eudaimonia

Revija za pravnu, političku i socijalnu teoriju i filozofiju

Br. 4 • 2020.

Izdavač

IVR Srbija

Srpsko udruženje za pravnu i socijalnu filozofiju

DISTINGUISHING IN STATUTORY LAW. THE STATUTE AS WRITTEN CUSTOM UNDER MAURICE HAURIOU'S LEGAL INSTITUTIONALISM

Cezary Węgliński

Strane: 75–90

UDK 34:321.01

Cezary Węgliński*

DISTINGUISHING IN STATUTORY LAW. THE STATUTE AS WRITTEN CUSTOM UNDER MAURICE HAURIOU'S LEGAL INSTITUTIONALISM

The common definition of the statutory law, especially in continental law culture, understands a set of regulations supposed to be applicable in all possible cases in the future. Nevertheless, already at the beginning of the twentieth century, this concept was criticized as too idealistic by absolutizing the statute as a unique and exhaustive source of law. Maurice Hauriou (1856–1929), a French academic of public and constitutional law at the University of Toulouse, presented at that time the concept of the statutory law as written custom, therefore a source of law that is supposed to be actualized in particular cases with judge's possibility to distinguish. The modern concept of the statutory law, inherited from the Enlightenment, is proven to be even more mythical. The paper focuses on the Hauriou's concept of the statute as a written custom which can be used as a useful tool to describe the reality of contemporary legal practice.

Keywords: *institutional theory of law, judiciary, Maurice Hauriou, statutory law, written law*

1. INTRODUCTION

The common definition of the statue, forged on the grounds of legal positivism and normativism, understands it as an enactment of legislative authority establishing rules of general and abstract character. It is therefore conceived as a set of regulations that are to be applicable in all possible cases that will occur in the future. Such a concept of legal rules presumes an absolute and reasonable character of the legislator as someone competent to predict and determine all possible cases and their solutions *pro futuro.* This idea constitutes the very theoretical base of the continental law systems, whose core principles are strongly

* Author is a student at University of Warsaw, Department for Legal Philosophy and Theory, *cezary.weglinski@outlook.com*

This paper has been written as a result of the research project funded by the Polish Ministry of Science and Higher Education within the framework of the "Diamond Grant" programme (project no. 0045/DIA/2018/47).

influenced by normative approaches in legal science. In these systems, the role of the judiciary is then strongly limited to the strict application of statutory rules. In this regard, they are opposed to the common law systems defined, on the contrary, in terms of *judge-made law.* However, some of those fundamental presuppositions made on the grounds of the normativism thesis cannot be sustained given many contemporary observations about the complexity of legal decision-making processes, its political character and the key role of the judiciary in it. This remark is of course nothing new nowadays, when the juriscentism has been already criticized and proven wrong by many social theoreticians such as Michel Foucault, Jacques Derrida, Jean-François Lyotard, Pierre Bourdieu, continuing the criticism of the cult of reason, started by Adorno and Horkheimer in their *Dialectic of Enlightenment.* Nevertheless, in legal practice the observation that, in short, many of the common presuppositions about the law are fictive and are over-simplifying the nature of legal phenomena, has not yet been fully put to use.

Quite surprisingly, the normative legal theory and the legal positivism as well, whose forerunners were fostering the above-mentioned concept of law, were strongly criticized from the very beginning of the twentieth century – just after the point when socio-legal science in the strict sense got established. It is during this period that Maurice Hauriou, a famous French professor and theoretician of public law, worked. As a great opponent of normativism, he established his own 'institutional' theory of law taking into consideration, as other socio-legal studies then, the historical and actual social contexts behind all legal processes. His work and thought, even after a century, can explain the history and the evolution of the modern concept of law and the importance of the legislative work that results from it.

