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Autonomy of Law in the European Conception of the Legal State

1. Introduction

The elevation of the rule of law to the fundamental values of the European Union has been one of the many symbolic dimensions of continental integration². It is a truism to state that ‘compliance with the rule of law is a *sine qua non* for effective interaction between the governments of aspiring states³, as well as those fundamentally established in the common European institutional framework⁴. The basic assumptions of rules collectively identified with the *rule of law* can be derived based on the analysis of the common constitutional traditions of the Member States. However, as many legal scholars point out,

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2 While the English version of the Treaty on European Union (Official Journal of the European Union C 202/17) utilizes the term “rule of law” in this respect, translations of the Treaty into the other most widely spoken official languages of the European Union – including French (*l’État de droit*), German (*Rechtsstaatlichkeit*), Italian (*Stato di diritto*) or Polish (*państwo prawne*) use terms best represented by the words ‘legal state’. For the purposes of this text, I assume that the latter includes the design of the term name “rule of law”.

3 As explicitly stated in Article 49 of the Treaty on European Union, respect for the values of the Union – including the rule of law – is a prerequisite in the process of applying to become a Member State of the Union.

4 A symptom of an important qualitative change in this aspect was the activities undertaken since 2014 within the *EU Framework to Strengthen the Rule of Law* (Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law – Brussels, 11.3.2014 COM(2014) 158 final), reflected in the adoption of the strategy *Further strengthening the Rule of Law within the Union* (Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union – Brussels, 3.4.2019 COM(2019) 163 final) and – ultimately – the notorious (at least from the perspective of certain Member States) Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (Official Journal of the European Union L 4331).

it is difficult to demonstrate the existence of a uniform pan-European concept of legal legitimacy⁵. It cannot be ruled out that the discrepancy between the specific values identified with the *rule of law* determined its relatively late (1986) verbalisation⁶, and ultimately its normativisation only in 1992 with the Maastricht Treaty.

The conclusions of studies devoted to the research regarding the *rule of law*, on the one hand, support the maintenance of the more than one hundred-year-old⁷ paradigm of the systematicity of law⁸, while on the other hand, they emphasise the vision of law – especially constitutional – as an autonomous system, secured against the arbitrary influence of *ad hoc* political factors⁹. It seems that the remarks formulated on the grounds of the theory of state law can be applied to the European Union law undergoing the process of constitutionalisation¹⁰. The Union and its institutions have already gathered an independent legislative competence; a structure of the supranational European legal system reflects the most essential features of the state law. Its structure is hierarchical and based on constitutional norms¹¹, within the EU there are specific, specialized bodies empowered to decide legal disputes. However, while the states still reserve the role of ‘rulers of the treaties’, the legal order of the Union operates mainly independently.

This text explores selected aspects of the theory of the autonomy of the legal system, engaging in a polemic with the findings of legal scholars from different countries, including Member States of the European Union, who represent different legal systems and cultures. The following research focuses on the concept of systemicity as outlined by H. Kelsen, examining it in relation to N. Luhmann’s theory of social systems, which was later adapted in the legal sciences by G. Teubner, whose work introduced the theory of autopoietic law to jurisprudence.

5 M. Ovádek, *The Rule of Law in the EU: Many Ways Forward but Only One Way to Stand Still?*, “Journal of European Integration” 2018, vol. 40, no. 4, p. 496.

6 The fifth recital in the preamble of the Single European Act provides for “compliance with the law” (Single European Act, Official Journal of the European Communities 1987, L 169/1). Cf. A. Magen, L. Pech, *The Rule of Law and the European Union. Handbook on the Rule of Law*, 2018, p. 236.

7 J. Raz, *The Concept of a Legal System: An Introduction to the Theory of a Legal System*, 1980, p. 93.

8 T. Bingham, *The Rule of Law*, “The Cambridge Law Journal” 2007, no. 1, p. 75.

9 O. Fiss, *The Autonomy of Law*, “Yale Journal of International Law” 2001, no. 1, p. 67.

10 M. Rasmussen, D. Martinsen, *EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies*, “European Law Journal. Review of European Law in Context” 2019, no. 3, p. 251.

11 Even though the Union is still lacking a single constitution, the core of Treaties functions in a quite similar manner. The movement towards explicit constitutionalisation (2004) has been suspended, however many ideas contained within the Treaty establishing a Constitution for Europe have been implemented in the Lisbon Treaty. Cf. M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, “European Law Journal” 2005, vol. 11, no. 3, p. 262–307.

