CSABA VARGA

TRANSITION TO RULE OF LAW
On the Democratic Transformation in Hungary

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PREFACE*

After the methodologically well-founded and scholarly well-developed legal scholarship broke down on the European Continent in the early mid-century—for it was unprepared to face, and unable to give any fairly justifiable response to, the challenge of the temptations the rise of new authoritarianisms and totalitarianisms (sprung up, first, from the attempts at implementing the tempting idea of Bolshevism and, later on, captivating parts of the world by the threats of Fascism and National Socialism) had offered—theoretical renewal followed all over the world, especially in Europe. This was the age of the rebirth of natural law, in the place of (rather than supplementing) the lawyer's traditional world concept, that is, legal positivism, rooted in the very foundation of the cultures of both Civil Law and Common Law.

Nevertheless, when the predominantly moral shock of World War II was over, the pressure of reconsideration became soon shadowed. Starting by the late '50s, however, a growing interest has arisen to substitute former patterns of methodology to historico-comparative investigation, sociological inquiry, anthropological foundation, as well as logico-linguistic analysis. Innovative trends of thought in legal theory have led to the foundation of a series of new disciplines and contributed to a genuine theoretical renewal. In the final account, it was a breakthrough and a success.

Nowadays, nevertheless, one can only encounter a growing dissatisfaction, accompanied by the well-felt need for re-orientation. The causes, as well as its context are largely a function of underlying domestic conditions, namely, socio-historical settings, political biases, intellectual traditions, and the store of instruments (ideologies, institutions, skills and techniques) the arrangement in question has ever developed for both serving everyday routine and coping with new expectations.

As to Hungary and the whole region in Central and Eastern Europe, one of the main characteristics of the imposed regime of 'actually existing

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* Originally drafted in 1989 for the 'Preface' to the proceedings of the Finnish-Hungarian Symposium of the International Association for Philosophy of Law and Social Philosophy, *Finnish and Hungarian Papers on Legal Theory*, which was then thought to be co-edited with Aulis Aamio as a *Beiheft* of *Rechtstheorie* (Berlin: Duncker & Humblot).

socialism' was the law's excessive instrumentalization. The reduction of the *ius* (including legal rights) to the *lex* (i.e., formal enactment) and, at the successive step, to mere means (subservient to any political wish), had already historical predecessors in the region. For instance, the destruction suffered by the one hundred and fifty years of Ottoman occupation of the land incited, and subsequent reforms to cut short belated development in the 18th century was also actually accompanied by, the strong political will of those enlightened emperors who then ruled the Hapsburg empire to expand their control over the country. As in all instances of modernization on forced paths, one of the consequences was that the idea of reform itself became identified with (by simply reduced to) the act of enacting. Over-reliance on enactments of enlightened ideas followed, instead of the attempts at tiresome implementation of genuine reforms. Centuries later, the practice was continued by the Communists who took over in the country. The translation by the party-state of Golden Age Utopia into everyday practice had in fact to resort to law only as a mere tool of enforcing freely replaceable policies. In the perspective of the Communist morality of a Rosa Luxemburg or George Lukács, legal instruments were only seen as easy-to-manipulate covering for repressive practices revolutionaries might resort to. Even by the time when Stalinism developed into a kind of good-will autocracy, law remained an agent for provoking (or substituting for) social reform. No wonder if the outcome were also devastating. The practice destroyed legal distinctiveness and corrupted underlying culture in both the short and the long term. The prestige of law had fallen, and its credibility faded away. All this was successful to such an extent that even nowadays, when re-instituting Parliamentary Democracy, Constitutionalism and Rule of Law are on the agenda, long-established corrupted practices persist unalterably to tempt minds. Albeit for obvious reasons, the success of the process of democratization is by now the main precondition of any further (economic, social, etc.) reform. Or, the failure of discontinuation can endanger the prospects of democratization.

From a theoretical perspective, the bare fact of resorting to such corrupted practices and also of considering them a viable option can only be interpreted as the rejection of the very idea of law. Therefore it is ultimately not by chance that reconsideration of the usual Marxist stand (and the socialist approach to the law) was initiated long ago, and that the first target was the re-shaping of social consciousness by building irreversible elements into it. Speaking philosophically, its ambition was to re-assert legal distinctiveness both as a statement in ontology and a clear-cut differentiation between the law's actual working and its ideology.

Having the general conditions in mind, the main task legal theorizing is faced with in Hungary is the following:

(1) to reconsider its own traditions, looking back to both pre-war and interwar periods, by re-assessing basic values they were grounded in in the classical German philosophy and its neo-Kantian methodological orientation (for the pioneering work done by Ágost Pulszky, Felix Somló, Julius Moór, Barna Horváth, István Bibó or István Losonczy still may have the potential of provoking challenges which were never fairly responded to earlier);

(2) to re-integrate into its body the insights and schools, approaches and methodologies which the western theories have developed since World War II; and

(3) to redefine and reshape its own position so that, *one,* it will again be open to critical reflection on all trends of thought in formation and, thereby, it will become once again a responsive partner to the academic world, and, *two,* it will finally grow into what it has always been, that is, a forum of human reflection in social theory and a source of foresight in social action, which for everyone it can leave behind it eventual remnants of past instrumentalization and merely technical uses of the law for power calculation.

ON VITALITY IN THE REGION*

There is a striking contradiction in Central and Eastern Europe between the poor state of development of contemporary political culture, on the one hand, and the living memory of outstanding intellectual achievements, born in the region (and especially in the Austrian-Hungarian monarchy of yore) in a number of fields, mostly the humanities, on the other. Illustrating some of the achievements—by naming nothing but a few personalities who equally marked the ethos of Europe of this century and modern thought as well—, are Béla Bartók, Sigmund Freud, Theodor Herzl, Franz Kafka, Georg von Lukács, Karl Mannheim, the Polányi's or Ludwig Wittgenstein, all of whom entered the international scene by having arrived from the region during the *fin de siècle* period.

The very first theory to describe modern formal law was proposed by a native of the region, Hans Kelsen. Born in Prague from a family based in Vienna, he developed his neo-Kantian philosophy in parallel with schools for reconstructing legal theory at Brno and also in Budapest. Early attempts at developing genuinely sociological ideas for the explanation of the nature of legal processes also sprung up in the region. It was everyday experience on how life and law were marshalled that nurtured legal sociology at the beginning of the century. Its foundations were laid down at the local university in Czernowitz, Bukovina, by a graduate from Vienna, Eugen Ehrlich. His pioneering realization went on to demonstrate that there had ever been a gap between the official law and that what he had termed as 'living law'. In scholarship, this realization was only preceded by early observations in legal anthropology such as those of Baltasar Bogišič who, through the completion of questionnaires he had drafted, committed himself to field studies describing and mapping out what the actual behaviour at remote highland settlements in Dalmatia was.[1]

* Revised version of the intervention at the conference held near to Prague at Stirin in December 1991 on "The Vitality of Central and Eastern Europe after the Eclipse", organized by the Institute for European and International Studies, Luxembourg.

[1] Cf. Csaba Varga *Jogi elméletek, jogi kultúrák* Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [Theories and cultures of law: surveys and reviews in legal philosophy and comparative law] (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures 1994), pp. 269 and 297 [Jogfilozófiák].

After all, a whole inventory of ideas came to shape the image of our century and to grant basic identity to it, and all that was bored out in the region. One can only wonder what kind of specific motives may have lurked behind such a virulent vitality? What is the particular message they may have left to the posterity? What kind and what amount of potential may they have preserved for us? Do we have any ground to believe that one-time local inventiveness may substantiate hope for the future? Or is all this just the other way round? That is, should we rather—if at all—simply remember it as a singular coincidence in history? Well, the question is whether or not Central Europe (and especially its Eastern part extending from Krakow to Zagreb, from Graz to Czernowitz) does have any further reserve for tomorrow? Or should we conclude instead by quietingly saying that sparkling as it was in the past, all this was only imputable to rare fortune which might only have to compensate for the region's tormented history? That the overproduction of intellectual output might only be destined to counter-balance the forced pathways of national histories, i.e. all those dead-locks that had for centuries been the only hard facts, strong enough to nullify both tactical and strategic considerations? That the absence of political culture and Western-type economic development could only be compensated by verbal achievements, taken mostly from letter-bound humanities?

In the following, I propose a tentative approach to the vitality of nations in Central and Eastern Europe as seen from the point of view of foundations defined by traditions.

1

Referring to the paradigm of social challenge and intellectual response, the best exemplification of the vitality of nations in Central and Eastern Europe can be found in two personal oeuvres. Our first, István Bibó, was a political thinker and a historian with a background in the philosophy of law, who argued for preparing the third road as the only liveable political alternative. After the communist takeover, he was forced into internal exile; after the revolution, he was also imprisoned. He died in the late 1970s. His works were collected first by Hungarian exiles who, later on, also published a selection of his basic papers in English.[2] The second, Jenő Szűcs, belonged to the next generation as a contemporary academic historian, who ended by committing suicide. The magisterial paper in which he summarized his

[2] István Bibó *Democracy, Revolution, Self-determination* Selected Writings, ed. Károly Nagy, transl. András Boros-Kazai (Highland Lakes: Atlantic Research and Publications, distributed by New York: University of Columbia Press 1991) xiii + 570 p. [East European Monographs CCCXVII; Atlantic Studies on Society in Change 69].

findings on *The Three Historical Regions of Europe*, undertook to reconsider the position that Bibó had once taken on *The Problems of the East European Small States* (1947), at a time when the underground festschrift to honour István Bibó with his contribution was in preparation.[3] All in all, Szűcs reasserts and substantiates Bibó's theoretical claim. According to this view, for almost fifteen centuries, stable borders have divided Europe into three regions. To put it briefly: the East split from the West, and a buffer zone came into being between the two. Consequently, this go-between area had to receive inputs from both neighbouring regions and to send outputs also in both directions. Eventually, the balance between the West and the East became broken by those winners of the Second World War who, negotiating at Yalta, finally pushed Central Europe eastwards and thereby permitted the East to absorb the former buffer zone.

As a result of ten centuries' development, the political and legal culture of the West became transplanted to and finally also acculturated Central Europe. From that time on, the only bordering line separating differing parts of Europe became the one dividing Eastern Orthodoxy from Western Christianity. By the successive implementation of the achievements of the Renaissance and the Reformation, as well as of the contractual theory at the foundations of the modern society, eventually the foundations for both constitutional democracy and multi-party parliamentarianism were laid down. All this was done in a successful way. In the course of a long development process culminating in the 18th to the 19th centuries, a political frame was formed in Central Europe, within which the law could also gradually build up its own prestige and autonomy. The construction of the institutional set-up, characteristic of modern formal law (and leading to the formation of modern legal professions, the modern legal education, the modern skills and working ethos of the judiciary, as well as the formation of modern channels for legal socialization), followed the former step by step. All this resulted finally in the formal rationalization of law all over Central Europe. Thereby in Central Europe, too, the distinctively juristic approach became defined by those classical authors and thought patterns which had once been instrumental in shaping the judicial mind on the European continent. From the middle of the 19th century on (and especially from the beginning of the 20th century), the initiative of theoretical developments granting the law of Europe a new identity has shifted to Central Europe step by step. To name but a few, Max Weber and Hans Kelsen reformulated the underlying basic legal doctrines;

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[3] Jenő Szűcs 'The Three Historical Regions of Europe: An Outline' *Acta Historica Academiae Scientiarum Hungaricae* 29 (1983) 2-4, pp. 131-184; *Les trois Europes* préf. Fernand Braudel (Paris: Harmattan 1985) 127 p. [Domaines Danubiens]; *Die drei historischen Regionen Europas* (Frankfurt am Main: Neue Kritik 1990) 107 p.

and, in their turn, Georg Jellinek and Carl Schmitt gave the theory of State and its constitutional doctrine a new theoretical structure, supplementing the legal outlook.

As a result of the Europeanizing development of parts of the Balkan during the interwar period, territories originally rooted in Byzantine traditions could also join what had been known as Central Europe. Experience relating to Eastern Europe, especially Belorussia, the Ukraine and the European parts of Russia will, however, offer an example in total contradiction to it, by their rejection of thorough-going Europeanization. For instance, the observer of Muscovite life and provincial localities can easily recognize that the entire background, fundaments and superstructure of modern legal culture (i.e. the law's formal-institutional, professional, ideological and deontological, conventional and traditional prerequisites, all components that can be considered *sine qua non* components of legal establishments in Europe) are practically missing. Only to take one instance, no text from (or standing for) Thomas Aquinas, St. Augustine, Hobbes or Locke, Kant or Hegel, or the representatives of European modern legal scholarship, has ever been translated into Russian or made available in Eastern European Slavic territories. In the sense of European legal modernity, Russian culture is without professional classics and also suffering a scarcity of contemporary foundational works. Speaking in terms of Jenő Szűcs, the case is one of a culture in which the historical achievements of both the Renaissance and the Reformation, as well as of the contractual theory, have ever been regarded as alien to local heritage and accepted style, i.e., as a suspected imprint of Europe, of a far-away civilization, which might be encountered by university students only for the part of their curriculum dedicated to the history of western philosophy at most. None of the foundational oeuvres has ever been translated to the language of popular education, or transformed into a culture of argumentation that should be exploited for debating publicly on current political, ethical or legal issues. I had to realize by the late '80s (when I had my last visit in Moscow) that the bulk of translations ever made on the field had mostly been made actually by the Czarist regime, during its closing, reformist period. What is more, the majority of those translations was in fact made in Odessa and other provincial universities, sometimes at remote localities, in an understandably limited number of copies.

Culture presupposes agents to be given life. The presence and survival of any culture can only be secured by continued efforts at mediating, transmitting and disseminating its achievements. In the field of law, in general, and of the popular reception of its European notion, in particular, there has hardly been any considerable number of agents in Russia that may have radiated legal culture and any liveable experience relating to the law.

Assessing the chances of the future (by raising questions rather than answering them) from the perspective of comparative legal cultures, one is driven to conclude that the situation of the post-Soviet empire as it stands now can only be compared to the state of Turkey at the time when Pasha Kemal Ataturk launched and forced through his reforms. As is well-known, in Turkey a by and large successful attempt at the European modernization of the country was made. Driven by wishful thinking characteristic of the rest of Europe, everybody took for granted for long that the will for reform provoked a thorough breakthrough and drastic change in local conditions too. Only recently was it disclosed—mostly by Americans, reporting on field research in legal anthropology which were dedicated to the law in action prevailing in local villages—that the whole reform amounted to hardly anything more than instituting a gap in forced modernization. And the consequence was the splitting of the legal entity into two components unbridged and unbridgeable: the transplanted law in books, practised in the metropolis, and the old law actually lived with, which survived in the countryside.[4]

The only conclusion one can surely draw is that the future of Soviet law is still open. The success of westernization of the empire and its satellite of yore is a function of whether they can or cannot in due time build up and also staff the entire network of the law, characteristic of the European continent. This requires superstructure and profession, concepts and instruments, ethos and deontology, skills and background culture as well. Of course, this is no easy task. Just for the sake of exemplification I can notice the common experience of Central Europeans, according to which no professional talk of jurists with Polish or Hungarian, German or Austrian background can be adequately shared by Russians to a sufficient depth. For their allegedly Marxist phraseology notwithstanding, Muscovite professional background as it were and continues to be, has lacked any genuine touch with European developments since at least the last century. Therefore, there is a strong chance for the emerging legal order in Russia to become a *sui generis* kind with ideals and inspirations taken from the West but mixing them with life styles and expectations rooted in the East, so that the outcome be one fully accommodated to, as sprung up from, the local spirit. Thereby all respective historical traditions become sublimated totally, and the division between the West and the East re-appears again.

Any differing forecast, I think, would be helplessly idealistic and could only be backed by calculations based upon *deus ex machina* interventions.

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[4] E.g. Judith Starr *Dispute and Settlement in Rural Turkey* An Ethnography of Law (Leiden: Brill 1978) xvi + 304 p. [Social, Economic and Political Studies of the Middle East XXIII].

2

In the following I venture a shortened case study with some exemplifications. The question I have in mind is how re-emerging legal cultures in Central Europe can promise outputs based upon past memories, experience and expectations, running against long-standing and surviving socialist corruption.

To begin with a historical outlook relating to Hungary, a basic charta, called The Golden Bull was adopted as early as the 13th century. A contemporary to the Magna Carta, it was concluded between the king and the feudal estates to guarantee their division of powers and the respect of basic rights accepted by the monarch.[5] During the 16th century, one of the earliest acts of tolerance of European history was promulgated in Transylvania, covering all religious denominations which were received at the time.[6] After the political compromise reached between Budapest and the imperial house in Vienna in 1867, the formation of modern Hungary followed. As one of the results of this wave, Hungary became one of the forerunners of government bureaucracies to set up codification department within the Ministry of Justice so that legislative drafting could be prepared carefully, through thorough-going scholarly debates. Since that time on, the Hungarian movement of codification kept in fact pace with European developments, following—and sometimes forerunning—the neighbouring Austrian, German or French patterns.

In the famous triangle formed by Vienna, Budapest and Prague, the Hungarian capital may have afforded the first foreign audience to welcome Sigmund Freud and also had as an offshoot its own school of psycho-analysis in competition with the master's one. Budapest offered the first foreign community to host and translate Thomas Mann too. All this openness, sensibility and readiness to be *au courant* with the avant-garde was far from hurting or overcoming past instances and traditions. On the contrary, in the field of jurisprudence one can invoke Jeremy Bentham, who was received in the country in Hungarian translation as an author contemporary to the Hungarian reform period; or Sir Henry Maine, whose *The Ancient Law* could have recently had the anniversary celebration (seconding to Cambridge) in Budapest, for his first translation ever made was into Hungarian.

In addition, local memory can remember how a number of Polish, Czech and Hungarian jurisprudents excelled in proposing new ideas and challenging

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[5] Cf. Zoltán Péteri 'The Golden Bull of Hungary and the Problem of Human Rights' in *Essays on Legal History* (Indianapolis, Kansas City, New York: Bobbs-Merril 1966), pp. 211-225.

[6] Cf. Ágnes R. Várkonyi 'Pro quiete regni—For the Peace of the Realm: The 1568 Law on Religious Tolerance in the Principality of Transylvania' *The Hungarian Quarterly* 34 (Summer 1993) No. 130, p. 99–112.

scholarly circles in Germany, Italy and France—particularly at the pre-war and interwar periods. It is noticeable that, for instance, the same interwar period that saw the flourishing of reformatory ideas in jurisprudence in the States lacked almost completely initiatives in Great Britain, even if by sheer chance.

As to the Central European region, since the time that the imposed regime of socialism has been shaken, a particular challenge can be sensed, one which—even if conceptualized in Hungary—can be taken as a comparative case, generalizing particular developments to the entire region.

Notably, according to the standard American textbook on comparative law,[7] the legal order of Hungary can be characterized as "civil law without a civil code." Of course, the author is right in saying that the considerable number of legal codes promulgated by the turn of centuries notwithstanding, the very first civil code ever enacted in Hungary was the one drafted by socialist Hungary in the late 1950s.[8] Till that time, the jurisprudence of the courts (by the precedential decisions taken by *Curia Regis* at the top) was the only available means of erecting (through the specific amalgamate of inductive and deductive kinds of reasoning) the body of civil law for the nation.

Now, when reconstruction of an entirely new legal set-up on the ruins left by socialist devastation is on the agenda, the cry for opting between the Rule of Law (as an English-American pattern) and *Rechtsstaatlichkeit* (as a basically German ideal) starts challenging minds. It goes without saying that any option will inevitably select background cultures as well. As is known, the pattern of the Rule of Law manifests English-American judicial sensibility and availability, and focuses on what is called justiciability. In terms of it, each and every issue which can be made legally relevant is eligible for judicial control. On the other hand, *Rechtsstaatlichkeit*, backed by the Prussian tradition of legal approach, strives seeking guarantees in that complete regulations be afforded by positive law. All in all, while the Rule of Law puts emphasis on judicial independence, the German ideal relies on the mighty rule of enacted law.

Having in mind what judicial traditions have meant to Hungary—namely that precedents (gained through deductive-inductive reasoning by the method of distinguishing) have become produced by judicial practice for that the actual message of the law be revealed—it is easy to understand the enhanced role and appeal that the idea of the Rule of Law fulfils in contemporary

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[7] Rudolf B. Schlesinger *Comparative Law* Cases—Text—Materials, 2nd ed. (London: Stevens 1960), p. 175, note *.

[8] In 1959.

Hungary. In all probability, it has good chances to extend and partly to win. At the same time the traditional protagonist, *Rechtsstaatlichkeit*, rooted in the formative era of modern Hungary, continues competing for the shaping of the ideals and skills of the legal profession of tomorrow's Hungary.

3

After the mere survival of a nation, corrupted and corrupting as it were, on the ruins left by the imposition of an Asiatic type of despotism, many difficulties have to be faced on the way in which transition is managed in the region. In the final analysis, the process of social transformation is expected to lead eventually to new legal conditions.

The reader cannot understand present conditions without reference to past analogies and model patterns. For contrasting the present with past instances and assessing the depth of its challenges, let's imagine the hypothetical case of a Nazism surviving in full flavour, with no military defeat, no occupation by foreign armies, no legal discontinuity, and with no Nuremberg-type trials and any further kind of external value-imposition. Let's also imagine that the task is as it is now: marshalling past dictatorship towards democracy. A regime has to be built which has totally been negated by the predecessor: that is, negation has to be negated without the negator being destroyed. Thereby revolutionary breakthrough is expected from continuation, which, by definition, can be evolutionary at the most. Starting anew has to be undertaken by the unshaken political, administrative and media forces. Thereby the future may become intimidated from the beginning, but the past will surely triumph by praising its alleged professionalism.

The present state of Central European nations can be characterized by the undisturbed co-existence of all forces of the past and the future alike. All assert themselves, and compete to each other for the lead. Nothing is transparent; and the past is not an exception either. It is everyday occurrence that old mandarins of proletarian internationalism confess to have ever been true but hidden patriots, having deceived common enemies by cladding themselves in professionalism. Sometimes one cannot simply foretell what a given representation actually represents and what it will tomorrow. In Hungary, not even the legal differentiation of what was criminal and what was honourable in the past has been achieved. Both the relief of statutory limitations in Germany and the lustration procedures in the Czech Republic have failed to set basic moral standards and/or to cure injuries in compensation of the crimes committed so far. Theoretically speaking, one can assert that the absence of democracy cannot and will not by itself switch over to its opposite. It cannot and will not generate what it is a negation of. Considering

the underlying conditions and paradoxicalness of "velvet" revolutions, there is no wonder if on the new, liberal flea-market of ideas & values it is the cheap, the easy-to-handle, that will be primarily (and, sometimes, also exclusively) sold.

Everybody concerned with the future of the Rule of Law in the Central and Eastern European region has to be aware of the sensibility of a number of questions, which may be distressing, albeit fully justified and even realistic. For instance: Who is the first layer or group interested to whom the protection of the newly instituted Rule of Law has been extended? Can the oppressors of yore become the prime target entity to be privileged by the new conditions? Is it the vocation of, or simply the price of instituting, Rule of Law conditions that the past becomes forgotten and relieved from any further legal concern? Is it the inevitable side effect that the old mandarins, in possession of old contacts, networking and power conditions, will eventually transform into the new and almost exclusive financial elite and entrepreneurial class? Are we justified to reverse the old maxim of "Nobody can profit from his wrong!" in a new way by saying that wrongs can be turned into prime goods from which any wrong-doer of yore should freely profit now?

The dilemma is Janus-faced. What is more, it is also troubling. To the extent of scholarly knowledge and practical experience accumulated so far, no proper solution has been given to it under and within the routine instrumentality of the Rule of Law.

NO-LAW

ON STALINISM*

Social consolidation coincided with Stalin's coming into power, with the task of implementing Stalinist political theory into practice. In the given historical situation, this resulted in the establishment of the Stalinist set-up.

Three components of it merit attention:

(1) The first is the domination of current political necessities and current tactics over theory. Such a reverse order has two consequences. *One*, theory cannot rise above the mechanically applied practicism of everyday practice. *Two*, its external vehicle will inevitably be a sort of dogmatism excluding all theoretical renewal originating from its own system. The basic insights of the classics of Marxism may thus degenerate into merely illustrative, auxiliary means.

(2) Stalinist theory has a basic tendency to make nothing but declarations. Reduction of human cognition to sheer declaratory forms can be expressed both in the use of means as ends and in the preference for resorting to verbal solutions instead of concrete, factual achievements.

(3) Finally, the organizational basis of political practice has to be mentioned. The operation of an apparatus in which democracy withers away, and the element of power gains preponderance, may have many serious consequences, which make genuine social dynamism illusory in its social-psychological manifestation, or can even turn it against itself, thereby endangering its own mass basis. If the fact that tactics becomes the exclusive determinant is also added to this, then we can conclude rightly that the individual actor in society will necessarily lose sight of the wider horizons and become a mere function of the tactics of the day.

"A strong and powerful dictatorship of the proletariat—that is what we must have now in order to scatter the last remnants of the dying classes to the winds and frustrate their thieving designs." These are the words of Stalin,[1] and Vyshinskii gives legal expression to these by setting out the requirement

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* Excerpts, adapted, from *The Place of Law in Lukács' World Concept* [completed in manuscript in Hungarian in 1979] (Budapest: Akadémiai Kiadó 1985), pp. 81–88.

[1] J. Stalin 'The Results of the First Five-Year Plan' [1933] in his *Leninism* (London: Lawrence & Wishart 1942), p. 437.

for a legal apparatus that would operate smoothly, yet with faultless and remorseless rigidity.

The characteristic and distinctive feature of Vyshinskii's approach is primarily his method. The conception of a centre which can make nothing but correct decisions and therefore may and actually does demand unquestioned implementation, all this resulting eventually in that theoretical reflection itself becomes unnecessary—well, all these elements can be discerned in every one of Vyshinskii's writings on the state and law at that time.

Otherwise speaking, this amounts to the apodictic declaration of the absolutely economic determination of social processes, in which neither autonomy, nor definition by the defined, nor feedback has any place any longer. Furthermore, what is at stake here is a determinist concept of social laws (voluntarist in its political tendency), which does not require and does not tolerate any spontaneous correction of the existing and therefore desirable state of affairs and, for this very reason, it precludes any social analysis.

PAST AND PRESENT*

In Hungary, it is an everyday saying that we were a nation of lawyers.

To make it concrete, let us illustrate it with some accomplishments of the late 19th century. The legal profession promoted the bourgeois development with outstanding pieces of a successful codification process, and largely contributed to the formation of a high-level professional legislature and independent judiciary. Judicial independence was guaranteed to such a degree that not even the judicature involved in the *causes célèbres* touching upon communist clandestine organisations during the interwar period, that is, the criminal verdicts pronounced by Géza Töreky, presiding at the High Court of Justice, was ever criticized upon the charge of political bias. Even after the time that Hungary was occupied by the German military, and home-grown Nazis, called Arrow Cross, seized the power in late 1944, the Administrative Court repealed systematically—as long as it could convene at all—all measures in racial matters and labour relations, which deprived of their civil rights the Jews and those who were made suspect of communist networking. Also in a wartime period, the General Headquarters of the Royal Army launched criminal procedures before the Military Court against those generals who were in command of the mopping-up operations against Serbian partisans intervening with the newly re-conquered Hungarian control of Vajdaság [Voivodina], which ended by instances of genocide in 1942.

It is also to be mentioned that a bench of professors, representing the peak of the profession, could set the level of modernization through the law and its academic backing on European standards. This bench included many persons, just to name the civilist Károly Szladits or Zoltán Magyary who, reforming the Prussian tradition in public administration prevailing at the time, redrafted and implemented the American technocratic and management ideals. There were also prominent figures like István Bibó who, during the tragically few years left after the war and before the communist takeover in

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* Adapted from the first part of a paper originally published as 'Law As A Social Issue' in *Szkice z teorii prawa i szczegółowych nauk prawnych* Professorowi Zygmuntowi Ziembinskiemu, ed. Slawomira Wronkowska & Maciej Zielinski (Poznan: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu 1990), pp. 239–255 [Uniwersytet im. Adama Mickiewicza w Poznaniu: Seria Prawo nr 129].

1948, offered a political philosophy for the short-lived coalition with emphasis on fostering the foundations of a democratic political culture rather than pressing any specific party programme, planning conditions in which democratic practice itself could be born out, and ways and channels of how to programme subsequent actions. Or, among the less known, István Weis is remembered who wrote his sociography on contemporary society of Hungary[1] with that determination and uncompromising firmness that it could also set the pattern for late Marxist investigations.[2]

Survivors of the intellectual opposition to Nazi manipulation were subsequently made political outcasts by the communist regime for the mark they had made in the advance of a characteristically European (that is, non-Byzantine and non-Muscovite type of) legal erudition. By the force of the ensuing social re-structurating, the constitutionalist István Csekey had to be lucky to be able to survive as a bibliographer of the local history of Southern Hungary at Pécs or the legal philosopher József Szabó as a professional translator. All in all, there were so many of those anonymous people who represented a European horizon in the legislature and the government of interwar Hungary. Just to recall one of them, a student of the legal professions in England, Germany and Russia, a codification expert of English law, libel and the media, a public servant at the Royal Ministry of Justice in Budapest and simultaneously a poet and sensible arts historian, Dr Béla Csánk, at the end of his life without a pension, was my first English tutor.

In the meantime, unfortunately, predecessors have been forgotten, and the long-standing prestige and achievements of previous times have faded away. The eradication from the corporate memory of today's generations has reached the extent that even the death of the last survivors is nothing any longer other than a merely family affair, and many of the predecessors are viewed with indifference as if historical amnesia were the prime qualification of successors today.

Giants shaped domestic legal thought, scholars of a great stature who could work in cooperation with the most prominent international authorities of their field (e.g. Julius Moór with Hans Kelsen in the field of the neo-Kantian philosophy of law[3]) or scholars whose foundational effect on present-day social theory in Hungary may have only recently been revealed—characteristically, by non-jurists (e.g. Barna Horváth in legal sociology). The centuries-long boom

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[1] István Weis *A mai magyar társadalom* (Budapest 1930).

[2] Like Kálmán Kulcsár's *A mai magyar társadalom* (Budapest: Corvina 1984).

[3] Cf. Csaba Varga 'Documents de Kelsen en Hongrie: Hans Kelsen et Julius Moór' *Droit et Société* (1987) No. 7, pp. 337–352 and *Aus dem Nachlass von Julius Moór* ed. Csaba Varga (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures 1995) xvi + 158 [Philosophiae Iuris].

in the tradition of juristic approach setting the pattern for social theorizing cannot be simplified to mean that the humanities and the field of social action had allegedly been majored by the stratum of legal specialists. Rather it means that legal education reached high standards while exerting a wide-ranging influence.

The genuine significance of such a boom can be appreciated in full depth only if confronted by the facts of afterwar Stalinist period. After the communist takeover, the law's autonomy was abruptly suspended and the fate of how law had to "mirror" external conditions came to be predetermined by the debate revolving around the question of how the economic basis had at all times mastered social superstructure. The issue itself of the debate on basis and superstructure became a paradigm degenerating scholarship into mere ideological exercise. Law in books and action was transformed into a reflection of the economic basis it had to serve subserviently. No room for distinctive manoeuvre was left to the law or the legal specialist either. The profession itself became reduced to converting into the law's language what the "objective laws" of the economic basis were. Needless to say that all this was only asserted ideologically. In practice, the sheer voluntarism of the party centre was enforced with a theory destined only to provide posterior ideological justification.

In consequence, the distinctiveness and also the dignity and prestige of the legal profession declined, and jurisprudence degenerated into a mere tool. Also the chance of offering responsible and responsive decisions after the open assessment of alternative options was replaced by mechanical execution. The ethos of substantiated legal activity survived only as the memory of remote past instances, and sheer norm-conformism was made to master as a general rule. As a result, cynicism ensued. The jurist became one of those specialists who were assigned to meet political expectations through their professional conversion and field-related execution. Legal distinctiveness only survived as mere rule-dogmatism. That is, ironically, that pattern became dominant from which socialist theory, for the emphatic discontinuation of the European past, was so determined to distance the legal profession.

Professional book publishing and journal editing were not an exception either. Publishing policy was also subjected to the central political will. In order to transform them into fitting tools, they were used as sheer interpretation in mediating political expectations. Step by step, the humanities and also philosophical insight were deprived of perspectives. What could the jurist learn and wherefrom? Mostly, barely disguised ideological pressure formed the subject as a compulsory exercise, as embodied in political and quasi-philosophical brochures. Legal theorizing had also been lost sight of. The inevitable outcome was that those classic authors and fundamental works

which had once profoundly shaped modern legal culture became an alien no-entity for the legal staff. That is to say that discontinuation of professional socialization perfected the institutional destruction. Rule-dogmatism also cooled down the social ambitions of those jurists who were otherwise well versed in the humanities. For the juristic point of view came to be estranged from the rest of humanities. Philosophers, sociologists and historians—independently of whether or not they were exempt from professional corruption—tended to look upon it as an area of suspicion they had to disregard.

The theoretical legacy of Stalinism is rather controversial. With reference to the wording of *The Manifesto of the Communist Party*—"your law is but the will of your class made into a law for all"[4]—law was conceived of and also conceptualized as a will. In its turn, this incidence led to further differentiations and sterile debates, paradoxically at a time when the law was the least characterizable to embody any socially noticeable will. Vyshinskii, formulating his authoritative definition of law, had in fact translated the Stalinist ideal of Soviet political consolidation into the language of law. In order to make the law's authority absolute, unshakeable and unimpairable, he defined formal enacting as a *sine qua non* specificity of the law, separating it from anything which was not issued officially and centrally. Thereby he made a great turn by deducing the *ius* from the *lex*. As a consequence, legal scholarship also lost its capability of dissociating itself from the subject of its speculation and of describing its subject from an outside observer's point of view. The annihilation of theory was the outcome. Theoretical approach *to* law was made a function *of* the law, that is, of the criteria the law itself had postulated as legal criteria. Questions not fitting in the frame were excluded from theoretical reflection.

Vyshinskii's stand aimed at securing the most servile implementation of central enactments under any conditions. Later on, also a para-sociology of law was invented for preparing grounds for fuller implementation, neutralizing adverse components, and pinpointing obstacles for gapless realization.

No wonder if timely problems crying for immediate solution have piled up in the meantime. For instance, burning economic short-comings refer to inadequacy and disorder built in the set-up, especially in the political mechanism, the management and interests representation. In both the causal chain and the social context, law has a significant role. Therefore to define the task facing the law in a single word, we can only stress restoring prestige. The law's prestige has to be restored not necessarily by re-instituting past states of affairs but through meeting contemporary requirements, challenges and needs. The resurrection of rights is also in the basket.

[4] Karl Marx & Friedrich Engels *The Manifesto of the Communist Party* [1848] in their *Collected Works* VI (Moscow: Progress 1975), p. 501.

Only a social theory foundation can convince the politician not to use law as a panacea, the singular instrument of social change, standing for—and sometimes substituting—genuine reform. Only such a foundation can show where the proper limits and limitations of the law are. It is only upon this knowledge that legal specialists can strive for an optimum degree of efficiency and a partnership with politicians and legislators already at a preparatory phase of law-making.

Attempts at reform from within
LA SÉPARATION DES POUVOIRS*

Il y a deux millénaires et demie que le philosophe grec de l'école ïonienne, Héraclite né à Ephèse, formula déjà le grand dilemme de la confluence de loi et tyrannie ainsi que de liberté et licence, et par celà, de la recherche de leur équilibre délicat étant toujours rompu et exigeant toujours un renouvellement. "Le problème majeur de la société humaine est – comme il a formulé – à associer un tel degré de la liberté sans quoi la loi constituerait une tyrannie avec un tel degré de la loi sans quoi la liberté serait tout simplement une licence." Et dans le développement européen et dans celui s'irradiant de l'Europe ce dilemme subsiste toujours; et jusqu'à nos jours des sociologues, politologues et juristes se voient contraints à reformuler la sagesse ancestrale. On pourrait même la placer parmi des enseignements de l'Antiquité classique, l'on sent de flotter dans une telle mesure les paroles prononçées par Lord Acton aux vérités éternelles de l'intemporalité: "Power tends to corrupt, and absolute power corrupts absolutely."[1]

Si, sur les vestiges de István Bibó, l'acteur et penseur politicien hongrois tout récemment déçu, l'on dégage l'enseignement de l'analyse de l'histore de la politique et de celui de la pensée politique que "derrière les *'devenirs'*, en s'étandant au-delà des siècles même sur de longue terme ce sont certaines *'structures'* qui sont essentielles, structures qui désignent des limites et en même temps offrent des possibilités pour le présent et 'que au delà de ces structures' il y a aussi des *modèles* dans l'histoire dont la structure interne peut changer, mais leur validité peut se prouver consistante à travers des différentes structures"[2], alors dans ces formulations nous devons voir un problème se cachant derrière le modèle et à la fois une prétention de la formulation de ce modèle. Et si l'on met tout cela en parallèle avec l'interprétation

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* Une communication faite au Symposium international qui a eu lieu à Varna du 26 au 28 septembre 1983 sur le thème "Séparation des pouvoirs: théorie, législation et pratique". Sa publication dans le volume des contributions était preièrement réfusée. Subséquemment la publication était entrepris quand même, mais l'on a ruiné le texte sous le guise de traduction. Le texte intégral est originairement paru sous le même titre en *Acta Juridica Academiae Scientiarum Hungaricae* 27 (1985) 1–32, pp. 243–250.

[1] Lord Acton *Essays on Freedom and Power* (Boston 1948), p. 364.

[2] Jenő Szűcs 'The Three Historical Regions of Europe' *Acta Historica Academiae Scientiarum Hungaricae* 29 (1983) 2–4.

marxiste du phénomène de l'aliénation et avec le fait que l'aliénation en soi-même n'est pas un phénomène particulier mais elle est un phénomène s'offrant de la rencontre des conditions objectives, en tout cas socialement concrètement déterminées, et de leurs tombées subjectives (à savoir que l'aliénation n'est aucunement une "condition humaine" déterminant nécessairement l'existence sociale et elle n'est non plus un trait historiquement limité qui pourrait être *a priori* exclue de la pratique des systèmes actuels du socialisme,[3] alors il devient perceptible l'actualité de ce sphère de problèmes pour la théorie socialiste aussi.

Je suis d'avis que seulement une approche méthodologique peut être utile d'un point de vue de philosophie juridique, une approche qui tente de saisir l'élément idéologique (de même, tout ouvertement utopique) et dans la doctrine de la distribution des pouvoirs et dans la critique pratique des efforts visant sa réalisation pour qu'elle puisse rendre possible avec la critique d'idéologie ayant fini, et rendre simplement inomissible au nom des exigences de l'intégrité théorique, la révélation des connexités sociaux fondamentaux au-delà des éléments d'une critique d'idéologie, c'est-à-dire celle du fondement propre du problème et, par cela, son actualité de tous temps. C'est pourquoi que je n'entreprend qu'un traitement méthodologique; elle peut avoir la seule ambition à devenir un stimulateur des recherches ultérieures à effectuer en domaines de la théorie et de la sociologie politiques.

L'humanité tient en tant que part du trésor commun des idées et en tant que reconnaissance jouant un rôle dans le développement de la civilisation occidentale le plus récent la différenciation et la description conceptuelles des povoirs étatiques et l'exigence des nouveaux temps exprimée d'une façon normative de ce que ces pouvoirs soient séparés d'une manière absolument conséquente et dans le système de l'État et dans son fonctionnement réel.

Cette communauté des idées ne signifie aucunement ni une universalité et ni une éternité réelles. La reconnaissance en question s'est développée de composants politiques et théorétiques de caractères et de motifs différents. Pour en mentionner seulement quelques de ses manifestations les plus éminentes: Aristote est parvenu à l'idée d'une différentiation conceptuelle (le corps délibératif, les magistratures et le corps judiciaire en tant que les trois éléments du pouvoir étatique) au cours de l'analyse comparative des différentes formes des polis grecs[4]; Locke a introduit une séparation des pouvoirs (pouvoirs législatif, exécutif et fédératif) dans l'intérêt d'un gouvernement subordonné aux

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[3] Cf. avant tout György Lukács *A társadalmi lét ontológiájáról* [Vers une ontologie de l'être social] II (Budapest: Magvető 1976), chapitre IV et – en connexité avec les phénomènes de l'objectivation et réification – Csaba Varga 'Chose juridique et réification en droit: Contribution à la théorie marxiste sur la base de l'Ontologie de Lukács' *Archives de Philosophie du Droit 25* (Paris: Sirey 1980), chapitre III, § 3.

