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The European Parliament Against the Background of the Rule of Law and the Standards of a Parliamentary System: Selected Issues

ABSTRACT: *The aim of this study is to show the legal status and mechanism of action of the European Parliament against the background of classical standards of the rule of law in a democratic system. This study shows the extent of the deviation of the European Parliament from these standards and highlights its special features by using historical-, theoretical-, and dogmatic-legal methods. This helps to understand what parliamentarism is built into the present concept of the rule of law, and what distinguishes it from the classically understood assumptions of a parliamentary system.*

Specifically, this study comprises three key issues: the nature of the subject that equips the Parliament with democratic legitimacy, the way it is situated in the mechanism of power or, finally, the extent to which it is bound by existing legal norms. This research perspective is, of course, limited in nature and deals with selected issues.

The crux of the study makes the reader aware that at the level of the European Union a new type of parliament and, consequently, a new type of parliamentarism has developed, and the rule of law applicable here is clearly different from the analogous principle found in traditional states.

KEYWORDS: European Parliament, rule of law, parliamentarism, parliamentary system

1. Introduction

As a constitutional institution, the European Parliament grows out of the idea of European parliamentarism and is a body whose characteristics are clearly related to the legislatures formed in the circle of European legal culture. From the

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beginning, the process of creating this body proceeded under the overwhelming influence of continental political traditions and led to the development of elements typical of the parliamentary systems of member states, especially in Germany and France. Consequently, the European Parliament became an institution stylised in Western European fashion and fit, roughly speaking, into the framework of the system of parliamentary democracy. However, in terms of legal construction, it was not indicative that it was a mere hybrid of the features of national parliaments operating within the framework of the community. On the contrary, it acquired distinct original features that distinguished it from classical legislatures. This direction was determined by the innovative tendencies marked in its individual path of development, which were associated with the specifics of the European integration process and the institutional system operating in the Union. It was these that determined the formation of the European Parliament as a body with a special systemic identity, as a conglomerate of elements of classical parliamentarism and elements of the Union's autonomously forming system of government.

The institution thus formed is interesting from a research perspective, and the study of its legal characteristics must provoke various questions. At the forefront of this study is the question of to what extent do the current legal solutions and mechanisms that define the status of the European Parliament correspond to the traditional model of the national parliament, and to what extent do they go beyond it. In this context, to what degree do they fulfil the requirements for legislatures in democratic systems in connection with the rule of law. The question is whether this body, with all its systemic and institutional peculiarities, meets the systemic minimum resulting from the rule of law and thus falls within the limits of the elementary standards set for parliamentary bodies in the democratic world. Reflection on this issue makes it possible to understand the peculiarities of the form of parliamentarism created at the European Union (EU) level. Simultaneously, it also makes it possible to determine to what extent—looking from the perspective of the assumptions of the concept of the classical parliamentary system—the EU rule of law affects the functioning of the current European Parliament. It provides an opportunity to clarify what this principle actually is in the context of the parliamentary centre of power generated at the community level and its contribution to its formation in institutional terms. This problem forms the crux of this study.

2. The importance of the rule of law in the tradition of European parliamentary systems

Parliamentarism, as a form of state power organisation, is a product of European legal culture. It was shaped by a long historical process, undergoing successive stages of development and taking root in a growing number of European states. At

present, there is no European state that is not mentioned in one version or another of the assumptions of this system. This also applies to EU member states.

The modern form of parliamentarism is embedded in the framework of the concept of a democratic state under the rule of law and—which is obvious—requires respect for the elementary standards flowing from this concept. Thus, the parliament, as the centre of democratic power in the state, must be formed in a given way and should simultaneously have the ability to act within a given scope. Legislators do not have full regulatory freedom here, and in the process of creating legal regulations governing this body they are obliged to respect a catalogue of minimum requirements. Only when these requirements are met, there is a democratic legislature that falls within the universally recognised concept of the rule of law.

It should be remembered that European parliamentarism was influenced by the rule of law only at a certain stage in its development. The confrontation of these two ideas unleashed a tendency to subordinate the institution of parliament to the regime of the principle in question and thus contributed to a change in its systemic characteristics. This was evident in different European countries with varying extents and intensities, leading to the emergence of different systemic models. The decisive factors here were the peculiarities of the parliamentary system in a given country and those of the rule of law.

