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IUS OR LEX ? THE EVOLUTION OF THE CONCEPT OF LAW IN CONTINENTAL EUROPE

Abstract: The paper analyses the evolution of the concept of law in continental Europe in order to answer the research question – to what extent European law and the direction of its development is closer to the idea of ius or lex. The former obviously implies treating law in a stratified manner. Positive law is limited by an unchanging and not fully human-dependent order of values. The idea of lex, on the other hand, is embedded in the positivist primacy of statute law. The history of European culture has been associated with the mutual inhibition of these two macro-conceptions of law. Meanwhile, the federative legal order of the Union, which is emerging before our eyes, seems to refer exclusively to the idea of lex.

Keywords: theory of law, statutory law, philosophy of law, European Union

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Introduction

Ius or lex – this division is as old as any reflection on law. At the same time, contrary to the convention, which is sometimes adopted, it has not always consisted (and this is still the case today) of a dispute over what is <real> law, i.e. that one formula excludes the other. Often, it was simply a matter of determining the reciprocal relationship between ius and lex and, in particular, of demonstrating the superior position of the content signified by these terms. In fact, a century-old episode of original legal positivism can be consigned to the past, according to which only the lex is the law and the ius is not and cannot be, because it does not meet the test of the origin and social efficacy of the law.

Nowadays, in the lex – which may be lex scripta as well as lex iudicialis – we find references to ius in various formulations and both in the preambles and in the articulated part of the normative act. Indeed, the modern understanding of human rights is founded on the inalienable human dignity that exists independently of political power. Even when arguing about the extent of this freedom or specific rights, lex is an affirmation of ius. It does not, therefore, function based on recognition of what is and what is not a right. It is the element of binding the being of law to the will of the political sovereign that is the fundamental determinant differentiating lex – symbolised by the conception of positive law (while not specifically referring to legal positivism) and ius – i.e. the non-positivist conception of law.

The history of law in Euro-Atlantic legal cultures is a path of mutual coexistence, dispute and inhibition of these two, great concepts of law, which move the level of consideration of the essence (ontology), cognition (epistemology) and valuing of law (axiology) to the metaphilosophical level. In this paper, we will trace how the approach to law evolved in selected events, although considered groundbreaking in general history. First and foremost, we will consider what civilisational repercussions are brought about by the tilting of the dominance of the philosophy of law in certain epochs towards, respectively, lex or ius. After all, is a balance between the two and a neutral attitude possible? It would appear not, and the more than 2,500-year history of the culture of established law proves that there is always a supremacy of one of the concepts mentioned. This analysis cannot, of course, be carried out completely neutrally and presupposes an axiological commitment on the part of the author. However, the assertions and evaluations presented in this study – by design – are intended to correspond to the dominant, or at least recognised as functioning, positions in the scholarly discourse. This review is carried out not only to describe the evolution of the concept of law, but to answer the question whether the European legal order that is being created before our eyes (we probably cannot speak of a system for the time being) is based more on ius or lex?

The article was prepared in the current of so-called analytical jurisprudence, using the method of conceptual analysis of historical and doctrinal literature.

Discussion

Antiquity – the origin of the dichotomy. Historically, the first was ius. The reason was obvious. The first settlements, therefore the first more or less elaborate political associations, did not know writing. Compact settlements arose with the invention of agriculture, which ended the nomadic stage around 7,000 BC. (Wolski, 2000, p. 9). The lex does not always take the form of a scripta, but for the certainty of the law and the ease of knowing it, writing it down is most desirable and effective. This, in turn, only became possible with the invention of writing, which occurred around the 3rd thousand BC. (Wolski, 2000, p. 9). This did not mean that human law was then automatically given precedence. The recognition of ius as the most important in the hierarchy of sources of law was fostered by the acceptance of the divine origin of the ruler and the ancient concept of despotic power. The ruler thus conferred divine law, and this fact further legitimised it. The lex was thus subordinate to the ius, but the ius constituted the non-subordinate sovereign. Reference to the divine origin of the ruler is found in the oldest sources of the lex scripta. Such a procedure was performed, for example, by Hammurabi in his Code (c. 1780 BC):

When the lofty Anu, king of the Anunnaki, and Enlil, lord of heaven and earth, determining the destinies of the country, to Marduk, the first-born son of the god Ea, they conferred supreme power over all men, and among the Igigi deities they made him the greatest, when they named Babylon after him loftily, and in the four corners of the world they made him reign, and in the interior of it an everlasting kingdom, the foundations of which, like heaven and earth, are firmly established.