[4] Aristote *La Politique*, livre IV, chapitre 14.

subordonné aux lois au lieu du régne des hommes[5]; et Montesquieu a proposé une séparation des pouvoirs, formellement garantie mais ayant en vue en même temps de leur coopération (la puissance législative, la puissance exécutrice et la puissance de juger en tant que sortes de pouvoirs) pour se rendre garante de la liberté civique par la déposition de ses fondements institutionnels[6]. La réconstruction conceptuelle faite par l'histoire politique y révèle le chemin parcouru de la rève antique des formes de gouvernement mixtes et des compromis mutuels y inclus par voie de la recommandation bourgeoise de la séparation des pouvoirs contre le despotisme de l'absolutisme féodal vers la découverte institutionnelle de l'égalité d'apparences du libéralisme. Et il est clair pour l'histoire de la théorie que c'est un développement à partir de la différenciation des composants de structure et des grandes fonctions étatiques jusqu'à la reconnaissance de certains effets mutuels du fonctionnement et de certaines régularités du développement de l'organisme étatique. Cela veut dire que la littérature tente donc de prouver d'une façon accentuée qu'il y a une hétérogénité, discontinuité et même une altérité historiques dans le développement de cette idée d'une part. Mais d'autre part, comme on va le voir tout de suite, tout cela semble à retomber en tant qu'une sorte de l'unité indifférenciée sous les coups des incantations des politologues et des constitutionnalistes jugeant le présent à partir des idées du passé.

Mais de quoi s'agit-il en effet à ce propos? Tout brièvement de la circonstance que les idées sont dès le début plurivalentes, conséquemment elles peuvent être utilisées librement sans l'exigence d'avoir aucune sorte de prérogatives ou contre-prérogatives. Ou, plus précisément, au cours des grandes transformations bourgeoises du tournant des XVII[e] et XVIII[e] siècles et avant tout dans la pratique constituante révolutionnaire en Amérique et en France, l'idée de la différenciation et de la séparation des pouvoirs a été interprétée comme un précepte prescrivant une solution institutionnelle positive et, en conformité avec celui-ci, la séparation des pouvoirs a été imposée comme un modèle en soi-même suffisant quoique nécéssaire. Quiconque manifestation de celle-ci soit passée en revue et inspectée. On peut voir clairement de n'importe quelle manifestation de tout cela qui est-ce qu'il a intervenu et avec quel résultat engendré. Notamment, c'était tout simplement l'absolutisation d'un objectif à atteindre, la sélection d'un moyen exclusif à le réaliser et, comme une conséquence, la présomption de la réalisation de l'objectif même par fait que la sélection du moyen est faite. Évidemment, tout cela n'est pas seulement une simplification, mais une déformation falsifiant la reconnaissance primitive et, par cela, menaçant méme sa propre raison d'être.

[5] John Locke *An Essay concerning the True Original, Extent, and End of Civil Government*, chapitres X-XII.
[6] Montesquieu *De l'esprit des lois*, livre XI, chapitre VI.

Mais l'action entraîne avec elle une sorte de réaction et cela ne manquait non plus dans ce cas. De même, si l'action se montre d'être trop catégorique, trop ferme et intolérante à toute autre éventualité, on ne peut pas être surpris si la réaction s'y ajuste et répond justement par toucher la corde sensible, sans s'efforçant à fournir une réponse plus contextuelle et différenciée, découvrant le noyau de problème primitif et y accordant une compréhension et une sensibilité plus adéquates. A quelle autre réponse pourra-t-elle inspirer l'énonciation presqu'agressivement déterminée et résolue par Madison, énonciation selon laquelle "l'accumulation de toutes sortes de pouvoirs [...] dans les mêmes mains, quoqu'ils soient les mains d'une seule personne, de quelques ou de plusieurs personnes et quoique cette(ces) soi(en)t héréditaire(s), auto-désignée(s) ou élue(s), une telle accumulation ne peut être autrement prononçée que la défénition propre de la tyrannie?"[7] Ou, à quelle autre réponse pourra-t-elle inspirer la mise en objectif des moyens, suffisante en elle-même, selon laquelle "le département législatif ne pourra jamais exercer les pouvoirs exécutif et judiciare ou l'un d'eux; le département exécutif ne pourra jamais exercer les pouvoirs législatif et judiciaire ou l'un d'eux; le département judiciaire ne pourra jamais exercer les pouvoirs législatif et exécutif ou l'un d'eux; et pour finir cela engendrera un gouvernement des lois au lieu de celui des hommes?"[8] Ou bien à quelle autre réponse pourra-t-elle inspirer la déclaration de l'Assemblée Nationale révolutionnaire qui a énoncé qu'une société au sein de laquelle la séparation des pouvoirs n'est pas déterminée, ne possède pas de Constitution? On sait que la réponse a pu mettre en question justement est-ce qu'ils existent ou pourraient-ils exister au fond des pouvoirs mutuellement séparés; est-ce qu'une telle exigence doctrinaire ou sa formulation normative a été réalisée ou pourrait-elle être réalisée en pratique; ou bien il ne s'agit plutôt du fait que ces projections présentées comme théoriques et aussi leurs formulations normatives ne sont que des illusions fallacieuses dictées par le simple désir et explicable seulement par l'euphorie caractéristique à la lune de miel des révolutions car leur critique et réfutation complètes sont données par le nouveau régime de l'État et par sa Constitution qui le reflète? Je suis d'avis qu'une telle réponse n'était pas seulement adéquate mais aussi justifiable, c'est-à-dire juste dans tous les deux sens du mot. En effet, les espérances que j'ai cité plus haut s'étaient avérées non seulement des illusions dès l'heure de leur naissance, mais aussi les développements ultériuers (les nouvelles constitutions eurent leurs fondations politiques et constitutionnelles également) ont entraîné leurs limitations supplémentaires et/ou leur dépassement effectué par plus ou moins de compromis.

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[7] James Madison in *The Federalist* N°. 47 (le février 1er, 1778).

[8] *The Constitution of Massachusetts*, partie I, § XXX.

Dans le cas si l'on tombe d'accord de tout cela, il ne reste qu'une seule question: une telle réponse peut-elle être complète en elle-même, ou bien elle constitue une réponse dont le caractère est défini par l'insuffisance ou même par les limitations de la position de la question?

Je crois que l'on pourrait parvenir plus près à un éclaircissement suffisant si l'on tente d'employer la notion de l'idéologie de Marx. Suivant la réconstruction méthodologique faite par Georges Lukács, l'on peut faire les constatations qui suivent: l'idéologie n'est autre chose qu'un instrument "pour rendre conscient et tenir jusqu'au bout leurs conflits."[9] Ce qui veut dire que selon une formulation générale, "l'idéologie est avant tout la forme de l'élaboration intellectuelle de la réalité, qui sert à rendre consciente et active la pratique sociale des hommes."[10] Considérant que selon l'approche principale de l'ontologie de l'être social "le critère décisif et final de l'existence ou non-existence d'un phénomène social est fourni par son efficacité sociale,"[11] la critique de l'idéologie, c'est-à-dire la démonstration de sa vérité ou fausseté en sens épistémologique n'est pas suffisante en elle-même, parce qu'elle n'est pas capable de donner l'explication de quelle manière des idéologies parfois vraies et parfois fausses peuvent également exercer une influence sociale; elle n'est pas capable de fournir une explication non plus à la question "de quelle manière pouvaient-ils les hommes agir sur la base d'une idéologie 'idiote' pourtant en conformité considérable avec leurs propres intérêts, c'est-à-dire d'une façon directement adéquate."[12] On peut conclure clairement de l'examen de l'oeuvre de Marx que "c'est pourquoi qu'il a soulevé le problème de l'idéologie non pas dans une abstraction gnoséologique mais dans une forme concrète de l'ontologie sociale lorsque pour lui la base génétique de la définition de l'idéologie n'état pas le dilemme de sa vérité ou fausseté mais sa fonction: pour rendre conscient et tenir jusqu'au bout les conflits de la vie sociale provoqués par l'économie."[13] Conséquemment, dans une formulation

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[9] "...ideologische Formen, worin sich die Menschen dieses Konflikts bewußt werden und ihn ausfechten." Karl Marx *Zur Kritik der politischen Ökonomie / Vorwort* en Karl Marx & Friedrich Engels *Werke* 13 (Berlin: Dietz 1975), p. 9.

[10] "Ideologie ist vor allem jene Form der gedanklichen Bearbeitung der Wirklichkeit, die dazu dient, die gesellschaftliche Praxis der Menschen bewußt und aktionsfähig zu machen." György Lukács *A társadalmi lét ontológiájáról* II, p. 449. [En allemande, cf. le manuscrit conservé aux Archives et Bibliothèque de Lukács à Budapest, *Zur Ontologie des gesellschaftlichen Sein* Die wichtigste Problemkomplexe: Das Problem der Ideologie, p. 947.]

[11] "Dominierend zeigt sich die gesellschaftliche Wirklichkeit als letzhinniges Kriterium für das gesellschaftliche Sein oder Nichtsein einer Erscheinung." Georg Lukács *Zur Ontologie des gesellschaftlichen Seins* Die ontologischen Grundprinzipien von Marx (Darmstadt & Neuwied: Luchterhand 1972), p. 8.

[12] "...wie Menschen auf Grundlagen einer 'blödsinnigen' Ideologie doch weitgehend ihren Interessen gemäß, also unmittelbar richtig handeln konnten." Lukács *A társadalmi lét ontológiájáról* II, p. 466. [En allemand, cf. le manuscrit, p. 967.]

[13] "Marx hat daher das Problem der Ideologie nicht erkenntnistheoretisch abstrakt, sondern gesellschaftsontologisch konkret aufgeworfen, indem bei ihm bei der Bestimmung der Ideologie nicht das Dilemma

extrême, "la mesure [des idéologies] n'est pas nécessairement quelle est gnoséologiquement plus adéquate ou socio-historiquement plus progressive, mais quelle a une impulsion plus efficace pour répondre aux questions soulevées par la situation historiquement toujours concrète du développement social et de leurs conflits."[14]

En appuyant par un exemple: lorsque j'ai tenté d'esquisser des connexités ontologiques parmi les institutions, le fonctionnement et l'idéologie du droit formel moderne, j'ai dû réaliser que l'approche qui part des normes pour parvenir aux normes, décrite par Marx et Engels comme la "conception juridique du monde"[15], est un composant *sine qua non* de ce type du droit en tant que caractérisation idéale du fonctionnement considéré comme spécifiquement juridique. Bien que sur les pages de *L'idéologie allemande* (1844) Marx et Engels aient démontré que cette conception n'était pas justifiée du point de vue gnoséologique, ils n'ont développé qu'une critique idéologique car en ce temps-là c'était justement cela qu'ils ont eu comme une tâche à remplir. Cependant, la réconstruction ontologique révèle des connexités fonctionnelles entre le système des normes qui est basé sur la définition formelle des constitutifs des causes légales, qui est soutenu par une validité formelle et présuppose une observation formelle de ses règles, d'une part, et l'idéologie professionnelle des juristes qui sont responsables pour le fonctionnement et la réproduction pratique de ce système des normes, suggérant justement une telle conception, d'autre part.[16]

Cet exemple permet peut-être de tirer une conclusion analogique, notamment que la doctrine politique de la séparation des pouvoirs de même que sa formulation constitutionnelle remplissent une fonction idéologique,

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von Richtigkeit oder Falschheit die genetische Grundlage bildet, sondern ihre Funktion: die von der Ökonomie im gesellschaftlichen Leben ausgelösten Konflikte bewußt zu machen und auszufechten." Lukács *A társadalmi lét ontológiájáról* III, p. 231. [En allemand, cf. le manuscrit, *Zur Ontologie des gesellschaftlichen Seins* Prolegomena, p. 340.]

[14] "...deren Maßstab jedoch nicht unbedingt das erkenntnistheoretisch richtigere, auch nicht das gesellschaftlich-geschichtlich Progressivere ist, sondern der bewegende Impuls für eine gerade Geradesosein der gesellschaftlichen Entwicklung und ihren Konflikte gestellt haben." Lukács, II, p. 466. [Le manuscrit, p. 967.]

[15] Cf. le terme "juristische Illusion" en Karl Marx & Friedrich Engels *Die deutsche Ideologie* en leur *Werke* 3 (Berlin: Dietz 1978), p. 63 et le terme "juristische Weltanschauung" en Friedrich Engels 'Juristen-Sozialismus' en *Werke* 21 (Berlin: Dietz 1979), p. 492.

[16] En première tentative de formulation, voir Csaba Varga 'La question de la rationalité formelle en droit: Essai d'interprétation de l'Ontologie de l'être social de Lukács' *Archives de Philosophie du Droit 23* (Paris: Sirey 1978), chapitre III. Pour un développement plus détaillé, cf. de l'auteur 'The Concept of Law in Lukács' Ontology' *Rechtstheorie* X (1979) 2, pp. 328 et seq.; 'Towards a Sociological Concept of Law: An Analysis of Lukács' Ontology' *International Journal of the Sociology of Law* 9 (1981) 2, chapitre IV, § 6; 'Towards the Ontological Foundation of Law: Some Theses on the Basis of Lukács' Ontology' *Rivista internazionale di Filosofia del Diritto* LX (1983) 1, § 6. En dernière tentative de formulation, voir Csaba Varga 'Das Recht und ihr Verwirklichung: "Juristische Weltanschauung", Subsumption und Manipulation' *Archiv für Rechts- und Sozialphilosophie* LXX (1984) 2, § 3.

conséquemment la démonstration de ses limitations réelles ou même de son caractère dépassé n'excède pas le niveau d'une critique de l'idéologie. Il y a cependant une différence considérable entre l'exemple ci-dessus concernant le droit et l'ensemble des problèmes relatifs à la séparation des pouvoirs. A savoir, l'idéologie professionnelle des juristes suggère une directive pour l'activité de l'autorité en fonction pour appliquer le droit: agis comme si l'observation formelle de ces règles formelles pourrait aboutir à une décision sociale responsable, agis donc d'une telle manière que le maximum de l'observation formelle de ces règles formelles puisse conduire à l'optimum d'une décision sociale responsable, en effet. Par contre, la formulation idéologique de la séparation des pouvoirs n'a rien de référence à l'activité quotidienne des individus bien déterminés, mais elle suggère plutôt un principe à suivre pour l'établissement institutionnel, structurel et fonctionnel du système d'organisme social le plus complexe, notamment de celui de l'État. Et tout cela veut dire que tandis que l'idéologie professionnelle des juristes suggère une idée irréalisable dans sa totalité mais pas entièrement irréalisable dans des cas individuels, la doctrine de la séparation des pouvoirs offre un idéal irréalisable et dans son ensemble et dans des cas individuels et d'une telle façon elle semble flotter par un brouillard léger des utopies.

Bien qu'à nos jours il soit largement accepté que le penser fait fondement sur une série de prémisses non-prouvées[17] et que l'utopie peut paraître non seulement en tant que système des vues cohérent mais aussi en tant que composant primitif d'un tel système,[18] même malgré l'entreprise prétentieuse de la sociologie de connaissance le rattachement des concepts de l'idéologie et de l'utopie n'a pas pu avoir lieu parce que la sociologie de connaissance les a interprété, et même a confronté, l'un excluant l'autre.[19] Toutefois si l'on utilise le concept marxiste de l'idéologie, il dépend évidemment de l'accomplissement de sa fonction sociale est-ce que l'utopie se qualifie d'un composant idéologique ou non. Par contre de la tradition engelsienne partagée par les courants de sociologie occidentaux aussi, qui considère l'utopie comme un système des vues cohérent et la caractérise d'un point de vue méthodologique en tant que déscription de l'image future remplaçant l'analyse scientifique du présent,[20] en connexion avec l'idéologie je parle plutôt de l'élément utopique, caractérisé avant tout par son résultat fonctionnel: par l'identification et l'utilisation de n'importe quelle idéalité en tant qu'indicateur

[17] *Proceedings of the Symposium on Scientific Objectivity* (Copenhagen: Munksgaard 1977) [Danish Yearbook of Philosophy, vol. 14].

[18] *Utopias and Utopian Thought* ed. F. E. Manuel (London: Souvenir Press 1973).

[19] Voir, par exemple, Karl Mannheim *Ideologie und Utopie* (Bonn: Cohen 1929).

[20] Friedrich Engels *Die Entwicklung des Sozialismus von der Utopie zur Wissenschaft* ([en français] 1880; [en anglais, avec une introduction] 1892).

de direction positif. L'essentiel de l'élément utopique est donc un idéal confronté avec le présent,[21] qui offre une mesure pour l'analyse et l'appréciation de la réalité, d'une part, et un indicateur de direction pour transformer la réalité, d'autre part. Il peut remplir ce rôle double parce que dans la liaison entre les objectifs et les moyens il concentre, au lieu du caractère direct des moyens, sur le caractère indirect des objectifs. Dans la piste zigzaguée de la pratique, produite par la transformation des moyens en objectifs et par l'absence d'aucun élément de rétrocouplage en ce proccessus, il peut indiquer une direction parce que c'est tout au plus s'il renferme des moyens enfermés dans cet idéalité et y dissous. Conséquemment, ni son renouvellement continu dialectique, ni son caractère abstrait, même ni l'impossibilité de sa réalisation directe exclut qu'il puisse servir d'indicateur de direction. Sa connexion dialectique avec la réalité s'exprime dans les faits que sa "preuve" est constitutée par l'efficacité pratique de ce qu'il puisse servir d'indicateur de direction positif et sa "critique" peut être raisonnable seulement et exclusivement en unité avec la critique de la réalité confronté en lui et par lui.

Si l'on tente de libérer l'ensemble des problèmes politique et constitutionnel de la séparation des pouvoirs des instrumentalisations qui l'ont actualisé, il me semble que l'on pourra obtenir une image qui correspond à celle qui était ci-dessus esquissée. On peut admettre qu'une différenciation faite entre les théories de la séparation des pouvoirs et celles de l'équilibre des pouvoirs ait une importance historique ou terminologique, il est pourtant certain que ces dernières sont plus larges, touchant l'essentiel du problème, conséquemment génétiquement plus primitives, et que l'on peut observer les variations idéologiques justement de celles-ci à partir de ses manifestations de l'Antiquité jusqu'à celles de l'époque contemporaine.

Comme j'ai mentionné plus haut, l'analyse des connexions ontologiques entre les formes idéologiques et la réalité actuelle rend possible la découverte de ce que sur la base de la réalité donnée pourquoi justement l'idéologie donnée s'est dévéloppée et a obtenu une utilisation efficace en pratique. Il devient explicable donc le fait que sur le sol du développement européen, dans la lutte des parlements contre le roi et, par la suite, du Tiers État contre l'héritage institutionnel de l'absolutisme féodal, pourquoi et comment l'idéologie s'est-elle réduite à une seule expression de moyens (c'est-à-dire la simple séparation

[21] Pour la plupart, la littérature formule la notion de *genus proximum* de l'utopie en se faisant dépendent d'une perspective (cf. G. Kateb 'Utopias and Utopianism' en *International Encyclopedia of the Social Sciences* XVI [New York: Macmillan 1968]) ou s'exprime en terms de l'image désiré (cf. A. Neusüss *Utopie* [Berlin & Neuwied: Luchterhand 1968], étude introductive et chapitre III, § 1). Cependant, ces notions n'excluent pas la réalisibilité de l'utopie, elles la plutôt poussent à l'avenir. C'est pourquoi que j'emploie les notions de l'idéal et idéalité à ce propos, univoques également sous ce rapport.

des pouvoirs législatif, exécutif et judiciare) et que dans les périodes de transformations révolutionnaires avec une concentration radicale des pouvoirs pourquoi et comment l'idéologie a-t-elle cédé sa place à une négation complète (c'est-à-dire à la reconnaissance tout au plus d'une certaine distribution de fonctions sur la base de l'unité inconditionnelle du pouvoir étatique) comme c'était égaleament exigé par Jean-Jacques Rousseau, au nom de la souveraineté du peuple, par le jacobinisme et, à notre siècle, aussi par la théorie bolchévique de la dictature du prolétariat.

C'est précisément cette recherche des connexions ontologiques qui peut démontrer que des conditions différentes peuvent "produire" des idéologies différentes au traitement et à la solution pratiques du même problème; que dans ces idéologies la transformation des moyens en objectifs, le rôle exagéré de l'élément utopique ou même la négation du noyau réel du problème pouvaient remplir une fonction nécessaire en leur *hic et nunc* concret, adéquate à l'état de la société et des ses conflits donc ayant une existence réelle [*seinhaftig*] en sens de Lukács. Il n'est pas par hasard qu'un répresentant éminent du droit constitutionnel hongrois, dans son discours inaugural prononçé il y a une décade à l'Académie des Sciences de Hongrie, s'occupait des contradictions intérieures et des égalisations dans l'organisme de l'État socialiste,[22] et il n'est pas par hasard non plus que justement après la fin de la seconde guerre mondiale, lors de l'établissement, au cours des années de la politique de coalition démocratique, des fondements espérés d'une nouvelle société hongroise, une personnalité de grande autorité politique a jugé à propos de déclarer dans son discours inaugural prononçé à la même Académie des Sciences: "Le problème n'est donc pas résolu par le fait que nous catégorisons les fonctions de l'État pour en conclure qu'elles doivent être séparées aussi strictement que possible; l'essentiel est à distribuer des compétences, couper et supprimer des compétences, même organiser des pouvoirs concurrents en contre-coup de n'importe quel phénomène institutionnel de la concentration des pouvoirs."[23]

Je suis d'avis que même en présence des interprétations actualisantes, un enseignement similaire est suggéré par la formulation de Marx, occasionnée par les escarmouches du *Landstag* et clairement discernable en ce qu'il y a à dire en général et en concret: "La vision des pouvoirs entourée du plus grand respect en tant que principe sacré et inviolable par les grands philosophes d'État [...] n'est au fond autre chose que la division simple du travail industriel

[22] Ottó Bihari 'Contradictions intérieures et égalisations dans l'organisme de l'État socialiste' *Acta Juridica Academiae Scientiarum Hungaricae* XVII (1975) 3–34.

[23] István Bibó 'Az államhatalmak elválasztása egykor és most [La séparation des pouvoirs au temps jadis et à l'heure actuelle]' [1946] *Vigilia* (1980) 8.

employée au méchanisme d'État dans l'intérêt de la simplification et du contrôle. Et comme c'est le cas avec tous les principes sacrés, éternels et inviolables, cela acqui aussi une application précisément dans une telle mesure comme les conditions existantes la demandent."[24] La critique de l'idéologie refuse donc la mystification qui se manifeste dans la profession de la toute-puissance des moyens et qui transforme les moyens en objectifs suffisants en eux-mêmes. Cependant ce n'est pas au caractère sans objet de la théorie ou au manque de son actualité que la réconstruction des connexions ontologiques en conclut, mais elle révèle dans les limitations de l'expression idéologique de l'ensemble des problèmes en question aussi son caractère pratiquement ayant une existence sociale *hic et nunc* concrète (*seinhaftig* en sens de Lukács), c'est-à-dire son rattachement pratique au résultat actuellement nécessaire et aussi se produisant en tant que tel, c'est-à-dire sa contribution réelle en tant que facteur social réel.

[24] "Die Teilung der Gewalten, die [...] große Staatsphilosophen als ein heiliges und unverletzliches Prinzip mit der tiefsten Ehrfurht betrachten, ist im Grunde nicht anders als die profane industrielle Teilung der Arbeit, zur Vereinfachung und Kontrolle angewandt auf des Staatsmechanismus. Sie wird, wie alle andern heiligen, ewigen ud unverletzlichen Prinzipien, nur soweit angewand, als sie gerade den bestehenden Verhältnisse zusagt." Karl Marx 'Vereinbarungssitzung vom 4. Juli' [1848] en Karl Marx & Friedrich Engels *Gesamtausgabe* partie I, tome 7, p. 177.

WHAT IS NEEDED TO HAVE LAW?*

We are living in an age of social revolutions—and not for the first time in the course of the history of our century—, full of calamities here in Central and Eastern Europe, but also in the wide regions of Asia and Africa, as well as of Latin America.

This especially holds true for the regions which are looked upon as the peripheries in relation to the centre of the world economy. The picture shows one common feature: these are societies which move along forced paths controlled by ideological and/or modernizing desires. They are societies in the process of substituting democratic arrangements for self-nominated charismatic leadership believing that, because of belatedness in development, they happen to be in a kind of emergency situation, and their recognizing it is the precondition of further development. Thus leadership resorts to social experimentation, subordinating the whole of society to this objective, about which Thomas Mann still held the hope in 1919—when applying to the Chancellor of Austria for George Lukács's life—that "[t]his possibility was one which occurred but once, as a consequence of a lost war, at a time when catastrophic conditions offered transitorily to social zealots the possibility of trying out their ideas experimentally on the living body of the people."[1] Each of those in power places on their banner the realization of liberty, of equality, and of something else in accordance with their own programme, while the emergency situation referred to mostly requires their practical negation, at least transitorily. However, according to the logic of the forced path, deformation of the conditions deforms the result as well. More exactly: all the factors alien to the original objective which are incorporated into the process as a result of some concrete necessity, becoming socially irrevocable

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[1] *Thomas Mann und Ungarn* Essays, Dokumente, Bibliographie, ed. Antal Mádl & Judit Győri (Budapest: Akadémiai Kiadó 1977), pp. 339–340; cf. Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985), p. 56.

in it, may set auxiliary directions which, finally, themselves block the way towards implementing the objective. The paradox of the process may manifest itself not only in the crying contradiction between the desired objective and the paths actually followed in reality, as with the dream of the Golden Age set against the misery of the present (e.g., the tyranny of hierarchical structures, bureaucratically set in motion and devastating the basic tissues of society, causing the re-feudalization of society instead of the establishment of a classless society), but it seems as if law too is constructed in such a way that the very idea of any law and order is dying out. Or, rather, is a kind of law and order perhaps going to get constructed without any law standing behind it?

The ideas to be explored in the following are not political standpoints. Their relevance is not even to a philosophy, social or historical in character. Consequently, they reflect neither committedness nor sympathies nor choices. It is simply the lawyer who stands behind them, representing a specifically homogeneous aspect of social existence. In his specific role the lawyer has to respect the specific values of the specifically distinct structure and independent operation of that particular aspect of social existence. Dealing with the ontology of social existence from the point of view of law, he knows that no matter of what overriding roles assert themselves in the total complex of social existence and become characteristic of individual partial complexes, they are characterized not by subordination but by being different in their ontological relationship. For the socialization of social existence presupposes the development of partial complexes (not only the economy, or politics, but religion, morals, law, science, etc.) in accordance with their own particularities. To put it in philosophical terms, it presupposes the formation of homogeneous aspects of social existence, which are different from each other and successfully manifest their being different in their social reproduction. Alternatively, it is the lawyer who in the following is to speak about the social preconditions of the partial complex of law and its homogeneity, as well as of the possible limitations which may jeopardize this homogeneity by eliminating the particularities of this aspect of existence and, thereby, also its distinctiveness.

In all that, a variety of subjective motives may play a role; however, from the above standpoint, it may only have one objective outcome. Therefore I believe that the fortunate process of self-reflection and self-moderation ongoing in Hungary and in some other neighbouring countries makes this search not unnecessary and unfeasible but, on the contrary, timely, and enables me to carry out the analysis of causes and consequences, at least from one point of view, to the end.

I. THE DILEMMA OF UNLAWFULNESS AND LAWFULNESS

What is dramatic about the murder of a priest committed somewhere by someone? The fact that people in uniform on duty ruthlessly killed a man who happened to be a priest, for political reasons? This is obviously so if we look at the event in its tragic straightforwardness and irrevocability. But if the query is of more general character, directed to the relationship between power and law, behind the point which gave rise to consternation on account of having received publicity, we have to see the submerged iceberg too. We have to see the power in whose eyes law is nothing else but the ornament of its mightful *mihi placet* at any given time. Once it grasped a club and it has been holding this in its hands ever since and no one can tell on whom it will deliver a blow, and when. All it needs do is merely make reference to the club whenever it wishes to limit someone else.

This is exactly the reason why the problem is by no means restricted to the cases of state terrorism. If it were exclusively such things, that would be enough to awaken us from our apathy, instead of our simply having lost interest. For the institutional movement amounting to this or that kind of state-run terror can also be tame and bloodless. It may be manifested in the lack of operation of law courts, the silence of administration and the sabotage of law-enforcement.

What kind of law and order is it in which the trial of lawsuits fully founded legally can be hindered by administrative decision (as happened in Hungary, for example, in relation to lawsuits aimed at achieving a proper re-division of private animal stocks which had got mixed in the course of requisitioning performed by the occupying military after World War II)? Or in which there can be *ab initio* an exclusion of any remedy against discretionary administrative measures taken to the detriment of basic rights (as happened in cases of decisions about nationalization and deportation in Hungary in the late '40s and early '50s)? Or in which a licence can be extorted in spite of an express prohibition (as in the scandalous case, e.g., of the beer bar to be built by a functionary's relative in the protected forest of Lake Héviz in Hungary)? Or in which a licence can be refused against the terms both of a law and of a government decree, enacted to give authority for it, through the deliberate silence of the government agency (as in the matter of the permission of private book publishing)? Or in which the population of a country may be made to face, not only without its approval but without even so much as knowing about it, a *fait accompli* which inflicts on it serious financial risks (e.g., by importing dangerous wastes from neighbouring Austria to Mosonmagyaróvár and Körmend in Hungary)? Or where such things may even amount to a governmental modification of a

peace treaty (as by the contract for building the Czechoslovak-Hungarian hydraulic power station at Gabcikovo and Nagymaros)? Or in which the validity of a Criminal Code can be suspended by resort to a non-legal norm (e.g., by making legal indictments dependent upon a preliminary political party decision)? Or in which (e.g., in respect of the regulations of the Highway Code on traffic accidents) a privileged separate order gets established without any explicit public legitimation (by and for the police and also in favour of those who exercise leading functions in the party and the state, and relatives of these), so that the man in the street does not even know whether the legal status of the prohibited act has been modified, or whether it is only a matter of selective non-implementation that regularly selects on the basis of the culprits being within the boundaries of the party and state power? Or in which an over-politicization of society can turn into over-reliance upon authorities to such a degree that guarantees of rights become practically unheard of in whole periods of legal development (e.g., in case of the disappearance of the presumption of innocence, or of the bare idea of meting out milder punishments than those proposed by the state prosecutor, or just of the possibility of acquittal) as happened in the Soviet Union until the recent past? Or in which the political context undergoes such a dramatic deterioration that something which is still legally conceivable (such as the disciplinary dismissal of a prison officer of the highest rank in the wake of a report submitted in the official way by a political convict) may be transformed from a real possibility (such as was reported by the late Hungarian poet and essayist, Gyula Illyés, in his historical memoirs, writing of an event that had happened in the turbulent years of the so-called white terror in the early '20s) into being an historical anecdote without any contemporary impact except as making people smile (for let us bear in mind that even in Hungary the Prison Code was confidential material for decades)?

What happens in real life does not necessarily depend upon norms, just as norms do not necessarily reflect or derive from such happenings. But positing a normative sphere can only make sense provided that at the same time you posit a world of facts that can be contrasted to it. And, as is known, in social existence normativity can only play a role if it is assumed that as soon as one raises the possibility of bringing the two into relation, every actualization of the normative is an actualization by the other.

What else is interesting at all in these examples, the list of which could undoubtedly be continued? To bring about the legal control of those who implement the law is an ancient problem which has emerged in every effort to reduce law (*ius*) to a written text (*lex*), e.g., in the efforts of Justinian, or Ivan the Terrible, or Frederick the Great. The protection of laws against judicial sabotage is not a novel problem either; attempts have been made to

take care of this problem institutionally from as early as the late Middle Ages. (In Byzantium, judges were under an obligation, in case of any ambiguity revealed while applying a law, to turn to the sovereign committee which was exclusively authorized to eliminate it; much the same was seen in the form of the *référé législatif* at the time of the French Revolution; the aim in both cases was to prevent judges taking liberties under the pretext of applying the law.)

The particularity of all this is an outcome of the claim to totality made by the revolutions of our century. The attempt to institutionalize change not only embraces the whole of society and virtually all the segments of its existence in a hitherto unprecedented way (étatisation of society as it were, largely annihilating its own existence, autarchy and reserves); it also displays a formidable accomplishment in formulating uniform hierarchical establishments and ruthlessly radiating and asserting central power (even if it is built upon competitive parallel competencies as was done in Byzantium and as survived in Russia, as well as being a feature of the organization of Nazi power in certain fields).

The social pathology embodied in these examples is not simply that execution slips out of the hands of the sovereign ruler or law-maker. What is new about them is that each of their components is organized into a single system of the all-embracing state, and that is the way they operate. For instance, in vain does ideology ascribe great importance to the separation of law-making and law-applying (*Rechtssetzung / Rechtsanwendung*; *création du droit / application du droit*): what it enacts is in practice only one single input—and not necessarily the decisive one—in a process (consisting of interactions of elements not necessarily presupposing albeit undoubtedly supplementing each other) which is carried out in the name of law, and as its realization. If enacting a law is in itself not sufficient to make the state machinery work in a uniform way, because each and every part and segment of it formulates, balances conflicting interests according to, and asserts, its own legal policy, then we may in the end see a state come into existence where that which is enacted in books will be accidental as compared to what will actually be made to happen. Suppose that each and every level of state machinery did not simply consider itself to be what it is and, as such, to be a functioning unit of the rule of law, but acted by holding a primary responsibility for the individual realization of the given programme of ideology or for modernization. In such a case, what mattered would exclusively be the agency's own legal policy projected into the concrete situation, or, rather, its political, tactical or strategic considerations, or prestige points of view, or just whatever personal interests may stand behind them.

"These two articles tell us everything we need to know. The rest was not intended for us. The other articles are intended for the world at large, for

those who consider that what matters are the articles, as such, not the essentials."[2] It seems as if the way of thinking hidden in such once-off trickery of political tactics came to be the main rule followed for decades. With its long-term practice and on account of its deep immorality it thoroughly undermined the validity of everything objectivated—words, writing, institutions. What was sabotaged was not a single institution or person but a complete sub-system integrated into the total system of society. The legal system itself could not but become Janus-faced, as a phenomenon internally split and built upon the negation of one of its manifestations.

All the way from children's tales up to the painful reality of today, we may encounter the myth of the good ruler whose wicked entourage is a source of mere suffering for the people. Is the assumption which projects before us the gigantic struggle of good law and bad execution the same in value? Or even more so if the Number One in the power structure qualifies the execution as unlawful too, and perhaps even names an individual as personifying the unlawful execution and has him executed too?[3]

At this point the question must definitely be raised whether this phenomenon is indeed unlawfulness. To put it more precisely: can something which is the result of the closed operation of a closed system of law be unlawful at all?

1. Unlawfulness or Law in Action?

The formal reconstruction of logic manifested in the construction and operation of law[4] displays the following structure: *(i)* the legal system (from the Constitution through the laws and decrees up to the judgements and their enforcement in individual-concrete cases) is built upon the hierarchical

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[2] Quoted as an interpretation given by the president of the revolutionary tribunal in Tshita, Siberia, by Endre Sík *Próbaévek* [Years of Trial and Error] (Budapest: Zrínyi 1967), p. 762. Following the half decade of the practical annihilation of law, one of its preconditions for avoiding bankruptcy and allowing capital flow into the country was that a Criminal Law be introduced in the Soviet Union. Lenin proposed (unusually for a post-feudal state) that the court be authorized to consider anything to be a crime on the bases of two general clauses, namely, *(1)* what was regarded as socially dangerous, and *(2)* what it found to be analogous to any category of crime defined in the Criminal Law. Cf. Csaba Varga 'The Formation of a New, Socialist Type of Codification' in *Acta Juridica Academiae Scientiarum Hungaricae* 17 (1975) 1–2, pp. 113–114 and Csaba Varga 'Lenin and Revolutionary Law-making' *International Review of Contemporary Law* 1/1982, pp. 48 et seq.

[3] Cf. the destiny of the subsequent NKVD chiefs in Roy A. Medvedev *Let History Judge* The Origins and Consequences of Stalinism, transl. Colleen Taylor (New York: Knopf 1971).

[4] From Hans Kelsen, *General Theory of Law and State* (Cambridge, Mass.: Harvard University Press 1946); *The Pure Theory of Law* transl. Max Knight (Berkeley: University of California Press 1967); *Allgemeine Theorie der Normen* (Vienna: Manz 1979)—as interpreted by Csaba Varga 'Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven' *Archiv für Rechts- und Sozialphilosophie* 76 (1990) 3, pp. 348–366.

breakdown of the normative order into elements of decreasing generality in which each and every level (as there is no gapless definition or entailment) is qualified as *creation* within the upper level's application. *(ii)* The establishment of correspondence between a lower and a higher level (just as with the establishment of the fulfilment of any criterion within any normative system) is within the exclusive *constitutive* function of those who are responsible for its administration. *(iii)* Whatever has been authoritatively decided (*res judicata*) in the normative order (in the absence of a right of appeal, or after expiry of any such right) gets *incorporated* into the legal order as one of its now indelible components.

It has to be said that the legal order has an ideology and a practice of self-reference of its own. However, all that is constructed from it, is according to its own criteria, organized into a unity in a formal way—procedurally, as it were. Every step within the normative system is a constitutive function which becomes an element of the normative system through gaining legal force. Thus, at the risk of over-simplification, one may state that whatever has been posited as a part of the legal order becomes a part of it. The ideology of law and its self-certification as lawful can have variable social weight, but may even amount to no more than words.

In this sense the legal order offers no independent evaluation, separable from its formal-procedural closure: once anything has been successfully injected into the legal order as part of it, it has at the same time been made a legitimate (i.e., lawful) part of it.

The concept of validity is generally used for describing and explaining the unity of the legal system. But it follows from what has been said that validity is also the product of a constitutive function. It is not a quality inherent in acts or objects, but is the result of their getting qualified which—provided certain social and legal conditions are met—comes into being in the system's self-reference as its own qualification of itself by itself.[5] Consequently, the inference of the validity of the system from the so-called apex norm (*Grundnorm*) proves to have an ideological character too. For the system actually proceeds step by step within a continuum in which the inference and/or transposition of validity also takes place step by step. In the alternative, and just to the contrary, validation is non-vertical as it gets carried out, in a diversity of directions, not only from above but horizontally and

[5] Cf. Csaba Varga 'Heterogeneity and Validity of Law: Outlines of an Ontological Reconstruction' in *Rechtsgeltung* ed. Csaba Varga & Ota Weinberger (Stuttgart: Franz Steiner Verlag Wiesbaden 1986), pp. 88–100 [Archiv für Rechts- und Sozialphilosophie, Beiheft 27].

from below too, with various norms supporting one another in a self-renewing interaction within the continuity of the system.[6]

From this flows the necessary conclusion that normative closure is not a feature outwardly added to law, as a contingent characteristic of it, but one which belongs to a communication performed in a specific practice of reference which (granted other social and legal conditions) establishes law. That is to say, it is that practice of reference that in a normatively closed way performs what we call law, and carries it as the exclusive medium of its specific motion and social existence.[7]

Thus the crux of our argumentation is procedurality and, particularly, the procedural institutionalization of legal force. It is nothing other than the formal-procedural closure of the normatively closed systems at any given time in which the last word utterable and uttered—without further regard to what that word is or to the relationship it has to the other components of the system—becomes for all purposes a member of the system.

Consequently—and precisely with a view to the final shaping of the system—an enormous responsibility is laid on the pre-closing phase of motion within the system. This is why it is stressed that there must be feedback into the legal (sub-)system as it is at any given moment from all the other sub-systems of society; and this must be internally acceptable in the legal (sub-) system.

In other words, the existence of a *remedy in law*, i.e., an *appeal*, in order to harmonize actual legal movement with desirable legal movement as socially perceived according to the 'natural meaning' of legal texts, or, in our context and terms, the establishment of the institutional and operational conditions of reconsideration, is therefore not simply and not merely the deferential begging of the subject for the self-limitation of an otherwise unlimited tyranny of power. On the contrary, the powers that be have the most urgent short-term and long-term interest in being able to identify as their own law (indelible and unmodifiable) what they have presented as such in sober state, after repeated reconsideration, with no remaining trace of the concrete-individual

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[6] Cf., e.g., Aleksander Peczenik 'The Structure of a Legal System' *Rechtstheorie* 6 (1975) 1, and, just in the sense followed in the text, Werner Krawietz 'Die Lehre vom Stufenbau des Rechts – eine säkularisierte politische Theologie?' in *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* ed. Werner Krawietz & Helmut Schelsky (Berlin: Duncker & Humblot 1984) [Rechtstheorie Beiheft 5].