Hauriou (1856–1929) was a French academic of public and constitutional law at the University of Toulouse. The beginning of his career was marked by a strong interest in the history of law and sociology. Since 1888, he dedicated himself to the study of public law, in particular of administrative law. It is in this domain that he received the greatest recognition in the French legal science. His handbook on administrative law, published for the first time in 1892, *Précis de droit administratif,* remains one of the most important works on the subject and is still present in the academic discourse of the French legal science (Patrick Arabeyre, Jean-Louis Halpérin, Jacque Krynen, 2007, 516–519). Apart from that, Hauriou is also known for his theoretical

works concerning constitutional and public law theory. Even if they have been kind of forgotten throughout the past century, they can still reveal a lot on the development of the legal theory in the twentieth century as he inspired such theoreticians as Santi Romano (1875–1947), one of the first writers about the pluralism of legal orders, Neil MacCormick (1941–2009) and Ota Weinberger (1919–2009), well known for their neo-institutional theory of law, or philosophers such as Gilles Deleuze (1925–1995) and Felix Guattari (1930–1992) who developed the idea of materialistic analysis of law (Eric Millard, 1995, 405; Filippo Domenicali, 2016). Hauriou is also reputed to have significantly influenced Carl Schmitt, in particular his concept of law as a concrete order, even if this hypothesis has been proven to be of a rather mythical character (Théophile. von Büren, 2015, 195).

The most important idea of Hauriou's legal theory is his theory of the institution. It is crucial to present briefly this concept, to make understandable the ongoing ideas on the concept of statutory law that he presented. According to the last version of the definition from 1925, 'the institution the idea of a work or an enterprise, which is realized and continues to be realized in the social environment; for this idea, a certain authority is organized which provides its organs; on the other hand, among the following members of the social group interested in the realization of this idea the manifestations of the community are held, led by the authorities and regulated by the procedures' (Hauriou, 1925, 96). Under this theory, law is perceived through the prism of social bodies acting as a part of a more general social order. These bodies – the institutions – are supposed to shape what is finally called the law, which is secondary to the institutions themselves that constitute its origin (Hauriou, 1906, 135–136).

Hauriou's theory is strongly inspired by sociological and historical studies and is one of the examples of the experiment to open up jurisprudence to other disciplines of science that marked the period of his work. According to him, the study of law, as in those sciences, was supposed to be based on concrete facts, events and phenomena, while trying to avoid any kind of abstract notions and reasoning (Mathieu Doat, 2015, 419–420). As a result, Hauriou put forward the idea of thinking about the law as an effect of a very concrete, material process of auto constitution of the society and, in particular, as the proceedings of socially authorized bodies that discuss and elaborate the law in the social environment. Likewise within posterior social construc-

tivism developed for example by Talcott Parsons, Hauriou believed, inspired by French sociology of Émile Durkheim and G. Tarde, that law is a general social institution shaped by the sum of individual acts concerning social relations, defining through their content the social order, directed by some cultural common ideas such as justice or equity. It should then be stressed that, in Hauriou's opinion, given this thesis on the social origin of law, none of the legal formal acts such as statutes can be considered as an absolute source of law, detached from the particular context in which it is produced.

The close relationship between law and social sciences mentioned above, clearly visible in Hauriou's concept of the institution, is an evidence of a more general breakthrough in legal theory at the turn of the nineteenth and twentieth centuries. Its main goal was to emphasize that the concept of legal sources limited only to legal texts, is much too narrow and needs to be extended. Many of the legal theoreticians of that time, inspired by sociology, were claiming that the real source of law is to be sought in the social convictions, representations and attitudes that reflect some general rules governing society. In this regard, institutionalism can be described as a movement in legal theory based on the notion of law as a building tool of the social order, broader than the specific concept of law under the technical legal discourse itself.

It is possible to identify common assumptions of Hauriou's theory of the institution and other institutional legal theories. According to Aristide Tanzi, in crude terms, they can be outlined as a criticism of formalistic approaches in legal science and of the concept of law as a set of rules. These theories see the origin of law primarily in the facts that precede the very act of establishing positive law, e.g. an enactment of a statute (Tanzi, 2004, 2–3). Moreover, they are also critical towards legal positivism, which requires a necessary cause and effect relationship between the law and the actions of a legitimate law-making body, in principle the state. Thus, they open the science of law to other sources of normativity, which are more tightly connected to the social phenomena. These sources include, among others, customs, official practice, politics, but also the large category of social practice (see: Julia Schmitz, 2015, 247; Maryse Deguergue, 2015, 577).