The theoretical nature of the research required the use of mainly review methods, hence the main part of the conclusions of the following studies is based on a critical analysis of the literature on the subject. In areas where the formulation of conclusions was possible based on the analysis of legal regulations, the classical formal-dogmatic method (textual approach) was also applied.

2. The Rule of Law and Legalism from the Perspective of the Autonomy of Law

Undoubtedly, some researchers correctly identify the roots of the idea behind the concept of legalism in the philosophical and legal achievements of the Great French Revolution. The assumption of the supremacy of the law (more broadly: the supremacy of law or generally the supremacy of norms, as derived from doctrinal sources) was at the basis of 18th-century movements aiming at a normative limitation of absolute power – whether in its classical variant or in its ‘enlightened’ variant, which was still promoted as optimal during the Enlightenment. Gradually, there was a growing awareness of the negative consequences of accepting the systemic unfettered position of the sovereign ruler. Drastic changes in perception can already be observed on the occasion of the entry into force of the Great Charter of Liberties enacted in 1215, admonishing explicitly in paragraph 1 on ‘freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity’¹², the legal force of which derived directly from the presumption of the supremacy of legal norms over the will of the sovereign. In the search for the origins of the ideological justification of the primacy of law over authority, one might as well go back to Greek or Roman times. The ancient Mediterranean world seemed to know and understand the very concept of law, as well as the sense of constitutional law norms reserving and limiting the space for state action. The institutional system of ancient Athens during the democratic period was based on the distribution of powers among a number of bodies (legislative, executive, judicial), whose legal legitimacy dated back to the laws of Solon – early sixth century BC. By entrusting legislative competence to the People’s Assembly (*ekklesia*), the composition of which was shaped on the basis of the principle of universality, and by taking a restrictive approach to the question of the legislative capacity of the body (the quorum was to be at least 6.000 citizens¹³), the Greeks showed respect for the accepted norms of the political system. Republican Rome, in an almost cult-like form, bore witness for nearly five centuries to the prestige accorded to the law itself and to the institutions of the state. The Law of the Twelve Tables, although long outdated, held

12 G. Davis, *Magna Carta*. Translated by G.R.C. Davis, 1963, [https://en.wikisource.org/wiki/Magna_Carta_\(trans._Davis\)](https://en.wikisource.org/wiki/Magna_Carta_(trans._Davis)) (accessed: 1.07.2024).

13 S. Epstein, *Quorum in the People’s Assembly in Classical Athens*, “Classica et Mediaevalia. Danish Journal of Philology and History” 2009, vol. 60, p. 74.

a permanent place in the *Forum* and continued to be regarded as the most important symbol of Roman legislation in Montesquieu's time¹⁴. The order of actions undertaken in the course of judicial proceedings was oriented in Rome from the beginning (already in the phase of the legislative process) towards a strict formalism, a restrictive application of the procedural formulas prescribed by the laws. By distinguishing between public and private law at the turn of the second and third centuries AD, Ulpian Domitian gave evidence of the (even though it could have only been nominal) recognition of the existence of a system of norms situated above the will of the already absolutist ruler, whose ambition was to reduce the state to a *patrimonium*.

Nowadays, the context for the references of the representatives of doctrine – both towards the rule of law and towards legalism – is most often a static projection of the ideological assumptions behind both terms in the form of a norm-rule situated among the general provisions of the acts codifying a given branch of law. The formal aspect of both issues consists in the observance of the law (execution of prescribed orders and prohibitions by their addressees). It is also worth noting that the theoretical classification operating within Roman law maintains its scientific and cognitive value; many languages, in particular English and German, distinguish between written law (Roman *lex*) and law *in abstracto* (Roman *ius*). Based on the same Roman criterion, the distinction between the terms 'rule of law' and 'legalism' seems to be determined to some extent.

Legalism and the rule of law can be distinguished on the basis of the passive (especially rule of law) and active (especially legalism) orientation of each concept. Thus, while legalism obliges the addressees of norms – primarily public authorities exercising *imperium in the legal-constitutional sphere* – to act the ('on the basis of the law') whenever required by law, it is bounded by the principle of the rule of law. That principle, which is broader both in terms of subjects and objects, mandates that public authorities operate strictly within the legally outlined and permitted scope, while individuals are limited only by what is not prohibited. The conclusions drawn from the analysis of the above view lead, firstly, to the conviction that legalism is a narrower concept than the rule of law, and secondly, to an attempt to define the scope of each concept on the basis of the primacy of the term 'rule of law'. It seems impossible to realise legalism outside the class of the rule of law – every action based on the law will inherently function within its limits. However, not every realisation of the rule of law will imply a legalistic action, as it is practically unrealistic in the legal state to limit individuals' behaviours solely to hypothetical scenarios enshrined in legal norms. The rule of law thus constitutes a framework of rules that determines the closure of the legal system, shaping it along the lines of the self-creating systems found in nature.