Then they called me, Hammurabi, a pious prince, worshipping the gods, in order to bring justice to the country, to exterminate the wicked and the wicked, so that the strong would not harm the weak, so that, like the sun for the black-headed, he would rise and radiate the country, Anu and Enlil, in order to care for the well-being of the people, by my name (Stępień, 2000, p. 9–10).

It is not without reason that the first reflection on the juxtaposition of lex and ius occurred in political organisms with a non-despotic form of government. We are, of course, talking about ancient Greece. A monument to this dispute is Sophocles' Antigone, a power drama from 442 BC and a philosophical treatise whose central theme is the attempt to construct a justification for taming the unfettered lex. Here, ius symbolises not the despotic will of the ruler, but "the holy laws of God, which are eternal and have lasted from age to age, that their beginning no one can examine" (Sofokles, 1939, p. 14). With the process of the positivisation of law, its separation from ius is perceived, a hypothetical contradiction between these normative orders was born. Because everything depends on who creates lex and on what principles. However, both ius and lex require interpretation – giving shape to a general rule. In ancient Greece, ius had a specifically divine legitimation. The ius was personified as Dike – justice eternal and immutable, daughter of Themis and of Zeus himself (Maureira 2015, p. 299). Here we find the first stratification of natural law (developed centuries later in the concept of St Thomas - with the division into lex aeterna and lex naturalis). The Greeks are thus the

first to attempt to contrast and define the relationship between ius and lex. These considerations – undertaken, of course, with varying intensity – can be found in the works of Homer (8th century BC), Plato, Aristotle (for example, in the Nicomataean Ethics) and even the Pythagoreans, for whom mathematical order and order was also an element of the natural order of things (Domingo, 2010, p. 5).

A fuller characterisation of ius a lex is of course found in ancient Roman law. Generalizing, ius is a right to something, derived from the natural order of things, in principle unchangeable by political authority. Lex is man-made law, whereby it can also constitute written ius. Lex was divided into statute law, magisterial (praetorian) law and doctrine, which sometimes had the value of a source of law. It is worth noting that the whole Roman conception of law is based on ius, not lex (ius es ast boni et aequi, ius gentium, etc.). Law becomes a cultural archetype, for it binds society and the state together; "The Republic, says Scipio Africanus, is the thing of the people, and a nation is not every association of people assembled in any way, but an association of the whole united by the consent of the law and the commonality of usefulness" (Cicero, De re publica, 1948, p. 6). Cicero, however, elaborates on this division. For him, all law consists of the law of nations – ius gentium – and the law of the state – civil law (Domingo, 2010, p. 7). For the Romans, law was a confirmation of virtue, morality, and universal values – it was therefore created in a significantly different way from the contemporary process of its creation.

In conclusion, one may risk a claim that, on the example of the evolution of the discussed concepts in the ancient period, the relationship between the role played – respectively – by ius and lex and the form of political system is outlined. Ius, by the fact of not being written down, is more susceptible to instrumentalization. The lex, on the other hand, without a foundation in ius, easily becomes an instrument of tyranny and arbitrary political power.

The Christian community – ius comune. The concept of universal (common) law found widespread acceptance during the medieval period. The starting point was, of course, Roman law, which, thanks to the Justinian Code, survived and became the universal body of law of early medieval Europe. In the light of the division that interests us, between ius and lex, the status of the Justinian codification is not that clear, even though the emperor's intention was obviously to made Roman law positivistic one (although no one used that name at the time). Like any 'codification', therefore, it was classical statutory law, therefore lex. On the other hand, codification quickly acquired the status of ius, for it became the basis for the reception of Roman law as universal law in Europe, in the sense that it ceased to be the law of a particular state and acquired the status of universal law. It was thus the point of reference of any 'newly' created statute law – as Corpus Iuris Civilis. For the secondary 'lex' thus became a kind of ius.

