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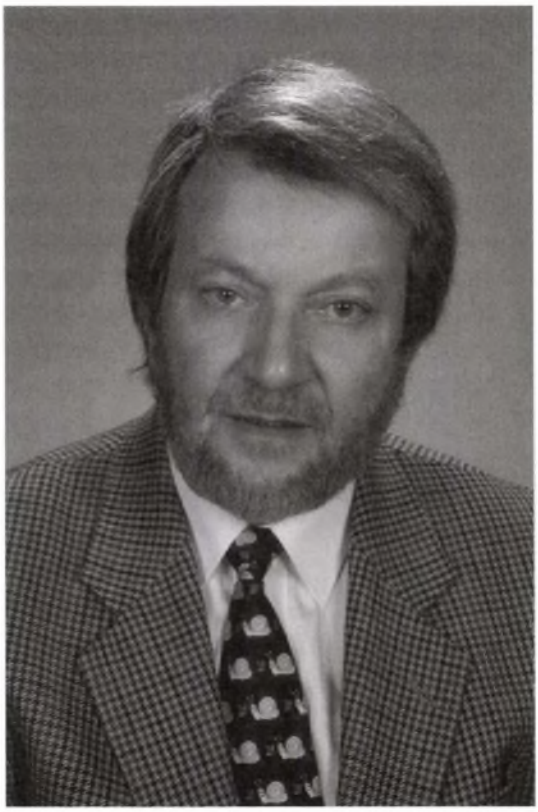

THEATRVM LEGALE MVNDI

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DE PETRO PÁZMÁNY NOMINATÆ

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PÉTER TAKÁCS

THEATRVM LEGALE MVNDI

SYMBOLA CS. VARGA OBLATA

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Acknowledgements

As editors of this book we had the aim to arrange a collection of essays that truly reflects the international reputation of Professor Csaba Varga. Colleagues and friends have sent their contributions not only from Hungary and the neighbouring countries but also from other countries of the European Union, as well as from America and Asia. The essays, written in English, German and French, cover various fields in legal scholarship, ranging from comparative law, theory and philosophy of law, through theory of state and political philosophy to legal history.

The present volume is published in cooperation of the Law Faculty of the Pány Péter Catholic University and the Eötvös Loránd University. It would not have been possible to publish a volume worthy of the present celebration without the generous support from our two Faculties. We have received valuable help from Justus von Daniels, Uli Frey, Hendrik Griffioen, Tünde Hovanyecz, Erzsébet Könczöl-Kiss and Keziban Kiliç in translating and proofreading the texts. We would like to express our gratitude to them all.

The Editors

Preface

It is indeed a pleasant obligation for the dean of the faculty to join the celebration with a preface when the most praiseworthy teachers of the Pázmány Péter Catholic University reach the age of 60, 65 or 70 years – having made their oeuvre but still at the peak of their creativity – and are honored by their colleagues with a collection of essays. This volume is dedicated to Professor Csaba Varga whose admirable career confronts the author of a preface with the problem not of finding what to speak of but of considering what to leave out from the list of his achievements in order to keep the limits of the genre. The reputation of Professor Varga within the field of jurisprudence is well illustrated by the fact that when contacting foreign law schools or legal scholars, in Europe and overseas, we always find that his name and works are known, his knowledge is respected almost everywhere, which cannot be told of every jurist in this country.

At the beginning of his career, more than 40 years ago, Csaba Varga has joined the Institute for Political and Legal Sciences of the Hungarian Academy of Sciences and started his work in legal theory and philosophy. This field of study has become his devotion and he has been faithful to his researches at the Institute ever since. This was a deliberate choice of his – and an excellent one. The theoretical foundations, systematization and epistemology of law, the study and comparison of legal cultures, the exploration of philosophical, social, anthropological and other aspects provide their experts with knowledge that never becomes out-of-date. One often perceives law as supporting socio-political changes, sometimes in a rather servile way, at the disposal of political fashions. This, however, cannot result in anything long-lasting. Law cannot survive without its ancient roots without passing on its meaning and system of signs: it has, and should have some deeper foundations. On the other hand, by recognizing law's systematic features and comparing legal systems one can improve the everyday functioning and efficacy of law. In this sense, theory is far from being an end in itself: it is the key to a stable and operative legal system. Political contacts are but transitional while thinking and theoretical foundations last forever. Professor Varga has

devoted his life and scholarly profession not to the ephemeral but to the solid foundations – I dare to say, to something what is "eternal" in law – and his hopes did in no way fail him.

Theoretical research had to be followed by the passing on of knowledge through education. The first place of his teaching was the Eötvös Loránd University but as soon as the foundation of the Catholic University came into sight, Professor Varga chose, without hesitation, the institution more appropriate to his moral values of a devoted catholic. He did not only contribute to the establishment of our University and Faculty with the organization of teaching in legal and political philosophy, although this would be enough reason in itself for his colleagues to dedicate this volume to that period of his career. He supported the project in an even more active way. Being the right person in the right place, chief counselor to Prime Minister József Antall, he had the opportunity to play an active and leading role in the founding of the Catholic University and later of the Faculty of Law. One cannot overestimate his part and cannot be grateful enough to him. As the founding chair of the department, he has been teaching courses which build up the theoretical foundations of catholic legal education. He has set up a manifold curriculum in legal and political philosophy – which is unique among Hungarian law schools. When starting these courses, Csaba Varga was conscient that catholic legal education can be distinguished, become preeminent among other universities, by building the subjects which are closer to legal practice on solid moral and intellectual foundations. In the present state of the unstable legal system, it is the fundamental principles that can offer a grip to our students, help them to tide over and draw the consequences of the unreasonably fast and often ill-advised changes, and to get a better look at the following steps – in a word, to be much better prepared to their various jobs in legal practice.

Research and, closely related to it, teaching are, accompanied by an exceptionally prolific publishing activity in the career of Csaba Varga. Its fruits are accessible for the international academic community as well, since his works have been published in various forums in many languages. Publishing activity cannot be complete without helping others to publish their results – stations of this route are marked by his membership in several editorial committees and his editorship of various book series. His role as the Chair of the Library and Publishing Committees of our faculty fits well into this picture. I should also mention here that teaching, publications and support to his colleagues have contributed to make the Legal Philosophy Department a real intellectual workshop whose manifold activities link to all fields of legal

theoretical research and that provides for a new generation of scholars by recruiting gifted young researchers.

It is impossible to enumerate all the merits of the jubilee within the limits of a preface. In addition to and also as a natural consequence of what is mentioned above, one should not forget from the long list of his activities and functions the numerous scholarships, conferences and lectures delivered abroad, his role in the professional and cultural life, the organization of international university relationships in the TEMPUS programme, his function at the Faculty as Deputy Dean, memberships in the Board of the Faculty and in other Committees, as well as his Széchenyi Grant Award.

We congratulate Professor Csaba Varga and express our friendship, respect and gratitude for his work, praying for God's blessing on his further creative activity which can be well expressed with a passage by Yehudi Menuhin: "Life is an art and every second should be a moment of creation."

May 2007

Gyula Bándi
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Abbreviations

Journals and Series

AAS – Acta Apostolicae Sedis

AJH – Acta Juridica Hungarica (Budapest)

AJP – Acta Juridica et Politica (Szeged)

APD – Archives de Philosophie du Droit

ARSP – Archiv für Rechts- und Sozialphilosophie

ARWP – Archiv für Rechts- und Wirtschaftsphilosophie

JK – Jogtudományi Közlöny [Review of Jurisprudence] (Budapest)

MJ – Magyar Jog [Hungarian Law] (Budapest)

RJ – Ratio Juris

Books

Dig. – Justinian, *Digesta*

EN – Aristotle, *Ethica Nicomachea*

ST – Saint Thomas Aquinas, *Summa Theologiae*

Reforming the Hungarian Lay Justice System

Attila Badó (Szeged) – Mátyás Bencze (Szeged, Debrecen)

Law is a two (maybe more) sided phenomenon. On the one hand we can say that law is a professional institution. Dealing with it requires a high-level expertise as homeness in legal reasoning, knowledge of rules, skill in legal doctrines, etc. However, law does not exist just for fun for lawyers but all citizens have the duty to obey it. That is, the rules of law determine the significant part of our acts in the public sphere, as Dworkin says "we live in and by the law".[1] This fact may be the most important reason which justifies the presence of the lay element in the judicial decision making process. Laypersons can have knowledge about the social background of a case which can help a professional judge to make the right decision not only with regard to the doctrinal correctness but moral sense.[2]

Nonetheless, we must remember that no legal institution can be judged taken out from the particular historical context, legal system or structure of jurisdiction. For instance, it might prove to be difficult to argue against the jury if it plays an important political role in the independence movement of a nation and defies the repressive power through its verdicts. However, it might prove to be difficult to argue for the jury if it functions primarily as a means of repressing ethnic minorities in a certain era.

We will discuss a particular form of lay justice, which is present also in Hungary, by scrutinizing the dysfunction due to the peculiarities of the Hungarian society and jurisdiction. The reason for this investigation is that, in our opinion, in Hungary there is a large gap between the intention expressed by the law and the everyday practice concerning this institution, established in other countries as well. We would like to emphasize, however, that we

[1] R. Dworkin *Law's Empire* (Cambridge, Mass.: Harvard U. P. 1986) [hereinafter LE], vii.

[2] See Z. Bankowski "In the Judgement Space: The Judge and the Anxiety of the Encounter" in Z. Bankowski – J. Maclean (eds.) *The Universal and Particular in Legal Reasoning* (Ashgate: 2006), 25–40.

would like to avoid any statements that could be interpreted as the general critique of this type of lay participation. We are convinced that under the same rules, but in a different social setting, and under different form of adjudication, the same institution could very well function efficiently. We also claim that there is an urgent need for the reform of the Hungarian lay justice system.

1 Historical Precedents

In Hungary, it was already in the 19th century that the juries were established and those debates took place which, with a certain of emphasis, enumerated the most common arguments for and against the necessity of the lay judges.

Those who know the history of Hungary will not find at all curious that at this time (and as it will be discussed later on, also at the beginning of the 1990s) it was the political role of the jury that became the focus of the contemporary discourse. Similarly to Tocquville's or Justice Black's arguments,[3] the main reasons for supporting this institution were the following: first, the importance of creating a counter-balance to the executive and legislative power; second, making popular the justice system.[4]

The system of juries was introduced temporarily during the 1848 Hungarian revolution against the Habsburg dynasty, and re-introduced after the fall of the revolution, following the forced compromise (1867) with the Austrians. (Although juries were introduced during the revolution concerning cases related to the press, they were quickly abolished in 1852, under the unconcealed Austrian dictatorship.) It is therefore not surprising that, similarly to American settlers in early times, the jury could be regarded as a peculiar symbol also by the supporters of the independence of Hungary. Furthermore, at the time when the development of the bourgeoisie, though with a certain delay, finally started and the bourgeoisie wanted to participate more actively in the administration of public affairs, the jury could prove to be an excellent place for achieving this objective.

The ephemeral jury system in Hungary was based on the French jury system imported through the Germans. The similarity is demonstrated mostly by the composition of the jury and the selection of jurors. The jury consisted of three professional judges and 12 jurors, but after the random selection of jurors the prosecution and the defense could drop out disfavored persons

[3] Justice Black in Green v. U.S., 356 U.S. 165, 1958, at 215–6.

[4] Gy. Bónis – A. Degré – E. Varga *A magyar bírósági szervezet és perjog [The Hungarian court system and the law of litigations]* (Zalaegerszeg: [2]1996).

in equal numbers. It was the population on which the selection was based that differed from the contemporary French system, as the number of those who could be selected for jury service was more restricted than it was in the contemporary France.[5]

2 *Lay Judges during the Period of the One-Party System*

The Hungarian jury system was swept away by the First World War, as after World War I it did not serve the interests of the Horthy-regime to have a court which could be the source of conflicts, since this court might even disregard the laws if something offended against its sense of justice.

After the Second World War, however, lay judges began to play an important role again. The transformation of the Hungarian judiciary started even before the communist takeover, and had as a consequence that this field, which was earlier relatively depoliticized, became an ideological battleground and, with respect to jurisdiction, the participation of people's representatives as lay judges was considered by the Communist Party as one of the most efficient weapons in the ideological struggle. After the war, lay participation was realized, on the one hand, in the People's Tribunals, established for the investigation of war crimes, and on the other hand, in the traditional courts in the frame of a lay assessor system.

2.1 People's Tribunals

The people's tribunals and their institution for appeal, the National Council of People's Tribunals, were set up on 25 January, 1945, before the end of the war by the Provisional Government. Hungary was obliged by the Truce of Moscow to establish people's tribunals and this obligation was reinforced by the Treaty of Paris, which was the closure of World War II. People's tribunals were organized at the seats of law-courts. The leaders of the councils were appointed by the Minister of Justice from among practicing lawyers and the six lay assessors were proposed by the five parties composing the so-called Independence Front and by the trade unions. The judges of the people's tribunals had a three-month-long mandate, which was renewable. The first judgments were passed without legal authority. Later on, the authority of the people's tribunals was extended to cases concerning the threat to peace. The new institution was intended to be a provisional one, and under the first act

[5] A. Badó "A francia esküdtszékkel kapcsolatos dilemmák" [Dilemmas concerning the French jury] *AJP* Szeged (1999), 1–26.

on people's tribunals, these courts would operate only until the restoration of the juries. The operation of the people's tribunals marked the beginning of making mockery of justice.[6] The sheer fact that in this period the people's tribunals had to deal with an incredible number of cases compared with similar courts established in other countries, revealed that besides punishing the war criminals these institutions served other objectives as well, namely the enforcement of party interests and the removal of political opponents.[7] Under cover of the punishment of war criminals which was required by the Western powers, the Communist Party led by Mátyás Rákosi began the elimination of the other parties with the help of these tribunals. All of a sudden more and more seditious elements were discovered among the members of the victorious political parties through the proceedings of people's tribunals, mostly on the basis of false accusations. As a consequence, the members of the democratic parties either joined the Communist Party or left the political scene in order to avoid retaliation. Looking back it is quite difficult to understand how Rákosi and his party managed to control the institution of people's tribunals to such an extent, while the people's judges were delegated by five parties. This can be partially explained by the fact that the Communist Party aided by the Soviets had filled the positions of council's leaders and those of people's prosecutors by their party members before the democratic parties could react. Furthermore, the communists got some of their party

[6] Before the people's tribunal, the prosecution was represented by the people's prosecutor nominated by the Minister of Justice. These were in many cases non-qualified lawyers who made serious mistakes determining both the legal issues and facts of cases. Their rhetoric was based on the pretentious slogans of the contemporary press. The strong position of the prosecution against the defense was striking. The words of the intimidated or party-loyal counsels resembled rather the speech of the prosecution than the speech of the defense. When the counsels represented too strongly the interests of the defendant, they were either reprimanded by the prosecutor or the judge or deprived of the right to represent the defense. Even the question whether the defendant had the right to choose his/her counsel was a matter for debate. The Bar of Budapest, on the pretext of conforming to public opinion, decided that the defense of war criminals was to be represented only by an appointed counsel. At the time when one could choose one's counsel there were still courageous counsels for the defense. However, after the introduction of the system of appointed counsels it became possible to select the counsels on a political basis. The president of the people's tribunal, who initially did not have the right to vote, was basically responsible for the instruction of laypersons and for the leading of the court hearing. However, the president had a large influence on the sentence. It was him who informed the lay judges about the law as it applied to the case, and about the possible sanctions. Consequently, it was not irrelevant for the Communist Party who held this position.

[7] Between 1945 and 1950, about 10000 people were accused in Austria, 17000 in Belgium, less than 20000 in Czechoslovakia, and almost 70000 in Hungary.

members to join various democratic parties and asked them to weaken these parties from inside. Finally, they had control over a considerable number of judges, who were intimidated by the threat that their past would be revealed. Such abuse of the justice system were either planned by the communists led by Rákosi or obeyed the explicit orders of the Soviet leadership. The activity of people's tribunals therefore was different from that one might expect considering the proclaimed ideological objectives, thus instead of fascists it was often the members of the victorious democratic parties who were accused. After 1949 the people's tribunals began to lose their importance, since their role was taken on by traditional courts. It was only after the 1956 revolution that they became significant political means again, when the conviction of revolutionists had to be hidden behind the mask of "the people" to legitimize the regime.[8]

2.2 The Lay Assessor System

In the course of 1948–1949 a turning-point came about when the communists, who had taken over the power, introduced a governing system following the Soviet way. At this time the new system required more definitely the reorganization of jurisdiction, and this marked the beginning of the epoch of socialist legislation. The process of legislation started with the reform of substantive and procedural law on the basis of the Soviet pattern. The modern codes having come into force under the Austro-Hungarian regime were gradually replaced. At the same time it was begun to have been simplified the highly complex four-level jurisdiction system so that could have been created a new jurisdiction system fitted the party organization and the administrative system. Act XI of 1949, which limited the possibilities of appeal in the criminal procedure, also ruled on the introducing of the lay assessor system, the authority of which was extended to other fields of law later on. This meant that the professional judges formed judicial councils together with the so-called lay assessors on various levels of the court system, in a way that the judges had equal rights within the council generally composed of one professional judge and two lay assessors.[9]

This system was practically the adaptation of mixed tribunals, present in

[8] Z. Fleck *Jog a diktatúrában. Jogszolgáltató mechanizmusok a totális és poszt-totális politikai rendszerekben [Law in dictatorships. Administration of justice in total and post-total political systems]* (Budapest: 1999) [PhD Dissertation]; I. Rév "A koncepciós színjáték" [The show trial play] *Rubicon* (1993), 3.

[9] T. Zinner "Háborús bűnösök, népbíróságok" [War criminals, people's tribunals] *História* 4 (1982), 2.

Germany and other European countries, to the Hungarian legal system. It is interesting to note that this frequently criticized institution proved to be more persistent than anyone would have expected, given the fact that it is still in existence substantially in the same form. According the first act on lay assessors, this form of administration of justice was initiated on the one hand to ensure that the opinion, the sound view of life, and the natural sense of justice of the working people play a role during court hearings and in the passing of judgments, and on the other hand to make possible the democratic control of the judge. Taking into consideration the particular political context, it is not difficult to realize the objective of the latter function of people's tribunals. The aim was by no means to supervise the impartiality or the incorruptibility of the judge, but to have control over the judges socialized in the former system. After the communist takeover the judges appointed under the former regime were progressively intimidated and removed. This could happen by assigning lay judges efficiently trained by the party leadership, who were to work with the professional judge, and had to report on his activity and obstruct his work. This was made possible by the new law which from the very beginning gave equal rights to the lay assessor and the professional judge. That is to say, if the law ordained the participation of the lay assessor, professional judges and lay assessors had to adjudicate strictly together in every phase of the procedure from the determination of issues of fact and law to the passing of the judgment.

After the Stalinist era, however, this institution gradually lost its political significance, and the dominance of professional judges became more and more manifest. In other words, from the 1960s, the stabilization of the communist regime and the considerable changes in the composition of the judicial society made it unnecessary to use lay judges for political reasons. With the emergence of loyal judges with a more and more technocratic view, the lay persons lost their importance.

Former research from a sociological view carried out by Kálmán Kulcsár[10] at the beginning of the 1970s already demonstrated this trend. The results of these studies show that the lay assessors' contribution to the making of the judgment is exceptional. Although numerous reasons of this dysfunction were revealed by the researchers, the most important one proved to be the process of selection, which usually made it possible to have been "elect" elderly, retired people, who would not have been considered to "disturb" the work of the professional judge.

[10] K. Kulcsár *A népi ülnök a bíróságon [Lay assessors in court]* (Budapest: Akadémiai 1971).

3 Lay Assessor System after the Change of the Political System

It becomes obvious from the above discussion that in Hungary lay participation cannot be regarded as a great success of the 20th century. What is most surprising is the fact that while most institutions discredited in a similar way were abolished or transformed, the lay assessor system is still in existence although it is widely known that this system does not work properly and that the recruitment of the necessary number of lay assessors causes constant problem.

Almost immediately after the free elections in 1990, there was a demand for the reform of the lay justice system, the main objective of which was the introduction of the jury in Hungary.[11] After the dictatorship, this demand seemed to be reasonable for many people, and they argued by underlining only the political advantages which were proclaimed by authors from Lord Devlin[12] to the ones quoted above. Supporters thought, the legitimacy of jurisdiction should have been reinforced by increasing the role of voters in the same way as the election of members of Parliament created the legitimacy of legislation directly, and that of the executive power indirectly. The political advantages alone could not convince those who had ambivalent feelings towards the jury in terms of professional competence. This was the reason why the proposals on the introduction of the jury were removed from the agenda in spite of historical traditions.

However, the arguments managed to weaken or wipe out those efforts which would have set out the future of Hungarian judiciary in the opposite direction by intending to eliminate the role of lay persons.

Finally, due to the practical problems of the selection of lay assessors, the lay assessor system was modified only to the extent that the number of cases requiring the participation of lay judges was limited and that the term *népi ülnök* [people's assessor], typical for the socialist era, was replaced by the term *ülnök* [assessor]. However, this institution remained pseudo-democratic and practically unnecessary in its present form.

3.1 Rules Presently in Force...

One of the greatest attempts at the reform of the Hungarian judiciary was made in 1997. The alterations affect fundamentally the court organization

[11] G. Botos "Az esküdtbíróság újbóli bevezetéséről" [On the reintroduction of the jury] *Rendészeti Szemle* (1992) 2, 11–51.

[12] P. Devlin *Trial by Jury* (London: Stevens and Sons 1956), 164.

and the external administration of courts. (The court system became more complex and the role of the Ministry of Justice was taken over by the National Judicial Council, which is composed mostly of judges.) The reform also contained changes concerning the lay assessor system. (We hold, however, that the reform was not far-reaching enough to solve this problem of the Hungarian jurisdiction.)

Under the new law, the assessors work together with judges in the judicial process. They obtain this position by election, based on the principle of people's sovereignty. The lower age limit to be able to become an assessor is raised from 24 to 30. This alteration is parallel with the rise in the lower age limit of becoming a judge. The selection of the assessors follows principally the former regulation. The assessors are nominated by Hungarian citizens having domicile under the jurisdiction of the court and a right to vote, by the local governments under the jurisdiction of the court and by non-governmental organizations with the exception of political parties. Depending on the level of the court which assessors will be assigned to, they are selected by different bodies of local governments. The law did not change the four-year-long mandate of the assessors. The preparation of the selection and the decision how many assessors should be elected for particular courts belong to the authority of the National Judicial Council. The date of the election is set by the President of the Republic. The assessors are assigned to the particular judicial councils by the president of the court. In contrast to the former regulation the new law provides in details on when and how the term of office of the assessors expires. The assessor is allowed to hold this position until the age of 70. In the judicial process the assessors still have the same rights as the professional judges.[13] Furthermore, there is a raise in the inadequately low stipend, which is thereby adjusted to the responsibility characteristic for the position of a judge.[14]

3.2 ... the Reality...

As a result of the modification some positive alterations can be observed. (The upper age limit of 70, for instance, excludes the possibility that really old people incapable of following the events of a court hearing become lay assessors.) However, there is still a large gap between the ideal form of this

[13] However, the equal rights are not parallel with equal obligations. The assessor is allowed to be the member of a party, which is also reinforced by a decision of the Constitutional Court: 51/1992. (X. 22.)

[14] Paras. 122–128 of Act LXVII (1997).

institution and the reality. In our opinion, the new rules did not change essentially this institution, which thus remained dysfunctional.

Yet, we are convinced that, taking into consideration the rules of Hungarian procedural law, mixed judicature in the proper sense of the word is needed on every level of the court system. One should not be keen on legal realism to be aware of the risk of letting alone a judge making decisions which have a large influence on the lives of citizens, as such decisions depend highly on the actual state of mind and powers of concentration of a single person. Without the intention to take part in the debates on the necessity of lay participation, we hold that due to budgetary limits on the lowest level of the Hungarian court hierarchy it is the only way to meet the requirement of judging in council taking lay participants into the judicial process.

Thus the above-mentioned problem manifests itself mostly in the so-called local courts representing the lowest level of the court hierarchy. These courts have to deal with the majority of the cases. However, these are the courts where we can find many novice judges (28–35-year-old) who have to make their judgment alone or in the more serious cases together with two lay assessors. [15]

Furthermore, they have to deal with hundreds of cases at the same time without an adequate number of administrative assistants. Nevertheless, concerning criminal cases the Hungarian procedural law gives especially great power – particularly with respect to the consideration of evidences – to the judges in the courts of the first instance. (The part of their judgment related to the consideration of evidences cannot be changed in principle by the appeal court.) In such a situation it would be of paramount importance to lessen the burden of responsibility lays upon the professional judges and not to let decide alone on people's future. At present, lay persons are not ready to assume a role with such high responsibility. Despite the legislators' intention for them to have such a role it is obstructed by the selection process, by the survival of lay judges' behavior developed in the socialist era, and by the prejudices of the professional judges etc. As we have already mentioned, it would be possible according to law that the lay persons outnumbering the professional judges, and theoretically they can reach a decision opposed to that of the professional judge. However, there are hardly any examples in the judicial practice of the past few decades where the professional judge, disagreeing with the judgment, expressed his dissenting opinion attached

[15] In criminal proceedings in case of crimes which can be sanctioned by not more than three years of imprisonment.

to the court's decision.[16] Yet, according to the judges the lay persons might make useful remarks especially if they have better knowledge of an issue than the professional judge owing to their profession. The results of our previous study[17] show that the judges do not consider the lay persons as equal partners, they are not involved in the passing of decisions, which is not expected by the majority of assessors either. Even those assessors who initially are active to a certain extent shortly take on a passive role, adapting themselves to the traditions, and become mere observers of the events. Taking all this into consideration it is not surprising that assessors are often mockingly called "ornaments" by the lawyers. This ironic attitude was also reinforced by the amendment of the existing law in 1995. The situation of the assessors is best characterized by the fact that their replacement has no consequence in terms of procedural law. That is to say, assessors can be changed freely during the procedure. Should the date of the court hearing not be suitable for one of the assessors, s/he can be replaced by the court leader in charge of the assignment of the assessors. Knowing what happens in practice we can point out that the present form of the lay assessor system is nothing but the caricature of people's participation. This is why we find that a comprehensive reform in this field cannot be further postponed in order to give sense to the existing institution by acknowledging the necessity of mixed tribunals.

3.3 ... and Reform

3.3.1 Reforms Fitting the Present System

In our view the problem could be solved by making the assessors' service civic duty,[18] by elaborating carefully the selective mechanism, and by ensuring an appropriate remuneration for the assessors. We are convinced that in order to achieve the above-mentioned objectives the Hungarian lay assessor system should adopt of solutions used in juries and lay assessor systems in other countries.

At present those become lay assessors who would like to. This intention is usually fueled not by an insatiable desire for participating in the administration of justice but rather by the modest stipend or by the "appetitus societatis". It was demonstrated by the last few assessors' selections that

[16] "Az ítélkezők felelőssége" [The responsibility of those who administer justice] *Magyar Nemzet* (1999) [24th of March], 7.

[17] A. Badó – Zs. Nagy *Az ülnök szerepe a bíróságon [The role of assessors in court]* (Manuscript).

[18] Or at least it should become an activity giving such an amount of social esteem that it would become really possible to choose from the applicants.

there are much fewer candidates for this position than it would have been necessary.[19]Even today, the overwhelming majority of the candidates are senior citizens, who represent a particular segment of society. It might sound strange considering the efforts made by other countries and especially by the United States to enforce the "fair cross-section requirement" and the constitutional requirement of impartiality. Although the theoretical and practical problems of the selective mechanism are known,[20] it is evident that experiences from the USA, from France and other countries could prove to be useful. It is unacceptable that with the exception of the court leader responsible for the assignment of the assessors, no one else has the right guaranteed by procedural law to make objections to the choice of the assessors. We do not intend to give work for the sociologists and psychologists,[21] but we think that the "voir dire" procedure could be applied with certain restrictions in the case of assessors.

Other patterns related to the passing of judgments ensuring the responsibility and the real participation of lay persons could also be applied. For instance, secret voting on certain issues, on guilt, and on the sanctions could be made mandatory. We are convinced that through such modifications carried out following the suggestions of experts the present situation could be altered in a way that the positive effects should be felt by the professional judges as well.

3.3.2 A possible Way of a Radical Reform

However, as we mentioned above the most serious problem with the present Hungarian lay assessor system is the passivity of the lay assessors in the trial. We cannot hope that the assessors' mentality will change radically in the future. Thus we need a structural reform to prove a more intensive participation of the laypersons.[22]

We hold that it is possible to divide the legal cases into two groups. Cases with less significance (e.g. so-called minor offences in criminal law) may be judged by lay judges solely supported by a qualified lawyer (this would be

[19] "Lassan befejeződik a laikus bírák választása" [The election of lay judges slowly comes to an end] *Népszava* (1997) [30th of October], 6.

[20] M. S. Zuklie "Rethinking the Fair Cross-Section Requirement" 84 *California L. R.* (1996), 101.

[21] Sage, W. "Psychology and the Angela Davis Jury" *Human Behavior Magazine* (1973) [January], 56–61; M. Sams Jr. "Persuasion in the Voir Dire: The Plaintiff's Approach" in G. Holmes (ed.) *Persuasion: The Key to Damages* (1969), 3–8.

[22] We would like to thank István H. Szilágyi for sharing his thoughts about this subject.

similar to the English system of magistrates' courts). The Act on Criminal Procedure in force allows the assessor acting alone in one particular case: the assessor may try to conciliate the defendant and the offended party in certain cases (defamation, misdemeanor of simple battery, etc.). Experiences regarding this activity clearly show us that assessors can deal with these cases in the same manner (or more effectively) as professional judges do. Thus we have a good reason to trust the laypersons' ability to judge such cases.

By expanding assessors' competence, on the other hand, the workload of professional judges caused by the huge number of different cases which they have to deal with could be eased. Thus they could have enough time to focus on cases of great importance.

Our other question is how the participation of the lay element could be improved in the latter groups of cases. We have to dig deeper to answer that.

We find that the most serious problem is caused by the fact that the present form of our law was mainly established in the 19th century, including both the most important rules of the civil and criminal law, and the justice system. That is the reason why our law is designed to the social situations of that time. One might say that judges at the time were able to make the right decision if they listened to "common sense" besides their legal expertise.

Nevertheless, today's law of our days must face some serious challenge which are generated by the appearance of multinational enterprises, globalization, internet, environmental problems, and above all the high-level specialization in almost every field of life. Debates in any of the beforementioned phenomena may be brought to courts. Each of them has its own particular nature. We think it is impossible for any member of the judiciary to be both professional lawyer and expert of one or more of these fields at the same time.

Thus what judges need is the experts' help from outside the law. Of course, in the existing procedure systems any judge can be supported by experts in finding out the statement of facts. However, this is not enough, because a judge in lack of proper skills can neither ask the correct questions nor can understand or control the opinion of the expert. Moreover, judges often have to apply rules which are understandable only to persons who are taking part in a certain field of practice (e.g. stock exchange, military service, agriculture, etc). And in those cases s/he must not call to any experts for help

because these problems are qualified not as "matter of facts" but as "legal issues".

We hold that there is a possible way to solve this problem; namely the experts should be included in the whole legal procedure before the court from the beginnings. They should have the same rights as the assessors have now (hearing witnesses, taking part in the final decision making, etc). Experts in complicated cases should play the same role as laypersons do in simple cases, since they know the special social context of those cases. It goes without saying that this kind of knowledge could be of great importance to legitimate courts.

We are fully aware that carrying out this plan would take a long time and on behalf of the legislators a grim determination would be necessary. Nonetheless, we hope they can rely on both the support of the professional judiciary as well as the studies of legal sociologists and other experts in making of an efficient lay justice system.

East Asian Encounter with Western Law and Emergence of Asian Jurisprudence

Chongko Choi (Seoul)

Introduction

East Asia, which usually is understood to include the vast territory and population of China, Korea and Japan, has long been proud of its splendid ancient civilization. Scholars agree that East Asian civilization can be compared with the ancient Greek-Roman civilization, which established brilliant classics in ancient times.[1] However, East Asia has a unique and dynamic history, which has seemed to be the "other" of Western civilization.

In the late 19th century, Western civilization met East Asian civilization and brought with it "technology and international law".[2] The long tradition of East Asia seemed to be a dust to abandon. Scholars thought East Asian laws should be displaced by Western laws and jurisprudence, and East Asian political and legal institutions changed into the Western ideal of democracy and Rule of Law.[3]

[1] For example, A. Kaufmann "Vergleichende Rechtsphilosophie am Beispiel der klassischen chinesischen und der klassischen abendländischen Rechtsphilosophie" *Festschrift für Werner Lorenz zum 70. Geburtstag* (Tübingen: 1993), 635–48.

[2] International law was first a threat to East Asian intellectuals. On that, Ch. Choi "Reception of Western Law in Korea" in Idem *Law and Justice in Korea: South and North* (Seoul: Seoul National U. P. 2005), 137–64.

[3] There is a great deal of research on this topic. G. B. Sansom *The Western World and Japan* (New York: 1965); J. Fairbank *The United States and China* (Cambridge, Mass.: Harvard U. P. 1971); K. Zentaro *Rezeption und Fortbildung des europäischen Zivilrechts in Japan* (Frankfurt am Main: 1970); N. Yoshiyuki "Reception of Western Law" in *Introduction to Japanese Law* (Tokyo: Tokyo U. P. 1976), 41–62; M. Rehbinder – J. Sonn (hrsg.) *Zur Rezeption des Deutschen Rechts in Korea* (Baden-Baden: 1990); S. Latouche *The Westernization of the World* (Oxford: 1996); K. Takeshida "The Modernization of the Japanese Legal System" *Kansai University R. L. & Pol.* 19 (1998), 1–12.

Nonetheless, intellectuals in East Asian countries thought seriously about how to confront Western values and civilization. Attitudes varied even within the same East Asian countries. At this time, lawyers and legal scholars in the current sense emerged.[4] After conducting the great experiment for over one century, East Asians begin to realize that Western laws and jurisprudence are not universal, but historically and regionally bounded. East Asian scholars tried to build up their indigenous legal systems and jurisprudence. As Ernst Hirsch aptly pointed,[5] foreign law took over one hundred years to root into the East Asian soil. I would like to call this phenomenon the emergence of Asian jurisprudence. I will describe the historical development of this process and will explain the basic features of Asian jurisprudence.