[7] This is the point stressed in several recent papers by Niklas Luhmann (cf. primarily his 'The Self-reproduction of Law and Its Limits' in *Dilemmas of Law in the Welfare State* ed. Gunther Teubner (Berlin & New York: de Gruyter 1986) and his 'The Unity of the Legal System' in *Autopoietic Law* ed. Gunther Teubner (Berlin & New York: de Gruyter 1988). Cf. also Csaba Varga 'Judicial Reproduction of the Law in an Autopoietical System?' in *Technischer Imperativ und Legitimationskrise des Rechts* ed. Werner Krawietz, Antonio A. Martino & Kenneth Winston (Berlin: Duncker & Humblot 1991), pp. 305-313 [Rechtstheorie, Beiheft 11].

circumstances in space and time which may have influenced their first, primitive, reaction.

Just to repeat: as a result of formal closure, everything becomes legal in law which occurs as legal, where there is no institutionally possible and conceivable alternative.

This dilemma may become actualized in a diversity of ways—from terroristic situations to bureaucratic manipulations. It may happen, for example, that a robbery or a rape committed by a member of the occupying forces is punishable with death both on paper and in practice, yet it may be that more frequently the initiative is foreclosed by the liquidation of the victim. It may happen that those who make reports about resort by the authorities to apparently illegitimate violence, not only have no chance of a serious hearing, but face the risk of being accused of defying the authority. Routine administrative action may also produce situations allowing of no real alternatives. The silence of the administration can prove to be impossible to fight against successfully (e.g., the resistance of the governmental agency mentioned above could not be broken by those applying for a licence for private publishing for a year and a half). Similar problems flow from the arbitrariness of present-day procedure (e.g., the registration of associations, a responsibility of local councils according to the law, was practically suspended by the non-legal requirement of prior political approval by the police or the Communist Party in Hungary for years). The exercise of discretionary power can also be wholly devoid of grounding in the law in force (e.g., in a practice of police administration where the reasons officially given for imposing obligations, limitations or prohibitions merely reiterate the general wording of the law, e.g., 'offending the public interest'). Independence of anything legal is quite obvious in cases of quasi-administrative practice where we may only speak about the one-sided abuse of a power position subject neither to legal authorization nor to legal limitation (e.g., management of the press through the use of 'prohibited authors' lists' by the government press agency, or quasi-administrative press management through the daily interventions of the local organs of the party).

What is going on here? I believe that in such situations the law is not simply distorted but is subject to a modification touching upon its basic identity. For in such cases the political motives of law-making will be re-posited for a particular situation in a concretely actualized way, while the true motives are *praeter* or *contra legem* as it were, that is, not at all determined by any legalistic considerations such as those is, whose name action is taken.

The outcome in such a case may be politically desirable or rationally justifiable, but from a *legal* point of view it is nothing but arbitrariness and chaos. By negating the law's principle of construction it denies the idea of law itself. Yet arbitrariness in the guise of law is certainly even worse than anything else. As long as law has any kind of prestige for those subjected to

it, arbitrariness committed in the name of law is the hardest of all to defend oneself against,[8] and the harm done is not merely that of arbitrariness but also the consequential damage to the prestige and moral credit of law, so important to any future.[9] In the final analysis, law is far from being simply a rule; it is a state (no matter how evaluated) of order, issuing from the practice of rule(s).

In *Alice in Wonderland*, Alice and the others might have believed at the beginning that, in the Queen's game of croquet, croquet was really played. However, they soon had to realize from the Queen's orders and their implementation that, instead, it was only the Queen's game that was being played. And even though they may have become confused about the nature of so obscure a game, that did not change the fact that there was a game in progress, and it had rules, although there was actually but one rule reconstructable and foreseeable, namely that the Queen alone was competent to set all the further rules.[10] Rules which have been declared to have and believed to have institutional standing may be subverted completely. But then her allocation of discretion will immediately institutionalize some new one(s) in their place. Something like this was experienced by Alice *Through the Looking Glass*: " 'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be the master—that's all."[11]

After all, what does it mean to say that a law is unconstitutional? or that a decree is unlawful? or that a decision taken by the judiciary offends a norm? The formal reconstruction of the internal logic of law conceptualizes this question in terms of conflict of norms. It accepts as an axiomatic basis that to be free from contradictions is not a logical principle of the system. Consequently, any conflict established outside the law may concern validity within the law only and exclusively *(i)* as the outcome of the exclusion of this conflict from the system by a measure of positive law; *(ii)* after its presence within the law has been constitutively established within the law.[12]

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[8] See the differentiation between state and law "simply accepted as unproblematic" and those which "count merely as a power factor" according to Georg Lukács in 'Legality and Illegality' [1920], reprinted in his *History and Class Consciousness* Studies in Marxist Dialectics, transl. Rodney Livingstone (Cambridge, Mass: The MIT Press 1971).

[9] Cf., e.g., Kálmán Kulcsár 'Politics and Law-Making in Central-East-Europe' in *Legal Theory—Comparative Law* Studies in Honor of Professor Imre Szabó, ed. Zoltán Péteri (Budapest: Akadémiai Kiadó 1984).

[10] Quoted by Antony Allott in his *The Limits of Law* (London: Butterworths 1980), pp. 255–256 as a positive answer to the question raised by Aleksander Solzhenitsyn in his *Gulag Archipelago*, namely whether all things considered Soviet law is law at all.

[11] Lewis Carroll *Through the Looking Glass* [1872] (Puffin Books edition, p. 274).

[12] Cf. note 3 and, in particular, Kelsen *Allgemeine Theorie der Normen*, ch. 29, p. 101.

The 'fact' of unlawfulness may only be established legally by the law. What is more, establishment of it may only be made by the law where there is a procedure for eliminating from the system whatever has been qualified as 'unlawful'. In other words: unlawfulness may be established only in order to start a process of reconsideration. And this process—like any process in the law—poses a dichotomous alternative: either unlawfulness gets established and, by the same stroke, discarded; or the attempt fails and the lawful quality of what was challenged is confirmed, and its position within the system becomes unchallangeable.

This means that logic turns upside down the ideology expressed in the statement: "the lawful is whatever is within the law," and concludes instead: "whatever is within the law is lawful." At the same time, it realizes what follows from this consistent logic: only that can be unlawful which thereby gets placed outside the law. And with this we have reached again our starting point: in law the decisive moment is the last word utterable and actually uttered in a process, the one which gains legal force.

What the whole thing boils down to is that, from a legal point of view, the law *hic et nunc* is what cannot be appealed against in procedure. From a social point of view, it is what is imposed upon society as a legal practice without the chance of society doubting it. This is what gets institutionalized as law in society; this is what those subjected to it can adjust to as the only foreseeable and rationally calculable standard in law.

Accordingly, no matter what tragic periods have been displayed by our history, only a public opinion trusting in the 'natural' meaning of words can call them 'periods of unlawfulness'. For if I call them that as a contemporary, I only give articulation to one of the possible opinions according to which the system in question is not consistent, not coherent, nor, above all, free from contradictions. That is to say, I am arguing for the institutionalization of something differing in content from what exists as law, even though I refer to the same text (actually: to a different interpretation of it).

The fact that law as experienced (*droit vécu*, rather than imposed) may at times be antihuman, corrupting, and even murderous, and that it may negate the sense of justice of contemporaries, or the judgement of posterity as to the 'natural' meaning of the enacted law, cannot be alleviated by the statement of its unlawfulness in retrospect, or by any kind of social, political, or legal rehabilitation. What was experienced as law by contemporaries can no longer be changed. Law can only declare change *ex nunc*—which may concern nothing but exclusively the judgement of posterity.

2. *Negation of Law or a Separate Order?*

What happens in situations which we regard as unlawful because of their contradicting our natural sense of justice and our trust in the 'natural' meaning of words? Must that which has been declared as law but which we consider unfit for living through as law be discarded from the realm of law? Or is it perhaps a kind of legal order, but one that splits, and engenders internal divisions?

The situation described above is commonly referred to as an antinomy within the legal order.[13] This characterization is obviously based upon a belief in doctrinal clarification, i.e., in the logical unambiguity of each and every statement within the law and consequently also of their interconnection. In turn, it presupposes the homogeneous formalization of each and every component on the one hand, and the identification of meaning on the other.

In view of the fact that these situations are to a great extent confused, casual and unforeseeable, they resist formalized expression and also the identification of the original enactment, till the very end. In other words, until you have eliminated the problem you cannot define what parts to count as antinomic at all. That is why such a split is to be conceived of as particularization or fragmentation, in which an ideal projection gets broken in practice, engendering a series of separate orders.

The only outcome of this process that can be taken for granted is a practical negation of the generality of law. But the question of what separate orders the law breaks into is only formulated in the practice of arbitrariness, contingent from a legal point of view. Law becomes unforeseeable not only because of the leeways affecting what will be declared part of it but also because so often the law as one has experienced it can also be described in retrospect only.

When speaking about particularism or fragmentation, our knowledge of history brings to mind the separate orders of the feudal social/legal structure. However, the arbitrariness now in question cannot be referred to as re-feudalization. Let me just mention the Chinese, Aztec, or medieval European modes of regulation. They calibrated law according to personal status from the very beginning. And anything that was experienced as law was properly built into the law without the annihilation of law and its ideal, without creating a legally unmotivated split between law as declared and as experienced. Consequently, it was undertaken in a moral sense as well (just as at the end

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[13] Cf. Carlos E. Alchourrón & Eugenio Bulygin *Normative Systems* (Vienna & New York: Springer 1971), pp. 123 et seq. [Library of Exact Philosophy 5] and *Les antinomies en Droit* ed. Chaïm Perelman (Brussels: Bruylant 1965) [as a reprint of *Dialectica* 18 (1964) 69/72].

of the last century the authors of the German Civil Code, when preparing the very first civil law book common to the whole nation, drafted a special set of regulations for the imperial family, working these into the structure of the Code itself as a novel added to it.) So even from the point of view of the ideals of feudalism, the arbitrariness of which I am speaking has an atavistic character.

The problem itself puts enormous weight on the responsibility of the holders of power for what they shape as law, for there lies the responsibility for resisting temptation of a direct power reaction to any given situation in favour of a transformation of power into law, with the consequent opportunity for an appeal and possible subsequent reconsideration. And when genuine consolidation is at hand, no matter how ashamed those responsible for the exercise of power are and must be of the past and present experiences, they cannot and must not shrug off the past and separate themselves from it by simply referring to what is already trodden into the past as 'the age of unlawfulness', for that was the law itself as it was experienced at that time. In other words, their responsibility for the past defines their responsibility for both the present and the future, since they never do anything in the name of the law but what they are willing also to undertake as law.

II. THE PATHOLOGIES OF LEGAL MEDIATION

What may be hidden behind all that ideologically? Obviously, a concept of law instrumentalized to the utmost, having lost genuine social backing, simplified into a sterile state.

But if we are to approach the problem which is historically and politically specific to our regions, we have to see something else as well. Primarily, a self-asserting Marxism, which in its practice, by postulating a unity of the methodological principles of the historical and the logical subordinated history to its utopia of the future, i.e., re-posited it according to its wishes and felt needs, adjusted it to tactical considerations, too, as a result of which even the logical could at most be manifested in a medium emptied of real past and future.

In order that something could serve as ideological background, no system of theses identified with a theory is needed. It may be sufficient to conceptualize it as the quintessence of practice.

Well, without being authorized to find any kind of scapegoat, I believe that all the simplifications related to law can at least symbolically be traced back to the wording of a political pamphlet, *The Manifesto of the Communist*

Party—and I emphasize here that I am speaking about simplifications committed later in the name of theory, and not about the political and related merits of a political pamphlet—: "[Y]our law is but the will of your class made into a law for all."

Only to recall some facts of history: in Europe at the beginning of our century the spokesmen of the Communist cause had to stand up against the sanctity of the law as such, in order to prepare the way for their objective, i.e., to overthrow the standing order. However, it seems that once they were in possession of power, they only learnt from Marxism—neglecting even the context of the quoted sentence[14]—that law is but state command, the will of the ruling class now represented by themselves. It is not the expression of social integration as in sociology; it is not the basic feature of social organization as in anthropology (*ubi societas ibi ius*); it is not the agent of mediation which makes social co-operation possible as in Lukács[15]—it is simply a one-sided instrument aimed at enforcing the power policy of the state. Or it is like a communicating vessel in which no movement is made possible except in one direction arbitrarily: it proceeds downwards from above and is as it is. It is like a medium whose agent is narrowed down *ad absurdum*, for the ruling class will be represented by its vanguard, and the vanguard, in turn, by those acting in its name.

1. Instrumentalization

In social movements inspired by ideological considerations and/or the force of modernization, usually two influences compete. On the one hand, one may identify in them a deep mistrust of any spontaneity, together with a mentality driving them to institutionalize every change in a compulsory way, radiated downwards hierarchically by legal decrees and the compelling force of state machinery. On the other hand, in the long run, the only legal reforms which can be implemented are those which re-assert reforms already achieved socially or initiate their implementation by offering desirable alternatives. To bring about a social reform by proclaiming a mere text to be a law is bound to fail.

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[14] "Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence [*Recht*] is but the will of your class made into a law [*Gesetz*] for all, a will, whose essential character and direction are determined by the economic conditions of existence of your class." K. Marx & F. Engels 'The Manifesto of the Communist Party' [1848] in their *Collected Works* VI (Moscow: Progress 1975). Cf. Varga *The Place*, pp. 96–98.

[15] For Lukács, language and law are special part-complexes mediating among the individual components of the total social complex which in turn is nothing else but the state of the interaction of complexes at any given time (cf. Varga *The Place*, ch. 9.1). At the same time, "the need [for] [...] legal regulation of social activities emerges at a relatively low level of the social division of labour," no matter how elementary this division of labour is (e.g. "beaters and hunters in the hunt"). György Lukács *A társadalmi lét ontológiájáról* [Towards the Ontology of Social Being] II (Budapest: Magvető 1976), p. 208.

This is a general dilemma of any undertaking which tries to come to grips with modernization, and the wide regions of Eastern Central Europe are not an exception here. As a matter of fact, belatedness in development, with every step bound to forced paths issued in a specific practice long ago, namely that of relying exaggeratedly upon law and upon the state's having the only hand in shaping law. In the orbit of socialism, one finds the inheritance of voluntarism asserting its prejudices and proclaiming social utopias in the disguise of revolutionary committedness.

It has had a final result, as to subsistence, in the following characteristics: *1)* the 'inference' of each and every practical step from a 'philosophy of history' approached quasi-normatively as an axiomatic theorem for deduction and, correspondingly, *2)* the irrelevancy of all kinds of pragmatic consideration and empirical feedback; and, as to form, *3)* the gapless étatisation of law and its treatment as mere command, in which *4)* whatever is posited by the state as such will become the decisive factor and is implemented, on behalf of the ruling class and representing its vanguard, by anyone who just happens to be at the top.

However, such an extreme instrumentalization cannot be without retribution in the long run. Making law arbitrary socially generates its own failure in that law becomes socially arbitrary. For the limitation of genuine reforms to an overproduction of arbitrary changes puts into operation a self-perpetuating inflationary spiral which results in a further narrowing of an already limited scope of action. The fact is that problems accumulated as a result of the dysfunctional effects of non-organic interventions become increasingly more difficult to handle. This necessarily pushes towards solutions in which actual social reform comes to be replaced by the mere enactment of reform texts, accompanied by accumulating inefficiency and loss of credit. And the result can be nothing else but unavoidable defeat: the irrevocable devaluation of both the instruments and the ideologies behind them.

2. Reduction to a One-faced, One-directioned Medium

The harms done by instrumentalization primarily appear in the reduction of law to a one-faced, one-directioned medium. This follows from the tendency of power-holders to be aware of nothing else in law than solely the significance in power politics of their dominion over it. Their horizons are reduced to embracing only their potentiality for assertion of tyranny in dominating law, i.e., their ability to shape law and manipulate its operation as they like. The idea of legal mediation—admitting that law is not simply the ornament of their mightful '*nobis placet*' at any given time but a form of institutionalized bondage which, once established, binds all parties involved

as sharing partners in the common enterprise of law—has hardly been developed in it. To an even lesser extent has the readiness evolved which would allow law to gain ground against mere power in situations where it might limit interests whatever they are—if they are proclaimed, or just sensed by those involved, as enjoying political protection.

As a matter of fact, there is hardly any law existing here. What is claimed to be law exists in inconsistent, one-sided allusions. It exists only in allusions to what they want and do and what is good for them; but the same may happen not to be good any longer if it turns out to serve the good of others, to 'their own' disadvantage.

This weakness of law is no more then an outcome of the similarly rudimentary character of politics. Politics can only subordinate law to its daily business because of the extremist concentration of power, which, in the long run, hinders politics also from functioning genuinely. Whatever has not developed is defective. What is characteristic of such politics is a one-sided manifestation of will and its implementation by all means at any price—sometimes by means of law (if possible), at other times through any other means as may seem expedient there and then.

What is it we are faced with conceptually in law? To put it in the language of ontology: fulfilment of the function of social mediation [*Vermittlung*]. This means that law ought to be institutionalized as the medium of orderly interaction in society. It ought to be a filter which channels social action into given directions. It gets incorporated into the totality of motion as a filter which, growing into a genuine social institution defines a framework of action and sets standards to all its addresses, i.e., it is to function as a specific established agent of social mediation so as to make the co-operation of social sub-systems and the interaction of all its individual participants orderly and possible—in such a way that, as a special sub-system of society itself, it preserves and reproduces its own autonomy of heterogeneity by its closedness in its self-reproductive function and its openness towards being set in motion.[16]

In other words, mediation has at least two conceptual components which are *sine qua non*: *(a)* it ensures interaction *(b)* which is to go on in an orderly way. Ensuring interaction presupposes at least two parties in social commerce who, from the point of view of the chances of movement within the system (and, accordingly, from the point of view of the chance of exerting actual influence through the system), are equivalent. A one-sided filter operating in a single direction is therefore excluded from this. Interaction is incompatible with the existence of anyone who can come into contact with

[16] Cf. Niklas Luhmann *The Autopoiesis of Social Systems* (Florence: European University Institute 1985) [Colloquium Papers 81].

the filter but still is not bound by it. Ensuring orderliness refers to the closedness of the system. This is what gives sense to its existence as a system and makes it operate according to the precepts that posit its closedness as well. In consequence, an operation made up exclusively of the exercise of discretionary power is excluded from it—i.e., an operation in which the only orderly component is the allocation of competence to exercise; for this has the result that the supposedly final dispositions of law are not operating according to their own terms but have undergone discretionary replacement by mere arbitrariness acting as a 'casual separate order'.

As a result of the want of orderliness, such law can act neither as a mediator nor as a transmission (for even transmission no matter how one-sided it is, displays some orderliness). Such a phenomenon reminds me at best of a club in possession of, and used at will by, mere Might (which must not be misnamed as 'power', as this term, reminiscent of *potestas*, may be coupled with legitimating overtones). Just as you cannot call it a 'boxing' match if one party has no gloves and cannot return the other's, so I cannot call 'law' the club which is not accessible to everyone under the same rules and with the same chances.

To put it again: it is an abuse even to posit to or characterize something as a legal system if it does not work so as to mediate in the sense of facilitating an orderly interaction. For the only long-term effect of such a practice is the destruction of the distinctiveness, heterogeneity, dignity and prestige proper to law and thereby to block the chances of any further development as well.

Perhaps those involved in the communist cause have failed to notice that their revolutionary breakthrough was crowned with success, that they actually took over power, and that it was their own law that they started ruining with the ruthlessly ambitious practice of their continued revolution breaking through everyday life? Perhaps they have not had confidence in their own enactments, or, admittedly, these have only been intended as results of a transitory compromise "for the world at large"? For power annihilates its own law if it is not willing to filter its own measures through law; if it considers law to be applicable only to whatever extent it happily coincides with its own interests, otherwise acting almost freely through developing and asserting a casual 'legal policy' of its own; if power rejects law's being called up and put into operation when it happens to be at the other side of the match. For the law in which what is clothed in the robe of law is non-legal or overtly illegal, according to how the huge social majority understands that same law can be nothing but a mere façade.

Legality? It seems as if the revolutionizing programme according to which "[as] motive forces they must sink to the status of matters of complete

indifference,"[17] has been implemented in a way which proves all too successful. It is just the Lukácsian dilemma and prognosis stated in the above quoted *Legality and Illegality* of 1920. As if excluding the very idea that the revolution would ever establish itself, its uncertainty and mistrust would push it towards handling its own institutions in the old 'revolutionary' manner, as if from outside, with practical indifference towards form. For according to political conventions still accepted in Hungary, the sign of dedication is if someone achieves with all the means accessible (i.e., arbitrarily from a legal point of view, not bearing the law in mind as a criterion) what he believes to be the interest of Socialism (and what may of course be of purely personal interest as well, if assertable within the system). For if everyone is a revolutionary, getting their mandate from the movement's monopoly of legitimacy in building the future, there is no wonder that in justice, parliament and government as well, attempts at realizing the particular values of law are looked upon as suspicious means aimed at unidentified objectives. Appeals to law are seen as a quasi-neutral expression of marked hostility, in any case as something inadequate and, therefore, worthy of disdain. This was a fact of common experience in the recent past.

These tendencies are present in every radical movement as a basic dilemma[18]; to restrict the ideology of the 'emergency situation' to cases of genuinely forced paths is everywhere problematic.

At the same time, the variety of historical-regional contexts defines particular features as well. What happened in Hungary, for example, followed on defeat in war. The country was occupied in the name of the Big Four by one of them which, there and then, also represented the Stalinist model of Socialism. A fight then started for the primacy in and exclusiveness of power.

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[17] Lukács *History and Class Consciousness*, p. 264. "Where the total, communist, fearlessness with regard to the state and the law is present, the law and its calculable consequences are of no greater (if also of no smaller) importance than any other external fact of life with which it is necessary to reckon when deciding upon any definite course of action. The risk of breaking the law should not be regarded as very different from the risk of missing a train connection when on an important journey. Where this is not the case, where it is resolved to break the law with a grand gesture, this suggests that the law has preserved its authority—admittedly in an inverted form—that it is still in a position inwardly to influence one's actions and that a genuine, inner emancipation has not yet occurred." Lukács, p. 263.

[18] In the Hungarian Soviet Republic, for instance, the legally free scope of action of so-called 'revolutionary legality' was, even during the 133 days of its whole existence, supplemented by a wish for law and order and also for its codificational foundations. Cf. Béla Sarlós *A Tanácsköztársaság jogrendszerének kialakulása* [The formation of the legal system of the Hungarian Soviet Republic] (Budapest: Közgazdasági és Jogi Könyvkiadó 1969). In contrast to this, in China, for instance, the struggle to achieve legal consolidation was at the same time fought out in the clash between the indigenous tradition (the unfixed, flexible *li* of Confucianism, which is a guide to moral decision-making) and the western pattern of modernizaion (the *fa*, in its fixed and inflexible character reminding one of the imperial repressive laws,' even though it was under Soviet influence that this was being received). Cf. Varga 'The Formation', pp. 129–132.

By getting hold of the key positions in police, army, home and foreign offices, the winners substituted for rule of law patterns the direct political utilization of state machinery. Every sort of abuse and short-sighted dissipation of the national wealth occurred in the management of oil and other fields designated for filling up the treasury of the winning party. In order to 'support' the elections, the state printing house was used for fraudulent manipulation of the ballot. The only judiciary for public law issues, the Administrative Court, was dissolved because (as we were able to learn recently from the monthly review of juridical science in Hungary) it lost its sense of time and referred to the law not realizing that something else was at stake then. The political essayist István Bibó, fighting for the establishment of political and legal culture, i.e., for there to be rules of the game in (and in spite of) the struggle, was put down by the communist ideologist György Lukács. That seems to have 'sorted out' the fate of law but not for only one day. As Lukács, near the time of his death, might have said, this fact was irreversible, in the sense of having been built into the social processes as a factor which became immanent in them.[19]

After all, can ruining a homogeneous medium be a politically justified function at all? Especially if thereby law is to slip back into the undifferentiated heterogeneity of the crudeness of the clenched fist? I believe that notwithstanding the facts shown above, the answer is still positive. It can be justified, obviously under certain conditions, in cases when breaking through needs also discontinuity, providing that it immediately starts laying down the bases of its own continuity. For if it fails to do so, it strangulates its own future with its own hands.

3. Loss of Contents

Instrumentalization also appears whenever law is conceived as law empty of contents. This means that, discarding all traditions and past experiences, law becomes synonymous with whatever of what is just those at the top want it to be. Practice is still strongly inclined to reduce law into a means which, in possession of power, can be shaped and applied quite freely. But to do this is to forget that it is only texts and hierarchical organizations that can be organized by a stroke of the pen, while it is impossible in that way to build society, or to participate in the advantages which stem from legal mediation.

For, socially, law has an optimum content and level of utilization at any given time. Certainly this is not so in the sense of the possibility of defining or determining it; not even in the sense that it could be inferred. But it is

[19] E.g. Lukács *A társadalmi lét*... III, pp. 172 and 359 and, as to irreversibility applied to the preservation of past facts in the collective memory of society, II, pp. 189–190.

true in the sense that a well-designed interference is conceivable. This means that, in retrospect, you can always establish when and to what extent there was optimal proportionality of functional effects and dysfunctional side-effects resulting from the given interference. This can only be done in retrospect, approaching the desired evaluation of the result from the angle of scoring for degrees of error. However, by revealing the steps on the road to the negative result, it defines bases of exclusion.[20]

At the same time it is to be noted that no matter how conservative the instruments of law are and no matter how strongly legal development is characterized by the re-adaptation of old instruments instead of inventing new ones[21], new situations always mean new sets of conditions, and human creativity is manifested in proper adaptation. For instruments in themselves are neutral, displaying their features and potentials exclusively in a concrete context. No matter how much experience and invention is compressed into a pair of forceps used in obstetrics, for instance, in relation to eye surgery it probably does not even count as being a medical instrument.

III. LAW AND ITS CONCEPTUAL MINIMUM

The generally accepted view of law does not essentially differ from what is traditionally attributed to German legal positivism: it is what it is. Nor did Marxism offer any new criteria as it degenerated into a kind of socialist normativism: law is what is enacted and/or enforced by the state. In contrast to that, what we call law on account of certain contents may at the most be natural law (or, to use a Marxist phraseology, only law according to its own ideological self-assertion). Although there is no excuse for theories becoming shallow, in the case of such a dichotomic polarization, I believe, there is presumably also something more and else at stake. I have in mind the development of modern formal law as an institutional set-up defining itself by its own postulates both in the validity of its construction and the legality of its operation,[22] and, thereby, the claims about the law's self-reference, self-organization and self-constitution, apparently of a systems-theoretical

[20] This evidence in sociology, having but a negative proof, is mostly developed in case-studies. Cf. *The Imposition of Law* ed. S. B. Burman & B. E. Harrell-Bond (New York: Academic Press 1979). For a more general formulation, see Allott *The Limits of Law* and Maria Borucka-Arctowa 'Can Social Sciences Help us in Determining the Limits of Law?' in *Soziologische Jurisprudenz und realistischen Theorien des Rechts* ed. Eugene Kamenka, Robert S. Summers & William L. Twining (Berlin: Duncker & Humblot 1986) [Rechtstheorie, Beiheft 9].

[21] Cf. Alan Watson *Legal Transplants* An Approach to Comparative Law (Edinburgh: Scottish Academic Press 1974).

[22] Cf. Csaba Varga 'Moderne Staatlichkeit und modernes formales Recht' *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 1–2, pp. 235–241.

relevance only, gaining genuine ontological significance.[23] To admit that makes it possible to justify theoretically a concept of law which separates from itself as non-law everything that it does not define as law.

At the same time, we confront numerous problems contemporary society is expected to cope with. All over the world our century has prolifically produced crises, atavisms, primitivisms, moral poverty and a great many other forms of inhumanity that have led—especially since World War II—to increasing efforts at, and claims for, asserting a new natural law. In law proper this may assume a diversity of expressions.

Attempts have been made to introduce directly the values of democracy, freedom and equality as minimum conditions into law. Material preconditions of law and order, that is to say, of legality, have been defined. A catalogue of human rights has been established in order to make it a *sine qua non* component. Under the auspices of legal culture, everything desirable has been put into words. Well, no matter how outstanding results all this may have brought in challenging theory and in popular/professional mobilization and practice, too, it could not amount to a theoretical renewal, since it has failed to substantiate the concept of law theoretically. (Theoretically it has been bound to fail as it has actually failed at transcending the level of the presentation of mere desires. Still, at the same time it has been successful in provoking an enormous breakthrough as a result of the codification of human rights and of the underlying conditions of law and order. It has promised an international law to which, in the long run, *volens nolens* each domestic law and order will have to conform. This, however, even in a case of full satisfaction will not result in the theoretical substantiation of the concept of law but, instead, as it may be hoped for, it will, finally and at least, result in a practical standard leading to more humanness in the institutions of human kind.)

Within legal philosophy, too, there have been several attempts at defining the minimum contents of law. In Western European, South American and British-American legal cultures, theories of natural law, justice and ethics have developed significant traditions which, having in view their starting point, i.e., value-orientation and cultural dependency, are at their best in formulating axiologically oriented theories, bound to given cultures, but not laying down general ontological foundations.[24]

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[23] Since the publication of his *Rechtssoziologie* (Hamburg: Rowohlt 1972), the most radical representative of this idea has been Niklas Luhmann.

[24] Just to mention one or two items from the huge bibliography on the topic: Heinrich Rommen *Die ewige Wiederkehr des Naturrechts* (Leipzig: Hegner 1936) and Leo Strauss *Natural Right and History* (Chicago: The University of Chicago Press 1953); Otto A. Bird *The Idea of Justice* (New York: Praeger 1967) and John Rawls *A Theory of Justice* (Cambridge, Mass.: Harvard University Press 1971); David Lyons *Ethics and the Rule of Law* (Cambridge: Cambridge University Press 1984).

Other trends are towards defining, from an anthropological, ontological or sociological standpoint, the minimum contents of law which are necessary for social reproduction; or the minimum conditions of average obedience to the law and the exceptionality in principle of the need to actually resort to compulsion, which are the minimum conditions of the self-reproduction of law as systems of norms that are asserting themselves in society.[25] Such and similar claims can be and are theoretically justified even in a framework free from any value-boundness. However, in the final analysis, they testify to the conditions of the chances in the long run not so much of law but rather of its successful societal self-reproduction.

Finally, there are attempts far from any kind of direct substantiation, formulating nothing but formal-technical requirements as basic conditions of the "morality" which "makes law possible" (enactment of rules, their publicity, non-retroactivity, understandability, freedom from contradictions, realizability, stability, implementation according to their actual wording); attempts which make the purposefully formulated internal coherence of law and its consequentiality the basic condition of the law-maker's achieving any moral credibility at all; and, finally, theoretical reconstructions which interpret law as a process within a continuity of changing density, which continuity is made up as the result at any given time of the continuous interaction between the factors of positing law as law, enforcing law as law, and socially complying with law as law.[26] Although due to their formal-technical approach and freedom from values, there are the theories which come closest to the possibility of offering a general theoretical answer, nevertheless, they also miss the point as they do not answer what is now the question. For, instead of the minimum conditions of law, one of them delineates the basic conditions of the technology of how to make the law function in a socially effective

[25] E.g., from Maria Borucka-Arctowa, 'Koncepcja "natury ludzkiej" wspolczesne problemy oceny prawa' *Etyka* 1970/6 and 'A természetjog jelenkori problémái és a jogtudat kérdése' [Contemporary problems of natural law and the question of legal consciousness] in *Vendégelőadások a jogelmélet köréből* [Guest lectures in legal theory] ed. Csaba Varga, I (Budapest: Eötvös Loránd Tudományegyetem) [manuscript]; Lukács *A társadalmi lét...* II, pp. 213 and 485 et seq., and III, p. 18, etc. and Varga *The Place...*, pp. 193 et seq. The third topic having a wide range of literature, suffice it here to cite M. J. Detmold *The Unity of Law and Morality* (London: Routledge and Kegan Paul 1984).

[26] E.g. Lon L. Fuller *The Morality of Law* (New Haven & London: Yale University Press 1964), ch. 2 and, as a critique in the sense above, Csaba Varga's note in *Acta Juridica Academiae Scientiarum Hungaricae* 12 (1970) 3–4, pp. 449–450; Csaba Varga 'Reflections on Law and on Its Inner Morality' *Rivista Internazionale di Filosofia del Diritto* 62 (1985) 3, pp. 439–451 and Csaba Varga 'Law as a Social Issue' in *Szkice z teorii prawa i szczególowych nauk prawnych* Professorowi Zygmuntowi Ziembinskiemu, ed. Slawomira Wronkowska & Maciej Zielinski (Poznan: Wydawnictwo Naukowe Uniwersyteu im. Adama Mickiewicza w Poznaniu 1990), pp. 239–255 or, for some further arguments, Csaba Varga 'Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures' in *Law in East and West* ed. Institute of Comparative Law [of the] Waseda University (Tokyo: Waseda University Press 1988), pp. 265–285.

way, the second speaks about its underlying social embeddedness, while the third touches upon the components of any legal operation (including its pathologies as well), i.e., the characterization of its genuine dynamism.

At this stage, one may well wish to ask the question: is there no chance of transcending the purely formal interest of legal positivism? of supplementing the systemic closedness of the self-definition of law with minimum conditions pointing beyond this systemic closedness? of limiting the arbitrariness already present in the formation and implementation of law—at least in theory, on the level of conceptualization, by defining law in terms also of a conceptual minimum?

The answer is difficult to give—for we are here to bear in mind the failure of prior attempts. Anyway, in the light of past experience it is doubtful whether we can introduce directly a material criterion directly into the concept of law. At the same time, it seems that certain features of substance can be incorporated in it, due to their formal-procedural aspects as technical-technological equivalents. The question arises: if I define the ontological minimum of normative mediation by reference to the criteria of orderly interaction, shall I not arrive at the formal expression of a quasi-material minimum?

Whatever the answer might be, it is obviously quasi-material since the formulation of legal contents is free from any restriction from this point of view, too: it is "a great mystery," as the formal reconstruction of the normative system has characterized the act of law-making, situated at the borderline of the transubstantiation between 'Is' and 'Ought'.[27] However, once law-making has taken place, all the political motives behind it, and all the sociological setting for it revert to being completely irrelevant. What should now exclusively matter is what has been posited as law in law: there is no 'up' and 'down' any longer. However, if there is no 'up' and 'down' any more, the moment of the quasi-material is immediately transformed into a material one in the sense that legislation defines a kind of equality in function of the posited legal text. We learn from historical experience that any degree of equality (no matter how low it be even in limiting-cases) is at the same time a degree of practical freedom. (According to the myth,[28] at least the Law of the Twelve Tables in Rome could figure as the first example of a legal revolution fought about a mere form. The direct objective may have been the public recording of the law as it was already being meted out by the patricians; but it was known that this in itself meant the democratization of legal knowledge, i.e., a degree of equality which, up to the level of this

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[27] Hans Kelsen *Hauptprobleme der Staatsrechtslehre* (Tübingen: Mohr 1911), p. 411.

[28] Livy [Titus Livius] *History of Rome* III, 9-57, cf. Csaba Varga *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991), ch. II, par. 2.

degree, resulted in a certain freedom as well.) It is perhaps a conceivable and feasible solution to describe law as mediation in the ontological sense, and thus through its connotations to insert also a minimum of equality and, thereby, freedom, into the very concept of law.

We have to accept that, in the final analysis, the game of the Queen is also law. Thus law is also this purely arbitrary unlimited discretion, in which the only moment reminiscent of equality and legality is that discretion is allocated, that is that the momentary caprice referred to as law is practised by the Queen. But it is far from being full-fledged; it is defective, faulty, and inferior. Since it does not provide orderly interaction, its ontological existence is not that of a mediating complex in social existence. Therefore it is open to question whether, in an ontological sense, we should be better to call it a state of pre-law instead.

In consequence, it seems that, even though with several transpositions, equality, and, as a function of it, freedom, is also a part of the law, just as medical interference needs something more than the bare belief of the medicine-men, the lancet, incision, blood, and suffering. As recovery seems to be related to genuine healing, I guess, a part of the law should be its taking itself seriously, too.

MARXISM IN SERVICE*

I

Marxian legal theory has never been an 'ordinary' trend or current or school of theorizing on legal issues in the sense or the way in which, for instance, legal positivism, natural law thinking or the sociology of law have been.

In the middle of the past century, the teaching of Marx and his comrades radiated all over Europe in total repudiation of the tendencies that were then on the agenda in Western European economic, social, as well as political development. The annihilating criticism, which was cumulative in effect, was categorical indeed, reminding one both of the sarcasm of the prophets of the Old Testament and of the determination and finality of the Last Judgement of the New Testament. As to its methodology, it may have followed a Jewish tradition of thinking and writing, certainly more alive in theology than in other, markedly worldly, fields, having more features in common with a mass of commentaries, comments and marginalia superimposed on one another in an incomprehensible way, than with any systematic exposition. As a matter of fact, the eschatological undertone of the categoricality of Marxism, both early and mature, was hardly counterbalanced by its claim definitively to cover anything and everything science and scholarship had ever been able to discover or explain since civilization began.

To put it briefly, from the beginning Marx's personal vision of Marxism amalgamated positive knowledge with ideology and *Weltanschauung* on the one hand, and a political platform as well as a party programme (set up for guiding practical action on a daily basis but also amidst particular or exceptional circumstances) on the other.

The outcome that such a variant to theorizing on eternal grand topics related to the vocation of humanity and the destiny of world history could offer was, first, the intellectual challenge it continuously evokes (thanks to the great number of methodological ideas and theoretical insights it has sparkingly borne out). Also it offers a mixture destined to be used partly as

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* First published, in its full text, as 'Introduction' to *Marxian Legal Theory* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: New York University Press 1993), pp. xiii-xviii [The International Library of Essays in Law & Legal Theory, Schools 9].

a surrogate for positive religion and partly as a catechism to draw upon of axiomatic and expected responses to all kinds of questions that could be raised either in theory or in practice.

Although Marxism has, since the time of its inception, professed a deep commitment to the idea of evolution, even the formative thought of the Founding Fathers proved to be closed to a surprisingly large extent. In their rhetoric, Marx and Engels insisted, within the perspective of evolution, on everything being process-like, open-textured and, as such, multi-chanced. Only later and tacitly was it revealed, from the analysis of the answers they offered, that what they actually meant to convey was, in the final analysis, an exception to the rule.

II

It may be surprising to learn that, from their youth, law served as a favourite subject for both Marx and Engels from which they learned to take a stand, to argue for or exemplify what they had in mind. The same holds for early disciples (like Ferdinand Lassalle) as much as for late adepts (like Georg von Lukács). In fact, law must not have been a specific or difficult job to them. After all, it manifested the juristic logic of how to develop and present ideas and argue for claims—a pattern which was the fashion of the day. Not by chance, Marx was a law graduate from Berlin; as columnists, Marx and Engels were also used to debating social and political issues in terms of law. Even the fundamental paradigm they introduced, notably the economy conceived of as a basis for the social superstructure which, in turn, serves it as a mere instrument by corresponding at all times to it, got exposed by the instance of law. Law was the master paradigm—a servant of the economic imperative of which it was considered to be an outgrowth.

In any case, the question remains unanswered whether or not Marxism has developed genuinely philosophical disciplines testing the evidence of on-going times as do ontology, epistemology, aesthetics and so on. Notwithstanding, we may take it for granted that Marxism has failed in developing a theory of law of its own which deserved the word. Marxism, as an amalgam of differing inspirations, methodological assumptions, theoretical insights and practical considerations, was largely applied only to questions related to law.

III

The fact that Marxism was born under an unlucky star and had but fragmented interest in law marginalized its applicability from the very beginning, predestining the limited impact it would have both on law and on theorizing upon law.

Its fertilizing effect may have first been exerted on European history at a period when the wishful preparation for the international revolution was, for many, the number one preoccupation of the day. The Golden Age spanned from the Founding Fathers' formative years, via the *fin de siècle* moods and expectations, to the manipulation of World War I events, their side-effects, consequences and the Aftermath. This resulted in a theory facing immediate challenges in the present which had to revolutionize constituencies to meet and overcome them. By a Philosophy of History inspiration, even if purely eschatological in nature, it was Predemption and Utopia that prevailed as substitutes for reality—stronger than reality; therefore, also finally able to transcend, annihilate and destroy reality.