This process coexisted with the formula of the Christian world created from the beginning of the era, and just as the process of the transition from antiquity to the "Middle Ages" is not easy to carry out in a periodisation of history. Historians also have difficulty in defining the end of this time. The most accepted date known as the

beginning of the era is the fall of the Western Roman Empire is conventional (fall of Rome in 476). So is the end of the Middle Ages – the fall of Constantinople (1453). Both dates are mere symbols. It is better to refer to historical processes. Thus, the beginning of the Middle Ages is the emergence of a feudal socio-economic structure, the origin of which was the Roman legal institution of colony. Divided property, so characteristic of the Middle Ages, resulted in the formation of a network of political dependencies that entwined Europe for more than 1000 years. This phenomenon, referred to in the literature as the triumph of particularism, consisted in the transformation of the city-state system, developed thanks to the Roman Empire and linked by a central authority, into a system of feudal fragmentation, where the feudal lord, reigning "by the grace of God", with a dispersed and weak (or if strong, as in the Frankish state, it was not sustainable) royal power at the beginning of the Middle Ages, strove for self-sufficiency in the domains he ruled. Hence, the cognitive horizon of the people of the time tightened, Roman common schooling declined and Justinian lex was transformed into ius, in places weakened by particularism based on common law. At the same time, under such conditions "private war became endemic" and in the early Middle Ages "someone was constantly defending or attacking someone" (Manteuffel, 1996, p. 106).

The above formula was exhausted with the flourishing of the Middle Ages (conventionally the 11th-12th centuries). At that time, several processes take place that contradict feudal particularism. In this context one points to economic development (more advanced agriculture, the growth of trade, the development of agglomerations), the rise of the bourgeoisie and, above all, the development of centralism – both on the side of the secular power and the Pope. The heyday of the Middle Ages is linked to the emergence and development of strong royal power, which is gradually taking place in France, England, Spain. Those regions that remain in the fetters of particularism will be subject to the expansion of the distributing powers of absolute monarchies (ex. Italy, German Reich).

In the Middle Ages, the conflict between ius and lex came to a head as part of the rivalry between the empire and the papacy, which lasted for several centuries – the so-called investiture dispute. The origins of this event can be traced as far back as Christmas Eve 800, when Charlemagne was 'unexpectedly' crowned Emperor by Pope Leo III. This was a skilful move by the latter, as he was becoming, in the opinion of the Christian world, the dispenser of the imperial crown (Charlemagne left Rome furious, perfectly aware of the danger). In this conflict, which lasted almost three centuries (ending with the Concordat of Worms in 1122), the roles were clearly divided. The papacy represented ius, referring to divine law and the role of the pope as God's sole representative on earth. Gregory VII in 1075 escalated the dispute by producing the document Dictatus papae with bold theses: the pope could dethrone emperors, secular rulers should “kiss his feet”, supreme authority in the Christian world belonged to the pope. The empire, of course, symbolised lex and the emerging tendencies in Europe towards strong, central political power. The dispute over investiture, as a historical event, determined the cultural identity of Europe and, above all, the developed legal and political system. It was the only moment when the Christian world could, like the Arab

world, choose the path of theocratism. However, this was not the case, and the political victory of the empire paved the way for the gradual domination of state law (lex), treated as a separate normative order from religion and morality.

To conclude this section, it is appropriate to mention what happened across the Channel. I refer, of course, to the rise of England because of the invasion of William the Conqueror (and his great victory in Battle of Hastings – 1066) and the subsequent three centuries of the development of a new legal culture. From the outset, a feature of English law was the lack of reception of Roman law (Corpus iuris ...) due to the separation of Britain from mainland Europe and the many migrations of people in the first centuries of the Middle Ages. The unification of the law of the English tribes also took on a different character. Common law emerged as an inventory (records then reports) of judicial decisions, based on the principle of stare decisis. Continental ius and lex replaced the English 'right' and 'law', where 'right' still takes precedence today, in the sense that it underlies the judge's autonomous decision on matters that are generically similar, which is the essence of precedent.

The era of centralisation and codification. Although the conquest of Constantinople by the Turks in 1451 is symbolically considered to mark the end of the Middle Ages, a new era occurred with the discovery of America (1492) and the speech of Martin Luther (1517). This led to a rearrangement of the perception of the world by the people of the time (Domingo, 2010, p. 22). Europe, possibly the Mediterranean basin (the Holy Land), ceased to be the whole world that had filled the entire cognitive horizon of man almost since antiquity. It turned out to be larger, to contain other peoples and riches. Apart from the attack on the very institution of the Catholic Church, the Reformation was also associated with a paradigm shift in the practice of philosophy – as Umberto Eco metaphorically put it – it was no longer enough just to 'store up knowledge', Renaissance man wanted to know the world around him. Perhaps not yet to understand it (as in the Enlightenment), but for profit, but he certainly broadened the horizon of his own mind.

