PRIVATE INTERNATIONAL LAW IN THE REFLECTION OF GERMAN POSITIVISM

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Abstract. The paper examines legal positivism by Gustav Radbruch, Georg Jellinek and Hans Kelsen. Gustav Radbruch and Georg Jellinek's legal positivism was based on social reality. Hans Kelsen, contrary to that, considered norms an inceptive of the law and "purified" it from any social "supplement". Radbruch's idea of law encompasses justice, expediency and legal certainty. In the frameworks of these three opposing notions, Gerhard Kegel's theory of interest is discussed along with its collusive and legal characteristics. Georg Jellinek's theory of the Normative Force of the Factual and private international law from the perspective of Hans Kelsen's normativism is also discussed in the paper. Both aspects of positive law are studied in the scope of modern social and political development. The author argues that modern science and practice mostly rely on social methods of understanding law, although in specific instances, the separate provisions of normativism are also interesting and original.

Keywords: positive law, the idea of justice, private international law

1. Preface

The modern independent world is founded on liberal and democratic values. To implement those values, a legal state is required which should have the function of a normative guardian of the political process.

In a legal state each field of law has its own meaning and its purpose.

There are classic fields of law and "exotic" spheres of law. Private international law belongs to the "exotic" sphere of law but it is not completely removed from the primary provisions of the classic fields. Private international law entails the legal means of social conflict resolution of a private nature generated in the international arena; and attempts at legal peacekeeping by applying foreign or local law in cases when the factual circumstances of a private legal case relate to the law of a foreign country.

Private international law, in a wide sense, encompasses international procedural law as well. International procedural law includes the international competence of courts, the recognition and execution of the decisions of foreign countries, and international legal assistance.

Private international law, in a narrow sense, is collusive law, which is focused only on matters of the application of law.

The effect of the doctrine of positive law on its key provisions would be interesting based on the characteristics of private international law.

2. Gerhard Kegel's theory of interest in the framework of Gustav Radbruch's positivism

The 19th-20th centuries were characterised by an upsurge of social movements. In this respect, the Europe of the post-World-War-II period is noteworthy for being a haven for crafting left-wing liberal ideas. The defeat of national socialism in Europe and the fear of primitive leftism, communist ideology and expansion, resulted in the establishment of social ideology which was based on evolutionary, rather than revolutionary, ways of development.

The above events were reflected in the science of law and legal practice. Special emphasis should be made on the condition of science of law, which was essentially based on social positivism and the theory of interest, although there were very original but inconsistently perceived developments of decisionism (Carl Schmitt) and normative positivism (Hans Kelsen). If we focus on Germany, one of the most prominent representatives of neo-Kantian positivism, Gustav Radbruch, is noteworthy in this respect. He explained legal provisions by social reality. His positivism was not absolute positivism (in particular, from 1933). Absolute positivism was characteristic of the doctrine of positive law by Hans Kelsen which was based on normativism. Unlike Hans Kelsen, Gustav Radbruch's positivism was saturated in elements of natural law.

Law as an instrument for conflict resolution takes us back to the idea of law by Gustav Radbruch. The idea of law by Radbruch is based on three principles: justice, expediency and legal certainty. Although these concepts are antonymous, they condition one another.

Justice is understood by Radbruch as the equality of equals and inequality of unequals. Besides, for Radbruch, justice is superior to law. Justice is determined by expediency.

Expediency implies social requirements and interests. It is reflected in values, encompasses political decisions, is comparative and its effect is connected to justice.

Legal certainty implies a positive legal order, the opportunity to anticipate, and peace, which should not oppose superior law[1].

These antonymous notions appear differently in private international law.

The concept of German professor Gerhard Kegel is noteworthy in this respect. He explains the justice of private law by the theory of interest. In particular, Kegel argued that justice in terms of private international law should be differentiated from justice in terms of substantive private law. Justice in terms of substantive law is based on the content of law, while justice in terms of private international law is based on the application of law without consideration of the content of substantive norms to be applied. The purpose of private international law ends where it indicates the law to be applied[2].