1 Chinese Encounter with Western Law

The Chinese legal family (*Rechtsfamilie*) or legal culture (*Rechtskultur*) was one of the four major legal families along with European Roman law, Anglo-American law and Islamic law.[6] Its influence extended to Korea, Japan, and South East Asian countries like Vietnam. Based on the traditional natural economy and fostered by the Confucian culture, the Chinese legal family could not survive when confronted by modern Western civilization. In order to be treated equally with other countries in international affairs – particularly to abolish the extraterritorial practice of foreign states – the Ching government had to reform its legal system. But the government leaders did not know what kind of legal system to introduce. Just like a hungry man is not choosy about his food, government leaders studied and introduced whatever Western law they happened to know. In those days, China could not even find one person who knew the terms "common law," "civil law," and "international law." Sometimes the government could not find capable interpreters when negotiating with Western powers, let alone well-trained lawyers who spoke foreign languages. So all Western laws were regarded as superior and introduced. The process of Westernization proceeded in a confusing and haphazard fashion.

At this juncture, the name of an American missionary must be men-

[4] Max Weber argued that there had been no *Juristenstand* in China, in his book *Konfuzianismus und Taoismus, Gesammelte Aufsätze zur Religionssoziologie* (Tübingen: 1920) I.

[5] E. Hirsch *Rezeption als Sozialer Prozess* (Berlin: 1981), 3.

[6] There are a number of theories on legal family. The Chinese legal family never fails to be mentioned. For example, R. David *Major Legal Systems of the World Today* (1966); K. Zweigert – H. Kötz *Einführung in die Rechtsvergleichung* (1971) I.

tioned: William A. P. Martin (1827–1916). He was an adviser to the late Ching government[7]. Because he was a scholarly person, he learned Chinese and translated a number of Western books into Chinese. Among them, three important translations deserve mentioning; *Mankuo Kungfa* (1864) which was the translation of Henry Wheaton's *Elements of International Law* (1836), *Kungfa Pinram* (1877) which was the translation of Theodore Woolsey's *Introduction to the Study of International Law* (1806), and *Kungfa Huitung* (1880) which was the translation of Johann C. Bluntschli's *Das Völkerrecht der Civilisierten Staaten* (1867). These translations are very important because many legal terms today have their origins in his translation of these Western legal books. For example, the word "rights" had not existed in the East Asian tradition; thanks to Martin it is known today as *Kuanli* in Chinese, *Kenri* in Japanese, and *Kwonri* in Korean (with a same word pronounced differently).[8] Some translated terms like "rights" do not carry their original Western jurisprudential meaning. This gives contemporary scholars in East Asia a difficult task.[9]

The foreign legal advisers employed by the government came from different legal traditions. However, the mainstream trend of legal reform in the beginning was the reception of Anglo-American law through English and American advisers. Later, the focus of legal reform shifted from the common law to Roman-European law. In 1903, the Commission of Legal Reform was established and Shen Chiapen (1840–1914)[10] and Wu Tingfang (1842–1922)[11] were appointed commissioners. Shen revised laws by actually making use of European Roman law and Japanese law. What were the causes that brought this fundamental change? First, Britain, which opened the door to China, was declining gradually in power and influence. After the Franco-Prussian war, Germany seemed to East Asians to be the most powerful state in the West. Second, it is impossible for a country like China,

[7] Martin visited Bluntschli to his home in Heidelberg on June 21, 1881. J. Bluntschli *Denkwürdigkeiten aus meinem Leben* (1884), III, 489; J. Spence *To Change China: Advisers in China 1620–1960* (Boston: 1969), 129–60.

[8] Ch. Choi "The East Asian Concept of Rights and Duty", paper read at IVR Congress in Edinburgh in 1991; also in *East Asian Jurisprudence in The World* (Seoul: 1995).

[9] For the problem of translation, M. Masao *Translation and Modernity of Japan* (Jap.) (Tokyo: 1998); Ch. Choi "Human Rights and Human Responsibilities" in B. Leiser (ed.) *Human Rights in Philosophy and Practice*, 200.

[10] For details, see the article on his name in *Biographical Dictionary of Republican China* (1970), 95–9. In 2004 I was invited to the grand celebrational congress to commemorate the 90- year-anniversary of his death in his hometown province of Houzou.

[11] W. Tingfang *China's Relation with the West* (Philadelpia: 1899); on him, *Biographical Dictionary of Republican China* (1970), 453–6.

which has a well-established legal system with a long history, to receive the case law of the common law world. Third, China and Japan are neighboring countries which share similar languages. Therefore, Japanese lawyers helped the Ching government to draft the new laws. In 1931, the reform work was completed. This marks the completion of the transition of the traditional Chinese legal system to the Roman civil law system.

In 1949, the People's Republic of China was founded by the Communist Party of China (CPC). The Kuomintang government fled to the province of Taiwan. There, the previous laws enacted on the mainland were still implemented. Taiwan's legal system continued to be a member of the Roman European law family. But in the mainland, many significant changes took place. As early as February of 1949, the CPC Central Committee promulgated the Instruction on the Abolition of the Six Major Laws System of the Kuomintang government, which stated that all laws and judicial organs must be based on the legal philosophy of Marxist-Leninism and Maoism. Nevertheless, the development of the Socialist legal system in contemporary China over the last fifty years has never been smooth. Although the legal system of new China is a socialist by virtue of the influence of the Soviet Union, we can still find traces of European Roman law. First, the traditional method of making law has not changed. Court verdict, including that of the Supreme People's Court, has no binding force over later verdicts of other courts but serves only for reference purposes. Judges usually make their decisions based on promulgated laws. The structure, principles, conceptions, and terminologies of current Chinese laws reflect the impact of German laws.

2 *Japanese Reception of Western Law*

Japan is usually considered to be the country which received Western law most successfully. Here is not the place to describe the story of the reception in detail,[12] but I want to give an overview as a background to the development of legal thoughts and jurisprudence in Japan.

In 1858, Japan concluded commercial treaties with the United States, England, France, Russia, and Holland, but in its ignorance of international law Japan accepted unfavorable conditions. These unequal treaties hurt the pride of the Japanese, and the Meiji government tried to revise them. The Western powers demanded the modernization of the Japanese legal system. The best way to do this was to imitate the models of the advanced capitalist

[12] For details, see Zentaro (n. 3).

states, which at that time were France and England. Japan chose France because Anglo-American law appeared too complicated.

After 1869, the Meiji Government showed a great enthusiasm in translating the French codes. Mitsukuri Rinsho (1846–97) finished a section of his translation and the Minister of Justice, Eto Shimpei, was very impressed. He ordered Mitsukuri to translate the French Civil Code as soon as possible. After the dramatic death of Eto in 1874 by capital punishment for a political crime, the drafting work was continued under the direction of the Minister of Justice, Oki Takao. In 1878, a draft civil code in three books and 1820 articles was completed, but it was not adopted because of it was too faithful to the original French code.

In 1873 Gustave Boissonade, a professor at Paris University, was invited by the Meiji government to take on the task of improving the legal system. He went on to live in Japan for 20 years at the request of the Japanese. He performed a great service and was praised as "the father of modern Japanese law." In 1889, the Boissonade draft was adopted; but it did not come into force as hoped. Legal scholars divided into two groups and carried out a heated debate. This debate reminds us of the Thibaut-Savigny Controversy upon the codification of the German Civil Code (BGB). Postponement was demanded because the Boissonade code did not take sufficient account of the traditional customs and morality of the Japanese people. Hozumi Yatsuka (1860–1912), the conservative legal scholar, argued that loyalty and filial piety collapsed with the new Civil Code.[13] The debate is usually explained as the struggle between the French Law School and the English Law School. Meanwhile, in 1892 the Imperial Diet voted for the postponement of the Civil Code.

On the other hand, in 1880 a political movement formed called *Jiyu Minken Undo* (Liberal Movement for Civil Rights). It was supported by a large percentage of the population, and it succeeded in convincing the government to establish a parliament. The movement was liberal in appearance, but most of its supporters were the discontented former *bushi* (warrior) who had been excluded from political power. In 1881, the government secretly decided to adopt a constitution based on the Prussian model to prepare for a parliament. According to the new constitution, absolute power was to be granted by the emperor to his subjects, and for this reason the absolutist character of the Prussian Empire was more attractive to the Japanese

[13] R. H. Minear *Japanese Tradition and Western Law: Emperor, State, and Law in the Thought of Hozumi Yatsuka* (1970); K. Noriko *Die bedeutung der deutschen für die japanische Staatslehre unter der Meiji-Verfassung* (Frankfurt am Main: 1993), 153–66.

statesmen than was the French Republic. In 1893, a law-drafting commission was appointed for the Civil Code. It consisted of three legal scholars: Hozumi Nobushige (1856–1926),[14] Tomii Masakira, and Ume Kenjiro (1869–1912).[15] They consulted many foreign laws, but made particular reference to the drafts of the German BGB. The completed new Civil Code came into force on July 16, 1898.

Even though Japan received the German law and jurisprudence so intensively, the basic structure and function of the government remained unchanged in the Emperor system. After its surrender to the allied military power led by General McArthur, Japan had to adopt a new constitution based on democratic principles. However the Emperor system survived. Karl Loewenstein called Japanese law and politics a "crowned democracy". Japanese scholars assume that they have made a "selective reception" of Western law. Furthermore, they have argued for the "Japanization of Western law" since the 1970s.[16]

3 Korean Reception of Western Law

Korea was the last "hermit kingdom" of East Asia to enter the world community of nations. Observing that China and Japan were threatened by the Western powers, the Korean government temporarily strengthened the closed door policy. After the Korean–Japanese treaty in 1878, and the Korean–American treaty in 1882, Korea opened herself to the Western world. Like in China and Japan, the Korean government employed some Western legal advisers such as Paul Georg von Möllendorff, Owen Denny, and Laurent Crémazy, etc.[17] However, due to the instability of the government and the irresistible invasion by Japanese imperialists, the Korean government could not make good use of those legal advisers. By the unpleasant

[14] H. Nobushige *Ancestor-Worship and Japanese Law* (London: 1912); H. Aoki "A Skillful Transplanter of Western Legal Thought to Japanese Soil" in A. Riles (ed.) *Rethinking the Masters of Comparative Law* (2001).

[15] He was the first Japanese *docteur en droit* from Lyon University. He drafted the Korean Civil Code and the Law of Civil Procedure. Ch. Chung *Kankoku Minpono Hikyohono Kenkyu* [*A Comparative Study of Korean Civil Code*] (Tokyo: 1989).

[16] H. Coing – K. Zentaro (Hrsg.) *Die Japanisierung des Westlichen Rechts* Japanisch-deutsches Symposium in Tübingen vom 26 bis 28, Juli, 1988 (Tübingen: 1988).

[17] On their lives and activities in Korea, Ch. Choi "Reception of Western Law in Korea" in *Law and Justice in Korea* (SNU Press 2005), 137–64. See, P. G. von Möllendorff *Das Chinesische Familienrecht* (Shanghai: 1895); O. Denny *China and Korea* (1888); L. Cremazy *Le Code Penal de la Coree* (1904).

mediation of Japanese power, Korea also proceeded with the modernization (Westernization) of its laws.[18]

In 1897, the Korean Kingdom proclaimed its sovereignty and adopted the first modern Constitution two years later. In 1895, a Training School of Judicial Officers was founded. This institution survived the turmoil of the Japanese rule from 1910–1945 and became the College of Law, Seoul National University. To this point, Korea was rather belated in its reception of Western law – and the process of the reception would become much complicated, because Japan began to play the role of "unpleasant mediator".[19] Nevertheless, Korean law survived the Japanese "unlawful colonialism",[20] and played a role in the reception of Western, partly European-German law and partly American law following the national liberation in 1945.

Gustav Radbruch describes the reception of Western law in Korea very impressively:

> Due to the lack of outspoken political characteristics and emphasized national identity and the far driven abstraction, the German Civil Code (BGB) became capable as law in culturally very different East Asia. A former German lawyer wrote recently to the author from Korea: "My work is especially fascinating for the following reason. Korea lives under Japanese law after it had been annexed 35 years ago by Japan. Japan had received more or less the German law. And I now sit as an American occupation officer in Korea and have the good reliable Bensheimer's legal texts on my desk and the BGB, the HGB (German Commercial Code) and the ZPO (German Code of Civil Procedure) and its supplementary laws, and would serve as a type of juristic connection-officer between Koreans and Americans. Because I am educated in both legal systems, the civil law and the common law, I have the task of explaining the American occupation law to Korean lawyers and the Korean law (German law) to American occupation officers." The identification of German with Korean-Japanese laws is correct only with large restrictions. The large codifications became widely spread according to East Asian needs of adaptation. Family law and succession law remained in Korea as customary law and has itself through the use of law, formed a sort of *usus modernus*. I am surprised to find that the German Romanists, who studied the process of the reception of the Roman law in Germany with endless care, never came upon

[18] In detail, Ch. Choi "On the Reception of Western Law in Korea" *Korean J. Comp. L.* 9 (1981); M. Rehbinder – J. Sonn *Zur Rezeption des deutschen Rechts in Korea* (Baden-Baden: 1990); Ch. Choi "Western Jurists on Korean law: A Historical Survey" *J. Korean L.* 2 (2002) 1, 167–93.

[19] Choi "On the Reception of Western Law in Korea" (n. 18), 34.

[20] S. Keifu *A Study of Japanese Ruling Laws in Korea* (Hokkaido U. P. 1989).

> the obvious idea that the reception process of German law in East Asia is to be investigated scientifically. That would be an interesting task from the standpoint of legal sociology.[21]

At this juncture, it would be good to consider the significant remarks of Paul Koschaker on the reception of foreign laws:

> Foreign law is not received because it is considered the best. What makes a legal system suitable for reception is rather a question of force (*eine Machtfrage*). On the intellectual and cultural plane, at least reception related, to the extent to which the law benefits from a position of strength: Whether this strength still exists at the time in question is an important political question. ... No legislator could avoid leaving some area for the application of indigenous law, and even if he envisaged an en bloc reception it is doubtful that he could even then completely exclude indigenous law. For though the law can be changed from one day to the next, the men to whom it is applied and those who have to apply it in the future cannot be changed this way.[22]

The reception of Western law is still ongoing, but the rediscovery and reevaluation of the East Asian tradition and the efforts of its modernization are also remarkable.

4 Roles of Western Legal Advisers

As we saw above, quite many Western lawyers and legal scholars acted as legal advisers to the governments and as teachers at the law schools. If we look deeper into the contemporary history of China, Japan, and Korea, we can find the presences of such Western lawyers and legal scholars more widely.

Besides Boissonade mentioned above, there were many legal advisers during the Meiji government.[23] In the early years of the 1880s, the government began to concentrate on German law, and the study of German

[21] G. Radbruch *Vorschule der Rechtsphilosophie* (Heidelberg: 1948), 51–2. English translation here is done by me. The latter mentioned above was written by E. Fraenkel (1898–1975), who was acting as a legal adviser to the American Military Government. About Fraenkel, Ch. Choi "Western Jurists on Korean Law" (n. 18), 182–4. Idem "Gustav Radbruch und Ostasien" in *Verfassung–Philosophie–Kirche: Festschrift für Alexander Hollerbach zum 70. Geburtstag* (Berlin: 2001), 485–500.

[22] P. Koschaker *Europa und das römische Recht* (München: 1947), 138, 145.

[23] Some literature on this topic: H. Jones *Live Machines: Hired Foreigners and Meiji-Japan* (1980); P.-C. Schenck *Der Deutsche Anteil an der Gestaltung des modernen japanischen Rechts- und Verfassungswesens* (1997); W. Röhl, *Fremde Einflusse im modernen japanischen Recht* (1959). W. G. Beasley *Japan Encounters the Barbarian* (Yale U. P. 1995).

law in the academic sphere also became widespread. The government employed several German jurists as advisers, whose duties included the drafting of laws. Penal code and the law of criminal procedure were Boissonade's domains. In 1922, the new Code of Criminal Procedure followed the German system. German advisers in the 1880s attended to other fields as well. The foremost scholars were: Hermann Roesler, a former professor at Rostock University, who authored the first Japanese Commercial Code and became involved in preparatory work for the constitution, and also lectured at Tokyo University; P. Mayet, an economist, who dealt with postal organization, insurance, and the savings bank system; A. Mosse, a judge, who was occupied in various branches of law, but mainly in creating the regulations for the administrative system of regional self-government; O. Rudorff, a judge, public prosecutor, and governmental official, who was engaged in the reform of the school system and also drafted the Code of Civil procedure; and H. Mosthaf, a government official, who was adviser to the Ministry of Foreign Affairs.

In addition, scholars of jurisprudence from Europe and America gave lessons on western law at educational establishments. The study of German law gained increasing attention, especially after Councilor of State Hirobumi Ito returned from Europe where he had studied the current constitutions, particularly the Prussian Constitution, and had been advised by the famous professors Rudolf von Gneist in Berlin and Lorenz von Stein in Vienna. German experts were employed by Tokyo University and the *Schule des Vereins für deutsche Wissenschaften* to lecture on Roman and German law. K. Rathgen (public law), L. Loehnholm (civil law), U. Eggert (finance law) and H. Weipert (civil law) at Tokyo University, and E. Delbruck at the school of the said society, were all well-known figures in Japan.[24]

In Japan, the Western lawyers and legal scholars who drafted the MacArthur Constitution, including Charles Kades,[25] Alfred Oppler[26] and Kurt Steiner[27] were brilliant.

In liberated Korea, scholarly lawyers served in the American Military Government from 1945 to 1948. Those lawyers were Charles Pergerler (1882–1954), Ernst Fraenkel (1898–1975), and Charles Lobingier (1866–

[24] For more details, W. Rohl (ed.) *History of Law in Japan since 1868* (Leiden: 2005), 23–8.

[25] He was the drafter of the MacArthur Constitution.

[26] A. Oppler *Legal Reform in Occupied Japan. A Participant Looks Back* (Princeton: Princeton U. P. 1976).

[27] He became a prosecutor at the Tokyo War Crime Tribunal and went over to America. He was a well recognized professor of Japanese politics at Stanford University. When I visited his home in 2001, he showed much original documents during his Japanese life.

1956).[28] After founding the new Republic of Korea, Hans Kelsen is said to have said that he would draft the new constitution if Korea were reunited. His former assistant in Vienna, Helen Silving (1906–1993), the wife of Paul K. Ryu (1915–1998), taught criminal law at Seoul National University Law College in the 1960s. [29] Manfred Rehbinder of Zürich University visited Korea several times and edited a book entitled *Zur Rezeption des Deutschen Rechts in Korea* (1990). Nowadays many Western lawyers and legal scholars come to Korea for conferences and cooperative programs.

5 *Emergence of East Asian Jurisprudence*

We are living in the age of globalization. In the field of law, we are also experiencing enormous changes and new phenomena. America became a superpower. Europe seeks the European Union and then the European Republic further in the future. East Asian scholars particularly envy these surprising step-by-step development in Europe because East Asia is still suffering the bitter past history of war, conflicts, and territorial divisions. Sometimes East Asia seems to be a roaring sea of nationalism and emotional patriotism. Japan seems not to be the same as Germany, which confessed its guilt for war and persecution. China is arriving on the world stage with its great population and economic potential. Japan and Korea feel uneasy about the hegemonic strategy of the socialist state of China.

However, the three East Asian countries feel common solidarity in the competition for survival in the world community. The South East Asian countries also formed the ASEAN community for regional security and prosperity.

Observing such global changes, I, as an East Asian legal historian and philosopher, came upon a research idea: East Asian Common Law (*jus commune*). I researched the possibility of this concept, historically and theoretically, and today assert its importance in China, Japan, and Korea. My argument is that we Asian legal scholars should try to find our commonness and solidarity rather than our differences. The so-called "Choi-Thesis" became the starting point of legal discussions in the East Asian context. Here I cannot go into the details of such discussions.[30] However, I would like to call

[28] These three were very scholarly; see their books: Ch. Lobingier *The Evolution of the Roman Law from Before the Twelve Tables* [1923] 1987; E. Fraenkel *Gesammelte Schriften* [Neubau der Demokratie in Deutschland und Korea] (Baden-Baden: 1999) III.

[29] H. Silving *Memoirs* (New York: 1989).

[30] Ch. Choi "Foundations of Law and Justice in East Asia" *Comp. L.* 18 (2001), 1–17; and

this phenomenon the emergence of East Asian jurisprudence. The Conference on East Asian jurisprudence was held in Tokyo and Kyoto (1996), Seoul (1998), Nanjing (2000), Hong Kong (2002), Sapporo (2004), and Taipei (2006). With time, the number of participants has increased. At the World Congress of IVR in Lund (2003), there was an independent working group on East Asian jurisprudence. Western scholars also ask earnestly about East Asian jurisprudence, including Confucian ethics.[31]

The task of building up East Asian jurisprudence is not simple. Probably all legal scholars in East Asia should devote serious attention toward that goal. The reevaluation of East Asian civilization and philosophy is most important. Western colleagues advise that East Asian scholars should not give up the Western tradition too quickly. However, East Asian scholars must develop their own theories, which could also be useful to the West. In drafting a textbook on East Asian Jurisprudence, I have found that this work is hard but worthwhile.[32]

Conclusion

In the above, I tried to survey the process of the encounter of East Asian countries with Western law. Even though America came early to East Asia, it was impossible to transplant the case law system in the East Asian legal culture. Notwithstanding a slight inclination towards French law in Japan, German law and jurisprudence has gained a wide resonance in East Asia. This is primarily due to its written code and its refined legal dogmatics.[33]

East Asian countries have experimented the received Rule of Law and

Idem "Possibility of East Asian Common Law" *Comp. L.* 19 (2002).

[31] For details, Idem *Asian Jurisprudence* (Forthcoming).

[32] I was thinking of the title originally as *East Asian Jurisprudence*, but I changed it to *Asian Jurisprudence*. Many colleagues advised me to do so because East Asian Jurisprudence sounds too regional when compared to European Jurisprudence, American jurisprudence, Islamic Jurisprudence, and African Jurisprudence. So, my Asian Jurisprudence is temporarily composed as follows: Part One: History of Asian Jurisprudence: Ch. I. Ancient Jurisprudence, Ch. II. Medieval Jurisprudence, Ch. III. Modern Jurisprudence, Ch. IV. Confrontation with Western Jurisprudence, Ch. V. Contemporary Jurisprudence; Part Two: Theory of Asian Jurisprudence: Ch. I. Foundations of Law and Justice, Ch. II. Concept of Law, Ch. III. Image of Law and Justice: Ch. IV. Ideal of Law, Ch. V. Law and Morality, Ch. VI. Law and Religion, Ch. VII. Law and Ideology (Liberalism and Communitarianism), Ch. VIII. Rights, Duty and Responsibility, Ch. IX. Feminism and Jurisprudence, Ch. X Globalization and Asian Jurisprudence.

[33] After 100 years, Japan adopted the law school system in 2004. However, it is not the same as an American law school, which is a professional school without undergraduate courses. We call it a Japanese-style law school. However, we are keenly observing progress there.

democracy for over one hundred years. They seem to be a sort of laboratory of all kind of legal systems and jurisprudential theories. China has even practiced European Communism on its soil. North Korea became the most severe Communist state in the world. East Asian law and jurisprudence has become westernized and globalized.

East Asian jurisprudence is not exclusive or aimed against Western jurisprudence; it is open to the world. The reception of Western law will go farther in East Asia, as we see typically in the current China. I would like to say that the emergence of East Asian jurisprudence means the acculturation or indigenization of Western jurisprudence in the East Asian context. One thing that is clear is that East Asian scholars have begun to reevaluate their philosophical and civilizational tradition in a positive way.

Karl Mannheims Rezeption in Ungarn

Lajos Cs. Kiss (Budapest)

1 Problemstellung und Begründung

Das öffentlich-wissenschaftliche Interesse an Karl Mannheims Werk und Person in Ungarn konnte man, wie es in der ungarischen Rezeptionsgeschichte der Wissenssoziologie – mit besonderer Rücksicht auf die Rezeption des Lebenswerks des wissenschaftlichen[1] Gründers der Wissenssoziologie Karl Mannheims[2] – nachzuweisen ist, erst in den achtziger Jahren und

[1] Obwohl Karl Mannheim, besonders in den früheren Phasen seiner geistigen Entwicklung, als ein sich hauptsächlich mit erkenntnis- und wissenschaftstheoretischen Problemen systematisch auseinandersetzender Philosoph seine Laufbahn begann, hat er nicht von dem Aspekt der Philosophie, wie Max Scheler, sondern von dem der Wissenschaft aus versucht, eine neue Disziplin zu begründen und zu gründen. Das Unternehmen Wissenssoziologie hat auf seiner sich am Ende der 1920er Jahre befestigenden Überzeugung beruht, dass die Geistes-, Kultur- oder Sozialwissenschaften empirisch-normativer Art im Medium der soziologischen Erkenntnis allmählich dazu fähig sind, die Grunderfahrung der Faktizität des ontisch-ontologischen Pluralismus der modernen Gesellschaften selbstreflexiv zu verarbeiten.

[2] Wissenssoziologie zu rezipieren war in Ungarn am Anfang gleichbedeutend mit der Rezeption des Mannheimschen Lebenswerks. Freilich müssen dabei auch andere Rezeptionsgeschichten beachtet werden, vor allem die Rezeption von Max Webers verstehender Soziologie, die sich als eine der wichtigsten Faktoren der Entstehung bezeichnen lässt, indem sie zur theoretisch-praktischen Neubegründung der ungarischen Soziologie in den siebziger Jahren auf ausschlaggebende Weise beigetragen hat. Dieser Entstehungsprozess war teils von derjenigen Philosophie geführt und zugleich begrenzt, die in der total-autoritären Phase des Ein-Partei-Staats-Sozialismus nach und nach politisch-ideologisch entstalinisiert worden war und mit Namen wie Georg Lukács und Antonio Gramsci unter der Flagge der "Renaissance des Marxismus" gefahren vermocht hatte, sich selbst fortbewegend in Richtung der Wissenschaftlichkeit bis zu einem gewissem Grade geistig zu befreien. Überdies aber soll hier noch eine vielleicht ungewöhnliche Bemerkung zu Carl Schmitts Rezeption in Ungarn mit besonderer Rücksicht auf seine *Politische Theologie* und auf seinen *Begriff des Politischen* gemacht werden, weil in diesen Werken nicht nur theoretische Ansätze, sondern auch die Darlegung und Demonstration einer möglichen Variante der Wissenssoziologie selbst

besonders im Zeitalter des Systemwandels theoretisch-praktisch rechtfertigen, begründen und anerkennen. An diesem Sachverhalt ist aber nichts selbstverständlich, deswegen drängen sich Fragen auf: Was soll es vor allem bedeuten, einen Anspruch auf Rezeption der Wissenssoziologie theoretisch-praktisch zu rechtfertigen, zu begründen und anzuerkennen, bzw. anerkennen zu lassen?[3] War und ist es nicht eine normalwissenschaftliche Selbstverständlichkeit in der ungarischen philosophisch-wissenschaftlichen Kultur, ein solches Rezeptionsunternehmen auszuführen? Wie es sich aus der Rezeptionsgeschichte herausstellen wird, ist es keine normalwissenschaftliche Selbstverständlichkeit gewesen, die Mannheimsche Wissenssoziologie in einem öffentlichen Diskurs zu rezipieren. Aus dieser Tatsache folgt sinn-

bereits enthalten sind. Diese Variante, die aus dem Aspekt seiner politischen Rechtswissenschaft heraus entwickelt worden ist, wird für unsere folgenden Ausführungen gewisse methodologische Bedeutung gewinnen. Zur ungarischen Rezeptionsgeschichte des Lebenswerks Carl Schmitts siehe eingehender Cs. Kiss L. "Egy keresztény Epimétheusz" [Ein christlicher Ephimetheus], "Utószó" [Nachwort] in C. Schmitt: *A politikai fogalma. Válogatott politika- és államelméleti tanulmányok. [Der Begriff des Politischen. Ausgewählte politik- und staatstheoretische Aufsätze]* (Übersetzt u. hrsg. von Cs. Kiss Lajos) (Budapest: Osiris – Pallas Studio – Attraktor 2002), 241–86; Cs. Kiss Lajos (hrsg.) *Carl Schmitt jogtudománya. Tanulmányok Carl Schmittről [Carl Schmitts Rechtswissenschaft. Studien über Carl Schmitt]* (Budapest: Gondolat 2004), 7–145, 415–37.

[3] Im Interesse eines angemessen komplexen Umgangs mit der Mannheim-Rezeption soll zwischen den Begriffen Rechtfertigung, Begründung und Anerkennung nach ihrem Problembezug und nur im streng operationellen Sinne unterschieden werden. Der Begriff der Rechtfertigung (Legitimation) bezieht sich auf das Problem der existenziell-funktionellen Autonomie des Wissenschaftsgebietes, die die fundamentale Voraussetzung für wissenschaftliche Freiheit schlechthin bildet. Wie Mannheim damals im Jahre 1945 in seinem Carl Schmitt zu "antwortenden Bemerkungen" bewegenden Rundfunkvortrag sagte: Freiheit des wissenschaftlichen Erkennens bedeutete "eine fundamentale Neugierde, die jede andere Gruppe und jede andere Person in ihrem Anderssein begreifen möchte". (Siehe C. Schmitt: *Ex Captivitate Salus. Erinnerungen der Zeit 1945/47* (Köln: Greven 1950), 13.) Die Ausführbarkeit eines Rezeptionsunternehmens setzt das Vorliegen, bzw. einen gewissen Entwicklungsgrad dieser Autonomie und Freiheit von Wissenschaft voraus, durch die es überhaupt möglich wird. Im Falle der Rechtfertigung geht es vor allem um praktische Gründe. Der Begriff der Begründung bezieht sich auf das Problem des Emergenzniveaus des rezipierten Theoriebestandes, das heißt auf seine innewohnende Anschlussfähigkeit, anhand deren die durch Rezeption zurück gewonnene, bzw. neu erworbene Theorie imstande sein kann, an den theoretischen Grundlagendiskussionen und empirischen Forschungen der Gegenwart emergenzsteigernd teilzunehmen. Im Falle der Begründung geht es vor allem um "rein" theoretische Gründe. Der Begriff der Anerkennung bezieht sich auf das Problem der Akzeptanz des inner- und außerwissenschaftlichen Publikums als öffentlicher Rezipient, der das rezipierte Theoriegut als organischen Teil der eigenen geistigen Überlieferung würdigt, hegt und bewahrt. Im Falle der Anerkennung, deren Gründe jenseits der Theorie liegen, wird die Rezeption als im Kontext der Traditionsbildung gestelltes und gedeutetes Problem betrachtet.

gemäß die weitere Frage nach den möglichen Voraussetzungen einer Rechtfertigung, Begründung bzw. Anerkennung, die vorliegen müssen, damit der Anspruch auf Rezeption im Sinne der Normalität der Sozialwissenschaften geltend gemacht werden kann.

Hinsichtlich des jetzigen Standes der Mannheim-Forschung sind diese Fragen eben darum mit Recht gestellt, und – freilich, wenn die Antworten richtig sind – aufschlussreich, weil Karl Mannheims Person und Werk in der zweiten Phase seiner Rezeption in den fünfziger Jahren nicht einfach herabgesetzt und abgewiesen, sondern im Interesse einer total-totalitär interpretierten Vernunftrettung von Georg Lukács ideologisch enthüllt und als Feinde der Vernunft geistig völlig, in jeder Dimension seiner Geltung – sollte man sagen: auf der "noologischen Ebene" seines Denkens – vernichtet wurde. Aus dieser Faktizität seiner geistigen, hermeneutisch-virtuellen Vernichtung – die zum Zweck des Aufhaltens (Katechon) der Zerstörung der Vernunft gerade die ideologische Enthüllung der absoluten Klassenfeinde als Feinde der Vernunft bedeutete, und die im Fall Mannheims paradoxerweise virtuell auch manche persönlichen Züge hatte – muss darauf geschlossen werden, dass die Wissenssoziologie in bestimmten historischen Situationen für Autoritäten verschiedener Art gefährlich war und, von den Änderungen der politisch-geistesgeschichtlichen Lage abhängig, auch gefährlich sein kann. Wir möchten damit betont nur darauf hinweisen, dass es sich im Fall Karl Mannheim nicht bloß um einen Normalfall des In-Vergessenheit-Geraten-Seins handelt, wo etwas, was einmal im eigenen Traditionsgefüge vorhanden und prinzipiell für alle erreichbar war, wegen der geringen komplexitäts(kontingenz)verarbeitenden Kapazität dieser Tradition in Vergessenheit geraten ist. Denn im Normalfall von Vergessenheit und Erinnerung kann das Vergessene ohne Weiteres – mit Erhöhung des Emergenzniveaus der geistigen Überlieferung hegenden Wissenschaften – wieder in Erinnerung zurückgerufen werden, und Rezeptionen allerlei Art bedürfen der Selbstrechtfertigung nur im Sinne der Relevanzbestimmung eines normalwissenschaftlichen Erkennens.

