict between art 115 Const 1848 and art 118 Const 1848 which established the binding force of the Constitution Could a judge set such a statutory rule aside with reference to art 118? The strict reading of art 115 made it impossible to do so It seems that this interpretation of art 115 was

86 Although Thorbecke criticized the governmental bill from a scholarly point of view his Bijdrage served also political purposes and was written rather quickly in order to serve in the debate about the bill

87 Thorbecke would not have minded since it would establish beyond doubt the exclusive legislative position of the parliament The conservative government on the other hand might have minded such a reduction of royal power in this respect too after the reduction of royal power with regard to the executive

88 Thorbecke ibidem pp 14-15

not precisely what the government may have had in mind (merely preventing violation of statutes by authorities, not violation of the Constitution by the lawgiver) But it was certainly a potential conflict, and art 115 proved to be the point of fixation It shows the force context can have on a sentence

It was in any case the way it was read in later times The great constitutional lawyer Buys phrases it so in 1881 According to him it was disputed since the Constitution of 1814 whether the judiciary had such a right, and the government wanted to finish this discussion in 1848 He invented in this way a constitutional dispute which did not exist, since the view in 1815 was that a statute was per se the correct application of the Constitution[89] He acknowledged the strength of the arguments in favour of abolishing this defence as enunciated by Thorbecke and Opzoomer But on the other hand, king and parliament had sworn allegiance to the Constitution And it was the duty of the First Chamber to keep an eye on the constitutionality of bills But what if a judge interpreted the Constitution wrongly? That would actually violate the Constitution, too Or did one want to return to the National Syndicate as envisaged in the 1801 Constitution? That provided supervision over the judiciary, which would not work either[90] All in all, it was better to keep it as it was[91]

That did not end the discussion The standard interpretation was, and still is, that a judge may not declare that a statute violates the Constitution, e g , the constitutional right of freedom of speech[92] In an article of 1952 G van den Bergh gave reasons for this[93] He points out that it is not a question whether a statute (or lower rule) can be unconstitutional it is not forbidden to say or write so Further, such a question will usually also require interpretation of the Constitution But it is first of all a question of who is authorised to declare this Art 115 Const 1848[94] excludes the judiciary But where a constitution has no such rule it is often an unwritten con-

89 J Th Buys De Grondwet toelichting en critiek Arnhem 1883 pp 633-634 Contrary to this Van der Pot-Donner Handboek van het Nederlandse staatsrecht bewerkt door L Prakke J L de Reede G J M van Wissen Zwolle 1995 157–158 cites the committee for the constitution of 1815 la loi qui n'est autre chose que la saine application des articles de l acte constitutionnel de la royaume Art 146 Const 1814 which had regulated the interpretation of the constitution if a disposition had raised uncertainty the committee considered unnecessary with the above words I doubt by the way whether the political situation in the period 1814–1830 was of a kind, that such an idea, if it were present with some people was the subject of a public debate The King s autocratic regime pointed into the other direction (Blankетwet of 1818[1]) and only slowly resistance emerged

90 Staatsregeling des Bataafschen Volks 1801, art 99 instituted a college of three Nationale Procureurs public prosecutors all lawyers the Nationaal Syndicaat which had to supervise all public authorities like courts and executives and to check whether these acted against the constitution If they thought that was the case they could indict the suspected authority before the National Court

91 J Th Buys De Grondwet toelichting en critiek Arnhem 1883 pp 634 637

92 In 2010 the MP Halsema proposed a bill with a limited form of judicial review (of the subjective fundamental rights and some other points) dossier 32 334 which awaits a second reading in the Second Chamber It is at the present not likely that it will be approved

93 G van den Bergh Beschouwingen over het toetsingsrecht Nederlands Juristenblad ' 1951 No 26 pp 417-425

94 In 1952 renumbered as art 124 lid 2 Const 1948, now the abovementioned art 120 Const 2008

stitutional rule that it is not permitted for a judge to make this decision He gives an example of how such a constitutional allowance should be phrased, with the intention to show what limitations would exist One would be that if a contrary opinion appears to have existed, the judge must defer to this Another is that the judge has no authority for this, or that a statute or the Constitution denies him this authority, or that there exists a procedure which is meant to prevent a collision between higher and lower dispositions, and evidently was meant to suffice for this In the end the interpretation given by the Crown and Parliament prevails that is, according to Van den Bergh (in 1952), in the prevailing interpretation of art 124 lid 2 Const 1948 was the old art 115 Const 1848 The example he gives is that of a later interpretation of a treaty That is binding[95]