This period sees a rapid transformation of the perception of law in continental Europe. This is due to the new legal and constitutional doctrine of absolutism. Although the consideration of legislative sovereignty as an immanent feature of the secular ruler had already been undertaken by imperial theologians, above all by Marsilius of Padua, it took the French and Italian theorists of absolute monarchy in the 16th and 17th centuries to shift the emphasis even more strongly from ius to lex. The former is only a guideline for the ruler and binds him only in so-called cardinal laws. These do not actually constrain royal power but extend its continuity and reproduce it (in absolute France: prohibition of disposal of the royal domain, male promignty, catholicity of the king). In the modern era, justifications for non-religious justification of the law are increasingly bold, despite the possibility of being accused of heresy. The lex positiva ceases to be a reflection of the lex naturalis (therefore ius), but is a fully autonomous normative order. With absolutism, political power becomes highly bureaucratic and centralised. As such, it seizes all lawmaking powers and displaces local law, including

customary law. The absolute monarch could not tolerate other subjects having the right to legislate, thus local communities, custom and so on. He therefore comes into conflict with parliament. Its front is suppressed (as in France) and if it loses (as in England) absolutism collapses. Ultimately, it is parliament that will end the era of absolutism in Europe – as we know from the example of the French Revolution.

As already mentioned, the justification for the existence of law begins to be sought in cognition by means of reason. Its source is found in the social contract (Hobbes), state power personified by the king (Jean Bodin, Machiavelli) or the imperative of reason to require of everyone what is required of oneself (Grotius, Kant). Natural law ceases to have a metaphysical foundation. Famous in this respect is the claim of Grotius, who reasoned that his rules bind us because divine intervention in the temporal world cannot be justified (God is therefore law-neutral).

The culmination of the above positions was thus the increased use of statute law, in addition centrally created in continental Europe, loosely based on axiological demands. Ius can only be subject to interpretation by the absolute monarch, whose will determine whether lex is consistent with it. If the lex is established, it enjoys a presumption of conformity with the ius. From the point of view of the peculiarities of the culture of statute law, the beginning, and the subsequent process of the codification movement, which lasted several centuries, would lead to the supremacy of lex in European thinking about the essence and cognition of law and bind it to the law-making activity of central, bureaucratic state bodies.

Transformations in the Age of Enlightenment, the historical school, the school of exegesis, legal positivism. The Enlightenment in the 18th century was the genesis of philosophical concepts that deepened the rift between ius and lex on the European continent. Central to this seems to be the consolidation of the theory of the social contract, the emergence of the concept of political utopias, which represented the opposition of the time to feudalism and absolutism. The former as a socio-economic system and the latter as a legal-political system were increasingly regarded by Europe's elites as outmoded and leading to wars, tensions, and misery. It is worth pointing out, however, that in Anglo-Saxon culture, proponents of the social contract, such as the mentioned T. Hobbes or J. Locke, sought to find the support of lex in the nature of society, immutable from political will or subjective human judgements changing over time. This was due, among other things, to the peculiarities of the already developed precedent and the dualistic structure of the sources of law, which was still dominated by judicial case law at that time. Private law, including the right to property, had since the dawn of common law culture been seen as an element of ius, not lex, and therefore an inalienable human right, the scope of which could not be freely shaped by political power. In continental Europe, because of a tradition of absolutism spanning several centuries, the concept of law was increasingly linked to the exclusive prerogative of the monarch, thus the central authority. As we have already shown, this had its genesis as far back as the beginning of the Middle Ages, thus nearly fifteen centuries earlier, when

Justinian the Great promulgated his codification, which acted as the main source of law in many parts of Europe even in 'recent times' (Palmirski, 2022, p. 11).

It is possible to formulate the thesis that Continental Enlightenment thinkers were less interested in extending the autonomy of ius in favour of lex, but rather in changing the centre constituting the latter according to their vision of the world as an opposition to absolutism and feudalism. This line of thought is found particularly strongly among French philosophers. Opposition to private property and progress and the aspiration to create an equal society governed by political power is the credo of the concept of the main representative of the continental theory of the social contract, Jean-Jacques Rousseau. The utopianism of the views he presented is sometimes the basis for the harsh assessment that he was 'the first of the wise men to love humankind and hate humans' (Cisek, 2023, p. 41). An outlet for opposition to social inequalities that could not be overcome in any way, but also to the increasingly perceived ineptitude of absolute monarchy, which was increasingly regarded as a system that did not fit with social realities, was of course the French Revolution (suffice it to recall the case of the so-called Marie Antoinette necklace, in which 'Mirabeu saw the prelude to the revolution and Napoleon I one of its three causes (Żywczyński, 2001, p. 23).