The primary effect of the spread of the rule of law in European systems was the assumption that the scope of parliamentary activity should be dictated by the rules of existing law rather than political will. This manifested itself most conspicuously in Germany, from where the principle in question derives its roots, with a particularly strong emphasis on the role of the state in binding the organs of state power, including the legislative bodies, in their areas of activity. It is well-known that the law in force has a position of supremacy in the political system and determines the permissible scope of authority for governing factors. At the same time, it performs a guaranteeing role in the sphere of individual rights and freedoms, protecting the latter from the negative consequences of the arbitrariness of power. It should be remembered that the rule of law paved the way for German legal culture to develop parliamentarism as a form for state organisation. Serving initially to reject the system of absolute monarchy with its characteristic tendency to subject the individual to the rule of a highly elaborate bureaucratic apparatus[1], it created fertile ground for systemic transformations aimed at dispersing the centres of state power. Under these conditions, in view of the emergence of favourable political circumstances, there was a proclamation of the Weimar Republic in 1919, which, unlike the previous system of government, made very explicit reference to the parliamentary model of the government. In the new system, the parliament became a key part of the state's decision-making

1 Dziadzio, 2005, p. 177.

centre, and its existence was considered a necessary element of the concept of the rule of law. This involved the simultaneous adoption of the principle of a tri-partite government, democratic mechanisms for recruiting the legislature, an elaborate system of guarantees given to the individual, and a weakening of the vision of parliament as a corporation not subject to state law, typical of 19th century German legal culture.[2] After several years of decline associated with the formation of the Nazi dictatorship, the concept of *Rechtsstaat* found continuation and creative development in the postwar system of the Federal Republic of Germany. Under the conditions of the political system, parliamentarism was restored as the foundation of the organisation of state power and all elements of the architecture of the system of parliamentary democracy. As before, the organs of the legislature were democratic and operated within the structure of the tri-partite government. To an even greater extent, their activities were restrained by the axiology statuted by the adopted constitution. In this regard, the principle of respect for human dignity came to the forefront.

Another effect of the increased importance of the rule of law was the reduction or removal of the principles of parliamentary sovereignty that existed in some countries. This was the case in France, where, until the second half of the 20th century, the position of successive legislatures remained strongly determined by this principle, thus affecting the way state authorities were organised in the multi-stage French democracy that was being created. Here, we dealt with the legacy of the solutions adopted during the French Revolution, which placed parliament—as the bearer of the will of the people—on the pedestal of the system of state authority and thus tried to guarantee its independence from other bodies. Combined with the principle of tri-partition, this concept freed, at least in part, the legislature from the existing legal framework and gave it the ability to act outside the law based on the political will of the majority gathered in its forum. Consequently, the belief persisted for a long time among the French that parliamentary decisions could not be challenged by any other authority, including courts, empowered to control the legality of the actions of public authorities.[3] Whether they were in compliance or conflict with the applicable law was irrelevant.

In addition, it should also be borne in mind that the spread of the rule of law has become intertwined in the historical process of evolution with the phenomenon of democratisation of the electoral systems of European countries, resulting in the growth of the electorate entitled to vote in parliamentary elections and, as a result, strengthening the democratic legitimacy of parliament. Subjected to transformations moving in this direction, the Parliament came under the radar of a growing group of citizens. Thus, an important systemic mechanism was created to contain, or at least limit, the arbitrariness of the actions of state bodies. This fits