This was, when Van den Bergh wrote, an unwritten constitutional law But he wrote on the brink of great European developments Much has happened since Just a year later the European Convention for Human Rights of 1950 gained force and with it the European Court for Human Rights Other international treaties followed The Convention and the Treaty of the European Union are the most important in the context of this chapter

In 1953 the Dutch Constitution was accordingly adapted It gives treaties direct applicability in the Dutch legal realm when it concerns rules meant to be directly binding for everybody, like fundamental rights[96] It forbids the judiciary to grant force of law to statutes for the Netherlands if they are incompatible with prescriptions of international treaties and decisions of international organisations which are meant to bind everybody[97] Here we see that the judiciary has a right of judicial review of statutes against international law[98] It makes the position of the Constitution all the more problematic And again, as in Buys' times, there seems to be no reason to worry then the Constitutional Oath was apparently enough, now, if the Constitution cannot be challenged, there is always the recourse to a treaty which a statute might violate

Yet, the question is still there and it is not just a question of whether the Constitution can provide more rights or protections It has been suggested that the defence of art 120 Const is restricted to constitutionality itself and allows for checking against '*rechtsbeginselen* / principles of law' That would be an opening to the '*Rechtsstaat*' and to the substantive Rule of Law, but it has been rejected by the govern-

95 G V den Bergh Beschouwingen over het toetsingsrecht Nederlands Juristenblad 1951 No 26 pp 420-421

96 Art 93 Const 2008 Bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties die naar haar inhoud een ieder kunnen verbinden hebben verbindende kracht nadat zij zijn bekendgemaakt

97 Art 94 Const 2008 Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing indien deze toepassing niet verenigbaar is met een ieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties

98 See A W Heringa T Zwart De Grondwet, Zwolle 1991 pp 206-207

ment and judiciary[99] Moreover, the present art 120 Const forbids even checking the constitutionality of treaties This implies that if an international treaty reduces or changes rights or protection offered by the Dutch Constitution, the Dutch Constitution loses

That is remarkable and makes one wonder what value and use the Dutch Constitution might still have The German Bundesverfassungsgericht (the Constitutional Court) has decided that no international treaty or rule can ever infringe on the core identity of the German Constitution This includes the essential human right of 'Menschenwurde'[100] In this way the Court upholds and increases the status of the Constitution against international treaties

More recently concepts have entered the discussion which were not present in the earlier constitutional debates 'rule of law' and 'Rechtsstaat' Again, main elements of the rule of law are the separation of powers, the legitimacy of any kind of official act, be it administrative or legislative, the safeguarding of the fundamental rights and the general principles of law, the independence of the judiciary The concept is of English origin, and the approach is traditionally formalistic and positivistic The Dutch use of the term appropriates more substantive content than the English one ever does (cf fundamental rights) Considering the above, one would place the Dutch approach more in this category It is a restrictive approach and the possibility of applying general fundamental legal principles based in the Constitution has been rejected The other concept is of continental origin (especially German), has also those distinctively-formulated principles, but focuses more on their contents as expressing an order, and sees this as the basis for the state (hence Rechtsstaat)[101] The above-mentioned view of the Bundesverfassungsgericht is an example of this

The Council of Europe prescribes that its members accept 'the principle of the rule of law' (without going into what they are)[102] Also the European Court of Human Rights seems to want to implement more of 'the rule of law' in its deci-

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99 *Ibidem* pp 230-233, for this pp 231-232 The art 131 Const 1972 mentioned there is the art 115 Const 1848 it has been replaced by the present art 88 and 94 Const

100 B verf G Beschl v 15 12 2015 Az 2 BvR 2735/14 Basically European law has priority over the German Constitution when considering executive acts but when European law is in conflict with the unchangeable core of the German Constitution (the Verfassungsidentitat) this no longer applies This core identity can also no longer be changed by statute see Artt 23 Abs 1 S 3 79 Abs 3 GG The protection of human dignity (Menschenwurde art 1 GG) is among others part of the Verfassungsidentitat

101 As cited in J Schokkenbroek Het EVRM als instrument ter handhaving van de rule of law Enige losse beschouwingen [in] Geschakeld recht T Barkhuysen M L van Emmerik J P Loof (eds) Deventer 2009 p 442 It is expressed in the German Constitution in art 20 section 3 Die Gesetzgebung ist an die verfassungsmäßige Ordnung die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden (The legislature shall be bound by the constitutional order the executive and the judiciary by law and justice) The crux is in the words verfassungsmäßige Ordnung constitutional order which is more than just the sum of the dispositions of the constitution

102 Statute of the Council of Europe art 3 Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I

sions That would be visible in a gradual distinguishing and recognition of a unity of a common group of legal principles and requirements, which together form an important foundation of the European legal order and are visible in the various national systems