It can then be concluded that legal institutionalism, in general, envisages and presumes a plurality of forms of law. An in-depth description of how differently law can manifest itself in social reality is thus an explicit expression of a strong disagreement over traditional,

dogmatic methods of legal science that reduce its research subject only to statutes and, as a last resort, to the case law. According to Millard, all institutional theories are therefore advocating for an interdisciplinary approach as a legitimate method of legal science, seeing there a response to the complex character of the legal phenomena (1995, 382).

It is also important to mention what position did legal institutionalism take towards other legal theories present in the discourse at the beginning of the twentieth century. One of the ideas most criticized by Hauriou was the concept of the social contract. Even if the theory of the institution does not reject the idea of consensuality as the basis for the legitimacy of power and law, it dismisses the notion of the contract as a relevant description tool for legal science. The fallacy of contractualism consists, according to Hauriou, in the fact that it implies the existence of an ideal, abstract contractual situation and, consequently, reduces the source of power to an individual and to an isolated act of a particular constitutional or electoral institution.

When describing the legitimacy of power, as argued by Hauriou, it is not about the agreement or the contract, but rather about the so-called '*adhesion*', i.e. passive recognition of a particular political and legal order expressed through participation in procedures established by the latter. The 'adhesion' should not be understood as an individual act of a citizen, but as a social level of acceptance (or even bearance) of the authorities' actions and internalization of the rules established by them. Collective adhesion is a value that can be measured. It is a criterion for distinguishing, what Hauriou calls, perfect law (*droit parfait*). Rules that enjoy the highest level of social acceptance and which are deeply internalized by the citizens are those with the greatest binding force (Hauriou, 2010, 649). Hauriou illustrates the functioning of the institution with the figure of *lex* in roman law, defined by Theodor Mommsen as a proposition of a contract made without the possibility to modify it, the only option for the other party being accepting or rejecting it. This is, according to Hauriou, a pertinent mechanism that, by analogy, describe the nature of the relation between the society built of individuals and the modern state (2010, 211).

Normativism was not the only legal movement targeted by the institutionalists. They were also highly critical in reference to the German statism developed i.a. by Paul Laband, Carl von Gerber and Georg Jellinek. Their theories, called often as the *Herrschaft* doctrine, were based on ontological voluntarism of law, reducing the concept

of sources of law to mere individual acts of competent state authorities. As a consequence, the concept of sovereignty itself was limited to the exclusive competence of the state. This theory was based on the private law concepts relating to the formation of contracts and declarations of will that were applied to public law relations. The State was described, in this regard, by means of the legal personality theory of civil law. Every action performed by state authorities was, therefore, to be treated as an expression of the will of the entire institution of the state, regardless of internal relations that might call this reasoning into question. Under the *Herrschaft* doctrine, the state as a whole was the only legitimate source of law. That was, of course, distinctly contrary to the assumptions of legal institutionalism presented above (Massimo La Torre, 2007, 17–20).

Hauriou's theory of the institution has, on the other hand, something in common with another German legal theory of legal order, developed by Otto von Gierke. According to him, every society should be seen as an organism composed of communities (*Gemeinschaften*), each of them creating their own legal rules. Under this concept, which implies a plurality of sources of law, the only objective and external law – the *quid commune* – is the one which regulates the mutual relations between the separate normative orders of communities. It rejects, just as Hauriou's institutionalism, the concept of a uniform and indivisible sovereignty (Rousseau's *volonté générale*), which results from the radical statist doctrine. Instead, they claim that sovereignty is complex and composed general will.

Not without reason, the idea mentioned above was conceived as an objection to the legal doctrine of the Enlightenment and the French revolution. According to Hauriou, the concept of uniform sovereignty contradicts the idea of the political liberty of every citizen. As he wrote 'the political freedom implies that the nation, within every of its objective particles, should have a share of the sovereignty and that this sovereignty should be exercised not only by central government bodies but also by minor bodies of the social organization down to every ordinary citizen' (Hauriou, 2020, 608). Thus, under Hauriou's legal institutionalism the concept of delegation of power by the nation to the state authorities is seen as dangerous to the people's sovereignty, as it can lead directly to the doctrine of the legislative monopoly of the state.