On the basis of Kegel's provisions, we may conclude that justice in terms of substantial law is based on personal equality and justice in terms of private international law implies the equality of the legal order.

Gerhard Kegel distinguished the interests of parties, the interests of legal relations and the interests of order.

According to Kegel, the interests of parties primarily encompasses the principle of close connection which entails, in the case of collision, the application of the law of the country to which the party to legal relations is socially particularly connected.

The interests of legal relations prioritise the law of the country which would facilitate the overcoming of a collision.

According to Kegel, the interests of order encompass legal certainty which implies the advantage of the positive legal order of the country whose application thereof would enable the anticipation of legal consequences. In addition, in order to overcome the collision of norms, he recognised the primacy of the legal order of the country the contents of whose norms are easier to determine.

In private international law, legal certainty is achieved through the harmonisation of law. Conflict resolution can be carried out in the framework of one legal order (internal harmonisation) or other legal orders (external or international harmonisation).

Internal harmonisation includes cases of controversy caused either by the abundance of norms or the absence of norms. In such cases, the factual circumstances of the case are divided into several parts which can be subject to the distinct legal orders of different countries.

International or external harmonisation includes cases of controversy of norms which can

1. *G. Radbruch,* Rechtsphilosophie, Achte Auflage, K. f. Koehler Verlag, Stuttgart, 1973, S. 164-169.
2. *G. Kegel,* Internationales Privatrecht, ein Studienbuch, C.H. Beck'sche Verlagsbuchhandlung, München, 1987, S. 80-96.

be regulated by unified law. Unified law encompasses international agreements, multilateral conventions, and the similar supra-national norms of union in the EU.

Expediency, one of the components of the idea of law by Radbruch, is a system of values. In private international law, expediency entails the application of legal order which is based on universally recognised values, in particular, fundamental human rights and freedoms.

Therefore, the idea of private international law, in particular, entails the application of the private law of the country among equal legal orders (justice), which principally aims at observing universally recognised values (expediency) providing private international legal peace by means of internal or international i.e. external harmonisation (legal certainty) of law.

3. Hans Kelsen's Pure Theory of Law

In the history of law, Hans Kelsen is one of the most ingenious thinkers.

According to Hans Kelsen's theory of law, the "inceptive" of everything is the basic norm (Grundnorm). The basic norm is the hypothetical norm, fictitious authority, which empowers the system of norms.

The basic norm is subjective perception (per Kant) of objectively existent disorderly facts which are reflected in mind, are regulated, and exist in the form of general internal obligation. First and foremost, it is an internal order. The basic norm is the logical and transcendent premise of legal order, the "inceptive". The basic norm is not the "issued, established" norm but the universal presupposed norm (Grundnorm ist "…keine gesetzte, sondern vorausgesetzte Norm")[3]. It is an abstract condition of unified legal order, not a positive act focused on performance. It is the norm of norms. The basic norm creates positive law. Positive law is derived from the constitution. There is a chain of vertical hierarchy underneath it – the legal order. In this hierarchy each norm generates and determines another norm[4].

Kelsen's positivism was based on normativism. Kelsen "purified" the law from everything factual and psychological, and from interests. For him, the law was just a legal norm and the "coercive order". Coercion should be efficient. Efficient coercion was "factual validity" for Kelsen. A norm is not generated from the factual, but it needs it. Essence is not law. Law is something that is conditioned by something that must be. Therefore, law is not something that is (sein) but something that hypothetically should (sollen) be. "Should" implies obligation. That which must be covers the validity of law, in particular, that of the norm.

3. *H. Kelsen,* Reine Rechtslehre, Verlag Österreich, Wien, 2000, S. 222.
4. *H. Kelsen,* Reine Rechtslehre, S.196-210.

According to Kelsen, the state is viewed in a framework of systems of norms. For him, the doctrine of state is derived from the doctrine of law.

