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Rechtssstaat and Rule of Law: Some Aspects

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Abstract:
Concepts of the Rule of law and Rechtssstaat reflect the general tendency of recognizing law priority in various legal doctrines and different legal systems. The concept of the Rule of law focuses on more broad meaning of law and its genetic fundamental priority in relation to the state contains a significant non-state element. The interpretation of the state includes sharing the power and obligations between various institutes representing ‘the different authorities’ for their self-control including law making, interpretation of law and its application is the cornerstone of Rechtssstaat. The interpretation of Rechtssstaat in theoretical concepts is allied to the sociological and psychological schools of law and more affined to the concept of the Rule of law. Despite distinction in an origin, concepts of the Rule of law and Rechtssstaat have similar objectives – the seeking of an ideal of legitimacy of the government and to support the optimum regime of rights and freedoms of subjects of law, which is necessary for harmonious and stable development of the society.

Keywords: Rule of law; Rechtssstaat; law-based state; supremacy of law; legislation; constitution.

JEL Classifications: K10; K33.

Introduction

After the Second World War in political and legal life of countries two various parallel processes were traced to develop. On one hand, the UN and its establishments took effective measures on creating favorable conditions for studying and distribution the ideas connected with the concept of the Rule of law at the international level. In other words, the active process of global introduction of the idea of the Rule of law began. On the other hand, after 1945 in many countries of continental Europe fall into active application of foreign-language equivalents of the German concept of Rechtssstaat (with which began to connect an image of ‘the result of the all-European
development\textsuperscript{1}) as equivalents of the last also acted: ‘Etat de droit’, ‘Law State’, ‘Stato di diritto’, ‘Estado de derecho’ (Monhaupt 1993, 75).

During ‘cold war’, the division based on ‘the western ideas and values’ and on existing in the countries of ‘socialist camp’ was basic distinction between legal systems. Considering this factor of ‘global’ distinction and opposition, UNESCO in 1956 approved the plan of development of ‘intellectual contacts’ between lawyers of the legal systems existing on both sides of so-called ‘iron Curtain’ – in the USSR and other countries of socialist system (‘East’) and countries of Western Europe (‘West’). In new conditions, the idea of UNESCO relating to carrying out discussion about the principles and features of legal systems supported ‘the western lawyers’ who, despite certain distinctions in legal systems of their own countries, were interested in clarification of particular features of the legal systems, which would be possibly recognized as main or fundamental.

The attempts to find the general point of view of ‘the western lawyers’ on fundamental lines of the ‘western’ legal systems were taken on the Chicago colloquium (on September 8-16, 1957). The legal systems of four countries were the subject of discussion: Great Britain, the USA – with system of Common law and France, Germany – with system of Civil law. Despite such a choice, the participants of the colloquium did not exclude the law of other ‘western’ countries from discussion. The discussion of reports on legal systems of Italy and the countries of Scandinavia became the evidence of that (Semilliard 2001).

The first complexity, which arose before participants of the Chicago colloquium, was the linguistic problem of translation of the concept of the Rule of law into other European languages. That concept was the main distinctive feature of English legal system since professor, Albert Dicey, gave it definition at the end of the XIX century.

The French participants of the colloquium even among themselves had no general opinion on what French-language term shall be used to convey more precisely the meaning of the phrase ‘the Rule of law’. In their opinion, because of ‘sufficient compliance’, the French lawyers offered such French-language expressions as ‘le principe de la legalite’ (legality), ‘suprématie de la règle de droit’ (the supremacy of the norm of law), ‘regne de droit’ (the supremacy of law), ‘le règne souverain de la loi’ (the supreme power of laws). The German authors almost unanimously considered that German-language compliance of the phrase ‘the Rule of law’ was the term ‘Rechtsstaat’. However, they all agreed that it is impossible to recognize the offered foreign-language terms interchangeable, that is any of the offered translations ‘is imperfect’ and each of them ‘tends to divert attention to different aspect of legal system’ (Hamson 1959, 4).

Thus, it was obvious at once that the application of purely technical tool –translation, is unsuitable for transferring the essence of that value which covers the concept of the Rule of law. Therefore decided, initially, to reveal and define key area of the relations, legal culture and legal awareness that would be general for four considered countries and their legal systems.