In this way it might approach *Rechtsstaatlichkeit* Since these decisions are binding for the Dutch judiciary, in this way EU 'rule of law' would enter the Dutch legal domain[103] Although, under this description a tendency is recognisable towards the *Rechtsstaat* The fact that the European Court is bound by the text and arrangement of TEU will most likely impede a full development of the European Union into a *Rechtsstaat*, at least along this route There is already a tendency to criticise the Court for applying TEU sections too widely and intruding by this into national law and national views on the matter[104]

One wonders where this tenacious hold on the principle that it is the legislator who has the final say on constitutionality of treaties and statutes comes from and why it is maintained Is it the view that the people, represented by parliament, has the last say in legal principles? There are no references to it, but one is reminded of the *référé législatif* of the French Revolution, when the *Cour de Cassation* had to consult the *Assemblée* if a legal rule was not clear enough to be applied to a case[105] True, there are to a certain extent safety valves in the Dutch democratic system The *Raad van State* / State Council always advises on bills and will warn, if necessary, if unconstitutionality might be looming The First Chamber sees it as one of its duties also to check bills of law for constitutionality

But an advice is not binding In the end the decision of the Second Chamber can override all[106], and one of the arguments to abolish the First Chamber is that it should not be able to stop a bill, since it has not been chosen directly by the people Still, as is apparent from the initiative bill by Halsema, a sizeable part of the Second Chamber thinks some lifting of the prohibition of art 120 Const 2008 desirable[107]

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103 See on this J Schokkenbroek Het EVRM als instrument ter handhaving van de rule of law Enige losse beschouwingen [in] T Barkhuysen M L van Emmerik J P Loof (eds) Geschakeld recht Deventer 2009 pp 443-452 What prevents the EU from becoming a *Rechtsstaat* ? The rule of law mentioned in the TEU could perhaps turn into a *Rechtsstaat* As suggested in the article by Schokkenbroek if the Court would build a system out of the separate rules of law and then say that these rules are manifestations of a body of unwritten law and that this body can produce new rules not laid down in the ECHR it would be possible

104 It was one of the arguments by those who favoured Brexit

105 Actually Van der Pot-Donner Handboek van het Nederlandse staatsrecht bewerkt door L Prakke J L de Reede G J M van Wissen Zwolle 1995 157 refers to this

106 In this context it is not superfluous to consider the change in the composition between the Second Chamber as of 1848 and now In 1848 the minimum age to be elected was 30 years (art 79 Const 1848) in 1963 it was lowered to 25 years (art 94 Const 1963) since 1983 it is 18 years (art 56 Const 2008) Although it will not often happen that such a young person is elected *It is not impossible* that one with that age disposes of sufficient insight and experience to judge on constitutionality Yet it seems that allowing one with such a low age indicates a lack of interest in experience required to appraise complicated bills

107 See note 90

The rule of law as present in the Constitution and in treaties is apparently not enough, there is a wish for more 'rule of law' through judicial testing of constitutionality (although, what is really being asked for is a principle of the German Rechtsstaat) Such a wish is probably connected with the greater importance attached to fundamental rights, as visible by their extension in the past thirty years in the Dutch Constitution It is typically a case of moving beyond the ECHR, and it shows the limitations of that treaty But inserting this possibility into the Constitution is on one hand just another extension of the rule of law

On the other hand, breaking up the prohibition and allowing judicial review might open the way to introduce, through interpretation, a road to Rechtsstaatlichkeit (as part of the Rechtsstaat) But notwithstanding this possibility (which, in view that the bill will likely never be accepted, remains a pious wish), one is still far away from the wider protection of the Rechtsstaatlichkeit The possibility of a constitutional court in the Netherlands as in Germany and other countries is apparently not being considered, and the way the Bundesverfassungsgericht ruled in 2015 has not been a solution favoured by the Dutch Supreme Court

So the situation continues The Dutch Parliament is judge in its own case, or, as some opponents might formulate it less deferentially, it is like a butcher who approves his own meat as safe and healthy The rule of lawmakers rules the Dutch state, but many may prefer an opening towards Rechtsstaatlichkeit Allowing judicial review could at least mean that the competition between the rule of law and the ideal of the Rechtsstaat, which is now only intellectually visible in the urge to restrict or abolish art 120 Const (and art 94 should in that context be reconsidered as well), would institutionalise into a balance between the rule of law as established in the Constitution and international treaties and the Rechtsstaat-idea as upheld by the check of the judiciary