Wenn aber in diesem Vortrag die Frage zu beantworten ist, in welchem Sinne und warum Karl Mannheim und seine Wissenssoziologie ideologisch für ein totalitär-autoritär aufgebautes politisches System gefährlich war, dann muss man sich darüber klar werden, dass es hier im Wesentlichen um einen Ernstfall des In-Vergessenheit-Geraten-Seins geht. Und im Zusammenhang damit fragt es sich auch, ob und wie das Außerordentliche dieses Ernstfalls in die Umbruchssituation des Systemwandelns hineinragt, das heißt, ob die Wissenssoziologie Mannheimscher Ausprägung für das freiheitlich-

rechtsstaatlich fundierte gesellschaftlich-politische System im neu geordneten Ungarn auch irgendwelche Gefahren oder Unannehmlichkeiten in sich bergen kann. Aber nicht nur das. Meines Erachtens liegt das Interessante an der Mannheim-Rezeption darin, dass sie darüber hinaus einen Spezialfall verkörpert, indem sie eine selbstreflexive Interpretationsweise – oder anders: eine Art Selbstinterpretation – des Rezeptionsvorgangs nicht einfach ermöglicht, sondern auch dazu zwingt. Dementsprechend gehen wir von der im ersten Augenblick vielleicht überraschend scheinenden Annahme aus, dass die Mannheim-Rezeption in Ungarn als ein sich selbst beschreibender Prozess interpretiert werden kann,[4] und wenn man die Anwendbarkeit der Wissenssoziologie für die Totalitarismusforschung nicht nur veranschaulichen will, sondern auch nach einem Erkenntnisgewinn strebt, dann soll man es tun. Aufgrund dieser Annahme wird es hier versucht, den Rezeptionsprozess wissenssoziologisch, aus der Perspektive des Untersuchungsgegenstandes selbst darzustellen. In diesem Fall geht es um eine selbstreferentielle Interpretation des Rezeptionsprozesses, das heißt, er interpretiert sich selbst. Es sei aber dazu bemerkt, dass über diesen angenommenen zirkulären Selbstbezug der Interpretation in ihrer idealtypischen Reinheit methodologisch erst in der

[4] Diese Aussage impliziert, dass Mannheims Wissenssoziologie, während sie rezipiert wird, in der Tat geeignet und auch imstande ist, die Rezipienten (ungarische Philosophie und Sozialwissenschaft) unter den faktischen Bedingungen und Strukturformen der geistigen Konkurrenz von ihrem eigenen Standort her zu beobachten und zu beschreiben. In diesem selbstreferenziellen Sinn – das heißt durch reflexives Einbeziehen der dem Gegenstand (Wissenssoziologie) innewohnenden zirkulären Verkoppelung der Selbst- und Fremdreferenz der Wissenschaft in die eigene Theoriekonstruktion des Rezipienten – rezipiert die Mannheim-Rezeption wissenssoziologisch sich selbst. In der deutschen Soziologie ist es noch immer eine Streitfrage, ob die Wissenssoziologie Mannheims die Eigenart und Fähigkeit der Selbstreferenzialität in diesem Sinne habe. Niklas Luhmann, der der Wissenssoziologie Karl Mannheims diese Eigenart abspricht, geht davon aus, dass man eine ausreichend universelle Theorie der Sozialität nur dann konstruieren kann, wenn man Selbstbezug (Theoriebildung vom Erkennen des Erkennens, von der reflexiv-zirkulären Struktur der Verkoppelung des Beobachters und des beobachteten Gegenstandes im Erkennen) und Fremdbezug (Theoriebildung vom Gegenstand, die das Problem (Faktizität) des Selbstbezuges des Erkennens als Element des Gegenstandes behandelt) im Horizont der Wissenschaft (Soziologie) synoptisch, das heißt funktional, zu behandeln und zu vereinigen vermag. Siehe dazu eingehender N. Luhmann *Soziale Systeme. Grundriss einer allgemeinen Theorie* (Frankfurt am Main: Suhrkamp 1984); zur Kritik der funktionalen Systemtheorie an Wissenssoziologie Karl Mannheims siehe Idem "Wahrheit und Ideologie"; "Soziologische Aufklärung"; "Positives Recht und Ideologie" in Idem *Soziologische Aufklärung* (Opladen: Westdeutscher Verlag 1972) Bd. 1., 54–65, 66–91, 178–203; Idem "Gesellschaftsstruktur und semantische Tradition" in Idem *Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft* (Frankfurt am Main: Suhrkamp 1980) Bd. 1., 12–3.

zweiten Epoche der Rezeption, wie wir sehen werden, nach der Feinderklärung durch Lukács gesprochen werden kann.

2 *Methodologische Überlegungen und Entscheidungen*

Vor diesem Hintergrund der wirklichen-potenziellen Gefährlichkeit Karl Mannheims als politischer Feind soll unsere hermeneutische Position in ihren allgemeinen Zügen auf das Kürzeste dargelegt werden, damit wir einige wichtige methodische Bedingungen der Rekonstruktion des Rezeptionsprozesses interpretativ klären können. Zunächst ist ein Kriterium für die Periodisierung des Rezeptionsgeschehens anzugeben, das uns ermöglicht, einerseits die einzelnen Epochen voneinander abzugrenzen, andererseits sie anhand der idealtypischen "hermeneutischen" Einstellung der Rezipienten näher zu bestimmen.[5] Mittels Zuordnung der idealtypischen "hermeneutischen" Einstellungen der Rezipienten zu den einzelnen Perioden kann das Rezeptionsgeschehen als ein Prozess dargestellt werden, der sich von den totalen-totalitären Formen der Ideologiekritik zur objektiv-sachgemäßen Kritik einer von der Politik allmählich unabhängig gewordenen Wissenschaftlichkeit entwickelt. Bei der Aufstellung dieser Typologie spielt die Mannheim-Interpretation von Lukács methodologisch, wie es angedeutet worden ist, eine entscheidende Rolle.

Kriterium der Periodisierung. Wir gehen von der Annahme aus, dass die Grundfrage der Mannheim-Rezeption nur im Hinblick auf die Faktizitäten des Politischen in Ost-Mittel-Europa angemessen gestellt und beantwortet werden kann. Deshalb soll für die Trennung der einzelnen Epochen des Rezeptionsgeschehens der Begriff des Politischen zum Kriterium gewählt werden. Aber dieser Begriff soll, um zu unserem Erkenntniszweck geeignet gemacht zu werden, auf eine bestimmte Art und Weise neu definiert

[5] Das auf diese Weise idealtypisch konstruierte Kriterium vermag mindestens zwei Aufgaben zu erfüllen, wenn es nicht bloß als Unterscheidungsmerkmal, sondern als ein konstitutives Prinzip der verstehenden Deutung angewendet werden kann, was uns überdies möglich macht, den von den Faktizitäten des geistigen Konkurrenzkampfes um Monopol der öffentlichen Weltauslegung bestimmten Sinnhorizont für Interpretation der einzelnen Epochen zu erschließen. Dadurch lassen sich die einzelnen Epochen der Rezeptionsgeschichte als spezifische Begegnungsarten und als Typen der Auseinandersetzungen zwischen den "sozial und geistig homogenen" bzw. "sozial und geistig heterogenen" Partnern als Gegner oder Feinde wissenssoziologisch beobachten und beschreiben, und so kann die sowohl theoretisch, als auch existenziell wichtigste Frage der Rezeption geklärt werden: Wo haben die geistigen Auseinandersetzungen faktisch stattgefunden, bzw. wo werden sie in der Zukunft stattfinden: auf dem Gebiet der Politik oder der Wissenschaft?

werden. Diese spezifische Bestimmungsweise bezeichnen wir als synoptisch und nehmen an, dass sich der Rezeptionsprozess mit diesem synoptischen Begriff des Politischen entsprechend periodisieren lässt und darüber hinaus ermöglicht, in die Struktur der vorher angedeuteten Selbstreferenzialität der Mannheim-Rezeption auch eine gewisse Einsicht zu nehmen. Hier handelt es sich um zwei Typen der Problemstellung und Begriffsbildung, ausgeführt in der politischen Rechtslehre Carl Schmitts einerseits, in der Wissenssoziologie Karl Mannheims andererseits, die hermeneutisch zusammengeschaut werden können.[6] Als seinsmäßig-reale Möglichkeitsbedingung dieser Zu-

[6] Die hermeneutische Zusammenschau und Verkoppelung dieser problembezogenen Art ist aus den folgenden theoretischen Gründen möglich: Beide Varianten gehen vom existenziellen Vorrang der Politik in der Moderne aus im Sinne eines ontisch-ontologischen Funktionalismus und setzen das Problem des Staates (totaler Staat versus rationale Verwaltung) als negativen oder positiven Bezugspunkt der Begriffsbestimmung voraus; beide Varianten definieren den Begriff des Politischen als letzte Unterscheidung (Freund/Feind versus rational/irrational), und als letzte Entscheidung (entweder/oder versus persönlich/kollektiv) im Rahmen einer gesellschaftsontologisch angelegten soziologischen Handlungstheorie mit Hilfe formal-funktionaler Operationsbegriffe; auf Grund ihrer parallelen Problemstellung und Begriffsbildung bauen beide Varianten mit solchen Operationsbegriffen (wie Handlung, Orientierung, Motiv, Unterscheidung, Entscheidung, Gruppierung, Feindbestimmung, Ideologie, Utopie, Feinderklärung etc.) von der eigenen Aspektstruktur der Rechtswissenschaft und der Wissenssoziologie her alternative Theoriekonstruktionen des Politischen funktionalistisch auf. Wie es in der *Ideologie und Utopie* nur andeutungsweise, das heißt in einer Anmerkung kurz ausgeführt worden ist, setzt die Antwort auf die Frage, "Ist Politik als Wissenschaft möglich?", unvermeidlich vorhergehendes Problematisieren und begriffliche Bestimmung des Politischen voraus. Dementsprechend hat Mannheim im dritten Kapitel seines Buches, ausgehend von der wissenssoziologischen Interpretation des mit dem Begriffspaar von Ideologie und Utopie umgrenzten Problemfeldes, versucht, ein alternatives Konzept des Politischen zu Carl Schmitt herauszuarbeiten. "Auch diesmal sei bemerkt, dass der hier zur Anwendung gelangende Begriff des 'Politischen' im Zusammenhang mit der Korrelation 'rationalisiertes Gefüge', 'irrationaler Spielraum' nur ein möglicher Begriff des Politischen ist, der allerdings für das Erfassen bestimmter Zusammenhänge äußerst geeignet zu sein scheint, aber nicht zum allein Möglichen hypostasiert werden darf. Will man den Gegenbegriff dazu haben, so ziehe man den Aufsatz von Carl Schmitts 'Der Begriff des Politischen', Archiv für Sozialwissenschaften und Sozialpolitik , Bd. 58, 1927, heran." (K. Mannheim *Ideologie und Utopie* [Frankfurt am Main: G. Schulte-Blumke 1978] [weiterhin: IU], 101.) Carl Schmitt wollte aber seine rein rechtswissenschaftliche Begriffsbestimmung des Politischen nicht als kontroversen Gegenbegriff zu der rein wissenssoziologischen verstanden haben, deshalb antwortete er auf die Herausforderung der Wissenssoziologie im Jahre 1932 in endgültiger Fassung seiner "kleinen Schrift" noch kürzer und ebenfalls in einer Anmerkung, wo er sie im Kontext staats- und rechtstheoretischer Hinweise mit einer indirekten Andeutung ihrer völligen Irrelevanz entledigte. Schmitt zufolge habe Mannheim nämlich unreflektiert A. Schäffles Gegenüberstellung vom "laufenden (unpolitischen) Geschäft" als Verwaltung (d.h. staatlich als durch Gesetz oder Recht "rationalisiertes Gefüge") und "anderen (politischen) Geschäfte" als Politik (d.h. nicht-staatlich als "irrationaler Spiel-

sammenschau muss ein einfacher Sachverhalt in Betracht gezogen werden, auf dem sich unser hermeneutischer Ansatz eigentlich gründet. Wir gehen nämlich davon aus, dass jede Feindbestimmung und Feinderklärung als Aktualisierung des Politischen im Sinne Carl Schmitts einer Begründung und Rechtfertigung bedarf.[7] Eben diese letzte Begründung und Rechtfertigung

raum", der durch Gesetz oder Recht rationalisiert wird) als "orientierenden Ausgangspunkt" übernommen, und dadurch sei die Eigenartigkeit des Politischen dem Staatlichen gegenüber verfehlt worden. "Im Allgemeinen wird 'Politisch' auf irgendeine Weise mit 'Staatlich' gleichgesetzt oder wenigstens auf den Staat bezogen. Der Staat erscheint dann als etwas Politisches, das Politische aber als etwas Staatliches – offenbar ein unbefriedigender Zirkel." Demgegenüber hob Schmitt hervor, dass im totalen Staat des 20. Jahrhunderts, der jede – nach der Formel "nicht-staatliche=nicht-politische" – neutralisierte und entpolitisierte gesellschaftliche Sachgebiete wirklich oder potenziell ergreife und damit die Identität von Staat und Gesellschaft faktisch-existenziell verkörpere, "infolgedessen *alles* wenigstens der Möglichkeit nach politisch" sei "und die Bezugnahme auf den Staat ist nicht mehr imstande, ein spezifisches Unterscheidungsmerkmal des Politischen zu begründen." (C. Schmitt *Der Begriff des Politischen.* Text von 1932 mit einem Vorwort und drei Corollarien [Berlin: Duncker & Humblot 1996], 21–4; siehe ferner Idem *Theorie des Partisanen. Zwischenbemerkung zum Begriff des Politischen* [Berlin: Duncker & Humblot 1995]; zum Verhältnis von Mannheim und Schmitt siehe Cs. Kiss L. "Egy keresztény Epimétheusz [Ein christlicher Ephimetheus]" 242, 244, 281.)

[7] Eine Feinderklärung, indem sie nur aus reinen politischen Gründen entstehen kann, muss ein reiner politischer Akt sein, dessen ideal- und realtypische Reinheit aber im Normalfall durch rechtlich-normative Voraussetzungen und Allgemeinheiten verdeckt sein mag. Deshalb kann man mit Bezugnahme auf die politische Theologie Carl Schmitts behaupten, dass die reine politische Bestimmtheit jeder Feinderklärung in ihrer existenziellen Reinheit – nur oder meistens – im Ernstfall zutage kommt. In dieser Hinsicht ergeben sich Unklarheiten vor allem aus dem Umstand, dass jede Feinderklärung einer vorherigen "theoretischen" Definition des Feindes bedarf, die "erkenntnismäßig" überhaupt nur durch eine grundlegende politische Frage – wer und warum, das heißt aus welchen Gründen, Feind ist, bzw. Feind sein kann, der bekämpft werden soll – beantwortet werden kann. Durch eine Definition solcher Art, die sich in der Moderne faktisch auf jedem Teilgebiet der Gesellschaft und Kultur (Religion, Kunst, Wissenschaft, Wirtschaft, Recht) vollziehen kann, wird der Feind als seinsmäßig Anderer und Fremder in einem die spezifischen Aspekten der Teilgebiete um- und durchgreifenden geistig-ideologischen Konkurrenzkampf zwischen Theologie, Philosophie und Wissenschaft "theoretisch" identifiziert. Diese definitorische Identifikation des Feindes bedeutet vor allem eine "theoretische" Begründung, bzw. Rechtfertigung im Sinne der "theologischen" oder "philosophischen" oder "wissenschaftlichen" Weise der Interpretation, durch die allerdings feindlichen Gruppierungen – so wie Barbaren, Heiden/Häretiker, Aristokraten, Kapitalisten, Untermenschen etc. – potenziell-virtuell sehr wohl sichtbar gemacht werden können. Doch jede Feinderklärung ist von ihrer funktionalen Bestimmtheit her gesehen stets eine Verwirklichung der ordnungskonstituierenden Entscheidungsfunktion der Politik, deren Leistung aus der eigenartigen Perspektive einer bestimmten Ideologienlehre liberaler, konservativer, sozialistischer, nationalistischer Ausprägung heraus begründet, gerechtfertigt, anerkannt werden kann und soll. Dementsprechend lässt sich eine zwar "theoretisch-definitorisch" notwendig vorbestimmte, doch "ideologisch" als existenzielle Endscheidung

einer Feinderklärung ist die wichtigste Funktion aller Ideologienlehren, mit besonderer Rücksicht auf jene Weisen der politischen Weltdeutungen, die in der *Ideologie und Utopie* mit dem speziell-totalen Ideologiebegriff bezeichnet und interpretiert wurden.[8] In diesem Punkt der seinsmäßig-funktionellen Verwirklichung des Politischen wird die unvermeidbare Berührung der beiden Begriffsbildungsstrategien sichtbar.

Mannheim musste, wie allgemein bekannt, zweimal emigrieren. Diese Tatsache beweist ohne jeden Zweifel, dass er wegen seiner existenziellen Verwurzelung und Zugehörigkeit – als Kollaborateur, als Rassenfeind, als Klassenfeind – mehrmals zum politischen Feind erklärt worden war. Das erste Mal wurde er in Folge eines innerstaatlichen Bürgerkriegs nur zum "wirklichen", das zweite und dritte Mal aber nicht nur einfach zum wirklichen, sondern auch zum "absoluten" Feind erklärt, der eine allerletzte Bedrohung für die kommende, vollkommene Einheit der Menschheit verkörpert.[9]

legitimierte Feinderklärung weder als "wissenschaftlicher" noch als "rechtlicher" Akt beschreiben, weil sie ihrem Wesen nach jeweils einen ausgeprägten ideologisch-politischen Charakter besitzt. Sollte auf den verschiedenen gesellschaftlich-kulturellen Teilgebieten über Feinderklärung(en) gesprochen werden, dann müssen (wahrscheinlich) deren Politisierung und Indoktrinierung schon im vollen Gange sein. Es sei hier analytisch angenommen, dass mit dieser im rein heuristisch-operationellen Sinne aufgefassten Unterscheidung von "theoretischen" und "ideologischen" Identifikation die begriffliche Differenz zwischen "Bestimmung" und "Erklärung" des Feindes ausreichend erläutert werden kann.

[8] Vgl. IU, 64, 68, 70.

[9] In der Abgründigkeit der in Gestalt dieser Feinderklärungen erscheinenden existenziellen Bedrohung wurzelte Karl Mannheims geistige politische Sorge für die Zukunft der europäischen Wissenschaft und Intelligenz. Diese stets anwesende Besorgnis, die sich als das existenziell-theoretische Problem des Politischen besonders im Ernst des Ausnahmefalls der Kriege und Revolutionen anmeldete, bildete den nur existenzial-analytisch erschließbaren Hintergrund des sich allmählich entfaltenden Lebenswerks. Mannheim stand stets – wie das Autoren-Triumvirat von David Kettler, Volker Meja, Nico Stehr überzeugend ausgeführt hat – "am Rand oder an der Grenze zwischen zwei oder mehreren geschlossenen sozialen Bereichen", in einer zur Vermittlung höchst geeigneten Position zwischen Philosophie und Soziologie, zwischen "kontinentaleuropäischen und angelsächsischen Denkweisen" sowohl im Normalfall eines akademischen Gelehrten, als auch im Ernstfall eines arbeitslosen Flüchtlings. Diese Zwischenlage war aber nicht nur durch objektive Strukturen historischer Situationen determiniert, sondern durch seine persönliche Entscheidung auch mitbestimmt worden. Deshalb könnte man sagen, dass Mannheim für sich und seine Wissenschaft seine eigene persönliche "Grenzsituation" gewissermaßen zu schaffen und gestalten imstande war, in der er als ein Intellektueller ungarisch-jüdischer Abstammung in seinem bewegten Leben immer und immer wieder im vollen Bewusstsein der Realität des Scheiterns danach trachtete, diese Situation sowohl wissenschaftlich, als auch politisch womöglich frei zu wählen, zu bestimmen und verantwortungsethisch zu meistern. In diesem Sinne hat das Autoren-Triumvirat geschrieben: "Keine Daseinsbedingung hätte ihm vertrauter sein können." (D. Kettler – V. Meja – N. Stehr *Politisches Wissen. Studien zu Karl Mannheim* [Frankfurt am Main:

Hermeneutische Einstellungen und Perspektiven. Ausgehend von Lukács's Mannheim-Interpretation lassen sich drei idealtypische Einstellungen und Perspektiven von Vernichten, Verschweigen und Ansprechen unterscheiden, die im Rezeptionsvorgang einander nicht notwendigerweise in chronologischer Reihe folgen. Die tatsächliche Reihenfolge dieser hermeneutischen Figuren der Rezeption durchs Vernichten, Verschweigen und Ansprechen, und auch die Weise ihrer konkreten Verbindungen, hängen von den konkreten Konstellationen der geistigen Konkurrenz in der jeweiligen geistesgeschichtlichen Situation ab. Im Zusammenhang damit muss man davon ausgehen, dass die eigentliche "hermeneutische" Ausgangslage nur mit den Verbindungskombinationen der Einstellungen, die jeweils eine spezifische Perspektive des Welthorizonts (Gegenstandes) erschließen und bestimmen, und der jeweiligen Situationen zu beschreiben ist. In diesem Punkt soll den "standortbestimmenden" Entwicklungsphasen des "Ein-Partei-Staats-Sozialismus" methodologisch eine Schlüsselrolle in der Rezeption der Wissenssoziologie zugeschrieben werden.[10]

Suhrkamp 1989], 12–3.) Im soeben zitierten Buch wird versucht, den politischen Charakter der Wissenssoziologie und die Konstitutionsweise des politischen Wissens selbst aus der theoretischen Perspektive des von Mannheim "in einem umfassenderen Sinne" verstandenen Begriff des Politischen zu interpretieren. Der zu Grunde gelegte Begriff des Politischen will eine stets "auf Weltveränderung ausgerichtete Aktivität" bedeuten, "die vom Willenszentrum ausgeht", und deren eigentlichen Sinn Mannheim in seiner eigenen Persönlichkeitsentwicklung durch den im Weltverhältnis liberaler Art innewohnenden Widerspruch zwischen Einstellung und Denkweise erlebnishaft in seiner spannungsvollen Unmittelbarkeit erfahren hat. (Vgl. ebd. S. 16–7.) Demzufolge ist Mannheim und seiner Wissenschaft die existentiell-theoretische Schicksalhaftigkeit des Politischen durch die Ideologie- und Utopieerfahrung des Liberalismus auferlegt worden, und davon ausgehend musste die Grundthese der Autoren formuliert werden: der Entwurf der Kultur- und Wissenssoziologie gründet sich letzten Endes auf einer subtilen Deutungsvariante des liberalen Grundgedankens der Vermittlung, durch die man sich sowohl im Bereich der Wissenschaft, als auch im Bereich der Politik zur ewigen Suche nach relativen Synthesen verpflichtet.

[10] Hier aber scheint es unvermeidlich zu sein, zum hermeneutischen Gebrauch des Begriffs "Ein-Partei-Staats-Sozialismus", der als einfache wissenschaftliche (historisch-soziologische) Situationsbestimmung zur Analyse des Rezeptionsgeschehens dient, Folgendes hinzufügen: Das Phänomen des so genannten "existierenden" Sozialismus als Problem pflegte man in Ungarn aus verschiedenen ideologischen Gesichtspunkten heraus mit dem politischen Begriff "Staatssozialismus" zu bezeichnen. Diese Bezeichnung aber wird nicht nur in der öffentlichen Gemeinrede ohne jede Bedenken gebraucht, sondern sie hat auch in den wissenschaftlichen Sprachgebrauch Eingang gefunden. Dieser Sprachgebrauch weist aber eindeutig darauf hin, dass man im wissenschaftlichen Diskurs über Totalitarismus bolschewistisch-kommunistischer Ausprägung den politischen Kern dieses Systemtypus eigentlich verfehlt, indem man ihn von dem Staat als *Gewalt*zentrum her, aber nicht von der Ein-Partei als *Macht*zentrum her zu verstehen sucht. Dadurch wird nämlich ein Missverständnis suggeriert, dass in totalitären Systemen über das Monopol des Politischen, das aus der Sicht von Max

3 Epochen der Rezeption

Zur ersten Feinderklärung kam es in den Jahren 1918–1920, weil Mannheim während der Räterepublik vom kommunistischen Regime eine Professur an der Budapester Universität angenommen hatte. Obwohl er kein Kommunist war und sich der Kommunistischen Partei nicht angeschlossen hat, machten die offensichtlichen freundschaftlichen Kontakte mit seinen zu Kommunisten gewordenen Sonntager Freunden den Kollaborationsverdacht und damit seine politische Bedrohung als wirklicher Feind des "Kursus" eindeutig.[11] Im Dezember 1919 emigrierte er nach Wien und von dort nach Deutschland. In seiner zweiten, unfreiwillig gewählten Heimat suchte Mannheim im Medium der sich kultur- und wissenssoziologisch orientierten Selbstreflexion nach einem neuen, für ihn bewohnbaren Zuhause des Geistes. Diese Suche vollzog sich im geistigen Konkurrenzkampf im Bereich der Wissenschaft.[12] Die damalige Schicksalsfrage Mannheims und seiner Wis-

Webers verstehenden Soziologie und Carl Schmitts politische Rechtswissenschaft zugleich zu erfassen ist, faktisch der Staat verfügt, doch nicht die Ein-Partei, die in einem durch rein politische Prinzipien (z. B. Grundprinzip des "demokratischen Zentralismus") und Normen institutionalisierten Gefüge den Staat selbst nicht einfach "leitet", oder "führt", sondern in wortwörtlichem, das heißt, staatsrechtlichem Sinne des Wortes "verwaltet". Man soll zum Beispiel beachten, dass das ideologisch-politische Grundprinzip des "demokratischen Zentralismus", als konstitutiv-regulatives Prinzip der politischen Ordnung, im Wesentlichen die Funktion einer "politischen Grundnorm" erfüllt hat. Das besagt nur, dass es als letzte Grundlage der normativen Geltung einzelner politischer Entscheidungen als Normen galt, indem es ihre politisch-normative Geltung begründete und rechtfertigte; sogar könnte man auch sagen: es "verbürgte" für sie. In diesem Gefüge des Ein-Partei-Systems konnte der Staat nur als "Maßnahmenstaat" funktionieren und wissenschaftlich kann er nur als ein solcher beobachtet und beschrieben werden. Dieser Sachverhalt lässt sich mit Formeln wie "Verwaltung der Verwaltung", "übergeordnete Verwaltungsentscheidung", "Riementransmission" etc. ausdrücken. In dieser Hinsicht also soll man den Ausdruck "Staatssozialismus" als einen politischen, den "Ein-Partei-Staats-Sozialismus" als einen wissenschaftlichen Begriff bestimmen, um die strukturell-funktionelle Eigenartigkeit, den politischen Kern des kommunistischen Totalitarismus in Ostmitteleuropa nicht zu verfehlen, um die ideologische Logik des Politischen, das heißt der dem Sprachgebrauch jeder Art innewohnenden Verführung und auch Gefährdung der unbewussten ideologischen Verschleierungen loswerden zu können.

[11] Zur Interpretation der geistigen-politischen Rolle des *Sonntags-Kreises* an der Jahrhundertwende siehe ausführlicher D. Kettler *Marxismus und Kultur. Mannheim und Lukács in der ungarischen Revolution 1918/19.* (Neuwied und Berlin: Luchterhand 1967); Karádi É. – Vezér E. (Hrsg.) *A Vasárnapi Kör [Der Sonntags-Kreis]* (Budapest: Gondolat 1980); Felkai G. "Bevezetés. Kordiagnózis, tudásszociológia, tudományos politika" [Einleitung. Zeitdiagnose, Wissenssoziologie, wissenschaftliche Politik] in Idem (Hrsg.) *Mannheim Károly* (Budapest: Új Mandátum 1999), 7–20.

[12] Die Mannheimsche Selbstreflexion in der ersten Emigration, die nach der eigentlichen

senschaft kann folgendermaßen formuliert werden: Was kann und auch soll bedeuten, im geistigen Sinne als Wissender, der dem Wesen nach im Schreiben und Lesen, in der Bildung existiert, Deutscher zu sein?

Die zweite Feinderklärung erfolgte in Deutschland während der absoluten Herrschaft des nationalsozialistischen Ein-Partei-Staates. Als stigmatisierter, absoluter Rassenfeind musste Mannheim seinen im harten geistigen Konkurrenzkampf erworbenen soziologischen Lehrstuhl in Frankfurt am Main aufgeben und sein geistiges Vaterland endgültig verlassen.[13] Durch den Verlust seiner ganzen deutschen Existenz musste er am eigenen Leibe schicksalhaft zu spüren bekommen, wie es "im irrationalen Spielraum" der Politik zugeht, wenn sich die innenpolitischen Gegensätze zwischen den kämpfenden Parteien innerhalb eines Staates so verschärfen, dass die politischen Gegner aus den verabsolutisierenden Sichtweisen ihren speziell-totalen Ideologien einander gegenseitig nicht als Widersacher,[14] sondern als seinsmäßig Anderer und Fremder, als einen wirklichen Feind behandeln, und einander nicht nur geistig – auf der "noologischen" Ebene –, sondern auch existentiell total vernichten wollen.

Existenzform des Geistes in der Moderne sucht, kann auch als Existenzerhellung wissenssoziologischer Art bezeichnet werden. Für die Entstehung der Kultur- und Wissenssoziologie aus der Sicht seiner Persönlichkeitsentwicklung waren existenzielle Erfahrungen – wie die Pluralität und Perspektivität der historisch-sozialen Standortgebundenheiten, die ständige Bedrohung der Autonomie und Freiheit der Wissenschaft durch Politik, und die philosophisch-weltanschauliche Verführung der Politik selbst – von konstitutiver Bedeutung. Siehe dazu eingehender K. Mannheim "Heidelberger Briefe I. II." in Gábor É. (Hrsg.) *Mannheim Károly levelezése 1911–1946 [Der Briefwechsel von Karl Mannheim 1911–1946]* (Budapest: Argumentum – MTA Lukács Archívum 1996), 231–244; C. Loader "Mannheims Heidelberger Letters of 1922" Vortagsmanuskript (Tutzing: 2006).

[13] Seine Verzweiflung und Enttäuschung waren fast verheerend, wie es in der Mannheim-Forschung allgemein bekannt ist. Zur Beschreibung seiner Emigrationssituation in England siehe Sigfried Ziffus: Karl Mannheim und der Mott-Kreis. Ein wenig beachteter Aspekt seines Wirkens im englischen Exil, in I. Srubar (Hrsg.) *Exil, Wissenschaft, Identität. Die Emigration deutscher Sozialwissenschaftler 1933–1945* (Frankfurt am Main: Suhrkamp), 206–23; Kettler – Meja – Stehr (Anm. 9); Felkai (Anm. 11), 18–21.

[14] Es wäre angebracht, wenn man bei der Semantik des Begriffs "Widersacher" nicht nur den Unterschied zwischen dem politischen und dem rechtlichen Handeln beachtet, sondern auf Grund ihrer geschichtlich-semantischen Verwandtschaft auch eine Möglichkeit der Transformation überlegt. Es soll hier nur aus rein heuristischer Absicht an die ursprüngliche, im Zusammenhang mit dem Rechtshandeln entstandene Bedeutung des Wortes erinnert werden: in einem Rechtsstreit gegen die andere(n) Partei(en) durch "streiten", "anklagen" zu handeln, das heißt ihr(en) Standpunkt(en) (Interessen) innerhalb des Rechtsverfahrens durch "widerstreben" rückgängig zu machen.

4 Ansprechen

Die erste Epoche der ungarischen Mannheim-Rezeption (1933–1947) begann in der Tat nach dieser zweiten Feinderklärung. Ironischerweise kehrte Mannheim nach Ungarn erstmals zurück, nachdem er aus seiner gewählten geistigen Heimat vertrieben worden war und in England wieder erfolgreich versuchte, seine wissenschaftliche Laufbahn neu aufzubauen. Nach seiner zweiten Emigration, zumindest nach dem jetzigen Stand der Mannheim-Forschung, war diese Reise (welche?) seine erste persönliche Begegnung mit Ungarn (nach der Emigration!). In dieser Zeit wurde Mannheim in Ungarn als wissenschaftlicher Gründer der deutschen Wissenssoziologie gewürdigt, der von nun an rezipiert werden sollte. Ungeachtet dessen, dass er im Grunde genommen als deutscher Philosoph und Wissenschaftler galt, war sein Vorname in den Übersetzungen und Veröffentlichungen bis zur Mitte der vierziger Jahre (noch genauer: bis 1952) noch "Károly".[15] Es kam zu dieser ersten persönlichen Begegnung Mannheims mit Ungarn im Frühling des Jahres 1934, als er in Budapest einer persönlichen und einer offiziellen Einladung gleichzeitig folgend, im *Cobden Bund* einen Vortrag hielt. Der Vortrag, dessen Titel *Sinn und Leidenschaft in der heutigen Gesellschaft* war, wurde in *Századok* veröffentlicht.[16]

[15] Nach seiner Emigration erschien im Jahre 1945 die erste größere Studie (Die Gegenwartsaufgaben der Soziologie) von Mannheim in ungarischer Sprache. In dieser Übersetzung war sein Name nicht mehr übersetzt, und der Übersetzer (József Zoltán) würdigte ihn als einen deutschen Professor, der als Weber-Schüler eigentlich nur die Lehre seines Meisters weiter entwickelte und darüber hinaus ein weltweit bekannter Vertreter der Erkenntnissoziologie wurde. Vgl. K. Mannheim *A jelenkori szociologia feladatai* (Übersetzt von József Z.) (Budapest: Egyetemi Nyomda 1945).

[16] K. Mannheim "Értelem és szenvedély a mai társadalomban" [Sinn und Leidenschaft in der heutigen Gesellschaft] *Századunk* (1934). Im Jahre 1937 veröffentlichte Mannheim zwei weitere Studien in *Szép Szó* mit dem Titel "A társadalmi technika" [Die soziale Technik]; "A modern háború keletkezésének pszichológiája" [Psychologie der Entstehung des modernen Krieges]. Der Cobden-Bund, der den Namen des englischen Ökonomen Richard Cobden trägt, entstand 1922, und er gründete 1934 die Zeitschrift *Századok* [Jahrhunderte], um den geistigen Widerstand gegenüber den europäischen totalitären Diktaturen zu unterstützen. Sie existierte bis 1939. Man wollte in dieser Zeitschrift einer jeden Weltauffassung und jedem politischen Standpunkt, der nicht chauvinistisch-nationalistisch oder demagogisch ist, einen Platz einräumen. Aber dem jetzigen Stand der Forschung nach kann man nur vermuten, dass die Heimkehr von Mannheim mit der Zeitschriftgründung im Zusammenhang steht. Zu seiner zweiten persönlichen Begegnung mit Ungarn kam es im Herbst des Jahres 1937, als er auch Lajos Fülep in Zengővárkony besuchte. Zu den biografischen Angaben dieser Begegnungen siehe Gábor É. "Mannheim Károly életének kronológiája" [Chronologie des Lebens von Karl Mannheim] in Idem (Anm. 12) 322–23. Zu Mannheims ungarischer Aufnahme siehe ferner Káldor Gy. "Ideologia és utópia. Mannheim Károly könyve" [Ideolo-

Obwohl es offensichtlich nur ein Zufall sein konnte, aber gerade in diesem Jahr erschien das Hauptwerk des ungarischen Rechtsphilosophen Barna Horváth, mit dem Titel *Rechtssoziologie. Probleme der Gesellschafts- und Geschichtlehre des Rechts.*[17] Dieses Buch, in dem Horváth, als Endergebnis seiner lebenslang dauernden Auseinandersetzung mit der reinen Rechtslehre von Hans Kelsen,[18] eine synoptisch-prozessuale Theorie des Rechts als Rechtssoziologie zu begründen und auszuführen versuchte, enthält an entscheidenden Punkten der Theoriebildung konstruktive Hinweise auf das wissenssoziologische Werk von Mannheim.[19] Aber darüber hinaus sei dazu noch bemerkt, dass die Wissenssoziologie am Problemhorizont Horváths Lebenswerkes in dessen verschiedenen Entwicklungsphasen stets anwesend war. Meines Erachtens kann mit den konkreten Hinweisen und dieser Präsenz eindeutig belegt werden, wie viel die soziologische Begründung der Rechtstheorie dieser Art der wissenssoziologischen Fragestellung zu verdanken hat. Es soll im Folgenden versucht werden, diese Verweisungen auf Wissenssoziologie im Vollzug der Theoriekonstruktion der synoptischen Rechtslehre in abgekürzter Form zu behandeln.

