

NICOLAE STEINHARDT AND LEON DUGUIT FACE TO FACE AFTER (ALMOST) A CENTURY

(reading Nicolae Steinhardt `Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit` [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work], Iași: Polirom Publishing House, 2008)

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Abstract: *This alignment of two names might seem at least strange or exaggerated: Leon Duguit and Nicolae Steinhardt. At the time of defending the thesis in 1936 by Nicolae Steinhardt, a young man of 24, Leon Duguit was no longer alive, but he had left an impressive scientific work. That is, it would be said that there is no place for comparison, the equality of arms being utopian. And yet the comparison is opportune, because it is about ideas to which history may or may not have given its answer.*

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In his doctoral thesis defended in 1936 in front of a commission composed of professors Mircea Djuvara (president), Paul Negulescu, Anibal Teodorescu, George Plastara and Aristide Basilescu (members)¹, Nicolae

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¹ F. Roatiș, edition note. *N. Steinhardt. Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit* [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work], Ronia Monastery, Polirom Publishing House, 2008, p.5.

Steinhardt analyzed several topics in the thesis, criticizing the work of Leon Duguit which was based on positivist postulates, such as the exaggeration of the exclusivist value of the fact, the ignorance and even contempt for abstractions and speculations, i.e. for concepts of metaphysics, persisting on the idea that observation and reasoning on the observed data are the only tools of investigation that man possesses in order to discover a small part of the truth that he is allowed to know².

Steinhardt believed that legal scholars must oppose positivism, for the reason that positivists require them, in Steinhardt's view, to abandon the basic ideas of reason and civilization, in order to start the whole discussion from scratch on every occasion. But, Steinhardt argued, a scientific discipline would not be possible if all the lines of thought that led to the formulation of its notions had to be recreated at every moment.

Steinhardt's credo was just the opposite, showing that the scientist must not abandon the basic ideas of civilization and reason, but impose the recognition of the necessity of the judgments that underlie the science of law, including the rational inductive method. In the work *Novum Organum* Fr. Bacon considered analysis, comparison, observation and experiment as the basis of the inductive method, and Steinhardt drew attention to the fact that Bacon urged us to give up preconceptions, not notions, thus appealing to the authority of the English author³, who did not serve the positivists, but precisely their opponents.

Expressing this conservative attitude, Nicolae Steinhardt referred to the famous dean of Nancy, Francois Geny, whom he called a modern jurist, who is on the side of tradition and does not admit that everything that was done in the past is radically false and that the whole old edifice must be destroyed⁴. Although Steinhardt often quoted Francois Geny, he did not entirely agree with the position of the dean of Nancy. He criticized the pragmatism of Geny who, in order to defend himself from Duguit, considered the fundamental notions of civil law to be procedures of legal art, symbolic constructions, technical instruments. Steinhardt sarcastically

² L. Duguit, *Traité de droit constitutionnel [Treaty of Constitutional Law]*, 3-ième ed., 1927, pp.107. Apud: Ș. Georgescu, *Filosofia dreptului. O istorie a ideilor din ultimii 2.500 de ani [Philosophy of law. A history of ideas from the last 2,500 years]*, Bucharest: BECK Publishing House, 2001, p. 151.

³ N. Steinhardt, *Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit, [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work]*, Ronia Monastery, Polirom Publishing House, 2008, pp. 208-209.

⁴ N. Steinhardt, *Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit, [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work]*, Ronia Monastery, Polirom Publishing House, 2008, p. 178.

mentioned that Geny defends himself with wooden weapons in which he transformed steel weapons (fundamentals), thus considering them more important than simple technical tools⁵.

Attributing a dubious and debatable character to fundamental legal notions, Steinhardt believed, is only an effect of the entire revision of ideas initiated by the social science of the 20th century - sociology. Law was considered by Duguit to be a phenomenon arising from social relations and, as an objectivist sociologist, he called for distancing from metaphysics.

Duguit campaigned for the exclusion from the field of legal research of individualistic legal constructions, entered into law by the French revolution, inheritor of the Roman tradition, adding that their time has passed, that it is impossible to fold the complex and varied relationships that were born at the beginning of the 20th century on the old frameworks between individuals and collectivity. In their place, Duguit put the ascertainment of facts, affirming as true only what can be ascertained through direct observation, wanting to cleanse legal science of metaphysical concepts⁶.

The theory of the sources of law had a distinct character at Duguit. We currently recognize that the material sources of law are represented by social facts that fix the idea of general norms in the social consciousness, which are then transformed into generally binding norms of law. The formal sources of law are the legal acts that establish a norm crystallized through a material source as effective positive law.