14 D. Beatrice, *The Roman law and the construction*, "Debreceni Yogi Műhely" 2010, no. 1, p. 15.

3. Dimensions of the Autonomy of the Law

Like the concept of systematicity, the science of law owes a fundamental part of its reflection on the autonomy of the legal order to H. Kelsen, who saw it as its specific property consisting of the self-regulating influence of a factor exogenous to the law on the system¹⁵. The ultimate state of the legal system is unity, understood as the rooting of all norms in the basic norm¹⁶. By detaching the legal order from its social ground and elevating legal concepts to an abstract level, H. Kelsen seems to see only the formal autonomy of the legal system. For example, P. Selznick, describing 'autonomous law' (albeit from a rather sociological perspective) as an order detached from the influence of political power – a 'government of laws and not of men'¹⁷ – highlights the importance of the material aspect of the autonomy of law. Reinterpreting the two approaches above, it can be argued that systematised, integrated legal norms should be characterised by resilience against the dominance of other social systems and should develop their own identity¹⁸.

An important dimension of the autonomy of law – especially in the view of R. Lempert¹⁹ – is the language of the legal act itself, forcing a certain cultural code to be taken into account in the process of assigning meanings to certain expressions. In this sense, however, the role of lawyers would be reduced to that of an exegete, the role of politicians to that of benevolent inspirers. Since the time of F. Schleiermacher, philosophers of law have proposed that exegesis should be distinguished from interpretation, making the correctness of the latter dependent on the adequate embedding of the signs studied in the cultural context²⁰, which constitutes the meaning of exegesis. The exegete is not merely a technically necessary, passive reproducer of the linguistic content recorded in the legal text, but rather an active actor. The result of interpretation

15 "Die Autonomie des Rechts heißt »lediglich«, dass es das Recht selbst ist, das abschließend bestimmt, wie sich äußere, also rechtsexogene Einflüsse im Recht selbst auswirken" (M. Jestaedt, *Einführung*, in: H. Kelsen, *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934*, Mohr Siebeck Tübingen 2008, p. XXVI).

16 H. Kelsen, *Reine Rechtslehre...*, p. 73.

17 P. Nonet, P. Selznick, *Law and Society in Transition. Towards Responsive Law*, Routledge, New York 2017, p. 53. In the Nonet's and Selznick's view, the acquisition of autonomy by a legal system constitutes one of the essential stages of its development. Assuming at the same time that the final, highest stage of development of a legal normative system is the status of "responsive law" characterised by political participation, both authors assume a harmonisation of legal and political culture.

18 M. Pichlak, *Tożsamość prawa w juryscentrystycznej wizji praktyki prawniczej*, in: *Perspektywy juryscentryzmu*, eds. P. Kaczmarek, P. Jabłoński, M. Pichlak, M. Paździora, Wrocław 2011, p. 126.

19 R. Lempert, *The Autonomy of Law: Two Visions Compared*, in: *Autopoietic Law: A New Approach to Law and Society*, ed. G. Teubner, European University Institute – Series A 8. Berlin, de Gruyter, 1988, p. 164.

20 M. Zirk-Sadowski, *Introduction to the Philosophy of Law*, Warsaw 2021, p. 82.

is determined by humanistic elements, individual experiences, and mental states of the interpreter. This is also where the so far undisputed superiority of humans over algorithms, which are forecast to reach the potential of replacing regular interpretation in the future as guarantors of legal certainty, is marked²¹. The relatively strong position of the exegete is balanced by the potential of culture as a collective phenomenon. At the same time, the exegete is not the ruler of the law; they do not have a monopoly on determining the only correct interpretive solution. Instead, they remain equal to all cultural subjects participating in the interpretive community.