Die unvermeidliche Tendenz zur Soziologisierung der Rechtslehre. Das als Ausgangspunkt dienende Paradigma der Soziologisierung der Rechtslehre stellt für Horváth eindeutig die reine Rechtslehre Hans Kelsens dar.[20] Seiner In-

gie und Utopie. Mannheim Károlys Buch] *Nyugat* (1930), 152–3; Bibó I. "Korunk diagnózisa. Mannheim Károly új könyvéhez" [Diagnose unserer Zeit. Über das neue Buch von Mannheim Károly] *Társadalomtudomány* 23 (1943) 454–74.

[17] B. Horváth *Rechtssoziologie. Probleme der Gesellschafts- und Geschichtslehre des Rechts* (Berlin–Grunwald: Verlag für Staatswissenschaften und Geschichte 1934).

[18] Es sei hier bemerkt, dass die soziologische Begründung der Rechtstheorie dieser Art, und in vieler Hinsicht auch Horváths Lebenswerk als ein Monumentaldiskurs mit Hans Kelsen zu betrachten ist, den Kelsen selbst, mindestens theoretisch, aus der Sicht der Theoriekonstruktion seiner reinen Rechtslehre, durchaus nicht zur Kenntnis genommen hat. Dazu siehe ausführlicher Cs. Kiss L. "Szabadság és kényszer. Horváth Barna szellemi pályája" [Freiheit und Zwang. Geistige Laufbahn von Barna Horváth. Nachwort] in Horváth B. *Angol jogelmélet [Englische Rechtstheorie]* (Budapest: Pallas Stúdió – Attraktor), 569–611.

[19] Hinweise auf Mannheims Aufsätze über *Historismus* und *Wissenssoziologie*, und auf sein Buch *Ideologie und Utopie* befinden sich an folgenden Stellen des Hauptwerks von Horváth: erstens bei der Erörterung der Probleme der unmittelbaren positiven (§ 2; § 3; § 4) und negativen (§ 6; § 13) Voraussetzungen der Rechtssoziologie; zweitens Behandlung der Voraussetzung, des Gegenstandes, der Methode und der wissenschaftstheoretischen Ortsbestimmung der Rechtssoziologie; drittens im Abschnitt 4 über "Wissen und Recht" (Vgl. Horváth [Anm. 17], 3–14, 25–31.)

[20] Der Vollständigkeit halber soll zu dieser Behauptung noch hinzugefügt werden, dass für die Entstehung der synoptischen Rechtssoziologie die Auseinandersetzung zwischen Fritz

terpretation nach ist die reine Rechtslehre von vornherein als Rechtssoziologie konstruiert, unabhängig davon, dass sie einerseits die Soziologie als kausal-explikative Naturwissenschaft strikt ablehnt und schließt Soziologie von der Bestimmung des Rechtsbegriffs aus, andererseits Gesellschaft und Staat als Norm, als ideale Gebilde auffasst. Nach Horváth ist die reine Rechtslehre aus den folgenden Gründen Rechtssoziologie: *(a)* Recht und Staat werden als Teil der Gesellschaft betrachtet; *(b)* gemäß der Bedeutungsanalyse des Begriffs "Grundnorm" wird offensichtlich, dass Kelsen mit der Ausschließung aller empirischen Inhalte von der Bedeutungskonstruktion juristischer Begriffe nur die formale, nicht aber die transzendentale Allgemeinheit der rechtswissenschaftlichen Begriffsbildung erreichte. Diese Begriffe sind zwar formal gebildet, aber die Ausschließung des Inhaltes bedeutet noch nicht, dass sie durch Abstraktion und Verallgemeinerung, von der Aspektstruktur des Rechts als Gegenstand des Rechtserkennens aus betrachtet, notwendig transzendental werden.[21] Mit den formalen Begriffen jeder überhaupt möglichen Rechtslehre können nur die Möglichkeitsbedingungen der Rechtserfahrung, nicht aber die der Welterfahrung bestimmt werden. Daraus folgt, dass die formalen Begriffe der reinen Rechtslehre nur beschränkt, im Sinne einer transzendentalen Soziologie, über die Eigenschaft der Transzendentalität verfügen könnten, die, wie Kelsen sagt, Bedingungen des positiv, inhaltlich uneingeschränkt und beliebig wandelbaren

Sander und Hans Kelsen von ausschlaggebender Bedeutung war. In dieser Auseinandersetzung sind für Horváth die theoretische Perspektive einer ihre Begrifflichkeit im Kontext der normlogisch zu analysierenden objektiven Sinnes auf dem Grundbegriff der Norm (Sollen) aufbauenden *reinen* Rechtslehre und die theoretische Perspektive einer ihre Begrifflichkeit im Kontext der eidetisch zu beschreibenden objektiven Sinnes auf dem aus der reinen psychisch-geistigen Erfahrung gewonnenen Grundbegriff der Intentionalität (intentionaler Bezugsmomente des Bewusstseins) aufbauende *reinen* Rechtssoziologie in der Reinheit ihrer Strukturen klar unterscheidbar und voneinander trennbar geworden. Auch in seiner Selbstbiografie berichtete er über diesen Streit um die eigentliche Reinheit der Rechtslehre und betonte ausdrücklich ihre konstitutive Bedeutung für die Formulierung des Ansatzes seiner synoptischen Theorie. (Siehe Horváth B. *Forradalom és alkotmány. Önéletrajz 1944–45-től [Revolution und Verfassung. Selbstbiografie von 1944–45]* (übersetzt u. hrsg von Nagy E.) (Budapest: ELTE Szociológiai és Szociálpolitikai Intézete 1993); Idem (Anm. 17); Idem *A jogelmélet vázlata [Abriss der Rechtstheorie]*. (Máriabesnyő–Gödöllő: Attraktor 2004); zur Auseinandersetzung von Kelsen und Sander siehe S. L. Paulson (Hrsg.) *F. Sander – H. Kelsen: Die Rolle des Neukantianismus in der reinen Rechtslehre. Eine Debatte zwischen Sander und Kelsen* (Aalen: Scientia Verlag 1988).

[21] Das Recht, das als Regulierung sozialen Handelns durch das sich immer mehr institutionalisierende Verfahren funktioniert, existiert und gilt als Teil oder Aspekt einer Gesellschaft und Kultur. Demzufolge dürfen Begriffe und Denkmodelle einer Rechtslehre – durch die sie ihre eigene Aspektstruktur aufbaut, um ihren Gegenstand beobachten und beschreiben zu können – nicht als Möglichkeitsbedingungen der Welterfahrung schlechthin aufgefasst werden.

Rechts interpretativ beschreiben solle.[22] Der Begriff der Grundnorm, mit der Kelsen das Recht vom Nicht-Recht innerhalb der Gesellschaft und Kultur trennt und auf diese Weise es als Gegenstand des rechtswissenschaftlichen Erkennens bestimmt, besitzt den Status eines *a priori* transzendentalen Grundbegriffs nicht;[23] er ist höchstens ein transzendental-soziologischer Begriff, auf Grund dessen die geschichtlich-soziale Wirklichkeit als objektiv geltendes Recht erfasst werden kann. *(c)* In der Identifizierung seines kritischen Rechtspositivismus mit einem transzendental-logischen Naturrecht kommt der Standpunkt der Methodenreinheit zum Ausdruck, nach dem die funktional autonomen und eigengesetzlichen Sphären von Sein und Sollen funktional gleichrangig, unvermittelbar und unersetzbar sind. Die Grundnorm hat keine Aufgabe innerhalb des Stufenbaus des Rechts, das Sein zum Sollen zu transformieren. Die Rechtswirklichkeit verwandelt sich niemals in Rechtsnorm und umgekehrt. Demzufolge existiert das Recht aus Sicht der reinen Rechtslehre, die nach Kelsen als paradigmatische Rekonstruktion der Aspektsstruktur der Rechtswissenschaft überhaupt zu begreifen ist, nur in der Weise der Synopse eines Tatbestandes und einer Rechtsnorm.[24]

Von der transzendentalen versus reinen Soziologie zur synoptischen Soziologie des Rechts. Auf diesem Punkt hat Horváth die Kelsensche Auffassung mit der begrifflichen Unterscheidung der Rechtswirklichkeit und des Tatbestandes

[22] Nach Horváth, der zwischen formaler und transzendentaler Allgemeinheit der Begriffe unterscheidet, müssen die eigentlich transzendentalen Allgemeinbegriffe völlig a priori und rein, das heißt, frei von jedweder Empirie sein. Dagegen sind die formalen Allgemeinbegriffe des Rechts und die des Rechtserkennens, obwohl der Begriff des Rechts selbst weder im Rechtsleben, noch durch die Rechtswissenschaft erfahren werden kann, immerhin notwendigerweise empirisch, insoweit nur durch sie Orientierungs- und Rechtfertigungsbedingungen für rechtbezogenes, theoretisches und praktisches Handeln überhaupt geschaffen werden kann. Das Recht vom Nicht-Recht kann und soll einerseits innerhalb des Erfahrungsraumes und Erwartungshorizonts einer sozialen Welt mittels solcher Allgemeinbegriffe getrennt, andererseits anhand der so gewonnenen Unterscheidung das Recht in seiner Eigengesetzlichkeit erfasst werden. Eine Rechtslehre kann nur dann transzendental begründet sein, wenn man von der unmittelbaren Voraussetzung der Identität von Normativität und Gesellschaftlichkeit ausgeht und nimmt an, dass durch den Rechtsbegriff (Norm/Sollen) das Wesen des Sozialen als Geistiges zu erfassen und zu bestimmen ist. Kelsen hätte nur in diesem transzendental-soziologischen Sinne behaupten wollen und können, dass das Soziale als Geistige mit Normativen, und die Gesellschaftsordnung als Staat mit der normativen Zwangsordnung des Rechts identisch sei.

[23] Dies gilt auch für die anderen reinen juristischen Begriffe der reinen Rechtslehre, die die Bedingungen des Erkennens des positiven, inhaltlich uneingeschränkt, beliebig wandelbaren Rechts sein sollen.

[24] Dazu siehe ausführlicher Horváth (Anm. 17), § 32, 91.

einerseits, und mit der der Rechtsnorm und des Rechtswertes andererseits korrigiert und die Grundthese der Methodenreinheit radikalisiert. Die reine Rechtslehre selbst ist und wird Rechtssoziologie, insofern die transzendentallogisch interpretierte Unterscheidung von Natur (*Sein* als Identität von Wirklichkeit und Tatbestand) und Geist/Normativität (*Sollen* als Identität von Norm und Wert) methodologisch in die synoptische Schau, die in Wahrheit eine reine funktionelle Deutung des Rechts möglich macht, überführt wird. "Transzendental an diesen Zuordnungsschemata, in dieser Konfiguration ist die rein logische Form der Norm und der Natur allein, also etwas, was für Recht nicht spezifisch ist. *Das Spezifische, das besondere Schema der Zuordnung, ist dagegen nicht transzendental, sondern nur synoptisch.* Die gegenseitige Funktionalität von logischer Sollform und Seinsform mag transzendental genannt werden, die spezifische Zuordnung von Rechtswert und Rechtswirklichkeit ist es nicht. Sie bedingt nicht Erfahrung, sondern setzt sie voraus. Diese Erfahrung ist die geschichtliche Erfahrung der Gesellschaftlichkeit des Rechts. Die Rechtslogik als Normlogik ist nicht Transzendentallogik, sondern Soziallogik oder Geschichtslogik."[25] Auf diese Weise muss die als transzendentale Soziologie verstandene reine Rechtslehre sich zur synoptischen Soziologie des Rechts umwandeln, und damit ist auch das Problem der Bestimmung der anthropologischen Voraussetzung eines selbstreflexiven Rechtserkennens von der Ebene der transzendentalen Subjektivität auf die der synoptischen Deutung der Subjektivität zu verlegen.

Fazit: Das Recht ist Ideologie und Utopie. Das Recht besteht weder aus reiner Natur (Tatsachen), noch aus reiner Norm (Werten), aber man kann es nicht einmal als irgendeinen dritten Gegenstand auffassen. Demzufolge kann im rechtswissenschaftlichen Erkennen das Recht nicht als Erkenntnisgegenstand, sondern nur als ein "bloß reflexives Denkgebilde" erzeugt werden, das in Wahrheit weder in der Rechtswirklichkeit, noch in der Rechtsnormativität vorkommt. Das Recht kann nur eben in der synoptischen Betrachtung, das heißt, im reinen Akt des Zusammenschauens der Juristen und Rechtsgelehrten gegeben sein, auf der Weise einer gegenseitigen und unaufhörlichen Zurechnung des Seins zum Sollen, und umgekehrt, des Sollens zum Sein. Infolgedessen lässt sich Rechtstheorie weder als reine Rechtslehre (wie Kelsen behauptet), noch als reine Rechtssoziologie (wie Sander behauptet), sondern nur als Soziologie des Rechts besonderer Art auffassen, die mit der Synopse als reine Denkmethode arbeitet und sich selbst konstru-

[25] Ibid. 91.

iert.[26] Anhand dieser grundlegenden methodologischen Einsicht der synoptischen Selbstkonstitution des Rechts und des rechtswissenschaftlichen Erkennens, die mit einer Analyse der geistesgeschichtlichen Lage der Rechtswissenschaft in der Moderne auch untermauert wurde, zieht Horváth das folgende Fazit: Das Recht, das als ein von der Aspektstruktur der Rechtswissenschaft her sich selbst synoptisch konstruierendes Gedankengebilde, als

[26] "Die Methode der Rechtssoziologie ist also bloß eine *spezielle Technik der Anwendung der naturwissenschaftlichen und der normwissenschaftlichen Methode*, eine Methode der aufeinanderbeziehenden Beobachtung der Arbeit der beiden Methoden, eine Methode der funktionalen Sicht von Sein und Sollen, kurz: eine *Methode der Methoden*. Sie *erweitert nicht* die Erkenntnis, erobert kein neues Land des Alogischen für die logische Erfassung, sondern hilft bloß, das bereits gegenständlich Eroberte, in seiner Eigengesetzlichkeit Erkannte, durch gedankliche – vom Standpunkt seiner Eigengesetzlichkeit willkürliche – Kombination, Aufeinanderbeziehung, in seiner praktischen Verwertbarkeit zu beleuchten. Sie will durch Zerstückelung des Gegenständlichen und Zusammenlegung heterogener Gegenstandselemente ein Denkgebilde erfassen, das durch die auf es gerichtete Schau und nur in ihr lebt. Es *steht* der Erkenntnis nicht *entgegen*, sondern *schwebt* bloß dem Denken vor." (Ibid. 62.) Nur durch Synopse kann die Rechtslehre als Rechtssoziologie das Postulat der Methodenreinheit erfüllen, das Sein und das Sollen methodenrein abbilden und das positive Recht in seinem eigenen Strukturaufbau erkennen, ohne synkretistisch oder dialektisch vorgehen zu müssen. Aber die synoptisch-funktionale Betrachtungsweise ist nicht bloß eine spezifische, in jeder Rechtslehre von vornherein irgendwie enthaltene Methode der Rechtswissenschaft, nicht bloß eine selbstreflexive Beschreibung der Konstitutionsweise des Rechts, sondern eine universelle Methode der sinnverstehenden, nicht naturwissenschaftlichen Soziologie als Gesellschaftslehre, und auf diese Weise auch eine methodische Variante der Hermeneutik, die eine selbstreflexive Beschreibung der Konstitutionsweise des Sozialen ebenfalls ermöglicht. Im Zusammenhang mit der wissenschaftstheoretischen Ortsbestimmung der Rechtssoziologie nimmt Horváth an, dass beim soziologischen Erkennen der Gesellschaft und Kultur ebenso die synoptische Methode zugrunde gelegt werden muss. Denn jede sich aus objektivierten Sinngebilden als besondere Teile oder Aspekte zusammensetzenden Gesellschaft besteht ihrer Wesensstruktur nach auch aus Natur (Tatsachen) und Norm (Werten) und konstituiert und reguliert sich selbst synoptisch durch Verfahren. Das Verfahren wird als rein gegenstandbezogener Grundbegriff der Rechts- und Gesellschaftstheorie gleichfalls synoptisch konstruiert, indem er eine gedanklich-kommunikativ hergestellte Beziehung zwischen einer vorbestimmten Handlung als abstraktes Verhaltensmuster (Sollen/Wert) und einer wirklichen Handlung (Sein/Tatsache) ausdrückt und als paradoxer Bedeutungsinhalt des Begriffs stabilisiert. Nach Horváth bildet das Verfahren die unmittelbarste Grundlage des Rechts und zum Teil ist es selbst Recht. Die Soziologie untersucht ganzheitlich die totalen Zusammenhänge und möglichen Konfigurationen der Teile und Aspektstrukturen der Gesellschaft, die aus verschiedenen Konfigurationen der besonderen Aspekte der gesellschaftlichen Objektivationen (Wirtschaft, Kampf, Macht, Wissen, Verfahren) einerseits und aus den kulturellen Wertsphären andererseits besteht. Dagegen behandelt die Rechtssoziologie nur das Recht im Schnittpunkt dieser Aspektkonfigurationen. Im Hinblick darauf wird die Möglichkeitsbedingung der Selbstreflexivität der rechtswissenschaftlichen Erkenntnis des Rechts durch zirkuläre Verkoppelung der Synopse als methodenbezogener und des Verfahrens als gegenstandbezogener Grundbegriff der Rechtslehre gewährleistet.

objektivierter Sinnzusammenhang betrachtet werden muss, ist seinem Wesen nach Ideologie und Utopie.[27] Wenn aber diese Schlussfolgerung "richtig" ist, dann muss jede Rechtstheorie notwendigerweise auf eine wissenssoziologische Selbstreflexion angewiesen sein.

Dieses Endergebnis weist eindeutig darauf hin, dass bei der Geburt der synoptischen Rechtslehre als Rechtssoziologie auch die Wissenssoziologie entscheidend mitgeholfen hat. Im Bewusstsein dieser konstitutiven Beziehung hebt Horváth hervor, dass seine synoptisch-prozessual gedachte Rechtssoziologie weder spekulativ, noch materialistisch sei, noch zum Soziologismus gehöre, sondern im Wesentlichen eine Wissenssoziologie des Rechts sei. "Von der Wissenssoziologie erwartet sie viel, weil auch für sie alles Wissen seinsgebunden, in der Seinslage perspektivistisch verankert ist, aber die soziologische Seinslage selbst kann nur zum 'Stehen' kommen in 'Geltungsbeziehungen'. Ist das für uns erblickbare Sollen eine Seinsfunktion, so ist das Sein auch nur eine Funktion der Sollgeltung. Wie das uns erreichbare Wissen eine Funktion soziologischer Seinslage ist, so besteht doch auch das Letztere nicht an sich, sondern ist eine Funktion der Wahrheit und, für uns, die des diese erfassenden Wissens. Auf dieser Gegenseitigkeit muss die synoptische Rechtssoziologie beharren."[28] Nun aus diesem Zitat soll es sich herausstellen, dass es hier nicht bloß um Anwendbarkeit oder Verwertung, nicht nur um Einbeziehen der wissenssoziologischen Fragestellung in die Theoriebildung der Rechtslehre geht, sondern darüber hinaus eine Korrektion auch durchgeführt wird. Sollte man aber Horváths Argumentation näher betrachten, dann wird sich herausstellen, dass diese Korrektion eigentlich einen Ansatz zur Ausführung einer alternativen Theorie des Wissens in sich birgt, oder noch mehr: dabei handelt es sich in der Tat um eine aus der Aspektstruktur der Rechtswissenschaft heraus konstruierte Variante der Wissenssoziologie selbst.[29] Mit Rücksicht darauf kann man also zusammen-

[27] Dieser Sachverhalt anders ausgedrückt: Das Ideologische und Utopische liegt in der nur synoptisch erfassbaren Selbstkonstitution des Rechts und der Rechtserkenntnis. Siehe dazu ausführlicher unten die zweite Grundthese und besonders deren dritte These.

[28] Horváth (Anm. 17), 95.

[29] Zum Unterschied zu Mannheim, der die Voraussetzungen neukantianischer Geltungsphilosophien jeder Art mit ihrer Grunddifferenz von Sein (Wirklichkeit/Tatsache) und Sollen (Norm/Wert) völlig ablehnt, und an deren "theoretischen Standort" den Sinnbegriff stellt. In seiner Fragestellung ist die Sinnkonstitution als ein rein ontisch-ontologisches Problem erfasst, indem der wissenssoziologische Sinnbegriff von der ontisch (vortheoretisch) – ontologisch (theoretisch) bestimmten Perspektive (Aspektstruktur) einer allgemeinen Gesellschaftstheorie als Ontologie der Sozialität aus definiert wird, das heißt anhand einer rein ontologisch verstandenen Sinndifferenz, die die gängige philosophische Unterscheidung von Seiendes und Sein irgendeiner Art in Medium eines wissenssoziologisch orientierten Kritizis-

fassend behaupten, dass Karl Mannheims Wissenssoziologie in Bezug auf drei Problembereiche der synoptisch-prozessualen Rechtslehre in der Theoriekonstruktion eine konstitutive Rolle spielte, die analytisch mittels zwei Grundthesen und drei weiterer Thesen folgenderweise darzustellen ist.

Erste Grundthese: Synopse ist die richtige methodologische Antwort auf die Herausforderung des Historismus. Das Recht als Teil und Aspekt der Gesellschaft auf Grund seiner wesenshaften Geschichtlichkeit und Wandelbarkeit kann weder mit der Natur, noch mit der Norm gleichgesetzt werden.[30] Da seine phänomenologisch gegebene Raumzeitlichkeit auch nur von seiner Geschichtlichkeit her angemessen denkbar ist, so muss man einen Standort mit der dazu gehörenden Perspektiven ausmachen, von dem aus diese Geschichtlichkeit, Raumzeitlichkeit und Wandelbarkeit des Rechts zu sehen und begrifflich zu reflektieren ist. Für die Rechtswissenschaft sind diese Perspektiven in der der Sozialität innewohnenden Zeitlichkeit des Rechts, in der Synopse und im Verfahren als deren spezifischer Standort gegeben. Horváth nimmt an, dass man nur mit Hilfe der Synopse (Verfahren) imstande sein kann, auf die Herausforderung des Historismus von der Seite der Rechtslehre her richtig zu antworten, ohne dass sie dabei ihre Grundhaltung, und damit ihre letzten konstitutiv-regulativen Differenzen, aufgeben müsste. An diesem methodologisch entscheidenden Punkt bezieht sich Horváth auf den *Historismus*-Aufsatz von Mannheim.[31]

mus wissenschaftlich zu neutralisieren trachtet. Mannheim hat im "irrationalen Spielraum" des geistigen Konkurrenzkampfes um die öffentliche Auslegung des Seins zwischen Philosophie und Soziologie versucht, das ontologische Selbstverständnis jeder Philosophie der Moderne ins rechte Licht ihrer eigenen unüberwindlichen Partikularität zu rücken und dadurch sie in durch ihre jeweilige Seinslage vorbestimmte Grenzen zurückzuweisen. In diesem Sinne wird für Mannheims Wissenssoziologie der ontisch-ontologisch konzipierte Sinnbegriff grundlegend, der gleichfalls als eine synoptisch-synthetische Konstruktion des subjektiven und objektiven Sinnes zu interpretieren ist. (Vgl. IU, V. Kapitel, bes. 245–63; Cs. Kiss L. "A tudásszociológia eszméje és hivatása" [Idee und Beruf der Wissenssoziologie] in Gelléríné Lázár M. – Karádi É. – Cs. Kiss L. (Hrsg.) *Mannheim – tanulmányok. Tanulmányok Mannheim Károlytól és Mannheim Károlyról. [Mannheim-Studien. Studien von Karl Mannheim und über Karl Mannheim]* [Der Band wurde von Éva Karádi redigiert.] [Budapest: Napvilág 2003], 158–247.)

[30] Vgl. Horváth (Anm. 17), § 18; Die unmittelbaren Voraussetzungen der Rechtssoziologie sind Sozialität, Geschichtlichkeit, Raumzeitlichkeit, Wandelbarkeit des Rechts.

[31] Die Historismus-Interpretation Horváths kann illustrativ wie folgt zusammengefasst werden. Im synoptischen Akt können – wie bereits ausgeführt – Natur (Sein/Wirklichkeit) und Norm (Sollen/Wert) zusammen in ihrer Gleichzeitigkeit gegenständlich als kausalwissenschaftlich *und* normwissenschaftlich erfasste Objekte nicht gegeben sein. In oder durch Synopse ist nur die Beziehung von beiden in ihrer Gegenseitig-Aufeinander-Bezogenheit als ein reines Gedankengebilde funktional, doch nicht gegenstandskonstituierend zu erfassen.

Zweite Grundthese: Rechtssoziologie ist Wissenssoziologie des Rechts. Horváth unternimmt es im 4. Abschnitt (Wissen und Recht) seiner *Rechtssoziologie*, eine Theorie des Wissens als Wissen vom Recht und als Rationalisierung des Rechts auf Grund einer "methodenrein" funktionellen Deutung darzulegen. Man darf aber diese reine funktionelle Deutung des Wissens nicht bloß als eine theoriebildende Anwendung des Mannheimschen Ansatzes be-

Die Struktur der synoptischen Akten in der Rechtspraxis und theoretischen Rechtserkenntnis muss man analog-reflexiv denken können. Da sich aber der rein gedanklich-kommunikative Akt der Synopse als Zurechnungsprozess im Verfahren tatsächlich in der oder durch die Zeit vorgeht, ist das Problem der Historizität offenkundig nicht zu vermeiden. Gerade deswegen drängt sich die Frage auf: Wie kann die unentrinnbare Zeitlichkeit des synoptischen Aktes in der *generalisierenden* Erkenntnis der Rechtssoziologie erfasst und zugleich als Element ihrer eigenen methodologischen Voraussetzung gedacht und gesetzt werden? Wie kann die Rechtssoziologie der Provokation der Geschichtlichkeit, die seinem Gegenstand (Positivität des Rechts), der selbstreflexiven "Logik" seiner eigenen Begründung (Selbstreflexivität des Erkennens) innewohnt, gerecht werden, ohne dadurch zur individualisierenden Geschichtsschreibung (Rechtshistorie) oder zur ungeschichtlichen Naturrechtslehre (Rechtsahistorismus) zu werden? Sollte die Rechtssoziologie die These der Radikalität oder die des unvermeidlichen Selbsttranszendierens des Historismus zugleich voraussetzen, dann muss man neben den unmittelbaren positiven Voraussetzungen der Rechtserkenntnis (Geschichtlichkeit/Raumzeitlichkeit/Wandelbarkeit des Rechts) die Nicht-Identität von Recht und Geschichte (als unmittelbare negative Voraussetzung) auch annehmen, um die Möglichkeit der generalisierenden Erkenntnis, die "gleichzeitig" geschichtlich *und* soziologisch sein soll, begründen zu können. Nur in diesem Fall kann Rechtssoziologie der Historizität ihres Gegenstandes und der ihres Selbst gerecht werden, und wird imstande sein, die Perspektive des geschichtswissenschaftlichen und die des soziologischen Erkennens zu vereinen, ohne zu einer individualisierend verfahrenden Geschichtsschreibung zu werden. Demzufolge muss man die Geschichtlichkeit des Rechts aus dem Gesichtspunkt der Geschichtstheorie heraus und zugleich auf der Ebene der Allgemeinheit thematisieren können. "Auch die Geschichtslehre will *Allgemeines* über die Geschichte feststellen. Selbst wenn sie mit Konsequenz auf dem Prinzip des geschichtlichen Allwandels beharrt, behauptet sie über die Geschichte etwas Allgemeines, versteht nicht individualisierend, sondern erklärt generalisierend. Das ist der Sinn der Rede, dass der Historismus sich selbst transzendiert. Ist die absolute Einmaligkeit das Gesetz der Geschichte, so ist es immerhin ein allgemeines Gesetz der Geschichte. Es ist etwas ganz anderes, das Einmalige individualisierend zu verstehen, als seine Einmaligkeit generalisierend zu behaupten. Mit dieser Behauptung wird das Einmalige zum denkbar Allgemeinsten. Diese Verlegung des Absoluten in das Einmalige, die Mannheim für den letzten Sinn der Forderung Troeltsch's, die Geschichte durch die Geschichte zu überwinden, erachtet, löst auch die Spannung zwischen dem Recht und seiner Geschichtlichkeit." (Horváth [Anm. 17], 13.) An dieser Stelle soll aber auch hinzugefügt werden, dass die These der Identität und die der Nicht-Identität von Geschichte und Recht nur in der Synopse "gleichzeitig" denkbar ist, und dass man sich nur durch sie auf das Paradoxon der Historisierung und Dehistorisierung des Rechts einlassen kann. Gerade deshalb lässt sich der Historismus in der Rechtswissenschaft durch Synopse, die als eine Sichtweise und Methode des in der Moderne möglich gewordenen Entparadoxierens ebenfalls zu begreifen ist, zugleich hegen und begrenzen und in der rechtswissenschaftlichen Erkenntnis sicherstellen.

trachten, weil hier auch eine wesentliche Korrektion der Wissenssoziologie Mannheims vorliegt. Im Interesse der richtigen Einordnung der hermeneutischen Varianten der Mannheim-Rezeption muss daher dieser Korrektion unbedingt Aufmerksamkeit geschenkt werden, gerade deswegen möchte ich hier vier weitere Thesen von der reinen funktionellen Deutung des Wissens kurz ausführen. *(a) Jedes Wissen konstituiert sich synoptisch.* Die Struktur der synoptischen Konstitutionsweise des Wissens lässt sich vereinfacht folgenderweise darstellen: die Welt als Etwas erscheint in ihrer ursprünglichsten Unmittelbarkeit im Erlebnis, indem sie als Objekt nur durch "willens- und gefühlsbetonten Erlebnisakte" in Differenz von Akt und aktualisierten Gegenstand gegeben ist. Die Welt als Erlebtes wird begrifflich mittels reinen, vom synoptischen Aspekt der weltlichen Grunddifferenzen (Natur/Geist=Normativität; Sein/Sollen; Wirklichkeit/Wert) aus vollzogenen Denkakte verarbeitet, und durch menschliches Verhalten (Handlungsakte)[32] aktualisiert, bzw. reaktualisiert, aus denen sich die gesellschaftlichen Objektivationen (Wirtschaft, Kampf, Macht, Verfahren) aufbauen. Daraus folgt als eine Art Selbstverständlichkeit – freilich nur, wenn man die Konsequenzen, die aus diesem Sachverhalt resultieren, nicht außer Acht lässt –, dass im Wissen allerlei Art die sozial-historische Welt nur als Differenz, nicht aber als Identität erlebt, gedacht und gehandelt werden kann. Das synoptisch produzierte Wissen als gesellschaftliche Objektivation, betont Horváth, sei "ein vermittelndes, mediatisierendes Element, das die Leistung von Wirtschaft, Kampf, Macht (und Verfahren auch: L. Cs. K.) einerseits zwar zu beeinträchtigen, durch sein Dazwischengeschobensein abzubiegen und abzuschatten vermag, andererseits aber *sie notwendig vermittelt.*"[33] *(b) Jedes Wissen ist rein "standortgebunden", doch nicht "seinsverbunden".* In diesem Punkt wird der Unterschied zwischen den beiden Standpunkten am allermeisten sichtbar. Im Kontext der *Rechtssoziologie* kann nämlich der Ausdruck "Standortgebundenheit des Wissens" ausschließlich eine rein funktionelle Bedeutung haben, weil einem Standort jedweder Art nur gleichwertig-gegenseitige Verweisungen auf die Seinslage und auf die Geltungssphäre der Gesellschaft und Kultur[34] zugerechnet werden können, und man muss sich mit der Annahme abfinden, dass die soziologische Bestimmung eines Standortes nur

[32] Dieser Begriff des "menschlichen Verhaltens" wurde von Horváth mit dem des sozialen Handelns im Sinne der verstehenden Soziologie Max Webers gleichgesetzt. (Vgl. Horváth [Anm. 17], 1.)

[33] Siehe ibid. 243.

[34] Horváth beschreibt die soziale Verwirklichung der Geltungssphäre mit solchen Begriffen wie Kultur und Bildung, durch die die ewigen Werte wie das Gute, das Schöne, das Wahre, das Heilige etc. positiviert werden, mit den jeweiligen Seinslagen ihrer Träger durch Handeln

solche funktional equivalente und zirkuläre Verweisungen enthalten kann. Auf Grund dessen lässt sich durch Bestimmungen der "Standortgebundenheit" einerseits "bloß" die synoptische Konstitutionsweise des Wissens, andererseits der funktionale Zusammenhang der Leistungen der einzelnen gesellschaftlichen Objektivation sichtbar machen und begrifflich ausdrücken.[35] Im Hinblick darauf kann der richtige Sinn der folgenden Sätze verstanden werden: "Die Standortgebundenheit des Wissens selbst sorgt dafür, dass es nicht ganz inadäquat wirken kann, um so weniger als es im Sein der übrigen Objektivationen bereits konstituierend enthalten ist. Ist es adäquat, so vermittelt es rein ihre Leistung."[36] Die "Standortgebundenheit des Wissens" bedeutet einerseits eine notwendige Gebundenheit an die Aspektstruktur der Synopse und bildet andererseits – indem jede gesellschaftliche Objektivation sich selbst als Sinngebilde synoptisch aufbaut – ein funktionelles Minimum für das Fortbestehen der Gesellschaft und Kultur. Nun vor diesem Hintergrund der als rein funktionelle Betrachtung verstandenen Synopse kann man die rechtswissenschaftliche Auslegung der Problematik von Ideologie und Utopie ins rechte Licht stellen. Wenn das in den Objektivationen enthaltene Wissen inadäquat ist, dann, behauptet Horváth, "wirkt es entweder nur verhüllend (Ideologie) oder gestaltend (Utopie), welche Gestaltung dann als die Entwicklung durch die übrigen Faktoren zugleich erscheint."[37]

rein funktionell, doch nicht seinsmäßig, in Berührung kommen können, ohne ihre Ewigkeit einbüßen zu müssen.