The awakening of the peoples in the two, great revolutions of the time – the American and the French – is widely regarded as the beginning of modern republican forms of government. The proclamation of human and civil rights, the recognition of so-called inherent rights, the introduction of equality before the law or the inviolability of property (the allodial conception of it later adopted in the Napoleonic Code) can lead to the belief that we are dealing only with a transformation of the conception of ius naturale into its so-called variable law variety. For the political sovereign ceases to be the full disposer of law. A specific area of it is deemed to be separated from the free shaping of the scope of individual freedom by political power. In fact, the French Revolution led to the further supremacy of statute law and is regarded as the end of the multicentric conception of the sources of law in continental Europe inherent in previous eras. This was particularly evident within the framework of the French school of exegesis, developed in the first half of the nineteenth century, whose chief demand was the 'prohibition of the interpretation of law' by judges. This was dictated by the fear that the legal establishment, including judges and clerks still remembering the times of the ancient regime, would not try to reactivate the axiology and selected solutions of the previous regime by interpreting the new in content law.

While the French school of exegesis developed gradually, the situation in German jurisprudence was more polarised in the 19th century. The first half of the century was dominated by an anti-naturalist philosophy of law referred to as the historical school of law. Its qualification is most often to be associated with the positivist current, although in its assumptions it was the radical opposite of legal positivism itself; in turn, positivists also fiercely opposed its assumptions – 05.07. 1847, in Berlin, Julius Herman von Kirchman, then a prosecutor in Berlin, in a lecture entitled "On the lack of value of jurisprudence as a science" criticised that "jurists have become worms that live in the rotten tree, turning away from what is healthy, nestling and spinning their filaments in

what is diseased [...] the science of law becomes the handmaiden of chance, error, passion, and misunderstanding, looking only to the past. [...] Where positive law is unambiguous, the science of law should remain silent, for it has nothing to say' (Stelmach, 2012, p. 7). Representatives of the natural law school (above all its most prominent protagonist, Friedrich Carl von Savigny) opposed the idea of statute law, proclaiming a commitment to legal custom, customary law, something along the lines of Anglo-Saxon case law. This current deepened the further separation of lex from the idea of ius.

This culminated, of course, in the rise of the philosophy of legal positivism in the mid-nineteenth century, and analytical jurisprudence in England a little earlier. There is no consensus in legal theory as to whether these orientations coincide with each other or whether they should be treated as independent philosophies of positive law. We do not need to explore this dispute in this paper. We are only interested in continental legal positivism, which for nearly 100 years became the dominant and highly influential philosophy of law in state law culture, whose tenets are still alive today. Bearing in mind, of course, the basic division of the philosophy of law in question, into positivism of the hard (original) variety and soft (refined) variety after the Second World War. The former is nowadays commonly treated as an anachronistic, extinct and theoretically erroneous concept (its most complete methodological critique was carried out by H. Hart).

It can be pointed out very generally that the positivists rejected ius, completely linking law to lex. At the same time, this is not a textual conception of law, although it is very often – albeit erroneously – regarded as such. For the positivists, law was a relation of social subordination of the addressee to political power. The science of law was to be based on a methodology derived from the applied sciences, for the positivists saw the correctness of the science of law in methodological naturalism. The philosophy was steeped in scientism (Zirk-Sadowski, 2020, p. 44). Positivists identified law through the test of origin and its social efficacy. In such a paradigm, only that which came from a political sovereign could be regarded as law, in a monocentric catalogue of sources of lex juris. This was emphatically emphasised (critically, after all) by Radbruch (1990, p. 159), who wrote that 'to us every law was a law and every law a law; the science of law meant only the interpretation of a law, and jurisprudence meant only the application of a law. We called ourselves positivists ...". At the same time, the conviction of the necessity of empirical identification of the law did not cease even after the tragedy of the Second World War. A hallmark of legal-positivist thinking is the search for an empirically verifiable source of law that provides a specific legal relationship – thus is normatively binding and allows for the enforcement of law by public authority (Dworkin, 1998, pp. 47–48). Among others, in 'Five Minutes in the Philosophy of Law', Radbruch still tried to identify 'the principles of law that surpass all statutes in validity', despite the 'interpretative doubts' that 'the efforts of centuries have created [...] in the Declaration of the Rights of Man and of the Citizen' (Radbruch, 1988, p.65).