Law, not being an intrinsically empirical entity, is always realised through the participation (whether passive or active) of the human being acting as the addressee of the norm. Insofar, it does not exist absolutely autonomously. In the deliberations on the extent to which the content of legal norms is influenced by appropriate shaping of the interpretation process, it is argued that the effects of such interaction cannot lead to a misappropriation of the legal norm²². The application of the law – regardless of the adopted model of interpretation – is essentially based on an algorithm. However, due to the characteristics of legal language (which is based on natural language), it is difficult to speak of its automation. The most sensitive, distortion-prone stage seems to be the moment of understanding the meanings of linguistic symbols in the process of decoding legal norms. Anticipating that a person reading a text is always under the conscious (or unconscious) influence of various stimuli, developed legal systems provide procedures for verification and validation of the decision

21 For an extensive discussion on this topic, see T. Sourdin, *Judges, Technology and Artificial Intelligence. The Artificial Judge*, Edward Elgar Publishing, Cheltenham 2021, p. 209 et seq. Human superiority can naturally be spoken of as long as artificial intelligence models do not reach a level of development that gives them the insight and ability to understand people's past, with which the existence and application of legal institutions makes sense. Assuming – purely hypothetically – a scenario of the development of mankind towards a transfer of consciousness into the digital sphere, it can be assumed that the cultural context will completely lose its meaning. Then, in an age of absolute pragmatism, the administration of justice (if it is still necessary at all) is likely to be subject to absolute algorithmisation.

22 The problem of the scope of the interpreter's freedom is a central issue of the two most widespread approaches to legal interpretation in Polish jurisprudence: the theory of clarificatory interpretation (Jerzy Wróblewski) and the theory of derivational interpretation (Zygmunt Ziemiński and Maciej Zieliński). In the course of the former, although assuming a significant limitation of the freedom of interpretation, the proper understanding of legal concepts is determined based also on the axiological factor introduced into the legal system by the lawmaker himself (intrinsic values of law); derivational interpretation, on the other hand, aims at extracting from the linguistic shape of a provision a specific “normative statement” – a prohibition or an injunction – with reference to the *omnia sunt interpretanda* principle (J. Wróblewski, *Sądowe stosowanie prawa*, Warszawa 1988; cf. M. Zieliński, *Derywacyjna koncepcja wykładni jako koncepcja zintegrowana*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2006, no. 3, p. 93 et seq.). The relatively stronger position of the lawyer as an empowered participant in the determination of conventional reality is drawn against the background of derivational interpretation.

to apply the law. This is also where the function of the multi-instance model of legal proceedings is marked, as well as the qualities and expectations related to the constitutional position of a judge or an authority or even a seemingly trivial issue such as the institution of rectification of the content of judgements.

4. Autopoietic Nature of the Legal System

The mature legal system, having enclosed its framework in constitutional rigour, encased in a basic range of protective institutions, first shows a tendency to 'seize', and second, to 'specify'²³. As the process of internal reproduction of law expands, the scope of application of legal norms already embraces not only the social interference of their subjects but becomes generally integrated into the sphere of activity of the individual. This reveals a certain degree of independence of law from social and political life. Consequently, the category of a legal event, within the context of the legal system as a whole, includes all possible behaviours of an entity, remaining in a constantly actualising legal situation. The processes occurring within the law are a model example of the *emergence*²⁴. Phenomena occurring in an autonomous system can be characterised as both synchronous and diachronic emergence²⁵. A legal norm has both the potential to derive a new interpretative quality from it (exegesis) and, based on the mechanisms of formal logic, to construct instrumentally, axiologically, or praxeologically derived norms from it.

Drawing on sociological findings made by N. Luhmann, the theory of autopoiesis of the legal system was formulated by G. Teubner²⁶. Although the roots of the whole concept should be sought in the area reserved by the

23 It is about the gradual coverage of most areas of life by legal regulations and the accumulation of detailed regulations in areas already subject to legal regulation.

24 T. O'Connor, *Emergent Properties*, in: *The Stanford Encyclopedia of Philosophy (Winter 2021 Edition)*, ed. E. Zed., <https://plato.stanford.edu/archives/win2021/entries/properties-emergent/> [(accessed: 01.07.224)]. For more on emergence in a strictly legal context, see W. Lamentowicz, *The Emergence of the Legal Orde*, "Studia Iuridica Torunienica" 2019, no. 23, p. 159–176.

25 This distinction refers to the developmental potential of fragments of the system in a static perspective (synchronous emergence) and a dynamic perspective (diachronic). To describe the first perspective, in which an element of a structure in a specific, temporally abstracted moment acquires new, individually typical properties, the term "adaptability" seems adequate. The diachronicity of emergence, which manifests itself in the emergence of a *novelty* – a new structure – on the basis of an already existing element, is best illustrated by the term "evolutionary".

26 G. Teubner, *Law as an Autopoietic System*, Blackwell Publishers, Oxford 1993; G. Teubner, *Autopoietic Law: A New Approach to Law and Society*, de Gruyter, New York 1988; G. Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, "Law and Society Review" 1984, p. 291 et seq.

exact sciences (biological and technical sciences²⁷), legal dogmatics owes its creator a skilful combination of H. Hart's vision of a system of law based on the gradability of rules with the social contextuality of legal norms.