The necessity to find the general element was dictated not only that the main problem in this case was the difference of legal systems. It was connected, according to lawyers, also with the contrast of some institutes, which had the fundamental character for each of legal systems. For example, in the German legal system the term Rechtsstaat was indissolubly connected with the existence of such institutes as ‘a written constitution’ and ‘the court authorized to exercise the constitutional supervision of acts.’ However, English and French systems did not recognize the necessity of existence of such ‘court’, and the English system of interaction did not know the institute of ‘a written constitution.’ The most obvious contradictions have found between English and German legal systems and their legal doctrines.

In this regard for carrying out the task the colloquium faced with it was offered not to take into account any institute or any characteristic of one legal system, which had no compliance in other legal systems. One of the methods offered was to apply ‘the classical method of scientific abstraction’ according to which ‘only that what is common can be regarded as essential.’ However, not all participants of the colloquium supported this method. One of the reasons, why such a method did not applied, was the fear that it would lead to depriving the concept ‘the Rule of law’ of such an important feature as ‘predominance of the legal spirit’ (Dicey 1959, 195).

Admitted that thereof, the Rule of law can be reduced simply to ‘regular function of governmental organs’ and then this concept would become so ‘indeterminate’ that will include ‘regimes such as Hitler’s’ (Hamson 1959, 6).

Participants of the colloquium have already had a general view that the concept of the Rule of law had ‘a peculiarly rich positive content’ and ‘constitutes a most valuable social achievement of a highly developed type of society’ (Hamson 1959, 6). Therefore, in order to determine within the comparative analysis what the essence of the English-language phrase of the Rule of law had, it was decided to apply another method. The basis of it was the following:
(a) definition of the objectives of the concrete legal system and its hierarchy, and also search and analysis of similarities and differences in these objectives;

(b) identification of ways by means of which the concrete legal system seeks to achieve its objectives. Especially – the status and activity of institutes whose application allows concrete legal system to achieve these objectives. It means the functions of concrete institutes of the legal system allowing to revealing analogy, similarity and difference between the institutes operating in different legal systems;

(c) clarification of ‘usefulness’ and ‘necessity’ of certain institutes, degrees of their ‘compliance’ to the objectives they serve in concrete legal system (Hamson 1959, 7-8).

Such an approach promoted the detection of ‘prominent value’ which the comparative legal analysis could give at ‘the practical level.’ It is the best way for a lawyer to make suggestions for improving his own legal system at the appropriate accounting of the opportunities in the light of information on its functioning, which the lawyer received while studying other systems (Hamson 1959, 7-8).

Therefore, the subject of studying during the colloquium was questions chosen to make the legal systems analysis in the form in which they existed at that time. Not the objectives or a main objective of the concrete legal system what they should be were discussed but about the objectives of real legal system with how they appeared during the analysis, and about how these objectives are achieved by means of the institutes existing within the particular legal system. Such an approach allowed the participants of the colloquium to find out the phenomenon known as a functional equivalence of various institutes in different legal systems that, in turn, gave the grounds to speak about the basic elements presented in the concept of the Rule of law, legal systems of the ‘western’ type (Hamson 1959, 9-10).

In the light of the revealed basic elements the generalized view relating to the term of the Rule of law and its ratio with fundamental national doctrines of some civil law countries – with Rechtsstaat within the German legal system, or with Etat de droit in the French legal system was formed.

1. Literature Review

The analysis of these doctrines (inherent to the legal systems of the countries of continental part of Europe), convincingly testifies that there is a close interrelation between them and the Anglo-Saxon doctrine of the Rule of law. However, the degree and features of such interrelation representatives of various schools of legal philosophy understood unequally and have the same position till nowadays.

Some authors completely or generally identify the concept of the Rule of law with Rechtsstaat; and are inclined to it representatives of the western legal systems Scheuerman (1994), as well as scientists from the countries of Eastern, Central Europe (Georgiev 1999, 330) and Russia (Sokolov 2002, 9). In works of a number of authors, take place attempts, without identifying them, to give definitions to the concepts of Rechtsstaat, Etat de droit and to them similar – through the concept of the Rule of law or – through clarification of the degree of the content of the last in continental concepts (Siedentopf 1993, 3).