The fundamental problem of the non-positivist conception of law combined with the idea of ius is always related to the fulfilment of the requirement of legal certainty and,

regarding law imposing particularly onerous sanctions (such as criminal or financial sanctions), of fairness, understood as the prohibition of circumventing the principle of nullum crimen sine lege et al. (Alexy, 1993, p. 44 and 48). This is why, immediately after the Second World War, a process called the positivisation of natural law, rather than the naturalisation of positive law, came into existence. This is not just an apparent play on words. The name conveys the true direction of change and the location of the centre of gravity on – respectively – ius or lex.

Conclusions: Ius or lex – the contemporary picture of European law and possible directions for its further development

Having so far established the concepts and recalled the most important stages in the development of the mutual inhibition of ius and lex in Europe – with a gradual assumption of the leading role by statute law – we will now consider whether the system of European law – understood as the law of the European Union together with the conflict-of-law rules, which are intended to resolve possible conflicts with the national law of the Member States – is closer to the idea of ius or whether it is in fact the primacy of lex and a positivist conception of law? This question is important, as in the doctrine the assessments in this regard are strongly divided. Some point out that 'we Europeans have created a fiction in which instead of natural law and instead of ius there is only international law and lex' (Czarnek, 2018, p. 28). Others present a more cautious position that points to the role of Article 2 of the Treaty on European Union (TEU), which, among the ethical concepts of principlism, relativism, situationism and anti-moralism, refers to Europe's liberal democratic legacy (Armin, 2020, p. 705). Such a position, however, is extremely positivist, for it rejects the ius entity, immutable from human will, replacing it with a relative perception of values, which can (and should) be defined according to the current standard of their understanding. Thus, morality ceases to be a set of permanent and unchanging values but is transformed with the transformation of matter and man's perception of it. This position therefore coincides with the extreme empiricism inherent in historical materialism (Lenin, 1949, p. 63).

Obviously, references to extreme communist ideology are not found in the main normative acts establishing the European Union (we are talking about the TEU, and the Treaty on the Functioning of the EU, TFEU) – above all in the preamble of the TEU. There are only symbols whose significance can be exaggerated or taken as dangerously glorifying representatives of the totalitarian ideology of Marxism – we are talking, for example, about Altiero Spinelli, who in the famous Ventotene Manifesto proposed a social reform of the EU states preceded by a strong criticism of the idea of the nation-state. The fact is that this very document "in the White Paper on the Future of the European Union" published by the European Commission in 2017. [...] was mentioned as the sole ideological foundation of the organisation" (Zych, 2019, p. 7). Another important element of this EU programmatic document (and this is how it is referred to on the websites of the Parliament and the European Commission) is the programmatic deficit of classically understood democracy – as the will of the majority, the voice of the

people, the dependence of policy directions on the opinion of the demos or, most importantly, the possible redefinition of concepts as a result of changes in people's views. On the other hand, the concept of democracy itself is extremely susceptible to values and worldviews as well as legal and political views (Heywood, 2009, p. 3).

It should be noted that this paper is not concerned with assessing the status quo. We are only interested in answering the question to what extent (and whether at all) law in the European community refers to the idea of ius, or whether it is in fact a completely relativised lex.

Of course, references to the values and origins of legislation can be found both in the TEU argot (the TFEU is devoid of it) and in several provisions of the Treaties, the most relevant of which is the already mentioned Article 2 TEU. To put it succinctly, 'on paper' everything looks pretty good. The first source of inspiration for European integration is indicated in the preamble as 'the cultural, religious and humanist heritage of Europe'. Of course, for conservative circles, this is sometimes not enough and points to the lack of reference specifically to Europe's Christian heritage or precisely to the concept of natural law. On the other hand, it can also be judged a good thing that such an admonition has a place in the preamble at all, and in view of the already summarised evolution of Europe's juridical and constitutional heritage, we have never really had to deal with theocratism on the continent. The treaties emphasise two elements very strongly: human rights and the rule of law. This conclusion is also reinforced by an analysis of the order of the values mentioned in Article 2 TEU. This provision states that 'the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society based on pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men". Indeed, on the other hand, 'the Treaty clearly takes the position of conferring competence, subsidiarity, and proportionality – as it is evident, for example, from the wording of Article 5(1) and is supported by the wording of Article 4(1) TEU. It would seem that the willingness to adopt a different policy – based on perhaps legitimate and necessary objectives arising from contemporary challenges – would require a redefinition of the Treaty, precisely because of the need to respect, inter alia, the principle of the rule of law, i.e. the action of public institutions on the basis and within the limits of the competences conferred" (Kotowski & Syryt, 2023, p. 11–12).