An autopoietic system is defined as a 'unit arising from an organisationally closed process of generating its elements'²⁸, pointing out that the reproduction procedure must fulfil two conditions. The generation of the components of the system should occur as a result of interaction between the components themselves. Moreover, the structure within which the components are generated should be inaccessible from the outside (demarcated)²⁹. Looking for these features on the legal level, the following phenomena, characteristic of legal processes, can be pointed out: *self-referentiality*, *self-descriptiveness*, *self-organisation* and *self-regulation*³⁰. The first two factors are of primary importance here. Self-referentiality allows the legal system to create its components on its own and, thus, makes it independent from external factors. The term 'self-referentiality' is the system's constant tendency to initiate processes of producing components that fall into its characteristic categories³¹. The ability to sustain the cycle of internal reproduction is referred to as *hyper-cycle*³². The operational closure of the law as an autopoietic system is also marked here: all the operations of the system become bound into closed, finite cycles. The cognitive openness of such a system, also mentioned by Teubner, according to which information coming from outside is accepted by the system in a selective manner, shall be oriented towards the maintenance of internal equilibrium.

G. Teubner himself emphasises that theory does not only have a theoretical dimension. Its practical manifestations can be observed at the level of the application of the law and the doctrine³³. In fact, the properties of the legal system identified by the researcher are observable; the question is how to describe them. In this respect, the legal positivists seem to focus on the aspect of 'self-referentiality', analysing the interactions between norms conceived in the abstract.

27 M. Zeleny, *What is Autopoiesis in: Autopoiesis: A Theory of Living Organisation*, Elsevier North Holland, New York 1981, p. 4 et seq. For more on the genesis of the concept, see M. Gładzewski, *Teoria systemów autopojetycznych Niklasa Luhmanna – między metafizyką a metabiologią*, "Przegląd Pedagogiczny" 2009, no. 1, p. 41–42.

28 M. Zeleny, *What is Autopoiesis...*, p. 2 [author's translation]. Representatives of the native literature on the subject in their considerations start from defining the phenomenon of *autopoiesis* itself (from the Greek – *αὐτό* = self and *ποίησις* = production, creation). "In general, the notion of *autopoiesis* refers to the designation of self-organising systems and to the characterisation of the dynamics of *non-equilibrium* systems, i.e. organised states of affairs (sometimes referred to as *dissipative structures*) that remain stable for long periods of time, despite the fact that matter and energy are constantly flowing through them." (M. Gładzewski, *Teoria systemów...*, p. 41–42).

29 M. Zeleny, *What is Autopoiesis...*, p. 2–3. cf. P. Luisi, *Autopoiesis: A Review and a Reappraisal*, "Naturwissenschaft" 2003, no. 90, p. 50–51.

30 G. Teubner, *Law as an Autopoietic...*, p. 15.

31 *Ibidem*, p. 19.

32 *Ibidem*, p. 23.

33 *Ibidem*, p. 123–124.

Those researchers who are closer to naturalistic views stress the ‘self-descriptiveness’ of the system, looking for the sources of the categories that the system operates within producing its own elements and naming them. The phenomenon of ‘self-descriptiveness’ in law can be seen as one of the consequences of the acquisition of autonomy by the legal system, or at least a factor supporting the separation of a set of norms from other areas of human social functioning.

Observing the process by which both state law and supranational European law move towards self-policing allows for a perhaps overly poetic (but nevertheless illustrative) comparison to the methodology of growing a tree. Initially requiring care and nurturing, the tree, once rooted in suitable terrain, eventually becomes robust enough to function independently, adapting to the most inhospitable conditions. As it grows and develops an intricate branch system, the tree covers more and more territory, just as the legal system – within its own framework, according to its ‘core’ norms – covers more and more disciplines (‘seizing’). Just as a plant’s external appearance is renewed in line with its physiological needs, the formal sources of law and the drafting of rules also evolve (‘clarification’). Here, however, the evolution of language, particularly legal language, comes into play well beyond the margins of consideration. People used to call mature, magnificent trees monuments of nature in their finery, just as the most momentous legal instruments, which are endowed with authority and prestige³⁴, are sometimes called ‘monuments of laws’³⁵.