As indicated above, institutionalism was intended not only as a criticism against certain, past theoretical concepts of the state and law, but also as a contribution to the discussion on the reform of the legal science itself, which took place at the end of the twentieth century. This time was marked especially by the end of the predominance of civil law dogmatism. Since the adoption of the Napoleonic Code in 1804, it was frequently the only legal method taught at universities. The cult of codification limited the legal science to a mere interpretation of law or even, as Christophe Jamin points it out, to only its reading and memorizing (2003, 380–381).

The crisis of the aforementioned concept of law was caused mainly by two factors. The first of them was the intense social transformation process of the ninetieth century. The second, that was taking place on the strict ground of law, was the development of administrative law related to the rise of the modern concept of the state. The social changes mentioned above, which lead to a structural reconstruction of society, the emergence of the working class and the rise of corporate movements put into question the universality of Napoleonic codification: having at its core an axiology strongly imbued within the philosophy of individualism, it had become more and more outdated. Despite numerous attempts to reform it, the lack of sufficient political will to enact the new code shifted the burden of the adaptation of written law to the changing social reality onto jurisprudence.

The discussion regarding the shape of the legal science was, in fact, broader and was held also during the International Congress of Lawyers organized within the World's fair of 1900 in Paris. It should be mentioned that it was also at this time that the American concept of legal realism emerged, encouraging lawyers to 'leave the libraries' and study the law 'as it is in reality'. However, the final solution adopted was, with few exceptions such as the works of Hauriou and Léon Duguit, an adaptation of the method proposed by Christopher Langdell from the Harvard University, that limited the new approaches to the legal methodology only to the case-law studies, based on the presumption that it can reveal some general principles of law which manifest themselves in practice (Jamin, 2003, 384). Nevertheless, the end of the ninetieth century was a time of a clear breach of the tradition of the predominance concerning the strictly linguistic legal interpretation approach, fostered i.a. by the French school of exegesis. It was then pos-

sible for the new generation of legal theoreticians, such as Hauriou, to propose more interdisciplinary approaches to legal science, based, for example, on the methods used in history or social science.

Therefore, Hauriou's legal theory, taking into consideration the context of its origin, was destined to provide concepts and manners of description of law in the social reality, trying to demystify abstract terms that are, till today, omnipresent in both theoretical and practical legal discourse. The central notion of this theory, the institution, constitutes a concept meant to be applied not only to the state, but to a more general figure of any social organization. It is, according to the definition formulated by Hauriou 'a category that is durable, continuous and real' (1925, 89). The process of the foundation of the institution is something basic and inherent for the society as an organization. The validity of social norms is then determined in reference to its persistence through time. In Hauriou's view, the law is not based on a subjective will of a person or even a social body, as claimed by most of his predecessors, nor on its transcendent and objective nature. It is a result of social activity that consists of individual facts of repeating and imitating actions of other individuals, motivated by the will to perpetuate an idea. Within this process, the individuals are presumed to be free in their choice to adhere or not to the idea in question. As a consequence, the main object of legal science should not be legal provisions and abstract rules, but socially recognized values and social representations that are determining people's actions in an organized community. For Hauriou, legal rules are, of course, important, but they should be seen as something secondary, allowing the legal order to change, while diminishing the importance of seizing it in the form of a legal text. Thus, Hauriou's institution can be described both as something already *instituted* and complete (a statute or legal decision) and as *being instituted* (constant actualization of the signification of values such as liberty or equality).

Having the basic notions of Hauriou's theory and epistemology of law it is possible to move on to his concept of the statutory law, strongly critical towards normativism (I). Then I would like to present the modern idea of legislation, as a rational tool of social change, and its decline (II) in order to argue why Hauriou's concept of statutory law can be useful nowadays, to cope with the ongoing changes in legal culture and legal *praxis*.

