ANTITHETICAL PERSPECTIVE OF LEGAL FORMALISM AND LEGAL REALISM

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Abstract

The necessity to outline a historical context is implicit in study of legal theories of formalism and realism. Understanding those notions presumes also understanding the social and polical context from the time of elaboration.
The main purpose of legal debates about this subject is to identify the preferable path for adjudicating particular cases, between mechanical application of existing legal rules and judge's possibility to use personal values, beliefs or ideological theories. The dispute about the measure of constraint by the text of the law has the aim of achieve the way to better decisions.

Keywords: *Legal formalism, textualism, legal realism, political influences, legal decisions.*

1. Introduction

The object of the present writing is to study the theoretical debate, between Legal formalists and Legal realists and to identify the definitions given to these notions.

Argumentations used by the adherents of both theories turned to account in understanding why the same laws are interpreted different modes. Legal Formalism and Legal realism are notions which can be examined especially in common law jurisprudence and juridical literature. But the importance and the use of the legal debate can not be neglected by the jurists from any legal system.

Regarding present concerns in our doctrine, the purpose of the article is to try to find answers to question that the judges from Romanian Constitutional and Supreme Courts are actually making the law when they interpret legislation.

Examinated notions are privileged in doctrine of common law community. Over decades there were many important partisans of both theories. Their solid arguments have enriched specialized literature from almost two centuries until these days.

The controversy brought to light interesting points of view concerning interpretation of legislation, especially by acting judges. One of the main gains is that after all the debate it is easier to understand decisions, even try to explain different adjudicating process.

A thorough from year 2008 research in law journals from United States pointed out the increasing number of articles having terms of Legal formalism and Legal realism in their titles. Until 1968, no article was published in a law journal with "formalism" or "formalist" in the title[1]. The first article title to include one of these terms was written by Grant Gilmore in 1968. From 1968 through 1979, *nine* articles had one of these terms in the title. From 1980 through 1989, the total was *twenty-seven*; from 1990 through 1999, it was *sixty-eight*; and from 2000 through 2007, *forty-eight*.[15] A search for titles with "realism" or "realist" (subtracting other usages of these common terms) shows a similar trajectory, moving from a relatively low frequency from the 1930s through the 1950s (a low of *seven* and high of *sixteen*), going up a bit in the 1960s and 1970s (numbering in the low *twenties* each decade), then jumping to a much higher level in the 1980s (*sixty-five*), 1990s (*eighty-two*), and 2000 through 2007 (*sixty-four*). It has to be mentioned that this counts only titles with a reference to the formalists or the realists. Many more articles (in the thousands) and books mention or discuss them[2].

1.1. Legal Formalism versus Legal Realism

Even before medieval Europe, kings had to show benevolence, merci, and above all, just as a condition to obtain the populace submission. In that period, kings were situated in a precise hierarchy under the religious leader. The common characteristic of that period was that every one of these rulers was supposed to be instituted by God Himself.

With all the achievements of our times, until these days, the religion justifies the limitless power of authorities as it is written in Apostol's Paul Epistle to the Romans (13:1-7)

Submission to the Authorities

Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. [3] For rulers hold no terror for those who do right, but for those who do wrong. Do you

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[1] Christopher Peters, *Legal Formalism, Procedural Principles, and Judicial Constraint in American Adjudication*, Springer International Publishing Switzerland (2015): 26-28.

[2] Idem: 34.

want to be free from fear of the one in authority? Then do what is right and you will be commended. For the one in authority is God's servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God's servants, agents of wrath to bring punishment on the wrongdoer. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also as a matter of conscience.

This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing. Give to everyone what you owe them: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor[3].

In order to obtain people's obedience, the rulers, with their authority received directly from God, kings among other duties, had to provide protection and well-being to them and to punish the wrongdoers. Even the equal rights weren't yet gained, and the privileged positions in those societies was obviously, there was an expectation of equitably treatments.

Only in presence of a benevolent ruler, the people will maintain their fidelity and the public welfare could be obtained.

And the solution of the equilibrium was Justice the only value that can provide or establish a fair balance between ruler and populace.

One of the important companions of Louis IX - also known as Saint Louis - Jean de Joinville, a crusader himself, describes the typical instance of king's justice:

During the summer he often went and sat in the woods of Vincennes after Mass. He would lean against an oak tree, and have us all sit round him. All those who had matters to be dealt with came and talk to him, without hindrance from an usher or anyone else. He himself would ask: Is there anyone here who has a case to be settled? Those who had one would stand up and said to them: Everyone be quiet and you will be given judgement, one after the another[4].

This kind of providing public justice was similar to King's Solomon which is also an iconic figure of fair judgement. Another similarity of these two kings was that neither one of them resolved cases based on a precise law. These are examples of how justice can be done analyzing the circumstances, and, regarding the precise context, giving the just resolution, by the entitled authority.

In modern society a new kingdom was established and the ruler of it is the Law. But, this new establishment came with a dispute between general rule of the law and the discretion to make justice of those which are entitled to apply it in this societies.