Gradually, despite conceptual, cultural and terminological dissimilarity of theoretical constructions, scientists of two legal systems – Civil law and Common law – began to pay more attention to internal interconceptual communications and proximity of the objectives of the doctrines. To representatives of Civil law it seemed quite natural to represent the updated concept Rechtsstaat by approaching it to the concept of the Rule of law. To representatives of Common law it was convenient to interpret the concept of Rechtsstaat (or to explain the legal systems of continental Europe) in parameters of existence or lack of the Rule of law in the concept of Rechtsstaat.

For the XX century, especially – its second half, it was possible to observe that different authors interpret the concept of Rechtsstaat:

(1) as an equivalent of the concept of ‘the constitutional state’ because fixing of ‘formal’ guarantees of the rights and freedoms of the person took place in constitutions (Ajani 1992, 5);

(2) as an equivalent of ‘the state which recognizes the idea and system of administrative justice’ (Ajani 1992, 5);

(3) in the ‘formalist’ understanding created by H. Kelsen where the concepts ‘legislation of the state’ and ‘state’ as the legal phenomenon coincide with the term of the law, in such a way that each state would be the Law-based state;

(4) as a synonym of the concept ‘the Rule of law’ (Byrd and Hruschka 2008, 608);

(5) as a concept which includes all activity of organs of the state on the basis of the principle of supremacy of laws (Ajani 1992, 5).
All these interpretations of the concept of Rechtsstaat not only differ among themselves, but also sometimes contradict each other. It is obvious that if to understand the concept of Rechtsstaat as a full synonym of the concept of the Rule of law, some of the interpretations of Rechtsstaat (given above) will be excluded because of contradict the Rule of law.

Against active discussion and distribution in the German legal and political circles for the XIX century of the doctrine of Rechtsstaat, actually French doctrine of Etat de droit appeared much later. This concept used in French was taken from German and was just a translation of the term Rechtsstaat. For the first time the term Etat de droit was introduced by the lawyer, professor of University of Bordeaux – Leon Duguit in 1907 (Duguit 1907, 238, 662). However, even applying the term Etat de droit, Duguit often referred to the German doctrine of Rechtsstaat and in order to retell the matter of the concept better he used expression ‘principe de legalite’ (Duguit 1907, 190, 659).

According to the famous French classic of legal positivism Carré de Malberg – Etat de droit (as well as in Germany – Rechtsstaat) in France acts as opposition to ‘police state’ – Etat de police (Millard 2000, 422). Within which the state is free from a duty to observe the rights of citizens and ‘does not know others, except force’ (Maracha and Matiuhin 2005, p. 277). The general conceptual foundation laid by the German school of public law also one can see in modern definition of Etat de droit as the state in which ‘public authorities have to carry out the functions according to the established set of legal norms.’ Researchers note that an important point of the French political and legal awareness is the recognition of ‘extremely big role’ of the state in France since XVIII century ‘up to the XXI century’ (Kola 2002, 111).

Distinction between doctrines of Rechtsstaat and Etat de droit is – if in the first case the state itself is the carrier of the sovereignty, in the second case the sovereign – the people directly or through Parliament (Pino 1999, 519).

Along with formation of the doctrine of Etat de droit on a conceptual basis of the German doctrine of Rechtsstaat, the French scientists participated in collective search of essence and value of expression of the Rule of law. Trying to translate literally the English-language phrase of the Rule of law, the French scientists suggested applying two possible word meanings of the rule. Taking into account that to terms ‘power’, ‘supremacy’, ‘board’ corresponded the French word ‘règne’, and to such legal category as ‘norm’ or ‘rule’ there corresponded the expression ‘la règle.’ As a result the proposal of the French authors was consolidated to that the phrase of the Rule of law could be translated as ‘règne de droit’ (the power of law), and as ‘suprématie de la règle de droit’ (the supremacy of the norm of law) (Letourneur and Drago 1959, 189). In their opinion, both these French-language expressions were rather suitable for transferring the value of the principle of the Rule of law, which can be understood as ‘in this political society the relationship between the persons and the state are regulated by legal norms, but not by force’ (Letourneur and Drago 1959, 189). However, at interpretation, so far as concerns ‘suprématie de la règle de droit’ (the supremacy of the norm of law), it meant ‘in political society the state and its organs, in the same measure, as the person, are subordinated to the norm of law (sont soumis à la règle de droit)’ (Letourneur and Drago 1959, 189). According to the French scientists, the form of political society guaranteeing ‘the supremacy of norm of law’ is opposite to such its form, where the state ‘is free from a duty to respect norms of law’, and citizens ‘have no warranty from abuses [from state]’ (Letourneur and Drago 1959, 189). Itself ‘the guarantee of the personal rights’ closely connected with ‘the supremacy of the norm of law’, and was ‘other aspect of the same principle’ (Letourneur and Drago 1959, 189).