2 Pastuszko, 2019, p. 64.
3 Tuleja, 2003, p. 32.

perfectly with the concept of protecting individual rights, which, from the very beginning, was the essence of the rule of law in all varieties of this political and constitutional doctrine. Therefore, over time, the idea of parliamentary democracy, based on electoral involvement and broad activation of the social masses, permanently entered the catalogue of its elementary standards. This was already evident in the interwar period when it became obvious that any state aspiring to adhere to the rule of law had to adopt the principle of universal suffrage in parliamentary elections and give it the character of a fundamental rule (additionally, restrictions were allowed which sometimes went very far and discriminatory in nature – so called censitary suffrage). What is noteworthy is that, at the time, the democratisation of the system understood in this way meant linking the concept of democratic elections with the idea of self-determination and the sovereignty of the people. By definition, a parliament was to be a forum for representatives of the sovereign and to formulate the political will of the sovereign. Thus, a state operating based on the rule of law was, in essence, one that gave the nation the opportunity for such an expression. The concept of the nation's sovereignty became a sine qua non of its existence. This perception of free and democratic elections persisted even after World War II. It was perhaps even stronger as its formation took place under the conditions of tragic experiences that accumulated as a result of the activities of the criminal dictatorships of the time. In the circle of the so-called countries of the free world, it has become clear that parliamentary democracy is an enduring element of the rule of law. This concept has become permanent and remains relevant in modern times.

3. The rule of law as the context for functioning of the European Parliament

The rule of law is one of the cornerstones of the development of the EU. Initially, it was used in diplomatic activities to promote a unified Europe throughout the world, and was subsequently introduced into official community documents.[4] The path of development here was set by judicial jurisprudence, which emphasised the validity of the rule of law in the EU legal order[5] and laid the groundwork for the treaty regulations adopted later. At present, this rule is expressed in the Treaty on the EU, which mentions it in the main proclamation of Article 2 and in other provisions. It is clear from these provisions that the rule of law has the rank of legally momentous and systemically protected value, and should be respected at the EU and national levels. For obvious reasons, this includes the unions' institutional systems.

4 Magen and Pech, 2018, pp. 236–238.
5 C-294/83 "*Les Verts" v European Parliament*, ECLI:EU:C:1986:166.

The meaning of the rule of law in the context of the legal formation and functioning of the European Parliament plays a key role in our deliberations. The questions that arise here are what axiological standards are set by this principle and how the content and scope of validity are shaped. The most interesting point lies in the similarities and differences between this principle and the rule of law found in traditional nation-states. We know that against the background of the assumptions of classical parliamentarism, the European Parliament is different, and its legal characteristics are marked by a variety of singularities.

These distinctions are, of course, due to the nature of the Union, which took its start from the idea of international cooperation and was a completely new creation in terms of its system. Under such conditions, in the absence of a unified subject of sovereign power and the novel organisation of the apparatus of power (which remains in a process of constant change), the old models of parliamentary democracy could not find full application. In particular, it was not possible to apply standards such as equipping parliament with democratic legitimacy by the sovereign people, situating it in the structure of the tri-partite division of power, or a full binding of applicable laws. This constitutes a democratic parliament under the rule of law.

However, the existence of objective obstacles to the realisation of the traditional form of parliamentarism in the EU system did not mean that this form played no role in the formation of the European Parliament. There is no doubt that the authors of the solutions regulating the legal status of this body used its "axiological resource" very extensively, aiming to create a construction of a European "legislature" based on values known in nation states. It was not without reason that the integrating Europe decided at a certain stage of development to establish democratic rules of electoral law in parliamentary elections, and thus make the parliament a representative body. This step clearly shows the direction of the planned political transformation and reveals the future of the parliament. It was unquestionably calculated to incorporate the rules of representative democracy.

Despite the patterns taken, the evolutionary shaped European Parliament has become an institution with its peculiarities and is characterised by a number of original features. However, it differs in many respects from parliaments functioning in traditional countries, remaining far from the initial ideals. What draws attention to the way it is formed is its democratic legitimacy derived from the will of the multinational community, its operation within the concept of institutional balance, and its tendency to expand the scope of its power beyond the treaty. All of these elements determine the systemic identity of the European Parliament and simultaneously show that it is a body that determines a completely new form of parliamentarism.[6] Aware of this, we are forced to conclude the uniqueness of the rule of law in this aspect of its validity. This not only implies a unique and peculiar content, but also

6 Lord, 2003, p. 30.

exhibits an extremely changeable and dynamic nature (as evidenced by the long and gradual process of changes that have been made to the institution of the European Parliament). It is certainly appropriate to speak of the existence of an autonomous principle, which is an original component of the EU's autonomous legal order.