Duguit considered that the thesis about the abrogation by a custom of the norm in a law is incorrectly stated, because they are not legal norms and cannot abrogate one another. When it is certain that the custom has given rise to a legal norm, and the rule of the text of the law is in contradiction with it, then the one who applies the law must apply the customary norm.

Regarding the legal norm, Duguit, based on his idea of the need to limit the state, promoted the opinion that it should not be seen as the result of the activity of the state, but as a rule that is formed in the mass of individual consciences and the determination of the moment when in the mass of individual consciences the conviction arises that the respect of that rule is so essential to the maintenance of social solidarity that it calls for an organized sanction, that is when the rule of law appears. Duguit wrote that

⁵ N. Steinhardt, *Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit*, [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work], Ronia Monastery, Polirom Publishing House, 2008, p. 229.

⁶ L. Duguit, *Traité de droit constitutionnel* [Treaty of Constitutional Law], vol.1, Paris, Ancienne Librairie Fontemoing & G, Rue de Médecis, p. 116. Réédité, Hachette Livre BNF en 2018.

he does not judge whether that rule is good or conforms to a higher ideal, but simply states that it is a legal rule of a social group.

Thus, Duguit's conception on the legal norm was based on the opinion that the legislator cannot give a rule the force of a legal norm, therefore, a binding character, unless and only if that rule has already been formulated and imposed to the legislator. By the force of things, the legislator recognizes and sanctions it. But who makes that rule? Duguit's answer: the mass of individual consciences, which can be observed and is based on an objective finding: the organic solidarity of the members of the group. It is not the will of a higher authority that is the basis of the legal norm, which is a social norm, but the mass of individual consciences. Maurice Hauriou reproaches Duguit for idealizing society in the same way that others have idealized the state, and solidarity can also be built on the basis of fear, of admiration for a charismatic leader, etc.

The mass of individual consciences, considered Duguit, is formed under the influence of two factors: the sense of justice and sociality. A legal norm arises from a social necessity and a sense of fairness, as it exists in human consciences at a given time. The rule which is inconsistent with equity is not a legal rule.

What makes a norm to be social? The reaction of the group, if a member of it does that act or his attitude towards that act. Duguit's predecessor, Emile Durkheim, believed that the feelings that lead to a social norm must be strong ones, from those that have stirred the souls of a society, feelings deeply anchored in the soul of that group, but that must crystallize in clear forms, clarified by evolution in concrete forms, so that everyone knows precisely that when a certain act is done, the collective feeling is struck. Analysing these ideas of Durkheim, Mircea Djuvara found that the honest and objective analysis of Durkheim led to the conclusion that the determination of the moral fact and, therefore, of the legal fact, acquires, with the progress, more and more a rational nuance. That is why Djuvara, as a faithful disciple of Kant, shows that the legal phenomenon is not a purely affective or instinctive phenomenon, but is a phenomenon that, in the final analysis, is reduced to a rational analysis⁷. The rulers, believed Duguit, cannot legitimize themselves by the origin of their power, but by the purpose they pursue, which is exercised in accordance with social law. Law is a psychological creation of society, determined by material, intellectual, moral needs⁸.

⁷ M. Djuvara, *Teoria Generală a Dreptului. Drept rațional. Izvoare și drept pozitiv [General Theory of Law. Rational law. Sources and positiv law]*, Bucharest, ALL Publishing House, 1995, p. 370.

⁸ T. Boccon-Gibod, *Duguit et après? Droit, propriété et rapports sociaux [Duguit and after? Law, property and social relations]*, *Revue internationale de droit économique*

Denying the subjective right, Duguit affirmed that its nature is impossible to define, because if it represents a power, a quality of the human will, the intimate nature of this will should be known, which is impossible, because it is an element that escapes perception and the observation. The man is not the holder of a right as an individual, but is the debtor of obligations as a member of the social body. Instead of subjective law, Duguit put the term legal situation. Because Duguit did not recognize subjective rights, he believed that the term sovereignty should also be removed from the legal field, which is, in his opinion, a metaphysical concept and should be replaced by a precise, concrete term that emerges from the positive observation of the facts. Duguit considered metaphysical any notion that involves a statement that cannot be verified by observation. He considered that sovereignty as a competence of the competence, understood by the individualist theory as a will with its own character, is independent of other will, has rights, but has no obligations. The assumption that the nation, as the holder of sovereignty, is a person distinct from the sum of individuals, that it has a conscience, a collective will, distinct from the individual ones cannot be demonstrated, replied Duguit. If we adhere to this view, he concluded, then it follows that the will of the nation subordinates the individual will, thus the autonomy of the human person disappears.