Formulas ‘the power of law’ and ‘the supremacy of the norm of law’ in this case acted, in fact, as synonyms of one more formula which was applied by the French scientists in this regard, – ‘le règne souverain de la loi’ (the supreme power of laws). The term ‘loi’ meant the act adopted by the Parliament as ‘the representative of the owner of the national sovereignty’ (Letourneur and Drago 1959, 190). ‘The supreme power of laws’ reflected the ideas of formal equality apprehended from the Declaration of the rights of Man and of the Citizen of 1789.

The laws was perceived as expression of the general will, ‘the supreme norms of laws’ proceeding ‘from representatives of the people’ as owners of its sovereignty and admitted as the best way of ensuring the rights of the persons. Thus, in France ‘The laws in formal sense’ was, in fact, ‘the only source of legality’, and the judge differed in nothing from the executor, ‘subordinated to the laws in formal sense.’ The judges had to ‘provide application of the laws’ and partly – to fill possible lacks in the laws (Letourneur and Drago 1959, 192).

Since the end of the XX century in the French literature, takes place more active process of convergence of doctrines of Etat de droit and the Rule of law. The cause of it is on one hand, some conceptual similarity of their ideas and the objectives. On the other hand, it is obvious that some French authors try to present the French doctrine of Etat de droit as a full-fledged equivalent of the recognized in the world doctrine of the Rule of
law. Like attempts of some German authors to define the concept Rechtsstaat through the English concept of the Rule of law, it is possible to find examples of how the concept of Etat de droit in French-language sources is defined through the English concept of the Rule of law. In one of such definitions, the concept of Etat de droit defined as the state founded on the rule of law.

2. Methodology

In determining the methodology of the study, the authors proceeded primarily from the multilayered nature of the subject of research. Taking into account that the problems considered in the article are somewhat interdisciplinary and touch upon issues of political and legal doctrines, the theory of state and law, constitutional law, the authors used a wide range of methods during the research. The methodological basis was a narrative-analytical approach to the object and subject of the study. During the preparation of the article, methods of interpretation and evaluation, comparative legal, structural and systemic were also used.

3. Results

Thus, the conceptual variety are partly connected also with semantic, figurative features of various languages as means of reflection and knowledge of the world, their dictionary, terminological, conceptual structure, internal communications, their historical evolution. Particularly, the terminology of civil law system has no satisfactory term through which it would be possible to transmit exact value of the English concept of the Rule of law. As a result, it is possible to meet a wide terminological variety in the applied translations when the Rule of law, depending on a country language, is represented as Rechtsstaat, the Law-based state, Құқықтық мемлекет, Etat de droit, Stato di diritto. Despite such a variety, to which the French expressions noted above are also added, there is a belief that the English expression of the Rule of law has no proper translation on other European languages.

Everything that is offered to use in these languages as its analogues can be considered as ‘the imperfect translations.’ Each of such translations tends to emphasis the various aspects of definite legal system. In the USA jurisprudence where is no language problem, the term of the Rule of law cedes other expressions, which faces the same purpose – in this case to transfer features of an American legal system (Fernandez Esteban 1999, 66).

If to pay attention to the translation into English mentioned above language units of various legal systems, all of them, beginning from Rechtsstaat, can be translated as the Law-based state (the state relying on the law), or – State based on the rule of law (the state built on the rule of law), or – Legal state, Law-governed state (the state which is governed by law), Law-ruled state (the state which is under the power of the law), Rule-of-law state (the state of the rule of law) (Butler 1991, 7).