Kelsen saw international law as a crude field as long as it did not have mechanisms of coercive execution. Quoting the prominent German philosopher Wilhelm Friedrich Hegel, who referred to international law as "foreign state law", he does not recognise monistic attitudes towards international law prioritising the national law. Kelsen recognises monistic theory but prioritises international law[5].

The modern world turned into a forge of controversial ideas. On the one hand, there are liberal attitudes prioritising respect for human rights, but on the other hand, it is impossible to observe these rights without strong democratic state institutions.

Democracy and liberalism differ. Democracy is the domination of the majority. Liberalism provides protection for individual freedoms, including the rights of minorities.

Despite legal positivism, Hans Kelsen was a defender of liberal ideas. He acknowledged individual freedoms and considered parliamentary representation a nonentity. Kelsen thought that the will of individuals and the will of elected representative bodies would separate over time. Therefore, within the state of the democratic process, only the will of representative bodies exists and it cannot be corrected until the next election. Even here Kelsen is a maximalist. He was a believer in direct democracy[6].

In the case of international legal torts, Kelsen considered unjustifiable the imposition of responsive sanctions on a violating state. A sanction, or rather a reaction, in the case of an international tort, i.e. reprisal – represalie (financial, economic or other types of administrative coercive measures towards a violating state), is unjustifiable as long as responsibility cannot be collective. In the case of imposing such sanctions, if the decisions are unfair, the persons and institutions that made those decisions experience less damage. The common people, having no connection with these decisions, are more susceptible to damage. As long as responsibility is individual, Kelsen considers such reaction to the untruthfulness of states wrongful[7].

Kelsen's liberalism is not an economic liberalism. He supports the idea of political liberalism. Therefore, the views of Friedrich von Hayek were unacceptable to him.

Social events are under the continuous process of development in the world. Changes in social events result in a partially or fully novel understanding of legal issues.

5. *H. Kelsen,* Reine Rechtslehre, S. 321-336.
6. *H. Kelsen,* Reine Rechtslehre, S. 301-304.
   H. Kelsen, Vom Wesen und Wert der Demokratie, Verlag C.B. Mohr (Paul Siebeck), Tübingen, 1920, S. 3-38.
7. *H. Kelsen,* Reine Rechtslehre, S. 323-328.

Following political changes, the works of Gustav Radbruch serve as a good example of the correction of legal views. Radbruch's positivism would remain a pure positivism, if not for the unfair state of national and social Germany. Hans Kelsen was in distress over the Germany of that time, however this did not have a substantial impact on his works. The reason behind this might be the fact that Radbruch's social attitude towards law had more of a focus on changes than Kelsen's normativism.

4. Private international law

in the frameworks of Hans Kelsen's positivism

As stated above, private international law entails the application of the law of one country in the territory of another. This has proved to be much easier in today's liberal world than it used to be. However, such cases are not an everyday occurrence. The issue concerns state sovereignty in general. The independent world does not recognise the absolute sovereignty of states. Even in the frameworks of comparative sovereignty, it requires fundamental substantiation to decide whether to apply the norms of a foreign country or not. This issue depends on the factual circumstances of the case and the relevant legislation.

In accordance with formal data, the legal system of the state which should enable the application of the law of a foreign country might refuse to fulfil this function on the basis of public order (Ordre Public). In such cases, the motives for refusal require fundamental substantiation in order that refusal on such a basis does not become a tendency and a formal cause for not applying foreign law.

From the very beginning, private international law was greatly influenced by the factual principles of the market economy. Under the conditions of globalisation, it turned into a means of regulating relationships between big and small markets. Recently, more significance has been given to regulating legal issues by means of factual rules established in the market. Historical "Lex mercatoria" has built up steam over time. Person and territory have become the determinants, not the state. Normative elements of law become barriers to the effective relationship between global markets. The citizenship of a person and the legal address of an undertaking are replaced by the usual whereabouts of a person and the factual (efficient) location of an undertaking. The idea of state sovereignty is replaced by personal and territorial factual rules. Authoritative international and national courts of the highest instance have actually transformed into the bodies creating law. Vertical and subordinate systems of governance have been reviewed in favour of horizontal and coordinative system. Political liberalism has been attired in powerful elements of economic liberalism. In this background, the doctrine of Georg Jellinek has been revived in academic legal discourse. This revival was required by the social development of the modern world.