[35] Das ist der Grund dafür, warum Horváth konsequent auf den Gebrauch des Ausdruckes "Seinsverbundenheit" verzichtete. Denn für ihn ist das Wissen von der Aspektstruktur der Synopse her betrachtet mit der Seinssphäre (Natur/Wirklichkeit) und mit der Geltungssphäre (Norm/Wert) zugleich "verbunden", freilich im Sinne der gleichwertig-gegenseitigen funktionellen Berührung der beiden Bereiche der Welt. Demgegenüber hat Mannheim, der die Wissenssoziologie als Fundamentalontologie des sozialen Seins ("Wissenssoziologie als Theorie von der Seinsverbundenheit des Denkens") in den Status einer Meta-Theorie der Philosophie, Geisteswissenschaften und der Soziologie selbst erheben wollte, gleichermaßen von den beiden Ausdrücken "Seinsverbundenheit", bzw. "Standortgebundenheit" Gebrauch gemacht. Als er im Jahre 1931 im Interesse einer normalwissenschaftlichen Rechtfertigung und der Klärung des Forschungsprogramms der Wissenssoziologie an Stelle des missverständlichen, "sehr belasteten" Wortes "Ideologie" den Begriff der "Aspektstruktur" stellte, schrieb er Folgendes: "Im wissenssoziologischen Gebrauch werden wir eben von einer 'seinsverbundenen – oder standortgebundenen – Aspektstruktur' eines Denkens reden". (IU, 229.)

[36] Horváth (Anm. 17), 243.

[37] "Das Wissen von Sein und Sollen, von Natur und Norm, von Wirklichkeit und Wert der übrigen Objektivationen erweist sich als Zement der synoptischen Gebilde insofern, als durch dasselbe Wirklichkeit und Wert aneinander selektiert werden. Im Maße ihres Bewusstwerdens gehen Sein und Sollen in das Gebilde hinein. Normgründe und Ursachen bestimmen es innerhalb der Grenze ihrer Sichtbarkeit fürs Wissen, aber diese Sichtbarkeit selbst ist auch ihre, wenn auch nicht ganz adäquate, Funktion." (Ibid.)

(c) Die Begriffe von Ideologie und Utopie als Strukturelemente und Aspekte der Synopse sind reine Funktionsbegriffe. Aus dieser These folgt, dass man mittels der Begriffe "Ideologie" und "Utopie" nur den geschichtlichen Wandel der Rechtsentwicklung und die gegenseitigen funktionellen Leistungszusammenhänge der gesellschaftlichen Objektivationen beobachten und beschreiben kann.[38] *(d) Die Rechtssoziologie als Wissenssoziologie ist eine reflexive Theorie der Entwicklung und Rationalisierung des Rechts.* Anhand dieser These kann die rechtssoziologisch-operationelle Anwendung des Mannheimschen Utopiegedankens und seiner Methodologie an Rechtsentwicklung sehr wohl untersucht und mit Rücksicht auf deren Richtigkeit auch überprüft werden. Horváth geht nämlich von der entwicklungstheoretischen Annahme aus, nach der die Möglichkeit eines kritischen Rechtsbewusstseins nur auf der Evolutionsstufe der den Traditionalismus und die Magie überwundenen Rechtsutopien entstehen konnte, und dass sich utopisches Rechtsbewusstsein allmählich in "Wissensform der Rationalisierung" verwandelte. Mannheims methodologischem Vorschlag folgend, mit Hilfe des "gegenseitigen Distanzierens, Relationierens und Partikularisierens" der konkurrierenden Rechtsutopien kann man ein kritisches, selbstreflexives Rechtsbewusstsein zustande bringen, "das die Rechtsutopien mobilisiert oder dynamisiert und dadurch dem utopischen Rechtsbewusstsein zu einem selbttranszendierenden Wandel verhilft."[39] Dementsprechend muss die Rationalisierung des Rechts durch Verfahren ebenfalls als ein synoptisch erfassbares Phänomen betrachtet werden, dessen Beschreibung Irrationalität (Magie und Tradition) und Rationalität (Rezeption und Rechtsutopie) der Rechtsentwicklung gleichzeitig zu umfassen und deutend zu erklären vermag. Eben darin liegt

[38] Zur Darlegung der Utopie-Interpretation der synoptischen Rechtssoziologie siehe ausführlicher B. Horváth "Der Sinn der Utopie" in Idem *Probleme der Rechtssoziologie* (Hrsg. von Manfred Rehbinder) (Berlin: Duncker & Humblot 1971), 101–35; L. Cs. Kiss "Utópia és valóság" [Utopie und Wirklichkeit], *Világosság* 1997/11, 36–48.

[39] "Kritische Rationalisierung transzendiert sich selbst insofern, als sie die Grenzen der Rationalisierung berücksichtigt. Sie sieht die Standortgebundenheit jeder Rationalisierung ein. Sie erblickt die Relativität der Rationalitätskriterien, die Perspektivität und Transformation des Rationalisierungsprozesses. Sie weiß, dass es absolute Kriterien der Rationalität nicht geben kann, weil jede geschichtliche Perspektive nur ganz bestimmte Teilaspekte als irrational und als rational erblickt, dass daher der Prozess notwendigerweise einer Transformation unterworfen ist, dass das Recht sich zu gleicher Zeit rationalisiert und irrationalisiert. Sie baut die Irrationalität des Rechts in ihren Rationalisierungsplan ein. [...] Sie transzendiert sich selbst, weil sie einsieht, dass die radikale Rationalisierung das Recht selbst vernichten, den Untergang des Rechts bedeuten würde. Aus der irrationalen Standortgebundenheit der sozialen Sicht geboren müsste das Recht untergehen, wenn es vollkommen rationalisiert werden könnte. [...] Würde es jedoch mit diesem Ideal zusammenfallen, könnte es vollkommen rationalisiert werden, so würde es untergehen." (Ibid. 249–50.)

das Rätselhafte, das jede Rationalisierung und auch jede Beobachtung der Rationalisierung dazu zwingt, sich selbst durch Setzung und Ent-Setzung des Rationalen und Irrationalen zu paradoxieren und zu entparadoxieren. Horváth war davon überzeugt, dass der auf diese Weise begründete kritische Rationalismus seiner Rechtssoziologie allein imstande sein kann, durch Synopse (Verfahren) wirklich reflexives Wissen über ihren Gegenstand und sich selbst zugleich zu produzieren. All dies aber soll nur das besagen, dass die synoptisch-prozessuale Rechtssoziologie, dank der Wissenssoziologie Karl Mannheims, dazu befähigt wurde, selbstreferenziell etwas über seine eigene Funktion als Vermittlung aussagen zu können.

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Für den Beobachter des Rezeptionsvorgangs mag es also kein Zufall zu sein scheinen, dass die rechtssoziologische Deutung, die die Wissenssoziologie rein auf der Problemebene der Begründung (Theoriekonstruktion) thematisierte und aus der Sicht einer auf Selbstreferenzialität Anspruch erhebende Rechtserkenntnis verwertete, die erste Epoche der ungarischen Mannheim-Rezeption eindeutig bestimmt hat. Hoffentlich hat es sich aus unseren Ausführungen auch herausgestellt, warum die synoptisch-prozessuale Rechtssoziologie als die paradigmatische Ausprägung der hermeneutischen Grundfigur des Ansprechens zu betrachten ist.[40]

5 Vernichten

Die zweite Epoche der Rezeption (1952–1969) hat mit der dritten Feinderklärung im Jahre 1952 begonnen, als Karl Mannheim und seine Wissenssoziologie in Georg Lukács' berühmt-berüchtigt gewordenen Buch, in *Die Zerstörung der Vernunft*, mindestens durch Interpretation und virtuell, als absoluter Feind erklärt und als wissenssoziologischer Handlanger des Irrationalismus "zerstört" worden ist. Methodologisch, wie bereits angedeutet, stellt diese Feinderklärung die eigentliche hermeneutische Ausgangslage der Rezeption dar, weil dieses Werk, das unter anderen als der Prototyp des geistigen kalten Krieges galt – und freilich gilt, insofern man es in seinem richtigen Zusammenhang seiner "Genesis und Funktion" verstehen und untersuchen wollte –, die bedeutendste und langfristigste Wirkung

[40] Im ersten Drittel des 20. Jahrhunderts, das in der Tat als die erste und zugleich letzte Blütezeit der ungarischen Rechtsphilosophie zu bezeichnen ist, war die Mannheim-Rezeption weder auf politisch-ideologische Rechtfertigung, noch auf öffentliche Anerkennung angewiesen, aber das könnte das Studium der *Rechtssoziologie* eher nur negativ nachweisen.

auf die Nachkriegsgeschichte der ungarischen Mannheim-Rezeption ausübte. Gerade deswegen scheint die Behauptung gar nicht unbegründet zu sein, dass Lukács' einflussreiches Werk sich für die ungarische Philosophie und Sozialwissenschaft als schicksalbestimmend erwies.[41]

5.1 Die Zerstörung der Vernunft als Feinderklärung

Es wird also behauptet, dass sich Lukács – als er seine weltanschaulich-philosophische Letztentscheidung für den Rationalismus und gegen den Irrationalismus getroffen und in Buchform festgelegt hat – dem Wesen nach rein politisch, das heißt der "Logik" des Politischen gehorchend, entschieden hat. Im Zusammenhang damit vertreten wir die folgende hermeneutische These: Wenn man das Werk und darin die Mannheim-Interpretation in Wahrheit verstehen will, muss vor allem diese politische Letztentscheidung als Feindbestimmung und Feinderklärung totalitärer Art ausgelegt werden, die sich auf eine bestimmte Freund/Feind-Unterscheidung, bzw. Freund/-Feind-Gruppierung (im Sinne Schmitts) bezieht und dem sich im "irrationalen Spielraum" der Politik (im Sinne Mannheims) orientierenden Handelnden als richtungsweisender Bezugspunkt dient.[42] Damit wird nur ge-

[41] G. Lukács *Die Zerstörung der Vernunft* (Neuwied: Luchterhand 1962). Dieses Werk wurde von Lukács als apologetische Kampfschrift gegen den Geist des braunen Totalitarismus in der Verteidigung und im Schutz eines roten Totalitarismus, also aus rein weltanschaulich-ideologischen Gründen verfasst. In seinem total verheerenden Angriff gegen damals noch Lebende und Tote trat eigentlich der Kompetenzstreit zwischen Weltanschauungsphilosophie und wissenschaftlicher Philosophie, zwischen Philosophie und Wissenschaft (Soziologie), zwischen Politik und Wissenschaft in seiner reinsten Form in Erscheinung, und letzten Endes handelte es sich um die allgemein- und endgültige Deutung der Idee des objektiv-rationalen wissenschaftlichen Erkennens als Beruf im Kontext des Monopolisierens der öffentlichen Weltauslegung in Ostmitteleuropa. Deshalb sei hier ausdrücklich darauf verwiesen, dass das Werk selbst als politische Kampfschrift den Interpreten zu einer bestimmten Art der Auslegung zwingt. Im Hinblick darauf wird es hier vor allem aus Plausibilitätsgründen vorgeschlagen, Lukács' Werk vor dem Hintergrund des synoptisch konstruierten Begriffs des Politischen zu verstehen und als eine Typusvariante der Verwirklichung, bzw. Transformation des Politischen in der Moderne zu interpretieren.

[42] Hier muss aber beachtet werden, dass nur eine anstaltmäßige politische Instanz (so wie ein Staat, eine Partei, eine Kirche), die über das Monopol des Politischen zu verfügen vermag, darüber entscheiden kann, wer und warum als seinsmäßig Anderer und als Fremder wirklich ein Feind ist, wer und warum ihn für einen Feind erklären muss. Diesem Sachverhalt zufolge ist Lukács' Werk als interpretative Beschreibung (Bestimmung) der Klassenfremden als Feinde aus dem Gesichtspunkt einer verabsolutierten Weltanschauungsphilosophie heraus zu betrachten, und überdies muss man sich wohl dessen bewusst sein, dass diese Feindbestimmung als Letztbegründung zugleich eine virtuelle Feinderklärung total-totalitären Zuschnitts ist. (Vgl. Anm. 7.) Durch diese Weise der ideologisch-politischen Letztbegründung

meint, dass dieses Werk, gerade weil es mit Rücksicht auf seine "theoretische" Absicht ein kritisches Gegenstück zur Wissenssoziologie selbst sein will, selbstreferenziell zu interpretieren ist. Aber nicht nur darum. Man muss sich sogar auf diese Interpretationsweise einlassen, insoweit man die geistesgeschichtliche Lage, deren Produkt und paradigmatische Ausprägung diese Faktizitäten sind, nicht außer Acht lassen will,[43] und zugleich seiner eigenen methodologischen Intention auch gerecht werden möchte.

einer Feinderklärung wird nämlich die Existenzialität (Anderssein) als seinsmäßiges Fremdsein des Klassenfeindes vollständig beseitigt, denn sie ist dadurch – wie Schmitt sagt: "*über das Politische hinausgehend*" – auf eine andere wertmäßig-normative Ebene der Feindbestimmung verlegt, auf der der Feind in Extremen des Wertes oder des Unwertes (Nicht-Sein des Wertes) systematisch abgewertet wird. Durch diese systematische Abwertung wird der Klassenfremde als Feind der Vernunft moralisch böse, wissenschaftlich unwahr, falsch, ästhetisch hässlich, wirtschaftlich schädlich etc., das heißt ein absoluter Feind, der – indem das Nicht-Sein des Wertes sich in ihm verkörpert –, im Selbstverteidigungsinteresse der wahren Rationalität der Menschheit ausgerottet werden kann und muss. Mit diesem durch Weltanschauungsphilosophie vollstreckten Transzendieren geht freilich "der spezifisch politische Sinn" der Worte Feind und Freund verloren. (Vgl. C. Schmitt *Der Begriff des Politischen*, 37.) Der Vollstrecker (Person und Werk) selbst, der sich vom Politischen nicht mehr zu distanzieren vermag und als Glaubenskämpfer auch nicht will, wird zu einem folgenschweren politischen Mythos der Moderne, durch den "Dialektik" der formalen und materialen Rationalisierung auf paradigmatischer Weise sichtbar wird. Im Zusammenhang damit wird es weiterhin behauptet, dass die Struktur der Letztbegründung dieser Feinderklärung die Komposition des Werkes bestimmt und den gesamten Sinnzusammenhang des Textes in seiner dennotativ-konnotativen Bedeutungsdimensionen prägt. Dementsprechend kann die Struktur der Feinderklärung auf das Kürzeste wie folgt dargestellt werden: Die sich für Vernunft entscheidende Freund-Gruppierung gilt als geschichtsphilosophisch auserwählter Träger des Rationalismus (existierender Sozialismus: Proletariat/Marxismus-Leninismus/Kommunismus); die sich gegen die Vernunft entscheidende Feind-Gruppierung gilt als geschichtsphilosophisch auserwählter Träger des Irrationalismus (Hitler-Regime und amerikanischer Imperialismus: Bourgeoisie als Imperialist/Faschismus-Nationalsozialismus/bürgerliches Denken/Imperialismus). Die Geschichte der deutschen Philosophie und Soziologie, beginnend mit dem deutschen Idealismus und mit der Entstehung der deutschen Soziologie, ist eine unmittelbar nach Marx weiter geschriebene Verfallsgeschichte der "deutschen Ideologie". Diese Geschichte als eine Philosophiegeschichte "von Schelling zu Hitler" ereignete sich im existenziellen Medium des Politischen, und geht letzten Endes im Mythischen und im Hitler-Regime unter. Dieser Untergang als Zerstörung der Vernunft wird von Lukács als ein rein politisches Geschehen betrachtet und erfasst, deswegen ist dieses Werk als Politikphilosophie oder anders – eine besondere Art Philosophie des Politischen – zu bezeichnen. Aus diesen Gründen kann es verständlicherweise keine harmlose Weltanschauung geben, weil jede Philosophie und Wissenschaft als Ideologie sich notwendigerweise auf das Politische bezieht, sie gehört also entweder zur Freund-Gruppierung oder zur Feind-Gruppierung. Überdies aber muss man zugleich in Betracht ziehen, dass Lukács' Werk sich in Form einer offenen Kritik am Sektarianismus vom Stalinismus distanziert.

[43] Wenn man das Werk von seiner "sozialen Genesis und Funktion" her – und das besagt: rein transzendent – betrachtet, dann muss festgestellt werden, dass es hinsichtlich seines tat-

5.2 Die Zerstörung der Vernunft als totalitäres Umfunktionieren der Ideologienlehre

Im Folgenden sei gezeigt, dass der Unterschied zwischen der totalen und totalitären Ideologiekritik als Aktualisierungsweise der Ideologienlehre auf entsprechende Weise nur dann geklärt werden kann, wenn man das Problem der Feindbestimmung und das der Ideologie(Utopie)bestimmung zusammengeschaut[44] behandelt. Aber eine theoretische Klärung dieser Art erfordert letzten Endes eine Interpretation jener *politischen* Entscheidung, die Lukács, der Logik des Politischen gehorchend, getroffen hat. Durch diese Logik wurde er vor die Alternative gestellt: Marx oder Lenin. Der Gegenstand dieser nur scheinbar theoretisch-hermeneutischer Entscheidung galt und gilt auch heute als eine der Grundfragen der marxistisch-leninistischen Tradition: Wie soll eigentlich - vom Klassenstandort ausgehend, durch den die Position des wissenschaftlichen Beobachters vorbestimmt ist - das Verhältnis von Politik und Wissenschaft richtig gedeutet werden? [45] Oder an-

sächlichen Wirkungszusammenhanges und existentiell-politischen Sinnes im Interesse der Selbstverteidigung einer geistigen Großraumordnung geschrieben wurde, die faktisch durch politische Idee und Wirklichkeit des Sowjetreiches beherrscht worden war. Dieses Werk ist für uns nicht nur deswegen berüchtigt und zugleich idealtypisch geworden, weil Lukács in ihm das totale zu einer totalitären Ideologiekritik transformiert und diese als hermeneutische Vernichtungsmittel angewendet hat, sondern weil durch diese Verwandlung des Ideologiebegriffs die Selbstreferenzialität der Rezeption der Wissenssoziologie vielmehr sichtbar wird, als in der synoptisch-prozessualen Rechtssoziologie von Horváth.

[44] Nach der synoptischen Behandlungsweise muss das Problem vom Begriff des wirklichen und absoluten Feindes her einerseits, und von der Ideologie(Utopie)deutung der Ideologienlehre her andererseits reflektiert – genauer: relationiert – werden.

[45] Marx hat das Paradigma der modernen Ideologienlehre ausgearbeitet, in dessen Rahmen der folgenschwere Begriff des totalen-wirklichen Feindes (Bourgeois als Klassenfeind) und die paradigmatische Form der totalen Ideologiekritik als geistige, theoretisch-wissenschaftliche Vernichtung dieses Feindes konzipiert wurde. Die Ideologienlehre ist von Marx in Form einer auf dem Axiom des ontisch-ontologischen Vorranges des Wirtschaftlichen (Unterbau als Wirtschaft und Gesellschaftsstruktur der Wirtschaft) und auf der geschichtlich-soziologisch konzipierten Unterscheidung von Unterbau und Überbau (Ideologie) beruhenden evolutionären Gesellschafts- und Geschichtstheorie aufgebaut worden. Marx hat anhand dieser positivistischen Theorie der Sozialität und deren Historizität die existenziell-funktionelle Sonderstellung und dadurch die relative Autonomie der einzelnen Gebiete des Überbaus anerkannt, und aufgrund dessen war er noch imstande, zwischen den funktionsspezifischen Leistungen der wissenschaftlichen Erkenntnis und der ideologischen Legitimation der Politik zu unterscheiden. Das kann eben nur besagen, dass Marx als ein bürgerlicher Intellektueller und Wissenschaftler, unter den Bedingungen der durch den klassischen Liberalkapitalismus und seine parlamentarische Demokratie bestimmten geistesgeschichtlichen Lage, fähig war, die von ihm untersuchten Sachprobleme innerhalb des wissenschaftlichen Diskurses zu halten, unabhängig davon, dass für ihn die Wahrheitsfrage

ders formuliert: Wie soll eine marxistische Ideologienlehre richtig verstanden und konzipiert werden: als wissenschaftlich-politische Theorie der Sozialität, die nur zur geistigen, bloß theoretisch-wissenschaftlichen Vernichtung des wirklichen Feindes ("auf der noologischen Ebene") geeignet ist, oder als praktische Theorie der Politik, die darüber hinaus schon zur faktisch-politischen Vernichtung des absoluten Feindes tauglich ist.

Die geistige Vernichtung der Kultur- und Wissenssoziologie, die Lukács unter dem Titel: *Die Wehrlosigkeit der liberalen Soziologie Alfred Weber, Mannheim* als Übergangsphase und Bindeglied in der "von Soziologie zum Nationalsozialismus" vorschreitenden Entwicklung der deutschen Ideologie vorgeführt hat, zeigt uns ja exemplarisch, dass sich Lukács, wie es ansonsten allgemein bekannt ist, für Lenin, jedoch nicht für Marx entschied. Im Hin-

als eine aus seinem substantiv geschichts- und politikphilosophischen Gesichtspunkt heraus von Vornherein entschiedene Angelegenheit galt. Es sei hier also daran erinnert, dass die in Wissenschaft und Politik aufgelöste Philosophie als Theorie der Sozialität noch vermochte, die Differenz von Ideologienlehre (Politik) und historischen, ökonomischen, soziologischen Forschung (Wissenschaft) in gewissem Grade aufrechtzuerhalten. Demgemäß war Marx in Wahrheit ein Positivist der Wissenschaft, der nicht zulässt, dass Philosophie als totale Kritik endgültig zur Weltanschauungsphilosophie etwa in Form des absoluten Geistes des Politischen wird. Dagegen hat Lenin als Berufsrevolutionär den Begriff des totalen-absoluten Feindes (Bourgeois als Imperialist) und das Paradigma der totalitären Ideologiekritik ausgearbeitet. Dementsprechend ist die leninistische Ideologienlehre als eine reine *praktische* Theorie der Politik und der geistigen-politischen Vernichtung des Feindes aus- und durchgeführt worden. In dieser praktischen Theorie von Politik wurde dem Politischen das existenzielle (ontisch-ontologische) Vorrang in paradoxer Form zuerkannt: Politik sei konzentrierter Ausdruck der Wirtschaft, die im Zeitalter des Monopolkapitalismus in der politischen Bewegungsform des Imperialismus konkret in Erscheinung getreten sei, und zur Entscheidung zwänge: entweder-oder. Lenins praktische Theorie von Politik, deren berühmt gewordene Leitidee als eine scheinbar einfach zum konkreten politischen Handeln auffordernde Frage ("Was ist zu tun?") formuliert ist, hat aber die funktionelle Sonderstellung, das heißt die relative Autonomie der einzelnen Gebiete des Überbaus beseitigt und die Monopolstellung der Politik gerechtfertigt. Damit ist die Wissenschaft einer reinen Politik und einer reinen Weltanschauungsphilosophie unterworfen und die öffentliche Auslegung der Welt durch Philosophie und Politik monopolisiert worden. Von dieser Zeit an ist Funktion und Beruf der Wissenschaft statt des wissenschaftlichen Erkennens die reine ideologische Legitimation des politischen Handelns gewesen, dessen existenziell-normativer Sinn ausschließlich auf den letzten Kampf für die Verwirklichung der Zukunftsziele und gegen den geistig-politisch völlig zu vernichtenden Feind gerichtet sein musste. Zusammenfassend könnte man sogar, ohne zu übertreiben, sagen, dass während für Marx der Klassenfeind (Bourgeois) nur auf dem Gebiet der Philosophie und Wissenschaft einen von Grund auf zu zerstörenden andersartigen Fremden bedeutet hat, aber in der Politik bloß virtuell, hat für Lenin der Klassenfeind (Imperialist) auf dem Gebiet der faktisch zum Zentrum der Gesellschaft gewordenen Politik in der Tat einen von Grund auf zu zerstörenden und wirklich vernichteten andersartigen Fremden, einen absoluten Feind im eigentlichen Sinne dieses Begriffs bedeutet. (Vgl. C. Schmitt *Theorie des Partisanen. Zwischenbemerkung zum Begriff des Politischen*, 94–5.)

blick auf Lukács' Entscheidung soll man behaupten, dass durch sie die marxistische Ideologienlehre totalitär umfunktioniert worden ist. Im Folgenden wollen wir eine thesenhafte Rekonstruktion dieser von Lukács "immanente Kritik" genannten Destruktionsweise auszuführen versuchen, die "methodologisch" stets von der Faktizität einer vorherigen ideologisch-politischen Entlarvung und Vernichtung des Klassenfeindes durch "transzendente Kritik" ausgehen und sich immer nach ihr richten muss.[46]

Beschreibung von Genesis und Funktion der Wissenssoziologie aus der Perspektive der transzendenten Kritik. Im Zeitalter des Monopolkapitalismus verkörpert der Imperialismus jene fundamentale politische Herausforderung, auf die Philosophie und Soziologie mit ihren eigenen – man sollte sagen: immanenten – Mitteln eine richtige ideologische Antwort geben müssen.[47] Aber die

[46] Aus diesem Grunde versteht es sich von selbst, dass die von Lukács im Vorwort (Über den Irrationalismus als Erscheinung in der imperialistischen Periode) ausführlich behandelte methodologische Differenz zwischen "transzendenter Kritik" und "immanenter Kritik" selbst reinen politischen Charakter hat. Das zeigt sich unter anderen schon darin, dass sich Lukács "rein" philosophisch mit dieser "theoretischen" Differenz vom Stalinismus als Sektierertum distanzieren konnte. Mit Bezug auf ihren politisch-funktionellen Sinn dient die immanente Kritik dazu, die durch transzendente Kritik – das heißt durch Funktionalisieren, das bei Lukács eine halbreflexiv-operationelle Anwendung der Destruktionsverfahren des Relativierens und Absolutisierens bedeutet – erschlossene politische Wahrheit in der Art und Weise einer abbildenden Veranschaulichung zu beweisen. Diese Wahrheit, die sich schon in faktischer Entlarvung und Vertilgung der geistig-politischen Existenz des absoluten Feindes verkörperte, sollte für Laien verständlich und annehmbar gemacht werden. "Insofern ist die immanente Kritik ein berechtigtes, ja unentbehrliches Moment für die Darstellung und Entlarvung reaktionärer Tendenzen in der Philosophie. Die Klassiker des Marxismus haben sie auch stets verwendet, so Engels im 'Anti-Dühring', so Lenin im 'Empiriokritizismus'. Die Ablehnung der immanenten Kritik als Moment der Gesamtdarstellung, die zugleich soziale Genesis und Funktion, Klassencharakteristik, gesellschaftliche Entlarvung usw. umfasst, muss zwangsläufig zu einem Sektierertum in der Philosophie führen: zu einer Auffassung, als ob alles, was für einen bewussten Marxisten-Leninisten von sich selbst versteht, auch für Leser ohne Beweis einleuchtend wäre. [...] *Der* (*politische*: L. Cs. K.) *Gegensatz* der verschiedenen bürgerlichen Ideologien zu den Errungenschaften des dialektischen und historischen Materialismus ist die selbstverständliche Grundlage unserer Behandlung und Kritik. *Aber auch der sachliche, philosophische Nachweis der inneren Inkohärenzen, Widersprüchlichkeit usw. der einzelnen Philosophien ist unumgänglich, wenn man ihren reaktionären Charakter wirklich konkret zur Evidenz bringen will.*" (Ibid. 11–2; Hervorhebung: L. Cs. K.)

[47] Die Abgründigkeit dieser totalen-totalitären Zerstörung zeigte sich besonders darin, wie sie Mannheims endgültige geistige Verbannung symbolisch zum Ausdruck brachte. Mannheim, dessen Vorname von nun an als "Karl", nicht aber "Károly" geschrieben wurde, wurde damit endgültig zu einem deutschen Soziologen kanonisiert, der als Träger und Vertreter des deutschen, in der Lebens- und Existenzphilosophie verwurzelten und in den Nationalsozialismus einmündenden Irrationalismus in Erinnerung gehalten und angeführt werden durfte.

sich in irrationale Lebens- und Existenzphilosophie verwandelte Philosophie und die Soziologie, die als Wissenschaft selbst aus dem Geiste der Philosophie geboren wurden, gerieten in den Bann jener "verschwommenen Utopie" "von der Permanenz der relativen Stabilisierung (und nach deren Zusammenbruch: von ihrer Wiederkehr)"[48] und erwiesen sich als untauglich, dieser Provokation des in Bewegungsform des Imperialismus erscheinenden Politischen weltanschaulich-ideologisch entgegenzutreten. Die liberal gesinnte "qualifizierte deutsche Intelligenz" als angeblich "freischwebende" Trägerschicht dieser Utopie, sagt Lukács, sei ihrer ideologisch-politischen Untauglichkeit zufolge auch unfähig, mit der Synopse der Philosophie und Soziologie die wahre Wissenschaftlichkeit der Soziologie selbst und mit ihr auch Idee und Beruf der modernen Sozialwissenschaft zu retten. "Aus der jüngeren Generation der deutschen Soziologen ist Karl Mannheim der prägnanteste Vertreter dieser Richtung. Bei der Formierung seiner Anschauung spielen die Einwirkungen der 'relativen Stabilisierung' eine noch wichtigere Rolle als bei dem älteren Alfred Weber. Darum tritt bei ihm an die Stelle von dessen offen mystisch-intuitionistischer Kultursoziologie eine skeptisch relativistische, mit der Existenzphilosophie kokettierende 'Soziologie des Wissens'."[49] Vor dem Hintergrund der transzendenten Kritik von Lukács muss also Karl Mannheims Wissenssoziologie als ein vergeblicher und ideologisch völlig nutzloser Rettungsversuch betrachtet werden, der von vornherein fehl greift und scheitert. Der von Max Weber beerbte Grundfehler liegt darin, lautet Lukács' Fazit noch am Anfang seiner immanenten Analyse, dass die Soziologie als Wissenschaft durch irrationale Philosophie und durch die relativierend-formalisierende Methodologie der Wissenssoziologie radikal neutralisiert wurde – und zu jener Zeit konnte Neutralisierung in diesem Kontext nur eins für die Soziologie bedeuten, entideologisiert und entpolitisiert zu sein.[50] Die Wissenssoziologie beraubte somit die Soziologie der eigentlichen Idee der rationalen Erkenntnis und des Berufs, politisch Stellung zu nehmen. Eben deshalb könne man, so Lukács, dieser radikal entideologisierten und entpolitisierten Wissenssoziologie nur schwer etwas Inhaltliches – das heißt etwas Politisches in Form einer letzten sinnstiftenden Stellungsnahme zum im Zeitalter des Imperialismus die Erde umfassenden

[48] Ibid. 548.

[49] Ibid. 549.

[50] Mittels dieser Unterscheidung von Entideologisierung und Entpolitisierung können jene zwei alternativen Begriffe des Politischen klar voneinander getrennt und zugleich darauf hingewiesen werden, wie die Wissenssoziologie der politischen Rechtswissenschaft gegenüber durch den doppelten Aspekt des Begriffspaars Ideologie und Utopie das Problem des Politischen in der Moderne theoretisch zu klären trachtet. (Vgl. Anm. 6.)

Klassenkampf – entnehmen. Sogar trotz der Erfahrungen der Hitlerherrschaft bliebe seine Grundkonzeption ... unberührt.[51] Demzufolge können Mannheims Gedanken und Ausführungen bloß in jenen Punkten "wissenschaftlich" ernst genommen und akzeptiert werden, wo er zufälligerweise vermochte, einen eigenen politischen Standpunkt darzulegen.[52]

Beschreibung der "theoretischen" Inhalte der Wissenssoziologie aus der Perspektive der "immanenten" Kritik. An dieser Stelle, um die Darlegung der Thesen der immanenten Kritik vorzubereiten, sollen wir vor allem einen Blick auf jene Charakterzüge Karl Mannheims werfen, die Lukács vor dem Hintergrund und als Folge seiner transzendenten Kritik aus dem Aspekt des Politischen heraus und ad hominem bewertend beschrieben hat. In der Schilderung von Lukács' Charakterstudie erscheint der schon verstorbene ehemalige geistige Weggefährte im objektiv-strukturellen Sinne als Feind; der sowohl praktisch, wie auch theoretisch handelnder Wissenschaftler wird als Defätist, Feigling und Abtrünniger dargestellt und zugleich abgetan. Dieser Schilderung zufolge wird "Mannheim als Praktiker", der sich der ideologisch-politischen Sendung seiner Wissenschaft als Beruf (Rettung der Rationalität durch das Politische) hätte bewusst sein müssen, als ein Schwächling im politischen Sinne des Wortes vergegenwärtigt, den man sich eigentlich nur als eine Karikatur des geistigen Kampfes und Widerstandes gegen den Faschismus-Nationalsozialismus vorstellen kann und darf. Dieser Charakterzug wurde durch das Bild "Mannheim als Theoretiker" ergänzt, nach dem er als Agnostiker und Relativist eingestuft ist, der die Objektivität des Wahrheitskriteriums und der Wahrheitsfindung und damit die der Erkenntnis schlechthin nicht einfach verneint, sondern in der als Imperialismus verdammten Moderne durch eine wissenssoziologische Sophisterei endgültig für unmöglich erklärt.[53] Die in *Zerstörung der Vernunft* geübte immanente

[51] Ibid. 554.

[52] "Nur in einem Punkt ist eine klare Stellungnahme bei Mannheim sichtbar. Er lehnt jede gesellschaftliche Lösung durch Gewalt, durch Diktatur ab, wobei er wieder, echt formalistisch, faschistische Diktatur und Diktatur des Proletariats, revolutionäre und konterrevolutionäre Gewalt als gleichwertig behandelt. [...] Der einzige Punkt, wo Mannheim über den reinen Formalismus hinausgeht und so etwas wie einen eigenen Standpunkt entwickelt, ist die Hoffnung auf einen Kompromiss zwischen den kämpfenden Parteien der einzelnen Länder, zwischen den kämpfenden Mächten im internationalen Maßstab." (Ibid. 554.)