4. Discussion

In the Netherlands jurists use the English word 'rule of law' to speak about their 'rechtsstaat' Law rules there through parliamentary supremacy This might count as an implementation of a formal 'rule of law', but since there is not a check on the legal prerogatives of the parliament, it complicates the matter The various procedures to ensure legality built into the statutory law of the Netherlands would probably also mean that the Netherlands approaches -at least on paper – the substantive Rule of Law as outlined by Fuller Its Roman law heritage concerning the law of persons would add weight to that side of the scale[108] But then again parliamentary suprema-

108 Roman law has rules in its procedural law rules which guaranteed protection of the individual These were received into modern Dutch law

cy looms large, threatening to upend the legal order with one pen, and without a judicial gatekeeper of the Rule of Law If the Dutch have the benefit of the Rule of Law it is not because their constitutional order is arranged so as to guarantee it It is likely because they are sensible, law-abiding Dutchmen, operating in a long tradition of consensual politics, a point that we return to below

Poland, with its *państwo prawne*, has a more fully German-style Rechtsstaat, including constitutional judicial review This could be seen as simultaneously implementing both the formal rule of law and the substantive Rule of Law by way of constitutional supremacy and a constitution that provides for the sorts of procedural care that Fuller et al identify However, as was mentioned throughout the article, constitutional supremacy is not necessarily part of the rule of law or the Rule of Law The Rule of Law is also not necessarily part of constitutional supremacy or constitutional government An over-adherence to the Constitution can betray the Rule of Law For, at times adherence to the Rule of Law requires departures from the constitution or even from the law itself[109] The ultimate standard of the Rule of Law is the person for whom law is made The constitution depends for its force on the doctrine of the Rule of Law, not the other way round Lastly, there could have been rule of law in ancient Athens or Rome (and even aspects of the Rule of Law especially in Rome[110]), there could not have been a 'Rechtsstaat' The latter requires very particular forms of constitutional government It probably, for instance, necessitates liberal democracy But it does not necessitate the doctrine of the substantive Rule of Law This might be a limitation of over-relying on the German model, which has only been with for seventy years

It seems that both Poland and the Netherlands might benefit from doctrinal development of either theoretical or praxis-based doctrines of the 'rule of law' This need not be done simply by appropriating English concepts or practices (which will be even less likely to attract jurists if and when Britain leaves the European Union) It could be done by clarifying the relation of native concepts to the received doctrines of the rule of law and Rule of Law And then supplementing the native concepts where they lack, or extending the native concepts to include admirable or attractive aspects of the English doctrines At least in the case of Poland the practice of law already seem to extend the principle of *państwa prawnego* beyond what it might have meant in its native context, where a German Rechtsstaat-idea was once front and cen-

109 J Finnis, Natural Law op cit pp 275

110 In the Roman Empire, the emperor was supreme lawgiver *administrator* and judge but he was bound himself to the law (an unwritten constitution) and there were a number of procedural rules which guaranteed protection of the individual citizen against arbitrary acts of authorities there was a regular judiciary an orderly judicial procedure with defence lawyers etc with possibility of appeal later on *defensores civitatis* in cities to protect against extortion etc Although there was no democracy and practice may not have been perfect can we not say there was some rule of law here? Is it not a feature of the rule of law that this law is a bundle of rules which can vary through the ages and according to society? The content does not matter all that much, so long as the government is bound by the law

tre Polish jurists can now speak of the principle *państwa prawnego* as if it includes large parts of the substantive Rule of Law But that is not precisely what the term clearly indicates to most who hear it In practice one reads that Poland is both and variously a manifestation of *Rechtsstaat*-idea and the 'Rule of Law' It cannot be both for reasons mentioned and implied above Or one hears that the ideas are too complicated to speak sensibly about the matter

Dutch-language lawyers and jurists just borrow the English term 'rule of law' when they want to speak about their '*rechtsstaat*' What they mean to communicate is that their legal system has a formal rule of law and a substantive Rule of Law Although '*rechtsstaat*' is what 'rule of law' is most often translated as in official documents, we should not think that '*rechtsstaat*' can mean what '*Rechtsstaat*' does for the Germans and Poles, or that it simply means 'the Rule of Law' at Fuller et al describe it Parliamentary supremacy and the forbiddance of judicial review in the Netherlands complicate the matter further Parliament can in principle go round both the Rule of Law and the Constitution, since Parliament provides and is the formal rule of law

Nevertheless, the situation is not as dire as it might seem What the Dutch have might, in fact, be closer to the norms that Dicey describes in his three understandings of the meaning of 'rule of law' The last of which was that a certain characteristic of England produced the laws – the unwritten but functional Constitution – based on the facts of their existing for a time together under a shared legal regime He says

There remains yet a third and a different sense in which 'the rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts, whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution[111]