What is the essence of Georg Jellinek's doctrine? Jellinek was Kelsen's direct opposite. Jellinek argued that facts can obtain normative force, which he called the Normative Force of the Factual (Normative Kraft des Faktischen).

On the basis of long-term attempts, factual relations develop into habits which replace existing legal relations over time. This means that factual relations acquire normative force by means of universal social recognition. The specific generates the general, not the other way around.

Jellinek's thinking was governed by social relations in the state and international law. He was a positivist as well, but his positivism was based on interests, psychologism and habits which, according to Jellinek, form the law – the factual creates the normative.

Under conditions of war or revolution, existing factual circumstances destroy the positive law in force and create a new one. Jellinek refers to this process as the "positivisation of natural law"[8].

Jellinek generated the law from those exact "substances" that Kelsen purified it from.

Hans Kelsen's theory of norms implies a vertical chain of norms where the norm of higher rank empowers the norm of lower rank. Kelsen was mainly governed by the principles of public law and the subordination of norms. However, private international relations are horizontal and of a coordinative nature.

Private international law, by nature, is not a field of typical law. It encompasses rules for the application of private law, public law, international law and foreign law. This field, similar to international law, is coordinative law.

As mentioned above, Kelsen's legal order is derived from the Constitution. Other norms should be in compliance with it. As for the validity (geltung) of a norm, it should be figured from the formal and legal inceptive of a norm. Kelsen recognises the contents (value) of a norm as well. The contents of a norm provide for the effectiveness (wirkung) of the norm. The contents of a norm are directly connected to justice and legal security. Kelsen considered it to be beyond the frameworks of that which must be and included it in the category of reality, the essence. Therefore, values are the precondition for the effectiveness of a foreign norm rather than its validity. Kelsen argues that the validity and effectiveness of a norm should be distinguished from each other, as long as validity is the category of that which must be and effectiveness is that of essence. In addition, Kelsen discusses two "extremes" in positivism, and does not agree with either of them. The first states that the validity of a norm and the effectiveness of a norm should be completely separated from each other. They are completely unrelated. The second aspect states that the validity of a norm is identical to

8. *G. Jellinek,* Das Recht des modernen Staates, Erste Band, Allgemeine Staatslehre, Berlin von O. Härtig, 1905, S. 329-338.

the effectiveness of a norm. Kelsen disagrees with both and attempts to find an "intermediate path". The effectiveness of a norm is a condition for its validity and not its basis. Effectiveness implies the executive function of a norm. If a norm is not complied with on a permanent basis, its effectiveness is affected negatively as well. Kelsen distinguishes the effectiveness and validity of a norm but he does not separate them completely[9].

Therefore, it can be concluded that the effectiveness of a legal norm of a foreign country is a precondition for its validity. This gives us a basis from which to argue that, despite formalist attitudes, Kelsen, at least indirectly, recognised values. However, for him these values were not connected to the normative inceptive.

Kelsen puts international law within the frameworks of the common legal order. According to him, relations between international law and national law are produced through delegation.

While discussing monistic theory, Kelsen states that there are two positions towards the relationship between international law and national law. The first implies the creation of international law by way of delegation from the legal order of separate countries. The second position states that international law is created by way of its delegation toward the legal order of separate states. The first implies the primacy of the national law of a state within the international legal order, and the second implies the dominance of the international legal order[10].

We argue that the notion of delegation, with the primacy of international law, recognised by Kelsen, partially applies to cases where private international law is concerned. In particular, when the issue concerns international agreements or conventions between states, or legal acts of inter-state associations of a supra-national level which are part of international private law.