2. HAURIOU'S CONCEPT OF STATUTORY LAW

As for the role of judiciary, in his *Précis de droit constitutionnel* (1929), Hauriou argued that absolutizing the concept of the statutory law as set of general and abstract rules oriented towards the future, is one of the dangerous ideas inherited from the ideology of the French Revolution, based on the notion of the absolute and general will of the nation expressed by the legislative. In fact, as believed by Hauriou, the statutory law should not be considered as something more than a work of codifying customs – accepted and repeated solutions to the cases encountered in the past. The legislative is then, like any other human being and human institution, limited in its capacity of predicting the future and all of the possible particular situations, impaired in its heuristic horizon mostly to what has been already a subject of law or legal decision-making process. In the above-mentioned work he described written law in the following way:

> 'It must, therefore, be admitted that written laws and organic laws regulate only in a present-day manner certain elements of the State, certain elements and certain procedures, but that the institution of the State, considered in its profound realities and its fundamental balances, continues to be legally sanctioned by a customary con,,auriou, 1929, 95).

The real nature of the statutory law is then constituted by customary consent that is at the source of its validity and normative force. For, as argues Hauriou, the statutes would be nothing but sheets of paper without the social recognition of their content, values that they express and their author – an institution of minority power (*pouvoir minoritaire*), primarily the State, the law-making process actor and its host (1929, 591). It is, by the way, important to mention that Hauriou's model of power inverts the traditional scheme of the governed individuals transferring their power to the group of their governing representatives (Eric Maulin, 2015, 534–535). As mentioned above, Hauriou argues that this vision is fallacious and proposes his own schema based on the idea of social recognition and acceptance of particular social groups and organizations pretending to have power over society. They have to be constantly assured of having enough *customary consent* backing their enactments which are temporarily and logically prior. That is why he considers every legal act, as the statutes for

instance, as secondary regarding the social general adhesion (*adhésion*), mentioned in the introduction, to values and postures that they realize (Hauriou, 1910, 211).

Hauriou articulates the idea very distinctly: 'the common law, it is essentially custom and not the written law' (1929, 225). The idea of the statute law as an ideal form of law-making practice is, in his eyes, 'a fruit and a sin' of the Revolution, that aimed at banishing the old legal system, too dispersed, heterogenic and complex, trying to replace it by the new unified legal order composed of statutes. Nevertheless, Hauriou does not condemn the idea of the statute itself completely. He underlines the importance of the statutory law regarding the principle of equality, which is manifested less within the system of multiple particular decisions of customary law. Nevertheless, he was very critical towards any attempt of absolutization of the statutory law technique. He argued that the strict normativism, conferring the primary role to written law, can be dangerous in the inverted direction: the statues can overgeneralize the reality and create some sort of 'abstract man' and impose it with force, whereas the idea of justice, as he claimed, requires, from time to time, some differentiation (Hauriou, 1925, 235).

Having made the above-mentioned observations, Hauriou does not reject statutory law, proposing only a more cautious approach. In order to proceed prudently with the statutory law, both in law-making and legal decision-making processes, he considers statutes, in the first place, as a work of codification of customs gathered in one document, then as an attempt to present them in the form of general and abstract rules. So, in fact, the statutory law is destined to simplify the legal order and not to change its very nature balancing between the general and the particular in the scope of equity, which in the tradition of European legal culture remains the key value of the law. Apart from that, Hauriou claimed that the statutory law incorporates also another component. As he argued, the second dimension of written law is to express the social will of change necessary to assure the liberty, because, as he said in the second edition of *Principes de droit public,* 'the freedom does not go without a certain possibility of change'. The scope of the modern law, according to his theory of institution, is to assure the indispensable balance between the forces of stability (*forces de stabilité*) and the revolutionary forces (*forces révolutionnaires*) both present in the complex and dynamic social order (Hauriou, 1916, 10–11).