According to scholarly opinions, mostly from western observers frequently not without a touch of sympathy for leftism, this was the generation of truly Marxian ideas which paved a new path in the history of social sciences. For that matter, the path in question was predetermined by the will of power and the wish to provoke through World Revolution, a new turn in history rather than by any theoretical consideration. This is why none of the paths and achievements set out by grand theories of Marxism was able to survive conditions that might have been instrumental to inspiring them, notwithstanding the fact that the age was characterized by names of great intellectual strength like Karl Liebknecht, Anton Menger, Georg von Lukács, Karl Renner and Ernst Bloch.

IV

The kinds of encounters and attempts at realization Marxism experienced later on can be divided into two groups. For the first, revolutionary conditions supplied the ideological frame for the issue of law; this was an intellectual exercise of formulating a programme of radical renewal for legal policy. For the second group, Marxism was only referred to as a methodological frame for inspiring a new theoretical start by fostering critical approaches.

1

In the first case which, unlike Western Marxism, is our primary concern here, it is the Bolshevik revolution in Russia and the early experience of bolshevizing the region, especially in the short-lived Hungarian Soviet Republic, that set the model. The pattern was enlarged when the Soviet Union ended World War II as a winning power, imposing its rule on Eastern Central Europe and Eastern Europe and, step by step, also in parts of Asia, Africa and even in Central America.

Needless to say, even the zeal of the new Jacobins could not succeed in forcing a breakthrough in the humanities. Law was not an exception, either.

In most cases, the revolutionary enterprise involved intellectuals with purely abstract ideas about society, who were filled with the firm will to elevate society to a stage never dreamt of. Reporting on his impressions of Georg Lukács, commissar of the people in exile in Vienna in 1929, Thomas Mann considered him basically a "thoroughly intellectual man who played, believed he had to play, a political role at a time when catastrophic conditions offered transitorily to social zealots the possibility of trying out their ideas experimentally on the living body of the people, trying out the order in which they believed."[1]

As is known, the first decades of Soviet construction were in fact rich in promising new attempts at theorizing. Perhaps it is sufficient to refer to the works of M. A. Reisner, P. I. Stuchka, as well as E. B. Pashukanis. In contrast, the triumph of Stalinism in legal ideology, expressed by the imposition of A. Ja. Vyshinskii's legal concept on the scholarly community at the meeting of the Institute of State and Law of the Soviet Academy in 1939, meant a full stop to (and practically a deadly reprisal against) any sign of further innovation.

The theoretical perspective of what has officially been called the "Marxist-Leninist Theory of State and Law" has not changed strikingly since. A few characteristic features of Soviet Marxism in law can be listed as follows:

- priority is given to political and ideological considerations;
- assumptions of legal positivism, the prevailing professional ideology, are taken as axiomatic stepping-stones in theory;
- socialist normativism remains supreme and unchallenged;
- because power factors are granted preference (which is called 'dialectics'), no specifically legal considerations can be taken independently;
- Marxism's self-assertion is only weakly counter-balanced by aggressively blind universalization, which is unjustifiably extrapolated as a world-wide, ahistorical eternal condition;
- Marxism becomes isolated by getting bogged down in its own tradition;
- the ideology rejects any otherness by ignoring approaches (anthropology, sociology, political science, linguistic philosophy), methodologies (analytical, logical, systems theoretical) and authorities (outside the control of agents of 'actually existing socialism') which differ from its own, and treat them, if at all, with scornful criticism.

Such an intellectual climate cannot be favourable to any genuine development in scholarship. Only small scope has ever been allowed the issue since. Consequently, the appreciation of their results is a function of the prior phase they have overcome. By way of illustration, let me quote one

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[1] Cf. *Thomas Mann und Ungarn* Essays, Dokumente, Bibliographie, ed. Antal Mádl & Judit Győry (Budapest: Akadémiai Kiadó 1977), pp. 339–340.

instance. The great turning point, achieved since the rise of Vyshinskii which opened theoretical vistas towards sociology, was in fact a debate revolving around the question of how to understand the definition of law Vyshinskii had accepted in 1939. Its main arguments held that *(1)* Vyshinskii accepted what had only been customarily established as law, and that *(2)* legal relationships were the exclusive forms of the practical realization of the workings of law. So the debate went on to explore whether relationships established in a way other than as "realizations of 'the' law" and "fulfilment of 'socialist legality' " (e.g. issuing from judicial practice, which the doctrine of mechanical jurisprudence, then prevailing, excluded from official recognition) could be regarded as law-generating components.[2]

As to the literature, one can of course find an abundance of outstanding names and magisterial works. The present situation is, however, rather unfair. For the underlying conditions which have prevailed for Marxists since the early '20s have themselves been rather unfair. To name but a few, these have included political domination, complete isolation, no access to international journals and symposia, scarcity of domestic publishing in foreign languages, preference for Russian (and especially Muscovite) institutions, practical destruction of cultures differing from the Byzantine one (particularly in the Baltics, as well as in Armenia and Georgia). All these indicate future lines of research which may surprise us with achievements worthy of further consideration and study.

2

In the countries which were made satellite to the Soviet Union after World War II, Moscow exported Marxism in a form reduced to a Byzantine, state-controlled religious surrogate. Marxism was imposed as the last word of scholarship at the uppermost stage of human civilization. In practice, the reception of the Soviet pattern also meant the destruction of national identities and traditions, ignorance of their academic past and its institutional framework. The Soviet pattern was visible even in minute details of both everyday life and in the professions. The chair systems at universities, the selection of state days, the reorganization of journals, the storing of food by the army—nothing, including titles, formalities, uniforms and directions of use

[2] For a survey of the debate, reminding of the classical clash between legal positivism and sociology of law in Germany in 1916–17 [the documents of which, summarized by Hubert Rottleuthner *Rechtstheorie und Rechtssoziologie* (Freiburg & Munich: Alber 1981), par. B.I.1 [Kolleg Rechtstheorie], will soon be collected in *Hans Kelsen und die Rechtssoziologie* Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber, ed. Stanley L. Paulson (Aalen: Scientia) forthcoming], see Csaba Varga 'Quelques problèmes de la définition du droit dans la théorie socialiste du droit' in *Archives de Philosophie du Droit 12* (Paris: Sirey 1967), pp. 189–205, reprinted in Csaba Varga *Etudes en philosophie du droit / Estudios de filosofia del derecho* (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures 1994), pp. 10–26 [Philosophiae Iuris].

was exempted. Academic freedom was discontinued; even the few academic survivors had no option but to change into proletarian clothing.

This brutal imposition process was a general condition. But the actual depth to which Soviet domination could provoke genuine change differed slightly. Those countries most vulnerable to getting thoroughly Sovietized had themselves been in want of a modern legal culture (e.g. Mongolia and Albania) or had a Byzantine past in common with their colonizing power (e.g. Bulgaria, Romania, as well as Serbia).

As to Central Europe, the Soviet occupation zone of Germany was dramatically Sovietized. It was perfected to such a point that not even contemporary German scholarship can respond to local arguments. Almost the same isolation was enforced on Czechoslovakia after the crushing of the Prague Spring movement in 1968.

Happily enough, Poland and Hungary have remained a different case. Historically speaking, Poland has had a flourishing tradition in social thought and methodology, particularly strong in formal logic and conceptual analysis. In consequence, Poland was quite successful in preserving relative 'otherness' in intellectual fields, by accepting Marxism in politics and ideology, but keeping it aside in domains where scholarship was felt to be at stake. That is, national pride and tradition were used as barriers to save scientific thought. The chance of intellectual survival in Hungary was less promising. A small country with a handsome number of universities, Hungary has had an established tradition mostly in social science theory inspired from neo-Kantianism. Even so, the humanities in Hungary could not withstand the army of new Bolshevik academics, including Georg Lukács and his comrades, who argued that they were laying the foundations of modern social theory instead of a narrowly German approach. Step-by-step Marxism became the only vehicle of scholarship in the humanities.

Finally, as to China, North-Korea, Vietnam and Cuba, as well as further countries in Asia and Africa at one time exposed to revolutionary upheaval but later fallen into chaos and disaster (Cambodia, Ethiopia and Afghanistan), information is too sporadic and scant to substantiate any judgement. One cannot even say whether the lack of information is to blame or whether legal theorizing is missing. Or is it simply that legal thought is wedged in a non-European context.

V

In sum, until recently in that part of the world which was called 'actually existing socialism', Marxian legal theory was nothing but the function of Soviet rule—until the Soviet empire itself fell apart. Marxian legal theory,

forced as a strait-jacket, came to be imposed (for want of anything better) in countries where it was meant to replace deep-rooted culture in law and philosophy (in Poland, Hungary, as well as the Czech and Moravian lands). In other places, where culture had been hindered from transcending grassroots levels, it became a panacea or a substitute for culture, influencing both conceptual and institutional patterns.

TRANSITION

THE *SUI GENERIS* NATURE OF THE CHALLENGE*

1

Neither legislators, nor policy makers, nor scholars, either in the region or anywhere in the world, could have been aware of the true nature of the challenge facing the countries of Central and Eastern Europe during the recent years.[1] Currently the Atlantic nations lack the imagination to appreciate the complexity of the tasks arising from the drastic changes and pressing needs.[2] It can hardly be expected from the peoples involved—crippled by their past, who have just become free from a desperately long pressure and who hope for their fate to take an immediate turn for the better—to be able to take into account with a clear head the historic importance of the unprecedented changes, the tasks piling up, the crisis situations, to proceed on a bumpy road under duress. Thus sometimes they may be impatient. They may occasionally be unjust as well. But it is a fact that their difficult transformation and building of a future have barely been helped by any theoretical groundwork. And judging by the present state of such endeavours, it will probably not help in the near future either.

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[1] As to the background, as well as the general conditions of recent events in the region, see, from the domestic literature, László Bruszt & János Simon *Political Culture* Political and Economic Orientations in Central and Eastern Europe during the Transition to Democracy (Budapest: Institute for Political Science of the Hungarian Academy 1992), as well as Imre Marton 'Transition démocratique ou démocratisation transitoire dans les pays de l'Europe de l'Est' and András Bozóki 'The Legacy of Authoritarianism in the New Democracies,' both in *Demokratikus átmenetek* A Magyar Politikatudományi Társaság Évkönyve 1991 [Democratic transitions: Yearbook of the Hungarian Political Science Association] ed. György Szoboszlai (Budapest: Magyar Politikatudományi Társaság 1991), pp. 143–154 and 158–165, respectively.

[2] The differing historical burdens, as well as respective legacies, of the Central European region and the Eastern European one, as developed under different pressures for more than fifteen centuries and got unified only for political rhetoric (justifying the *status quo*) after World War II, also cry for consideration. See István Bibó *The Distress of the East European Small States* [1946] in his *Democracy, Revolution, Self-determination* Selected Writings, ed. Károly Nagy, transl. András Boros-Kazai (Highland Lakes: Atlantic Research and Publications, distributed by New York: University of Columbia Press 1991), pp. 13-86 [East European Monographs, CCCXVII; Atlantic Studies on Society in Change 69] and Jenő Szűcs 'The Three Historical Regions of Europe: An Outline' *Acta Historica Academiae Scientiarum Hungaricae* 29 (1983) 2–4, pp. 131–184; *Les trois Europes* préf. Fernand Braudel (Paris: Harmattan 1985) 127 p. [Domaines Danubiens]; *Die drei historischen Regionen Europas* (Frankfurt am Main: Neue Kritik 1990) 107 p.

This is why the conceptualization of law within the paradigm of social challenge, on the one hand, and instrumental response, on the other—instead of the law's reduction to a merely abstract entity—provides the only key for the proper understanding of what is genuinely at stake when we assess and try to interpret recent developments in the region. Rule of Law from No-law,[3] Constitutional Democracy from Totalitarian Dictatorship, Market Economy from Centrally Planned Structures—these are only some of the possible indicators to describe the unprecedented transformation process the new political elite in the region is expected to manage.

Considering the drastic political changeover, in the wave of which total economic restructuring and building of a new institutional set-up has to overlap with achieving complete intellectual, moreover, moral reconstruction—a historical task that targets the same constituency all it has to be drawn from, after seventy-five years of Bolshevik socialization in the Soviet Union and forty years of Soviet-type corruption in the satellite region, with the success of any of them conditioning (and, at the same time, being conditioned on) the prospects of any other—the challenge seems to be of a *sui generis* nature indeed. It features up its own characters which withstand to any comparison with great cases of transformation we know from the near past. For in Greece, in Portugal, in Spain in Europe, so much as in the new democracies of Latin America, the democratic turn meant exclusively a political caesura to draw; they had to win against previous corruption, but not to undertake basic economic switch-off at the same time. Even in countries forced to get on a new pathway after their experimentation with Nazi and Fascist barbarism was eventually stopped, i.e., Germany, Italy, as well as Japan, the state-imposed prevalence granted to Nazi and Fascist ideologies was rather restricted in time. Even if they exerted their impact merciless and not quite without precedents, interwar totalitarian ideologies had no time to evaporate at least the memory of the previous establishment at peaceful times and the moral order they were based upon.

As a matter of fact, in a world globally unifying by the maturation of the twentieth century, the great changes which aimed at fitting in the world-scheme of the community of nations were actually assisted to a large extent

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[3] This is but a jurisprudential (properly speaking, legal ontological) characterization of the state of law under Soviet rule in Central and Eastern Europe. Cf. 'What Is Needed to Have Law?' in the present collection. For the practical continuity of law, see the expert opinion the Special Committee gave to the Prime Minister of the Republic of Hungary: Imre Békés, Mihály Bihari, Tibor Király, István Schlett, Csaba Varga & Lajos Vékás 'Szakvélemény' [On the principles and legal conditions of a judgment about, as well as the establishment of responsibility for, conducts and privileges realized between 1949 and 1990 in infringement of the social sense of justice] *Magyar Jog* 38 (1991), pp. 641–645.

by the nations which played this community game. It is worthwhile remembering that the last pattern the community provided for any nation on the European scene was the settlement of defeated Germany after World War II on behalf of the victorious powers. Regardless of domestic conditions and of the state and applicability of the Rule of Law in the United States of America, the United Kingdom, as well as France, the process of transforming National-Socialist Germany into a German member country of the Atlantic family of nations was set as follows:

(1) military defeat, with the effect of imposing legal discontinuity;

(2) occupying military administration, forcing through its own legal frame taken from without;

(3) imposition of values, standards, institutions and techniques, by reducing alternative choices to uniformity;

(4) institution of Nuremberg-type trials, to the exclusion of the self-justifying reference to the past any longer;

> that is, everything considered, the total substitution of the workings of domestic factors by external authorities which were to transplant ready-made institutions, taken by a stroke of pen from without, i.e., from the external world, and meant to intervene as *deus ex machina* solutions, instead of generating institutions from within, through democratic processes and procedures;

(5) having drafters of a new constitutional regime only come after the job of forcing through a transition was already done and completed.[4]

As opposed to such a model of pacification, the overall changeover in Central and Eastern Europe—called "velvet revolution" in a somewhat embellishing manner—is rather characterized by features (and is expected to be fought through under conditions), which belong to another range of ideas and ideal of implementation.[5]

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[4] This itself proved to be a rather frustrating undertaking. The whole story of legal reconstrucion is surveyed in Ingo Müller *Hitler's Justice* The Courts of the Third Reich, transl. Deborah Lucas Schneider (London: Tauris 1991), part III.

[5] As to the background, as well as the general conditions of constitutional and legal reconstruction in the region, see, from the domestic literature, Kálmán Kulcsár 'Constitutional State, Constitutionalism, Human Rights in the Transformation of the Hungarian Political System' in *Constitutionalism* (1990), pp. 9–36 and Kálmán Kulcsár *Systematic Change in East Central Europe* Political and Legal Problems of Transition: The Lessons of the Hungarian Case (Budapest: Public Law Research Centre of the Hungarian Academy 1991). As to some theoretical alternatives, as well as problems of conceptualization, see, from various approaches, Valentin Petev 'A New Concept of Law for Eastern Europe', as well as Marek Zirk-Sadowski 'The Instrumentalization of Law and Legal Culture in Eastern European Countries,' both in *Recht, Gerechtigkeit und der Staat* ed. Mikael M. Karlsson, Ólafur Páll Jónsson & Eyja Margrét Brynjarsdóttir (Berlin: Duncker & Humblot 1993), pp. 317–325 and 327–336, respectively [Rechtstheorie, Beiheft 15].

The conditions set to them are ones of

(1) unbroken legal continuity;

(2) full-pledged framework of Rule of Law, instituted in a gapless way as far as its formal arrangement and in-built guarantees are concerned; as well as

(3) ethos and prestige—unchallenged and unquestioned—*of constitutional democratic establishment.*

> What matters here is that all these conditions rely exclusively on the workings and also on the final outcome of the democratic processes and procedures generated by domestic local factors, ones which, in most of the cases, have been able to either survive or manage to be brought about from, or as opposed to, the old structures.

So the transformation is by far more complex, harder to manage, and more open in chances and risks as well, than any former pattern. Irreparably, the surrounding dangers are also constantly in play.

As apparent from the contrast made above, routine practising of the store of instruments available within the frame of the Rule of Law was definitively set aside in Germany and Japan in order to resort to externally-imposed authorities (replacing any internal democratic output temporarily), and routine was only reinstalled after the extraordinary measures did the job, on the one hand. Notwithstanding, everyday western Rule of Law routine (even without the slightest touch of adaptation, fantasy or special empathy) is expected to fill the expectation in Central and Eastern Europe now, by providing a frame adequate to the transformation which has to relieve from both earlier subjugation and moral and political corruption (at a time when the hard efforts and extraordinary measures taken by World War II winners to pacify have already gone into oblivion), on the other. Accordingly, democracy in Central and Eastern Europe is now considered simply to be the continuation in time of past dictatorship. It is so to such an extent that, for example, the Chairman of the Constitutional Court in Hungary can profess openly that, properly speaking, no "transition period" has ever existed. For all that could be termed as transition was actually reached by the head of the state when he declared officially five years ago that the Republic of Hungary was born.[6]

Rule of Law, this accumulation of local experience in its germ, re-affirmation of growing social consensus in its formation, ideal for everyday routine in normal application, has thereby been made a panacea, extended to universal use with no variety or limitation.

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[6] "I am upset and irritated by the term 'transition': for how long are we going to be in transit?! Three years is a very long time in a historic era of rapid change. From a legal point of view, transition was accomplished [...] on October 23, 1989 [...]. Hungary must be considered to have been a law-governed state since that time [...] so from a legal angle there is no further stage to transit to." László Sólyom in *Constitutionalism in East Central Europe* Discussions in Warsaw, Budapest, Prague, Bratislava, ed. Irena Grudzinska-Gross (Bratislava: Czecho-Slovak Committee of the European Cultural Foundation 1994), p. 51.

3

Constitutionally speaking, there is no doubt that the statement referred to above is justifiable. But is it so also from a social, as well as a political point of view?

All countries in Central and Eastern Europe are now facing the task of managing large scale, drastic transformation of societal and economic conditions in a way that it can result in radical reforms of the whole constitutional environment, including both legal set-up and economic structure. It has to meet the success, and also the speed, of a foundational break-through, so that no temptation of either the destiny of the Weimar Republic or the fate of democratic construction in Latin America can bring it to failure on the European scene.

There is an apparent paradox here, notwithstanding. That is, that from the very beginning, the ethos and the prestige of the Rule of Law conditions have to be preserved from shaking and questioning. Those conditions which are, at first sight and most visibly, responsible for the outcome that—cynically enough, maybe, but, as a historical chance, randomly necessarily, notwithstanding—the strive for survival of the *old* political forces proves to be the prime beneficiary of the *new* regime. It is a *sine que non*, at the same time a *condition générale* of the transition process in the region. Although, at least apparently again, it contradicts both the popular justification of the change itself and the pressing need of the whole transition process to gain, to keep on gaining and strengthening popular support for everyday democratic construction.

In consequence, one of the accompanying components of the daily management of transition is to cope with ensuing discrepancies, tensions, conflicts, and antagonisms, which do crop up unescapingly. As a matter of fact, their successive materialization in one or another (historically random) form is actually built into the scheme. The system patterned upon the ideal of Rule of Law and Constitutional Democracy reacts uniformly to differing acts, responds homogeneously to heterogeneous challenges, with partial steps taken for partial moves, sometimes even pressured by timely needs, without being able to control the final result. This is why it is especially doubtful, risking seriously of a self-corruptive effect, to resort to nothing but the routinized instruments, techniques and responses of the store of means called 'the Rule of Law,' which itself may have originally been designed and calibrated to use under average, everyday conditions.

In want of constitutional precedents, conventions and customs, in short, of established practice, the field where the political and legal game is played is rather empty. The transition period now is the dramatic high time for Central and Eastern European nations to set the style for their future. It is a

historic time for developing standards and making them conventional step by step. This is the reason why each and every occurrence of unbalance and failure of check can prospectedly re-arrange the field of the game lastingly, if not definitively. Normal functioning is the privilege of adequately structured entities. In Central and Eastern Europe, having in view the moral gap accompanying institutional scarcity, not even trust of, and reliance in, the outcome of long-term processes (especially of self-generating democratic ones) can easily develop.

It is no wonder if the temporary experience is not without specific tensions, mostly due to the improper functioning of constitutional check and balance, lack of co-operation.[7] Just to name a few: destruction of informations systems in work (in tax, health, public administration, police, intelligence), by banning personal identification number[8] with no substitute whatsoever; abolishment,[9] by the *fiat* of the Constitutional Court, with no penitentiary reform or preparation for effective crime control; facing with state sponsored political murder made impossible, by enforcing statutory limitation (regardless of the fact that state machinery itself, responsible for prosecution but which kept on silence all along, acted as the accomplice)[10]. And the list can be continued for long.

It is not by chance that I have mostly raised questions without the slightest ambition of either responding quietingly to or drawing abstractly formulated theoretical conclusions of them.

As everybody knows, the process of transition goes on in the region. And as everybody hopes, all we, players and observers alike, are in a position of gathering experience, but reject to expose it to human experimentation.

[7] For a comparative overview, see, e.g., Herman Schwarz 'The New Courts: An Overview,' with five national surveys, *East European Constitutional Review* 2 (1993) 2, pp. 28–32 and 32–53, respectively. For reports related to Hungary, see, e.g., Ethan Klingsberg 'Judicial Review and Hungary's Transition from Communism to Democracy: The Constitutional Court, the Continuity of Law, and the Redefinition of Property Rights' and George P. Fletcher 'Searching for the Rule of Law in the Wake of Communism' *Brigham Young University Law Review* (1992), pp. 145–164.

[8] Constitutional Court decision, No. 18 of 1990.

[9] Constitutional Court decision, No. 23 of 1990.

[10] The Act on Amenability to Prosecution of Grave Crimes Committed, But Not Prosecuted for Political Reasons, Between December 21, 1944, and May 2, 1990, adopted by the National Assembly at its session of November 4, 1991, and held unconstitutional by the Constitutional Court on March 5, 1992 (decision No. 11 of 1992), has caused great concern. In addition to the papers included in the present collection, see Hans-Heinrich Jescheck [Prof. DrDr. of the Max-Planck-Institut in Freiburg] *Presseinterview in der ungarischen Tageszeitung "Új Magyarország"* [mimeograph] (1991). As to the spin-off effects, see Georg Paul Hefty 'Im Namen der Republik: in Ungarn dürfen die unterlassenen Strafverfahren nicht zu Lasten der Täter nachgeholt werden' *Frankfurter Allgemeine Zeitung* 14 (5 March 1992); Stephen Schulhofer, Michel Rosenfeld, Ruti Teitel & Roger Errera, contributing to the forum on 'Dilemmas of Post-totalitarian Justice' in *East European Constitutional Review* 1 (1992) 2, pp. 17–22.

The most I can propose is the realization that the Rule of Law—instead of being an ossified rigid entity—is rather an ideal which, even if measured by general and universalizable criteria, calls for a variety of implementations under varying conditions.

The reduction of polyphony to unison is in any case, if unmotivated, a pathology of self-deprivation with the distortion of (because of the undue interference with) underlying conditions, which cry for a treatment in differentiation.

TRUMBLING STEPS OF THE NEW CONSTITUTIONAL STATE*

I. EVERYDAY CONSTITUTIONAL PROCESS

1

For its own sake, society is justified in requiring that what appears to it as the State be not only restricted by law but be predictable in its actions and be controlled. It is a natural requirement that the legislation be predictable and understandable.

One must be aware of the fact that plans concerning the future usually have only the slightest chance of realization. That is why Nobel-Prize-winning economist Friedrich Hayek cautioned against state intervention when examining Nazi and Bolshevik planning ideals.[1] Antony Allott, who teaches African law at the University of London, described in his recent book how fragile and hopeless the intention of the legislator is if it is not supported by other social forces, that is, the will of genuine reform.[2] All this warns twentieth century actors on the political arena and especially ones in the region that the legislator's ambition must be minimized, that it must at all costs be humble and pragmatic.[3] On the other hand, one may say that it has not been solved, even theoretically, what kind of requirements political actors must meet and which of these must be addressed specifically to the government.

Let me remind the reader of a lesson of the history of codification. Namely, a governmental system based on multi-party parliamentary rotation of administration greatly reduces the chances of systematically planned, long-term legislation. This, of course, does not mean that one should not strive for it. However, if we take this into account, it becomes immediately understandable why only the late absolutist legislatures of 18th and 19th

* First published as 'A kezdő jogállam botladozásai' and 'Jogi hagyományunk kérdőjelei' *Magyar Nemzet* LV (27 April 1992) 99, p. 6 and (9 June 1992) 135, p. 6, respectively.

[1] F. A. Hayek *The Road to Serfdom* (London: Routledge & Kegal Paul 1944).

[2] Antony Allott *The Limits of Law* (London: Butterworths 1980).

[3] Cf. Kálmán Kulcsár *Modernization and Law* (Budapest: Akadémiai Kiadó 1992), as well as Csaba Varga 'Macrosociological Theories of Law: from the "Lawyer's World Concept" to a Social Science Conception of Law' in *Soziologische Jurisprudenz und realistische Theorien des Rechts* ed. Eugene Kamenka, Robert S. Summers & William Twining (Berlin: Duncker & Humblot 1986), pp. 197-215 [Rechtstheorie, Beiheft 9].

Century Europe succeeded in carrying out codificational legal reform, and why similar reforms have not occurred in the European Continent or in England since then.[4]

Thus in general, all criticisms calling for more careful work and far-sightedness in government preparation are appropriate. However, taking into account other experiences, one can hardly find a counter-example to point to, where a renewing, restructuring process of similar magnitude could have been realized more easily. It is worth adding that the success of any legal renewal, as also witnessed by Allott, can be guaranteed only by full social and political support.

2

The body of the *Corpus Iuris Hungarici*[5] has not been fully surveyed to date. It would be difficult to determine statistically how the present-day legal order emerging in Hungary compares to the second half of the last century, the interwar period or the Communist era. Anyway, considering the legislative activity of Parliament and the government to date, the results are considerable: in thirty-two months, 262 acts (134 of which were completely new), 228 parliamentary decisions; only in the first twelve months, 203 government decrees and, with other resolutions also considered, altogether 575 government-level decisions. This is several times more than the legislative output of any previous Hungarian parliament or government. This hardly supports the argument that these laws are mere "alibi laws" which were passed only to relieve the government from its responsibility. I find that some oppositional criticism in this respect is nothing more than rhetoric. Often they apply the same logic in two opposite directions in a mutually exclusive way. For example, they raise objections to government decisions and initiatives for lacking multi-party agreement—in cases when the government's jurisdiction and responsibility is unambiguous both according to the Constitution and to established European practice.

Compared to the party-state system of the recent past, the government now has a far larger role, weight and responsibility. This, of course, should not be considered an abnormal overgrowth, especially not at the expense of Parliament. The case is that, as a result of free elections, the constitutional powers appear again in their original and true selves—hopefully leaving behind for good the falsity of the party-state, which only used the classical network of state institutions as a cloak. There are other consequences as well. For

[4] Csaba Varga *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991), chapters 6, 11 & 12, in particular at p. 169.

[5] The serials called *Corpus Iuris Hungarici* encompass legislation in Hungary from the time of the first king one thousand years ago, Saint Stephen, to the Communist takeover in 1948.

example, as soon as the branches of power concentrated in the State have re-established themselves and checks and balances have been institutionalized, to speak of a "voting machine" in a pejorative sense is not only meaningless but also testifies to the critics' refusal to recognize the results of elections, which are the main selection principle of democracy.

3

Scientific life in the socialist era was to a large extent corrupted. It is the good fortune and also to the credit of Poland and Hungary (albeit due for different reasons), that this was truly characteristic not primarily of them but of those of their neighbours who were closer in spirit to Moscow. This corruption manifested itself, for example, in the theoretical requirement that scholarship must deal either with the "socialist system" (and exclusively in a "constructive" way) or with the "capitalist system" (but with the exclusive aim of criticizing and discrediting it). Thus, according to this requirement, what was considered "bourgeois heritage" could not be used to support theories. It could only appear in critical studies, where the aim of the examination could only be devastating criticism.

(Hardly a decade ago, I participated in a socialist international meeting on the division of powers in Varna, Bulgaria—a ritual play claiming to be the funeral feast for this so-called bourgeois state organization ideal. Thus in the circle of those who spoke of total annihilation, I seemed to be throwing down the gauntlet when I tried to display a sensitivity to problems with general validity in Montesquieu's insight, which had a message for the socialist system as well. This was a cry for help, though symbolic, calling attention to the fact that even the state power of the socialist system must either be an open acceptance of the merely dictatorial rule or based on the division of powers and brakes and balances. The reaction was one of protest, incomprehension and denial. At first its publication was refused. Later, after my protests, it was included in the proceedings of the meeting, but its text was completely ruined by editing.[6])

4

Today the point is reached in Hungary where the division of powers is being institutionalized, with a Constitution which everybody knows is temporary.[7] The reason is that the bulk of its institutions were the result of political deals,

[6] For the falsified version, see Csaba Varga 'Die Gewaltenteilung: Ideologie und Utopie im politischen Denken' in *Die bürgerliche Gewaltenteilung* Theorie, Gesetzgebung und Praxis, ed. Heinz Röder (Berlin/East: Institut für Theorie des Staates und des Rechts der Akademie der Wissenschaften der DDR 1985), pp. 143–149, and, for the original text, Csaba Varga 'La séparation des pouvoirs: idéologie et utopie dans la pensée politique' in the present collection.

[7] The Act on the Constitution of the People's Republic of Hungary, No. 20 of 1948, as amended.

since at that time the stake was exclusively the long-term position of individual political forces. The compromise-seeking games were thus piled one atop the other as a result of historical coincidence. Perhaps for this reason—to counterbalance the forces of Socialism which were then thought to be able to prolong their rule—a strong Constitutional Court was created, collecting all the authorizations and guarantees known in western patterns like a prism.[8] The jurisdiction of the President of the Republic, too, was formed by the temporary requirement of its serving as a final institutional state guarantee for the pioneering bulk of the transition period before free elections.

One may believe (and I strongly do) that in the period of this large transformation, some principles were successfully laid down in spite of the temporary nature of things and the continuous changes. There is still a need to settle things in several areas. For example, the Constitutional Court is regularly compelled to be activist and choose among values which would otherwise be the task of the political and legislative sphere.[9] In the United States, such cases are usually refused by the Supreme Court. The President of the Republic's power to appoint and/or relieve has caused repeatedly a latent constitutional crisis. The reason is evident. If the President of the Republic—referring to his personal judgement and private conscience—recurrently pushes into the background those constitutional criteria which otherwise exclusively define his status in law, and if, based on his philanthropic concept which he had formed himself about his personal vocation, he reacts to official proposals by the Prime Minister with stubborn silence or by imposing contrived conditions, then the act of appointment, etc. will at last be the function of a personalized act of "*mihi placet*," which was characteristic

[8] The Act on the Constitutional Court, No. 32 of 1989. For the legislative instruments of the political transformation of Hungary, see generally *Democratic Changes in Hungary* Basic Legislation on a Peaceful Transition from Bolshevism to Democracy in Hungary, ed. Géza Kilényi (Budapest: Public Law Research Centre of the Hungarian Academy 1990) [Studies on Hungarian State and Law 3].

[9] The political activism and legislatory interventionism of the Constitutional Court is the topic of thorough, sometimes bitter, debates in Hungary. In addition to the political controversy it has arisen repeatedly, see, for a theoretical stand, Albert Takács 'Az alkotmányosság dilemmái és az Alkotmánybíróság ítéletei' [Dilemmas of constitutionality and the decisions of the Constitutional Court] *Acta Humana* I (1990) 1, pp. 38–56; Béla Pokol 'Parlamenti törvényhozás és alkotmányos alapjogok' [Parliamentary legislation and constitutional basic rights] in *Politológia* ed. Mihály Bihari & Béla Pokol (Budapest: Universitas 1992), ch. 19, pp. 343–356; Béla Pokol 'Aktivizmus és az Alkotmánybíróság' [Activism and the Constitutional Court] in *Magyarország politikai évkönyve 1992* [Political yearbook of Hungary] ed. Sándor Kurtán, Péter Sándor & László Vass (Budapest: Demokráciakutatások Magyar Központja Alapítvány és Economix Rt. 1992), pp. 150–155; Károly Törő 'Az alkotmánybíráskodás és a "láthatatlan Alkotmány" ' [Constitutional review and the so-called "invisible Constitution"] *Jogtudományi Közlöny* 39 (1992), pp. 85-90; Béla Pokol 'Aktivista alapjogász vagy parlamenti törvénybarát? A magyar alkotmánybíráskodásról' [An activist judge of the basic rights or a friend of the law enacted by the Parliament? On the constitutional review in Hungary] *Társadalmi Szemle* 47 (1992), pp. 67–78. For a comparative theoretical stand, see, e.g., Marijan Pavčnik 'Argument der Grundrechte (Verfassungsauslegung – Am Fall der Republik Slowenien)' in *Law, Justice and the State* Abstracts of Working-group Papers, ed. Ayja Margét Brynjarsdóttir (Reykjavík: University of Iceland 1993), p. 67 [16th World Congress on Philosophy of Law and Social Philosophy].

only of past absolutist rulers. And in addition, if he attempts to make this a constitutional practice recognized as one of the varieties of the lawful implementation of the right to appoint, then it is as if the circumvention of legal obligation would be made law-abiding. (For that matter, it is known that Hungarian law has traditionally treated since centuries the *bona fide* practice of law as obligatory and the abuse of it as forbidden. Thus, simply, it has never been customary to condemn cynical abuse by a separate, formal law, independently whether the abuse takes the form of searching for by-ways, instead of the exhaustively codified patterns, or of keeping silence forever, with reference to the regulation's alleged failure at setting a deadline.)

The Constitution is obviously shaped in everyday local practice. In addition to the rulings of the Constitutional Court, each and every moment of democratic state life contributes to the unfolding of its increasingly complete face. The question, however, of whether it will be replaced, and if so, how, is still open. In any case, both the Parliament and the political representation in it are now sailing on such a legislative wave, and public life is characterized by such confrontations, that—lacking a respite and readiness for compromises—the conditions are not conducive to establish a new constitution.

II. QUESTION MARKS OF LOCAL LEGAL TRADITION

5

As far as the choice between great social and historical models is concerned, though the actors may be feverishly enthusiastic in more than one direction, I would caution against any unfounded contrasting or false conceptualization. Although some political forces may aim at making the political and economic recovery in the large social transformation process according to models, this can never be fully achieved. The other side of the same consideration is that one may strive to accept national past and maintain historical traditions, only as an intention at best. Living social processes are very complex and defy any attempt to force them into the Procrustean bed of artificial conceptual dichotomies. As the Hungarian observer of the Muscovite life of the early thirties remarked once, commenting upon the Bolshevik attempt at transcending (by setting the final course for) world history,[10] one cannot jump in history at wish, as Hegel, Marx & Co. may have believed and

[10] "No matter how substantially it is new that will get a start with the qualitative change, with the jump, with the individual and the nation jumping, also their past will leap. History won't be left on the other side. It will be taken with, it will be as continued in their personality. They may have a fresh start, but also the old will be continued." Ervin Sinkó *Egy regény regénye* Moszkvai naplójegyzetek (1935–1937) [The novel of a novel: a Moscow diary, 1935–37] ed. István Bosnyák (Újvidék [Novi Sad, Voivodina/Serbia]: Fórum 1985), p. 320 [Sinkó István művei].

advised strongly. At least, when trying to do so, your past and tradition, habits and skills will also jump with you. Certainly, only personal intention can be classified alongside dichotomic differentiation, for I can only be sure that, e.g., it is within my intent that I do respect or, just to the opposite, disrespect, what I can learn from the national heritage.

It is obvious that Hungary must be modernized, westernized and once again made open towards European ideals, accepted earlier or changed in the meantime. All these are vital elements of both political and social efforts. At the same time, everything that is going to be realized from these can only appear in the context of national past and traditions. There is nothing new about this. For it is well-known as a socio-ontological and hermeneutic lesson that social things, as such, have no identity in themselves. Their existence lies in (or rather, in the effect of) how the members of the given society think about them, recognizing their presence, importance, and nature.[11] To repeat it once again: though you may jump as high as you can, you cannot burst out of your skin. No matter what kind of institution or thought any society adopts from elsewhere, one can interpret the process of its assimilation only in the above context.[12] This means that the receiving medium rejects (or, alternatively, will suffer paralysis by accepting) only what—by refusing the special characteristics of the receiving medium—is incapable of co-operation.

6

Concerning the necessity of changes, I would like to refer above all to the fossil which was first attacked as "socialist normativism" by one of its first proponents in socialist legal theory.[13] It was a degeneration of European legal positivism, trusting in the prudence of *"Das Recht ist das Recht"* ("the law is the law"), which, by the way, left already German lawyers unprotected against coming Nazi cruelty. In its Stalinist version, it was the political idea of one absolute (that is, simultaneously undebated and undebatable) decision-making centre that was thereby translated into the language of law.

If Central and Eastern European legal development is really facing a turn, then this time it cannot be confined to the desire to join (re-join) Europe, to possess (re-possess) things chosen from the common European past and

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[11] See Csaba Varga 'The Fact and Its Approach in Philosophy and in Law' in *Law and Semiotics 3* ed. Roberta Kevelson (New York & London: Plenum 1989), pp. 357–382.

[12] Cf. Alan Watson *Legal Transplants* An Approach to Comparative Law (Edinburgh: Scottish Academic Press 1974) and Alan Watson *Society and Legal Change* (Edinburgh: Scottish Academic Press 1977).

[13] Imre Szabó 'The Notion of Law' *Acta Juridica Academiae Scientiarum Hungaricae* 18 (1976) 3–4, pp. 263–271 at 268, reprinted in *Marxian Legal Theory* ed. Csaba Varga (Aldershot, etc.: Dartmouth 1993), pp. 261–269 at 266 [The International Library of Essays in Law & Legal Theory: Schools 9].

present at will. One has already to consider the true nature, as part of the "Socialist" legacy, of the adopted juristic world-view—which, until recently, broke the law's complex nature into a strictly uniform hierarchical structure, by reducing the administration of justice to simple executive function, and which regarded law itself in a formalistic, moreover, in a quasi-mechanical way, that is, as a set of decisions logically predetermined in every respect, without any alternatives.[14] And this is one of the foundational parts of the legacy. For the juristic world-view functions as part of the ideology of the legal profession, a conceptual paradigmatic order which is going to be successively realized in society, thus both maintaining and re-establishing what the legal order in the given society is.[15]

Formally, in the high times of the implementation of what "actually existing Socialism" meant in the Central and Eastern European region, attempts were made to counter-balance the proper lack of legal culture by making a fetish of rules. Stalinist revolutionaries tried to make people believe that mere texts called laws could determine real-life processes. Law and its practice, however, are not the rote learning, copying or mechanical application of texts. Law in the largest sense is, above all, one of the basic aspects of the life and survival of a culture. This is why in law, rules are not independent actors. They work by getting integrated into legal reasoning and the judicial process. The process follows traditions, but at the same time it is based on the judge's personal responsibility, involving its aim to find a solution to social conflicts. The legal machinery does it so in such a way that at first it re-formulates these as conflicts within the law and later—within the frame of values, principles, reasons, considerations and references once acknowledged as relevant in law, that is, as based on, or drawn or concluded from, laws and other sources of the law—it gives its own answer, which, then, can be presented in the name, and referred to as *the* answer, of the law.[16]

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[14] Cf. Csaba Varga 'Law As A Social Issue' in *Szkice z teorii prawa i szczególowych nauk prawnych* Professorowi Zygmuntowi Ziembinskiemu, ed. Slawomira Wronkowska & Maciej Zielinski (Poznan: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza 1990), pp. 239-255 and, as put into larger context, the various papers collected in *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, etc.: Dartmouth 1992), part IV: Comparative Legal Methods, pp. 333–447 [The International Library of Essays in Law & Legal Theory, Legal Cultures 1].