4. Legal characteristics and mechanism of functioning of the European Parliament and the requirements of the rule of law as classically understood

■ *4.1. Democratic legitimacy of the European Parliament*

As is known from earlier considerations, in regimes based on the rule of law, it is indispensable to give parliamentary bodies a democratic character. Thus, wherever we face this philosophy of governance, the legislature must adopt constitutional rules to create a model of representative democracy. Above all, it was within the sphere of its duties to introduce democratic principles and mechanisms into the electoral process. In reality, regulations in this matter, mutatis mutandis, determine the possibility of forming the composition of parliament according to the preferences of the electorate and leads to equipping it with democratic legitimacy.

Contrary to appearance, meeting the requirements of the rule of law in this regard does not mean merely adopting a formal construction. In addition to the law, even the best conceived in a democratic system, the existence of a civic community and a well-functioning party system are equally important. Both of these elements mean that a sovereign—who is, after all, the source of power— can act as a collective and, in making his choice in the ballot box, has a clear picture of the political orientation in a state. This gives comfort in expressing support all together and at the same time for preferred views and ideas and thus shapes political representation. In the absence of similar conditions, democracy—and therefore the rule of law—becomes an illusion.

This gives rise to the question as to what extent the standard of the rule of law, understood in this way, corresponds to the legal nature of the European Parliament. In particular, of interest here is whether this body can really be considered—as Article 10 of the TEU wants it to be—a representative forum for Europeans and whether it can be seen as the bearer of the political will of the human community.[7] Clarifying both these questions essentially boils down to a

7 Art. 10(1) of the TEU states that: 'The functioning of the Union is based on representative democracy.' Para. 2, in turn, provides that 'Citizens are directly represented at the Union level in the European Parliament. Member States shall be represented in the European Council by their Heads of State or Government and in the Council by their governments; Heads of State or Government and governments shall be democratically accountable either to their national parliaments or to their citizens.'

reflection on the nature of the legitimacy that the European Parliament possesses as an entity of the EU's central authority. This issue is crucial in the search for answers to the questions posed.

The problem of the legitimacy of the European Parliament must be considered against the backdrop of a broader phenomenon that has been observed for decades in the life of the EU, consisting of making key decisions at the EU level, including those of the greatest gravity, by institutions devoid of a democratic character. This phenomenon, well described in the literature[8] as the democratic deficit, is treated as one of the biggest fragilities of the EU and thus is subjected to strong criticism from scientific and political circles. Concerned scholars and politicians unanimously emphasise that the actions of the EU, which has extensive power delegated to it by the member states, otherwise permanently increased in the process of political transition, escaped the perception of Europeans and, as a result, remained outside the sphere of any social control.[9] In this way, the broad powers granted to EU decision-makers in the transfer made with the consent of the member states, but often also the powers "appropriated" by them as a result of informal actions, are exercised without the approval of voters, at best with the consent or acquiescence of national authorities. Under such conditions, it is difficult to exert democratic pressure on the political decision-making process and its associated influence on the shape of the decisions taken. The lack of appropriate legal mechanisms precludes the achievement of a similar goal, and this justifies the accusation that the EU, which refers to the principle of democratism in numerous documents including treaties, has a problem with its realisation in the constitutional sphere.

In search of solutions to reduce the deficit in question, several legal and political demands have been made in the past and specific reforms have been implemented. One remedy was to transform the European Parliament into a representative institution, thereby creating a democratic forum within the central government system. The originators of this concept expressed unanimous hopes of changing the perception of the integrating community in public opinion while aiming to set in motion a new dynamic in the process of building a federal state.[10] Their aspirations yielded positive results, although they did not resolve the problem completely. Despite the democratic transformation of the European Parliament, this problem, as is well known, has remained relevant to the present day.[11] It should be recalled here that in its original phase of existence, the European Parliament, called the National Assembly, was recruited from among the delegates of the member states and played a role typical of multimember decision-making bodies functioning in international organisations. However, it began to evolve

8 See Majone, 1998; Mizera, 2014; Mrozowska, 2007; Potorski, 2011; Schiatti, 2016.
9 Grosse, 2008, pp. 75–76; Grosse, 2017, pp. 12–13.
10 Grosse, 2017, pp. 12–13.
11 McCormick, 2020, p. 302.