[53] Übrigens mag diese kurze Charakterstudie dem Leser andeuten, dass das Verhältnis zwischen den ehemaligen Weggefährten, besonders von Lukács' Seite her, nicht ungestört gewesen ist. Dazu siehe die Geschichte ihrer Begegnung, die am Anfang der 1930er Jahre entweder in Berlin oder Wien stattgefunden haben soll. Diese merkwürdigerweise berühmt gewordene Begegnungsgeschichte, und das von Lukács im Kreise seiner Schüler oft erzähl-

Kritik an Wissenssoziologie kann anhand einer Grundthese und vier weiteren Thesen zusammenfassend rekonstruiert werden.

Die Grundthese besteht aus zwei Behauptungen, die miteinander zusammenhängen und entscheidende wirkungsgeschichtliche Hinweise enthalten, bzw. aus Bewertungen, die sich auf die philosophische Grundlage der Theoriekonstruktion und auf das Novum der Mannheimschen Leistung beziehen. Erstens stammen die konstitutiven Voraussetzungen und Grundgedanken der Wissenssoziologie, insofern sie richtig sind, aus der Ideologienlehre von Karl Marx. Der Grundgedanke der marxistischen Ideologienlehre (das Bewusstsein ist durch das gesellschaftliche Sein bestimmt) ist mit der ontisch-ontologischen Voraussetzung der Seinsverbundenheit des Denkens identisch. Aber dieser richtige gesellschaftsontologische Ausgangspunkt, der allein Objektivität und Wahrheitsfähigkeit jeder wissenschaftlichen Erkenntnis zu verbürgen imstande ist, wird durch Methode, Begriffs- und Theoriebildung der Wissenssoziologie völlig entstellt, und darüber hinaus – denn in und durch Wissenssoziologie ist der absolute Feind am Werk – verunstaltet. Nach Lukács ist die Theoriekonstruktion der Wissenssoziologie, insbesondere wenn man die Verbindung der Erkenntnistheorie mit der Ontologie in Betracht zieht, völlig verfehlt, nicht nur, weil sie sich mittels ihrer rein relationistisch-relativistischen, formalistisch-funktionalistischen Denkfigur die Soziologie radikal zu neutralisieren vermessen hat, sondern weil sie von Vornherein von einer entideologisiert-entpolitisierten pseudo-wissenschaftlichen Perspektive aus durchgeführt worden ist. Aber, wie wir sehen werden, aus dem Mangel an Politischem – oder anders: aus Entpolitisierung der Wissenschaft – folgt notwendigerweise die Unmöglichkeit, den historischen Materialismus entweder wissenschaftlich zu widerlegen, oder philosophisch zu irrationalisieren. Zweitens entbehrt die Wissenssoziologie in jeder Hinsicht der Originalität und Neuheit, denn ihre methodologisch entscheidenden Gedanken sind nur scheinbar Mannheims eigene Leistungen, sie stammen in der Tat von seinem Hintermann Max Weber, der für Mannheim zugleich als Paradigma des praktisch und theoretisch handelnden Wissenschaftlers gilt. "Der Zusammenhang mit Max Weber ist hier klar ersichtlich, nur tritt an die Stelle des Rickertschen Neukantianismus eine so-

te ironische Gespräch zwischen den beiden über die Originalität von *Ideologie und Utopie*, hat meines Wissens zwei Deutungsvarianten. Die eine ist in István Mészáros's Besprechung über das Buch Mary Glück (*Georg Lukács and his Generation. 1900–1918* (Cambridge, Mass.: Harward U. P. 1985) zu finden (*Journal of the History of Philosophy* 26 [1988] 2, 334–6.), die andere wurde durch mündliche Überlieferung in der ungarischen Lukács-Forschung allgemein bekannt. Ich bin für die Hinweise auf István Mészáros' Besprechung und auf die andere Variante der Begegnungsgeschichte Péter Szigeti und Éva Karádi Dank schuldig.

ziologisierte Existenzphilosophie à la Jaspers-Heidegger. [...] Das Ergebnis der 'Mannheimschen Wissenssoziologie' ist nicht viel mehr, als eine Aktualisierung der Max Weberschen Lehre vom 'Idealtypus'."[54]

Erste These. Historischer Materialismus ist durch Relationismus nicht zu widerlegen. Es gibt keinen Unterschied zwischen Relativismus und Relationismus, weil es für die Soziologie auf der Objektseite des Erkennens keine ontisch-ontologische Gleichwertigkeit – aus synoptischer Sicht sollte man sagen: keine existenziell-funktionelle Äquivalenz – geben kann. Das Objekt des soziologischen Erkennen, ist durch konkrete Dialektik der Gesellschaftsgeschichte als Entwicklungsgeschichte des Klassenkampfes – mit einem Wort: durch das Politische – vorherbestimmt. Aus der historischen Logik des Politischen, die sich im Zeitalter der als Imperialismus verstandenen Moderne als Kampf zwischen Vernunft und Unvernunft, Rationalismus und Irrationalismus konkretisiert, muss darauf geschlossen werden, *(a)* dass sich Formen des richtigen Bewusstseins jeweils Formen des falschen Bewusstseins entgegensetzen, und umgekehrt, *(b)* dass Relationismus nur eine der verschleierten Arten des Relativismus sein kann, und zum Schluss, *(c)* dass die Alternative von Absolutismus und Relativismus nicht zu überwinden ist. Wenn man Soziologie als objektiv-rational erkennende Wissenschaft betreiben will, dann muss man der konkret politischen Logik des Erkenntnisgegenstandes – oder anders formuliert: der Logik des Politischen selbst – gehorchen. Dies kann aber nur bedeuten, dass im Interesse der objektiven Erkenntnis auf der Subjektseite zum Politischen Stellung genommen werden muss, weil man in der Moderne immer und immer wieder, ohne es zu wollen, vor eine unüberwindbare Alternative gestellt ist: Absolutismus oder Relativismus, Rationalismus oder Irrationalismus, Marxismus-Leninismus oder Faschismus-Nationalsozialismus. Wenn man (nämlich der Soziologe) politisch nicht Stellung nehmen will, dann wird die Geschichte ohne und gegen ihn Stellung nehmen.[55] Wenn man mit der Annahme von Relationis-

[54] Ibid. 550–51.

[55] "Nur bemerkt er nicht – wie alle Vulgarisationen und vulgären Gegner dieser Theorie –, dass in ihr das Relative und das Absolute in dialektischer Wechselwirkung ineinander umschlagen, dass in ihr aus dieser Wechselwirkung der annähernde Charakter der menschlichen Erkenntnis entsteht, in der und für welche stets die objektive Wahrheit (die richtige Widerspiegelung der objektiven Wirklichkeit) als Kriterium und Element enthalten ist. Es gibt dort also ein "falsches Bewusstsein" als ergänzenden Gegenpol zum richtigen Bewusstsein, während Mannheim seinen Relationismus als Typisierung und Systematisierung aller möglicher Arten des falschen Bewusstseins denkt." (Ibid. 549–50) Indem das Wahrheitskriterium im Erkenntnisobjekt – das heißt in der konkret *politischen* Dialektik der Geschichte, oder anders: in der binären Logik des Politischen selbst – enthalten ist, kann man nicht von jedem Standort aus für beliebige Erkenntnis gleichermaßen Wahrheit beanspruchen. Nur derjenige

mus und Synopse (funktionelle Äquivalenz der möglichen Erkenntnisobjekte und der möglichen Erkenntnissubjekte) und mit der Differenzierung des speziell-totalen und des allgemein-totalen Ideologiebegriffs[56] die soziologische Erkenntnis radikal entideologisiert und entpolitisiert hat, dann – weil dadurch das Objekt von Vornherein verfälscht ist – hat man keine Möglichkeit mehr, den sich auf der Ebene des speziell-totalen Ideologiebegriffs bewegenden historischen Materialismus zu widerlegen. Wenn die Soziologie als Wissenschaft im Sinne von Weber und Mannheim den historischen Materialismus bewältigen wollte, dann müsste sie sich selbst wiederum faktisch und praktisch sozusagen "zurück" politisieren und ideologisieren.

Zweite These. Historischer Materialismus ist durch Synopse von Existenzphilosophie und Soziologie nicht zu irrationalisieren. Mannheim hat die Existenzphilosophie "soziologisiert" und die Soziologie "entökonomisiert", um durch Irrationalisierung des historischen Materialismus das Werk der Neutralisierung der modernen rationalen Wissenschaft vollenden zu können. Da Seinsverbundenheit jedes Denkens und Erkennens bloß als "Situations- und Funktionsgebundenheit", bloß als abstrakt-formale Gleichwertigkeit des "existierenden" Menschen und Menschengruppen etc., also ausschließlich in ihrer Seinsrelativität zu denken ist, kann man beliebige Irrationalität durch formalisierend-funktionalisierende Begriffsbildung in den historischen Materialismus hineinprojizieren. Dazu mussten nur zwei parallele theoretische Schritte getan werden. Der erste Schritt zur Irrationalisierung wurde mit der "Entökonomisierung der Soziologie" durchgeführt: "Mannheim sagt in seinem späteren Werk, Konkurrenz und Regulierung seien keine ökonomischen, sondern 'allgemeine soziologische Prinzipien' [...] Durch diese ab-

kann in Wahrheitsfragen entscheiden, der über das Monopol des Politischen und über dessen öffentliche Auslegung als alleinige Garantie der Objektivität der Erkenntnis schlechthin verfügt. Doch dieser Logik zufolge wandelt sich die substantive Geschichtsphilosophie notwendigerweise in eine Politikphilosophie, der ontologisch fundierte Wahrheitsbegriff in einen politikphilosophischen um; und aus der Perspektive dieser Umwandlung in die Philosophie des Politischen wird die relationistische Denkfigur der Wissenssoziologie unausweichlich zu einer relativistischen Karikatur. Lukács' vernichtendes Urteil über die im Wissenschaftsgebiet sich selbst entideologisierten entpolitisierten Soziologen, mutatis mutandis, beschwört Napoleons Spruch über die Ideologen der Aufklärungszeit herauf. (Vgl. IU, 66.)

[56] Immerhin gibt es zwei theoretische Möglichkeiten, das Wissenschaftsgebiet durch Soziologie auf der Ebene des allgemeinen totalen Ideologiebegriffs zu entideologisieren und zu entpolitisieren. Die Entideologisierung als Entpolitisierung dieser Art kann erstens vom Gesichtspunkt des wertfreien allgemeinen totalen Ideologiebegriffs aus vollzogen werden, wie es in der verstehenden Soziologie Max Webers der Fall ist. Zweitens kann sei vom Gesichtspunkt des den wertfreien Ideologiebegriff transzendierenden wertenden allgemeinen totalen Ideologiebegriffs aus vollzogen werden, wie es in der Wissenssoziologie Karl Mannheims der Fall ist.

strahierende Entfernung von der objektiven ökonomisch-sozialen Wirklichkeit wird es erst möglich, 'irrationale Motive' im historischen Materialismus zu entdecken. Mannheim betrachtet demzufolge die Methode des historischen Materialismus als 'Synthese zwischen Intuitionismus und extremen Rationalisierungswollen.'"[57] Aber die "ökonomisch-soziale Wirklichkeit" kann nach Lukács nur als pure Manifestation des Politischen aufgefasst werden, wie es sich aus dem zweiten Schritt zur Irrationalisierung durch "Soziologisierung der Existenzphilosophie" erhellt. Durch Synopse von Philosophie und Soziologie dieser Art wird nämlich sowohl die reale, als auch die ideale Möglichkeit einer rational-planmäßigen Eroberung und Beherrschung der Gesellschaft durch revolutionäre Politik nicht nur in Frage gestellt, sondern völlig ausgeschlossen. Wenn das Politische als revolutionäre Entscheidung in den irrationalen Spielraum in beliebigen Augenblicken und in beliebigen Formen einbrechen könnte, dann wäre so etwas wie rational-strategisches Handeln in und durch Politik schlicht unmöglich. An dieser Stelle seines Buches behauptet Lukács, obwohl sich seine Argumentation scheinbar auf der Ebene einer Philosophiegeschichte als Problemgeschichte bewegt, dass diese Art Irrationalisierung des Politischen durch Chiliasmus und Anarchismus *politisch* unannehmbar und für ihn persönlich auch unerträglich wäre: "Die revolutionäre Situation, nach Mannheims Ausdruck: der 'Augenblick' erscheint als irrationale 'Lücke'. [...] Die im Marxismus so konkrete Dialektik der Revolution wird bei Mannheim ebenso kierkegaardisiert, wie die Neuhegelianer die Dialektik überhaupt kierkegaardisiert haben. Der so aufgefasste, das heißt, dem extremen Relativismus entsprechend angepasste, lebensphilosophisch-irrationalistisch gemachte historische Materialismus Mannheims Ansicht hat große Verdienste, jedoch auch den Fehler, dass er die ökonomisch-soziale Struktur der Gesellschaft 'verabsolutierte'."[58] In diesem Punkt wird der Unterschied zwischen den beiden entgegengesetzten Auffassungen des Politischen sichtbar: von der Wissenssoziologie her wurde das Politische nur als Handeln und Entscheiden im "irrationalen Spielraum" – der weder durch irgendeine dialektische Logik des Geschichtsprozesses, noch durch andere außenpolitische Instanzen vorherbestimmt werden kann – radikal entpolitisiert und nur für Zwecke eines wertfreien (Max Weber) oder wertenden (Karl Mannheim) Erkennens angewendet;[59] dagegen wurde das Politische vom Leninismus ausgehend

[57] Ibid. 551.

[58] Ibid. 552.

[59] Hier soll nur an zwei bekannte Thesen, bzw. Formulierungen Mannheims erinnert werden: 1. Die Ideologienlehre von Marx als Paradigma des spezial-total-wertenden Ideologie-

durch Lukács' Interpretation durchpolitisiert, was eigentlich mit "durchrationalisiert" gleichbedeutend ist. Die Unterscheidung zwischen richtigem und falschem Bewusstsein kann man niemals und durch keinerlei Wissenssoziologie aus der Gesellschaftsgeschichte wegdenken, weil deren Kriterium im Politischen wesenhaft verankert ist. Demzufolge kann nur derjenige das Rationalitätskriterium besitzen, der über das Monopol des Politischen und dessen öffentliche Auslegung verfügt; und derjenige, der darüber faktisch allein verfügt, kann nicht nur jede Irrationalität der Gesellschaft für einen wirklichen Feind erklären, sondern er ist auch in der Lage, sie durch Verabsolutierung des Wirklichen zu einem absoluten Feind aus der Gesellschaft vollkommen und endgültig auszurotten.

Dritte These. Die verschiedenen konkurrierenden Formen und Stile des politischen Denkens sind nicht gleichwertig. Mit Bezug auf die wissenssoziologischen Axiome des Relationismus und der existenziell-funktionellen Äquivalenz der standortgebundenen politischen Denkstile und Formen lässt sich die Möglichkeit einer wissenschaftlichen Politik oder die der Politik als Wissenschaft weder begründen, noch rechtfertigen. "Mannheim steht auf einem extrem formalistischen Standpunkt, von welchem aus nur eine ganz abstrakte Typologie der jeweils möglichen Stellungnahmen gewonnen werden kann, ohne über sie sachlich Wesentliches aussagen zu können. Diese Abstraktheit des

begriffs ist nur eine der sich im "irrationalen Spielraum" um politische Macht kämpfenden Weltdeutungen, die selbst von den Gegnern (von wirklichen Feinden?) entweder als Ideologie oder als Utopie entlarvt werden kann. (Siehe IU, 69–70; 108–16.) 2. Es gibt nicht und es kann in der Moderne keinen "Standort" und mit ihm auch keine auf irgendwelche Art und Weise ausgezeichnete Weltperspektive geben, von der aus per se die zwei irrationalen Zentren der gesellschaftlichen Struktur (Wirtschaft/Politik) planmäßig rationalisiert werden könnten. Der irrationale Spielraum ist ein seelisch-sozialer Raum zwischen der zum Teil rationalisierten Wirtschaft und der zum Teil rationalisierten Politik als Staat. "So weitgehend jedoch unser Leben rationalisiert ist, so sind dennoch alle diese Rationalisierungen nur Teilrationalisierungen, denn die allerwichtigsten Gebiete unserer Gesellschaftssphäre sind auch im heutigen Stadium noch irrational fundiert. Unsere Wirtschaft, obzwar technisch weitgehend durchrationalisiert, in Partialzusammenhängen exakt berechenbar, ist dennoch nicht zu einer Planwirtschaft verbunden. Sie beruht trotz aller Tendenzen zur Vertrustung und Organisation im entscheidenden Punkte auf freier Konkurrenz. Unser gesellschaftliches Gefüge ist klassenmäßig aufgebaut. Die Machtkompetenzen im staatlichen Leben sind im irrationalen Kampfe errungen, wo also die Entscheidungen des Schicksals ausschlaggebend sind. Von diesen beiden irrationalen Zentren der gesellschaftlichen Struktur aus gestaltet sich aber jener Spielraum, in dem das *nicht* organisierte, *nicht* rationalisierte Leben zur Geltung kommt, in dem Handeln und Politik nötig werden." (Ibid. 100.) Ansonsten sollte sich aus diesen Thesen und Formulierungen auch herausstellen, dass Mannheim niemals, weder theoretisch, noch praktisch, ein Marxist war.

Typologisierens geht bei Mannheim so weit, dass seine einzelnen Typen die heterogensten, in sich widerspruchsvollsten Richtungen umfassen, nur um in der gesellschaftlich-geschichtlichen Wirklichkeit eine übersichtliche, beschränkte Anzahl von Typen aufzeigen zu können."[60] Dementsprechend vermag die Wissenssoziologie mit ihrer idealtypischen Methodologie das Politische nur noch rein formell-funktionell zu erfassen, und damit begeht sie einen politischen Grundfehler. Unter anderem zeigt sich dieser ja vorbildlich darin, wie Mannheim "als einheitlichen Typen einerseits Sozialdemokratie und Kommunismus, andererseits Liberalismus und Demokratie identifiziert."[61] Und dieser politische Fehler der Wissenssoziologie scheint umso ernster zu sein, wenn wir beachten, dass Lukács in dieser Streitfrage der Erkenntnisweise[62] von Mannheim gegenüber auf den Standpunkt eines echten, und nicht bloß virtuellen absoluten Feindes, auf den eines Carl Schmitts positiv Bezug nimmt. "Der offene Reaktionär C. Schmitt ist ihm hierin, wie wir sehen werden, *weit überlegen*: dieser sieht im Gegensatz von Liberalismus und Demokratie ein wichtiges Problem der Gegenwart."[63] Hier kann aber eine korrigierende Bemerkung nicht nur unerlässlich, sondern auch aufschlussreich sein. Aller Wahrscheinlichkeit nach hat sich Lukács in diesem Punkt absichtlich, wohl aber für uns exemplarisch, geirrt, weil Mannheims interpretative Beschreibung des Liberalismus in *Ideologie und Utopie*, die auch als eine Art synoptische Sachkritik ausgelegt werden kann, unmissverständlich ist.[64] Andererseits könnte man Carl Schmitt in *Begriff des Politischen* gleichfalls die Sünde des Formalismus seiner juristischen Begriffsbildung nachweisen, was Lukács im nächsten Abschnitt (VI. *Präfaschistische und faschistische Soziologie: Spann, Freyer, C. Schmitt*) seines Werkes auch getan hat. Nur derjenige kann imstande sein, die Möglichkeitsbedingungen einer wissenschaftlichen Politik oder die der Politik als Wissenschaft richtig zu bestimmen, der eine substantiv-rationelle Auffassung über das Wesen

[60] Lukács (Anm. 41), 552.

[61] Ibid. Die Streitfrage zwischen Wissenssoziologie und historischem Materialismus könnte sogar folgenderweise formuliert werden: Wie ist es möglich, durch wissenschaftliches Erkennen politische Fehler zu begehen? Oder umgekehrt: Wie soll man durch wissenschaftliches Erkennen vermeiden, politische Fehler zu begehen?

[62] Nach Lukács' Überzeugung kann die methodologische Auseinandersetzung zwischen der formal-idealtypischen und der substantiv-realtypischen Erkenntnisweise nur mit Hilfe einer substantiven (material-rationalen) Bestimmung des Begriffs des Politischen entschieden werden.

[63] Ibid.

[64] Siehe IU, 102–8; 121; 123; 191–8.

des Politischen und dessen Rationalitätskriterium zur Verfügung hat, und zugleich fähig und entschlossen genug ist, sie jederzeit aus seinem eigenen Standort heraus zu handhaben.

Vierte These. Es gibt kein "Freischweben", keine "mittlere Position", keine von der binären Logik des Politischen irgendwie "unabhängige" Intelligenz in der Gesellschaftsstruktur; einen solchen "Standort" kann man sich nicht einmal als Möglichkeit vorstellen. Das Zeitalter der relativen Stabilisation, einer endgültigen Nivellierung der Gesellschaft in der Gesellschaft ohne politische Entscheidung ist reine Utopie, für Lukács unbegreifbar und zugleich unakzeptabel. Er war in seinem ganzen Leben (ungefähr seit seines Beitritts zur Kommunistischen Partei) fest davon überzeugt, dass man sich den Zugang zum ... richtigen Verständnis der Strukturformen des gesellschaftlichen Seins ausschließlich durch das Einlassen auf das Politische verschaffen kann, durch eine letzte Entscheidung, die jede Erkenntnis notwendigerweise aus dem wissenschaftlichen Bereich in die Politik transzendiert.

Aus den vier Thesen der immanenten Kritik, deren Beweiskraft durch transzendente Kritik bereits bewiesen wurde, geht eindeutig hervor, dass Wissenssoziologie vergeblich versuchte, den historischen Materialismus zu neutralisieren und zu entpolitisieren. Nach Lukács muss aus diesem misslungenen Unternehmen darauf gefolgert werden, dass eine geistige Kapitulation der Wissenssoziologie vor dem historischen Materialismus faktisch unvermeidbar ist.

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Lukács' Stellungnahme zum Kompetenzstreit zwischen Philosophie und Soziologie und sein verheerendes Urteil über die soziologische Aufklärung, deren erster Entwurf in Max Webers verstehenden Soziologie entwickelt worden ist, kann man mit dem folgenden Zitat sehr wohl veranschaulichen: "Die tiefe Unfruchtbarkeit der soziologischen Bewegung, die von Max Weber ausgeht, zeigt sich klar in einem solchen Programm für die Vertreter jener bürgerlichen Intelligenz, die nicht ganz widerstandslos vor dem reaktionär-faschistischen Irrationalismus kapitulieren wollen, jedoch vollständig außerstande sind, ihm ein klares und entschiedenes demokratisches Programm gegenüberzustellen; ganz davon zu schweigen, dass sie in ihren erkenntnistheoretischen und soziologischen Anschauungen tief in jene reaktionäre Tendenzen verwickelt sind, aus denen, als ihre letzte Konsequenz, der Faschismus ideologisch entstanden ist. Diese Diskrepanz macht diesen, den Faschismus ablehnenden Teil der Intelligenz der faschistischen Demagogie gegenüber schwach, ja ideologisch wehrlos. Und diese Wehrlosigkeit ist, wie

das Beispiel Mannheims zeigt, durch die Erfahrungen des Faschismus nicht überwunden worden."[65]

[65] Lukács (Anm. 41), 556. Dieses Fazit ist die "theoretische" Konsequenz Lukács' politischer Entscheidung, deren weltanschauungsphilosophische Letztbegründung und Rechtfertigung durch transzendente und immanente Kritik als Vernichtung des absoluten Feindes "Irrationalismus" den eindeutigen Beweis dafür liefert, dass seine Interpretation als reine Ideologiekritik doch nicht einmal scheinbar aus dem Aspekt der Begründung durchgeführt worden ist. Lukács' Feinderklärung hat auf ideal- und realtypische Weise von der hermeneutischen Grundfigur des Vernichtens Gebrauch gemacht und damit die zweite Periode der ungarischen Mannheim-Rezeption eindeutig beherrscht. In dieser düsteren Epoche des Ein-Partei-Staats-Sozialismus hat die Rezeption durch "Zerstörung", indem Wissenssoziologie als Handlager des Irrationalismus politisch-philosophisch für unlegitimierbar, für destruktions- und aberkennungswürdig erklärt worden ist, mit ihrem eigenen Gegenstand sich selbst zerstört und mit in das Mythische transzendiert. Im Hinblick auf die unvermeidbare Zirkularität des Ideologischen (Utopischen) und Mythischen sollte uns die totalitäre Variante der "Zerstörung der Vernunft" letzten Endes zugleich darüber belehren, dass die funktionale Grenze zwischen Hermeneutik als Wissenschaft und Ideologiekritik als Politik ohne Folgen nicht zu überschreiten ist.

How to Use Philosophy, Economics and Psychology in Jurisprudence: The Case of Paternalism in Contract Law

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Contract regulation and paternalism have raised much interest within American legal academia in recent years for either of the two following reasons: they illustrate the philosophical and methodological difficulties involved in the justifiability of paternalism or they demonstrate that the findings of behavioural decision theory may lead, in many cases, to conclusions (empirical findings and indirectly policy recommendations) that are significantly different from the traditional anti-paternalism, supported both by liberal and economic arguments.

In this paper I discuss the conceptual and methodological background of an economic approach to paternalism in contract law. This should serve as a case study to a more general problem: the uses and abuses of inter- and multidisciplinary research in jurisprudence, i.e. the proper scope of non-doctrinal analysis of legal issues. Freedom of contract and paternalism are concepts eminently important in legal theory. I will argue that to evaluate this importance, legal scholarship should take into account not only political philosophy but economics and cognitive psychology as well. In the complex interrelations of empirical research, theoretical models and philosophical questions, multilateral translation and learning seem not only fruitful but necessary.

Robert Cooter and Thomas Ulen suggest in their influential law-and-economics textbook that economists should learn from contract law:

> "Economists frequently extol the virtues of voluntary exchange, but economics does not have a detailed account of what it means for an exchange to be voluntary. As we shall see, contract law has a complex well-articulated theory of volition. If economists will listen to what the

> law has to teach them, they will find their models being drawn closer to reality."[1]

As I see, even if this gesture of two economists towards lawyers is to be appreciated, it cannot be taken fully seriously as it stands. The "theory of volition" in contract law, as it has been generally so in law, is not well-founded theoretically. Jurisprudence and legal doctrines may doubtlessly often reflect practical rationality and offer at the level of folk psychology an intuitively appealing shortcut to endless philosophical debates. For instance, there is some close-to-ordinary-language (English) or dogmatic-technical (Continental) legal meaning of voluntariness (and other concepts like causation, intent, etc.) which usually half-knowingly reflects the philosophical or scientific standpoint of earlier ages or is just expressing some naïve, folk notions.[2]

For law as a practical enterprise this is in most cases fully satisfactory. But what law says about voluntariness can be called a "theory" only in this "practical" sense. Of course, I am not suggesting that lawyers should become (besides becoming economists and psychologists) philosophers as well. Still for instance, it is impossible to answer from a purely legal perspective how it is to reasonably regulate the legally required degree of voluntariness of contract formation or the criteria for the judicial control of standard form contracts.[3]

[1] R. Cooter – T. S. Ulen *Law and Economics* (Boston: Pearson [4]2004), 11.

[2] See, e. g. H. L. A. Hart – T. Honoré *Causation in law* (Oxford: Clarendon Press [2]1985), A. Watson *Legal transplants: an approach to comparative law* (Edinburgh: Scottish Academic Press 1974).

[3] The view of law as a self-contained and self-sufficient theory is especially characteristic of the contract doctrines expressed in most of the civil codes in Europe. Dating from the 19th century when legal scholars deliberately worked out their doctrinal constructions, both in civil law and common law countries as markedly 'legal' doctrines, these codifications were supposed to be independent of any philosophical theory. More specifically, as the American historian of private law, James Gordley has convincingly reconstructed, the Aristotelian and Thomistic philosophical theories which were used by the late Scholastics to give a coherent theoretical structure to contract law (and other areas of private law as well) from the 16th century on, have gone to disrepute and oblivion in later centuries. But there has not been any overarching alternative philosophical theory at hand to replace them, thus the fragmentary and heterogeneous 'legal' doctrines of the last two centuries, most prominently the will theory of contracts. See J. S. Gordley *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press 1991). The will theory, dominant in the 19th and still influential in 20th century contract law basically says that (as far as contracts are concerned) the ultimate measure of the good is the will of the parties of a legal transaction (*Rechtsgeschäft*). Although this theory is problematic in some respect (e.g. it cannot deal with the problem of *laesio enormis*), it can solve the questions of mistake, fraud and duress, by saying that what

Legal scholarship should rely on empirical research about (and a theory of) human behaviour. But on which and to what extent? Of course, there are several possible outside perspectives. This paper takes the methodology of rational choice theory, as applied and modified in the *law and economics* literature as a starting point and then discuss the possible limits and corrections to this approach. In this sense it proposes an *economic* analysis of paternalism in contract law.[4] In any case, the legal discourse has some autonomy that does not allow a 1:1 codification of the results of empirical research. Not only because this research is inconclusive, but also because in itself it does not contain a normative standard either – this has to come from elsewhere.

1 Freedom of Contract and Paternalism – Conceptual and Justificatory Issues

Paternalism is discussed both in philosophy and economics but the arguments need more solid foundations. Paternalism and freedom of contract have been the subject of a far reaching discussion in practical (moral and political) philosophy and at a less abstract (more applied) level in jurisprudence for a long time. Since J. S. Mill's ideas about the limits of state power and the harm principle as the only justification for the use of coercion against competent individuals has become widespread in the Western world, paternalism has come to disrepute in legal and political theory.[5]

happened was not out of the actual will of the party (mistake), or that it is wrong to lie (fraud) and use coercion (duress) in order to influence the free will of the other party.

[4] For the methodological background see P. Cserne "The Normativity of Law in Law and Economics" [December 2004] *German Working Papers in Law and Economics* [http://www.bepress.com/gwp/default/vol2004/iss1/art35], P. Cserne "A racionális döntések elméletének helye a jogelméletben" in P. Szigeti (ed.) *Államelmélet – Politikai filozófia – Jogbölcselet. Országos tudományos konferencia [Theory of State – Political Philosophy – Jurisprudence]* (Győr: Universitas-Győr Kht. 2005), 245–72.

[5] Historically, the problem of justifying paternalism is linked to the rise of liberalism and the value of individuality. Speaking about the same phenomenon in earlier ages and different cultures, we are inclined to use another term, patriarchalism. This is the way the term is used in those narratives on Western political thought which attach much importance to John Locke as a liberal political thinker and his critique of Sir Robert Filmer's work, *Patriarcha* in the *Two Treatises of Government*. Patriarchalism is a social order in which the patriarch's concern to secure his own and his subjects' individual good is subsumed under a conception of the general good that gives it definition and to which it contributes. E.g. in the medieval European social and cultural setting, characterised by general views on the *relational nature* of the self who is embedded in his roles, patriarchalism was backed by generally accepted values. By contrast, in case of paternalism (as a typically modern concept) we conceive the good of the paternalised individual as sufficiently independent of the good of others or some social whole

Besides paternalistic individual actions (e.g. towards children), cases of *legal* paternalism also abound: from medical law (the regulation of the doctor–patient relationship), drug prohibition, occupational safety and health regulation to the mandatory waiting time before marriage and the general irrelevance of consent to mutilation and homicide on part of the victim in criminal law. Sometimes paternalism can be an issue in a very subtle way, e.g. when it is about transfer of information and true or false believes. E.g. can a physician waive responsibility for the harm to his patient if she refuses or chooses certain treatment just because she does not want to hear and accept or believe the information, given to her by the doctor? How much is the doctor obliged and allowed to convince, persuade, press and coerce the patient to have or not to have a certain therapy? Similar questions about the interference of family, friends, strangers, and officials in our life we encounter almost every day. Limits to freedom of contract are also often justified by paternalistic reasons.

1.1 Freedom of Contract

Freedom of contract is an ideologically charged notion which may attract strongly-held political beliefs but which eludes the interest of the lawyer in his everyday work for the most part. Nevertheless, the question of freedom of choice and its limits have crucial importance in law, especially contract law. For instance, the validity of a contract, liability and remedies are often conditional on the (in)voluntariness of one party's action. There are also several typical cases when modern legal regimes set limits on the general principle of freedom of contract, for good or wrong reasons (labour law, consumer protection etc.). Paternalism is arguably one of these reasons.

Behind the law of contracts, a central subject area of private law lays a broad set of economic, social and political values that define the role of markets in modern developed countries. But markets are not the sole mode of social organisation. As Heilbroner argues, societies organise production and distribution basically through three institutions: tradition (social conventions and status), command (centralised information gathering and processing and coercion) and market (decentralised decisions). Most of the so-

to constitute *on its own* a focus of attention. A *locus classicus* of classical liberal antipaternalism is J. S. Mill's *On Liberty*. There is now an enormous body of secondary literature on it. As one of the most thoroughgoing contemporary critiques see J. F. Stephen *Liberty, Equality, Fraternity* [1873] *and Three Brief Essays*. (Chicago–London: University of Chicago Press 1992). As a starting point for modern interpretations see G. Dworkin (ed.) *Mill's On Liberty: Critical Essays* (Lanham: Rowman & Littlefield 1997).

cieties usually combine all these three organisational modes. At the same time a modern developed society, mainly based on market-type production and distribution has to cope with certain backdrops of the market economy relative to the two other modes of social organisation (such as the potential for dramatic shifts in consumption and production, the destabilisation of personal, social and communal relationships, and a significant degree of inequality).

Let's see briefly how freedom of contract is treated in moral and legal philosophy. Despite a relatively wide consensus in favour of economic liberalism and the market economy, there remain many troubling and potentially divisive normative issues about the extent of markets and freedom of contract. Michael Trebilcock calls this consensus, together with its theoretical underpinnings the *private ordering paradigm*. In neo-classical economics this

> "predilection for private ordering over collective decision-making is based on a simple (perhaps simple-minded) premise: if two parties are to be observed entering into a voluntary private exchange, the presumption must be that both feel the exchange is likely to make them better off, otherwise they would not have entered into it."[6]

To rebut this presumption, the economist has to refer either to contracting failures or market failures. These constitute (from an economic perspective) the reasons for the limits of freedom of contract. Or, as Milton Friedman has put it:

> "The possibility of coordination through voluntary cooperation rests on the elementary – yet frequently denied – proposition that both parties to an economic transaction benefit from it, provided the transaction is bilaterally voluntary and informed."[7]

Besides the consequentialist arguments used in economics there are, as we have already referred to it, non-economic justifications for the primacy of private ordering (and the rejection of paternalism) which are based on individual autonomy (negative liberty) as a paramount social value. These liberal theories see the law of contracts as a guarantee of individual autonomy. On the other hand, there are some other stances of political philosophy which are more ambivalent toward freedom of contract, such as theories based on the positive (affirmative) concept of liberty which are concerned with the

[6] M. J. Trebilcock *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard U. P. 1993), 7.