However, the literature signals the absence of any limitation of the political sovereign in both the EU CAT and its policy documents, which is only required to be democratically established and to act on the basis and within the limits of the law. Freedom is thus limited by the 'civic collective', whose omnipotence is sometimes criticised by, among others, proponents of natural law, that 'the omnipotence of the sovereign collective led to the Jacobin terror' (Wielomski, 2023, pp. 85–86).

Another problem of the very dynamically emerging EU legal system is the phenomenon described as the democratic deficit in its systemic aspect (Muntean, 2000). This issue is more of a political question than a legal one, but it cannot be ignored in the analysis between ius and lex. The non-transparency of certain decision-making

processes or the very structure of the supreme institutions of the Union are very often cited as examples of the phenomenon in question. However, not all these arguments seem to be correct. After all, the European Parliament is elected by universal suffrage. It therefore has a democratic mandate. The European Commission is represented by representatives-designate of all states. These designating authorities, in turn, have a democratic mandate. Simply put, the democratic legitimacy deficit is due to the distance of the decisions to be taken from the individual societies and is the result of the double-stage nature of the appointment of a person to a particular function. By being multi-member bodies, EU bodies do not have the same strong democratic legitimacy as personalised single-member bodies. It is like making accusations against the cabinet system by comparing it with the presidential system. In a national government, citizens are also not sure who the leader of the winning party designates as individual ministers or with whom he or she enters into a coalition. Much of the problem with the legitimacy of EU power, on the other hand, stems not from normative solutions, but from the political culture that has developed. It is often pointed out that deserving politicians of the Member States who, for various reasons, would find it difficult to gain support at home (e.g. as a result of making difficult decisions) are appointed to EU organisations. The crux of the problem of the democratic deficit is seen by more insightful authors as being in the genesis of European integration and the axiological concept adopted (Haller, 2008, p. 313). The problem is that the fragmentation of Europe into nation states prevents the creation of a common European demos. The values on which the Union is based are also understood differently in various parts of the continent. Perhaps the most serious problem is related to the contradiction of political interests between, for example, the core states of the Union (Germany, France) and the others, either west and east or north and south. The best example of this is the Union's energy policy, which for years has been based on Russian gas imports, putting the countries of central and eastern Europe at risk. Drastic differences in foreign policy were revealed by the Russian aggression against Ukraine. In Western Europe, this conflict is sometimes treated as distant or even as one that poses a problem for the hitherto established economic line based on cooperation with Russia. In contrast, for the countries of Central and Eastern Europe – including, of course, Poland – it directly threatens sovereignty and security. The attitude of Germany and France at the outset of the conflict makes one wonder whether, in the event of an aggression against Poland, the western states of the Union would not decide to help, but only up to the Vistula line, according to an illusory security treaty or a new division of influence. At one time these considerations may have seemed preposterous, but reality evolves very quickly.

History teaches that federated; multi-ethnic states were created based on the shared, positive values of the people who came to build them. Thus, they were created from below and not from above – as creations of elites. On the contrary, the latter option always ended in failure. This one was merely postponed. The USA – the best example of a multi-ethnic state – was built by emigrants seeking, however, a common frame of reference: broad economic freedom, opposition to feudal social relations, subjectivity, and individual autonomy (in the sphere of customs, religion and even self-identification,

with which the right to bear arms is linked). States created by elites, by force as it were, to unite the conflicting interests and axiologies of nations, collapsed more or less violently. We can mention here: Austria-Hungary, Yugoslavia, the German Reich (after all, forcibly united by Prussia), and centuries earlier the Roman Empire, whose decay accelerated with the introduction of the Dominion. Meanwhile, European integration involves the imposition of an axiology chosen from among its various models and social transformation through more or less overt processes of social engineering. These, in turn, are implemented with little acceptance by European elites of traditional democratic institutions (Haller, 2008, p. 336–337). The institution of the European referendum was almost compromised by the double votes on the Constitution for Europe in France and the Netherlands, which 'came as a shock to the political establishment' (Haller, 2008, p. 1-2). The most important decisions affecting the future of European societies were taken with little, no, or illusory consultation with citizens. We are talking about climate, immigration, or economic policy. Basically, all these decisions are taken from the top down, in fear of confronting the people.

