CONSIDERATIONS REGARDING THE INTEGRATION OF FUNDAMENTAL HUMAN RIGHTS IN THE SYSTEM OF NATURAL LAW

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Abstract

This article studies the relationships and interactions between fundamental human rights and natural law school. The objectives of this paper are circumscribed to the way fundamental human rights, by their nature, can be integrated within the doctrine of natural law or to the contrary, may be related to various branches of legal positivism. In specialized literature, it was pointed out that fundamental human rights constitute genuine natural rights which have the same natural law recognized attributes: immutability, non-alienable nature et. al. However, in the context of contemporary changes within the European Union, generated by cultural differences which are becoming ever more significant, the question rises of whether those rights are in fact a creation of legal positivism. Within the paper there are several doctrine opinions described, as well as some arguments for reconsidering the placement of fundamental rights within the sphere of legal positivism. Using the comparative method, the study analyzes the common points and the points of divergence between fundamental rights and the doctrines of natural law and legal positivism, seen through the prism of the general theory of systems, legal culture, legal colonialism and legal ethnocentrism.

Keywords: *natural law, human rights, legal cultures, legal ethnocentrism*

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1. Introduction

Natural law school is one of the oldest schools of legal thought within the general theory of law. His early representatives existed in Ancient Greece, among them being Anaximander of Miles, Pythagoras and Heraclitus[2]–.

Subsequently, the doctrine of natural law has been developed in detail by Socrates, Plato and Aristotle, being continued with the theories set forth by theologians such as St. Augustine or St. Thomas of Aquinas. Later, in the era of contractualism theories, Hugo Grotius and its continuers, Puffendorf and Thomasius, proposed a differentiated evolution of the concept of natural law: from an anomic, natural state, to a State governed by a social contract.

Legal positivism, on the other hand, strongly rejected the idea of natural law, being based on exclusive knowledge of the scientific, positive and legal reality[3]. Positivism is based on the idea that the law is the creation of the State, because of certain historical circumstances, economic, conceptual, etc. Within legal positivism one can better explain the relationship between the material and formal sources of law. Thus, material sources, representing the needs of society, indirectly determine the formal sources, which synthetically represent the legal creation of state authorities.

The concepts pertaining to fundamental human rights also found their origins in antiquity, particularly in religious systems. Thus, the Vedic texts contain references to the link between the divine justice and moral obligations towards the other members of the community[4]. Similar references are found and in Christian texts, and in other religious writings. Also, within the ideas relating to natural law, exposed by Plato or Aristotle one may observe early concepts related to human rights. Later, subsequent theories, presented by Christian philosophers such as St. Augustine, St. Bernard of Clairvaux or St. Thomas Aquinas, are inextricably linked to concepts relating to human rights, derived

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[2] Howard P. Kainz, *Natural Law: An Introduction and Re-Examination* (Chicago: Open Court, 2004), 1, http://www.questia.com /read/118121410/natural-law-an-introduction-and-re-examination.

[3] Sofia Popescu, *Teoria Generală a Dreptului*, Lumina Lex, Bucharest, 2000, p. 84.

[4] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, "Pennsylvania Studies in Human Rights„ (Philadelphia: University of Pennsylvania Press, 1998), p. 6, http://www.questia.com/read/125501069/the-evolution-of-international-human-rights-visions.

primarily from the commandments submitted by Moses on Mount Sinai, explained in detail in the New Testament, both in the Gospel and in the teachings of St. Paul.

Later, after numerous conceptual developments and analysis, fundamental rights, as we know them in the present were crystallized and formalized in the Universal Declaration of Human Rights and in other international treaties, such as the European Convention on Human Rights. These rights have a universal character, being on equal footing with other essential legal principles, namely equity, equality and justice[5].

The relation between fundamental rights and the legal schools of thought, namely natural law and legal positivism present a significant scientific importance, concerning the acquisition of such rights, the exercise, the immutability and indefeasibility of such rights. At the same time, this relation is relevant when analyzing the impact of legal culture over this category of rights, as well as systemic approaches, stemming from legal aspects of ethnocentrism and colonialism.

2. Brief considerations concerning natural law school

The essence of natural law doctrine emphasizes the existence of divine laws, aprioric to human existence, and having authority over the existence of human society. Of course, between the ancient Greek concepts, which were based on the idea of natural divine justice, and the concepts of contractualism nature, as set out by Grotius, Puffendorf, and Thomasius, there were significant differences of approach. As pointed out in the literature[6], the framework of the contractualism theories, is articulated by a sequence of events as follows: initially, people were in a natural state where there was no law, no order, and at some point, they have advanced to the stage of society or community, through an initial social engagement, only to join later in a social contract in which community members are committed to comply with a Government.

Researches in the field of natural law were conducted by Thomas Hobbes, which placed emphasis on self-interest and self-partiality[7]. Another writer, John Locke, appreciated that human rights are inalienable rights, but the existence of divinity is necessary for the existence of mandatory natural law[8]. On the other hand, J.J. Rousseau rejected the idea of the divine origin of the natural law, which he replaced with the idea of a general will through which a citizen shall govern itself, thus being conceptually close to contractualism theories[9]. Also, some of the concepts set out by I. Kant were related to the idea of universal order, which leads to the idea of natural law. Generally speaking, the principles of natural law are found today both in national legislations and in international law, supporting the primacy of international law over national law[10].