Mircea Djuvara objected to this conception of Duguit, that sovereignty is not a de facto power, it is an organizing power of law, organizing law in society in the form of laws, administration, judicial power, all of which are the legal order. Law thus presents itself not only as a manifestation of force, but is primarily the realization of an ideal of justice, which, although not fully realized, commands our entire judgment. In this case, the right that sovereignty organizes is not something arbitrary, it must correspond to what the respective society understands as the ideal of justice⁹.

The foundation of any legal norm is in the social norm of solidarity, considered Duguit, who did not agree with the hypothesis of a superior will addressing the subordinate wills that he could constrain, because, he believed, this thesis cannot be verified by experience. The norm is imperative only because it emanates from the social norm. A legal rule is based on a social need and the sense of equity as it exists in the minds of people at a given time. A rule that is not in accordance with equity is never a legal rule, it may be a legislative rule, but not a legal rule. Once again,

[*International Journal of Economic Law*], no.3, t.XXVIII, 2014, pp.285-300. Available at: <https://www.cairn.info/revue-d-histoire-moderne-et-contemporaine-2005-3-page-88.html> (Accessed: May 09, 2023).

⁹ M. Djuvara, *Teoria Generală a Dreptului. Drept rațional. Izvoare și drept pozitiv* [*General Theory of Law. Rational law. Sources and positiv law*], Bucharest, ALL Publishing House, 1995, pp. 374-375.

invoking equity, Duguit appeared as an unwilling metaphysician. Steinhardt saw the inconsistency of Duguit's theory in the fact that he adhered to metaphysical concepts, without recognizing it and fighting against them. The inconsistency of Duguit's work was demonstrated by the fact that, on the one hand, he ignored and considered useless philosophical reflections, attacked the theory of natural law, but, on the other hand, appealed to the feelings of sociality, justice. In Duguit's opinion, sociality is a feeling that exists in a group of people (tribe, family, city, nation), in which the bond of solidarity that maintains social integration can be broken, if the violation of an economic-moral rule will not be sanctioned by law. The sense of justice is variable in ways and applications, but it is constant in its background, which is proportion and equality¹⁰. But these very feelings are at the heart of natural law theory. Even the disciples of Duguit, the adherents of his theory, admitted the ideas of justice and reason, Reglade considering that Duguit only describes the phenomena, but does not explain them, and G. Jeze presented Duguit as inspired by the idea of natural law in the most naive sense¹¹. Geny considered that Duguit brings us back to the classical theory of a natural right, resulting from the nature of things and as such imposing itself on man under the control of reason. Relying on this idea, Steinhardt aligned the opinion of Mircea Djuvara, who claimed that the doctrine that denies any legal rationalism does not put anything in its place to impose this solution, so that the systematic effort that imposes this solution cannot be seen¹².

Another idea criticized by Steinhardt was related to the concept of the state. Duguit affirmed the impossibility of establishing, according to the observation method, that the state is a person, therefore it cannot even be recognized a right of sovereignty, i.e. a right to command individuals. The state, in Duguit's view, can be defined using the distinction between governors and governed. Duguit was very concerned about the possibility of abuses by the rulers. The state thus is a tutelary court, over the will of individuals, therefore it cannot impose a law that it itself cannot break. From here Duguit saw the contradiction between individual freedom and sovereignty and believed in the absorption by the state of violence between individuals.

¹⁰ L. Duguit, *Traité de droit constitutionnel [Treaty of Constitutional Law]*, vol.1, Paris, Ancienne Librairie Fontemoing & G, Rue de Medicis, 1, p. 124, Réédité: Hachette Livre BNF en 2018.

¹¹ N. Steinhardt, *Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work]*, Ronia Monastery, Editura Polirom, 2008, p. 217.

¹² N. Steinhardt, *Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work]*, Ronia Monastery, Editura Polirom, 2008, p. 241.

Through his doctrine, Duguit insisted on limiting the power of the state, disagreeing with the label of anarchist that Hauriou had put on him, stating that his theory ensures obedience and submission to the legitimate decisions of the governors, so this is a fact, being unnecessary a claimed principle of authority, the principle being qualified by him as one devoid of meaning and content. Another label attributed to Duguit, that of a socialist of the department, was taken up by Steinhardt, who added that democracy is essentially opposed to socialism¹³.

