The relationship dynamics between legal positivism and the divisions of law, analyzed from a systemic perspective[1]

Lecturer **Claudiu Ramon D. BUTCULESCU**[2]

Abstract

This article is studying the dynamics of the relationship between legal positivism and the two divisions of law, respectively private law and public law. Legal positivism, envisions concepts of human intervention in the creation and application of the law, and so it finds application in both public law and private law. However, in private law, there are several principles which can be deduced from the doctrine of natural law, such as substitution, reversibility and others. To the contrary, in public law, legal positivism is all present, manifesting itself in all its branches. It is not, however, an exclusive presence, because there is a balance between natural law and legal positivism in each of the divisions of law. The two orientations of law, namely natural law and legal positivism coexist in each of the divisions and branches of the law, but with a different structure, dynamic or static, depending on specific branches of law. This paper presents in an analytical manner, the static and dynamic manifestations of legal positivism within the framework of the two divisions of law, namely private law and public law.

Keywords: *legal positivism; public law; private law; general systems theory.*

JEL Classification: K10, K40

1. Introduction

The system of law can be envisioned as a subsystem of social normative system, along with the moral system, legal cultures system and others.

To be able to observe how legal positivism is manifested in the two major divisions of law, i.e. in the public law and the private law, it is necessary to first briefly explain natural law and legal positivism from a systemic perspective, related to the system of law.

Natural law is based on the idea of transcendental law, whose aprioristic values are applicable to state authorities, while in legal positivism is essential the

---

[1] This article was submitted to 6th International Conference "Perspectives of Business Law in the Third Millennium", 25 -26 November 2016, the Bucharest University of Economic Studies, Bucharest, Romania.

[2] Claudiu Ramon D. Butculescu - „Acad. Andrei Rădulescu" Legal Research Institute, Romanian Academy, Spiru Haret University, Bucharest, butculescu@yahoo.com

material, state creation of law, and the legality of law implies unconditional subordination in relation to normative commandments[3] .

Traditionally, public law division encompasses the branches of criminal law, constitutional law, administrative law, and more, while private law Division includes civil law, labor law, business law, and so on.

Analysis of the relationship between the two divisions of the current law and the two major schools of legal thought -natural law and legal positivism present a relevant scientific interest. Thus, it is apparent that natural law ideas seem to be largely present in branches of private law, while legal positivism concepts project themselves more in public law branches. Thus, principles such as substitution and reversibility are found mainly in private law, within civil institutions such as civil liability, where it is essential to restore the balance or in contractual obligations regarding property transfer, which usually generate a patrimonial subrogation. These rules are mirrored in the concepts of natural law. Similarly, legal symmetry may find its juridical origins of the doctrine of natural law.

In terms of legal positivism, this doctrine is closely related to public law branches, because public law branches are mainly concerned about relations between the State and its citizens[4]. Thus, public law branches fully benefit from legal creation of norms, which are founded on the principles of legal positivism.

However, it is interesting to study whether the two schools of law overlap directly and exclusively on certain branches or rather behave like abstract and analytical systems, which, pertaining to a specific branch of law, acquire a quasi-static or a quasi-dynamic balance. In addition to this analysis of the principles of the two schools regarding the branches of law, constitutes an important aspect in the perceptiveness of the two doctrines: natural law and legal positivism, in the sense that the legal phenomena to which they relate may be similar or identical. However, the perception of these phenomena may to be different, if they are analyzed through the principal schools of legal thought, namely natural law and legal positivism.

2. Brief overview of the divisions of law related to legal positivism

In specialized literature, it has been shown that positive law is divided into two large divisions, namely public law and private law, this divisions being well-known since roman law[5]. Internal public law aims at regulating social relations between citizens and the state[6]. On the other hand, private law regulates

[3] Alexandru Florin Măgureanu, *The law as an axiological system*, in The Proceedings of the International Conference Communication, Context, Interdisciplinarity, vol. 3, 2014, p. 367

[4] Mihail Niemesch, *Teoria generală a dreptului*, Hamangiu, Bucharest, 2014, p. 28

[5] Nicolae Popa, *Teoria Generala a Dreptului*, 3rd edition, C.H. Beck, Bucharest, 2008, p. 66.

[6] Mihail Niemesch, *op. cit.*, p. 28.

relationships between people, referring to each individual interest[7], so it governs private interests.

Legal positivism rejects the idea of natural law, being characterized by pragmatism. The main idea that legal positivism takes into consideration is that the law is the creation of an earthly, material authority[8] .

The branches of private law seem to relate to natural law ideas rather than to those of legal positivism. It is true that the rules governing relationships governed by private law are creations of the legislator, because of the material and formal communication of law. However, these rules borrow the essential ideas from the natural law doctrine. The immutable and perennial concepts of natural law are projected over legal relations governed by private law rules, even though through this projection, some concepts of natural law lose their initial attributes. Limiting the effect of this transposition of natural law concepts do not affect their primary source. In matters of civil law, which is designed to be regarded as common law in relation to other branches of private law, and even to some branches of public law, natural law concepts are found most poignantly. Reversibility, established as a natural effect of restoring balance universally, manifests itself in legal matters, through civil institutions. Such institutions concern the restitution of payments when void, reestablishment of parties in the previous situation in certain cases of civil law such as civil liability effects, delicts, rescinded contracts, overpayments, etc. Moreover, universal subrogation and constants can also can be found in the private law as a crystallization of the opinions stated by the known chemist A.L. Lavoisier, who believe that both in nature and in art, everything transforms, but nothing is gained or lost[9] .