Kelsen's doctrine regarding national collusive law is related to a tiered, hierarchical system of legal order which is headed by the Constitution. Applying the law of a foreign country falls within the frameworks of the constitutional order of the applying country. This implies that, during the collusive legal reference, the law of a foreign country is formally valid, but its effectiveness depends on the legal order of the applying country.

5. Summary

The scientific views of Gustav Radbruch, Hans Kelsen, Georg Jellinek, Gerhard Kegel and others are not removed from reality. Proceeding from the fact that the science of law is a normative science, a scientific viewpoint is something that is in the background of practical matters and gives meaning to legal studies. Particular emphasis should be given to the

9. *H. Kelsen,* Reine Rechtslehre, S. 215-221.
10. *H. Kelsen,* Reine Rechtslehre, S. 332-333.

importance of a scientific viewpoint for the courts of the highest instance as long as they not only apply law but create it as well.

The law operating in the modern industrial world reflects the priorities of the development of society. Despite the fact that Hans Kelsen is very ingenious and popular even today, his normativism has been criticized. Today's law stands on social origins rather than on the dogma of normativism.

This paper is an attempt to describe the primary directions of German positivism and to connect private international law to it, as applicable. This attempt has led to the following conclusions:

– Radbruch's formula. Despite the differences between Radbruch's idea of law and Kelsen's doctrine, there are almost invisible similarities between them. They take different paths but those paths lead to the same result. The visible differences are universally understandable. Radbruch's doctrine of positive law is not the doctrine of absolute positive law. It is dependent on social regularities and keeps an eye on the provisions of natural law as well. These provisions were reflected in Radbruch's formula, which states the following: When positive law in the form of legal certainty contradicts fairness and this contradiction becomes "abominable", positive law loses its power and legitimacy. In such cases, fairness is prioritised over legal certainty. Legal injustice cannot be justice. In such cases, positive law is replaced by above-the-law justice.

– Kelsen's Pure Theory of Law. A legal norm for Hans Kelsen was an absolute category, something that must be, which has legal power within. Kelsen did not reject values, the contents of a norm or fairness. He just saw them within the scope of social relations and connected the effectiveness of a norm to it. Kelsen also said that fairness is not an absolute but a comparative category. Kelsen never raised the question of contradiction between that which must be and the essence. He generally considered the effectiveness of law to be a condition for the validity of law.

– Comparison of Kelsen and Radbruch. Radbruch's formula and Kelsen's Pure Theory of Law gave a good view on the light and shade of positivism. We consider that both Kelsen and Radbruch take different paths but really strive to achieve one result. Kelsen never discussed directly the conflict between fairness and positive law. However, we may assume that the possible differences between a norm and value, when applying a norm, may be overcome and resolved by the assessment of its effectiveness. According to Radbruch's formula, positive law and fairness may overlap somewhere. Unlike him, Kelsen considered these concepts in parallel to each other, without any overlap. Radbrukh's and Kelsen's doctrines resemble a lot the parallel postulate of Euclidean and non-Euclidean geometry. Both are very original, depending on the angle you choose to look at them. Kelsen's positivism is often criticised for the reason that the threat of manipulation by means of its opinions is high. This critique

has its logic of course but, on the other hand, anything can be manipulated. If one desires it so, the most humane idea may serve as a basis for injustice.

– Private international law in the reflection of positive law. If we put the provisions of private international law within the framework of Gustav Radbruch's idea of law, we are left with an idea of private international law which is specific and different from Radbruch's idea of law. The idea of private international law implies the equality of legal order (justice) by means of the protection of values (expediency) and the harmonisation of law (legal certainty).

According to Hans Kelsen's doctrine, if we analyse private international law, the formal validity of the law to be applied by a foreign country which is determined by national collusive law cannot be doubted, and in its application, its effectiveness depends on the legal order of the country applying the law.

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