Most of the Steinhardt`s texts, often marked by dramatic conditioning of history, are under the sign of a liberal-conservative thought and under that of bourgeois values; the author did not appreciate the slide of his countrymen towards socialism¹⁴. So, not only sovereignty, but also the right to integrity of the natural person, the right to free movement, the right to property, the right to work, the right to contract freely, the right to express one's thoughts¹⁵ were elements that Steinhardt defended as classical. Duguit was laying a new foundation for the right to property which, he believed, was not a sacred and inviolable right, as the French Revolution had proclaimed, but a social function. Because he did not recognize legal personality as a useful notion for law, Duguit also did not recognize the legal personality of the state, so that public property was conceived not on the basis of the legal personality of the state, but on the basis of the appropriation of goods.

¹³ N. Steinhardt, *Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work]*, Ronia Monastery, Editura Polirom, 2008, p. 289.

¹⁴ C. Jinga, Nicolae Steinhardt (1912-1989), *Mémoires; Histoire, Témoignage. Essais sur la littérature du Goulag Est-Européen [Briefs; History, Testimony. Essays on the Literature of the East European Gulag]*, Dir. Dumitru Tucan, Szeged, 2014, p. 105, 120. ISBN 978-963-315-188-4. Available at:

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¹⁵ N. Steinhardt, Liberalism [Liberalism], *Revista Fundațiilor Regale [Royal Foundations Magazine]*, 1937, nr.9, pp.594. Available at: <http://dspace.bcu-iasi.ro/bitstream/handle/123456789/46026/Steinhardt,%20N.,%20Liberalism,%20RFR,%20An.4,%20Nr.9,%201937,%20p.584-604.pdf?sequence=1> (Accessed: May 09, 2023).

Steinhardt mentioned how in an ironic note the author Louis Bourges urged Duguit to become a professor of civil service, if he considers that there are no rights, but only social functions, but not to teach law, because, it is necessary to say it, he does not have the right¹⁶.

In interwar Romania, this conception of the public function of property was accepted by the Constitution of 1923 and, as a result, the nationalization of the subsoil, of some armaments enterprises, metallurgical plants took place. As a doctrinal argument, the thesis of the French authors Aubry and Rau was invoked: Everything that cannot be legitimized by concrete efforts, naturally falls into the public heritage¹⁷.

On the issue of female suffrage, Leon Duguit and Nicolae Steinhardt were on divergent positions, Duguit considering it necessary to grant the right to vote to women, while Nicolae Steinhardt considered the opposite. Generally, Steinhardt`s conceptions reveal `hostility [...] to the universal vote that could lead to despotism of masses`¹⁸. Duguit believed that the political incapacity of women is temporary and the evolution of societies will lead to the ascent of women in political life, in the future, the humiliation of women, including through the norms of the Napoleonic Code, will prove to be unjust. It should be noted that women in France could vote only for the election of local bodies (they were granted this right in 1915), while French women obtained the right to vote for the legislative body only in 1944, i.e. at a later date than Steinhardt's criticism of Duguit's work.

The situation was somewhat similar in Romania, where at the time of Steinhardt's criticism of Duguit's work, women could be involved in political life only at the local level, but even in this case with difficulties, because a considerable part of public opinion displayed a shrill tone towards women who wanted to get involved in political life. Women's right to vote was not mandatory, and registration in the electoral race could only be done if the candidates belonged to a political party. However, in the elections of 1930 some women participated, and 2 of them obtained the post of mayor¹⁹.

¹⁶ N. Steinhardt, *Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work]*, Ronia Monastery, Editura Polirom, 2008, pp.217.

¹⁷ M. Duțu, *Constituția din 1923 – punct culminant al constituționalismului românesc [The Constitution of 1923 – the culminating point of Romanian constitutionalism]*. Available at: <https://www.juridice.ro/essentials/6193/constitutia-din-1923-un-punct-culminant-al-constituționalismului-romanesc> (Accessed: May 09, 2023)

¹⁸ M. Precupanu, Political Thinkers Present in Nicolae Steinhardt`s Journalism, *Analele Universității Dunărea de Jos Galați din Galați. Seria Istorie [Annals of Dunarea de Jos University of Galati. History Series]*, 2021, no.20, pp.203. Available at: <https://www.ceeol.com/search/article-detail?id=1044928> (Accessed: May 09, 2023).

¹⁹ Ș. Mihăilescu, *Din istoria feminismului românesc. Studiu și antologie de texte, (1929-1948)*. [From the history of Romanian feminism. Study and anthology of texts, (1929-1948)], Iasi: Polirom, 2006.