[7] M. Friedman *Capitalism and Freedom* (Chicago: University of Chicago Press 1962), 13.

fairness of distribution of welfare (equality) in society; and communitarianism that emphasises the essentially social nature of man (fraternity).

These four theories about freedom of contract partly cohere and converge but partly contradict each other. To be able to construct a normative theory of the law of contracts and deduce arguments from it for or against certain limits of freedom of contract, the complex relationship "between autonomy values and welfare (end-state) values (efficiency, utility, equality, community)" shall be cleared.[8] If we explore the congruencies and conflicts between current moral and political philosophies and their normative implications regarding the fine details of the law of contracts and then contrast them with our moral intuition and legal rules in force, we will probably come to the conclusion that neither autonomy-based theories nor different sorts of utilitarianism nor communitarianism can offer alone a coherent theory about freedom of contract. This, of course, does not come as a surprise – the question is rather whether there is a reasonably large range of overlapping consensus between there theories. For our present purposes, it is important to see that the "convergence claim" (i.e. that a market ordering and freedom of contract simultaneously promote individual autonomy and social welfare) may be true in certain contexts but it is not robust enough to be true in general. The problem of paternalism is at the heart of this conflict.

1.2 Paternalism: A Rough Definition

Although intuitively we can determine a large number of regulations which seem paternalistic, the term itself hardly ever figures in legal texts or commentaries.[9] Thus we cannot avoid recurring to some extra-legal definition of the term, and then using it in order to circumscribe the field we have to deal with. Still even in philosophy and social theory there is no consensus around the conceptual boundaries of paternalism. The reason for this is probably that paternalism is linked strongly to the concept of liberty, an "essentially contested concept".[10] Especially with respect to freedom (liberty), it is im-

[8] Trebilcock (n. 6), 21. As an ambitious meta-theoretical attempt to integrate welfare-based and autonomy-based theories of contract see J. S. Kraus "Philosophy of Contract law" in J. L. Coleman – S. Shapiro (eds.) *The Oxford handbook of jurisprudence and legal philosophy* (Oxford: Oxford U. P. 2002) 687–751.

[9] H. Eidenmüller *Effizienz als Rechtsprinzip. Möglichkeiten und Grenzen der ökonomischen Analyse des Rechts* (Tübingen: Mohr 1995), 360.

[10] W. B. Gallie "Essentially Contested Concepts" *Meeting of the Aristotelian Society* 12 (1956), 167–98, cf. K. Smith "Mutually Contested Concepts and Their Standard General Use" *Journal of Classical Sociology* 2 (2002) 3, 329–43.

possible to find the clear boundaries or conceptual features around which there would be a reasonable degree of consensus in the literature. Nevertheless, there are three conditions that are usually included in the definition of paternalism. Thus the paternalist

(1) Intentionally limits the subject's liberty,

(2) Acts primarily out of benevolence toward the subject, and

(3) Disregards (is not motivated by) the subject's contemporaneous preferences.

As indicated above, paternalism has both justifiable and unjustifiable cases (forms). These differ not on the level of definition but with regard to their justifiability (legitimacy, reasonableness, etc.). More precisely, they can be distinguished conceptually only if we introduce some further specifications for different kinds of paternalism.

1.3 Internal Distinctions: Kinds of Paternalism

In the philosophical literature, the following distinctions are usually made:

1. Pure and impure paternalism. In the former case, the motive/reason behind an action, a rule etc. is only paternalistic, with impure paternalism it is mixed with other reasons. To be sure, this distinction works at the level of actions, rules, etc. while I will refer to paternalism as a reason. Thus when we speak about legal rules, their paternalistic rationale, if any, is almost always impure. This is the consequence of what I shall call below the theoretical over-determination of rules.

2. Direct and indirect paternalism. This distinction is especially relevant for contract law. By regulating contracts, not only the freedom of choice of the self-harming individual (the subject of direct paternalism) but that of the other party is limited. The latter case, when A's freedom is restricted in order to paternalistically promote B's good is called indirect paternalism. Indirect paternalism, of course, can be done with or without direct paternalism happening at the same time.

3. Hard and soft paternalism. While soft paternalism restricts the freedom of a subject whose actions are not fully voluntary or informed and thus the intervention is not especially controversial (more easily justified), in case of hard paternalism this justification is more problematic as here autonomous (self-harming) action is restricted.

4. Further distinctions can be also relevant for the justifiability of paternalism. Thus, it is not indifferent whether the intervention is benefit-conferring or self-harm preventing, exercised by an individual or by the state, and in the latter case by means of private law, taxation or criminal law.

1.4 Hard and Soft Paternalism

A conceptual problem about paternalism is that what free will (voluntary consent) in a specific context means is not easy to tell, as there is no self-evident reference point or threshold. Or more precisely, there are a number of criteria that should be fulfilled for an action to count as fully autonomous. In practice this is an unattainable ideal thus the autonomy is always limited. This of course does not in itself justify paternalistic intervention but leads to the useful distinction between hard and soft paternalism, introduced by Joel Feinberg. The standard distinguishing feature is whether the subject's conduct is substantially voluntary. Roughly, we can distinguish three sub-conditions of substantial voluntariness:[11]

1. Capability of making choices (even if a decision is foolish, unwise, reckless, it is still the decision of an autarchic subject).

2. Substantial freedom from controlling external influences (e.g. compulsion or manipulation, be it from the contractual partner, third parties or else).

3. Substantial freedom from epistemic defects (cognitive and/or emotional biases leading to mistakes about the nature of one's conduct or its foreseeable consequences).[12]

Thus, if the subject's conduct is substantially voluntary then liberty limitation with respect to such conduct is hard paternalism and conversely, if the subject's conduct is not substantially voluntary for any of the three reasons above then liberty limitation with respect to such conduct is soft paternalism. The importance of the distinction becomes clear if we agree with Joel Feinberg that soft (weak) paternalism is not paternalism in any interesting

[11] T. M. Pope "Counting the dragon's teeth and claws: the definition of hard paternalism" *Georgia State University L. R.* 20 (2003–2004), 659–722.

[12] At first glance, these sub-conditions remind one different contract law doctrines. The rules of incapacity are supposed to regulate that only agents being capable of making choices (in the above said sense) can conclude a valid contract. The contract law rules of duress, fraud, misrepresentation serve to guarantee the lack of certain substantial external controlling influences (but, to be sure not the absence of others, e.g. economic necessity or the "legitimate inequalities of fortune"). Substantial freedom from epistemic defects is taken care of, e.g. via rules on unilateral mistake, disclosure or cooling-off periods and other rules making consent more deliberate.

sense, because it is not based on a liberty-limiting principle independent of the harm principle. In this case, the intervention is defended (and according to Feinberg: justified) as the protection from a harm caused to the individual by conditions beyond his control.[13]

1.5 Justification and Overlapping Consensus

Despite the general acceptance of the importance of liberty as a social and political value in the Western world, there is much disagreement about why to value it and how to compromise it with other values. Accordingly, in the contemporary philosophical literature there is no consensus on the justifiability of paternalism. Looking at the end-result we can roughly distinguish three standpoints: (1) hard anti-paternalists consider paternalism generally, thus even in its soft form unjustifiable; (2) soft anti-paternalists distinguish hard and soft paternalism and condemn only the former; (3) finally there are those who argue that even hard paternalism can be justified in certain contexts. In contrast to law and legal reasoning, however, in philosophy the way of the argumentation is often more important or interesting than the end-result. Paternalism can be supported or attacked with very different arguments. Looking at the extensive philosophical literature on the topic, it seems difficult to decide between the three standpoints without discussing such far-reaching questions as the nature of the good and the meaning of free will.

Still, my aspirations here are much more modest. As far as normative philosophy is concerned, I try to avoid taking side in far-reaching metaphysical debates in this work. Basically I follow John Rawls' ideas about "public reason" and "overlapping consensus" and thus use arguments that can be, on a middle level of abstraction, acceptable or at least reasonable from several comprehensive philosophical/ethical perspectives.[14] Although I don't think

[13] This is the way Joel Feinberg defines his version of paternalism, by saying "soft paternalism would permit us to protect him from 'nonvoluntary choices,' which, being the genuine choices of no one at all, are no less foreign to him." J. Feinberg *Harm to Self* (Oxford: Oxford U. P.), 12. For a critique see R. J. Arneson "Joel Feinberg and the justification of hard paternalism" *Legal Theory* 11 (2005) 3, 259–84.

[14] See J. Rawls *Political Liberalism* (Cambridge, Mass.: Harvard U. P. 1993). To be sure, in Rawls' view overlapping consensus is not simply a compromise reached by softening or mixing irreconcilable views. I should not follow this idea here; only indicate that there are good arguments that there are conceptions of perfectionism and liberalism that do not exclude each other (see P. de Marneffe "Liberalism and Perfectionism" *Am. J. Jurispr.* 43 (1998), 99–116) and to some extent they can also be harmonised with economic theory (see S. Deneulin "Perfectionism, paternalism and liberalism in Sen and Nussbaum's Capability Approach" *Rev.*

that this is the only reasonable way to do political/legal philosophy, by speaking about legal issues of more practical concern, the idea of searching for an overlapping consensus seems quite attractive and plausible. Even such a prominent figure of the *law and economics* movement as Richard Posner once argued for this idea as one possible basis for a general acceptance of the minimisation of social costs as the objective of tort (accident) law.[15]

Here we have to see whether a similar consensus is possible in another relatively specific area, the limitation of freedom of contract for preventing harm to a contracting party. Just to indicate what a possible overlapping consensus about the scope of justified paternalism in contract law might be, I refer to a stylised version of the deontological (autonomy-based), the consequentialist (welfarist), and the perfectionist (Aristotelian) perspective. From this we can see that the practical conclusions of different philosophical arguments might be quite similar.

If one says that people should have the right to choose self-harming actions because there is an intrinsic value of freedom of choice, he still softens his anti-paternalist standpoint by allowing for intervention in certain cases when autonomy is limited for the reasons mentioned above (soft paternalism).

If one's starting point is the good (well-being) of the person, as he himself conceives it, and additionally we have an empirically based presumption that freedom of choice promotes well-being, still this presumption can be refuted in any instance. More weight can be given to the value of freedom itself by acknowledging that the freedom to make one's own choices is a component of this well-being.

And what if the philosophical starting point is neither libertarian (deontological) anti-paternalism nor a welfarist (consequentialist) view but a perfectionist (communitarian) one? In this view one should strive for a good which is supra-individual (the overall utility, happiness, etc. of a community) or compare the individual's actual actions and decisions with a morally or otherwise superior preference or value system. It is nevertheless possible to argue that in several cases the individual is the best judge of how to attain this state of affairs and/or that in certain cases a third party, especially the state is not able to promote this good better than the individual.

Polit. Econ. 14 (2002) 4, 497–518, F. H. Buckley *Just exchange. A theory of contract* (London–New York: Routledge 2005), Idem "Perfectionism" *Supreme Court Econ. Rev.* 13 (2005) 1, 133–63).

[15] R. A. Posner *Overcoming Law* (Cambridge, MA: Harvard U. P. 1995), 505.

Let me shortly elaborate on this third approach.[16] In its most abstract form, perfectionism is a moral theory which views the human good (flourishing, excellence) as resting on human nature. Perfectionism has an ideal for each human: that he develops his nature. It accepts self-regarding moral duties, thus it tells us something about what we should choose for ourselves. In contrast to most other moralities which hold that the good is subjective and thus exclude any claims about what humans ought to desire, perfectionism has an objective theory of the good. Nevertheless, for our purposes perfectionism is not so much relevant as a personal morality, rather as a political one, i.e. a normative idea about the aims of a political community, eventually formulated in legal rules. Specifically, but formally, perfectionism holds that "the best government most promotes the perfection of all its citizens."[17]

Paternalism is justified in this approach if there is an objective good, there is a difference between right and wrong action and an individual's good can be promoted by another person's decisions. To be sure, in this view to find the right choice in a given situation is not a matter of demonstration, deductive logic or scientific knowledge rather a matter of prudence (practical rationality). Still the view that there are wrong (e.g. self-harming) choices that should be dispreferred (discouraged) by law is supported not only by Aristotelians but utilitarians like Amartya Sen or perfectionist liberals like Joseph Raz as well.

Nevertheless, there are limits to paternalism even from a neo-Aristotelian perspective, for at least five reasons.

1. Making one's own choices is part of being human. Otherwise a person would be only "a figure on a chessboard" moved by a paternalist.

2. Sometimes it is better to let people make mistakes and learn by that way in order to make better choices in the future. Still there are fatal mistakes that should not be allowed for this reason.

3. Sometimes the question what the right choice is, depends on facts which are best known by the actor and cannot be practically known by the paternalist (e.g. whom to marry). He can point to choices which are definitely wrong but there are several right decisions. This is similar to the Rawlsian argument on reasonable pluralism (several not demonstrably irrational plans of the good life).

4. There are values that can only be achieved by voluntary action. For instance, one can be forced to pretend or confess belief in a religious doctrine

[16] Cf. J. S. Gordley "Contract Law in the Aristotelian Tradition" in P. Benson (ed.) *The theory of contract law. New essays* (Cambridge: Cambridge U. P. 2001), 281–5.

[17] T. Hurka *Perfectionism* (New York: Oxford U. P. 1993), 5.

or interest in music and high culture but inner belief or genuine interest can not be imposed on the individual by a third party.

5. There are practical limits on the paternalism of the government, especially if it is democratic and not aristocratic (in the sense of being seen as morally superior). There is no presumption that the government knows better, as it consists of people like us (being elected on an egalitarian basis) and falls often short of what a virtuous elite would know and do.

With respect to contract law, paternalism has some role to play in an Aristotelian view. To fully understand the problem at stake we have to start with the point of the institution (in the sense of Dworkin's theory of interpretation) "contract law" – it is to help people to get what is good for them. There is a presumption that what they choose is actually good for them and this is true for the most of the cases. But when not, then there is some legitimate space for paternalism.

1.6 Theoretical Over-determination of Rules: Helmet and Tobacco

As mentioned above, paternalism is understood as a reason for action or in case of legal paternalism, a possible justification for a rule (being itself in need of justification). It seems to be a general human characteristic that in a given instance (action, rule) several principles are or could be in play (as explanations, motives, rationalisations etc. for the action or rule). The possible overarching theoretical systems behind more specific reasons for intervention and also the possible justifications of a concrete rule are multiple. That is, one can construct several more or less coherent explanations or justifications for a rule. They are, of course, not equally plausible or convincing.

Instead of discussing this far reaching problematic in its abstract metatheoretical form, let's see two concrete examples, frequently cited in the discussion about the justification of paternalism. It is often argued that to justify the compulsory use of safety helmets or the ban on tobacco advertisements it is sufficient to refer to the social burdens caused by accidents and tobacco-related medical costs and thereby the "dubious" arguments about autonomy, coercion etc. can be avoided. In contemporary European countries with universal (i.e. nationwide and compulsory) social security systems, we can allegedly avoid referring to paternalism in order to justify the prohibition of certain self-harming behaviours and can "simply" refer to the external effects, i.e. the financial burdens that a given action would cause – provided self-inflicted harms are not excluded from the coverage of social security.

But it is possible that in pure social expense terms these paternalistic rules are counter-effective. While certain accidents without safety helmets often cause death, helmets usually save "only" the life of a severely disabled (i.e. in social expense terms burdensome) person. Without smoking people live longer on average, thus it might easily be that nonsmokers use up more social funds (mainly in form of pension) than smokers who die relatively early, near to the end of their working carrier. Not denying that if these effects are empirically provable, they are remarkable from a purely economic perspective, still they are not workable as 'public reasons' in the Rawlsian sense.[18] If we don't want the arguments about paternalism to run fully against our intuitions, we should take paternalism seriously, and possibly also acknowledge the relevance of some non-welfarist arguments, as I will argue below.

The example serves to illustrate that if a rule is impurely paternalistic, i.e. there are several reasons behind it, we have to analyse each reason for its plausibility. Then we can see whether these reasons, taken together are enough to justify the rule.

In law we can see this uneasy relationship of general principles and specific rules very clearly. Namely, if we want to analyse a given legal doctrine non-dogmatically, i.e. not by asking for its technicalities, wording, or its place in a larger body of the legal system etc. but critically, looking for reasons justifying it, we often find that a given rule can be backed by several, often contradictory principles. Due to this over-determination we might not see clearly if a given rule is the expression of paternalism, self-interest of an influential group, symbolic expression of a generally held value (moralism) or the instrumentally rational response to an externality problem. To be sure, what matters are not the (unobservable and contradictory) subjective *intentions* of the lawmakers but the possible justifications for a legal rule. Of course, the legitimacy and authority of law largely depends on whether its rules are enacted and enforced for the right reasons.

1.7 Freedom and Benevolence

As mentioned before, paternalism is a certain kind of *reason* that we may use to justify or condemn restrictions of liberty. Liberty-limiting principles include mainly (1) the harm principle, (2) the offence principle, (3) moralism,

[18] See Rawls (n. 14), G. F. Gaus *Contemporary Theories of Liberalism. Public Reason as a Post-Enlightenment Project* (London: SAGE Publications 2003), Ch. Larmore "Public Reason" in S. R. Freeman (ed.) *The Cambridge Companion to Rawls* (Cambridge: Cambridge U. P. 2003), 368–93.

and (4) paternalism.[19] Since J. S. Mill's ideas about the limits of state power and the harm principle as the only justification for the use of coercion against competent individuals has become widespread in the Western world, paternalism has been a central problem of legal and political theory. Paternalism is problematic from the liberal point of view as it implies promoting the good of a person against his (free) will thus violating individual autonomy for the sake of the individual's welfare. The freedom-diminishing character of paternalism raises a moral question about it. As for justification, paternalism is not such an essentially condemnable thing as murder: in a formal sense it is rather like killing which has justified and unjustified cases. The moral interest of paternalism comes from the juxtaposition of two values: freedom and benevolence.[20]

1.8 Justification by Redefinition: Alternative Strategies

Although the moral problem about paternalism can be arguably interpreted best as a conflict between freedom and benevolence, there are alternative views that redefine paternalism in such a way that it looks also normatively more acceptable.

Maximising freedom. Some commentators consider paternalism justified only (or usually at least) if it *promotes* autonomy.[21] Freedom maximisation, the term used in Eberlin's monograph for the same idea of autonomy-promoting paternalism, refers to the normative idea that the freedom of choice of an individual not only may but should be restricted in the present if this promotes, on balance, his freedom more in the future more. Of course, to make this idea any more than intuitive, we should be able to compare present and future freedom, *a fortiori*, to measure freedom. Furthermore, this idea seems unsuited to handle the case of autonomous commitment, i.e. the voluntary limitation of one's own freedom for the future by choosing a profession, a companion or concluding a contract.

Collective self-protection. Eidenmüller also states that in the justification of paternalism first we have to recur to general constitutional principles and "objective values" expressed in the constitution. Then in the second turn, in

[19] For a more elaborate categorisation see Feinberg (n. 13), xvi–xviii.

[20] J. Kleinig *Paternalism* (Towata: Rowman and Allenheld 1984), ch. 1.

[21] Eidenmüller (n. 9), W. Enderlein *Rechtspaternalismus und Vertragsrecht* (München: Beck 1996).

a non-legalistic sense, i.e. beyond the reference to the constitution the justification can be based mainly on some sort of hypothetical consent. More concretely, reference is made to weakness-of-will and the institutions that are collectively imposed to protect citizens against it. In this way, in a democratic state legal paternalism is nothing else but collective self-paternalism (of the majority). It is similar to what has been discussed in rational choice theory on the individual level with reference to the paradigmatic case of Ulysses and the sirens, i.e. the autonomous, rational side of the self defending itself against the irrational other.[22] This line of reasoning seems promising for justifying certain limitations of freedom of choice. The idea is to justify regulation by redefining the situation as a collective action problem. Namely, it may help citizens (e.g. employees, consumers) to fulfil their preferences which would be frustrated because of a prisoners' dilemma like situation. This kind of justification for contract regulation has been discussed approvingly by hard anti-paternalist J. S. Mill – although not in *On Liberty* but in his *Principles of Political Economy*. There he referred to "cases in which public intervention may be necessary to give effect to the wishes of the persons interested, because they being unable to give effect to it except by concert, which concert again cannot be effectual unless it receives validity and sanction from the law."[23] Mill used the example of the limitation of working hours.

Hypothetical consent. Collective self-limitation is not necessarily (logically) linked to hypothetical consent which, in my view, is a more problematic conceptual tool to justify paternalism (especially hard paternalism).[24] This approach is debatable on a level more general than the problem of paternalism would suggest. The essence of the problem is that the hypothetical consent behind the rule runs, in case of hard paternalism, against the *actual* will of the subject. As it has been discussed widely in the literature on "social contract", hypothetical consent as such does not live up to justify a rule or a regime, it is at best a metaphor referring to the public nature of arguments that rational individuals have reason to accept as justifying the rule. More specifically, if we take the fact of reasonable pluralism (Rawls)

[22] Cf. J. Elster *Ulysses and the Sirens: Studies in Rationality and Irrationality* (Cambridge, etc.: Cambridge U. P. ²1984), Idem *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge, etc.: Cambridge U. P. 2000)

[23] J. S. Mill *Principles of Political Economy* with some of their applications to social philosophy [1848], ed. J. M. Robson (London: Routledge 1996), 956.

[24] T. M. Pope "Monstrous impersonation: A critique of consent-based justifications for hard paternalism" *UMKC L. R.* 73 (2005), 681–713.

into account, it is rather improbable that there are a large number of hard paternalistic rules that can be backed by such hypothetical consent even in this reinterpreted sense: the very nature of the problem, namely that paternalism is about finding out (and enforcing against his will) what serves the good of a person, indicates that the core of the problem is "defined away" but remains unsolved if we assess paternalism in terms of a hypothetical consent. More precisely, we cannot avoid substantive arguments by referring to hypothetical consent in a contractualist way.

More generally, as we have seen, neither philosophical approach can come to a final argument about the justifiability of paternalistic policies without making some assumptions about empirical facts. These facts, relating to human judgment and decision making have been systematically studied in various empirical disciplines. These disciplines have thus an eminent role in answering the justifiability question, as I will argue shortly.

2 *Paternalism in Economics: Mainstream and Behavioural*

The economic literature on paternalism[25] tries to justify instances of reasonable seemingly paternalistic regulations roughly in the following way. For some cases paternalism is redefined or "explained away" by showing that a given policy can be justified by (1) externalities or (2) market failures. For instance in case of informational asymmetries we have to deal with some boundary cases of paternalism and correction of a market failure. (Here, however, the problem of information overload leads to further complications.) In still other cases, consumer sovereignty is questioned by introducing the concept of (3) merit wants and merit goods,[26] i.e. formally modelling the individuals' utility function that the policy maker has to maximise differently from the way the individual herself perceives it. Still other models introduce specific *(ad hoc)* assumptions about the preference structure of the individuals, such as (4) path-dependent preferences, (5) dynamic inconsistency, or

[25] E.g. P. Burrows "Patronising Paternalism" *Oxford Economic Papers* 45 (1993), 542–72, P. Burrows "Analysing Legal Paternalism" *Int'l R. L. & Econ.* 15 (1995), 489–508, E. Zamir "The efficiency of paternalism" *Virginia L. R.* 84 (1998), 229–86. On paternalism in contract law see also D. Kennedy "Distributive and paternalist motives in contract and tort law, with special reference to compulsory terms and unequal bargaining power" *Maryland L. R.* 41 (1982), 563–658, A. T. Kronman "Paternalism and the law of contracts" *Yale L. J.* 92 (1982), 763–98, R. Spergel "Paternalism and contract: a critique of Anthony Kronman" *Cardozo L. R.* 10 (1988), 593–634.

[26] See the still very illuminating summary article by J. G. Head "On Merit Goods" *Finanzarchiv* 25 (1966), 1–29.

(6) multiple self models. There are finally such heterodox approaches that want to remedy the simplistic reduction of every normative instance to preferences over outcomes by (7) stressing the difference between what one desires and what one has reason to value, or by (8) highlighting the need for including freedom and/or fairness in the economic models.

The eliminative redefinition of paternalism in economics is arguably the natural way to treat the substantive problem indicated by the concept. Indeed, at first glance it is relatively easy to incorporate paternalism in mainstream economic analysis: we just have to define specific preferences and/or specific informational imperfections and asymmetries. Still, it raises some problems. First, a normative one as it reduces the function of law to the maximisation of individual preferences. Second, one of methodology: the growing amount of evidence on biases and other irrational behaviour calls the scientific fruitfulness of ad hoc modelling of bounded rationality into question. To put it differently: in cases where people systematically make suboptimal choices, paternalistic intervention may be justified. This justification, however, cannot be based solely on revealed preferences of the individuals. And to determine the scope and technique of intervention, the systematic empirical research on bounded rationality is necessary.

2.1 Consumer Sovereignty and Revealed Preferences

Contemporary economics is used to be criticised on the basis that it accepts existing preferences as given. It does not offer "ethical criteria for disqualifying morally offensive, self-destructive, or irrational preferences as unworthy of recognition." If, on the contrary, economic theory acknowledges some exceptions, as it usually does (e.g. in case of minors or mental incompetents) then "some theory of paternalism is required, the contours of which are not readily suggested by the private ordering paradigm itself."[27] Being reluctant to criticise preferences or rethink their model of individual choice as a combination of information (beliefs) and preferences, economists use an "eliminative redefinition" strategy in order to fit paternalism in the neoclassical models. Why is it problematic to model individual choice as a combination of information (beliefs) and preferences?

As Robert Sugden argues with regard to public choice theory (economics) and political philosophy in a slightly different context:

> "Neither approach is grounded in empirical hypotheses about human psychology or human nature. Political philosophy is concerned with

[27] Trebilcock (n. 6), 21.

> good reasons: the question of how, as a matter of psychological fact, good reasons motivate people to act is left unanswered. But . . . economic theory . . . does not concern itself with the psychology of motivation either. It simply asserts the a priori postulate that, for each individual, there is a well-defined set of self-interested preferences, on which that individual invariably acts. When pressed, economists usually defend this assumption on the grounds that it corresponds with the requirements of rational behaviour. In other words, they appeal to a notion of good (prudential) reasons and do not concern themselves with the question of how such reasons motivate. . . . However, an empirical social science has to rest on empirical foundations. Consider the fact that many people choose to consume substances such as alcohol and heroin in amounts that endanger their health, social lives, and careers. Is this self-interest? From a conventional economic perspective it is: the consumers have preferences for these substances, and they are willing to pay to have those preferences satisfied. This is all that economics ever expects of self-interested consumption. Psychologically speaking, the consumers are motivated by desires for the sensations that are triggered by the substances they consume. Biologically speaking, those sensations are by-products of a neural system that is well adapted to the world in which homo sapiens evolved, but they are dysfunctional (that is, they do not serve the "purpose" of survival and reproduction) in a world in which manufactured drugs are readily available."[28]

I think this critique is justified but if it leads to an anti-philosophical attitude within legal or social science is rather unfortunate. Empirical research is crucial in answering questions about the best possible way to design legal rules of paternalism and even in the discussion of the reasons for paternalism.[29] But the (behavioural) economic literature also uses a normative benchmark, namely that of welfare, measured in an acknowledgedly simplistic way by cost and benefits.[30] More precisely, when economists come about with suggestions for intervention, they rely not only (implicitly) on a standard of voluntariness but also (explicitly) on a standard of rationality, according to which weakness of will, sour grape mechanism etc. are irrational behavioural patterns. This strategy implies measuring real world individuals on a normative (artificial) scale and speaking about abstract subjects of a certain quality: rationality as put equal to autonomy (one's preferences are to be

[28] R. Sugden "What Public Choice and Philosophy Should *Not* Learn from One Another" *Am. J. Econ. & Sociol.* 63 (2004) 1, 210.

[29] On the empirical research in contract law scholarship see R. Korobkin "Empirical scholarship in contract law: possibilities and pitfalls" *University of Illinois L. R.* (2002), 1033–60.

[30] C. Camerer et alii "Regulation for conservatives: behavioural economics and the case for 'asymmetric paternalism'" *University of Pennsylvania L. R.* 151 (2003), 1211–54, at 1219.

respected in any case if they reflect one's desires). Now, this autonomous self can be in conflict with the other features of the very same person or in other terms with different selves. This is thus still another reconceptualisation of paternalism as a multiple self problem or even an "intra-personal externality problem". In certain cases of soft paternalism (i.e. when the paternalised subject is *not* a fully competent and fully informed individual), it is possible to argue that by imposing on him we defend his true self against weakness of will or mistake etc.

2.2 Bounded Rationality and Paternalism

There is an enormous literature, doctrinal, historical, economic and philosophical on the limits of freedom of contract, like the judicial control of standard form contracts, labour law or consumer protection. Within *law and economics* most of these issues has been analysed in terms of (now) standard economic concepts such as transaction costs or asymmetric and imperfect information. Thus not only the case for freedom of contract but many of its limits can be explained in relatively narrow economic terms, by neither relaxing the rationality assumptions nor recurring to fairness arguments.[31] What do psychological findings (empirical data about cognitive and emotional biases in information gathering, information processing, risk-assessment, choice consistency etc.) as referred to in *behavioural law and economics* add to this? How can the findings in cognitive psychology about judgment and decision making change the justifiability and the extent of limiting freedom of contract?

In the last two decades there has been a large volume of ongoing empirical research in this direction, both by psychologists and economists.[32] It has been shown by several empirical studies that human behaviour systematically deviates from the precepts of expected utility theory. Thus human choice behaviour is often characterised by loss aversion, endowment effect and framing effects. Furthermore, people commit judgement errors when

[31] G. Mitchell "Why law and economics' perfect rationality should not be traded for behavioral law and economics" *Georgetown L. J.* 91 (2002), 67–167, B. Hermalin – A. W. Katz – R. Craswell "Chapter on the law & economics of contracts" [June 2006] in *The Handbook of Law & Economics* (forthcoming) [http://ssrn.com/abstract=907678].

[32] For an overview and further references see C. Camerer (ed.) *Advances in behavioral economics* (Princeton: Princeton U. P. 2004), M. Englerth *Behavioral Law and Economics – eine kritische Einführung*. Preprints of the Max Planck Institute for Research on Collective Goods, Bonn 2004/11 [http://www.mpp-rdg.mpg.de/pdf/_dat/2004/_11online.pdf] , R. Korobkin – T. Ulen "Law and behavioral science: removing the rationality assumption from law and economics" *California L. R.* 88 (2000), 1051–144, C. R. Sunstein (ed.) *Behavioural law and economics* (Cambridge: Cambridge U. P. 2000).

assessing probabilities. By using mental shortcuts called heuristics (availability, representativeness etc.) their judgements might become biased and vulnerable to manipulation – self-serving bias, hindsight bias, overoptimism, unstable risk-assessment being the most well-known examples.

Several features and mechanisms of human judgment and choice have been thus described which contradict neoclassical assumptions and should be theoretically explained and modelled within neuro-sciences and cognitive psychology. These phenomena, of course, are context-dependent and there is still controversy in the literature about the magnitude of these effects or (for instance) about their responsiveness to monetary incentives. Still, some of the effects were studied in several hundreds of experiments and proved significantly present in a wide range of contexts. What seem nevertheless disputable are the theoretical status and the normative consequences (policy implications) of these empirical facts.

At present, behavioural law and economics does not rest on a single theory or definition of bounded rationality that would allow the decisions of the contracting parties to be axiomatised. Despite prospect theory suggested by Kahneman and Tversky as the alternative to expected utility theory[33] (and still other candidates), in this matter the research remains to a large extent inductive. There are specific behavioural regularities which are highly relevant and can be modelled at a lower (middle) level of abstraction; still we cannot fully explain every main feature of human decision making and judgement in terms of a single general theory.[34]

More specifically, it is not always easy to tell what is given and part of the autonomous self and what is potential subject to paternalistic correction. It is not evident which features belong to the abstract person to be protected and what counts for an anomaly or judgement error that needs or justifies a cure. If, due to the endowment effect there is a gap between willingness-to-accept and willingness-to-pay, it is not self-evident, which of them should be accepted as the "real" valuation of the object, right etc. in question.[35] Also, attitudes toward risk, for instance, are usually taken as given. But it is not clear whether extreme risk aversion is to be corrected for or an individual's risk attitude is just a *datum* which can not be the object of regulation, manipulation

[33] On the genesis of this approach and its basic metaphor about the human mind as "an intuitive statistician" see F. Heukelom "The origin of prospect theory" (Paper presented at the 3rd PhD Conference in Economics, University of Turin 8 Sept. 2005).

[34] Cf. "Roundtable Discussion: Must we choose between rationality and irrationality?" *Chicago Kent L. R.* 80 (1995), 1257–84.

[35] Cf. C. Jolls – C.R. Sunstein "Debiasing through law" *J. Legal Stud.* 35 (2006), 199–242.

etc. as belonging to the preference structure of the person making the decision. Experimental results show that these attitudes are context-dependent, differ for gains and losses, and depend also on the amount of value at stake – the cognitive background of risk perception is thus too complex to allow for an easy conclusion.[36]

Despite these difficulties, in the meanwhile there seems to be a wide consensus among legal scholars open to empirical and social scientific research that the findings of behavioural decision theory are relevant for positive analysis of human behaviour and thus the prediction of the effects of legal rules. When it can be empirically proven that people (usually consumers) "fall prey to these anomalies" systematically and repeatedly (thus not only in one-shot laboratory experiments but in real-world situations and despite the possibility of learning effects) then these behavioural findings might justify paternalism in these given instances. These empirical findings alone, however, do not justify legal intervention.