quickly into a body with the characteristics of a national legislature, which incidentally distinguished it from analogous institutions that had previously existed in the international space.[12] During the long process of systemic evolution, the watershed moment was undoubtedly the adoption of legislation that established a mechanism for universal and direct elections. This momentous change took place in 1976 and was accomplished through a Council decision and an accompanying law on the election of Assembly representatives by direct popular vote.[13] This led to the formation of the European Parliament as a body elected during the process of democratic procedures. It was also equipped with a type of legitimacy that was different from the previous one. Interestingly, however, the norms introduced within its framework rejected the concept of a uniform electoral system for the entire electoral territory of member states and allowed for individual regulation of this system in elections to the European Parliament by the national authorities. The result was not only a plurality of legal mechanisms manifested at the national level, but also a clear emphasis on the national origin of elected parliamentarians. Such an approach illustrated the sense of realism of European decision-makers, who were aware of the national divisions that existed in the unifying Europe, although it remained far from the vision of the Parliament as a political representation of the European community, which was already being promoted at the time. It was thus an acceptance of the shaping of Parliament's representation as a forum for European nations.[14]

Endowing the European Parliament with legitimacy obtained through a democratic electoral process was not only a step toward a major overhaul of the EU's institutional architecture but also a clear signal that this body is beginning to act with due regard for the rules placed on legislatures under the rule of law. For this was the fulfilment of the minimum standard inherent in this principle, which is that a properly constructed representative system must ensure democratic and universal elections in at least one of the houses of parliament.[15] Thus, the establishment of formal procedures has changed the perception of Parliament in this regard.

However, the democratic legitimacy thus formed did not result in the European Parliament becoming, based on the model of parliaments functioning in nation-states, the disposer of power delegated by the sovereign people. On the contrary, because of the participation in the elections held by citizens of various states, who are also members of many nations, it was necessary to speak of equipping it with power by a group of sovereign peoples while recognising a very clear difference in the way the subject was represented in the parliamentary forum. Unlike classical democracy operating at the level of member states, in this

12 Menon and Peet, 2010, p. 2.
13 Jacobs, Corbett and Shackleton, 1996, pp. 40–44.
14 Grosse, 2008, pp. 81–84.
15 Pelc, 2000, p. 77.

case there was no forging of political representation of one particular national community, but there was a delegation of the representation of many such communities. Consequently, a hybrid collective was created, which—being a subject with a certain scope of power and simultaneously having the authority to transfer it to representatives—in the process of expressing political will and thus deciding on the composition of the European Parliament remained more exposed to being guided by the criterion of particularistic national interests rather than the interest of the community as a whole. This was possible because elections to the European Parliament have never, until the present day, become programmatic elections[16] in which citizens would advocate the programmatic vision of the existing parliamentary factions (and since the 1950s) in this body. This factor undoubtedly fostered the development of the concept of national representation, shaped on the basis of sympathies and preferences shown to national groupings rather than those with a pan-European profile. Of course, this could not remain indifferent to the functioning of the representatives themselves, who were often incapable of acting in the logic of the common good of all Europeans and revealed a tendency to place national interests above those of the community and its people. This behaviour, which is otherwise consistent with the European cultural code and the political tradition of the Old Continent, contributed to the formation of a new model of political representation, characterised by tensions generated not only against the background of clashing programmatic ideas about Europe as a whole, but also against the background of striving to realise the raison d'état of the member states. Therefore, making use of Jan Zielonka terms, this model should be called the post-Westphalian representation model.[17]

The problem with the above-described nature of the European Parliament's democratic legitimacy persists even today. Subjected to the process of integration, Europe remains divided into individual nations and is unable to produce demos. This was aptly stated by Raymond Aron in his famous statement that in mental terms, 'there is no such animal as a European citizen. There are only French, German, or Italian citizens.'[18] This state of affairs cannot be changed by the current Treaty of the European Union, which, in Article 114(2), stipulates that the European Parliament is composed of representatives of Union citizens.[19] The wording of this provision suggests that there is a community of European citizens with the characteristics of sovereign power. However, such a stance is counterfactual and is an expression of reality conjuring by the creators of the treaties, as well as a manifestation of the voices present in the European debate about the need to create a new cosmopolitan society;[20] it is impossible to conclude that it

16 Moravcsik, 2002, p. 613.
17 Zielonka, 2000, p. 2.
18 Cited by Siedentop, 2000, p. 10.
19 Kowalik-Bańczyk, 2020, p. 432.
20 See Habermas, 1992, pp. 8–10.