34 It is by no means coincidental that the (undoubtedly apt) aforementioned term is used in relation to the European Convention on Human Rights. The term “living instrument” recurs in many ECtHR judgments. The doctrine views the act in a dynamic manner, as adapting the scope of application and normative legal provisions of both the core part and the protocols to the challenges posed by a constantly evolving reality. The process of interpreting the provisions of the Convention is characterised by self-reliance in determining the highest possible standard of protection of values (so G. Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, Faculty of Laws – University College London, 2012, p. 9–11). The Convention is surrounded by an aura of widespread recognition in the legal and political world related to its long-standing application; the level of effectiveness of human rights protection to which the European regional system has been elevated contributes to the legal and cultural self-esteem of the perfect majority of European states. A full analogy between the legal system of a constitutional state and the ECHR regime is admittedly excluded due to the specificity of international self-contained legal orders; nevertheless, the status of the Convention perfectly illustrates the practical plane of the legal systems’ desire for operational closure. Based on the term animating the Convention first used in the judgment of 25 April 1978 in *Tyrer v. the United Kingdom* (Application No. 5856/72, paragraph 31), a doctrine potentially applicable to any act regulating issues (as sensitive as those of human rights) requiring an unorthodox interpretative approach – in line with the substantive view of the rule of law proposed above, with the spirit of the law – has been developed. Valuable arguments on the basis of the Charter of Fundamental Rights of the European Union for the extension of the “living instrument” doctrine are cited by G. Palmisano, *Making the Charter of Fundamental Rights a Living Instrument*, Brill Nijhof 2014, *passim*.

35 M. Reimann, *A Monument of Legal Learning: Anglo-American Perspectives on the German Civil Code*, in: *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, eds. J. Nafziger, S. Symeonides, Brill 2002, p. 793 et seq.

Integrating the autonomy of law understood as ‘relative independence from what is “extra-legal”’, with legal culture (and, in turn, with general social culture), as W. Gromski suggests³⁶, would create an additional democratic justification for the autonomy of the system of norms. If the law is to be, as it were, a projection of culture, then it is determined by the will, values, patterns, and experiences of the community at its very core. It is difficult to resist the impression that by questioning the extent of the autonomy of law in the context of its cultural roots, one touches on the very essence of law – its basic element, which serves as the building block of the social norms, and only under the auspices of the state acquires the status of a legal norm.

5. Conclusion

The phenomenon and consequences of the autonomy of the law cannot be reduced merely to the separation of the area of integration of the state into the legal system and the restriction of the possibility of institutional influence on the law. Rather, the effect of the law’s properties, on the one hand, appears to be a derivative of rules (following H. Hart, which can be described as rules of the second degree³⁷), meaning that legislative activity itself becomes a specific form of applying the law and must, therefore, fall within the limits of norms. The state, reaching, as it seems, deeper than the ‘minimum of morality’³⁸, conducts a cultural orientation of the law, which is expressed in the formation of legal institutions in a manner rooted in values, founding them on cultural goods. The autonomisation of law in its various aspects – linguistic, economic, and cultural – is the result of the systemic formation of its structure. The concepts of the rule of law and legalism developed within the European conception of the democratic legal state – co-creating the paradigm of the systematicity of law since the beginning of the 20th century – are reflected in practice by the phenomenon of the legal system’s autopoieticity and autonomy of law. The legal system seeks to achieve operational closure³⁹ within the planes of its functioning. All these properties make up the ‘active power of establishing itself’, aligning with the Cartesian conception of subjectivity⁴⁰,

36 W. Gromski, *Autonomia prawa jako funkcja kultury prawnej*, in: *Z zagadnień teorii i filozofii prawa. Autonomia prawa*, Wrocław 2001, p. 43.

37 H. Hart, *The Concept of Law*, Oxford University Press, New York 1961, p. 94 et seq. As long as civilisations adopting an absolutely technocratic model of development remain in the realm of *science fiction*, even an extremely positivistically oriented state organism will realise culturally shaped patterns of behaviour – if only in the formal sphere, legitimising legal actions taken in a certain way. Unless state law is to be a complete fiction, it must reflect at least part of the catalogue of judgements established in culture.

38 *Ibidem*, p. 199.

39 W. Gromski, *Autonomia prawa...*, p. 55.

40 J. Cottingham, *Cartesian Autonomy*, in: *Mind, Method and Morality: Essays in Honour of Anthony Kenny*, eds. J. Cottingham, P. Hacker, New York 2010, p. 8.

which allow the law to be seen as an autonomous entity – detached from the arbitrary, ad hoc will of the state power, yet still rooted in the social context.

A credible description of the function of the constitution, as established in the constitutional traditions of the Member States of the European Union, is only possible against the background of a synthetic approach, which contains elements of both naturalism and the positivist current in legal studies. Positivism, in particular, is indebted to the rule of law, as proposed by H. Kelsen and his successors, for its description of law as a system of norms binding on the legislator by the very fact of their establishment. Although H. Kelsen himself categorically ruled out the possibility of the existence of positive and natural law at the same time⁴¹, it is only the demand, characteristic of jusnaturalism, to view law from a broader, social perspective and to underpin its system with external values that guarantees that it will not be made the object of usurpatory exploitation by a degenerate authority⁴².