The choice of the English analogue of continental terms seemed to be as an extremely complex challenge. It is connected with the fact that the English language does not differentiate accurately such two values of the term of ‘law’ as which act, respectively, – jus and lex (in Latin), recht and gesetz (in German), droit and loi (in French), Құқ Қәдім (in Kazakh), or (in Russian). In this regard, we join the opinion that all these translations are inadequate fully and only fragmentary transfer an essence of the concept of the Rule of law.

The prerequisite of the idea of the Rule of law or in other words – a decisive factor in this concept is not the state, but ‘autonomous, non-state’ law. Therefore, it is important to realize that the Rule of law as the phenomenon can exist in society without the state, or if to be more exact, it exists where the state may not assume business of creation of the law.

Strong connection which united for the XX century and unites presently the concepts of the Rule of law and Rechtsstaat (together with all its almost identical national compliances in languages of the other countries of civil law). Both concepts represent different ‘technologies’ of achievement of the same objective, namely: submission of the political power to the requirement to respect the norms of law, especially – aimed at providing the rights and freedoms of the person.

Thus, it is important to take into account a considerable difference between these informative ‘technologies’ and designs. Following the Rule of law, the political power governing the state is subordinated to the law, which is not a direct product of the state. In a case with Rechtsstaat the state subordinates itself to the ‘own’ law (Ajani 1992, 5). Such ‘own’ law includes principles of the state, standardly consolidated hierarchy of acts and government organs, natural law, custom law and religious law ideas, the principles and norms on a measure of their integration by the state into a positive law.
It means that despite a certain modification throughout the second half of the XX century, from the point of view of jurisprudence the concept of Rechtsstaat, and all its continental analogues, keep in themselves some reflection of ‘analytical positivistic jurisprudence.’ According to it, the law consists of set of norms or instructions (rules, gesetz, loi, zandar, laws) which were accepted (or authorized) by the state. Moreover, which the state applies through coercion.

Rechtsstaat means rather ‘rule by law’, the power based on the law, but not as ‘the power of law itself.’ This concept did not involve such fundamental law, which comes from the source existing out of the state and in relation to which the state has no legal power to cancel or completely to ignore it.

However, the limit of this process became the statement of the idea that law and order is own artificial work of the state presented in a specific form of system of acts, and that the law in broad understanding (recht, droit, jus, ); is identified with the law in narrow sense – with system of the legislation (gesetz, loi, lex, ) established by the state. It reduced Rechtsstaat, in fact, to Gesetzesstaat, – the state in which the power was carried out by means of laws. Not incidentally, even totalitarian regime, including the fascist regime in Germany, at the deformed law consciousness, could declare easily (by means of not too sophisticated legal formulations) the adherence to the concept of Rechtsstaat (Berman 1992, 47).

In this regard, we can remember again A. Dicey who explaining the concept of the Rule of law noted that ‘the rights of individuals to personal freedom’ in many countries ‘depend upon the constitution’ whereas in England ‘constitution’ is a result of ‘a generalisation of the rights which the Courts secure to individuals’ (Dicey 1959, 200). According to professor Dicey ‘where the right to individual freedom is a result deduced from the principles of the constitution’ quite can happen that ‘the right is capable of being suspended or taken away’ (Dicey 1959, 201).

4. Discussion

Parallel development of the concepts of the Rule of law and Rechtsstaat reflects the general tendency of recognition of a priority of the law in the context of various legal doctrines and different legal systems, features of their evolution.

Historically the idea of the Rule of law meant submission of judges to a case law – system of the principles developed by forward development of justice, judicial interpretation of laws and customs, and independence of judges of any orders of the king or his representatives. The problem of law enforcement in law making and in activity of administration was considered not as ‘achievement of the state subordinated to the statute law’ but as ‘the demand for recognition of the Rule of law.’ Therefore, the concept of the Rule of law is not related to statistic concepts of the state (Cook and Heilmann 2010, 7). Possibly, it can be explained by that the monarchic power in Britain had softer forms and considerably relied on customs, traditions, recognized the power of public opinion. Here, it was problem not so much of that ‘how to divide the power’ which was originally concentrated in hands of the absolute monarch, but about ‘how to determine the volume of authorities and an obligations of various organs’, how legitimately to keep a monarchy, its propriety and authority on the changing world. The question was about creation and functioning of compromise system, which would prove uselessness of new revolutionary changes, the viability as optimum option of protection of the rights and freedoms would show the high capacity of traditional legal institutes and their self-sufficiency for normal development of society.