[15] Cf. Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985), in particular par. 5.4.3, pp. 152–156.

[16] Cf. Csaba Varga 'Judicial Reproduction of the Law in an Autopoietical System?' in *Technischer Imperativ und Legitimationskrise des Rechts* ed. Werner Krawietz, Antonio Al. Martino & Kenneth I. Winston (Berlin: Duncker & Humblot 1991), pp. 305–313 [Rechtstheorie, Beiheft 11], as well as Csaba Varga *A Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995).

According to legal history, only those absolutisms which aimed at the exclusive control of law, such as Justinian, Frederick the Great of Prussia or Peter the Great of Russia, tried to trace back law (*"jus"*) directly to the law as the compound of laws (*"lex"*), that is, to the ruler's will as embodied in formal texts.[17]

7

Experience of local legal histories, characteristic particularly of western development—where, due to the continued feedback gained by everyday democratic processes in re-conventionalizing and re-consenting issues, beliefs and words, intents and institutionalization usually back (and do not belie) one another—well, western experience may suggest a course differing from Central and Eastern European experience and sensibility. This explains why the search for common values, standards, symbols, conceptualization, etc. may seem to get so much emphasis in the Central and Eastern European region. In fact, it testifies to the social and cultural complexity of legal phenomenon. It holds that the law's formal objectification (enactments, decided cases, etc.) can be meaningfully interpreted only within its informal contexture. This environment is called legal culture; it is embedded in general societal culture. Legal cultures include ethos, values, conceptual and referential frame related to law, judicial skills and habits, as well as ideology and deontology of the legal profession, among others. It is this component that gives law a life, makes it dependent from local histories and domestic culture, defines its orientation, shapes its receptiveness and responsiveness, and, in case of eventual reform, backs or withstands to it.

The statement of social and cultural complexity is, however, not only a description. At the same time, it offers a dual strategy for law. For the law can be both formally amended and re-contextualized through molding its environment.[18] The proportion of the two strategies may vary, of course. Anyhow, in cases of transplant of big units and/or radical legal reform—when receiving whole patterns, models or cultures is at stake (especially in Eastern Europe, just pointing to what 'Europeanization,' respectively 'westernization'

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[17] Cf. Michel Villey *La formation de la pensée juridique moderne* 4th ed. (Paris: Montchrétien 1975) passim and Csaba Varga *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) passim.

[18] See Csaba Varga 'Is Law a System of Enactments?' in *Theory of Legal Science* ed. Aleksander Peczenik & al. (Dordrecht: Reidel 1984), pp. 175–182 [Synthese Library 176] and Csaba Varga 'Law As History?' in *Philosophy of Law in the History of Human Thought* ed. Stavros Panou, Georg Bozonis, Demetrios Georgas & Paul Trappe (Stuttgart: Steiner 1988), pp. 191–198 [Archiv für Rechts- und Sozialphilosophie, Supplementa 2].

genuinely mean)—the latter may major the former. In average cases, a combination is the optimum solution.[19]

8

The transformation of the juristic world-view, characteristic of "socialist normativism," into a more complex, at the same time responsible and responsive one, leads to changes beyond the relationship of law and laws.[20] It restores principles into their own rights, without affecting the importance of rules. Thus it takes into account that principles—and only principles—can offer the legal order a living entity. Only by means of principles can one make law responsible and able to respond sensitively in every situation requiring a decision. As a consequence, only by reviving the role of principles can one transform the law into a dynamic factor which is able to shape continually itself from case to case, from decision to decision, in order to become representative of the nation's history.

The role of principles is to check the relevancy of the various arguments which can all be logically conceivable and justifiable. By doing this the principles thoroughly examine, moreover, control, the province of the application of rules.[21] This role has been known since Roman law. Both the rabbinic jurisdiction of the Jewish diaspora and Muslim tradition took this role into account. Contemporary Anglo-American jurisdiction builds strongly on this role. Since World War II, it has been known and practised particularly in French, German and Italian jurisdictions as well.[22]

(It may be interesting to note that until recently, namely, the issue of the first Civil Code approved by Parliament in the country's history, Hungarian private law was based mainly on judicial practice, considered and treated as a precedent.[23] Thus the Hungarian legal genius was differentiated from its continental neighbours, who drowned in the soullessness of positivism, by a

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[19] This is the way I have translated Allott's description (cf. note 11) into a statement of legal policy. Csaba Varga 'The Law and Its Limits' [1985] in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures 1994), pp. 91–96 [Philosophiae Iuris].

[20] Philippe Nonet & Philip Selznick *Law and Society in Transition* Toward Responsive Law (New York, etc.: Harper & Row 1978), ch. IV, pp. 78–113.

[21] R. M. Dworkin 'Is Law a System of Rules?' [from his 'The Model of Rules' *University of Chicago Law Review*, 35 (1967), pp. 14 et seq.] reprinted in his *The Philosophy of Law* (Oxford: Oxford University Press 1977), pp. 38–65 [Oxford Readings in Philosophy].

[22] Chaïm Perelman 'Legal Ontology and Legal Reasoning' *Israel Law Review* 16 (1981), pp. 356–367.

[23] The Act on the Civil Code, No. 4 of 1959. Cf. Imre Zajtay 'The Importance of the Evolution of Hungarian Law in Regard to the Theory of Sources' *Comparative and International Law Journal of South Africa* 4 (1971), pp. 72-84 and Gyula Eörsi 'Richterrecht und Gesetzesrecht in Ungarn: Zum Problem der Originalität eines Zivilrechts' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 30 (1966), pp. 117–140.

thinking culture which concentrated on the solution of individual legal cases using legal principles and processing them casuistically.[24])

9

However proud some Central European nations are (and not necessarily without basis) that their legal scholarship was able to preserve the bulk of their past European values, their recent relationship to law could only be formed on the spot, in the given circumstances. That is, they had to base their own survival on the theoretical acceptance of the law as the mere order imposed by those in power and on evading it in practice as much and as many times as possible. Thus even Hungarian, Polish and other characteristic national life strategies also rested on the sheer cognizance of the law and its use, only according to timely interests.

All this has also to mean that present conditions can in no way be considered fully developed. They are too new for the nations concerned to feel at home in them and to continue their respective traditions through them. At present even political scholarship in the new democracies, which was born under the unlucky stars of historical materialism and scientific socialism of Marxism, is at somewhat of a loss before this multi-coloured political map, multi-party system and democratic establishment. And in the same way, it is far from being obvious in both popular and scholarly understanding, characteristic of the first period, that freedom does not equal licentiousness, and democracy does not equal anarchy. It may sometimes make political actors in actual play forget that freedom and democracy can only be based on commonly accepted rules, on their observance and enforcement. That they cannot exist without social discipline, not even in the established democracies. With the only difference that, with the Atlantic nations grown out of the same European tradition, all these things are so natural that there is no need to emphasize them separately.

Democracy is not served only by manifestos. It can be served primarily—and not hypocritically—also by not destroying its own foundations while one is blinded by ephemeral political interests in the heat of the battle one fights for it. For the law also has its own *sine qua non* instrumental precondition which makes it able to function. Namely, one may criticize all kinds of laws and lawfulness from political, economic, moral or even legal points of view. There is only one thing one cannot do without destroying law: questioning its legal character and validity.

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[24] This explains why Hungarian law was exemplified to be an instance of "civil law without a civil code" by Rudolf B. Schlesinger *Comparative Law* Cases—Text—Materials, 2nd ed. (London: Stevens 1960), p. 175, note *

This is precisely what occurred in the memorable days of the taxi blockade (a 1990 fall cabdrivers' demonstration against higher gasoline prices) in Hungary, when unlawfulness was made to appear as lawfulness by a conceptualization mirroring mere political wishes: it was termed 'civil disobedience' (thus deliberately distorting the term as it is known in its American, as well as European, understanding). And today, such things are hammered into the populace by journalistic trial balloons: scandal mongering, labelling and attempts to discredit. This occurs, for instance and especially in Hungary, when legal practice in harmony with the Constitution and the laws and regulations of the country is condemned as despotism and the defamation of democracy. The same is true when some try to frighten the sympathizers with the spectre of a nepotistic state, because appointments (and human resource-management in administration) reflect governmental responsibility and not necessarily oppositional political wishes. These are insipid, outworn ideas. One may not only have met with some of their prototypes in the arguments of the leftist, not infrequently even nihilistic, student riots of the western hemisphere in 1968, especially in Paris.

10

As seen above, law reflects the general state of society. The question marks of university legal training arise mainly from the slowness, the unresolved aspects and, in some areas, the hopelessness of the conditions of transition in the Central and Eastern European region.

As the professor of a subject which investigates the points where law, philosophy and culture meet, I have taught for many years that nobody having ever been socialized according to the Soviet pattern can step over Marxism by a simple pronouncement or decision. One simply cannot get rid of what became ingrained in by nonchalantly throwing one's garment into the corner. "Actually existing socialism" had its apostles in the region, who had, maybe even slightly preceding the political changes, already turned against what they had preached when it was fashionable—but by turning their feverish devotion in another direction, their way of thinking may have remained implacably relentless. They may confess that, even if they had seemed to be leading ideologists then, they had only wanted to give Marxism a chance, they had only used its language—well, after all they can at least add to the camp of anti-Bolshevik Bolsheviks.

Returning to the law, to the questioned Marxist heritage which the nations concerned wish to cast off, a fresh start is made difficult not only by the "socialist" character of the heritage, by certain propositions or their Marxist nature or background. I do strongly believe that the original *anti*-scientific, moreover, irreparably *a*-scientific, or rather *pre*-scientific, mindset of the

Marxian heritage is more fundamental and, at the same time, more difficult to cure. That is, the fact is that Marxism was invented and also rigidified before the emergence of sciences and disciplines which determine modern thinking, characteristic of the twentieth century, such as sociology, psychology, ethnology, and anthropology. Furthermore, its aggressive self-justification and conceited missionary fury have since prevented the teacher from learning. And in addition, its concept concerning the foundation of human thinking (especially the paradigmatic understanding of 'fact,' 'thought,' 'language,' 'concept,' 'reasoning,' 'truth,' and 'verification') has unchangedly remained uncomprehending and strange, at an atavistic distance from presuppositions and basic assumptions that modern scholarship and language philosophy have accepted in the western world for more than a century.[25]

The only consequence of this is that each and every nation and individual concerned should, step by step, start anew, beginning from the very basics, not only in textbooks but in one's own mind. This requires time and humility, understanding, and a persistent intent to learn. In addition, it requires a social atmosphere which makes the renewal of all not only imaginable and possible but also a precondition of societal survival.

[25] Cf. Csaba Varga 'Introduction' to *Marxian Legal Theory*, pp. xiii-xviii and Csaba Varga *Paradigms of Legal Thinking* (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures forthcoming), ch. 1 [Philosophiae Iuris].

SKRIMISHES AND THE GAME'S RULE

CRIME, NOT CIVIL DISOBEDIENCE
An Amnesty Law Is Needed*

During the 1989 round-table talks preparing for the politico-legal transition, political forces, which today play an influential role in Parliament, agreed upon the framework for a constitutional democracy and have consequently succeeded in its implementation. This framework provides accepted processes through which political and social conflicts may be resolved within the range of law. At any time, when seeking solution to societal crises while keeping the future in mind, partners in crisis have to take the above as a starting point.

1

Civil disobedience is originally an English term, which I consider to be political rather than legal in nature. Examples characteristic of civil disobedience include Mahatma Gandhi's passive resistance movement in India, the American burning of draft cards in the '60s during the Vietnam War, demonstrations against nuclear threat, and protests against environmentally harmful projects. Social movements like these serve common moral and basic interests, and not simply and merely the aspirations of individuals. Participants in these protests can be characterized as possessing great self-discipline and a firm guiding belief in non-violence. They are consistent in challenging or provoking the prevailing order and are willing to bear the legal consequences of their actions. Their reasoning holds that, for instance, "I protest because my conscience compels me to, and the authority's task is to treat me in accordance with the law. But they have to know that if they arrest me, tens and hundreds, maybe tens of thousands will stand up in line behind me." That is to say that authorities have to act in order to preserve law and order, but in doing so they may be bound to initiate processes that may subsequently undermine their authority. And if law-enforcement agencies fail, belief in their authority will be diminished, too.

* First published as parts of [with Péter Hack, Gábor Jobbágyi, Zoltán Rockenbauer & Emil Tallós] 'Nem állampolgári engedetlenség; Közkegyelmi törvény kell' [Not a case of civil disobedience; A general bill of pardon is requested]: A Reggeli Pesti Hírlap nyilvános vitaülése [Enyedi Nagy Mihály vitavezetésével] a fuvarosblokád jogi megítéléséről [a public debate conducted by Mihály Enyedi Nagy on the legal qualification of the taxi drivers' blockade], I-II *Reggeli Pesti Hírlap*, I (12 & 13 November 1990) 179 & 180, pp. 8 & 8.

2

That what occurred in Hungary during the long weekend starting by the night of 25 October 1990, displayed a rather different logic actually. The mass media covered the events freeze-frame, starting on Friday morning when the first timid policeman approached the cars comprising the blockade in order to write down licence plate numbers. The media then showed his mission rendered impossible and even his notepad tossed into the Danube. The same morning also the dismissal of the Minister of the Interior was demanded by charging him that, allegedly, by his referring to regulations in law, he threatened cab drivers to use force.

In fact, civil disobedience is not simply citizens' participation. It is a social process in which the events are limited to the civil sphere and the fight for citizens' rights. In consequence, the events in question must not conflict with the law in a way diminishing or violating the rights of others. In plain terms, the relationship between the protester and the state authority is one that conceptually precludes the use of force, including, in our case, the construction of blockades as well.

3

One can state that instances of civil disobedience, taken in its classic meaning, are extremely rare over the one-thousand-year history of Hungary. And one has to remember that division of labour as such is most meaningful in crisis situations. Accordingly, politicians have to do their job and the members of the legal profession to do theirs, but the two must not be mixed. Now there is a crisis in fact because of the political stand that was made to prevail in the legal assessment of the blockade. Providing that there are legal experts in the country, they have to do their job and they have to elevate themselves, today as well as tomorrow, to a professional standing for putting things in order, at least up to the point of the proper qualification of events. All of us have to know what to expect and do now and in the future. And in order to prepare for the future, we have to find immediately the legal (or quasi-legal) forms of managing political crisis, by avoiding the pattern offered by Weimar in Germany in the '20s.

Of course, law cannot suppress any social phenomenon. At the same time, constitutional democracies are not subject to the ruthless and unrestricted hand of mere facts. In a constitutional democracy, problems arise mostly at times when laws become irrelevant, when the rationality secured by the law is lost. For instance, paradoxically speaking, everyone has the right to commit a crime, but not the right to say that what he does is not criminal. Consequently, I may not state that as long as such a crisis may arise, it is solely the state authority that is held to be responsible. Though law provides

a framework for any situation, its effect is mainly exerted through foretelling consequences. In our case, crimes were committed. Providing that it is in the interest of society not to punish these crimes, pardon shall be offered to them in a legally acceptable form. But notwithstanding the issue, damages have to be compensated. (For instance, international insurance companies will probably pay for goods trapped or spoiled in trucks, but will afterwards turn to Hungary for reimbursement.) That is, the legal consequences of all these events have to be thoroughly considered. And we have to be conscious of the established order according to which the qualification of events can only be changed by legislatory amendment or by the introduction of a new, revolutionary order. If we claim remaining within the framework of the existing law and order while at the same time accepting such a contradiction, then tomorrow any small grouping may venture to blocking the roads leading out from and connecting towns and, what's more, can even expect and reclaim freedom from prosecution.

4

Today it is our job to lay down the foundations of a common future. That is why it is so important to state that citizens from birth are entitled to exert the *ius resistendi* (i.e., the right to resist) against a tyrant only. But the cab drivers' demonstration was completely different even if the blockaders' rhetoric made occasional reference to it. In fact, no force asserting itself in the conflict ever demanded the overthrow of an oppressive regime. The country was totally blockaded notwithstanding the fact that the blockade is a serious step of a grave situation in which, according to the Constitution, the President of the Republic should have announced a state of emergency, convened the National Defence Council and, simultaneously, mobilized the army.

Memory of The Golden Bull (i.e., the Magna Carta of Hungary from 1222) may justify the claim by tradition that the right to resist will once upon the time be integrated into the formal system of the law of the Republic of Hungary, albeit it is not yet the case.

5

No matter what is going to happen in these days, the preservation of the law and order has to be guaranteed first of all by exactly those political parties that have established the constitutional set-up itself. For no political party is entitled to escalate a situation in which crime-like behaviours play a determining role. On that dramatic Friday night, the public television's news program raised the question to the leading representatives of the so-called liberal opposition in parliament, a historian and a jurist, whether they are

disturbed by the fact that the country is blockaded, and millions of citizens are deprived of their freedom of movement? Interestingly, in spite of explicit constitutional obligations, none of them distanced themselves and their own parties from the employment of criminal tactics. And at the end of the crisis, though all the parliamentary parties made clear in their statements that they had distanced themselves from the illegality of recent events, they avoided referring to the future. This is why to have a final answer requires all the parties to unequivocally renounce the use of criminal tactics in their daily management and actual settlement of all kinds of social and political conflicts.

FRAGILITY OF THE CONSTITUTIONAL ESTABLISHMENT*

Law is a fragile entity. It has no strength in and of itself to come to power, nor does it put up with attempts to tyrannize it. In such cases, it retreats. Even if at some future time it does return, it won't be the same any longer. It is not its old self that we can observe at such times, but a broken reflection, which is easily forced to retreat again. Law is the type of thing which either is, or isn't. While it exists, it cannot be paranthetisized. It cannot be blackmailed by the imposition of preconditions. The law itself decides what it is, and whatever we do, our relationship to it is decided by actions either in agreement, or in opposition to it.

Speaking of the law of the state, Kant writes that the denial of legality is revolution itself.[1] We have to realize that a dual proposition is hidden within this statement. Specifically that, in some way, all actions are qualified by the law. One of the fundamental principles of the conditions of the Rule of Law is that all actions which are not prohibited by the law are permitted. In the final analysis, therefore, all actions are either illegal or legal. We speak of the latter when the law specifically allows an action, or is silent regarding its status. Whatever an action's qualification, it cannot change, except when the law itself is amended. Within a specific legal system, therefore, I cannot label the same action both legal and illegal. If once I begin to declare the opposite of what I have qualified, that, according to Kant, is revolution itself.

Whilst telling of the founding of the City, Livius speaks of the battle waged by the plebeians against the patricians.[2] They were fighting to have the laws applied to them by the patricians to be at least known to them beforehand and be recorded as such. The patricians were not to be allowed, therefore, to hold them in a position of uncertainty. They fought for the law

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* First published as 'Törékeny jogállamiságunk' [Our fragile rule of law] *Magyar Nemzet* LII (13 November 1990) 266, p. 4 [abridged] & *Hitel* III [December 26, 1990] 26, pp. 37–40.

[1] The limits of legality are explored by Immanuel Kant in Section 49 of *Die Metaphysik der Sitten* Das Staatsrecht.

[2] The origin of the City is described by Titus Livius in his *Romanorum ab urbe condita* III, Section 34 [in English by B. O. Foster (Cambridge, Mass.: Harvard University Press & London: Heinemann 1967), p. 113].

of the City to stand not on any one side, but on its own feet, just between the interested parties. As such, it would serve all in its own way. The simple fact is that a commandment which stands above the conflicts of the day (coming from a burning bush, to be later engraved in stone and made public as the proper way of handling public affairs, etc.) is one of the humanity's most ancient desires. We know that the totalitarian regimes which were forced upon us under the label of socialism, annihilated the basic principles of law, primarily through the termination of the autonomy of law and its characteristic prestige and dignity. They made it impossible for the law to act as a mediator in incidents of conflict in society. They made it impossible for the law to be the agent, whatever happens in our lives, that could not be silenced and swept under the rug. Let us listen, then, to the law as well, rather than to simply allow the politician, the economist, the small-holder, the everyday citizen, or even perhaps the taxi driver in each of us to speak instead of the law.

The surprising thing regarding those remarkable events occurring at the end of that October in Budapest is that automobile demonstration organized at various points around the capital turned into a total blockade so quickly. The mercilessness of the immediate taking advantage of "the situation" shows in the occupation of key points along the nation's highways, in the stopping of traffic within the municipalities and along the roads tying them together, and in the total paralysation of our crossing points to the rest of Europe.

It may hold a pleasant ring to our ears to state (in a manner to stimulate an association of ideas and with a noble simplicity which agrees with the customary chatter of our organs of mass communications) that all of this was simply an act of civil disobedience. We cannot do so, however, without distorting our language. Language does not only suggest moods, but transmits customs as well. We cannot use its expressions to label things of our choosing in a manner to our own liking. Likewise, though it may be preferable to many to judge the government measure setting higher gas price as motivated by secret knowledge and hidden intentions, this does not give us the right to construct blockades. It is important to note that in the realm of international law, for example, resorting to blockade building is one of the last steps before preparing for war.

In the wake of the events and in the opinions following one another at the scene—on public radio and television, as well as in the press and several of the party headquarters in Hungary—, a number of voices were formulated in a way as if this part of Europe had never heard about law.

We know of the law that it generally offers an institutionalized procedural framework. At times, it also endeavours to remove those frameworks and modes of action that have not yet become institutionalized.

In case when institutionalized procedures (such as strikes and demonstrations) are established, it is not sufficient to act according to our own heads and follow our liking up by speaking pretty words selected to serve the goal. We can only take part in such institutionalized frames even verbally if certain formal conditions (e.g., preannouncement of a demonstration) are satisfied. If formal requirements are not met, we simply cannot enter into an institutionalized relationship. Providing that there is no categorical rule to rule the situation, in the first case we are living with and practising the law. In the second, however, we remain free, independent of and untouchable by institutional determinations.

If a custom has not yet been legally institutionalized (one example being civil disobedience, which our culture has come to know primarily from American writings), the custom itself may serve as a guideline. Perfect examples would be the struggles of Gandhi, the denial of draft orders in the United States during the Vietnam War, the occupation of the White House lawn and sit-ins on roads leading to military or industrial sites to protest in favour of nuclear disarmament or against environmentally harmful industrial factories. Nevertheless, none of these examples bear the slightest resemblance to the logic of our taxi blockaders, primarily because those engaged in the classic examples have not pursued and served their own personal interests. They are trying to serve one or another moral principle, and not a simply consumer choice. Also, before all else, these protesters openly accept the consequences of their opposition to the law. They actually demand reprisal by the authorities. They are aware that taking advantage of the authorities past a certain point could destroy the machinery of the state and would result in trust of the citizens in the legality of the state to fade.

Our taxi drivers could, of course, have become involved in a genuine act of civil disobedience. Naturally, they would have had to avoid blocking all public roads anyway. It is conceivable that the insignificant number of vehicles at the disposal of the police to use force had made it impossible from the very beginning to react properly in a legitimate way. On the other hand, just the extreme burden on police resources as a result of acts of disobedience brings us to the dilemma: what purpose is it purposeful to use the powers of the organs of public security for? Should we, perhaps, use them exclusively to do away with the disobedience? Or should we rather concentrate our efforts to prevent society's being left unguarded from threats that are maybe unseen but feasible in its wake? Our taxi drivers and parties in opposition and supporters of the paralysis of the country were, however, motivated by perfectly an opposing logic. From the first day, they made it impossible that the licence plates of cars involved in the blocking of public bridges be noted. Certain party bosses demanded even the resignation of the Minister of the Interior for "the threat of application of force."

Civil disobedience presupposes acts of protest free of coercion and which cause no harm to others. In the neighbouring countries in the West of Europe, protests result in only the partial closing of roadways and even these can only be limited in time. At worst, they force detours and increased expenses. For this reason, not even the question of whether some of these acts qualify as crime can for the most part crop up. There is no need to disturb public works in any large manner. Likewise, transportation security is not endangered and society is not forced to endure the resulting hardships.

Words cannot contain anything we wish, unless we want George Steiner's "hollow miracle"[3] or the inner infidelity of our own verbal manifestation to set in once again in the new era after democracy is reborn.[4]

I cannot argue, therefore, that the sheer number of illegal acts suspends the law's validity. If I were to do so, I would at best be strengthening Carl Schmitt's pattern of thought as it evolved from the shocks of the Weimar Republic and his early experience with National Socialism.[5] Specifically, if formal law is binding only within the framework of "normal, everyday life," then the proposal of exceptions calls in fact for its collapse and the setting aside of the relevance of the Constitution by establishing exceptional powers. (The same situation occurs when I argue—as terrorists do—that the situation is legally unjudgeable or unmanageable, or that avoiding important dangers legitimates the limitation of citizens' rights.)

I likewise am not allowed to throw the fact into the public's face that at all the bordering points of the Republic of Hungary from Hegyeshalom to Záhony, i.e., throughout the country from West to East, "we," the legally undefined entity, brought the entire nation to a standstill—as the taxi drivers declared boastfully to the emerging new citizenry. Constitutionally speaking, such a declaration can only be construed as an invitation of the President of the Republic to proclaim the state of emergency by calling the National Defence Council in for preparing the domestic mobilization of the Army.

Likewise, the law cannot stand for the construction of alibis. If I consider these unlawful protests as being justified, I divide the legal system into two headings: "normal" and "abnormal" situations. By doing so, I make it possible for all groups in society—including all political power wielders—to toss

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[3] George Steiner's thought-provoking essay, 'The Hollow Miracle' [1959], can be found in his collection of essays *Language and Silence* (Harmondsworth: Penguin Books 1969), pp. 136–151.

[4] Cf. Csaba Varga 'Reflections on Law and on Its Inner Morality' *Rivista Internazionale di Filosofia del Diritto* LXII (1985) 3, pp. 439–451 and Csaba Varga 'Law as a Social Issue' in *Szkice z teorii prawa i szczegółwych nauk prawnych* Professorowi Zygmontowi Ziembinskiemu, ed. Slawomira Wronkowska & Maciej Zielinski (Poznan: Wydawnictwo Naukove Uniwersytetu im. Adama Mickiewicza w Poznaniu 1990), pp. 239–255 [Uniwersytet im Adama Mickiewicza w Poznaniu: Seria Prawo nr 129], in particular par. II. & III.

[5] Carl Schmitt's philosophy, characteristic of the era, can be best studied from his *Politische Theologie* Vier Kapitel zur Lehre von der Souverenität (Munich & Leipzig: Duncker & Humblot 1922).

aside what we know as law through their loud and aggressive behaviour, only provided that they will refer to their differing understanding of law. On the other way round, if I am of the opinion that what happened was a legal revolution, then all that we have achieved by demolishing the set-up of Stalinism through the political round-table talks and the re-establishment of constitutional democracy will be lost. Consequently, all that we have brought into existence—constitutionalism, the constitutional state and its Rule of Law, taken as the basic pieces of the game presently accepted—need to be rebuilt.

All crises are destructive. Though this is still true, we could see from the beginning that the situation would be solved somehow. What is at stake now after the crisis is over is not so much a question of law, as one of our newly instituted multi-party parliamentary democracy. Consequently, it is not the coalition and the government that are the primary victims (or targets) of what has in the wake of events happened to the law. What is at stake is rather constitutionalism and the Rule of Law, finally established through a long series of fundamental laws (voted by a two-third majority), i.e., rules of the game to be implemented in the solution of social conflicts. For by now they have been made relative again, doubted and rejected. Those parties (now in opposition) were agreed on the protesters' moves, which had aligned with parties now in charge of government to set the new conditions of constitutionalism and the Rule of Law some months ago.

It is the task of political analysts to explain why constitutional methods (e.g., special motions in Parliament) were not initiated to compel government to retreat gásoline price hikes (economically belated by the way) and why no attempt was made to push protesters acting within the established framework of civil disobedience. Beyond doubt it is a sign of weakness of the new fundaments that the new frame could so easily be turned upside-down by the occasion of a minor event. It likewise points to poor foundations that all this move could be supported by apparently liberal forces whose legitimacy is based upon references to European values and civil rights doctrines.

By now we have learned what are the strategic points by the control of which the nation can be paralysed, its forces and reserves wounded. From these events we have also learned that by the mobilization of a sizeable number of vehicles any social group can get in control of a whole nation. In the assessment of these events, it is therefore especially doubtful whether we can ignore the legal point of view, having in view the precedential value it represents.

For that matter, genuine solution can only be afforded by re-defining the relevance and internal limitation of the whole constitutional construction,

framing also the way and know-how of crisis management on the fields of both politics and law, on the one hand, whilst regarding the issues of the present events as items crying for a specific learning process to start, on the other. Part of this process is that political parties having had a hand in those events shall reconsider their positions, re-assert the common rules of the politico-social game in a way irrevocable by them, so that instead of perpetuation the crisis will finally be over.

TROUBLES SURROUNDING THE FUNCTIONS OF LAW*

The columnist reveals some uncertainties related to the law's functioning in his leading article in the Hungarian daily newspaper.[1] He seems to feel uncertainties following the "taxi blockade when the legal experts of the largest governing party meticulously collected those facts that could constitute a case in law, and which were in fact broken in the weekend in question by half of the country." He adds that in the meantime "nobody mentioned that the law was not a panacea, that it is effective only in relatively stable situations."

For the sake of historical accuracy, let me recall that the expert opinion of the legal committee of the Hungarian Democratic Forum was drafted and issued in the early afternoon of 27 October, Saturday, in the midst of the events. By this time the capital was almost deserted. The opinion was meant to respond to the events of the previous day, when the country had been completely debilitated and the triumphant declaration of "We are in control!" had been heard. Though expressed differently and with varying intensity, all the three opposition parties aligned themselves with the blockade. In addition to pressing for the dismissal of the Minister of the Interior, who allegedly threatened the use of force, also the resignation of the government was demanded. The support by certain political forces was explicitly shown from the organizing role they had, statements they published in newspapers and declaration they made on the public radio, and incitement they spread over through leaflets. Even non-activist forces expressed their sympathy by refraining from open condemnation.

The leading governing party's assessment of the situation was sent to two television channels for their information that was marked "for internal use." It was therefore quite surprising when the next morning the document was published in a special edition of the Free Democrat's weekly, *Beszélő,* with the tacked-on and evocative subtitle "Crimes and Sins," suggesting moral

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* First published as ' "A jog funkciói körüli szerepzavar"-ról' [On "the ambiguity of roles around the functions of law"] *Magyar Nemzet* LIV (19 January 1991) 16, p. 14.

[1] Péter Balla 'A jog funkciói körüli szerepzavar' [The trouble of roles around the functions of law] *Magyar Nemzet* [Hungarian Nation] LIII (29 November 1990).

condemnation of the assessment and thereby emphasizing the difference in approaches.

It is beyond my task to examine whether the legal stand taken by the Hungarian Democratic Forum may have had an effect on that the parties involved refrained eventually from further escalating of the situation. The limiting nature of the events, as Péter Balla has sensitively recognized it in his article, calls for the close examination of the relationship between the function of law, on the one hand, and the differentiation of the normal conditions from the extraordinary ones, on the other. Allow me to consider it.

1

Above all, law is a system of references. In that respect, law is similar to morality and any other system of rules which are based on conventions. Law is a network of references to which I can relate real life events so that I can find their place in the related conceptual system. The primary aim of law is, therefore, nothing but conceptual classification. In the cases when this network is normative, the pigeon-holing of life events entails at the same time a normative judgement of the whole situation.

Though widespread popular opinion may suggest that law is associated with courts, as well as law enforcement and jail, this is as false as if I were to say that the fruits I buy at the market are law (because I have previously contracted for them), or the decades I have spent with my wife are law (because our common life was preceded by a ceremony called "marriage"). Similarly, morals are not equal to the cutting of women's hair (as the French allegedly did with female compatriots who had entered sexual relationships with the occupying Germans): at most and at best, it is one of the possible consequences of a moral judgement.

Law differs from morals in many respects. Law is superior to morals especially in forms. It is strictly formalized in both its procedures and consequences. Above all, the law is not flexible. The law is calibrated so as to allow only black-and-white-type answers within the conceptual categories of the normative system. The law's answer is either "yes" or "no," and *tertium non datur*. Furthermore, as its procedure follows normative patterns, either a decision of "yes" or one of "no" has to be reached once provided that anybody who is entitled to initiate proceedings has chosen to do so. Finally, the law is staffed with institutions, among others, public prosecutors, whose explicit task is to initiate proceedings.

2

There is a common feature of the networks of normative reference with the fields covered by logic, namely that in every sphere the network is relevant

it is valid as well. In contrast to logic, notwithstanding, where a given connection can be said "to prevail" and "to be the case" irrespective of whether we are aware of it or not, the same cannot be formulated in respect of law. On the one hand, statements in law are strictly formalized, as they are determined by the rules of and steps taken in a formal—legal—procedure. On the other, the answer to the question of "What is law?" presupposes interpretation by legal authorities. Thus the answers to the questions of "What is stated in law?" or "What is the law's message for a given situation?" can only be construed from within the normative system through normative means. In the final analysis, they can only be afforded by competent legal authorities.

3

Having in view the formalized nature of law (and also the fact that since the end of the feudal arrangement, legal formalism has been considered an achievement in itself as a means and condition of development), when speaking in terms of the law, the points of view and the rules of the game cannot be freely changed. For law functions mainly through judgements by the law. And each of us has to accept legal judgements if we don't intend to discard the idea of the Rule of Law. We have to let the law function undisturbed if we want to refer (without ulterior or hidden motives and without using a position of strength) to it in the future, as something whose validity and general applicability are granted and not questioned again.

One has also to be aware of the fact that once one has created a situation in which the law is muted, then the case is not simply an individual occurrence of the infringement of the law but it necessarily involves that also its very foundation has thereby been kicked out from under it, namely its validity, which in principle can only be restricted by legal means.

If I were in the position to state authoritatively that the law, as opposed to its letter, does not apply to any one matter, this, as to its form, were by itself an act of revolution latently completed. The example Péter Balla formulates in his article, classifying the demolition of the Bastille as destruction, illustrates my point well. For after a successful revolutionary breakthrough, I would remain psychologically captive of the old regime if I had insisted in qualifying it as destruction. But in want of a revolutionary success, I would be denying also the continuity of any law and order if I did not allow the question of destruction to be raised. There is no third choice: again, *tertium non datur.*

All in all, there is no valid reason to argue against legal relevance. In addition, properly speaking it is not just the law but something else that can at all be rendered muted. For law only means the availability and the duty of that concrete situations shall be related to the pigeon-holing network of normative conceptual references. And law is only identical to itself; it cannot

be identified with the presence and/or the effective use of the means of enforcement it may define. As it is known, law employs a complex qualification system spanning from basic, general principles to concrete rules, applicable in details. This is the reason why preliminary qualifications do not necessarily preempt final decisions. Thus, in spite of the qualification of an action as an infringement of the law, one can reach the conclusion notwithstanding that no practical reaction (compensatory damage or enforcement in civil law, or policeman, the dock or prison in criminal law) is required, for this could only turn to be harmful or socially unacceptable. Naturally, such a conclusion can only be reached and justified by arguments taken from within the prevailing system of law and only after the acknowledgement of the fact that an infringement of the law has been committed. In this respect, too, *tertium non datur.*

4

There is a widespread opinion in Hungary, expressed by many, from politicians to journalists, occasionally upheld by legal experts as well, according to which the matter of the blockade requires not a legal but a political assessment. Provided that it only messages that social problems can only be approached in a complex manner, I am in full agreement. For it is important that also the voice of the law is allowed to be heard; that a legal assessment of the issue is allowed to be formulated. No need to say that the legal approach can only be one of many.

Law is not a panacea indeed. It has never been that. It is unrealistic to expect social change exclusively from law. Such a statement, however, does not limit legal validity at all but only describes the law's working mechanism more realistically. As far as the validity of the law is concerned, the experience of the imposed socialist regime—namely the practical limitation of the law's proper sphere of validity according to varying political considerations of the day—led already to the conclusion that socialist law, on the final analysis, did not function as law. Consequently, the achievement socialist ideology has been so proud of can only be qualified as an atavistic pre-law state of existence.

I believe that our aim, irrespectively of which side of the future barricades we may stand on, is to surpass past conditions and their predicament.

INDIVISIBILITY OF THE LAW AND RULE OF LAW*

In the recent past, if we dreamed of the Rule of Law at all, by natural inclination towards neighbourhood experience we thought of its German version. The *Rechtsstaat*, this characteristic product of the continental European tradition, is based on regulation by law. It is based on the precondition that the operation of the state and the guarantees of legal protection are regulated institutionally. This is in accordance with its history, as in continental Europe the law (*ius*) has ever been defined by the laws (*lex*); and the administration of justice based upon the application of the laws. By way of contrast, the English-American pattern was for long a distant one for the whole Central and Eastern European region. Today its approach seems to be more familiar. According to it, law is rooted in traditions of the past. Casual declaration of what the law is is the task of the courts. The Rule of Law is confined only and primarily to secure that debatable questions can be decided by a court of justice. Both patterns presuppose certain minimum conditions for the Rule of Law. *One*, it is necessary that the operation of the state and the guarantees of legal protection be subjected to proper regulation. Furthermore, *two*, it is also necessary that all matters that may have of legal relevance can be taken for decision before a court of law. Only together can these two conditions guarantee that the Rule of Man be replaced by the Rule of Law.

Historical studies on Western ideals have revealed that in modern times the formation of Europe was fundamentally determined by theories of social contract. That is, we ourselves create our social institutions as a result of mutual agreement, in order to provide orderly circumstances for ourselves. Thus all we are responsible for them. Law is also our own product. We created it to be the medium of social mediation, to play the role of common denominator when dissimilar forces confront one another. This mediating equivalent is nothing other than the formulation of faceless rules for society. The main demand is the provision of a framework. This does not require

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* First published as 'Oszthatatlan jog és jogállamiság' [Indivisible law and the Rule of Law] *Magyar Hírlap* (13 May 1991), p. 7; respectively 'Jog és jogállam' [Law and Rule of Law] LIII *Magyar Nemzet* (3 June 1991), p. 7.

self-supplication to a predetermined goal, but the establishment of a system in which the future is capable of anything. (Remember István Bibó's popular writings in the short-lived coalition period after the Second World War: the main issue was not choosing a particular party programme, but the institutionalization of a political culture enabling party programmes to develop freely.)[1]

What could a politician have understood of the values of the West who places importance on western values, but at the first given occasion sings the praises of a situation that suspends laws? Let's think about the reasons for the difference between life in the West and here. Is it because they have laws? Is it because they have courts? We have both of these and they function properly. Our feeling of being different, however, is distressing, in spite of the fact that, speaking about Eastern Europe proper, not even Czars were assassinated weekly in Russia and politicians did not shoot at one another every year in Belgrade or Sofia. We know and experience, however, that even actions taking only seconds can stiffen into tradition. Simply because they may happen. For order here is not unconditional, and tolerance exists in such scarcity that order may be overturned at any time. Perhaps only exceptionally. This is sufficient, however, for us not to be able to foresee when a state of exceptionality will find us again.

The main differences between the West and its eastern epigones, therefore, are stability, reliability and predictability. Naturally, there are rebellious, criminal and insane people in the West as well. The difference lies not in that the West is protected from these people. The difference is how it reacts to challenges. It reacts with dignity, with the awareness of the supremacy of order. It forgives deviancy but doesn't neglect breaches of the law. They don't indulge themselves with ideological negotiations that can undermine the very foundations of law.

We may accept, then, that our parties have been unable until now to articulate the needs of the people, and that mistakes committed by governing forces are judged severely. We may also accept that the more society is broken down, the more it is atomized. In the heat of the moment, however, I cannot allow myself to react purely instinctually. I might get burned. Thus my standpoints and the arguments they are based on require careful consideration. As situations may arise when my next step can only be the breaching of the law. In this case, too, the conclusions have to be drawn. For example, statutory conditions that are no longer sustainable are to be deleted. Or, alternatively, special regulations concerning a course of action

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[1] For István Bibó, see Zsolt Papp 'Társadalomelemzés és politika' [Social analysis and politics] *Kritika* (1980) 11, pp. 11–15.

when a regulation is not sustainable need to be adopted. For lawfulness is only reached as a condition when exceptions to it can also be legally treated.