derives from a reliable view of the situation. So far, no data have confirmed that Europeans have a sense of communal ties that gives reason to believe that they are indeed functioning as a collective sovereign. No statistics prove the trust shown in Parliament as an institution acting on behalf of the European civic community. Rather, from those available to us at present, it appears that this body is treated with great distrust by Europeans.[21]

In light of these observations, it is difficult to consider the legitimacy of the European Parliament as fully matching the standards reserved for traditional legislatures in the Western world. While this legitimacy is democratic in nature and, thus, distinguished from the legitimacy of other EU bodies due to the non-existence of a unified entity that conveys it through elections, it is impossible to speak of fulfilling the rule of law requirement of basing a political system on the concept of sovereignty of the people. From this perspective, their constructions contradict these requirements. Besides, this should also be borne in mind. Legitimacy shaped in a similar way, unlike in a classical democratic state, does not legitimise all the key central authorities (in a parliamentary system, the parliament elects the government responsible for it and sometimes also the head of state, thus becoming a source of legitimacy for the state's governance mechanism), but legitimacy is limited to selected bodies (the European Parliament and the European Commission). With such limits, its scope of social authorisation is mainly due to the fact that the centre of gravity of power lies in large part on the side of bodies legitimised at the level of national political systems (the European Council, the Council, and the Court of Justice of the European Union), by no means corresponding to the concept of parliamentary democracy in the traditional edition. Thus, it is a generic legitimacy different from that we are familiar with in member states, which is clearly incompatible with the classically understood assumptions of the traditional rule of law.

■ *4.2. The legal status and political activity of the European Parliament in the structure of the EU authorities*

Under the conditions of a standard understanding of the rule of law, it is assumed that a democratically elected parliament is structurally and functionally related to legislative power, while its place in the system of the organisation of power is determined by the principle of tri-partition. This results in the separation of the three segments of power in the state system–legislative, executive, and judiciary–and connecting them–differently constructed in each case–by a mechanism of mutual dependence. In such a structure, authorities carry out the tasks and the competencies assigned to them by the system. By definition, they operate within the functional boundaries of each of the aforementioned segments so that the constitutional mission they carry out fits the logic of the Triad. However, this rule

21 Menon and Peet, 2010, p. 2.

does not always apply, and a body belonging to a given authority often has powers that go beyond the scope of its function. In addition to such bodies in a government system based on tri-partition, there are also bodies that do not qualify for any branch of government. The fact that they remain outside this structure is mostly because of the characteristics of the functions they perform (located at the interface of the activities of either of the authorities or located completely outside them). Obviously, in this regard is the assignment of the parliament. Wherever there is a tri-partition, this body, in terms of competence and organisation, is a member of the legislature.

However, this is certainly not the case in the European Parliament. The legal positioning of this institution presents itself in a completely different way and is unrelated to the concept of tri-partition. In seeking to regulate the organisational structure of the central authorities, the treaties introduced the principle of institutional balance, which positions the European Parliament in a way that is unknown to traditional parliamentary democracies. Nonetheless, this structure should be regarded as a substitute of the tri-partition.

It is worth recalling that the indicated principle has been accompanied by the development of community structures since the European integration in the 1950s. Having its source in judicial decisions, it became one of the key principles shaping the institutional order of the Union and thus determined the further direction of the legal and organisational competence transformations of this organisation. Its essence lies in the assumption that no EU institution can be assigned exclusive legislative or executive competencies and simultaneously the exercise of competencies by individual institutions must respect the competencies of other institutions and member states.[22] Thus, from the point of view of the functioning of the European Parliament, this means that, first, this body does not have purely legislative powers (its legislative power is severely curtailed), and second, it cannot implement practices that result in taking away prerogatives reserved for other bodies,[23] nor can it itself be deprived of these prerogatives.