Bibliography

Literature

- Beatrice D., *The Roman Law and the Construction*, “Debreceni Yogi Műhely” 2010, no. 1.
- Bingham T., *The Rule of Law*, “The Cambridge Law Journal” 2007, no. 1.
- Cottingham J., *Cartesian Autonomy*, in: *Mind, Method and Morality: Essays in Honour of Anthony Kenny*, eds. J. Cottingham, P. Hacker, New York 2010.
- Davis G., *Magna Carta. Translated by G.R.C. Davis*, 1963, [https://en.wikisource.org/wiki/Magna_Carta_\(trans._Davis\)](https://en.wikisource.org/wiki/Magna_Carta_(trans._Davis)) (accessed: 1.07.2024).
- Epstein S., *Quorum in the People's Assembly in Classical Athens*, “Classica et Mediaevalia. Danish Journal of Philology and History” 2009, vol. 60.
- Fiss O., *The Autonomy of Law*, “Yale Journal of International Law” 2001, no. 1.
- Głazewski M., *Teoria systemów autopojetycznych Niklasa Luhmanna – między metafizyką a metabiologią*, “Przegląd Pedagogiczny” 2009, no. 1.
- Gromski W., *Autonomia prawa jako funkcja kultury prawnej*, in: *Z zagadnień teorii i filozofii prawa. Autonomia prawa*, ed. W. Gromski, Wrocław 2001.
- Hart H., *The Concept of Law*, New York 1961.
- Kelsen H., *Reine Rechtslehre. Studienausgabe der 1. Auflage 1934*, Mohr Siebeck Tübingen 2008.
- Kumm M., *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, “European Law Journal” 2005, vol. 11, no. 3.
- Lamentowicz W., *The Emergence of the Legal Order*, “Studia Iuridica Toruniensia” 2019, no. 23.

41 H. Schambeck, *Hans Kelsen's Science of Law* “Studia Iuridica Torunensia” 2011, n. 8, p. 42–43.

42 D. Richards, *Rights and Autonomy*, “Ethics” 1981, no. 1, p. 20.

- Lempert R., *The Autonomy of Law: Two Visions Compared*, in: *Autopoietic Law: A New Approach to Law and Society*, ed. G. Teubner, European University Institute – Series A 8. Berlin, de Gruyter, 1988.
- Letsas G., *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, Faculty of Laws – University College London, 2012
- Luisi P., *Autopoiesis: A Review and a Reappraisal*, “Naturwissenschaften” 2003, no. 90.
- Magen A., Pech L., *The Rule of Law and the European Union. Handbook on the Rule of Law*, Edward Elgar Publishing 2018.
- Nonet P., Selznick P., *Law and Society in Transition. Towards Responsive Law*, New York 2017.
- O'Connor T., *Emergent Properties*, in: *The Stanford Encyclopedia of Philosophy (Winter 2021 Edition)*, ed. E. Zalta, <https://plato.stanford.edu/archives/win2021/entries/properties-emergent/> (accessed: 1.07.2024).
- Ovádek M., *The Rule of Law in the EU: Many Ways Forward but Only One Way to Stand Still?*, “Journal of European Integration” 2018, vol. 40, no. 4.
- Palmisano G., *Making the Charter of Fundamental Rights a Living Instrument*, Brill Nijhof 2014.
- Pichlak M., *Tożsamość prawa w juryscentrystycznej wizji praktyki prawniczej*, in: *Perspektywy juryscentryzmu*, eds. P. Kaczmarek, P. Jabłoński, M. Pichlak, M. Paździora, Wrocław 2011.
- Rasmussen M., Martinsen D., *EU Constitutionalisation Revisited: Redressing a Central Assumption in European Studies*, “European Law Journal. Review of European Law in Context” 2019, no. 3.
- Raz J., *The Concept of a Legal System: An Introduction to the Theory of a Legal System*. Oxford University Press 1980.
- Reimann M., *A Monument of Legal Learning: Anglo-American Perspectives on the German Civil Code*, in: *Law and Justice in a Multistate World: Essays in Honor of Arthur T. von Mehren*, eds. J. Nafziger, S. Symeonides, Brill 2002.
- Richards D., *Rights and Autonomy*, “Ethics” 1981, no. 1.
- Schambeck H., *Nauka prawa Hansa Kelsena*, “Studia Iuridica Toruniensia” 2011, vol. 8.
- Sourdin T., *Judges, Technology and Artificial Intelligence. The Artificial Judge*, Edward Elgar Publishing, Cheltenham 2021.
- Teubner G., *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, “Law and Society Review” 1984, vol. 18, no. 2.
- Teubner G., *Autopoietic Law: A New Approach to Law and Society*, de Gruyter, New York 1988.
- Teubner G., *Law as an Autopoietic System*, Oxford 1993.
- Wróblewski J., *Sądowe stosowanie prawa*, Warszawa 1988.
- Zeleny M., *What is Autopoiesis*, in: *Autopoiesis: A Theory of Living Organisation*, Elsevier North Holland, New York 1981.
- Zieliński M., *Derywacyjna koncepcja wykładni jako koncepcja zintegrowana*, “Ruch Prawniczy, Ekonomiczny i Socjologiczny” 2006, no. 3.
- Zirk-Sadowski M., *Wprowadzenie do filozofii prawa*, Warszawa 2021.