The European culture knows two possible answers to those situations in which law conflicts with other values. *One*, law may turn out to be powerless, but as soon as the opportunity arises to speak, legality must be confirmed. (What is important is that the law be symbolically confirmed, and not that retaliation be instigated.) *Two*, it is also feasible that the law will finally extend a helping hand to what otherwise would happen inevitably. In this case, law gets eventually violated because it itself carries out the task that should be otherwise carried out by a constitutional convention, namely, the legislative separation of the normal from the extraordinary. A classic example is Magnaud, "Le bon juge."[2] He worked in southern France at the end of the last century. Justice Magnaud was unwilling to convict starving street children for stealing bread. With this he didn't open the gates of lawlessness notwithstanding. For he only tried to avert the criminalization of those events that would occur inevitably. He acquitted the broken down, those who were compelled to steal because they were starving, who had no other means of alleviating their need. But he convicted those he found too lazy to search for a law-abiding solution to their problems.

Therefore the question of what to do is a burning issue. In finding an answer legislature can do only little. Legislators may enlarge the circle within which a deed is lawful, but a limit will in any case be reached. Once it is actually reached, they cannot go further. It is judicial practice that has to find the answers. By solving borderline cases the judiciary may try to demarcate the boundaries of lawfulness. But they cannot offer a helping hand to unlawful deeds or crimes. They cannot even add interpretation to cases only in order to unjustifiably elevate them into the domain of the lawful.

Is it possible that there is no intermediate area between complete lawfulness and complete unlawfulness? Wouldn't it be practical to find a borderline for those swaying between these two poles? Though these questions are beyond the law, the responsibility of legal experts remains high, because they only can effectively contribute to preventing law-breakers from complete denial and rejection of the law. Those who directly deal with the situation—for example, the police or the court that can review police procedure—can surely provide this mediatory service. But it is necessary that all intermediate conditions that can later serve as patterns, precedents or bases of reference, be made conventional. For example, is the application for permitting a demonstration beginning at that same time acceptable? In what circumstances

[2] Cf., by Paul Magnaud (1848–1926) *Le bon juge.*

will a social act call for the involvement of the police? Can an orderly counter-demonstration be permitted? What is the responsibility of those whose demonstrations violate the Constitution by trespassing the limits law and order set?

No mediatory service is entitled at making the unlawful lawful. Mediation is not even capable of doing so. Its main task can only be to help in starting communication between the conflicting parties. And in making the responsible parties enter into a dialogue, it should attempt to direct their reasoning towards channels characteristic of the realm of the law; to recall the accepted rules of the game; to keep in mind the common interest in preserving all these rules—by recalling the danger that necessarily awaits in their breach.

CIVIL DISOBEDIENCE
Pattern With No Standard?*

Considerable intellectual courage is needed to formulate and present something as completely new. It also requires intellectual honesty to introduce an idea that is already known from the past or elsewhere. Though there are instances crowned with success for both, they may sometimes cover merely irresponsible, impromptu or dishonest ventures.

I was inspired to reflect and also distressed by the chorus-like concurrence amongst parties in opposition, alleged liberals in both academic positions and the news, so much proud of their professional qualities, who during the taxi drivers' blockade in the end of October, 1990, glorified their product as an outstanding instance of civil disobedience and of the *ius resistendi*. Their stories have been repeated many times since then, they have appreciated very high the main elements—only to forget about the basic component. This was the following sequence of events: shock by the news of an unexpected hike of gasoline price; masses flocking to the street in protest; erection of blockades closing the roads of the country; cutting off the traffic with the factories of public importance; limitation of the freedom of movement for millions; and finally, public broadcasting of political statements amounting to a case of incitement to revolt. A great many of representatives of the domestic cultural elite joined the choir, welcoming and justifying this sequence of events, greeting it as the first successful experimentation of transplanting western civic virtues in a Hungarian context.

They were cocksure in considering their variant of truth being beyond dispute. They were preaching the praise of this case of successful genuine "westernization" with a missionary fury. They declared that the day of the liberty had thereby finally come and that it was already high time for all us

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* First published as 'Polgári engedetlenség: jogfilozófiai megfontolások s amerikai tanulságok a jog peremvidékéről' [Civil disobedience: philosophy of law considerations and American experience from a limiting domain of law] in *A polgári engedetlenség helye az alkotmányos demokráciákban* A Bibó István Szakkollégium 1991. március 9–10-i konferenciájának előadásai és vitája, ed. Tamás Csapody & Júlia Lenkey (Budapest: T-Twin Kiadói és Tipográfiai Kft. 1991), pp. 158–163 [Twins Konferencia-füzetek 2].

to learn how we should live together with the manifestation of civic virtues, and also that all what had happened was not in detriment but in reinforcement of democratic culture and procedures. Academics and essayists of the newborn Hungarian liberalism, those with first-hand experience relating to the everyday and scholarly life of the Atlantic nations, who had claimed for long to import the culture of "the West," taught a nation by praising this very specific move. To be sure, they have had no reference at all to the thorough and sometimes bitter debates that have for long been revolved around the issue throughout the Atlantic world. They have been disinterested in the contradictions, as well as the dangers and limited (i.e., exceptional and partial) acceptability of those manifestations of civic resistance which are sharply opposed to, albeit fought through within, democratic establishment. They have failed mentioning the fact that as a result of such debates, American and European scholars have reached a basic agreement upon the terms by which civil disobedience can be justified, its limits can be drawn, and the consequences partners in disobedience may face can be foreseen.

After the blockade, intellectuals from the news to the academic world in Hungary presented their conjectures as if it were the case of an objective description of one established form of popular behaviour, known from all western-typed civilizations of the world. Albeit they were representing nothing but own dreams, coming out of wishful thinking, their arrogance was hardly counter-balanced by the cool detachment of a true interpreter they apparently took. Actually, what they were interpreting was in fact a series of fragments in theory which, with the exception of the type of anarchists in 1968 and doctrinaires of extreme left-wing terrorism, nobody was ready to accept in the western world. It seems to be of a paradigmatic feature that these partisan writings, their detached-off scholarly pose notwithstanding, did not even mention the legal approach (as if it were again suspicious of standing for hidden motives or second thought, in spite of the collapse of Stalinism). They were not reckoning with the fact that it was the legal profession that in the United States and Europe, following the cataclysms of the recent decades, eventually answered the sophisticated legal philosophical, political philosophical, constitutional and moral issues which civil disobedience may raise, in a rare theoretical agreement.

In the midst of the events, I felt that the characteristic reaction of a huge part of the intellectual elite in Hungary was a self-repetition of *la trahison des intellectuels* as described by Julien Benda.[1] As a matter of fact, never before I have come across theories resembling those partisan views since the

[1] Julien Benda *La trahison des clercs* (1927).

time I surveyed the topic two decades ago.[2] For it can also be taken as a characteristic feature that I began working on this problem whilst the heydays period of the socialist era when it was still expected to endure for a long time, and this was the very reason that I was interested in the boundaries and actual borderlines of law in order to extend and also delimit legal imagination.

It is common knowledge in philosophy that concepts are conventional. Therefore, what has to be justified first is not why one follows established prevailing traditions but why one attempts at rejecting or changing them.

We are free in judging the way in which civil disobedience was understood in the United States of America and received in political and legal philosophy and practices of Europe. There is only one thing we must not do—providing that we intend preserving professional integrity. Namely, we should not replace an established and conventionalized concept with the outcome of merely wishful thinking without the simultaneous taking of the notice of what we are in fact doing. Accordingly, we are expected not to present own conjectures as objective description of a state of affairs which is known to have been established or institutionalized elsewhere.

In the following, I shall summarize some key elements of a theoretical approach to civil disobedience as it was developed in the American literature, pioneering in the scholarly treatment of the topic. Those aspects of civil disobedience are primarily targeted which can be conceptualized in law, that is, mainly the juristic efforts to distinguishing it from ordinary violations of the law. In consequence, the analysis will concentrate on a juristic and legal philosophical description of the notion of civil disobedience, or, rather, of some of its *sine qua non* minimum conditions, and will not be concerned with the moral, constitutional, or political philosophical issues associated with it.

Civil disobedience is a concept born outside the law; however, it can gain meaning only as opposed to the law. This is the basic source of its inherent Janus-facedness. The origins and inspirations of civil disobedience are partly

[2] *Jogi Tudósító* [Herald of Legal News] I (1970) 13–14, pp. 27–32, reprinted in Csaba Varga *Jogi elméletek, jogi kultúrák* Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [Theories and cultures of law: surveys and reviews in legal philosophy and comparative law] (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures 1994), pp. 438–443 [Philosophiae Iuris].

pre-law and partly outside the law. Nevertheless, we can only define its meaning by making clear what it denies, why and how, and what is that distinguishes the denial in question from other violations of the law.

Civil disobedience is a concept that refers to law, but is outside the structure of the law. It is unjustifiable to draw its inherent unlawfulness into the very structure of the law.[3] By doing the same under a moral pretext is no more than empty sophistic exercise.[4]

Judgement of cases relating civil disobedience, therefore, does not raise any specific problem from a legal point of view. Once we have decided that we resort to civil disobedience, we can freely discuss from any non-legal point of view who, when and how to take a course of action, but this

raises no substantial or even interesting questions for the lawyer *qua* lawyer.[5]

Furthermore, we may venture even to formulate a paradox here: the pure legal point of view cannot even play a part in the legal judgement of civil disobedience. For it can be rightly said that

[m]oral decisions concerning civil disobedience certainly ought to take relevant legal considerations into account, but it is a mistake to look for a legal defence of an illegal act. Since such acts fall outside of law in every sense, civil disobedience cannot be treated as a legal category or classification.[6]

Therefore, in cases of criminal violation no reference to civil disobedience can ever justify a special assessment or treatment upon the basis of legal criteria.

This is the reason why legal experts, too, who may otherwise be socially sensitive, do protest against the smuggling of purely moral or political considerations into the forms of legal reasoning proper. For the intermingling of dissimilar concepts may result in the undifferentiated treatment of that what requires social differentiation. And this is why it must be stressed repeatedly and unambiguously that

[v]iolations of our criminal laws are criminal violations, not civil disobedience.[7]

Providing that for one or another reason we take notice of a case of civil disobedience in a legal context at all, we have to make it clear from the very

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[3] E.g., Freeman writes in Harrop Freeman et al. *Civil Disobedience* (Santa Barbara: Center for The Study of Democratic Institutions 1966), pp. 2 and 18–19 [Occupational Paper No. 15], that "the theory is not anti-law but within the law."

[4] "But as long as the law is dealing with men as rational beings, it cannot command simply do this or do not do this; it must say do this or do not do this—or else," as Rucker argues. By tracing imperatives back according to the formula "—or else," he concludes that "[a]nd the 'or else' provides an essential alternative *within* the structure of law." Damell Rucker 'The Moral Grounds of Civil Disobedience' *Ethics* 76 (January 1966) 2, pp. 142–145 at 143.

[5] Francis A. Allen 'Civil Disobedience and the Legal Order' *University of Cincinnati Law Review* 36 (1967), p. 2.

[6] Robert T. Hall *The Morality of Civil Disobedience* (New York, etc.: Harper & Row 1971), p. 18 [Harper Torchbook].

[7] Whittaker in Charles E. Whittaker & William Sloane Coffin, Jr. *Law, Order and Civil Disobedience* (Washington, D.C.: American Enterprise Institute for Public Policy Research 1967), pp. 3, 52 and 2.

beginning that civil disobedience can only be directed—temporarily—against a rather partial and limited measure (or provision) of the law, and has at the same time to distantiate itself from both the negation of the prevailing law and order as such (which is already anarchy) and the questioning of legitimacy (which, on its turn, is revolution).[8]

When violations of the law are judged, an act can be recognized to be a case of civil disobedience—if there is a number of sound reasons supporting it—only within the discretionary sphere of the application of law by the given legal forum. On its turn, this is available only provided that its basically illegal character crying for sanctioning has been acknowledged. The legal assessment can in no case lead to even a symbolic authorization of an act of civil disobedience.[9] Therefore, not even the eventual discretionary postponement or, moreover, cancellation of retaliation can alter the principle according to which

> [t]here is no immunity conferred by our Constitution and laws of the United States to those individuals who insist upon practising civil disobedience under the guise of demonstrating or protesting for 'civil rights.' The philosophy that a person may—if his cause is labelled 'civil rights' or 'states rights'—determine for himself that laws and court decisions are morally right or wrong and either obey or refuse to obey them according to his own determination, is a philosophy that is foreign to our 'rule-of-law' theory of government.[10]

To repeat it once again, it is a conceptual precondition of an act of civil disobedience that its unlawful nature will be unconditionally acknowledged. In consequence, partners in civil disobedience have to be prepared to submitting themselves to punishment.[11] In other words, as civil disobedience can only originate from an individual's moral and political conviction and, as a result, it can only be intentional and fully conscious, it does by far not challenge the legal situation according to which

> [i]t is the state's duty to arrest and punish those who violate the laws designed to protect the private safety and public order.[12]

It is worth emphasizing here that the threat of punishment and/or its practical implementation—notably that it does not remain a rhetorical substitute or a

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[8] "His objection, and consequently his moral rationale, is directed toward only a part of the positive law of the state. Objection to law as such (anarchy), or an opinion that the state itself is immoral and ought to be overthrown (revolution), would therefore be unacceptable as a moral reason for an act of civil disobedience." Hall, p. 20.

[9] Cf. Ronald M. Dworkin 'On Not Prosecuting Civil Disobedience' *The New York Review of Books* X (6 June 1968).

[10] Frank M. Johnson in *Forman v. City Montgomery* 245 F. Supp. 17, 24-5 (M.D. Ala. 1965) [Middle District of Alabama], quoted also in Frank M. Johnson 'Civil Disobedience and the Law', pp. 2-3.

[11] "A willing submission to arrest," as Hall at p. 146 states it.

[12] Abe Fortas *Concerning Civil Disobedience and Dissent* (New York: The New American Library, Inc. 1968), p. 63.

symbolic act but will in fact be meted out—does not originate from the judges' so-called "tunnel-vision," or their obstinate insistence on retaliation. The inner logic of the act itself demands this, in order that the merits of the moral-political dilemma inherent in the internal logic of civil disobedience be demonstrated. Thus it cannot, and should not, be eliminated. This is what makes the act dramatic, enhancing its effect and substantiating the moral commitment of resorting to it. The moral commitment gives the reason why—at least at the level of a general political judgement—the partner in civil disobedience may expect balanced, moderate, and to some extent liberal, treatment.[13]

Everything considered, the American jurisprudence offers the following definition for civil disobedience:

an open intentional violation of a law concededly valid, under a banner of morality or justice by one willing to accept punishment for the violation.[14]

It seems to be a matter of course that the more we proceed in the analysis, the more essential, limiting factors and considerations we find. As

it is not characteristic of the moral point of view to determine what is right or virtuous wholly in terms of what the individual desires or of what is to his interest,[15]

and since exclusively

[t]he intent of the criminal is to gain benefit for himself at the expense of the interest of other people,

in recognizing acts and assessing cases of civil disobedience, the emphasis will inevitably be placed on the unselfish character of the act and on its refraining from violating or harming others' interest.[16]

Finally, though we can not exhaust thereby all analytic possibilities, the necessary balance between the acts of civil disobedience, on the one hand, and the aims sought and the direct damages inflicted, on the other, have to

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[13] "Yet whatever concessions may be made to civil disobedience, on the most vital of issues it cannot be protected from the threat of punishment. In fact, precisely because civil disobedience may be a vital part of constitutional order in our times, there are limits to how much it may be shielded from penalty. Punishment is often essential to the disobedient himself: it provides a dramatization of his concerns, an instance of his sincerity, and a challenge to complacency which may be essential if he is to command the attention of those 'good citizens' who may be moved by the 'spectacle of courage [...] taking its own path.' " Wilson Carey McWilliams 'Civil Disobedience and Contemporary Constitutionalism: The American Case' *Comparative Politics* I (1969) 2, p. 226.

[14] Frank M. Johnson 'Civil Disobedience and the Law' *Tulane Law Review* XLIV (December 1969) 1, pp. 1–13 at 2.

[15] William K. Frankena *Ethics* (Englewood Cliffs, New Jersey 1963), p. 6.

[16] Hall, p. 24. "[A]n obvious limitation of the act to non-violent practices." Hall, pp. 146–147. Cf. also William Kunstler 'Dissent and the Jury' in Daniel Berrigan et al. *Delivered Into Resistance* (New Haven, Conn.: The Advocate Press 1969), p. 57.

be mentioned. Judicial practice sanctions that the means of achieving what the act of civil disobedience aims at be just.[17]

Summarizing the whole diversity of the components of civil disobedience and also to some extent paraphrazing the criteria enlisted by the literature,[18] we may set the *sine qua non* conceptual elements of civil disobedience as follows: The act must be *1)* clearly unlawful, *2)* as a deliberate step, *3)* in the realization of a given plan, *4)* proceeding from 'conscientious' dissent, *5)* inspired by moral or religious beliefs, *6)* with motives unselfish, *7)* with public reform as the objective sought, *8)* performed openly, *9)* after that legal remedies are exhausted, *10)* using 'non-violent' means, *11)* with concern for the right of others, *12)* by maintaining a proximate relationship between the goal and the means, *13)* while submitting to the legal consequences of the act.

In the light of the events of the taxi drivers' blockade, we can only be sure of one thing: it was not a case of civil disobedience—assuming that we do not have a special reason to deviate from the term's established and conventionalized meaning. This statement in the negative, however, does not render it unnecessary—but, just to the contrary, it expressedly presupposes—that further research on the characteristic features and the genuine meaning of civil disobedience is carried on.

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[17] "To qualify as an act of civil disobedience, an action would have to be appropriate to the agent's stated purpose, and the purpose should have to be of a socially responsible nature." Hall, p. 146. "Here as elsewhere civil disobedience requires a measure of political prudence." McWilliams, p. 226. "[I]t seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested or petitioned against. [...] In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly." Justice Johnson in *Williams v. Walace* 240 F. Supp. 100, 106 (M.D. Ala. 1965). "There must be [...] a 'constitutional boundary line' drawn between the competing interests of society." Johnson 'Civil Disobedience and the Law', p. 4.

[18] "*1)* The act must be performed openly—secrecy is prohibited. *2)* It must be a deliberate, not an accidental step. *3)* The action is clearly unlawful, i.e. not permissible under existing laws and court interpretations of civil rights and liberties. *4)* The illegal act is voluntary, not induced by others. *5)* The conduct proceeds from 'conscientious' dissent, inspired by moral or religious beliefs. *6)* The objective sought is a concrete, public reform. *7)* Legal remedies must be exhausted before disobedience is undertaken. *8)* The disobedient is obligated to use 'non-violent' means. *9)* Throughout his challenge he demonstrates concern for the right of others. *10)* A proximate relation exists between the rule under attack and the reason for dissent. *11)* The disobedient must submit to the legal consequences of his act." Paul F. Power 'On Civil Disobedience in Recent American Democratic Thought' *The American Political Science Review* LXIV (1970) 1, pp. 35–47.

In its present-day culture, civil disobedience is aimed at improving the constitutional system through the individual's exceptionally dramatic acceptance of responsibility.[19] By doing this, the disobedient undertakes a creative contribution to the development of the constitutional system by the simultaneous re-assertion of the system's underlying basic values. Therefore we may anticipate that cases of civil disobedience will occur in one form or another in the future. For

> [i]f society is going to exist in dependence upon man's moral nature, on his ability to choose the right course from the wrong—on his conscience—then society is also going to have to recognize man's right and duty to follow his conscience even if it leads to civil disobedience.[20]

[19] Christian Bay 'Civil Disobedience: Prerequisite for Democracy in Mass Society' in *Political Theory and Social Change* ed. David Spitz (New York: Atherton Press 1967).

[20] Harrop Freeman 'The Case for the Disobedient' *Hastings Law Journal* 17 (1966), p. 437.

COMING TO TERMS WITH THE PAST

ON SETTING STANDARDS*

Let me start this essay on a rather sceptical note. In my opinion, it is always a potentially catastrophic practice to administer justice in the aftermath of political changes. At the same time, it would be likewise disastrous to eliminate the possibility of jurisdiction in such periods of history. We are clearly on the horns of a dilemma here. Our choice is that between the Devil and the deep sea.

We must put it on record right here that, irrespective of the prevailing circumstances, conformity to law is a fundamental asset of every viable society, which must not be sacrificed on the altar of any real or presumed cause. Of course, we are always free to cogitate upon the actual meaning of lawfulness—if only to proclaim our deep-seated convictions, but never to give reason to fetishism. We must also be aware that the elements or ingredients that constitute our complex social existence each have their own particular sphere, whose integrity we are all obliged to respect. Law is one such ingredient, and lawfulness is a mandatorily enforced organizing force within its sphere. Law and lawfulness represent a peculiar approach and set of standards that can hardly ever be ignored. In other words, in cases when law has relevance to our life, we must remain within the bounds of its authority.

In general, we can say that the implementation of what is commonly (and, as we will see, rather inaccurately and reprovingly) identified as "ex post facto political justice"[1] is indispensable for the launching of a new social or political system. Since we cannot draw a clear dividing line between past and present, there is no other choice left for us but to postulate continuity. In this process the moral standards must become clearly manifest, if only as a result of the logical sequence of events.

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* Lecture and contribution, on 12 January 1990, to the first symposium organized in Hungary on this subject, published originally in *Visszamenőleges igazságszolgáltatás új rezsimekben* [Ex post facto justice in new regimes] ed. György Bence, Ágnes Chambre & János Kelemen (Budapest: ELTE BTK Társadalomfilozófia és Etika Tanszék 1990), pp. 20-24 & 48–49 [FIL 2 Gyorsszimpózium].

[1] György Bence's term, from the invitation to the symposium.

Let me recall a personal experience here. About fifteen years ago, I was busy elucidating Georg Lukács' social ontology from the point of view of legal philosophy.[2] Pretending that I was working on some kind of official assignment, I chanced to travel to Transylvania now in Rumania in the hope of learning more about Lukács' early activity there as a law student in Kolozsvár[3]. One specific goal of mine was to track down Lukács' doctoral dissertation, which he wrote for Felix Somló there. During my stay, I met with several interesting people, including the historian Samu Benkő. Meanwhile, in Budapest, the renown poet Gyula Illyés published a rather scathing article regarding Herder's prophecies in the Christmas issue of the daily *Magyar Nemzet*.[4] True to their age-old habits, the then rulers of Rumania spared no time to take revenge on the Hungarian minorities there. Aware of these developments, I was shocked to have heard Benkő's words in a café in the town's main square. "Listen, we have to heed the message of the Old Testament. We must be familiar with the deeds and motives of the prophets. They duly went about their business, as Scripture says. Time and again they raised their voice, as it was their calling to set standards. Accordingly, they established certain moral limits, and they never cared for the consequences of their actions. After all, this was their calling."

In time, we must publicly proclaim and lay down the basic common values of society. Furthermore, we have to follow the example of our predecessors by reciting and re-establishing our laws.[5] Of course, it makes a difference how we execute this task. For example, the establishment of basic values must never result in lynching. Summing up, we can say that justice, in one or another form, has indeed something to it, which is worth considering, and which would be a shame to either ignore or just put off.

It is a *sine qua non* of this process to grant, at least in principle, a minimal redress to the victims, and also to make certain that the related measures have a preventive effect on the public in general, and the offenders in particular. It is likewise necessary to learn the details of the past, and to denounce the negative developments in history, at least symbolically. Among other things, this is important so that we can rule out communism, whose ingrained practices still appear to linger, as an acceptable political alternative. We must prevent communism from sneaking back in through the back door in the guise of a democratically legitimate political alternative.

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[2] Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985) 193 p.

[3] Or Klausenburg, now Cluj-Napoca.

[4] Gyula Illyés 'Válasz Herdernek és Adynak' [Response to {Johann Gottfried} Herder and {Endre} Ady] in his *Szellem és erőszak* [Spirit and violence], cf. Gyula Illyés *Naplójegyzetek* 1977–1978 [Diaries 1977–1978] ed. Ms. Gyula Illyés & Mária Illyés (Budapest: Szépirodalmi Könyvkiadó 1992), pp. 194 et seq.

[5] According to the archaic institution of the living voice of the law, well-known from Iceland to Israel, the *lag saga* was the professional to recite the law in the absence of any written code. Cf. Csaba Varga *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991), p. 28 and p. 40, note 2.

Preventive effect? The accounts are still to be settled, and this process has not even started yet (during the last days of the previous regime, it was this process which Imre Pozsgay, on behalf of the late communists, so spectacularly contrasted with the spectre of a showdown). Isn't this a shameful development in itself? Breaking the decades of cowardly silence that had accompanied the state's criminal deeds, a lone journalist writing in a virtually unknown weekly publication[6] (and forced to brave the salvo of subsequent private and public slander) undertook the impossible mission of identifying the files of at least some of the new-old public figures in the archives of the previous regime's secret services. This was the first, and practically the only, attempt to date to address this problem. I would call this an absurd situation. We have the still silenced victims in one corner, and the one-time torturers in the other, and the latter are granted the right to successfully prevent their own identification. Elsewhere in the world, this scenario would be considered unacceptable. In Latin America, for example, "black" and "white" books and lists of names were published immediately after the fall of the generals.

The dawn of freedom tends to give rise to practices that are commonly identified as the spontaneous delivery of historical justice. This is but a response coming from historically coherent small communities. In our specific case, this process—as we have learned from the works of certain sociologists—manifested itself in the rejection by the peoples of the Hungarian villages of those social outcasts and pariahs who had been recruited by the communists in the early '50s, and again after 1956. This rejection qualifies as a textbook example for cultural anthropologists, since it was translated into practice through subtle signals and gestures that were hardly perceptible to outsiders, and were hardly attributable to any individual either. And yet, these signals and gestures unmistakably identified those with whom responsibility was believed to lie. All this without hurting a hair on anyone's head. People would just silently pass by these outcasts, thereby ostracizing the most inhuman of themselves from society. Those rejected could always read the others' thoughts, and received no mercy when they struggled with their shame. It is a basic truth of legal anthropology that in societies where the individuals' prime mover is their belonging to the community, there is nothing more important for people than to preserve this sense of identity. This is why stigmatization and ostracism are known to be far more hurtful than corporal punishment. For an outcast, life is bound to lose meaning and perspective.[7]

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[6] E.g Ferenc Kubinyi in the periodical *Kapu*. Cf. also his series for a *Fekete lexikon* [Black lexicon] in newspapers and also as collected (1994).

[7] Cf. Leopold Pospíšil *Anthropology of Law* A Comparative Theory (New Haven: HRAF 1974), pp. 87–95.

Contrary to the practice accepted elsewhere, no lists or memoranda have been compiled in Hungary about the legal violations that occurred during the past half century. We do not have reliable (i.e., judicially or scientifically established) information at our disposal on any of those criminal activities that happened in that period. Apart from a few isolated attempts to address this problem, we still do not have comprehensive documentation on the destructive moves the state targeted at the communities for nearly fifty years.

In connection to my reference of the spectre of returning communism that I believe is still looming large today, let me also recall the as yet unsettled theoretical dilemma which I discussed at length in my address to the participants in the plenary session of the World Congress on the Philosophy of Law, held in Edinburgh in 1989.[8] How are we supposed to approach those laws whose very legal qualities we refuse to recognize? Was it law after all that had been presented to us as such? Or what was it that they enforced so mercilessly? For long decades, we had to suffer a regime which trampled the essence of the institutions underfoot, and which at the same time caroused in its means as if its existence and deeds were all legitimate. That regime confined itself to applying labels all across the board: it identified a building as "Parliament," and another one as "court;" it stuck the label "official gazette" on a newspaper, and identified individuals (often semi-illiterates) as "attorneys" or "judges." That regime pretended to maintain law and order. And now, looking back on the ruins left behind by the previous system, we cannot but wonder how it could push down our throat something that cannot qualify as state administration, politics or law. After all, compared to the modern-day social patterns, the political practices of the communists were but degenerated attempts to pre-condemn social co-operation in order to satisfy certain individuals' lust for power.

What, after all, are we talking about? Can we identify the real issue here, or do we instead tend to apply labels driven by our unsaid fears?

"Ex post facto political justice." What specifically does retroactivity mean in this context? At a basic level, every criminal case is "ex post facto" by default. Someone commits something; the act at issue is subsequently qualified with reference to the laws in force; and eventually certain procedures are launched. In other words, every standardized normative judgement is by definition based on previously established norms. Consequently, the term

[8] Csaba Varga 'Liberty, Equality, and the Conceptual Minimum of Legal Mediation;' also in the present volume.

"ex post facto" carries no specific additional meaning here. Should we identify any kind of 'extraordinariness' in this concept, we would be bound to sanction vengeance, which we are determined to avoid.

And what does the adjective "political" stand for in the above definition? Let us not forget that the legal situation has remained unchanged. This means that if an issue is unambiguously settled from a legal point of view, the legal aspects of that issue can under no circumstances be approached politically. From this it follows that any attempt to punish acts that were not considered punishable by the laws that were in force at the time of the given acts would lead us into the very same trap in which the ill-famed people's tribunals found themselves in Hungary after World War II. These tribunals became dominated by a thirst for revenge at a fairly early stage, and this can hardly ever be considered a noble motive. This is why we believe that to use these tribunals as a model would be self-defeating and ultimately suicidal. No matter how valid the historical study may be on the procedures of delivering political justice,[9] we must never forget that the relationship between jurisdiction and political jurisdiction is similar to that between democracy and what has become known as "socialist" democracy. In the latter term, the adjective negates, or at least restricts, the qualified word. This is why we, in our capacity as legal experts, must steer clear of deliberating on any aspect of political jurisdiction. This falls beyond the realm of the law, and we should leave it for the masters of extra-legal practices to explore. In this field, the laws are not applicable any more. Characteristic of this approach was the gruesome rite, wrapped in a kind of legalese rhetoric, which was employed in the killing of Romania's Nicolae and Elena Ceausescu. At the same time, we must also establish that in any legal procedure the legally accepted means and concepts can be utilized only with regard to the specific legal peculiarities of these means and concepts.

At this point, we have to return to our previous question, namely, whether it is possible to consider as law what otherwise would qualify at best as the negation of law. The gist of statutory limitation is the following: if normally functioning state machinery fails to initiate proceedings against people who commit acts which qualify as criminal acts under the penal law in force, this system is bound to expire after a certain period of time. The underlying philosophical consideration behind statutory limitation is that it is not possible to keep people at bay with the threat of proceedings for a discretional length of time. In the absence of such proceedings, legal order is bound to be

[9] Otto Kirchheimer *Political Justice* The Use of Legal Procedure for Political Ends (Princeton, New Jersey: Princeton University Press 1961).

automatically restored after a certain period. And yet, statutory limitation does not rest exclusively on the progress of time. After all, statutory limitation was not meant to be conditional upon the progress of time only. It was conceived to function in a normal social context, where all those individuals who suffer from a given criminal act are entitled by law to seek legal remedy. The problem is that under socialism legal proceedings were recurrently ruled out or prevented in certain specific cases (and this is where the political link manifested itself in the activities of the party, the state, and the legal authorities during the previous regime). Those who ventured to report someone to the police faced subsequent harassment and often earned the label of "provoker." Meanwhile, the state's criminal authorities went out of their way to prevent the termination of statutory limitation.

Let me cite here a paradigm of this situation from Belgium. During World War I, when Belgium was occupied by the Germans, the king and the government were both forced to move to the Hague in neighbouring Holland. They continued to exercise their authority there. However, under the Belgian Constitution, the legislature serves as the foundation for the government's operation, and the legislative powers are shared by the king, the house of representatives, and the Senate. Since the latter two bodies could not move into exile, they were legally not existent any more. After the war, several attempts were made to interpret the king's decision to leave the country, and to decide whether his decrees could be considered valid and legally acceptable. No matter how patriotic and dramatically heroic the king's fight may have appeared to the public, his constitutional status remained questionable since the law did not recognize the institution of exceptional power, and the Constitution by default precluded the possibility of its own abeyance. The solution to this problem came from the *Cour de cassation*, which upheld the validity of the laws in force, but established that "the law can contain provisions for normal, predictable situations only." According to this verdict, if "life takes such turns which are not explicitly foreseen by the law, the conclusion cannot be that there is an absence of relevant stipulations, as this would lead to anarchy and the negation of a legally organized society." Instead, in these cases either the legislators or the judicial authorities are obliged to fill in the gaps in the law. Since in our Belgian example the situation was not predictable by the legislator (or, to cite a term used by Carl Schmitt from 1934 on,[10] "normality" did not prevail), the case at issue must be considered peculiar and exceptional, and our legal approach to it must be discretionary. Consequently, as the *Cour de cassation*

[10] Cf. Varga *The Place of Law...*, pp. 62–64.

promulgated, the gap in the law could not be covered even by explicit constitutional regulations, and therefore the king's conduct was in conformity with the Constitution.[11]

Coming back to our original problem, I would propose a similar solution to that dilemma. If the previous regime automatically averted criminal impeachment, we must agree that statutory limitation could not even start on these cases. After all, social normality (i.e., the unhindered operation of the mechanisms of criminal investigation and impeachment) is obviously a *sine qua non* of statutory limitation.

It is certainly possible to frame a criminal proceeding which refuses to recognize the start of statutory limitation on cases of crime which enjoy the illegal support of the state, which enforces the substantive rules of law that were in force at the time of the commission of the offence, and which, for example, exercises the prerogative of pardoning due to humanitarian considerations. Based on the provisions of the substantive, and perhaps also the procedural laws, the criminal court could declare remission to relate not to the committed acts but only to the execution of the non-recidivist's punishment, on account of the elapsed time.

It appears likewise possible to frame a social-cum-legal procedure of investigation that could directly fill the prophetic function as described in the Old Testament. After all, we should not forget that there are several journalists, survivors and witnesses who could put pen to paper to record their experiences. Meanwhile, irrespective of the actual revelatory power of these accounts, we can also count on the presence of certain nostalgic groups or forums who would stick to their guns by lauding the culprits as being heroes after all. In the absence of clear-cut and unchallengeable verdicts on the legal status of the committed acts, even the latter kind of opinion and approach stands a chance of being recognized as acceptable. In other words, while we have to agree that exposure can offer no solution in itself, we must continue our quest for a socially acceptable framework within which the issues of the past could be settled at long last. After all, what we are looking for is not punishment proper. We could even rule out punishment as a possible conclusion of the court proceedings, thereby settling for the drama of public identification as being the ultimate climax. But the fact remains that the procedure of identification must assume some kind of a publicly recognized form.

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[11] A. Vanwelkenhuyzen 'De quelques lacunes du droit constitutionnel belge' in *Le problème des lacunes en droit* ed. Ch. Perelman (Brussels: Bruylant 1968), pp. 347–350 [Travaux du Centre de Recherches de Logique] and Chaïm Perelman *Logique juridique* Nouvelle rhétorique (Paris: Dalloz 1976), par. 41, pp. 76–78.

Just as in all other developed societies of the world, we in Hungary can also take for granted the existence of a traditional expectation for legal security, and we too must take special care of our fundamental legal values (without fetishizing on any of their aspects in themselves). Meanwhile, we must also be aware that no legal text has the potential to guarantee positive foresight, definitions or security in itself. It is considered a fundamental principle of cognitive sciences today[12] that meaning is by definition conditional on the practical application of certain contractual communicative conventions to typical everyday situations. Consequently, the principles and rules may always entail exceptions, as the diverse inherences do (or may) generate diverse conventionalised situations. Each situation entails its own value assumptions. Accordingly, our concepts represent an exceptionally rich and complex collection of tools with which we have the power to get to wherever we want. But this apparent freedom also has certain limitations. For all its contextual openness, the law entails clear short-term and long-term standards. The law entails restrictions, because it is rooted in permanent feedbacks; because it perpetually provokes us to justify ourselves with definitive arguments; because it adopts innovations only through the filters of the established traditions of the legal profession; and also because the social context in which the juristic processes occur is characterized by the common acceptance of certain values.

Summing up, I am inclined to describe this problem as one that has not only legal and jurisprudential aspects inherent in it, but moral philosophical, political philosophical and other considerations as well. If it is important for a community to make some progress in this field, and if these efforts are supported not only by the public at large but also by the various related branches of science (political science, moral philosophy, etc.), then we can expect the interpreters of law to eventually discover an acceptable technical solution. In this effort, we need to rely on sound theoretical foundations, and we must also be able to identify appropriate legal techniques. This, clearly, may evolve into a tough dual challenge. But first and foremost we must understand clearly our own motives, and must also define our goals. In my capacity as a legal expert, I am bound to believe that if our goals do not qualify as overly ambitious, and if we prove able to justify these goals with appropriately responsible and sober arguments, we will most likely find enough of a hold in our existing legal system to start working toward an acceptable interpretation.

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[12] Cf., for both their survey and development into a legal theory, Csaba Varga *A Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995).

DO WE HAVE THE RIGHT TO JUDGE THE PAST?*

In Hungary today, the beginning resulting from the new political conditions, the urgent need for reconsidering the national past and present to finally meet the challenge of an overall intellectual and moral reconstruction, and also the judgement relating to the past equally force thinkers to face yesterday by drawing the borders which may divide it from today.

In this regard, two questions urge prompt answers: *1.* Was the regime just left behind one governed by law? *2.* What is our relation to the past like? Are we heirs or only happy survivors, who can at best build on top of the ruins?

Once answers are given, further dilemmas will immediately crop up: *3.* Which kinds of requirements have the Rule of Law and the Constitutional Democracy imposed on the builders of the new state? *4.* How can we draw a distinction between ordinary and extraordinary conditions? Is there or is there not a connection between the universal validity and obligatory nature of the law, on the one hand, and the tacit assumptions and social preconditions of the constitutional state, on the other? *5.* What is the use of statutory limitations and how do they operate? Is there any complementary effect on the limitation's action if the state has persistently been unwilling to execute its own laws? If the state itself has obstructed its implementation by punishing those who have lived by those laws? And, finally, *6.* what is the relationship between the legal and the extra-legal instruments at the disposal of the state, the society and the individual? Can they be used in parallel as well?

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* A shortened version of the paper presented in March 1991 to the Committee for the Investigation of Unlawful Benefits, commissioned by the Prime Minister of the Republic of Hungary in issuance of the Government Decision No. 1025 of the 30th of August, 1990, for clarifying philosophy of law foundations. Cf. 'Szabad-e ítélnünk a jogról? Jogfilozófiai megfontolások' *Reggeli Pesti Hírlap* II (4 November 1991) 258, p. 8; *Jogtudományi Közlöny* 47 (1992) 1, pp. 10–14; *Társadalmi Szemle* XLVII (1992) 1, pp. 85–90, as well as in *Visszamenőleges igazságszolgáltatás* ed. Vanda Lamm & András Bragyova (Budapest: MTA Állam- és Jogtudományi Intézete 1992), pp. 5–68 [MTA ÁJI Közlemények 1]. The first English version was presented and discussed as a seminar material at the Sociology and Philosophy of Law Institute of the Westfalian Wilhelm University in Münster on the 3rd of March, 1992, and subsequently published in *Rechtstheorie* 23 (1992), pp. 396–404.

1

In dramatic situations, when a completely new start becomes a political necessity, the question of the continuity of law and legal conditions is often raised.

For judging the law upon the basis of values just challenging it, we may be inclined to simply declare that laws serving despotism, inhumanity and moral destruction are at best mere abuses of the very idea of law. This is a position characteristic of natural law. From a legal philosophical point of view, we can also declare that laws of abusive power-mongering are not laws at all, but at best faint precursors to any law. This statement can be concluded from the ontological assessment of the genuine roles of law. However, none of these two approaches can afford any valuable answer, for their criteria fall outside the law.

From a legal point of view, we can state at most and best that law is an aggregate of rules with a certain regulative power which do *(a)* embrace the whole society by *(b)* providing order to its underlying fundamental living conditions and which are *(c)* supreme by taking effect as the final authority in the community. In consequence, both Nazi and Bolshevik legal arrangements are to be regarded as varieties to the law. They can be deprived from their legal character exclusively in an extra-legal sense. Nevertheless, such a negative statement has no practical purport whatsoever. Exceptionally, it was resorted to notwithstanding in view of either annuling the legal innovations made by short-lived regimes (e.g. the Hungarian Soviet Republic during its 133 days of action in 1919) or by legal cultures developing under retrograde conditions (e.g. the Bolshevik revolution in 1917 or Tito's takeover in Yugoslavia in 1944).

In sum, regardless of how much alien the so-called socialist law was to western legal values, from the point of view of the criteria of modern formal law, it was, however, law.

2

Legal continuity is one of the issues to be answered by the state in one way or another. In principle, it can choose between recognition and repudiation at will, but none of the options can be selected free of charge, that is, without bearing the consequences. Therefore the alternatives need to be weighed in light of their side-effects.