As noted earlier, the principle in question does not follow the Montesquieu concept of the separation of powers between parliament, the head of state, and the courts, thus creating a fundamental construction different from that to which modern democracies are accustomed.[24] The solutions resulting from this assume that in the constitutional system of the EU, there are three separate authorities assigned to separate institutions: the legislative power is the Council and the Parliament, the executive power is the Commission (in the current process of political action) and the European Council (as an institution that takes action of a strategic nature), and the judicial power is the Court of Justice of the European Union.[25] At

22 Kowalik-Bańczyk, 2020, p. 418.
23 Ibid.
24 Dubowski, 2010, p. 137.
25 Poboży, 2015, p. 1.

the same time, they define a specific form of relation between these authorities, which, while giving individual institutions a strong position in the performance of their functions, abandons, especially in the area of action of legislative and executive powers, the establishment of effective mechanisms of inhibition and balancing of authorities. As Monika Poboży (2015) notes,

> In the EU system, these authorities are practically unconstrained. The braking and balancing mechanisms available in this regard are either few or politically ineffective. Thus, in the institutional system of the European Union, we are dealing with a strong executive power (only partially, with limited or little useful control), and a strong legislative power uncontrolled and unbalanced by the executive, and a very influential, legislatively active judiciary. Thus, in the institutional system of the EU, there are three separate, but arbitrary, because uncontrolled, and unbalanced authorities.[26]

With the above remarks in mind, however, it should be borne in mind that the lack of mechanisms typical of tri-partition does not mean that the Brussels bureaucracy acts in a completely arbitrary manner and that the process of exercising its treaty powers does not encounter any form of control. On the contrary, certain forms of control exist in this regard, which provides the possibility of blocking, to a certain extent, the extra-legal activity of EU institutions. One can speak here of the peculiar surrogates of the mechanism of inhibition and the balancing of powers. This type of control activity was mentioned by Moravcsik (2002). In other words, the author writes:

> (...) the EU's ability to act, even in those areas where it enjoys clear competence, is constrained by institutional checks and balances, notably the separation of powers, a multi-level structure of decision-making, and a plural executive. This makes arbitrary actions (indeed, any action) difficult and tends to empower veto groups that can capture a subset of national governments. Such institutional procedures are the conventional tool for protecting the interests of vital minorities – a design feature generally thought to be most appropriate to polities like the EU, which must accommodate heterogeneous cultural and substantive interests.[27]

These observations leave no doubt that the European Parliament functions outside of the scheme of the classically understood rule of law. Clearly, the creators of the

26 Poboży, 2015, p. 1.
27 Moravcsik, 2002, p. 609.

treaties rejected the patterns that existed in parliamentary democracy and broke with the concept of parliament as a legislative body that was generally accepted at the nation-state level. Their aim was to adopt solutions that arranged the Parliament's relations with other institutions in a different way and defined its systemic role differently. However, the new construction does not mean that the Parliament (as well as other central bodies) remains organised in contradiction to the idea of the rule of law, and the legal status given to it contradicts its basic assumptions. In the literature, the existence of this construction is treated as a form of compensation in the tri-partite relationship and serves as an argument in defence of the position that, under such conditions, despite the differences, the rule of law is preserved.[28] After all, as if not looking at it, there is a deconcentration of the power characteristic of the tri-partition, and mechanisms emerge to effectively stop the abuses associated with its exercise. The institutional system of the EU, although organised differently, is therefore not free from safeguards that flow from the concept of the rule of law.

■ *4.3. The competence creep as a part of the political activity of the European Parliament*

The basic assumption that flows from the principle of the rule of law is that public authorities are bound by the applicable law and that their activities are limited exclusively to the sphere of granted competencies. Under such conditions, the law becomes the only factor shaping the form of activity of the said entities, and it can only provide them with the necessary legitimacy. In the event of an action resulting in its violation, the body in question exposes itself to the charge of misappropriation of the rule of law.

It is beyond dispute that the primacy of law signalled here also applies to the European Parliament. Like any body of public authority, the European Parliament is obliged to comply with the law that binds it, including its obligation to comply with treaty norms that define its powers. In this respect, its legal position is no different from that of member states' national parliaments. Thus, one can confidently say exactly the same standard as the rule of law applies to parliamentarism at the EU and national levels.