Legal acts

Communication from the Commission to the European Parliament, the European Council and the Council: Further strengthening the Rule of Law within the Union – Brussels, 3.4.2019 COM(2019) 163 final.

Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law – Brussels, 11.3.2014 COM(2014) 158 final.

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

Single European Act, Official Journal of the European Communities 1987, L 169/1.

Treaty establishing a Constitution for Europe (Official Journal of the European Union C 310/1).

Treaty on European Union (Official Journal of the European Union C 202/17).

Judgments

Judgment of the European Court of Human Rights of 25 April 1978 in *Tyrer v. the United Kingdom* (Application No. 5856/72).

Autonomy of Law in the European Conception of the Legal State

Abstract

The principle of a democratic legal state has become a paradigm for modern democracies and an essential value of the EU. It still raises, though, emotional disputes. This text explores its selected aspects, specifically the theory of the autonomy of the legal system, discussing in this respect the findings of legal academics from different legislations, representing different legal systems and cultures. The following research focuses on the concept of systemicity as outlined by Hans Kelsen, which is confronted with Niklas Luhmann's theory of social systems, eventually adapted in the legal sciences by Günther Teubner, to whom jurisprudence owes the theory of autopoietic law. The research includes reflections on the concepts of 'rule of law' and 'legalism' from the perspective of the autonomy of law, as well as its dimensions in the views of jurisprudence. Finally, the study presents the idea of the autopoietic nature of the legal system in the context of its features applicable in the EU legal framework – likewise in the constitutional state. The study concludes and presents evidence that concepts of the rule of law and legalism developed in the European conception of the democratic legal state – co-creating the paradigm of the systematicity of law in force since the beginning of the 20th century – are reflected in practice by the phenomenon of the legal system's autopoieticity and autonomy based on social contextuality of law.

Keywords: autonomy of law, autopoiesis, rule of law, legalism, democratic legal state

Autonomia prawa w europejskiej koncepcji państwa prawnego

Streszczenie

Zasada demokratycznego państwa prawnego stała się paradygmatem dla nowoczesnych demokracji i istotną wartością Unii Europejskiej; nieustająco budzi jednak emocjonalne spory. Niniejszy tekst bada wybrane aspekty tej zasady, koncentrując się szczególnie na teorii autonomii systemu prawnego, omawiając w tym kontekście wyniki badań przedstawicieli różnych systemów i kultur prawnych. Koncepcja systemowości prawa w ujęciu Hansa Kelsena zostaje na potrzeby pracy skonfrontowana z teorią systemów społecznych Niklasa Luhmanna, jak również jej wersją rozwojową przedstawioną przez Günthera Teubnera, któremu jurysprudencja zawdzięcza koncepcję autopojetycznego prawa. Badania obejmują refleksje na temat koncepcji „państwa prawnego” i „legalizmu” z perspektywy autonomii prawa, a także jej wymiarów. Praca podsumowuje ideę autopojetycznej natury systemu prawnego w kontekście jego cech mających szczególne znaczenie w procesie stosowania prawa UE. Autor stoi na stanowisku, w myśl którego koncepcja demokratycznego państwa prawnego – współkształtująca hierarchiczny i systemowy obraz prawa, aprobowany od początku XX w. – znajduje swoje odzwierciedlenie w praktyce w zjawisku autopojetyczności i autonomii systemu prawnego, opartej na społecznej kontekstualności prawa.

Słowa kluczowe: autonomia prawa, autopojeza, praworządność, legalizm, demokratyczne państwo prawne