Contrary to it, the interpretation of the state in which the authorities and obligations should be distributed between various institutes representing ‘the different authorities’ for their self-control including in law making is the cornerstone of the concept of Rechtsstaat. Historical concentration of the power in hands of the monarch at the end of the XVIII century and the subsequent efforts for subordinating the monarch to ‘laws which were adopted by parliament’ were the cause of it (Fernandez Esteban 1999, 89).

The concept of ‘logical sequence of the law’ prevailing on the continent in Great Britain changed to the concept of ‘historical succession’: ‘the law operating in the country’ (the law of the land) represents ‘the corpus of the principles’ which is in continuous internal development (Stein 2007, 20). English the Rule of law focuses on ‘dialectics of trial’ even if it takes place in parliament.

For the Rule of law, the historical succession and development of ‘law’ are the different parties of the single continuous process relying on practical lawsuits: ‘law’ develops if ‘injustice’ in concrete business takes place. Freedom and the rights grow from concrete, their situational manifestations and rely on court judgments. For the concept of Rechtsstaat the idea of justice is more abstract. Here freedom and the rights are derivative of the general principles and rely on the legislation applied by courts. By the end of the XX century, these two concepts according to their semantic contents more approached.
After the Second World War, many European countries became ‘the constitutional states.’ In ‘the constitutional state’ as it was put by the American tradition; the basic principle is supremacy of the constitution in relation to the statute law. In the conditions of globalization, active development acquires the international law, which is sprouting in all national systems and actively influencing evolution and rearrangement of the national legislation. Process of rapprochement and mutual penetration of legal systems also plays the role in rapprochement of their fundamental concepts.

Conclusion

The evolution of doctrines and legal systems, development of researches of the lawyers representing different systems and law schools formed a definite opinion. Despite distinction in an origin of concepts of the Rule of law and Rechtsstaat, eventually, both of them express, by means of specific interpretations, in many respects the same. They have the similar objectives – try to find an ideal of legitimacy of the government and to support the optimum regime of the rights and freedoms of subjects of law so necessary for harmonious development of society. Both concepts if to apply them literally and directly meant that all actions made by authorities of the state should base on the law and follow from it.

Despite difficulties of the translation of the Rule of law into languages of the people of continental Europe, in the second half of the XX century in the legal circle remained less and less of those who considered it as ‘purely Anglo-Saxon concept.’ Moreover, became more increasing those who believed that if to apply it as ‘shorthand expression’ in relation to ‘the corpus of the principles and ideals’ which are ‘known and recognized’ within various legal systems, harm from it tests only ‘the linguistic accuracy’ (Thompson 1964, 303).

Ideas associated with the Rule of law in ‘classical’ understanding, in the first place, connect with protection of the person against an arbitrariness of the power. Therefore, within each of legal systems already, there was consent – full or even excessive concentration of the power in hands of one person or one organ dangerously to society. For this reason, there has to be a certain division of the power (authorities); that executive power has to submit to the law and for this purpose necessary the strict supervision, which would be exercised by the organs, which are independent of executive power, etc. With than, according to some modern European scientists, implementation of the concept of the rule of law in a certain measure is connected also with the concept and level of an internal neutrality of the state which is required for practical realization of the law and legal administration (for example, in relation to religious and other minorities) (Laegard 2011, 9).

One of the most important factors of gradual change of the characteristic of expression of the Rule of law as ‘purely Anglo-Saxon phenomenon’ was, of course, also the fact of existence of this term in the Universal Declaration of Human Rights of the UN of 1948, in documents of the Council of Europe – the Statute of the CE (1947) and the European Convention on Human Rights (1950). Finally it led to that a view of modern researchers about the Rule of law in the countries of continental Europe less differs from modern representations of authors of system of Great Britain or transatlantic (Canada, the USA, Australia) Common law sample.

References