Additionally, in political practice, the realisation of this momentous value of the European Parliament's respect for the rules of competence established by the treaties is sometimes very different. Numerous experiences clearly show that the Parliament happens to take actions that are not directly supported by treaty norms, or even those that are reserved exclusively for member states (among others, by taking resolutions which are out of the competence sphere of this institution). These situations arise in the exercise of various treaty prerogatives and have to do with the phenomenon, which has been occurring in the EU for years, of

28 Schweitzer and Hummer, 1996, p. 498.

the EU institutions "strutting" within the scope of authority granted to them. This phenomenon, which is well recognised but inconsistently defined by doctrine,[29] is referred to as competence creep. It covers several spheres of institutional activity in the EU and is shared by most organisations. European literature points to six basic forms of competence creep and thus exposes the scale of the problem. These include indirect legislation, negative integration through case law, international (trade) agreements, economic governance, soft laws, and parallel integration.[30]

The most characteristic and visible cases when the European Parliament acts in this way concern interference in the area of member states' authority. Such situations involve going beyond the scope of so-called "conferred competences" (competences that member states have voluntarily transferred to the Union and thus violating one of the key treaty principles of Article 4(2) TEU). The form of this type of extra treaty can vary, and its scope is determined by the political agenda of the institution in question. First and foremost, it is necessary to point here to activities related to the enactment of legal acts beyond the area of competence of the EU, the conclusion of international agreements (in all these procedures, the European Parliament participates under certain conditions together with other institutions), and the issuance of the so-called soft law (resolutions adopted on matters that do not fall within the competence of either the European Parliament or the EU in general).

It is worth noting that the competence creep of the European Parliament is relatively limited and certainly much less impressive than the activity of institutions in this area, such as the European Commission or the Court of Justice of the European Union. This does not change the fact that as a phenomenon taking place in the sphere of political reality and not in the sphere of legal regulations, it must be evaluated as controversial from the point of view of the idea of the rule of law. Neither the sometimes-accompanying difficulties in the decision-making process in interpreting flexible treaty norms (this flexibility is in many situations necessary to achieve the integration effect, aimed at the introduction of provisions relating to the various legal orders of individual states), nor the analogous tendencies observed in some democratic systems to unconstitutional expansion of their authority by the legislative bodies, are an explanation here. Generally, this should not occur in a regime subject to the rule of law.

5. Conclusion

It follows from the above analysis that the rule of law in force at the level of the EU, in the part in which it relates to the functioning of the Parliament's institutions, has clear original content, and the scope of the resulting standards differs

29 See Barnard, 2008, p. 267; Prechal, 2010, p. 5; Weatherill, 2004, p. 2.
30 Garben, 2019, p. 207.

from that found in parliamentary systems in traditional states. The reason for this is the peculiar path of development that the European Parliament has taken, transforming itself from a body typical of the assemblies of international organisations into a parliamentary body similar to the legislatures functioning in parliamentary democracies. This process meant that politicians deciding on their shape, inspired by the political system models found in nation-states, were forced to seek their own paths and solutions. This resulted in deviations from the rules of the parliamentary system and consequently led to autonomous features of the European rule of law.

In principle, we can distinguish a few of the most prominent features of parliamentarism in Europe.

The first involves shaping an entity that equips the European Parliament with democratic legitimacy. This subject is the multinational community of citizens of the Union who have the full right to participate in elections and elect their representatives. This solution, enforced by the multinationalism of the Old Continent, contradicts the classical principle of the nation's sovereignty, thus breaking certain patterns of thinking about parliamentarism. Here, we are undoubtedly dealing with new qualities in political construction.

The second feature is the positioning of the Parliament in a system of institutional balance rather than a tri-partite division of power. The Parliament here acts as a body exercising legislative powers to a limited extent and simultaneously remains limited by the sphere of competence of other EU institutions. Its actions are verified within the framework of a mechanism of bureaucratic and institutional control, which is different from the mechanism of balancing and inhibiting powers that operate under tri-partite conditions. This case clearly shows the extent to which the European legislature has departed from the fundamental assumptions of the parliamentary system.

Finally, the third feature is the tendency observed in the Parliament's actions to go beyond the scope of the powers granted to it in the process of exercising power, known as competence creep. This tendency manifests on several levels and strengthens the Parliament's constitutional position. However, this is not as strong as in the case of institutions such as the European Commission or the Court of Justice of the EU. This does not change the fact that from the perspective of the requirements of the rule of law, especially the requirement that public authorities be bound by law, it must appear controversial.

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