Having this perspective on the role of the law as a means to balance the dichotomic forces of conservation of the established order and the will of the social change, Hauriou distinguished two aspects of statutory law. As he said, 'the law is a historical combination of regulation and custom', then a junction of the regulation, as an expression of the governing power will projecting an outline of the new order to be, and, on the other hand, of the custom having its normative force based strongly in general social *adhesion* (Hauriou, 1916, 27–31). Despite all of that, it is important to stress that Hauriou defined the statutory law, first and foremost, as a law-making technique. According to him, its advantages are, among others, its written form that is easy to be found (and it's even more pertinent nowadays with the internet) and interpreted (for its synthetical character). Hauriou's vision of statutory law remains at the same time based on some sort of a materialistic analysis of this process – as he claimed 'a law is manufactured as an industrial product, through various devices and following a wire rope' (Hauriou, 1910, 150–157). In his theory, he stressed the fact that the positive law can only constitute some sort of approximation of the ideal law but will never become ideal itself, something which is not consistent, nor entirely comprehensive as a system (Didier Mineur, 2015, 63). The statutory law is therefore no longer the expression of the abstract reason, but an effect of a complex process of its elaboration through conceptualization and then its application by the judiciary (Doat, 2015, 415).

The concept of the statutory law present in Hauriou's works can be demonstrated through an analysis of how he argued in favor of the permanence of the Declaration of the Rights of Man and of the Citizen from 1789, which, at the time of the Third Republic, when Hauriou lived and worked, was no longer formally a part of the French legal normative order as a statute made during the period of another political era. In fact, in order to prove that the Declaration remains in force, he argued that it is not the text itself that was formally still binding, but the fact that the French society has profoundly adhered to it and internalized its principles made it still valid for the legal discourse. As he said, 'there are many fundamental principles that can form constitutional legitimacy, situated above the written constitution. (...) Apart from the Republican form of government, there are many other principles for which there is no need for text because it is proper for the principles to exist and to be in force without a text' (Hauriou, 1929). In this vision, the text itself is only a material tool and the statutes are

only examples that can be helpful for those who apply the law to extract its true meaning, just as it was the case for customary law, before the advent of the modern concept of the statutory law which I will describe in the next part of the article.

3. THE ADVENT OF THE MODERN CONCEPT OF STATUTORY LAW AND ITS DECLINE

Hauriou's concept of the statutory law must be analysed in a broader, more general context of the legal philosophy of written law. It seems that it is precisely the modern concept of legislation, elaborated by the philosophy of the Enlightenment, that he stands clearly against. According to Denis Baranger, the concept of the statutory law is linked in its essence to the 'constituent feature of our historical and social consciousness, a way of our political existence – that we aspire to give ourselves our own laws' (2018, 12). The cultural practice of law-making can then be considered as a strict application of the philosophical project of the Enlightenment based on the notion of the autonomy, i.e. 'the fact of governing ourselves by our own laws'. And it is precisely during this period, fully convinced of man's rational nature capable of analysing the world and extracting the general and universal laws that govern it, that the modern concept of legislation could emerge.

The key fact about this concept of the man-legislator is that it was, in its very origin, a philosophical and speculative project based on the assumptions of human nature which came to be after a concrete venture of law-making. As argued by Denis Baranger, this modern political philosophy got subsequently realized as real, practical, or even technical cognitive enterprise oriented towards social change (2018, 15). The statutory law, as a practice already known in history before the Enlightenment, gained a new meaning and a key role in the modern law-making theory. The statutes, in the course of the past two centuries, have become the most important tool of political power. This process was, in the origin, stimulated by the fear of tyranny. The idea of being governed by some universal, general and abstract laws – resulting from universal human reason possessed by every human being – was seen as a possible remedy to escape the necessity of being governed by some other man and to preserve the postulated equality of citizens.

The modern concept of statutory law was, obviously, far from homogenous. It is possible to observe two main tendencies. The first, conceiving the legislation as an act of cognition, and the second as an act of human will. In the works of Jean-Jacques Rousseau or Montesquieu, the law-making is described in terms of an art of discovering universal truths that govern social life. The political activity is then an exercise that consists in going beyond the particular and thinking about what is good and just for the whole community in general. The second way of conceiving legislation admits that law is an act of will of those who govern. The law as an act of will becomes, under the philosophy of the Enlightenment a work of projecting social change based on reason and empirical science. This way of thinking is particularly present in the thought of utilitarian philosophers such as Jeremy Bentham or Cesare Beccaria, who were describing the statutory law as a means to regulate and structure social reality for the purpose of assuring better life conditions for all the subjects of the law-making power.