There is a clear separation alluded to here between a constitution that is the result of law ruling (the product of the rule of law over time), and a rule of law that is the result of constitutional supremacy This is shorthand for a core point of divergence between the *Rechtsstaat*-idea and a *rule-of-law* idea Dicey was speaking of judge-made law emerging over time in Britain, the Common law as it is called So, it was 'rulings by law' – through judgements and legislative acts – that gave the British

111 A V Dicey An Introduction , op cit

the rule of (their own) law, rather than an imposition of a set of general constitutional principles from which lower law was to be derived and against which it was to be reviewed for constitutionality Britain, also like the Netherlands, has a competing principle of the supremacy of parliament in matters relating to legislative acts

The Netherlands is certainly a civilian, codified system, so, there is no talk of 'judge-made' law And it does have a typical nineteenth-century, idea-driven, generalist constitution Yet, the supremacy of the parliament in law-making means that for the past century and half a representative body has been legislating on behalf of the people – a body which has the liberty to be the rule of law, without the 'suspicion' that it is betraying the Constitution This is not a 'Rechtsstaat' in the German sense Neither is it fully a system of formal rule of law, with identifiable Rule of Law principles in the English sense of Dicey plus Fuller Like contemporary Britain, it is a mixed bag But it is not unlike contemporary Britain, and it is not lacking a character of the Rule of Law that has descended from its particular legal culture and she sense and sensibility of the Dutch

5. Prospects for a single doctrine of „rule of law"

What do the details of these two cases tell us about the prospects for the rule of law as a core principle and fundamental value of European legal order[112]? Or even of the international legal order? First, they call for much more thought on the doctrinal issues of the Rule of Law in specific lands Is it something that is even possible under strong German Rechtsstaat-inspired systems (or contemporary American constitutionalism, for that matter)? What to do when one system says that the 'rule of law' is part of the Rechtsstaat (constitutional government), as Germany does, and another says that constitutional government (Rechtsstaat) is part of the rule of law, as Poland implies? Both cannot be the case without one value ceasing to be fundamental We have not done a detailed study of France and Croatia, Italy and Spain, Luxembourg and Estonia, but similar oblique relations to English rule of law ideas and the German *Rechtsstaat*-idea would likely emerge in a consideration of their legal systems Perhaps that is okay, and necessary corollary of ruling actual peoples under law However, if there is no 'thing' or shared meaning when we speak of the 'rule of law', that is a problem (Not to mention there being no shared doctrine) It will cause trouble and confusion when there is a conflict of laws or jurisdictions, for instance between EU law and the law of a particular system, or between member states[113]

112 European legal order is not merely equivalent to *espace juridique Europeen* since it includes national legislation s adherence to its own rule of law as a separate jurisdiction

113 This is one way of reading the intrigue about the current Polish Constitutional Tribunal Both sides are invoking the rule of law (but in the popular rendering of *panstwo prawa*) without much effect or clarity but with great conviction that it is a high value and principle of the legal and political order

Second, this rule-of-law problem should give the lawyer, jurist, legislator and judge pause Ill-formed legislative statements become black-letter treaties and laws And then we are responsible to interpret them as sensibly as we can It must generally be assumed that the framers of the laws had *some clear idea of what they meant* or implied in a law If a simple analysis of the concept or practice shows this not to be the case, it might illustrate a deeper problem with, well, the prospect for rule of law in certain institutions Or it might indicate an endemic disease in certain kinds of legal institutions or jurisdictions, such as large international bodies with pretentions of becoming federal states

In order to save the virtue of the rule of law from becoming just 'ruling class chatter', the term needs to refer to a clear doctrine, concept, practice or tradition[114] None of these seems now to be the case outside of the English legal traditions And even there it is not entirely secure Nevertheless, in its general international deployments the term does refer to *something* (rather than to *nothing*), even if that something is often only visible in its conspicuous absence Tom Bingham mentions the knock at the door in the middle of the night as *something* precluded from legal systems that have a formal rule of law, without substantive norms against arbitrary enforcement Perhaps like some of the most convincing ways of defining God, the way of negation should be taken We might want to begin by defining the Rule of Law by what it is not[115]

114 J Shklar Political Theory and the Rule of Law, [in] A Hutchinson, P Monahan (eds) The Rule of Law Ideal or Ideology Toronto 1987 p 1

115 There is a long tradition in theology that attempts to define God in this way Apophatic theology uses things we know not to be God to talk about God This is done because God (like the rule of law) is more elusive than all *that is not-God* For a contemporary philosophical defence of this method see W Franke A Philosophy of the Unsayable Notre Dame 2014