If we consider the basic requirements of the concept of ius, the absence of this idea in European legal thought becomes readily apparent. Man is the exclusive creator and disposer of law, the system of sources of law is based on a monocentric, highly detailed set of normative acts, the necessity of their implementation into national systems and the verification of this process as well as application. Decision-making discretion, including judicial discretion, is only desirable when operating within the paradigm of unilaterally conceived European integration. It is, after all, contrary to the requirements of the rule of law for elected European Commissioners to criticise rulings by national (constitutional or supreme) courts, which introduce a certain limitation of the powers of the EU institutions or explicitly point to limitations on their competences arising from the principle of conferral of powers and such an understanding of the primacy of EU law that cannot extend to competences not conferred by the Treaties or exercised jointly within the framework of subsidiarity and proportionality (Article 5(2) and (3) TEU).

In conclusion, if we analyse the evolution of the macro-concept of law in continental Europe, the direction of the development of Union law appears to be extremely positivist (while not to be judged in terms of: good or bad, etc.). This obviously entails certain repercussions for the integration process and a repository of future possible tensions in the absence of a common European axiology that respects the autonomy of the societies of individual Member States (Bunikowski, 2013, p. 18). Without positive law being based on absolute values, its enforcement and justification becomes merely physical coercion (Szyszkowska, 1995, p. 142). EU lex is a highly formalised lex scripta, based on a top-down created axiology with little grounding in ius.

References

Alexy R. (1993), In defence of the non-positivist conception of law, State and Law, no. 11–12.

Principles of a systemic deficiencies doctrine: How to protect checks and balances in the Member States, CML Rev. 2020, no. 3, pp. 705–740.

Bunikowski D., Values and Axiology in the European Union Legal System In Context of The European Culture and the Constitution for Europe. Why does the EU need the axiology?, DOI:10.13140/RG.2.1.4402.1367.
Cicero (1948), De Re Publica, Cambridge. https://books.google.pl/books?id=KAo9AAAAIAAJ&printsec=frontcover&hl=pl&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false [access: 10.05.2023].
Cisek A.M. (2023), Freedom, Equality, Genocide. Lies and crimes of the French Revolution, Warsaw.
Czarnek P. (2018), Natural law in Europe – foundation or forgotten reality, Bulletin of SAWP KUL, vol. XIII, no. 15 (2).
Domingo R. (2010), The new global law, New York.
Dworkin R. (1998), Taking rights seriously, transl. T. Kowalski, Wydawnictwo Naukowe PWN, Warsaw.
Heywood A. (2009), The key to political science. Warsaw: Wydawnictwo Naukowe PWN.
Kotowski A., Syryt A. (2023), Introduction. In: A. Kotowski, A. Syryt (ed.), Values of the European Union in light of Article 2 of the Treaty on European Union, Warsaw.
Lenin V.I. (1949), Materialism and Empirio-criticism. In: Works, vol. 14, Warsaw.
Manteuffel T. (1996), History. The Middle Ages, Warsaw.
Maureira M. (2015), Dike, ius orthe unrealized freedom. On the abstraction of law by Hegel. Anuario Filosofico, no. 48, pp. 299–314.
Muntean A.M. (2000), The European Parliament's Political Legitimacy and the Commission's 'Misleading Management': Towards a "Parliamentarian" European Union?, European Integration online Papers (EIoP), vol. 4, no. 5. http://eiop.or.at/eiop/texte/2000-005a.htm [access: 10.05.2023].
Palmirski T. (2022) (ed.), Justinian Institutions I, Warsaw.
Radbruch G. (1988–1989), Five minutes of the philosophy of law, transl. J. Zajadło, Colloquia Communia, nos. 6(41)–1(42).
Radbruch G. (2002), Law and the Law, transl. J. Zajadło, Ius et Lex, no. 1.
Sofokles, Antigone, trans. K. Morawski. https://wolnelektury.pl/media/book/pdf/antygona.pdf [access: 10.05.2023].
Stępień M. (2000), Hammurabi Code, Warsaw.
Szyszkowska M. (1995), European philosophy of law, Warsaw.
Wielomski A. (2023), Freedom, In: A. Kotowski, A. Syryt (ed.), Values of the European Union in light of Article 2 of the Treaty on European Union, Warsaw.
Wolski J. (2000), History. Antiquity, Warsaw.
Zych T. (2019), The Ventotene Manifesto – the ideological foundation of the EU. Introductory remarks by the scientific editor, In: A. Spinelli, E. Rossi, Manifesto of Ventoteone, Brussels.
Żywczyński M. (2011), History. 1789–1870, Warsaw.