Nevertheless, in the course of the nineteenth and particularly twentieth century, the concept of the statutory law turned out to have been largely, or even excessively idealistic. Denis Baranger indicates many problems of the written law that allowed him to qualify the contemporary statutory law condition in terms of a 'deceived love'. The law has strongly devalued. It has become a political illusion that is difficult to understand and is, contrary to the idea in the origin, too complex. There are too many laws and, in the end, it seems to have lost his efficiency and even its legitimacy (2018, 10–11). The law is not consistent and comprehensive, no matter how intensively many of the legal theoreticians try to defend the logical character of the legal discourse. All those problems are visible when we take into consideration, for example, the development of the constitutional review and, in general, the more and more important role of the judiciary as a response to the deficiencies of the statutory law.

To sum up, as is defined by Jean-François Lyotard (1979), the history of the modern idea of the concept of statutory law appears as a story of the rise and fall of a grand narrative. The great concept of the statutory law as the supreme source of general and abstract rules, having reached its top in the doctrine of normativism, had to submit itself to changes provoked due to the urgent needs of legal practice. In order to maintain justice, nowadays, the role of the statutory law is to be interpreted with many restrictions, which is clearly visible in the judiciary

dimension of legal practice, in particular within the constitutional and international courts where the relations between politics and the law, often underestimated in all democratic societies, are the strongest.

However, in some contexts the paradigm of the statutory law as an absolute law source turns out to be less obsolete as argued above. In fact, there are some tendencies that, even though rejecting the primary role of law in the sense of legal normativism, are clearly based on the paradigm of the absolute character of the statutory law. It is, for example, within constitutional populist, explored by i.a. Paul Blokker, that this idea returns as a consequence of the sovereignty rule (2019, 14–17). According to the author, the legal populism, critical toward liberal understanding of the rule of law, highlights the importance of statutes as an expression of the general, homogenous will of the nation. This problem, while a very interesting attempt to restore the absolutist statutory law concept by returning to the political voluntarism and the sovereignty paradigm, cannot hide the truth about the complexity and multi-faceted character of legal phenomena. In this respect, in my opinion, the observations of Hauriou (and of many others afterwards) remain in force as a critical and reflexive contribution to the legal theory, particularly within the continental law culture.

4. CONCLUSION

In my opinion, the concept of the statutory law as written custom, presented by Hauriou, could be applied in the analysis of the contemporary jurisprudence and in the theory of law. Under Hauriou's institutionalism, the statutory law is described taking into consideration all of the heuristic limits of the figure of the legislator and the interferences resulting from the strict materialistic and discursive nature of the process of law-making. Understanding statutory law as written customs, while viewing the very nature of law as something turned to the future but also anchored in the experiences of the past, can help us understand why it is sometimes necessary to let the judiciary 'step into the shoes' of the legislator.

As mentioned above, the contemporary legal practice, in which the role of the constitutional and international law courts is, without any doubt, crucial for the functioning and the consistency of all of the modern Euro-Atlantic legal systems, is clear evidence of the imperfect

nature of the statutory law itself. Even if there are some concerns, even criticisms about the judicial activism, when taking into account Hauriou's allegations against the positive, written law, we should be aware that the very nature of law is essentially based on the balance between the past and the future, the abstract and the particular, something predetermined on one hand, but needing further determination on the other. The decline of the modern absolute concept of statutory law is clearly observable also in the emergence of numerous forms of normative sources that are generally called *soft-law.*

To sum up, the institution of *distinguishing,* rejected in the course of the nineteenth and the twentieth centuries in the continental law culture as contrary to the principle of people's sovereignty and legality, could be, in my opinion, restored as a useful tool of description of how the law works in practice, even within those legal orders where judges are supposed to be bounded by the statutes. For, as I think, there is a great potential, and sometimes also an urgent need, to *distinguish* a case and bend the statutory law in force, in order to maintain justice as claimed by those who are subject to all legal processes.