A question similar to it was already formulated by those nations which had lost World War I, when the victorious powers presented the bill of waging the war to the common folk, themselves forced to war, instead of their elite, by demanding them to grant the winners territorial concessions, reparations, etc. Why should they pay those debts which their own former oppressor managed for its own sake?

Irrespectively of the merits of the answer, it has to be consequential. One cannot deny legal continuity by repudiating responsibility for some selected burdens, whilst one actually does acknowledge continuity by taking the advantage for privileges. Or, the choice cannot be situationally selective. Eventually, one of the alternatives has to be selected, and the selection made has to be justified by the law.

That is to say, in terms of cost and benefit, it may happen to be too expensive to be freed from specific burdens. Notwithstanding, the law's call for internal coherency allows only principled choices and exceptions to be made. In consequence, it authorizes neither legally nonconformist choices nor ones which do not logically proceed therefrom. Legal validity is either recognized or it is not. No third option can be taken.

Consequentiality, internal coherency and legal justifiability are strong calls in international law as well. In the final analysis and in the long run, the validity of any domestic order is the function of its international setting, i.e., its formal recognition. Domestic orders can become parts of the international order through the mutually co-operative support of each other. That is the reason why breaking continuity can result in loosing international recognition as well.

Therefore, from a legal point of view, the change of regimes in Central and Eastern Europe was not a revolution. For this very reason and since the nations concerned take the advantage of legal continuity, their laws were not discontinued in a technical sense.

3

Declaring revolution will necessarily imply the fracturing of legal continuity. In case of discontinuity the chain of legal validity is broken, and the state has to apply anew for international recognition. In case of non-revolutionary transition, it will remain at the discretion of the new establishment to decide how much and in which respect to depart from and amend, if at all, old conditions.

In Hungary, the transition was rather peaceful and gradual. This is why it resulted in gapless continuity. Therefore Hungary could in fact profess the ideal of Constitutional Democracy from the first moment of her renewed existence, and not simply for mere ideological legitimization.

So the topical question is the following: what is the message of accepting Rule of Law after forty years of communist dictatorship, the annihilation of European and national values, the brutal reprisal against opponents and the intimidation of the rest, the destruction of economy, the waste of reserves, the corruption of morals, eventually all having pushed the whole nation into

bankruptcy? Surely, the ideal of Rule of Law is indivisible. Certainly, it includes respect for prevailing law, recognition of previous conditions as legal ones, and the reference to nothing but the law in force at the time when the legal assessment of past incidences is at stake.

Thus, if anyone is removed, denied an unlawful benefit, identified in relationship with past action or reprehended for past action, it can only be done through common legal procedures and according to the law which was in force when the act was committed.

The ideal of the Rule of Law has been made the touchstone of the new regime. Accordingly, the state can only act through and justifiably within the available legal mechanisms.

4

The requirements of the Rule of Law were historically formed under certain preconditions and assumptions. First of all, historically they were fitting the development pattern of the West of Europe, rooted in its socially balanced, consolidated conditions. They have never been challenged to cope with limiting cases and extraordinary conditions which characterize the Central and Eastern European transition.

The Rule of Law offers a set of principles for consideration and requires that action is channelled through legally justifiable procedures. The demand is absolute but not for its own sake. Legal procedures cannot threaten the chance of bare societal survival. It cannot preclude the exceptional handling of exceptional conditions. Whilst its practical implementation, the Rule of Law is not to be used for legitimating illegal situations.

Ideas are a function of the foresight of effects. In law, assumptions are usually backed by the vision of some well-ordered ordinary processes. This also holds for cases of exception, like the regulation for emergency conditions, born of the crisis of the Weimar Republic, differentiating between ordinary and extraordinary conditions. Nevertheless, the vision of exception is also built upon the foresight of what can actually be envisaged upon the experience of normality, and those departures from and deviances to it which are collected in historical memory. The claim for the law to be universally valid and obligatory can only be made absolute within the frame of such an understanding.

In a conflicting situation, if there is no statutory resolution, usually a gap is construed in the law to be filled by law. General principles can justify that stipulations of the law do not apply and that there can be no solution within their reach, so a second, subsidiary order, the one defined by the general principles, will come to the forefront to decide. This is the case of a failure

of regulation, not rejection. Within the reach of the general principles, the judicial filling of the gap will justify that, notwithstanding the failure, the case is covered by law and the general principles offer a solution.

The Rule of Law requires the use of available procedures and observation of principles. With regard to itself, however, it cannot make assumptions as to the preconditions of its own relevance and obligatory nature. This may result in conflicting situations. With respect to the Rule of Law, these have to be resolved, too, within the bounds of law.

5

The Rule of Law requires that legal proceedings can only be launched with reference to the original legal situation and according to the available legal instrumentality. At the same time, however, the requirements of the Rule of Law do not provide any criteria for their own foundations, presuppositions and relevance.

The law's inability to stipulate on its own foundations, however, cannot be taken as a burden upon or a contradiction of it, to be resolved once and for all. The dilemma involved is a paradox of formal legal cultures, arising from the conflict between the formalism legal procedures take and the substance the practice of law has to offer. In the final analysis, it results from the self-referential nature of law, continually positing and re-establishing what it is, but not what preconditions it.

Let us take the issue of statutory limitation [*Verjährung*; *péremption*, *prescription*, *extinction d'un crime*] as an example. This is a kind of institutional guarantee that after a given period of time, with no further action, will take effect, unless certain actions in law which can break its continuation are instituted. Under well-balanced social conditions and legal implementation, statutory limitation establishes a time-based limitation on the state's prerogative to inflict punishment and the citizens' right to instigate legal proceedings. But what is the consequence if the state does not use this for fulfilling its punitive responsibility but rather as a perspective for avoiding fulfilment? What if the state itself becomes perpetrator? What if the politics of the state are backed only by committed crimes and rewarded state criminals?

Let us take an example, apparently extreme but by far not unrealistic, from World War II Central European history. At incidences of rape, the commanders of the occupying forces when official notice was made, reacted abruptly under military law, by shooting the offender. It could only be established subsequently that nevertheless this was the exception. The average practice was to expose those making complaint (the victim and/or her relative) to immediate brutal, often murderous destiny. The invaders preferred eradicating the trouble itself at once and for all; and only if it proved not to

be feasible for any reason, they resorted to kinds of legal proceedings. In any case, the roles of the victim and the guilty were mixed, and the only secure way was not to take cognizance of the crime committed. Is it then reasonable, fitting within the morality of the Rule of Law, that those transgressing any law and order would be the first beneficiary of the protection extended by the new law and order? That the new Rule of Law has to be tested (and corrupted) from the very beginning by granting unpunishability for state-organized murderers? And all this simply because the running amok did not last for a shorter period of time? Simply because they were unscrupulous enough to make their crimes officially unnoticeable? Because they held on long enough so that both their self-granted statutory limitation could pass and grant a pardon to make the rest unpunishable?

In law, there is no unobjectionable answer to limiting questions. In borderline cases the law is always ambivalent. The law provides foreseeable patterns to foreseeable events in society, with its routine covering only routine conditions.

Nevertheless, a routine answer to a non-routine question has no stronger argument to defend than a non-routine answer to such a question. With the legal staff in the background, the built-in sequence of principles, rules and exceptions to rules, the eyes of the Goddess of Justice can equally be seen as impartial objectiveness and blindness. That is, from the available legal staff another response can also be construed, based upon principles and the merits crying for exception.

In the name of law, a response can be formulated according to which *(a)* Reference to the formal system of available rules is no longer relevant and applicable to the case, therefore, *(b)* It has to be judged by the principles which justify departure from routine ruling.

Law is not a decision-exacting automaton as statutory positivism may have believed. As classics taught, *ius* is the profession and art of the materialisation of justice, which must prevail under changing conditions. That is, law is a medium of justice to prevail, with only stepping stones and channels and methods of reasoning afforded for a process to identify it, having neither ready-made answers nor definite choices at the beginning. This is why in developed legal cultures literature relating to the general principles of law is as large as the doctrinal treatment of statutory instruments. Thus we should know more of the old principles, e.g., what the message of the maxim "Nobody can profit from his wrong" is.

In the final analysis, once the routine is questioned, the insistence on routine is just as much one of the choices for a genuinely creative, responsible and responsive decision as the one based upon substantive argumentation. Eventually, any of them is only justified by a political position.

Without clarifying all this, the bulk of the question was answered by the constitutional lawyers of the Weimar Republic, by recognizing the possibility of extraordinary circumstances. They lived through various crises, and facing the question of a state of emergency, they argued: all rules are based on some assumptions, on what can be foreseen normally.[3] Even if I consider the exceptions, I can do it with the help of my own imagination, available for me there and then. If reality produces something essentially different, then I must reconsider the whole situation by the deliberation of final principles which control the rules as well. This is the aim of principles in law, namely, to help in extreme cases of the application of rules. In Anglo-American jurisprudence, the practice of thinking through legal principles allowed new requirements such as social care, the welfare state and liberal legal ideals to be accepted.

Based upon these, we may choose from the following alternatives when giving an answer to the dilemma of statutory limitations. On the one hand, we may say that in spite of the honourable character of the above arguments, they are legally irrelevant, they have no legal sense. This is the same as if we would state (as was actually said at a politico-legal academic debate in Budapest, receiving a warm response[4]) that in a legal sense, there is no difference whatsoever between the infanticide of an unmarried mother and the murders committed in support of the party-state, the latter within an institutional framework, for the benefit of the prevailing regime, thus openly rewarded by its political establishment, and whose prosecution was therefore blocked by the same state—provided that since they were committed, the time prescribed in the law as statutory limitation had already passed. On the other hand, we may equally say that just the essential difference of the two situations, the differing stately reaction to crimes, can be a basis for differentiating between the two cases in a legally relevant way. That is to say that while prosecution was hindered, the mere physical passage of time could not initiate statutory limitations.

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[3] Experience of the Weimar Republic was interpreted by various writings of Carl Schmitt, especially his magisterial work on *Political Theology* (1922).

[4] One of the Hungarian interventions, not included in the published proceedings of *Visszamenőleges igazságszolgáltatás* A Magyar Tudományos Akadémia Nagytermében 1990. november 8-9-én megtartott konferencia anyaga [Ex post facto justice: Materials of the conference held in the Great Assembly Hall of the Hungarian Academy of Sciences between 8 and 9 November, 1990], ed. Vanda Lamm & András Bragyova (Budapest: MTA Állam- és Jogtudományi Intézete 1992) 110 p. [Working Papers No. 1 of the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences], offered opportunity to such a remark.

II. TAKING LAW SERIOUSLY

One of the most striking features of the answer one shall formulate concerning the question of statutory limitations is that no kind of political consideration will interfere here with the law. For the arguments hinge on the fact that politics as such is missing from the whole dilemma. If we think of politics, we may realize that politics is by definition connected to choosing value preferences. In politics, people select for and want some program and values. But describing such a choice is not politics in itself. If, for example, we state that the Communist regime imposed by Moscow was based not on guaranteeing internationally accepted human rights but on neglecting them, not abiding even by its own declared set of rules—this is only an institutional statement at the most, as its meaning can only be understood in an institutional context. It is as party-neutral as if we would state: rain also falls in Socialism. Or the same way: stating that the whole question of facing the past has political roots, as the flawed phenomenon of certain crimes remaining unprosecuted was caused by the political system—this is also a sort of classifying statement that describes the medium which was especially active in the previous regime. As we have already noticed, anything could have prevented the state from exercising its punitive power, and this wouldn't alter the characteristics of the problem one bit.

It is equally important to realize that the answer we propose does not bring any new elements into the law. In the jurisprudential thinking following World War II, even Ronald Dworkin, one of the most authentic representatives of Anglo-American liberal legal ideals, emphasized that the resolution of theoretical debates is mainly the task of the courts. It may be that, compared to previous judicial practice, the decision that is a result of debates on legal principles seems to be a new one. However, this makes use only of opportunities given from the beginning, as available from, within the framework of, the law.[5] At the same time, the debate itself strengthens the legal culture of the community. By this I wish to say that even if the dilemma presented here is solved by the passage of a new law, such a law would not create but merely declare the result which would otherwise be achieved in judicial practice. The role of the law here is barely more than a final judicial verdict—that is, to finalize the answer, making it legally undebatable. As a matter of fact, what I have just explained contains a double statement. It means that if there were in Hungary an alternate, untouched legal body and

[5] This is the general message of Ronald M. Dworkin's 'The Model of Rules' 35 *University of Chicago Law Review* 14, reproduced as 'Is Law a System of Rules?' in his *The Philosophy of Law* (Oxford: Oxford University Press 1974), pp. 38—65. Cf. also Ronald Dworkin *Law's Empire* (London: Fontana 1986).

judiciary—like the one in Germany, receiving and answering such dilemmas on the local level—, solving the question by passing a new law would not be unavoidable, the only way imaginable. It could be left to judicial practice. But it also means that there is no legal obstacle whatsoever in Hungary—after due deliberation—for the judicial practice to reconsider the framework which was drawn by the law on, for example, statutory limitations.

A common characteristic and basic result of debates on legal principles is that they eliminate the necessity of resolving them with routine answers. For as soon as the actual dilemma behind them ripens socially and becomes legally conceivable to formulate, a routine answer can no longer be afforded for it. From this point on, a formalistic argument will be as creative and representative of a responsible decision in an alternative, limiting situation as the one which refutes formalistic argument. That is, after the time that the routine answer is questioned, even choosing the routine answer is no longer a routine answer itself, but one theoretically possible solution of the dilemma and not necessarily the only one.

It also follows from the above that independently of whether the legislature passes a new law or the judicial practice clears up the problem, it is not a new law that is institutionalized. Thereby we only take the old law seriously, restoring to it its original rights. That is, the judicial system which was hindered in its functioning and thus violated, is given a new opportunity to function again within the prevailing law and order according to what has originally been posited, as if nothing has hindered its functioning. "Settling scores with the past?" "Planning a future government coalition?" These are mere mumblings masking the lack of objective legal arguments, as such possible ambitions are hardly a legal matter. But the most important is that from the law's perspective, the machinery of justice must function in harmony with its original purpose, authorization and legal obligations. And the only duty of the government and Parliament is not to stand in the way.

That is why I consider it a false ambition, an attempt to distort the whole problem, if one tries, as opposition proponents and the mass media reflection mostly did, to attribute the question to the dilemma of the Revolutionary Spirit versus the Rule of Law. For no one wants to disregard constitutionality, no one intends to restrict it, to make conditions on it, or to put it in parentheses. The game is being played not in opposition to constitutionality but rather for strengthening its foundations within its own frame. In the meantime, one may use scare tactics or create an uproar at will. But this can only be good for swaying public opinion or arousing passions. Politicians and legal experts are aware that the question can and must be answered within the framework of the law. And the answer will be one or the other. But in any case, it will be the realization of the requirements of the Rule of

Law, utilizing procedures available in a constitutional state in harmony with the established laws and obligations. And this means that as soon as a constitutional answer is given, all other considerations become irrelevant. Referring to the overburdened state of the courts, to the difficulties in producing evidence, or to incidental or side effects will be as irrelevant from a legal point of view as it would be unusual if somebody would like to make Mafia crimes appear legally acceptable because of the overburdened machinery of law enforcement and the difficulties of investigation.

Though our legal conception was simplified in the past into a dull rule-positivism, we canot say that law (*"jus"*) is composed merely of laws (*"lex"*) in the form of printed codes. For law is also a part of the living culture of the community, which is formed in everyday practice and strengthened—i.e., challenged and answered—day after day. It differs from other entities in that it is based on the acceptance of certain sources of reference, forms and methods of reasoning. Thanks to its specific procedure of application, it can prevail in everyday life. For judicial fora apply the law through the repeated reconsideration of principles, rules and exceptions which can be found, i.e., revealed, identified, conceptualized and defined, in its body. As we all know, the aims to be achieved are formulated in society. If we continue the debate on these in the law, then the important thing will not be to achieve one specific result, but to find results in harmony with the law, by pursuing all legal means available. As a simplified example, from the perspective of the law, the interesting thing is not who of the parties will win but that the legal process will be pursued to its conclusion. Thus we may conclude proudly that within the law, constitutionality is both the foundation and the aim of our debate, while in the meantime, the law provides the methods to achieve the aims.

The first requirement is that our dilemmas must be considered in legal terms. And it is obvious that appropriate legal considerations cannot be replaced by other arguments. That is, in the sphere of law, other points of view may only be gratuitous and troublesome—and forcing these other points of view through would harm the law. Naturally, it is the task of the politician and not the legal expert to harmonize requirements and to find compromises without harming the law.

Thus the debate on statutory limitations is the dilemma of how to process relevant questions in law. And since up until now no one has done this job, to find a solution in harmony with the law is the prerequisite for building constitutionality in the country on firm grounds instead of social, moral or legal sand. Thus the legal debate is inevitably necessary, though obviously not sufficient in itself. For this reason it cannot replace any other tasks and cannot relieve us from other tasks.

To say what is to be done outside law—in Parliament, in the government or in the political parties, or in moral answers, in political journalism, or historical writings—would be a different story.

III. APPENDIX

It is to be noted that the decision of the Constitutional Court (No. 11 of the 11th of March, 1992) over-politicized the issue by the rather activist stand it took. By construing notions like 'constitutional criminal law' and 'criminal law legality,' which it was the decision itself to introduce into the body of the Hungarian law, the Court invented artificial references for its decision to base upon and draw wherefrom—this time, by the force of syllogistic logic. In addition, the decision also overruled the prevailing law of the country by concluding that, *one*, statutory limitation is not a self-limitation on the punitive powers of the state but one of the basic rights guaranteed to the subjects and, *two*, statutory limitation is one of the constitutional pillars of legal security and, therefore, once established, it cannot any longer be interfered with by legislation.

As a matter of fact, there was no political force in Hungary to actually challenge the principle of statutory limitations. Since the fall of the Communist regime, the debate has only revolved around the question whether or not in want of any specific clause in the Constitution or the Criminal Code, can the period of prescriptions have had a start at all if, *one*, the state acted as an accomplice and, *two*, justice it had had to administer was actually silenced? Are the actual workings of the laws and the exercise of the state's punitive power a precondition for that statutory prescription can at all apply?

For obvious reasons, there is something more at stake here than the local issue of how the nation may address to and come to terms with her past. For the admission itself that Constitutional Democracy and its Rule of Law instruments cannot offer any answer to the depth and merits of the issue, risks as being construed by future perpetrators as an invitation extended to them for that they may resort freely to means of state terrorism. For, in such a case, there will be no constrain any longer why to prevent state action from slipping into a criminal act if feasible. And, in such a perspective, not even violations of own laws will make an exception. For the only thing that will actually matter will be ruling. That is, ruling, mercilessly maybe, but surely long enough, so that pre-codified periods of prescription will be safely passed and also self-granted acts of pardon administered in due time. Thereby also usurpation of power—providing that it is determinate and unscrupolous enough—will turn to be one of the conceivable alternatives, quite well paying-off and gratified. For in this Brave New World the first thing taken for granted will be the protection of the old perpetrators by the Rule of Law of the new regime. For, according to the message it leaves to the external world, one of the first pre-occupations of any constitutional law and order emerging on ruins of any kind has to sanction, by making irrevokable and irreparable, what the ruiner did.

As one of the side-effects, the reasons added to the decision of the Constitutional Court have raised doubts on the constitutional acceptability of the standing prosecution of war crimes in Hungary as well. For it is known that in Hungary just as in a number of other European countries, the exclusion of war crimes from prescription which was accomplished thirty years ago actually interfered with periods of statutory limitations passing on; properly speaking, in fact it annuled retroactively already passed limitations.

FAILURE ON ACCOUNT OF CONSTITUTIONAL CONSIDERATONS?*

In the countries of Central and Eastern Europe that have undertaken to change their political systems in recent years, the natural desire to start life anew could rest exclusively on another desire altogether—namely, on the need to settle the issues of the past. Whether explicitly or mutely, the latter can manifest itself in several different forms, ranging from a prevalence in society of the ethos of aversion to acting in any which way, from steering a sober middle course to a radical means of calling to account or even to letting all hell break lose. This apparent freedom of choice may give the impression that the only reasonable and practicable option, that which also entails genuine social goals, is to focus our attention exclusively on our future. After all, if we become wrapped up by our past, we are bound to remain captives of our instinctual selves. Only our grievances or some externally elicited desire have the power to make us bury ourselves in our past. However, both have only negative and destructive results to offer, since they cannot be simultaneously constructive or beneficial in any way.

Meanwhile, the experiences of those regional countries that approach the issue from different angles lead us to conclude that, after all, our choice does make a difference. Our answers to the questions of the past set a course for our approach to the future. This is why the history, traditions, and customs (and of course also the prevailing degree of manoeuverability and preconditions) of each country have a direct influence on the extent to which their peoples identify with these dilemmas and also on the answers they eventually find. People may be prepared to look all sorts of problems in the face in a calm and level-headed manner. They may just as well feel an urge to just wipe these problems under the carpet. And they may also feel inclined to dodge these problems by loosening the reins or fanning passions to a heat. However, since man is caught between past and future, his answer to one set of problems directly determines his answer to another, related set of problems. *Le style, c'est l'homme même.* But style is also the system itself. And this problem becomes all the more pronounced if we make people conscious of the fact

* 'Preface' to the collection on *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1995) xxvii + 176 p. [Windsor Klub].

that in the realm of the law, the relationship between past and future is not merely logical or social in nature. If we consider these problems in a legal context, we are bound to realize that our constitutional ideals cannot hold water if they do not simultaneously help us to look our past in the face. Should these ideals turn out to be unfit in helping us transcend the past, our initial enthusiasm would inevitably cool off, our constitutional ideals themselves would lose their moral cohesion and appeal, and would eventually dry out, as it were, democratic pathos and perspective evaporating away.

Hungary was among the first countries in the region to have made serious efforts toward finding appropriate answers to this historically arduous massive and exceptional challenge. As well known, at the time, there were no external patterns for this country to adopt. We are familiar with the results of the efforts Hungary has made over the past few years, and we are aware of the occasional mistakes, the weaknesses, and the lack of organization this process has entailed. And yet, we cannot but admit that the actual results of these diverse efforts and often contradictory attempts were to a decisive extent determined by hard facts and the external and internal conditions that defined the process of changing the nation's political system.

The experiences of success and failure can both be lost to memory. At the same time, the realm of the subconscious is immense in both the community and the individual. We have a broad stage on which to manoeuver, and freedom of choice is also ours. But the interaction between past and future we can never ignore. Our past is our future. And this is true the other way around as well; our power and ability to control the future has its roots primarily in our past.

One of the toughest nuts to crack for those attempting to look the past in the eye has been the dilemma over the issue of delivering historical justice. In a strictly legal sense, statutory limitation lies at the core of this problem.

Practically speaking, we can identify only one approach to the issue of statutory limitation as prevailing in Hungary today. This approach is the one that bears the seal of approval of the Constitutional Court—the legal body charged with exercising control over the sovereign powers of Parliament. This approval is considered authoritative, and in principle it is irrevocable. Of course, people are free to ask whether the decision at issue fits into the established traditions of constitutionalism in Europe; whether it peremptorily follows or can at least be deduced from the text of our prevailing Constitution; or whether it is theoretically well-founded and buttressed by anything other than the seal of the body itself. But it is to no avail to ask such questions, since they have no power whatsoever to alter the decision's definitive force.

In Hungary, this development is not in the least accidental or lacking in precedent. Among other things, it entails that peculiar distribution of roles which a hypothetically conceived contemporary Julien Benda would still describe as *La trahison des intellectuels*. After all, the domestic press, as well as the bulk of Hungary's professional lawyers and legal scholars, have done their utmost ever since the early emergence of the dilemma at issue to forestall its full and proper deliberation through an open-ended search for enumeration, consideration, and clashing of all possible arguments. Instead, labels have been applied, threats have been pounded into heads, legal considerations have been replaced with purely pragmatic or openly political arguments, and allegations of political ill-will have been raised again and again in an effort to divert treatment of the issue into a conceptual web which would inevitably anticipate the very final conclusion and would therefore preordain adjudication.

In Hungary, the first academic debate on the dilemmas that surround the issue of delivering historical justice was held on January 12, 1990.[1] At the time, the debate itself was considered premature. In fact, it was more of an attempt to formulate a response to the preceding events in Temesvár and Bucharest. The participants nevertheless raised a few relevant questions, and charted a course for future research.

For all its diversity, the prevailing approach to the problem has by and large boiled down to the following conjectures and conceptual schemes:

(1) There is a natural course of events under which statutory limitation enters into force after the lapse of a given period. This approach draws its conclusions from the laws that were in force at the time of the committal of the offence, and sees no alternative to this solution under the prevailing conditions of our constitutional state. In other words, under this concept the time-frame is determined by penal law. The expiry of the legally stipulated term of limitation inevitably and irrevocably means that statutory limitation must enter into force (regardless of any other conditions or possibilities of subsequent interference).

(2) All efforts that aim to upset this natural and established course of events are described as attempted subsequent violations of the legal system. Even if they appear in a legal disguise, these are considered attempts at

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[1] Cf. *Visszamenőleges igazságszolgáltatás új rezsimekben* [Ex post facto justice in new regimes] ed. György Bence, Ágnes Chambre & János Kelemen (Budapest: ELTE BTK Társadalomfilozófia és Etika Tanszék 1990) 53 p. [FIL 2 Gyorsszimpózium].

retroactivity in either legislation or *ex post facto* jurisdiction. Mindful of the guarantees accepted as inherent by civilized society, such attempts are strictly prohibited in criminal jurisdiction.

(3) In the field of legislation, the guiding principles of a constitutional state are legal security and acceptance of the fact that laws can only be altered or amended operatively and never retroactively. This requires that all normative conditions remain unchanged from the moment of the committal of the deed until its judicial litigation, which may bear any influence whatsoever on the legal evaluation of the given deed or offence.

(4) Statutory limitation cannot be considered a mere act of self-control by the state, or a simple act of notification of the authorities by the state of the expiry of its penal claims. The significance of statutory limitation is more and different than that. It is a fundamental institutional guarantee, which grants each citizen the basic right to expect progressive legal protection. Consequently, after the lapse of a given period, each citizen of a constitutional state—irrespective of whether he has already committed or only considered a crime—can assert a right to unconditional impunity.

(5) All this follows from the natural course, fundamental purport, and compulsorily close observance of the words of the law. Hence the inevitable suspicion generated by any such attempt whose aim is to upset the established order or to violate the principle of legal security, and which indicates the presence (or contemplation) of an ignoble political desire to evade the acceptance and recognition of statutory limitations.

(6) It follows from the foregoing that the course of the law is strictly and accurately determined, and is fully calculable irrespective of whatever conditions may prevail. Any attempt to bypass this course amounts to a head-on attack on the fundamental values of a constitutional state, as it can only arise from extra-legal, political motives. These attempts must be rejected in the interest of protecting our constitutional state.

(7) Since there is no possibility or need to manoeuvre here, full and unconditional responsibility for any such interference by the legislature or government in office (irrespective of their actual division of power) must be shouldered by its initiator. In other words, since the adherents of the above opinion reject the idea of deducing the compulsion—or sheer obligation—to act from the basic principles of the law itself, they unconditionally shift responsibility for the interference (and also for the eventual social costs and the predictably modest practical results) onto the "trouble-making" initiator. At the same time, these people tend to base their acts and conduct on their understanding that they are exempt from the need to consider relevant aspects of the law, and that their only task is to influence public opinion. This explains their selective inclination to use exclusively the crimes that remained

unpunished during the four and a half decades of communist dictatorship, and also the prospect of delivering historical justice for these crimes, as a pretext for applying the label of scapegoat to ill and elderly people who have lived a deplorable life, and for describing the prospect of a lenient settling of the past as but rubbing salt in old wounds in a petty and despicable way. Those who identify with this view also go out of their way to accuse the government of overtaxing the already overtaxed district attorneys' offices and courts, of wilfully dividing along political lines the legal profession, and of attempting to ruin jurisdiction. Finally, these people have put themselves in the robe of a prophet in an effort to describe those who want to look the past in the face as people guided by mean instincts, as witch-hunters, and as agents carrying on subversive propaganda against society's moral unity and future prospects.

In the final analysis, this approach rests on the understanding that the eventual definitive journalistic treatment of the basic legal situation must focus on the disclosure of a series of related considerations (specifically on unveiling presumed political ill-wills), and also on presenting as unworkable and inviable any such attempt whose aim is to find legal remedy to the grievances of the past. Consequently, this approach has always managed to avoid the obligation to address the real question—i.e., that of the basic legal situation. This is why the cool-headed, deliberating questions of lawyers could be outbellowed by all those do-nothing political scientists, historians, moral philosophers, and theologians who have assumed battle formation under the banners of humanism, the future, and social peace.

All this has inevitably resulted in a situation in which this loud, one-sided, and unnecessarily frightening din of battle—unfit to entail fine distinctions or conceptual considerations (let alone the requirements of a lasting social peace, the demands for laying the moral foundations of a constitutional state, and the realization of the need to generate social support for such a state)—makes it impossible to address the key issue which at the same time is the precondition to any further clarification of the problem. This issue is that of conceptualization—that is, the differentiated description and classification of phenomena that are contrastible, the consideration of all methods of argument that can be employed to describe the given problem, and the elaboration of predictable consequences in their own conceptual context and also as contrasted with the underlying values of society.

The intractable demand of this Pyrrhic victory, and the adjourning of the debate prior to its very start (with the active or passive involvement of the crème de la crème of this country's intellectuals), have promoted the ethos of "do-nothing" to prevail without any substantial contribution by our scholars

(who, by the way, are so proud of their sensitivity to problems) to the clarification of all human and social dilemmas, opportunities, difficulties, and historical experiences which comparative legal history, political history, and theology could potentially have addressed.

Let us mention here a few such aspects we believe are worthy of consideration: the state of legal affairs during the period of Hungary's occupation by the Turks, as seen from a post-occupation perspective; efforts in the post-Civil War US to enforce through a congressional fact-finding committee the compulsory examination of dirty clothes before doing the laundry; the experiences of France (a country proud of her moral sensitivity but also noted for her readiness to unceremoniously bury the embarrassing events of the past) in liquidating some ten thousand alleged collaborators and in the public humiliation of tens of thousands of others after World War Two (and in the subsequent announcement of a further six thousand death sentences by the belatedly formed institutions of official jurisdiction, and the eventual execution of some 2,000 of these sentences); or the legal treatment of crimes committed by dictatorships that had emerged (not through foreign occupation as was the case in the Soviet satellite empire but) through domestic developments like coups (e.g. in Greece, South America, East Asia, or Africa) or civil wars (like in Spain or Portugal). The rare and scattered references to the precedents and archetypes most often lacked academic purity, completeness, and objectivity. Instead, these references employed either the incantational word-magic of concealment or the practice of hammering in examples. (As if there were no genuine experts in Hungary any more, as if the literati could measure themselves only through their political influence, as if the pen was but a field marshal's baton or a prophet's sign in disguise!)

Among other things, our own legal heritage has also been left untreated, and the same applies to its Central European antecedents and German and Austrian patterns. Polarizing actualization aside, there is no applicable elaboration on statutory limitations or on the uncodified preconditions that had their roots in the principles of the Roman law. We cannot attach a historical explanation to the fact that while the codifier of German penal law declared (so close in time to the casuistic past in the 19th century) statutory limitation dormant during the paralysed phases of criminal prosecution by the state, his Hungarian counterpart did not consider it urgently important to separately elaborate on this obvious presupposition and unheard-of state of affairs (i.e., that if the state, in its capacity as the designated persecutor of crime, becomes an instigator and accessory itself by paralysing prosecution in order to ensure impunity to crimes committed in its interest, the absence of a legally justifiable starting date prevents statutory limitation from being enforced). Furthermore, there are no general studies available on the role of

the presuppositions of the law (i.e., on the apparently evident, unquestioned, or sometimes even tacitly accepted, and yet professionally consistently bequeathed principles). The question is: how could they be enforced if they are called into question? We do not know whether we have the right to interpret a legal institution outside its context, or it is just this very context that gives it meaning and a life (see Ludwig Wittgenstein's thoughts on language[2]). Strangely enough, the undisputed regulation whose long-forgotten memory was revived only recently by constitutional judge János Zlinszky has never truly been incorporated in our criminal doctrine. In his minority opinion aimed at questioning the legal foundations of majority ruling, Zlinszky revived a tradition and at the same time pointed out the continuity of jurisdiction in Hungary:

> The statutory limitation on crimes committed between June 21, 1941, and the conclusion of the armistice enters into force with the signing of the armistice on January 20, 1945. The statutory limitation on those political crimes which were committed in and after 1919, and which have claimed human lives, and also on those crimes specified in the present decree which were committed through the press, and whose persecution was impeded by those in power, enters into force on December 21, 1941.[3]

In Hungary, the legal and procedural problems of persecuting war crimes and crimes committed against humanity (which often have relevance to cases and authorities in this country as well) do not have copious literature. Consequently, the related arguments have not been reconsidered, the lessons that can be drawn from these cases have not been projected onto the present situation, and the legally relevant similarities and differences have not yet been identified.

When we discuss the respective roles of the legal profession, the scientists, the political and governmental forces, or the journalists, our aim is obviously not to evaluate, praise, or criticize the standpoint or opinion of any individual player. The different views are welcome constituents of a democratic state, similarly to the different votes. Our criticism is not meant to indicate an intention to arrogate an exclusive right to knowledge or to give an impression of shouting in from the sidelines. But it always creates a problem, and democracy is bound to be violated, whenever the debates on basic issues cannot be brought to a conclusion; whenever these debates are broken up prior to the clarification of the starting points; and whenever the pros and cons fail to be considered.

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[2] "Every sign *by itself* seems dead. *What* gives it life?—In use it is *alive*. Is life breathed into it there?—Or is the *use* its life?" Ludwig Wittgenstein *Philosophische Untersuchungen / Philosophical Investigations* transl. G. E. Anscombe (Oxford: Blackwell 1945), par. 432, p. 128.

[3] The Prime Minister's Decree No. 81/1945 (5 February) on people's jurisdiction, § 9.

Statutory limitation assumes that the state abides by its laws and crime is usually followed by prosecution. If this is not the case, one may doubt whether the mere physical passing of the time can lead to legal extinction.

6

In addition to legally formalized procedures, there is a variety of other available means as well. We can chose any and many at will, for what is not forbidden is permitted in law. Our free scope of action can only be limited by the instruments of human rights, both constitutional and international.

Differing types of action, the fulfilment of which *(a)* is a legal obligation, *(b)* is specifically allowed by the law, *(c)* is only regulated by the law in a specific relation, connection or domain, or *(d)* falls entirely outside the law, can equally be undertaken, following parallel tactics and ways. Legalized and non-legalized modes of action can equally be instrumental in the achievement of the desired result. They can successfully complement one another.

Legal considerations can only delimitate the choice what we make from among actions, procedurally protected in law. The variety of paths and ways that can also be chosen is certainly larger.

Considerations of principles and practical insights can nevertheless suggest that, for coming to terms with the wrong and injustices of the past, legal instrumentality is also to be used.[1]

[1] For the expert opinion submitted on the feasibility of the idea, cf. Imre Békés, Mihály Bihari, Tibor Király, István Schlett, Csaba Varga & Lajos Vékás 'Szakvélemény [Expert opinion on the principles and legal conditions of the judgement about, as well as the establishment of responsibility for, conducts and privileges realized between 1949 and 1990 in infringement of the social sense of justice]' *Magyar Jog* 38 (1991) 11, pp. 641–645 and *Társadalmi Szemle* XLVII (1992) 1, pp. 70–76. Cf., for a similar stand, *Ein Presseinterview mit Herrn Professor DrDr. Jescheck [Max-Planck-Institut, Freiburg] in der ungarischen Tageszeitung "Új Magyarország"* [manuscript] 11 p., as well as the documentation in *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 176 p. [Windsor Klub].

THE DILEMMA OF ENFORCING THE LAW*

I. DEBATE ON STATUTORY LIMITATIONS

One of the most sensitive questions in domestic public life—in political skirmishes, debates in the press, scholarly conferences, and especially at the time when the Constitutional Court has had to rule on the issue in Hungary—has been how to address the past. The essence of the dilemma can be put in this way: a great number of serious crimes were committed in the previous regime. There is no debate over their assessment: at the time they were committed they were crimes according to the Criminal Code promulgated by the socialist state. Some of these crimes, however, were initiated by and served the interest of the party-state. The latter, for obvious political reasons, went unprosecuted, almost without exception. However, both ethics and law prescribe that crimes must be prosecuted. If this becomes temporarily impossible for any external reason, then obviously, criminal proceedings must begin as soon as the obstacles are removed. Criminal procedure is a legal procedure with strict guarantees. Before it begins, legal conditions for it must be shown to exist. The extensive political debate concerns this question.

The Criminal Code, which contains provisions for the punishment of the deeds in question, simultaneously prescribes statutory limitations for them. That is, if the deed is not prosecuted, then following the passage of a certain amount of time, commensurate with the prospected punishment, the culpability of the deed diminishes. The source of the dilemma is that the same regime which enacted the law as its own also initiated deeds which can be classified as crimes, while hindering the prosecution of these deeds and even rewarding their perpetrators—and, moreover, succeeded in remaining in power for decades. By the time it collapsed, the time fixed in the law on statutory limitation (maximum 20 years for the most serious cases) had already passed.

* A version of the paper originally published by the nation-wide circulated newspaper five weeks before the Constitutional Court was to take its decision, 'A jogérvényesítés dilemmája' *Új Magyarország* II (23 January 1992) 19, p. 9. The Appendix was originally prepared to a version published in English in *Rechtsnorm und Rechtswirklichkeit* Festschrift für Werner Krawietz zum 60. Geburtstag, ed. Aulis Aarnio, Stanley L. Paulson, Ota Weinberger, Georg Henrik von Wright & Dieter Wyduckel (Berlin: Duncker & Humblot 1993), pp. 427–435.

For a legal expert, the most interesting aspect of this problem is the recognition that in connection with certain deeds, the state *did not* exercise its punitive power in the given period, as forces outside the law were hindering it. It is important to realize that following the removal of the obstacles, the state *must* exercise its punitive power as if nothing had disturbed it. The fact that the state was made an accomplice by the political system and that the obstacles were removed by political changes is irrelevant to legal assessment. Following some historical happenstance, it could have occurred through temporary collective coma, amnesia or incapacity. However, the dramatic nature of our example lies in the fact that we have suffered not from overwhelming natural forces or a *condition humaine* restricting our social self, but from the fact that society was controlled by an aggressive minority which also employed the means of state terror against the majority. Anyway, it is obvious that the source of the obstacles was not the law, but external forces that made it impossible to enforce the law.

There are two possibilities in such cases. It may be that, following the removal of the obstacles, there are no legal barriers against initiating criminal proceedings. In such cases, proceedings begin as if they have not been disturbed. But what is to be done if the question of statutory limitation arises? We may argue this in a formalistic and routine way. Quoting the law, we may state that three things are necessary for statutory limitation. *First*, a law which institutionalizes it. *Second*, a deed committed to which the law refers. *Third*, the mere physical fact that time passes. However, we may be justified in saying that, as this formalistic argument is designed to handle a routine situation in a routine way, it lacks a very important element, exactly what gives meaning to statutory limitation in the reconstruction of its substance, notably, the reason why the legislator has institutionalized it. And this is none other than the social environment which has been built up and is operating in a normal way. This is a precondition for—and by reinforcing it, also the aim of—the institution of statutory limitations. Orderly functioning of society stands for the normal operation of the social environment. Among other things, it preconditions that the state abides by its own rules. For example, it will do everything possible to prosecute crimes according to its own legal duties. And because the state can and does do this, it does not need unlimited time. The time necessary is defined by the law. And if this time passes and the state takes no action, then afterward it cannot take action. The statutory limitation takes effect.

For a way of thinking which does not treat law as if it were placed in an ideal vacuum but tries to address its whole system of rules in its complex environment by taking into account also the natural preconditions, statutory limitation is not a rule which can be treated apart from the legal order, as if

it would take effect exclusively and merely by the simple fact of the passage of time. Statutory limitation is merely one of the legal provisions, which functions as a part of the legal order and depends on it. It can start only if the state itself also functions in its entirety—if, among other things, the state customarily and consistently abides by its own rules. That is, statutory limitation does not begin automatically, upon the mere physical passage of time. Rather, it is the state that operates it in harmony with also operating the whole variety of legal instruments available for criminal prosecution.