This information was of public notoriety, especially for the cultured public, but the press and in wider public opinion was not very favourable to women, showing that they lacked the necessary training for political exercise, and the level of education was unsatisfactory. It should be noted that this was not true for all women, so for example in the suffrage of 1930 participated Sarmiza Bilcescu-Almănișteanu, who had obtained her bachelor in law and PhD in law in Paris, being the first female PhD in law, just before the French Jeanne Chauvin; then, after enrolling in the Ilfov bar (Bucharest) she became the first female lawyer in Europe. But the majority Romanian mentality of that time meant that after enrolling in the bar, Sarmiza Bilcescu was unable to practice law, because clients avoided her, preferring male lawyers²⁰.

Another example of remarkable historical success refers to Ella Negruzzi, the first female pleading lawyer in Romania. She has studied at The Faculty of Law in Iasi and has become a member of the Bucharest Bar Association in 1919, after being refused by the Iasi Bar Association, in 1914. In the Parliamentary elections 1930s she ran on the lists of National Peasant Party. Ella Negruzzi had to fight against an outdated way of thinking, in which the woman had no right of professional affirmation in public space. (Friedmann-Nicolescu Iosif. *Faces and Portraits from the World of Romanian Law*.²¹

Nicolae Steinhardt was probably aware of these realities, being himself appreciated a difficult subject to be approached, insofar as he discusses uncomfortable topics, including the model of the interwar intellectual²². Although, he answers through Adhemar Esmein, that women's political suffrage is neither in accordance with the principles nor useful to society, and the division of labour between men and women shows that public life belongs to the man, and the care of the home to the woman. But Esmein had died before the start of the First World War and had not seen the changes that had taken place in social life, when women had taken the place of men who had gone to the front and proved themselves capable in those fields

²⁰ *Povestea Sarmizei Bilcescu – prima femeie avocat din Europa [The story of Sarmiza Bilcescu - the first female lawyer in Europe]*. Available at: <https://historia.ro/sectiune/portret/povestea-sarmizei-bilcescu-prima-femeie-avocat-578891.html> (Accessed: May 09, 2023).

²¹ I. Friedmann-Nicolescu, *Chipuri și portrete din lumea avocaturii românești [Faces and portraits from the world of Romanian law]*, *Revista Română de Istoria Dreptului [Romanian Journal of the History of Law]*, 2021, vol.1, no.1, pp.32-33. Available at: <https://www.rrid.ro/index.php/rrid/article/view/6> (Accessed: May 09, 2023).

²² R.P. Mureșan, *Spiritualitate și cultură în scrierile Părintelui Nicolae Steinhardt (1912-1989) [Spirituality and culture in the writings of Father Nicolae Steinhardt (1912-1989)]*. *Teologie și Educație la Dunărea de Jos [Theology and Education at Dunarea de Jos]*, 2020, no.18, pp.265. Available at: <https://www.ceeol.com/search/article-detail?id=918899> (Accessed: May 09, 2023).

previously reserved only for men. Steinhardt supported those authors who considered political feminism as a phenomenon that shakes the family. Women's suffrage, Steinhardt stressed, would unnecessarily complicate political life, facilitate unfortunate legislative activity, and undermine constitutional law²³.

On this subject, history proved Leon Duguit right, because, from a legislative point of view, in France, women obtained the right to vote in 1944, and in Romania - in 1938.

Conclusions

History gave its answers to the confrontation between legal classicism (Steinhardt) and the ideas of the new sociological school, whose legal representative was Leon Duguit. The opening of legal science to reality was the focus of the great jurists of the last century, whose works were analyzed by Steinhardt, a larger place being given to François Geny and Leon Duguit. And if in the case of Geny Steinhardt's sense of confidence in the ideas of the Dean of Nancy was dominant, the same cannot be said of the attitude towards Duguit's work, which was vehemently criticized. It is possible that in Duguit's case the labeling of him as the `socialist from the chair` played a role, a label with which Duguit himself did not agree. The leaders of the interwar Romanian intelligentsia (where we include Steinhardt as well) had a repulsion towards socialism for various reasons, including the Bolshevik practice in the Soviet Union, with which Romania had a border on the Dniester, so that Steinhardt defended the classical principles of constitutional law and opposed legal positivism.

After almost a century, history reconciled Duguit and Steinhardt, giving both of them partial justice, because legal positivism, including pseudo-positivism (to which Duguit's theory is attributed) is still attacked without disappearing, women have the right to vote both in France and in Romania as well, and the classical principles have been enriched, have been and continues to be claimed by numerous authors, especially after the Second World War.

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²³ N. Steinhardt, *Principiile clasice și noile tendințe ale dreptului constituțional. Critica operei lui Leon Duguit, [Classical principles and new trends of constitutional law. Criticism of Leon Duguit's work]*, Ronia Monastery, Polirom Publishing House, 2008, p. 184.

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