REFERENCES:

1. Arabeyre, Patrick, Jean-Louis Halpérin, Jacques Krynen. 2007. *Dictionnaire des juristes français (XIIe-XXe siècle)*. Paris. Presses Universitaires de France.
2. Baranger, Denis. 2018. *Penser la loi.* Editions Gallimard.
3. Blokker, Paul. 2019. *Populism as constitutional project.* 536–552 in International Journal of Constitutional Law, Volume 17, Issue 2.
4. Doat, Mathieu. 2015. *Durée et droit chez Maurice Hauriou*. 415–429 in *La pensée du doyen Hauriou à l'épreuve du temps: quel(s) héritage(s)?*, edited by Christophe Alonso, Arnaud Duranthon, Julia Schmitz. Aix-en Provence. Presses Universitaires d'Aix-Marseille.
5. Deguergue, Maryse. 2015. *Les standards et directives et le rôle du juge dans la protection des droits chez Maurice Hauriou*. 577–593 in *La pensée du doyen Hauriou à l'épreuve du temps: quel(s) héritage(s)?*, edited by Christophe Alonso, Arnaud Duranthon, Julia Schmitz. Aix-en Provence. Presses Universitaires d'Aix-Marseille.
6. Domenicali, Filippo. 2016. *Ripensare l'istituzione. Deleuze lettore di Maurice Hauriou*. Stamen.
7. Hauriou, Maurice. 1906. *L'institution et le droit statuaire*. Recueil de législation de Toulouse.

8. Hauriou, Maurice. 1925. *La théorie de l'Institution et de la fondation. Essai de vitalisme social*. Cahiers de la Nouvelle Journée nº 4 (*La cité moderne et les transformations du droit*).
9. Hauriou, Maurice. 2015. *Précis de droit constitutionnel*. Paris. Dalloz.
10. Hauriou, Maurice. 2010. *Principes de droit public* (introduction by Olivier Beaud). Paris. Dalloz.
11. Hauriou, Maurice. 1916. *Principes de droit public*. Paris. Receuil Sirey.
12. Jamin, Christophe. 2003. *Dix-neuf cent: crise et renouveau dans la culture juridique*, in *Dictionnaire de la culture juridique*, edited by Denis Alland and Stéphane Rials. Paris. Presses Universitaires de France.
13. La Torre, Massimo. 2007. *Constitutional and Legal Reasoning*. Dordrecht. Springer Science & Business Media.
14. Lyotard, Jean-François. 1979. *La Condition postmoderne. Rapport sur le savoir*. Editions de Minuit.
15. Maulin, Eric. 2015. *Maurice Hauriou et le pouvoir minoritaire*. 533–541 in *La pensée du doyen Hauriou à l'épreuve du temps: quel(s) héritage(s)?*, edited by Christophe Alonso, Arnaud Duranthon, Julia Schmitz. Aix-en Provence. Presses Universitaires d'Aix-Marseille.
16. Millard, Eric. 1995. *Hauriou et la théorie de l'institution*. Droit et société, nº 30–31/1995 (L'environnement et le droit).
17. Mineur, Didier. 2015. *L'argument philosophique chez Maurice Hauriou*. 63–83 in *La pensée du doyen Hauriou à l'épreuve du temps: quel(s) héritage(s)?*, edited by Christophe Alonso, Arnaud Duranthon, Julia Schmitz. Aix-en Provence. Presses Universitaires d'Aix-Marseille.
18. Schmitz, Julia. 2015. *La doctrine juridique face à la complexité*. 239–257 in *La pensée du doyen Hauriou à l'épreuve du temps: quel(s) héritage(s)?*, edited by Christophe Alonso, Arnaud Duranthon, Julia Schmitz. Aix-en Provence. Presses Universitaires d'Aix-Marseille.
19. Tanzi, Aristide. 2004. *Cosa resta dell'istituzionalismo giuridico*. Padova. L'ircocervo.
20. von Büren, Théophile. 2015. *Carl Schmitt, lecteur de Hauriou*. 195–213 in *La pensée du doyen Hauriou à l'épreuve du temps: quel(s) héritage(s)?*, edited by Christophe Alonso, Arnaud Duranthon, Julia Schmitz. Aix-en Provence. Presses Universitaires d'Aix-Marseille.