As shown above, legal positivism is closely related to public law branches. Firstly, given that legal positivism is based upon the idea that the State is the creator of legal norms and hence of law, and public law regulates relations between the State and just regular citizens, we can observe a first strong link between positivism and public law. On the other hand, the legal relations regulated by the branches of public law, such as criminal law, constitutional law or administrative law, for example, are regulated in accordance with the needs of the society, and communicated through the sources of law. These sources are not an expression of universal and unique material realities, but have a different nature depending on the legal system in which they manifest themselves. Legal culture is the medium through which material sources of law are transmuted into information communicated to authorities, with the purpose of drafting legal norms. Legal culture also essentially contributes the configuration that establishes the limits within which legal rules are drafted and enforced. From this perspective, legal positivism is indeed essential in setting up legal relations governed by public law. For example, in matters of criminal law, the natural and universal rules are limited

[7] Mihai Bădescu, *Teoria Generală a Dreptului*, Sitech, Craiova, 2013 p. 40.
[8] Sofia Popescu, *Teoria Generală a Dreptului*, Lumina Lex, Bucharest, 2000, p. 84.
[9] Antoine Laurent Lavoisier, *Elements of chemistry in a new systematic order, containing all the modern discoveries*, fourth edition, Edinburgh, 1799, p.187.

to ensure a positive development of society. Thus, some actions may be regarded as criminal offences in a certain law system, while in other systems of law, they may be regulated by norms who prescribe less severe penalties or even go unregulated and therefore unpunished. Within constitutional law, there are differences regarding the universal values of natural law, from a legal system to another. Even though at present the focus is on the monism of international law[10], which acts as a unifying factor of law, that does not contradict the claim the legal positivism is deeply implemented in existing legal norms in public law branches of each national system.

3. The dynamics of the relationship between legal positivism and the various branches of law

Firstly, it should be examined whether the ideas of legal positivism, existent in the majority of public law branches, are absent, wholly or partly from the scope of relationships under private law. The idea that the ideas of legal positivism are absent, partially or entirely cannot be accepted, and to the contrary, neither can be accepted that natural law concepts are absent in the field of public law. Rather, in each of the branches of law, within each division, there is a system of ideas and concepts, containing elements of both natural law and legal positivism. Of course, these ideas or concepts are not present in numerical or quantitative equality, but rather in a state of equilibrium, with some differences. Thus, in private law relations, legal positivism concepts are embedded in a system that has a tendency for a quasi-static balance, and as such is more difficult to be perceived by operators to the law, while in public relations, legal positivism ideas manifest themselves in a quasi-dynamic equilibrium being easily perceived by the experts and scholars of law. Thus, we may conclude that legal positivism ideas are in a quasi-static equilibrium within the branches of private law and in a quasi-dynamic equilibrium within public law branches. This balance is relative and can be affected. Consequently, we cannot take into consideration an absence of legal positivism concepts in private law, or most the ideas of natural law in these branches of law. Similarly, there cannot be a majority presence of legal positivism concepts and an absence of natural law in public law. Continuing in the same direction, if the concepts both pertaining to legal positivism or natural law would exist only partially or exclusively in the branches of the right, it would be impossible for them to reappear once they become extinct. The concepts prescribed by legal positivism and natural law exist permanently within all branches of law. What differs is the degree of manifestation of these concepts, generated by state of equilibrium in which they are, related to each branch of law. As shown before, the state of equilibrium found within each branch of law may be affected and altered. Since legal positivism is closely related to the existence and development of human society, the cause of these systemic unbalancing may be found in social change.

[10] Emilian Ciongaru, *The monistic and the dualistic theory in European Law*, „Acta Universitatis George Bacovia", issue no.1/2012, pp. 212 – 231.

Thus, in the case of branches of private law, the imbalance of legal positivism manifests itself through excessive regulation of legal relations, through legal abuses which can be seen in the context of extremist regimes, characterized by the violation of human rights, limitation of the right to property, etc. To the contrary, in the case of public law branches, quasi-dynamic imbalance manifests itself through a dilution of state authority, followed by an increase in the influence of private entities, national or transnational, which can generate socio-economic and legislative changes.

4. Conclusions

Within the contents of this paper are been presented the relationship between legal positivism and the branches of law, the dynamics of these relationships, and the manifestation of legal positivism concepts within the of branches of law. From those shown above, one can easily observe legal positivism ideas exist in both divisions of the law and in all branches of law, private or public. In this context, it is relevant for the systemic analysis of the influence of legal positivism over the branches law to study the way it manifests itself, which generally has the nature of a system that tends to a quasi-dynamic equilibrium in branches of public law and to a quasi-static equilibrium in the branches of private law.

Bibliography

1. Bădescu Mihai, *Teoria Generală a Dreptului*, Sitech, Craiova, 2013;
2. Ciongaru Emilian, *The monistic and the dualistic theory in European Law*, „Acta Universitatis George Bacovia", issue no.1/2012;
3. Lavoisier Antoine Laurent, E*lements of chemistry in a new systematic order, containing all the modern discoveries*, fourth edition, Edinburgh, 1799;
4. Măgureanu Alexandru Florin, *The law as an axiological system*, in The Proceedings of the International Conference Communication, Context, Interdisciplinarity, vol. 3, 2014;
5. Niemesch Mihail, *Teoria generală a dreptului*, Hamangiu, Bucharest, 2014;
6. Popa Nicolae, *Teoria Generala a Dreptului*, 3rd edition, C.H. Beck, Bucharest, 2008;
7. Popescu Sofia, *Teoria Generală a Dreptului*, Lumina Lex, Bucharest, 2000.