In Politics, Aristotle states: Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement[5].

In any democracy, the general rule of law has undisputedly preference, being emission of the people's representatives.

While the legislature generalizes, the judges decide over individual cases, based on the existent law.

The main danger in judicial interpretation in judicial interpretation of any law – is that judges will mistake their own predilections for the law[6]. Originalism does not aggravate the principal weakness of the system, for it establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself[7].

It appears as a justified worry that unloosen discretion of judge could weaken the democratic legitimacy, making necessary a strict mechanism of applying the law.

Simply identifying the danger didn't make it easier to regard laws, reflecting judge's values and goals; often, laws appear rather to reflect compromises achieved by the different parties.

Studies of the legislative process stress the importance of interest groups, pursuing private goals rather than the public interest, in shaping legislation[8].

In this conditions it appeared a favorable ground for contradictious philosophies regarding adjudicating, and how is preferable for judges to decide cases.

One of them is a Formalist theory which considers that law is determinate in rationally, offering to the judge full and sufficient support for his decision.

Legal Formalism theory encourages the judge to adjudicate without prior appealing to moral or political ground using a mechanical deduction as it is found in Beccaria's model of the syllogism[9].

There are frequent situations when, in the law making process not all the legislators think at the same time, at the same things when, or a precise outcome is not prefered by all groups of interests. This kind of situations give birth to a serious question of authority transfer from legislator to judge.

Interpretation is a human enterprise which can not be carried out algorithmically by an expert system on a computer. But discretion can be hedged in by rules and misuse of these rules by a crafty or willful judge then can be exposed as an abuse of power. A more

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[3] *Holy Bible*, New International Version, by Biblica, accessed on April 8, 2017 at url: https://www.biblegateway.com/passage/?search=Romans%2013.

[4] Jeroen Duindam, *Dynasties: A Global History of Power, 1300-1800* Cambridge University Press (2016): 24.

[5] Ernest Barker, Sir - *The Politics of Aristotle, book III, ch xi, § 19* Oxford Clarendon Press, (1946):127.

[6] Antonin Scalia *The Rule of Law as a Law of Rules*, The University of Chicago Law Review, Volume 56 Number 4 Fall (1989): 863–864.

[7] Idem.

[8] Daniel Farber and Philip Frickey, *The Jurisprudence of Public Choice: Empiricism, Cynicism, and Formal Models in Public Law Theory,* forthcoming in Texas Law Review (1986): 15.

[9] Cesare Beccaria, Interpretation of the Law in Of Crimes and Punishments (1764):98.

latitudinarian approach to interpretation, by contrast makes it hard to see when the judge has succumbed[10].

Irremovability conjugated with the fact that usually that to be judge is a lifetime option, gives a higher probability for her or him to show faith to a law than the lawmaker who adopted by a political conviction.

Even so, the judicial unanimity is not a guarantee if the interpret a of the law is a Textualist.

Fidelity to the text of law rather than legislator's thought, intention, or expectetion from his creation is decisive for judge.

The beauty and the real meaning of a law consists in legislator's and community's eyes that interprets the text at the moment of adoption. But law are made to be applied by generations.

So, the real meaning of any law must be found at any time in order to exclude any speculative interpretations with their undesirable consequences. The desideratum is to consolidate society's trust in the rule of the law.

Nontextual interpretation makes statesmen of judges, promotes the shifting of political blame from the political organs of government to judiciary. The consequence is the politicizing of judges and a decline of faith in democratic institutions[11].

It is an utopia to think that Textualism will exclude any hesitation in adjucating process. It's purpose is to achieve the necessary predictability in this activity that will gain the necessary trust in the rule of law.

The lack of predictability leads to weakness of any society and the increasing number of laws conduct also to a difficult acces to laws.

It is undisputed true that even a bad law is preffered to a lack of law but this does not mean that we must accept a inflation of rules.

Liberation from text is attractive to judges as well. It increases their ability to do what they think is good.

The quest for nontextual decision-making sometimes become a kind of mystical divination. Preffering the spirit to the letter, we should endlessly create new meanings[12].

The fact that almost every judge uses the phrase "begining with the words of the law" it doesn't mean necessary that judge has textualist convictions. The difference between textualist and non-textualist is determined by grade of remaing fidel to the text.

Textualists are conducted by Justinian's saying A verbis legis non est recendum, meaning not to depart from the words of the law. There is no doubt that we have to understand the context which presumes the purpose of the law.

The difference between textualist interpretation and so-called purposive interpretation is not that the former never considers purpose. It almost always does. The subject matter on the document is the context that helps to give words meaning[13].

But the textualists insist on four limitations[14]:

- The purpose must be derived ftrom the text,not from extrinsic sources
- The purpose must be defined precisely, and not in a fashion that smuggles in the answer to the question before the decision-maker
- The purpose is to be described as concretely as possible, not abstractly.
- Except in the rare case of an obvious scrivener's error, purpose cannot be used to contradict text or to supplement it.