The line of thought which governed the doctrine of natural law emphasized its importance, when opposed to positive law. Still, some theories have tried to demonstrate the absolute priority of the natural law, inspired from ancient Greece or Rome, or scholars of Christianity, while other theories, namely the contractualism theories have tried to theorize the existence of natural law without a mandatory overlap of natural law over positive law. Human rights have a distinct relevance in natural law, seeing that within this doctrine, the existence of natural and inalienable human rights is essential[11].

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[5] Alexandru Florin Măgureanu, *Legal certainty and legitimate expectations*, in „Communication, Context, Interdisciplinarity", vol. III, section Law, p.367

[6] Sofia Popescu, *op.cit.*, p. 84

[7] Perez Zagorin, *Hobbes and the Law of Nature* (Princeton, NJ: Princeton University Press, 2009), p. 101, http://www.questia.com/read/118189029/hobbes-and-the-law-of-nature.

[8] Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton, NJ: Princeton University Press, 1994), p. 189, http://www.questia.com/read/103235901/natural-rights-and-the-new-republicanism.

[9] Lloyd L. Weinreb, "10: Natural Law and Rights," in *Natural Law Theory: Contemporary Essays*, ed. Robert P. George (Oxford: Clarendon Press, 1994), p. 279, http://www.questia.com/read/26348866/natural-law-theory-contemporary-essays.

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

[11] Mihail Niemesch, *Teoria Generală a Dreptului*, Hamangiu, Bucharest, 2014, p. 54

3. Analysis of fundamental human rights from the perspective of natural law

The notion of fundamental rights lies in its early form, under the natural law school since antiquity. Both Zeno of Citium, and Aristotle have discussed a universal law that binds all members of the community[12]–.

Later, John Locke, showed that the main purpose of the earthly authority is to protect the natural rights of the individual[13], which he considered inalienable. The English philosopher John Locke grounded the incipent theory of the separation of powers in his book published in 1689 "Essay on the Civil Government" where he speaks about the power essentially judiciary available to civil status under a contract with society members. Based on this contract the society members are guaranteed natural rights and the civil State acquires judicial power to punish and justice[14].

In the same sense, J.J. Rousseau considered that people do not lose their freedom because of the social contract, but shall retain their rights, from their previous natural state[15].

As shown above, it follows that man's natural rights, which is part of fundamental rights, in the light of the doctrine of natural law, has an inalienable and obviously indefeasible character.

This issue arises from the fact that the universal values set forth by natural law have a continuous character, aprioristic and immutable. However, although the fundamental rights are subordinated to the rights of natural, it may be possible that their exercise may be influenced by legal and cultural ethnocentrism.

If fundamental rights are to be considered a creation of positive law, then it means that these rights arose through the will of the state authority. Otherwise, if the rights in question are the projection of a universal order, the attitude of the state authority can only be declarative, through recognition of the existence of prior rights. This distinction is of importance, in terms of inalienability and indefeasibility these rights. What is inalienable cannot be acquired or lost, but what has been conferred by a state authority or social structure may be restricted, limited or even eliminated. This analysis is particularly important from the perspective of significant differences between legal cultures, which among other things, may present serious effect, characterized by abusive acts, terrorism etc.

Even if fundamental rights are not necessarily an emanation of a divine will, they accompany the human being and are inseparable. Thus, from the point of view of the general theory of law, they should be allotted to the doctrine of natural law, as absolute rights.

The perception of fundamental rights is closely linked to the concept of ethnocentrism, especially when analyzed from a systemic perspective. In the case of closed systems, which are inflexible, ethnocentrism has a greater importance in the assessment of the nature of such rights. Under the influence of legal cultures, the coordinates of a closed system, transmuted from a geographical space to another, will probably remain the same, even if they are transposed in a system of legal values, which is open and it has different conditions.

In the case of open systems, the permeability of legal values promoted by closed cultural legal systems, that have a high degree of inflexibility will most likely cause uncertainty and thus will raise the degree of entropy of the system.

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[12] Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen*, Pennsylvania Studies in Human Rights (Philadelphia: University of Pennsylvania Press, 1998), p. 14, http://www.questia.com/read/125501069/the-evolution-of-international-human-rights-visions.

[13] Carl Wellman, *The Moral Dimensions of Human Rights* (New York: Oxford University Press, 2011), p. 4, http://www.questia.com/read/121394992/the-moral-dimensions-of-human-rights.

[14] See Cătălin-Silviu Săraru, *The State and the separation of powers*, „Juridical Tribune – Tribuna Juridica", vol. V, issue 2, December 2015, p. 278.

[15] Sofia Popescu, *op.cit.*, p. 53

4. Conclusions

The doctrine of natural law proposes the existence of a set of universal values, perennial that are pre-existing to human society. In this context, fundamental human rights should be considered as emanations of the natural law, enjoying the attributes of inalienability and indefeasibility.

From the cultural point of view, fundamental rights form an immaterial heritage, specific to each national or extranational legal cultures, behaving in a systemic manner, being directly determined by conditioning of its own systemic legal cultures. The interactions between closed systems, proposing some inflexible meanings related to fundamental human rights and open systems, which offer distinct meanings, the result may be the harmonization of these systems or otherwise, the appearance of a conflict, which will generate systemic entropy, characterized by a high degree of social and legal uncertainty.

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