This is not an unfamiliar way of thinking for a legal expert. Hans Kelsen, Europe's greatest legal philosopher in this century, writes in his *Pure Theory of Law*—laying the foundations for the understanding of the formal idea of law on the European Continent—that law defines itself within its validity. But for this definition to be a sensible one, that is, for it to gain legal validity, it is necessary—though in individual cases, the efficacy of the law is never a precondition for its validity—that the entire legal order, within which we speak of validity, be effective socially.[1] We already know that this is a common problem with all formally defined notions. Namely, the definition can only be formal, but without certain content-based preconditions, the notions have no meaning whatsoever. This is mainly a theoretical question; in practice it can be found in limiting cases, arising in critical situations. In general cases, concepts are sufficient in themselves, but they are not suitable to illuminate their own preconditions.

We know from contemporary analyses of linguistic philosophy that all communications and conceptual thinking are based on natural assumptions, typical and routine ones. This works well in everyday life, and the clarification of implicitly accepted boundaries is necessary only in extreme and limiting cases. The British analytical philosopher Friedrich Waismann proved that, all things considered, not a single concept has closed boundaries but open contexture.[2] It can even be said that artificial closure is possible only in a given situation and for a certain characteristic. For example, we all know what it means in general when we say "dog" or "vehicle." But questions such as whether we may call an animal which has four legs and can bark, but fits in our pockets, a dog, or whether we may call a flying carpet a vehicle, and so on, can be answered only in concrete situations and contexts—for example, in connection with the interpretation of the rules of order in a public park.

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[1] Hans Kelsen 'The Law As A Specific Social Technique' [1941] in his *What Is Justice?* Justice, Law, and Politics in the Mirror of Science: Collected Essays (Berkeley & Los Angeles: University of California Press 1960), pp. 231–256.

[2] Friedrich Waismann 'Verifiability' in *Essays on Logic and Language* ed. Antony Flew (Oxford: Blackwell 1951), pp. 117–144.

Our aim with documenting on the preparations for the German laws on statutory limitation (1993), as well as the Czech bill on the illegality of the Communist regime and its constitutional assessment (1993), has been to broaden the scope of this debate, which has not yet started due to the over-politicized approaches, its one-sided publicistic treatment, and also the rejection of this issue by the Hungarian Constitutional Court. We are familiar with the related course of events, and are aware of the relevant political messages. However, since this is essentially a professional issue, the professional debate on the legitimization of dictatorships in a constitutional state, and also on the legitimacy of the state's ability to exempt itself from punishment for crimes committed under the state's auspices, must at one point be carried out. The German example is relevant on account of that country's historical and spiritual proximity to Hungary. At the same time, the arguments in the German debate were not voiced in an essentially heated atmosphere typical of a "period of turncoats," but instead by German experts during debates at the prestigious and for us exemplary *Bundestag*. These experts are known to be punctilious on the point of their sense of justice (and are noted for their experiences in handling and interpreting cases on the level of their Constitutional Court). In light of the prospects for civil political development in the Czech Republic, the decisions made by the national legislature in Prague and the Constitutional Court in Brno are especially worthy of analysis.

Curiously enough, the analysis of the German and the Czech documents also reveals that while the different potentials of the situations there and here may give account for the differences in the respective approaches and also in the support lent to the issue by the political parties, the underlying approaches and experiments still derive from similar roots in Hungary, on the one hand, and in Germany and the Czech Republic, on the other. There are several similarities between the three countries' theoretical approaches, and also between the laws approved by the parliaments of Hungary and Germany and the Czech Republic, respectively. Belated as these laws may have appeared at the time, they were still the first answers given to this question in our region.

The first professional debate on the problem took place in Hungary five years ago. The diversity and polarization of the approaches already anticipated the subsequent developments.

My standpoint, which I expounded during that debate, rested on the following considerations:

(1) The constitutional system of our nascent democracy cannot be built on the sand of nihilism and cynicism. For this reason, it is highly risky to

just indifferently ignore the burning issues of the past. The only way for us to balance accounts with the past leads through clear and unequivocal statements on the illegal deeds of yore. However, whatever our ultimate aim may be, we can proceed only within the justified, principled and exemplary framework of the current requirements of our constitutional state.

The relationship must be fully and completely clarified between the legal criteria applied and our possibility to subsequently persecute and punish crimes committed before the end of World War Two. Whether we highlight similarities or differences, they must be equally justifiable from a legal point of view. In addition, we must make certain that the solution we offer has the potential to protect for all time this much-tormented society from the unpunished crimes of a dictatorship (similarly to the Nuremberg trial and the people's tribunals after World War Two, which also served as a warning to posterity). In other words, the new constitutional state must not give a chance to those who cynically employ the laws to tread on the laws themselves, by committing crimes not against, but with the tacit support of, the state, and who in addition grant themselves immunity from punishment through self-imposed statutory limitation or amnesty.

(2) Constitutional state is not a matter of mere determination. It cannot be created or maintained through declarations. Only those societies can expect to live in a constitutional state where the citizens fully and unconditionally subject themselves to its requirements. Consequently, constitutionality must be protected from one-sided pressures and also from unreasonable expectations, both of which have the potential to disrupt it. In the wake of forty-five years of murderous acts, the crushing of the nation and the ruining of its economy, we cannot expect our new constitutional order to have a favourable reception by the public if it excels primarily in failing to unveil the past and in exempting state-sponsored crime from state prosecution.

It is a generally recognized fact of legal anthropology that if the society's quest for justice gets out of hand, assumes uncontrollable dimensions, or enforces authoritarian intervention, this quest is bound to deal a much harder blow to constitutionality and to present a much greater threat to the security of the citizen (and, eventually, to disillusion him from the ideals of constitutionality) than any other legally regulated procedure which *per se* has the potential to steel itself with all sorts of guarantees along the constitutional path.

(3) Constitutional state is not a system of dogmas. It is neither a panacea nor a ready-made, unchangeable, and universally applicable method or tool. It is not independent of history either, as it develops in the specific context of peculiar traditions and challenges. This is why it is not codified. According to the constitutional state's known historical antecedents, its prime mover

has in most cases been the acceptance of the prospect of balanced development. Constitutionality can address historical cataclysms only if fate orders it. This, however, is anything but typical of its classical western manifestations. The task of recovering from the ruins of a dictatorship is practically unprecedented for constitutionality. (The occupying military administrations after World War Two did not consider it their task to re-legitimize the defeated and collapsed German or Japanese state administrations, the press, or the expert corps.)

Accordingly, constitutionality can be defined as a kind of ideal that evolves through its historical continuity, and whose currently recognized boundaries have emerged from the generalization of the answers elicited by individual challenges. As a normative framework, it rests on the unity of principles and regulations. The answer to the question of how we should behave in a given situation is furnished by the regulations. At the same time, it is the principle that defines the situation itself, and it also determines our choice in marginal cases. Normally, we can confine ourselves to observing the regulations. However, it takes a careful consideration of principles to find a definition for "normal," and also to determine how law can be applied in "abnormal" circumstances.

(4) There are several ways to look the past in the face. It may be expedient to choose several complementary methods simultaneously. We can also take several different legal courses (such as cancelling unjust advantages, publicly specifying acts in the past, or conducting criminal proceedings). Whatever our choice may be, we must make certain that the law's own criteria are enforced, and that the act is qualified on a legal ground. Those acts which had a clear-cut legal status at the time of their commitment cannot remain unspecified only because the state authority which was obliged to tackle it simply ignored that obligation, and because a certain period has lapsed since then.

(5) Statutory limitation is a self-restriction by the state that affects its punitive powers. It is but a declaration addressed to the authorities, which specifies a deadline for the expiry of the state's punitive claims. This temporal limitation is an indispensable element of a constitutional state, although it is not a guarantee built into the basic laws. The criminal cannot legally appeal to its immutability, and therefore it cannot be considered a fundamental and basic plea in bar (as it was established by the German Constitutional Court). It is not a pillar of legal security either.

The state's self-restriction, which prevents the state from persecuting crime after the expiry of a specified period, postulates the proper functioning of the state's penal machinery. It also postulates that the state takes measures against the criminal acts it identifies, and that such investigations can be

initiated by the citizens themselves. It would be a rather cynical solution, and would also impair our prospects for the future, if we agreed to grant impunity (let alone anonymity) to the criminal minions of a state that throws obstacles in the way of fighting crime only because this fundamentally criminal state managed to throttle fight against its own crimes over a period of time specified by itself. An intact judicial sense would exclaim in protest against such an abnormal and preposterous manifestation of absolutism. Not even the most ancient and primitive laws would allow anyone to gain by his sin. Any temporal limitation of criminal persecution can be enforced only if in the preceding period the state's punitive mechanism had functioned properly, i.e., the obligation to fight against crime was observed, or at least the authorities were ready to meet that obligation. If the state's relevant mechanisms were unable to perform these duties, no starting date can be attached to statutory limitation.

(6) The court is not just a logical robot whose only task is to enforce the laws. Instead, it is a responsible institution which has the power to attach authoritative legal definitions to individual legal occurrences. Rather than getting bogged down in the logical analysis of the individual regulations, the court starts out from the entirety of the laws in force and draws its concrete conclusions from that.

Our laws in force today would enable the courts to reach the above conclusion. However, if we cannot rest assured that the individual court decisions have the power to generate a consistent legal practice within a reasonable span of time, we can vest other forums (supreme court, legislature) with the power to authoritatively interpret the cases at issue.

(7) For forty-five years, our state played an active role in committing, rather than persecuting, crime. This fact presents a challenge to those who intend to make Hungary a constitutional state again. Whatever our answer to this challenge may be, it remains a fact beyond dispute that this answer cannot and will not be based on routines or on the mechanical observance of certain particular regulations. Our answer must be based on the comprehensive assessment of the legal system, and it must be worthy of a constitutional state. This will be a responsible answer to a highly unusual question. It will require an exclusively creative approach, and in this sense it will also require political determination. This holds true even if we choose to completely ignore the peculiar aspects of the situation, and base our answer exclusively on the positivistic messages of the individual regulations, or if we seek an answer to the premises and limitations of the individual regulations taking the legal doctrines as our starting point. On this basis, we are bound to conclude that it would be at least as cynical and morally indefensible to constitutionally recognize statutory limitation on crimes committed by a state

that had illegally refused to have those very crimes prosecuted as it would be for us to go into raptures over the small-minded positivism of the *Das Recht ist das Recht!*, by re-evaluating the Nazis' take-over and reconsidering our utter rejection of the legal ideology which recognized the duality of a constitutional and an absolutistic state (i.e., Ernst Fraenkel's *Doppelstaat*[4]). The former would clearly signal our total disrespect for the law's moral foundations, would slap in the face the principles behind the legal regulations, and would only serve to encourage the would-be dictators. Similarly, the latter example would simply and subsequently invalidate all our righteous indignation at the crimes of Nazism.

History is known to be wise. At the same time, we are also aware of the fact that the judgement passed by history enforces itself in the long run only, and that we can establish only subsequently the real identity and role of the developments and phenomena. It is only after the event that we can establish with certainty the actual purport and significance of each of our moves which we choose to make while we remain caught in the medley of our convictions, cogitations and reservations. Mankind's way of thinking is eternal. Our ability to cogitate goes hand in hand with our ability to act, and the former also enables us to pass subsequent judgement on our deeds. Consequently, we cannot but hope that we can base our quest for solutions on those Central European experiences that have their roots in such considerations, professional expertise and practical steps that are also well-known to us.

[4] Ernst Fraenkel *The Dual State* A Contribution to the Theory of Dictatorship, transl. E. A. Shils [New York 1941] (New York: Octagon Press 1969) xi + 248 p. Cf. also Wolfgang Luthardt 'Unrechtsstaat oder Doppelstaat? Kritisch-theoretische Reflektionen über die Struktur des Nationalsozialismus aus der Sicht demokratischer Sozialisten' in *Recht, Rechtsphilosophie und Nationalsozialismus* ed. Hubert Rottleuthner (Wiesbaden: Steiner 1983), pp. 196–209 [Archiv für Rechts- und Sozialphilosophie, Beiheft Nr. 18].

RULE OF LAW

VARIETIES OF LAW AND RULE OF LAW*

When we set out to achieve and re-institutionalize the Rule of Law in Hungary a few years ago, we may have failed to understand completely how remote and obscure our goal was. This, of course, is justifiable to some extent, since our priority at the time was to counter with a positive example the then-prevailing socialist version of legal culture, i.e., the practice of defaming the ideal of law. At the same time, we had no urge to pay special attention to the already existing forms of the Rule of Law. After all, throughout our modern history, Hungary's legal system has been patterned mostly on that of Germany and Austria. Quite often, Western European, British or even American values have also reached Hungary through channels in Munich, Berlin or Vienna.

1. VARIANTS OF THE RULE OF LAW

The German and Austrian mediation of cultures occurred despite the fact that *Rechtsstaatlichkeit*, which has its roots in the European continental traditions, differs from the concept of the *Rule of Law* as conceived in British and American legal mentality.

Succinctly expressed, *Rechtsstaatlichkeit* strives to achieve its goals through comprehensive and across-the-board regulations. It attaches guarantee to each aspect it wishes to protect through these regulations. The *Rule of Law*, on the other hand, rests on the principle of all-covering justiciability. All it institutionalizes is the right to contact a judicial forum for a definitive legal verdict in any such case that may have legal relevance.

These should not be seen merely as two different legal techniques. Instead, they represent two different legal approaches which are rooted in two different cultures. They are as markedly different as if they had nothing to do with each other but were differing responses to differing questions.

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* An address delivered at the Symposium on Legality and Morality held on 4 May, 1993, for the General Assembly of the Hungarian Academy of Sciences and first published as 'A jogállamiság és joga' [Rule of Law and its law] *Magyar Tudomány* XXXVIII (1993) 8, pp. 941–950.

1.1. *Rechtsstaatlichkeit*

The conceptual culture of *Rechtsstaatlichkeit* rests on certain historical presuppositions. Among them I have to formulate that

- the present is, by definition, free and unrestrained. It cannot be bound by the past. Laws are shaped by the state, which in turn is dependent on the prevailing discretion of the ruler (either prince or popular representation); as well as that
- human activities can be regulated through their submission to the legal enactment of orders. Consequently,
- in order for the law to play a controlling role, the need exists for us to introduce appropriate legal regulations, to which we can subject human and/or institutional activities.

The continental legal culture which stands behind *Rechtsstaatlichkeit* entails further, tacitly approved inferences. On their grounds, we have also to postulate that

- only and exclusively a written code can provide guarantees to laws. The lack of such a code would result in insecurity, disorder and even chaos;
- the written code or charter spells out all the rules of the game that we are supposed to follow. This represents the sole and exclusive basis for the social contract on which social order rests. Consequently,
- any updating or modification of this contract can only be implemented through the alteration (amendment or replacement) of the charter. Furthermore, the only possible interpretation of a shift in approach (getting relatively stricter or more liberal) to any legal situation is that we abide by the codified commands in a shifted (relatively stricter or more liberal) way.

1.2. Rule of Law

The conceptual culture of the Rule of Law rests on different foundations and has its roots in different experiences. Unlike the previous concept, here we must tacitly infer that

- laws are coeval with mankind, and the law, which is made of the immemorial custom having ever prevailed in the nation's history, has always been applicable and reliable. Consequently,
- in the Rule of Law, our only task is to make certain that no one can evade the jurisdiction of a judicial forum in any case to which laws are applicable. At the same time, this also implies that

- the immemorial custom the law is a temporary expression of is not subject to changes or innovations. The questions addressed to the law can refer to its actual contents only.

Here again our acceptance of this conceptual culture implies certain tacit theoretical conclusions. Inherent in the British and American approaches to law are the following considerations:

- confidence in social automatism backing the law. In other words, here we must take it for granted that, on the final account, the law is able to organize itself and its own operation. For this reason, it is also able to function by itself—only provided that the laws themselves do not get stamped out (which has not yet happened in British or American legal history!);
- the realization that our only task with law is to let it operate freely. The law will certainly organize whatever it deems necessary for its operation;
- the realization that the law must not be provoked, or forced to provide answers. We must not try to influence the operation of the law. All we need to do is take interest in the law, and heed the conclusions generated by the legal system.

2. VARIANTS OF THE LAW

It goes without saying that the above differences are rooted in the differing perceptions of the situations and problems. These perceptions are determined by the *Weltanschauung* and conception the legal profession has developed of the law, by the ideologies serving the legal profession, and consequently by the traditionally accepted and conventionalized legal techniques.

2.1. *Rechtsstaatlichkeit* and the European continental conception of law

The continental conception of law, on which the ideal of *Rechtsstaatlichkeit* rests, postulates first and foremost that we subject ourselves to the authority—or rule—of a text. This accounts for the axiomatic ideal and logical pattern of legal thinking. The latter is rooted in the ideal of logical submission, and in its classical form also in the operational sequences of deductive conclusion (normative syllogism).

2.1.1. Logical pattern

2.1.1.1. Axiomatism The application of logic to legal thinking means its organization into an axiomatic or quasi-axiomatic system.[1]

The axiomatic system separates the theses that can be established about the world within the bounds of the system (or, more precisely, the logical postulates that correspond to these theses) into axioms and theorems.

In this context, the theorem is defined as the logical consequence of the axiom(s). In other words, the theorem cannot, under any circumstances, be a vehicle for independent thoughts or statements. It is the product of sheer application. And there is no third choice in an axiomatic system. As a result, all acts that aim to introduce innovations in the system are bound to occur on the level of axioms. An act can be either an axiom or a purely mechanical function resulting from axiom(s).

If a postulate within the system turns out to be unrelated to any of the system's axioms, we must consider this postulate an axiom itself. Obviously, no system can be built on axioms that contradict each other.

The system is closed also in the sense that its axioms—i.e., its foundational theses—are by definition codified. Consequently, its theorems are not discretional either. Finally and in conclusion, the theses within the system are also pre-codified. In other words, none of its systemic elements can be incidental.

For this reason, if a thesis within the system turns out to be unrelated to any axiom(s), we are bound to consider it a new axiom. However, no new axiom can enter a given system. The result is that the new axiom ruins the old system—unless we can manage to eliminate the thesis by proving its untenability. Of course, the fact remains that the proven tenability of the thesis at issue creates a new system *eo ipso facto.*

In other words, in the axiomatic system all forms of creative activity are focused on the enactment of axioms. All other forms of activity are bound to remain executive, i.e., they merely draw the mechanically and logically inevitable conclusions.

2.1.1.2. Logical submission There are two possibilities for the legal representation of the axiomatic pattern of thinking. These two ways differ in their concept and enforcement of logical submission.

[1] For the approach to law as a system, cf. Csaba Varga 'Leibniz und die Frage der rechtlichen Systembildung' in *Materialismus und Idealismus im Rechtsdenken* Geschichte und Gegenwart, ed. Karl A. Mollnau (Stuttgart: Franz Steiner Verlag Wiesbaden 1987), pp. 114–127 [Archiv für Rechts- und Sozialphilosophie, Beiheft 31]; Csaba Varga 'A kódex mint rendszer (A kódex rendszer-jellege és rendszerkénti felfogásának lehetetlensége)' [Code as system: the systemic character of the code and the impossibility of its understanding as a system] *Állam- és Jogtudomány* XVI (1973) 2, pp. 268–299; Csaba Varga 'Law and Its Approach as a System' *Acta Juridica Academiae Scientiarum Hungaricae* 21 (1979) 3–4, pp. 295–319, reprinted in *Informatica e Diritto* VII (1981) 2–3, pp. 177–199.

2.1.1.2.1. Logical determination Initially—for many centuries—logical submission was considered identical with logical determination.

This trend culminated in the second half of the 19th century, in the "jurisprudence of legal concepts" [*Begriffsjurisprudenz*]. That period witnessed the ossification of codified law, in the course of which the doctrine of legal positivism which determined the European continental legal concepts became simplified to statutory positivism [*Gesetzespositivismus*].

The tenet which considers logical determination possible or inevitable has by now lost its exclusivity and radicalism. Its most recent definition came from Georges Kalinowski, who challenged Chaïm Perelman's view in the debate on formalism versus anti-formalism.[2]

According to this definition, all developments that occur in the law are expressible and construable through logic. "Normative syllogism" is the logical manifestation of the legal event. It must be noted here that the mere allowance for the possibility to trace the judicial actions back to syllogistic conclusions postulates that, on the theoretical level, the result announced in the judicial verdict is the only possible and conceivable outcome. This, and only this, is what can be logically inferred from the law.

From this conviction follow the ethos and ideology of the legal profession, which considers the judge the servant of the law—or the mouth of the law, as Montesquieu put it.[3] The word of the judge is the word of the law. The judge and his verdict are the expressions of the rule of law.

2.1.1.2.2. Normative definition of a legal frame The political upheavals and scientific discoveries of the late 19th and early 20th centuries broke up the rigidity of the concept of logical determination.[4] In the wake of the ground-breaking sociological work (by Max Weber and Eugen Ehrlich), the French free-law movement (François Gény) and finally the logical reconstruction attempted by the Vienna school of neo-positivists (Hans Kelsen and Adolf

[2] The debate between formalism and anti-formalism is surveyed by Joseph Horovitz in his *Law and Logic* A Critical Account of Legal Argument (New York & Vienna: Springer 1972) xv + 213 p. [Library of Exact Philosophy].

[3] The statutory positivist definition of the judicial function is formulated in a classical way by Montesquieu *De l'esprit des lois* [1748], book XI, ch. VI.

[4] For the relationship between fact and norm, as well as their operation, cf. Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985), ch. 5; Csaba Varga *A Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995); Csaba Varga *Paradigms of Legal Thinking* (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures 1996) in preparation [Philosophiae Iuris].

Merkl), the purport of logical submission was defined as the drawing or filling of the actually available normative frames.[5]

The most comprehensive recapitulation of this theory came from Kelsen. According to him, the normative frame is given and blank by definition. Now whatever is blank needs to be filled in. It is the judge's verdict on the concrete case that fills it in. It is that verdict which renders the legal judgement of the concrete case possible within the frameworks of the legal regulations.

Regarding its conceptual construction, this theory, operating with the metaphor of the building steps [*Stufenbautheorie*], was construed as a normative application. This theory rendered relative the conceptual separation of law-making from law-application. It considered discretion the gist of all attempts to fill the normative frame. In short, the adherents of this theory pointed out that each individualizing decision which points towards the concretization of the general normative tenet qualifies as application. However, seen from another perspective, the same act qualifies as creation. Seen from the angle of the general which is thus broken down into something concrete, the direction, method and contents of this breaking-down are far from determined. This move does not lack alternatives either, since in principle it is always possible to act differently. Coming back to the *Stufenbautheorie*, however and for whatever reason this breaking down has taken place, those reasons and ways appear as given for all the subsequent concretization attempts. This is how the normative frame is filled.

This is also how the system of the sources of law is structured. The space between its vertex and medium levels (i.e., between the constitution and the centrally issued decrees) is filled by a mass of general norms which is homogeneous, hierarchic and free from contradictions. Its lower levels (ranging from the locally issued decrees to the judicial and executive decisions) contain the individual realizations or implementations of the above norms along highly varied horizontal fields.

From this it follows that the legal verdict is a responsible personal statement. It is simply the judge's own, irreplaceably individual contribution to the body of the law. It is irreplaceable and individual and strictly creative, because the actual filling in by the judge of the given normative frame can

[5] For the genuine role logic plays in law, cf. Csaba Varga 'On the Socially Determined Nature of Legal Reasoning' *Logique et Analyse* (1973) Nos. 61–62, pp. 21–78, reprinted in *Etudes de logique juridique* V, ed. Ch. Perelman (Brussels: Bruylant 1973), pp. 21–78; Csaba Varga 'Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives' in: *Legal Development and Comparative Law* ed. Zoltán Péteri & Vanda Lamm (Budapest: Akadémiai Kiadó 1981), pp. 45–76; Csaba Varga 'Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven' *Archiv für Rechts- und Sozialphilosophie* LXXVI (1990) 3, pp. 348–366; Csaba Varga 'The Nature of the Judicial Application of Norms (Science- and Language-philosophical Considerations)' in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: Loránd Eötvös University Faculty of Law Project on Comparative Legal Cultures 1994), pp. 295–314 [Philosophiae Iuris].

occur in infinite forms in principle. Now this infinite diversity may also produce incoherent elements and "inconsistencies" in a given horizontal field. In terms of the diversity that manifests itself in the filling of the frame, the only common denominator of the various judicial decisions appears to be that—at least according to their own claims—they are all meant to fill in the very same ready-made normative frame.

2.1.2. Conclusions

These realizations lead us to a number of conclusions. We must face and finally approve these conclusions, no matter how innovative they may seem at first sight.

2.1.2.1. Legal force as a criterion First and foremost, as we have seen, each specific legal case allows not just one decision but rather an indefinite number and variety of competing decisions. This is why the judge's verdict is an act of genuine creation. It is a law-making contribution in the strictest sense of the word. And this is why a forum is needed, which guarantees discernment and clarification, which helps preserving the peculiar nature of the law, and which can tell apart and establish in a legally authentic manner those decisions which are acceptable for filling the frame set by the higher norms, from those other decisions which do not qualify for that role on account of their potential to fill other—in this case: extra-legal—frames only.

The legal force which is also called the principle of *res adjudicata* provides such a forum.

In such a general and rather philosophical sense, the legal force is merely the execution (for the sake of guaranteeing the conformity of norms) of that purely procedural principle according to which it is always the last step taken at the highest attainable level that shall be considered authoritative in the sequence of individual judicial decisions based on a set of given norms. This—and only this—step is recognized as definitive and conclusive by and in the system.

It goes without saying that in this way, legal force assumes new meaning and at the same time a selective power. Besides being the symbolic emphasis of the conclusion, it now also becomes the only officially recognized standard in the field of the competing potential fillers.

However, if our only criterion of the judicial "truth" and "righteousness" is whether this selection and confirmation has actually taken place—i.e., if it is no more an objective relationship or an *in se* and *per se* logical necessity between the higher norm and its frame wherefrom and whereto the breaking-down has taken place—, our conception is bound to change radically. In this

case the legal force (together with the institutional—conventional and consensual—games conducive to it) remains the only factor that is empowered to exercise control over the judicial process.

And this in turn amounts to the self-destruction of the whole formal theory, including both its logic-based and application-based angles.

2.1.2.2. Science- and language-philosophical reconsideration Here we find ourselves confronted with problems related to the philosophy of science and language, as well as with paradigmatic questions inherent in the modern understanding of law.

2.1.2.2.1. Ontology of concepts and texts Concepts and texts undeniably lack the potential in themselves to determine or control our activities. Only we ourselves can determine and control our own activities. In social life, we normally practice this by

- taking seriously the traditions, the professional practices and the need to preserve the existing conventions,
- remaining responsive to the feedback by society, and thereby
- confirming and re-shaping in our activities the various communal, and especially pattern-setting and role-playing traditions.

In relation to this ontological statement, it constitutes a different question with relevance to another kind of relationships that for regulating our activities (and/or also for having them controlled by others in a formally transparent way), we employ (refer to or interpret) concepts and texts as references, i.e., merely as tools of abbreviation of social economy.

2.1.2.2.2. The role of logic The fact that logic is unfit and unable to address the above problem appears to buttress our conclusion. After all, a closer look at logic reveals that it deals not with reality and the relationships inherent in it, but instead with the coherence, compatibility, consequences and lack of contradiction of

- the concepts, as we define them, and
- their relationships, as we define them.

More precisely, logic addresses these concepts and relationships only as they appear upon their application to, or extension over, other concepts and relationships.

2.1.3. Summary

Such is our intellectual heritage. Such is our tradition. Imperfect as it may be, it still manifests the historically motivated yearning by the people and

cultures of the European continent for something tangible in which they could place their confidence and through which they could demonstrate that confidence as independent of them. It is possible that we are simply witnessing a quest for a firm handhold amidst the transmutations of history. In any event, it is an effort toward something solid and concrete that could replace elusive and fluid human relationships with the promise of an objectively demonstrable, immovable pillar.

2.2. Rule of Law and the British-American conception of law

In a way characteristically different from what we have described above, the Rule of Law has trust in social processes. It considers the self-organization, reproduction and permanent renewal of societal processes the foundation on which the legal system rests.

Contrary to the continental concepts, here the historical experiences have not elevated artificial human constructions to the role of buttresses of continuity. Here the law is not embedded symbolically in concrete, but instead rests on the natural self-organization of human processes themselves. Law is committed to the care of the continuity of organic social existence. This is how public opinion, which was so sensibly described by Dicey, is able to serve as the foundation for law.[6]

As is clearly manifest in the term of "administration of justice," the English-language civilization considers "justice" a peculiar form and manifestation of law. And, surprising as it may sound for continental Europeans, this "justice" gets "administered" similarly to the way the governing administration functions (or at least the same term is used to describe both activities).

According to its classical interpretation, Anglo-American legal thinking is distinguished from its continental counterpart primarily by its inductive nature. As opposed to the deductive nature of continental legal reasoning, Common Law approach starts out from individual cases and builds its systemic network from below. And yet, for all its individualistic and case-oriented qualities, it always remains principled and proceeds by reconsidering these principles in their contextures.

In everyday judicial practice, this is known as the method of distinguishing. This approach confronts the judge with all the precedents at his disposal.

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[6] For the function of public opinion, cf. Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* [1885] 2nd ed. (London: Macmillan 1923) and Albert Venn Dicey *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* [1905] 2nd ed. (London: Macmillan 1926).

The judge starts out from his own specific case and, while aiming for a solution that is both just and principled, he directs its processing from the conceptually less general through the precedents at his disposal and the principles reconstruable from them toward the doctrinal channelling of all the concepts involved. However, if and when he finds it impossible beyond a certain point to identify with the suggestions and legacies of the past—i.e., when he sees his specific case as one lacking an archetype—the judge creates a distinct, *sui generis* conceptual scheme for his specific case which differs from all the previously recognized patterns.

From this it follows that in Common Law legal thinking the general does not dominate or overrule the specific. At the same time, of course, the specific is not chaotic. The particular attains its general purport not through its sheer contingency but in relation to the recognized manifestations of the general.

3. THE ROLE OF CONCEPTUAL GENERALITY

The evolution of science shows that the general, abstract concept is a tool employed primarily by the systematizing thought to distinguish. However, there is nothing to indicate that it has *per se* to overrule the process. Its aim is not to occupy a mercilessly superior position. It is destined—primarily in the longer run—to mark out the conceptual field which has evolved from mankind's cognitive activities. In other words, it marks out the possible choices for thinkers and it also outlines the prospects of thinking in the given field. It can become restrictive only in the interest of preserving the traditions. This is why the general, abstract concept is to be considered more of a call for work than an order.

3.1. The paradigm of the concept

3.1.1. The Roman tradition

The general concept appeared in the Greco-Roman legal culture at a rather early stage. However, its purpose was not to create normative systems or axiomatic hierarchies. Seen in their own abstract generality, the norms—if at all formulated—were merely the starting points in legal arguments. Michel Villey described their function as a springboard. The general concept was made the exclusive use of founding and generating ideas. But it was definitely not a shackle in which the heated mind was supposed to cool down.[7]

[7] The classical tradition is described by Michel Villey in his 'Histoire de la logique juridique' *Annales de la Faculté de Droit et des Sciences économiques de Toulouse* XV (1967) 1, pp. 65–82.

3.1.2. The duality of the conceptual world

The rule of the axiomatic ideal has lasted for centuries, from medieval times to the modern age.

Today, modern science philosophy appears to go back to the earlier traditions on several points. In the field of the philosophy of law, some ancient patterns have already re-appeared in the works of Paul Oppenheim, Carl G. Hempel and Gustav Radbruch, along with the recognition—and partly as opposed to the exclusivity—of the axiomatic heritage of the logical treatment of concepts.[8]

As suggested by them, the distinction they have introduced between the concepts of system and the ones of order [*Systembegriffe* and *Ordnungsbegriffe*] re-asserts the theoretical heritage of the axiomatic approach, in so far as the so-called concepts of system mark out places in a system of concepts. For this reason, our response to issues defined by a concept of systems has to turn out to be unequivocal, as it contains the definitive elements of either "here" or "there." The phenomenon that we identify with a concept of systems either is an element of the general at issue, or is not. It either is part of a given system of concepts, or is not. It either contains these concepts, or does not. There is no third possibility. We cannot employ any form of dialectic uncertainty or the random indication of conceptual relations here. As opposed to this, the concept of order indicates a direction only, with reference to the frequency or scarcity (i.e., the condensation or decrease) of the similarities in contents. It attempts to separate clubs of characteristics only. At the heart of most of those fertile ambiguities that we encounter in rational conversations, there are such concepts of order. It would be a massive misinterpretation of their peculiar nature if we wanted them to convey or express any kind of formal identity, entailment or inclusion. Whenever a concept of order is applied, our question concerning the object or notion at issue can only draw one of the following types of answers: "it is more or less similar," or "it is more or less comparable." Concepts of order cannot be used for any purpose other than indicating such an obscure, scattered direction.

There are, however, systems of notions that are formal, and are thus *per se* artificial. Man has created them artificially, on purpose, and consciously in a form alien to reality. And yet, this does not mean that we could contrast

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[8] The duality of the concepts of systems and of orders is treated by Carl G. Hempel & Paul Oppenheim *Der Typusbegriff im Licht der neuen Logic* (Leyden: Sijthoff 1936) vii + 130 p. and Paul Oppenheim *Von Klassenbegriffen zu Ordnungsbegriffen* (Paris 1937) [Travaux du IX[e] Congrès International de Philosophie], as well as by Gustav Radbruch 'Klassenbegriffe und Ordnungsbegriffe im Rechtsdenken' *Revue internationale de la Théorie du Droit* XII (1938) 1, pp. 46–54.

the particular with the general, or that the particular could be conceived as part of the general, as something that is either totally entailed by or totally separated from the general. This kind of thinking is clearly put on forced pathways from the very beginning, and rests on the acceptance of logical submission. Instead of this, the general should be considered an exclusive vehicle for the principled processing of the particular (except, of course, for the artificial and formal languages based upon a specific use of concepts).

3.1.3. "Concept of order" in the law?

In British-American civilization, the concept of law is not identified with what has been "enacted," "made" or "issued" by the legislature. Instead, law is what the court considers to be the law. The court's verdict declares the meaning of what "law" is in a given case.

For this reason, Common Law thinkers consider the "law" to be a kind of tree accumulated out of individual judicial decisions that has been ramifying for long centuries now. Each judicial decision can transform into a precedent, which enriches law and legal culture day by day. Decision-making employs the technique of distinguishing, and therefore it introduces new conceptual divisions. In other words, there is a continued process of enrichment here. Owing to this chain of differentiation, law becomes endlessly ramified. It can never reach a stage of completion, because the new situations generate new conceptual differentiation, which in turn may provide new answers.

It follows from the foregoing that any one stage in the Common Law understanding of "legal development from within" is only related to its preceding stage as one of the contingent generating factors, i.e., genealogically. Neither evolution, nor linearity can be found in such an understanding of legal development. The system of precedents has to be conceived as a sequence of free link-ups, a kind of randomly accumulating mass. (Ronald M. Dworkin quite aptly uses the phrase "chain-writing" to describe the British-American concept of legal development. He likens this process to a literary game in which each word, phrase, paragraph, etc. in a text is contributed to by a different player. As they take turns, each unit will improve on its direct precedent, while it remains impossible to apply any binding rule or prediction to the way the chain evolves.)[9]

Consequently, the Anglo-American concept of the development of the law is completely free of any doctrinal questions. It does not involve any

[9] The metaphor of chain-writing has been used by Ronald M. Dworkin in his 'Law as Interpretation' *Texas Law Review* 60 (1982), pp. 527 et seq., as criticized by, among others, Stanley Fish *Doing What Comes Naturally* Change, Rhetoric and the Practice of Theory in Literary and Legal Studies (Durham & London: Duke University Press 1989), pp. 89–119.

problems relating to the creation of a system. Each of its steps is self-contained. It is not subjected to anything, except the order of the judicial process. And yet, its structure is not anarchic. This concept is aware that its answers promote its own future.

At the same time, this structure of legal development and this concept of the judicial process also entail the philosophical ideation and admission that, in theory, each decision is different and unique.

It is important to clarify at this point that, from a legal technical point of view, any decision can be described as one of three potential alternatives. The court is free to make its choice. The only important point is that it must be able to justify its casual choice, and through a motivation attached to the decision, it must also be able to defend its reasoning before any forum of appeal. Accordingly, the given decision may

- follow the previous decision(s); or, on the contrary,
- may prove to be independent and genuine by filling an independent conceptual slot, different and separate from the conceptual direction of the preceding decision(s); or
- may openly overrule the established precedent(s). In practical terms, this is similar to the pursuance of the previous decision(s). Here the decision also accepts the conceptual differentiation on which the preceding decision rests, but it attaches different legal considerations and/or consequences to the qualifications that originate from the differentiation.

Let me reiterate that here the choice is unrestrained by logic. The actual choice of concepts and conformity to the precedents is determined by the conventions applied. In theory, the court is free to defend all three alternatives indicated above in its motivation.

John Rawls's descriptive concept of reflective equilibrium refers to a similar relationship between principle and adjudication rule.[10] Rawls's message is that a principle can never be exhaustive in itself. The principle cannot rule over anything, and cannot have definite contents either. Approaching the issue from another angle, we can also say that in an individual case the rules of adjudication are never principled in themselves. Only the projection of these principles onto each other can fill the principles with definite contents (and thus lend them well-defined meaning) and make the rule of adjudication principled (which undeniably renders this unique and contingent process a function and consequence of some previously existing general). Only the

[10] The explanation of reflective equilibrium can be found—as suggested by the foundational proposition of Nelson Goodman in his *Fact, Fiction and Forecast* (Cambridge: Harvard University Press 1955), pp. 65-68—in John Rawls *A Theory of Justice* (Cambridge: The Belknap Press of the Harvard University Press 1971), pp. 20–21, 48–51 and 120.

continued projection of these principles onto each other can answer the following questions: What is the principle at issue and "what does it say?" and: What is the rule of adjudication and "what does it say?"

Of course, such an argument presupposes an underlying paradigmatic conviction. After all, the only thing that can make this rational is the presupposition that, in the final analysis, the separation of rule from principle is relative. By separating them, we differentiate between things which, on the one hand, appear directly applicable as compared to the other (this is the rule of adjudication), and which, on the other hand, must be taken into consideration and enforced as a condition in every practical case because they refer to fundamental considerations and coherence (this is the principle).

3.1.4. Different approaches to law? A community of law?

The above considerations suggest that the structure of judicial reasoning, characteristic of the cultures of Civil Law on the European continent (which rests on a conceptual dichotomy and polarization), is ultimately detached from the structure of judicial reasoning, characteristic of the Common Law (which in turn is built upon the random ramifications—i.e., branching off and out—of the potential arguments that apply to any one individual case). In the former case, the conceptual separation of *A* from *non-A* serves as a starting point for conceptual areas that are equal for eternity and in every sense. This is why it gives the impression of entailing the breaking down of a hierarchical construction along conceptual lines. Meanwhile, the latter kind of reasoning openly admits that it applies individual considerations to each individual case. This is why it avoids holding out the promise of any regular systemicity.

At the same time, we have every reason to suppose that this rather dramatically described gap between Civil Law and Common Law and the related fields of legal thinking and legal culture is but a mere appearance. The difference is not insignificant, but it is not substantial either. The genuine difference tends to manifest itself exclusively in the conceptual reconstruction of naming rather. After all, the dichotomic structure resting on a strict conceptual differentiation which we have described in connection with the legal thinking characteristic of Civil Law, carries the *per force* meaning only in its formal logical projection of that what we are witnessing here as a separation into two areas of equal volume and extension and equal theoretical significance. In effect, all this can be just as random and unjustified by any kind of separation of contents as the Common Law conceptual ramifications can be determined by purely individual considerations.

If this is the case, then what we are discussing here is hardly more than a set of different verbal manifestations that have their roots in different conceptual cultures.

Coming back to the dichotomy of rule and principle, our conclusion is that they are equally present in that very dichotomy at any given time. That dichotomy enables us to say that legal culture is more than just a mass of rules of legal adjudication. Such law, consisting of nothing but such a mass of rules, could only be conceived of as a mechanism operated by rule-automatisms.

In other words, rule and principle co-exist in all legal cultures. What may differentiate one legal culture from the other is, instead, the proportion between rules and principles, and also their respective potentialities. However, we have to note that even this difference can only be described as we perceive it through our experiences. There is no difference of any kind with regard to the fact that in both cases it is the exclusive competence of the judge to determine which of the available alternatives he wants to employ and how. This decision is normally based on necessity, recognized interests or simply the accepted rules of the legal profession.

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