Legal formalists try to impose what the text is really transmiting, not to speculate what it may imply. They adopt the definition of law as a set of rules and principles. This theory puts the law above institutions of political or social nature.

In opposition to legal formalism is the legal realism, starting from the point of view that notes the frequent contradictions of the law and the frequent exceptions from it.

In contrast, "legal realism" is the concept that the law, as a malleable and pliable body of guidelines, should be enforced creatively and liberally in order that the law serves good public policy and social interests[15]. Legal realists often believe that judges should develop and update law incrementally because they, as the closest branch in touch with economic, social, and technological realities, should and can adapt the law accordingly to meet those needs. They often believe judges should have broad discretion and decide matters on an individual basis, because legislatures are infamous for being slow or innate to act to such pressures for change[16].

For the realists, the judge decides by feeling and not by judgment and uses deliberative faculties not only to justify that intuition to himself, but to make it pass muster. They sought to weaken, if not dissolve, the law-politics dichotomy, by showing that the act of judging

[10] Frank Easterbrook, Foreword to Antonin Scalia & Brian Garner, Reading Law, The Interpretation of Legal Texts, Library of Congress Cataloguing-in-Publication Data (2012):18.

[11] Idem: 20.

[12] Antonin Scalia & Brian Garner, Reading Law, The Interpretation of Legal Texts, Library of Congress Cataloguing-in-Publication Data (2012):22.

[13] Antonin Scalia & Brian Garner, Reading Law, The Interpretation of Legal Texts, Library of Congress Cataloguing-in-Publication Data (2012):34.

[14] Idem: 61.

[15] Ibidem:116.

[16] Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?* University of Chicago Law School Chicago (2010), accesed on April 8, 2017 at url: http://ssrn.com/abstract=1646110.

was not impersonal or mechanistic, but rather was necessarily infected by the judge's personal values[17].

Realists were certainly antiformalists. The doctrine of legal formalism holds that the law is an internally consistent and logical body of rules that is independent from the variable forms of its surrounding social institutions[18].

In doctrine it was said that formalist conceptualism served the end of limiting the scope of law in the sense that it limited occasions on which legal functionaries would assess conduct and therefore occasions on which persons would be called upon to justify their actions before such functionaries[19]. The realist and postrealist ambition, by contrast, is the expansion of these occasions, theory which it is inherent in the anti-formalist's treatment of law as an instrument for achieving social purposes. That treatment postulates a collective purpose or collectively determined end state as an objective, an organic beneficiary of this end-state and someone, presumably the legal functionary, as the formulator and implementor of the objective[20].

The Legal realism's suggestion for legal argumentation has the advantage of ambivalences as solution to the issue of whether judges make or find law. The judges who embrace this theory try to adjudicate without ignorance of the social coutcome and their decisions contain moral value choices.

The realists weigh the social context, case's circumstances, judge's ideologies, and professional consensus affirmingg that study of this elements should increase predictability of decisions[21].

3. Conclusions

The subject of whether judges make or find law will continue to concern legal practictioners and theorists. Judges exercise judgment (they make law) and the realist insight that judges are substantially constrained in that process by the social and institutional context in which they act (they find law)[22]. Confusion about how to understand the relation between these two insights is the most pronounced characteristic of the current state of legal theory[23].

The legal process theorists have moved away attention from essential legal principles to the process by which legal institutions operate. According to legal realist theory, specific rules cannot deduce from abstract legal principles.

Contrary to legal formalist theory, it is sustained that legal rules can be justified if they are created through a legitimate set of procedures by legitimate institutions keeping within their proper roles[24]. This approach to legal reasoning has three different facets: institutional competence, reasoned elaboration, and majoritarianism[25].

If we are trying to analyse in this context we can hope for clarification and enlightenment, but it cannot be found final answers. The analysis may clarify meanings and truths as they arise in different linguistic contexts or in different human situations, but there are no final answers because there is nothing fixed or final about the contexts or situations that we encounter in actual life[26].

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[18] Wendell Holmes Jr, *The Path of the Law,* in Harvard Law Review **(1897):** 457, 461.

[19] Paul N. Cox, *An Interpretation And (Partial) Defense Of Legal Formalism* inaugural lecture was delivered on March 7, 2002, at the Indiana University School of Law—Indianapolis, in Indiana Law Review (2002):57.

[20] Idem: 72.

[21] Karl Llevwellyn, *The Common Law Tradrion: Deciding Appeals* Indiana Law Review (1960)**:** 19-61, 121-32, 178-219.

[22] Idem.

[23] Ibidem.

[24] Joseph William Singer, *Legal Realism Now*, in California Law Review (1988): 505.

[25] Idem .

[26] Hans Meyerhoff, *From Socrates to Plato,* in *The Critical Spirit: Essays In Honor Of Herbert Marcuse*, K. Wolf & B. Moore eds. (1967): 187, 200.

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