True, in some cases it can be shown in an economic model that limiting the freedom of choice of boundedly rational individuals may increase, on average, their welfare. This is so even if the regulator does not know what is best for each individually but simply knows the distribution function of their errors.[37] In general, however, the normative conclusions are not straightforward. With regard to paternalism, psychological insights rather show that the issue is an "uneasy case" – outright anti-paternalism should not be replaced by uncritical paternalism.[38] Shortly, there are strong arguments both for and against paternalism. The behavioural findings may lead, in given circumstances, to normative conclusions (policy recommendations) that are significantly different from the traditional anti-paternalism of mainstream economics. The consequences for normative analysis, however, are not simply the uncritical endorsement of paternalism. Some researchers speak about anti-anti-paternalism in this respect.[39]

So why should *not* the law always intervene despite systematic irrationality? The arguments stem both from traditional scepticism toward governmental regulation, but recently and interestingly from specific psycholog-

[36] See e.g. R. G. Noll – J. E. Krier "Some implications of cognitive psychology for risk regulation" in Sunstein (n. 32), 325–53.

[37] G. Saint-Paul "Policy consequences of limited cognitive ability" *Spanish Econ. R.* 6 (2004), 97–105.

[38] J. J. Rachlinksi "The uncertain psychological case for paternalism" *Northwestern University L. R.*97 (2003), 1165–225, J. A. Blumenthal "Emotional paternalism" [March 2006], [http://ssrn.com/abstract=895187].

[39] C. Jolls et al. "A behavioural approach to law and economics" in Sunstein (n. 32), 13–58.

ical arguments as well. The anti-paternalist arguments can be either deontological (from a libertarian point of view even an irrational choice, if autonomous, is valuable in itself) or consequentialist (referring to (1) the over-inclusiveness of rules, (2) the un(der)informedness of the regulator or (3) his lack of motivation, e.g. the potential capture of legislatures by interest groups.) The consequentialist reasoning for not intervening in people's choice stresses that the information the regulator has about the "genuine interests" of the subjects of paternalism is seriously limited and potentially biased. In any case, the intervention may be more costly then beneficial, either (1) for the individual, (2) for third parties in similar situations (e.g. because of the over-inclusiveness of the law), (3) or for the general public (costs from the administration of rules or unintended consequences of the intervention, e.g. the ban on certain transactions may lead to the unravelling of the market).

Along with these, the psychological arguments for not intervening in people's choice are also numerous. They refer, *inter alia*, to the fact that biases are highly context-dependent, embedded in a complex decision-making mechanism (e.g. one bias may temper another), privately hired experts can help individuals to choose more rationally, and learning effects can be at work. In a dynamic perspective, regulation may lead to the inhibition of learning and thus of rational choice in the future. The dynamic (negative) effects of paternalistic regulation, which have been stressed already by J. S. Mill, have been now convincingly demonstrated in empirical terms.[40] The dynamic (developmental) argument against paternalism, already to be found in Mill, is essentially this: "If adults are treated as children, they will in time come to be like children. Deprived of the right to choose for themselves, they will soon lose the power of rational judgment and decision. Even children, after a certain point, had better not be 'treated as children,' else they will never acquire the outlook and capability of responsive adults." [41] To put it in another way, paternalism may be problematic in these cases not only because it is costly for others but also because it might backfire, i.e. make worse off the very group of persons it intended to protect.

An elementary insight of the economic approach is that in all cases of formal and substantive limits on freedom of contract designed in favour of the "weaker party" there is a trade-off. This trade-off is between the protection of the disadvantaged party in individual cases (the *ex post* perspective)

[40] See J. Klick – G. Mitchell "Government Regulation of Irrationality: Moral and Cognitive Hazards" *Minnesota L. R.* 90 (2006) 6, 1620–63.

[41] Feinberg (n. 13), 24.

and the negative incentive effect of the rule from an *ex ante* perspective. Furthermore, the costs of the intervention might be reflected in the contract price, depending on the market conditions.[42] All these arguments should make supporters of paternalism cautious.

Recently, "asymmetric" and "libertarian" paternalism have been suggested as regulatory ideas which take into account both the behavioural insights and some of the economic and libertarian counterarguments. More concretely, it is argued that legal interference with private choices is justified (in a firm/consumers setting) if

$$(p \times B) - [(1-p) \times C] - I + \Delta \prod > 0,$$

where B denotes the net benefits to boundedly rational agents, C is the net costs to rational agents, I stands for the implementation costs, $\Delta \prod$ denotes the change in firms' profits, and p is the fraction of consumers who are boundedly rational (all other consumers are supposed to be fully rational). Thus "a policy is asymmetrically paternalistic if it creates large benefits for those people who are boundedly rational while imposing little or no harm on those who are fully rational."[43] This formula, in fact, only illustrates the structure of the problem of legal paternalism. It does not serve to measure and quantify these variables but to highlight who are the beneficiaries and who bear the costs of a paternalistic intervention. These costs and benefits can be more precisely assessed in specific contexts.

While "asymmetrical paternalism" suggests policies that protect boundedly rational individuals while not burdening (significantly) others who do not need protection, "libertarian paternalism" draws attention to the different methods and techniques of this protection. More precisely, "libertarian paternalism" suggests policies that respect the autonomy of the boundedly rational people but nevertheless help them to avoid bad choices.[44]

[42] See e.g. R. Craswell "Passing on the costs of legal rules: efficiency and distribution in buyer-seller relationships" *Stanford L. R.* 43 (1991), 361–98.

[43] Camerer (n. 30), 1219.

[44] R. H. Thaler – C. R. Sunstein "Libertarian paternalism" *Am. Econ. R.* 93 (2003), 175–9, C. R. Sunstein – R. H. Thaler "Libertarian paternalism in not an oxymoron" *University of Chicago L. R.* 70 (2003) 4, 1159–202. Mostly due to the provocative title of their article, there has been some controversy in the literature whether what Thaler and Sunstein suggest is indeed paternalism (see D. B. Klein "Statist Quo Bias" *Econ Journal Watch* 1 (2004) 2, 260–71, C. R. Sunstein "Response to Klein" *Econ Journal Watch* 1 (2004) 2, 272–3, D. B. Klein "Response to Sunstein" *Econ Journal Watch* 1 (2004) 2, 274–6) or whether it is truly libertarian (G. Mitchell "Libertarian paternalism is an oxymoron" *Northwestern University L. R.* 99 (2005), 1245–77).

Still another regulatory ideal, "debiasing through law", suggested by Christine Jolls and Cass Sunstein[45] is more ambitious. Instead of finding legal rules adaptive to judgement and decision errors, it aims at reducing the occurrence of boundedly rational behaviour at the first place. In addition it suggests doing that by exploiting (or at least relying on) bounded rationality. As already mentioned, psychologists have found several instances where biases interact, more specifically they offset each other. In these cases, the intervention aiming at the reduction of only one of them can actually worsen the situation. But the interaction between compensating biases may be deliberately designed and used by policymakers as well. Jolls and Sunstein illustrate with examples from various legal areas how legislation can make use of the presence of one psychological limit (e.g. the availability heuristic) in order to counteract the self-detrimental effects of another (e.g. over-optimism).

One of their examples is consumer safety law. It is a well-established fact that consumers are asymmetrically uninformed about the safety features of most products they purchase. Mandatory disclosure requirements (a widespread legislative response not only in the US but in Europe as well),[46] though in principle a preferable way of intervention as respecting individual choice, do not necessarily work in practice, because people do not process the information in a rational way. Most notably they are overly optimistic about the occurrence of risks in their specific case even if they have correct information on the risk probabilities in statistical sense. By using vivid and personified examples (making use of the availability heuristic), this tendency of underestimation of risks (overoptimism bias) can be compensated. If people face a story about a recent real-life case of harm caused by a defective product, they become more aware of the risks involved.

To be sure, this rudimentary idea of debiasing through law should be refined in many ways before making actual use of it in regulation. Still the basic idea that the way information is communicated matters thus it should be provided to the addressees in a way they can best process it, is very plausible – some would say almost trivial. There are some practical lessons, however, that are less trivial. Although asymmetric information and disclosure duties have been widely discussed in law and economics scholarship, and recently the consumer protection policy of the European Union has been focusing on information provision, they often do not take into account that the mere

[45] Jolls – Sunstein (n. 35).

[46] See e.g. S. Grundmann – W. Kerber – S. Weatherhill (eds.) *Party Autonomy and the Role of Information in the Internal Market* (Berlin–New York: de Gruyter 2001).

provision of more and more detailed information do not necessarily make the consumers choice more rational and autonomous.[47]

3 Conclusion

At first sight, a large number of contractual rules can be explained as law's response to bounded rationality.[48] Nevertheless, as far as normative implications are concerned, caution is warranted. The discussion in the literature about the policy consequences of behavioural research is now at a point where every participant pleas for more empirical research and argues that the balance of costs and benefits of regulation is very context-dependent. Although this discussion about the optimal form and degree of legal paternalism seems to end up in an empirically oriented pragmatic balancing of costs and benefits, there are also some philosophical difficulties involved. Interestingly some of these are partially brought to the surface (at least as far as law and economics is concerned) by the research in cognitive psychology. Arguably, if rational autonomous choice is accepted as a normative ideal, especially for contracts, law should counterfactually slightly "overshoot" with its assumptions of rationality in order not to simply map and thus stabilize biases but to leave space for learning and development.[49] Finally it should be emphasised that legal policy and discourse are not academic discussion: here pragmatism and simple rules are needed, time constraints are strict, resources are limited and experimentation is exceptional. These factors, among others, set some limits to the use of philosophy, economics, and psychology in jurisprudence and legal policy.

[47] For a behaviourally based critique of the information model of EU consumer protection see M. Rehberg "Der staatliche Umgang mit Information. Das europäische Informationsmodell im Liche von Behavioral Economics" (Paper presented at the 2006 Travemünde Workshop on Law and Economics) [http://www.markusrehberg.de/lehre/_vortraege/2006travemuende.pdf]. Information regulation however is beyond the scope of this paper.

[48] M. A. Eisenberg "The limits of cognition and the limits of contract" *Stanford L. R.* 47 (1995), 211–59.

[49] H. Eidenmüller "Der homo oeconomicus und das Schuldrecht. Herausforderungen durch Behavioural Law and Economics" in R. Alexy (ed.) *Juristische Grundlagenforschung – Tagung der Deutschen Sektion der Internationalen Vereinigung für Rechts- und Sozialphilosophie (IVR) vom 23. bis 25. September 2004 in Kiel* (Stuttgart: Steiner 2005), 13–28.

Policy of Law and Codifications

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1 Introduction

My first contact with Csaba Varga took place in the late seventies when he was living and studying in Lund, Sweden, for some months. He also visited the University of Aarhus, where I was employed, and delivered some very interesting lectures. In this connection, I got to know him as a very original legal theorist, and we discussed several topics of common interest. In the same period, he published a most interesting article in *Retfærd*, the new Nordic magazine on legal theory. The article was about one of his major fields of inquiry at that time: codification,[1] and I wrote a postscript to the article commenting on Varga's points of view.[2] Subsequently, Varga concentrated on many other topics, and I have had the pleasure of meeting him later on at various occasions and of taking up our discussion. I have also followed his theoretical development, which has been manifested in a great number of important books and articles.

On this occasion, I find it natural to go back to the topic that he and I wrote about during the 70s: codification, but I am going to do it from a special point of view. My primary intention is to discuss the field of policy of law as an important, but underdeveloped part of legal science and in this connection comment on one of the early ideas of how to work within this field by making codifications which were regarded as a superior type of legal regulation. Especially, I am going to discuss the problems of codification seen from a modern point of view. However, there are many other ideas of how to establish policy of law as a specific field of inquiry, and in the subsequent passage I shall comment on some of these ideas – also primarily

[1] Cs. Varga "Utopi og kodifikation" 8 *Retfærd* (1978), 72–85.

[2] J. Dalberg-Larsen "Efterskrift. Kodifikationsutopier og andre utopiers rolle inden for retstankningen" 8 *Retfærd* (1978), 86–93.

from an actual point of view. Firstly, however, I shall make some comments on the barriers against recognizing the possibilities of this specific field of inquiry, especially from a Nordic point of view. Csaba Varga has also taken an interest in the field of policy of law and has been co-editor of an important book on this topic that was published a few years ago.[3]

2 *Some Barriers Against Recognizing Policy of Law as a Specific Field of Equality*

For historical reasons, jurisprudence has always had its primary field of inquiry within legal dogmatics, but part of jurisprudence has also dealt with the question of how law ought to be elaborated. However, during the 20th century, this part of jurisprudence has been severely criticized from several quarters, and two of these forms of criticism will be described below.

The first one was advanced by the adherents of the legal-positivistic or legal-realistic conception of law, which in the Northern countries was especially adduced by the adherents of the Scandinavian Realism, especially by the Dane Alf Ross. According to Ross, who in the 1940s adopted logical positivism, all evaluating assertions were to be regarded as assertions having no meaning contents, and they should be regarded as expressions of the subjective feelings of a person. This would apply within moral as well as policy of law, where he criticized the previous practice of evaluating the current rules and suggesting new ones within the existing jurisprudence, inter alia in Denmark.[4] During a long period from the 1940s and ahead, Ross' points of view dominated the Danish as well as the Nordic jurisprudence with the consequence that many jurists entirely abstained from embarking upon the field of policy of law. This situation was also to be found in many other countries where legal positivism and legal realism had a dominant position within legal theory.

During recent years, however, legal positivism has totally lost its previous strong position, and many researchers – not least in Denmark – have adhered to points of view that rather ought to be regarded as a manifestation of an idealistic conception of law. However, this has not resulted in an increased

[3] P. Koller – Cs. Varga – O. Weinberger (eds.) *Theoretische Grundlage der Rechtspolitik* (ARSP Beiheft 54) (Stuttgart: Franz Steiner Verlag 1992). Varga has also written a chapter in this book: "Descriptivity, Normativity and Ascriptivity: A Contribution to the Subsumption/Subordination Debate", 162–72.

[4] A. Ross *Kritik der sogenannten praktischen Erkenntnis* (Copenhagen: Levin og Munksgaard 1933).

interest in the field of policy of law, for according to a widespread modern conception of law, partly inspired by the American legal philosopher Ronald Dworkin, the general principles of law – rather than the concrete rules of law – have to be regarded as the fundamental element of law.[5] According to this conception of law, it is not natural to talk about policy of law as a specific field of inquiry. Now, there is absolutely no criticism of normative assertions figuring in jurisprudence. On the contrary, the entire jurisprudence is regarded as normative, and a frequent conception is that the primary object of jurisprudence is to point out the general principles of law underlying the individual legal systems, and furthermore partly to interpret the actual state of law as an expression of exactly these principles of law and partly point out which (moderate) reforms of the law are possible, taking all due respect to these principles.[6] Thus, it may be said that this conception of law leaves no real distinction between legal dogmatics and legal politics. In both fields, the task will be to look at law from the perspective of principles of law, and in both cases it means a constructive, evaluating contribution on part of jurisprudence. On one hand, it means that an evaluating interpretation of the concrete rules of law always has to be made, and on the other hand it means a criticism of the view that policy of law should be regarded as a specific field of enquiry, separated from the field of legal dogmatics. Therefore, a legal positivist will assert that the entire jurisprudence has been made policy of law, and a legal idealist will claim that the principles of law have been put back in the right place.

My own conception is that it was definitely a failure that Ross completely banished normative statements from jurisprudence. On the other side, it is still important to sustain a relatively well-defined distinction between legal dogmatics and policy of law – not least for the sake of democracy and thus the division between the legislative power and the juridical power. Just like Jürgen Habermas, I think that a modern system of law primarily has to be legitimized by referring to its democratic background.[7] Therefore, I consider it necessary to operate with policy of law as a special field of inquiry, where the primary purpose is to give good advice to the democratically elected legislators. Now, the question is how such field of inquiry has to be defined, and this is the subject of the following passages.

[5] R. Dworkin *A Matter of principle* (Cambridge, Mass.: Harvard U. P. 1985).

[6] J. Dalberg-Larsen – B. Lemann Kristiansen (eds.) *Om retsprincipper* (Copenhagen: Jurist- og Økonomforbundets Forlag 2004).

[7] J. Habermas *Faktizität und Geltung* (Frankfurt am Main: Suhrkamp 2002).

3 Codifications as Products of Legal Science

The idea of codification can be traced far back, which Csaba Varga has also done in a number of articles. In this place, I only mention one of the most outstanding codification adherents in modern times: Jeremy Bentham, whose fundamental idea was to replace the existing British common law by a well-defined codification of law with the purpose of giving a contribution to a reorganization of the outworn parts of law and furthermore putting the citizens in a position to succeed in finding their own legal status. In order to attain this object, Bentham wished to change jurisprudence from legal dogmatics to policy of law. By so doing, he believed that the citizens' happiness and common good would be essentially increased.

Accordingly, the idea of codification includes the conception that a better state of the law can be achieved through the technical work of collecting the laws in one single coherent form. It can be described as a legal-political variant, where the most characteristic feature is the belief that a rationally framed law is also an advantage for the society and its citizens. Or it can be described as a form of policy of law with the jurist in the role of an *architect* – an architect or a builder having the task of building not only small detached houses but a large structure: a cathedral, which ought to remain standing for ever as a monument to the delight of everybody.

It can obviously be maintained that many of the persons having elaborated codifications in course of time have not at all had such noble aims, and besides that the codifications have only come into existence in order to consider the need for regulation on part of those in possession of the political power. However, the very idea of codification can also be regarded as an idea of the perfect and most rational way of elaborating law – a way requiring a contribution from the most competent jurists within the jurisprudence of that time.

In fact, a number of codification projects with such high ambitions were realized in the period after Bentham, and in this connection it comes natural to mention the German *Bürgerliches Gesetzbuch* from about 1900. During the 20th century, too, a number of large codifications were carried out in various countries. In general, however, the idea of codification has fewer supporters today than it had previously. This is probably due to a number of factors, some of the most important ones I am going to mention below – partly in continuation of Varga's analyses.

Firstly, it is far from being certain that what is the logically correct way of systematizing law is also the correct way of formulating the state of the law in

order to make it comprehensible for the ordinary citizen. A logically framed codification puts rules in their correct logical connection. Accordingly, rules that function as a body and have to be understood as a body seen from the view of a citizen are often located in widely different places.

Secondly, the citizens often need to have the state of the law described in a popular way, whereas a logically framed codification aims to describe the rules of law in their logical relations to other rules in the system.

Thirdly, even an ever so logically framed codification can certainly not prevent that judges and others applying the law will still have to make evaluating interpretations of the rules. Accordingly, the citizens cannot find a completely unambiguous understanding of their own legal status exclusively by studying the law.

Fourthly, codifications function best in periods with no significant development in the surrounding society, and the situation in the last hundred years or more can hardly be associated with such quiet period. In periods when the development of society is rapid, or new values gain ground, large codifications will stand as a monument from the past preventing a development of law in conformity with the new challenges. It is difficult to effect changes in a large, ingeniously framed codification without losing its coherence, which often implies that codifications prevent a development of law that would have been of benefit to both society and citizens.

Finally, there is a built-in incompatibility between elaborating a perfectly framed codification and creating a law in keeping with the culture of law and the general culture and mentality characterizing the society in which the rules will be effective. Both from the past and nowadays, there are numerous examples of well-framed bodies of law not at all functioning as intended, simply because they both formally and materially are organized in such a way that they are inconsistent with decisive elements of the culture of law as well as the view of law in the surrounding society. Such examples are especially known from the many attempts made at modernizing a society by importing modern bodies of law from more advanced countries. The results are often very negative, both because the rules are based on values that are not regarded as central, and because the formal shape of the rules is inconsistent with the more informal way of thinking characterizing the jurists with the assignment of contributing to implement new law.

Among others, today's adherents of the idea of codification are to be found within the field of international law, where the general opinion is that in this way it is possible to create the necessary unification of law, for one thing in order to have international commerce function better. In this con-

nection, the problem is that in order to create a real unification of law it is not sufficient to create common rules. The fact is that the rules still have to be interpreted and applied in the respective countries, and they will still be interpreted according to the view of legal method predominant in the respective cultures of law.[8] Consequently, a unification of law will often not be implemented, and the endeavours to make perfect rules can easily constitute an obstacle to the possibility of finding more simple solutions in the endeavours at attaining the objects that the codifications are supposed to promote.

4 *Some Other Ideas of Policy of Law as a Specific Field of Inquiry*

As stated in the previous passage, I find a lot of problems in the idea of using codification as a central element in a modern theory of policy of law. However, I will certainly not reject this theory completely. It might not be realistic in the old form, but to a greater extent than most other ideas it emphasizes something that all jurists ought to be interested in: that rules of law being so well formulated as possible are elaborated. So to speak, this theory stresses how important it is that rules of law are given the linguistically correct form. Unfortunately, however, it says nothing about what precisely this means, for one of the problems is that rules of law ought to be understood and applied by both jurists and ordinary citizens.

Next, I am going to look at some other ideas of what can be considered the principal element of policy of law,[9] beginning with an idea that could be called *the legal politician as a social technologist*. Within this line of thought, there is a well-defined distinction between those formulating the objects and those pointing out the best legal instruments for attaining the objects. At least within recent versions of the idea, it is imagined that the elected representatives of the citizens are charged with the task of formulating the objects that the legislation has to realize in the best possible way. Accordingly, policy of law being a specific field of inquiry has to be addressed to the politicians, advising them as to how law ought to be elaborated. And it is imagined that this advising primarily has to be based on social-scientific and especially legal-sociological knowledge of how law functions in real life. At least, this is the conception of Alf Ross. Unlike most legal positivists, Ross does not entirely reject policy of law. He only rejects the previously current

[8] T. Wilhelmsson "Europeisering av privatretten" *Tidsskrift for Rettsvitenskap* (2001), 1–32.

[9] See also J. Dalberg-Larsen "Fem opfattelser af retspolitik som retsvidenskabelig aktivitet i historisk og aktuel belysning" in J. Evald – S. Schaumburg-Müller (eds.) *Om retspolitik*, (Copenhagen: Jurist- og Økonomforbundets Forlag 2004), 9–42.

form of policy of law and subsequently defines the field as applied sociology of law,[10] probably influenced by the American Realism where such ideas are also formulated.

As mentioned before, this conception forms a sharp contrast to the traditional conception of policy of law, and it introduces a sharp limit between legal dogmatics and policy of law, by assigning a specific foundation of knowledge to policy of law. Since this foundation of knowledge originates in social sciences, like for instance sociology and anthropology, it is a natural thing that this idea made no great progress until social sciences in the 19th century established themselves as independent sciences.

The appearance at the end of the 19th century of the positive criminology probably has to be regarded as the major breakthrough of this conception of policy of law. The new science criminology offers a form of knowledge that is crucial for the fight of society against criminal offences, and in many countries during this and the following periods great importance is attached to this knowledge for the elaboration of a modern criminal policy.[11]

The fact that criminal law was the first field where this form of policy of law penetrated, can probably be explained by the great interest – and fear – of criminality that characterized the end of the 19th century. Criminal offences were on the increase, especially in the big and rapidly growing urban communities, and consequently people were eager to listen to those who believed that they scientifically had succeeded in finding the proper cure for this great social problem.

Later on, in the 20th century, sociology of law evolved as an independent field of inquiry, and just like Ross many believed that this was the science which in general and within all branches of jurisprudence was in a position to point out the most suitable means for attaining the many objects that the politicians had in view, among other things by means of legislation. Indeed, since the middle of the 20th century a large number of legal-sociological investigations have been made that conduced crucially to our knowledge of why the objects of some laws are attained whereas others are without success, and to some extent this knowledge has been applied in practical policy of law. However, the expectations of what sociology of law can offer have been rather modified. Especially, it is demonstrable that society and its citizens

[10] A. Ross *Om ret og retfærdighed* (Copenhagen: Nyt Nordisk Forlag 1953), 417f.

[11] J. Dalberg-Larsen *Retsvidenskaben som samfundsvidenskab* (Copenhagen: Juristforbundets Forlag 1977), 320f.

cannot easily be governed by legal rules, and in this connection a large number of barriers impeding the use of law as an instrument for social reforms has been traced.

In itself, this altered attitude has definitely not made this form of policy of law antiquated, but it has made it more natural to set up less ambitious and more realistic objects for what sociology of law can offer. Instead of believing that the consequences of a given regulation can be precisely calculated beforehand, it will be more realistic to aim at replacing fully subjective assessments by some more reliable predictions and especially to be able to point out which measures are not likely to lead to the desired results. However, this is definitely a good deal to aim at.

Generally speaking, the *second* idea I want to mention can be regarded as a rehabilitation of the form of policy of law that legal positivists like Alf Ross energetically turned against as being scientifically impossible, that is a policy of law based on the *traditional legal values* has to be worked out. The mode of thought is that what the jurists especially have to offer concerning legal-political advising has to be based on their thorough knowledge of the existing system of law and its fundamental values. Accordingly, the jurists have to make every effort that the reformation of law is performed in such a way that the new rules can be regarded as being in natural continuation of the existing rules and principles. In Denmark, this view of policy of law as a legal-scientific topic was formulated by Preben Stuer Lauridsen in the 1970s,[12] precisely turned against Ross' attempt at making a strictly theoretical distinction between legal-political and legal-dogmatic ways of thinking. In Stuer Lauridsen's opinion, this distinction cannot be recovered in the existing jurisprudence, and it is based on a view of science that nowadays has to be regarded as absolutely antiquated. It may be asserted that this is tantamount to build on a conception of policy of law that used to be very predominant and in a manner of speaking reflects an old, valued legal tradition.

In my opinion, there are nowadays no conclusive legal-theoretical grounds for rejecting this view of policy of law. It may be emphasized that jurists, including legal researchers, often have a good knowledge of the concrete branches of jurisprudence they deal with in detail and thereby some special qualifications to evaluate when new rules will possibly be inconsistent with existing rules or principles, and where adjustments and reformulations may be needed in order to avoid conflicts between the existing and the new elements of law.

[12] P. Stuer Lauridsen *Retspolitisk argumentation* (Copenhagen: Juristforbundets Forlag 1974).

A legal-political argumentation of this kind ought to be attached special importance in the classical branches of jurisprudence that the jurists are thoroughly familiar with, especially where the rules seem to function fairly satisfactorily – also seen from the perspective of the citizens. However, if this conception is made general, great problems will arise. By way of example, the legal tradition and the principal legal values are far from being unambiguous elements. Thus, there are legal traditions dating from the Age of Enlightenment, but also far older as well as far later traditions, but these different traditions with matching values will often be completely incompatible. Therefore, this model is hardly applicable in fields with a fundamental disagreement as to the crucial legal values in society. Neither is it applicable in fields where the demand for legislation is caused by special considerations or values that are new and consequently not part of the legal tradition. An example of this is the field of environment, including environmental law.

Finally, a fundamental problem of this model is that we live in a democratic society, and that many of the advocates of this model are far from having a modern democratic line of thought when they regard politically formulated claims for legal reforms as misplaced intermingling in something that is conceived as a legal monopoly. In fact, this reference to democracy was one of Ross' motives in the 1930s for criticising harshly a policy of law based on traditional legal values, which influential legal scientists of that time represented and which was in fact used for advancing a political criticism against the welfare legislation of the 1930s.[13]

The *third* idea I'm going to mention here also regards a value-oriented policy of law just like the previous one, but based on *the values of the citizens* instead of the traditional legal values. A natural question would be: why start from the legal values when the primary function of the legal rules is to regulate the citizens' life? Frequently, the fundamental idea of those wanting to formulate a policy of law based on the citizens' values is that a principal problem of much legislation is that its contents do not reflect the citizens' values, but instead some general ideologies, some specific legal conceptions or some interests of those in power politically as well as financially. Consequently, the object must be to introduce reforms returning law to the people.

An earlier advocate of this conception is the founder of the Historical School von Savigny, who in the early 19th century elaborated some ideals about a law based on the norms, values and culture of the surrounding society. Another one is Eugen Ehrlich, who about 1900 formulated the point

[13] S. Blandhol *Juridisk ideologi. Alf Ross' kritikk av naturretten* (Copenhagen/Oslo: Jurist- og Økonomforbundets Forlag 1999).

of view that the living law was identical with the informal norms existing in society. And in various ways, you had to make an effort to have this living law recognized as the proper basis of a legitimate law, including the basis of legal reforms.[14]

In Denmark, this legal-political model has had special importance as regards Greenland law because it was made the basis of a codification in the 1950s of the Greenland criminal law. In this connection, Danish sociology of law came into being through analyses of the traditional Greenland informal criminal law, which was made the basis of the subsequent codification. The idea was to formulate a specific Greenland criminal law being in conformity with Greenland values in order to make sure that the future development of the Greenland society could take place in conformity with Greenland – and not Danish nor other imported – values and ways of thinking.[15]

In my opinion, this form of policy of law can be regarded as valuable from different angles of approach: Firstly, I think that in itself it is to be desired in the highest possible degree to base the law on the citizens' conceptions in the fields in question. Of course, there may be many good reasons for departing from this principle, but nevertheless it has to be preferred as a starting point. Secondly, it is certain that the rules of law being in agreement with the citizens' own norms will generally be observed to a far higher degree than the norms being inconsistent with the citizens' own values and norms. An infinitude of empirical investigations shows this.

However, this policy of law also has its limitations, among other examples manifested by the experience from Greenland. Firstly, it is difficult to transform the informal customary law to legislation without loosing essential shades and the flexibility of an informal law. Secondly, the society in which the rules have to work sometimes changes so rapidly that the values which the rules are based on shortly after are no longer the principal values of the society. Finally, the circumstances, especially nowadays, are that different groups in society have got different norms and values, and it is therefore often practically impossible to make rules based on the citizens' values without somebody feeling precisely their values offended – and with justice. As has been proved through many empirical investigations, there is no general and universal conception of justice within the population.

[14] Cf. R. Banakar *Merging Law and Sociology: Beyond the Dichotomies in Socio-Legal Research* (Berlin/Wisconsin: Galda und Wilch 2003).

[15] V. Goldschmidt *Retlig adfærd* (Copenhagen: Bianco Luno 1956); A. Weis Bentzon "JUREX reconsidered" in H. Garlik Jensen – T. Agersnap (eds.) *Crime, Law and Justice in Greenland* (Copenhagen: New Social Science Monographs 1996), 97–118.

The *fourth* conception may be called the legal politician as a *moralist*. In this connection, values also play an important role, but it is not a matter of specifically legal values or of recording of the citizens' actual conception of values. It is a question of a more general and independent moral attitude, where policy of law is based on general ethical reflections. It may be asserted that in several important respects this model is similar to the classical conception of natural law, in which the philosophers of natural law formulated the fundamental values, the correctness of which anybody could see only by using common sense. However, this model is no longer widespread, even if it has appeared in new versions during recent years – also in Denmark. Nevertheless, it can be asserted that nowadays it has become common and rather uncontroversial to regard moral and ethics as important elements in a legal-political analysis.

Interesting as it may seem, the famous Norwegian criminologist Nils Christie is one of those who most vigorously has argued in favour of such form of policy of law. One would be more inclined to think that exactly he would regard the criminological research relating to the causes of criminal offences and the effects of the different forms of penal sanctions to be the framework of a rational criminal policy. However, Christie considers that the consequence of a criminal policy of that kind will almost inevitably be an inhuman, technocratic policy, where human beings are regarded as objects that it is legitimate to manipulate based on reflections of what is beneficial to society. Instead, it ought to be considered for instance how much pain it is fair to inflict a fellow human being under inspiration by old thinkers like Plato and Aristotle.[16]

In certain fields, an ethically based policy of law has been generally accepted during recent years. One of the most important fields concerns legislation on medical experiments and especially legislation on development and application of the new genetic engineering within medicine. In this connection, an ethical board *(Det etiske Råd)* has been created in Denmark with the purpose of giving advice to the politicians. This board comprises philosophers and theologians, and besides several research centres have been established, where research is done in the legal-political and ethical aspects of the new technology.[17]

This new model has some advantages, especially in certain fields, but it also has some limitations, partly because philosophers from different philo-

[16] N. Christie *Kriminalitetskontrol som industri* (Copenhagen: Hans Reitzels Forlag 1996).

[17] P. Kemp – J. Rendtorff – N. Johansen (eds.) *Bioethics and Biolaw* Vol. 1–2 (Copenhagen: Rhodos 2000).

sophical schools can arrive at widely different conceptions of how the legislation ought to be framed, and partly because it seems important also to listen to the ordinary citizens' conceptions.

The principal element of the *fifth* and last idea I am going to mention here, is to base policy of law on an analysis of the development tendencies in law and society. The fundamental idea in this connection is that it is reasonable to develop law in conformity with these actual tendencies in order to avoid developing an antiquated form of regulation which might have been the answer to problems in previous phases of development, but which is not adequate compared to modern challenges and mentality.

In this model, the main stress is laid on attempts at finding the general tendencies of development rather than looking at the problems in the concrete situation. In this way, the model has a more general character than those mentioned above, and the advocates of this model believe that this is the field where jurisprudence and theory of law can make the most important contribution to the modern legal-political debate. Taking interest in the development of new forms of legal regulation, forms partly a very important element of any constructive policy of law and partly an element that would otherwise not have been included at all.

This model has had its advocates also in previous periods. By way of example, the views may be mentioned which were adduced by the advocates of the *Interessenjurisprudenz* at the end of the 19th century. Nowadays, the most prominent advocate of this view of policy of law is probably the German theorist of law Gunther Teubner. Especially, I refer to his works from the 1980s in which he framed the idea of a *reflexive form of law* in answer to the modern regulation crisis.[18] For Teubner and his advocates it is extremely important to discuss which modern tendencies are pointing to new types of problems that law has to be applied to and on this basis reflect on which forms of law are most suitable for solving such problems.

It is important also to have this conception of policy of law in mind as it helps to recommend the field of policy of law to use new types of investigations which many have been interested in during recent years.[19] However, this model, too, has its natural limitations – a fact that among others can be

[18] G. Teubner "Reflexives Recht. Entwicklungsmodelle des Rechts im vergleichender Perspektive" *ARSP* (1982), 13–59.

[19] C. Henrichsen *Retssikkerhed og moderne forvaltning. Et retspolitisk studie* (Copenhagen: Akademisk Forlag 1997); I. J. Sand *Styring av kompleksitet* (Bergen: Fagbokforlaget 1996).

seen by watching the development of law and society since the beginning of the 1980s, when Teubner wrote his famous articles. If you do so, it seems fair to conclude that the development has partly taken other directions than the ones supposed by Teubner, and this shows that it is difficult to safeguard legal regulation deep into the future.

5 Conclusion

Above I have put forward a number of "ideal types" of legal-scientific policy of law that in my opinion are entitled to be taken seriously. Each of them makes different demands on policy of law as a specific field of research and operates with widely different conceptions of rationality. This is the reason why it is impossible to combine them freely without losing important features of the individual models.

It is arguable that some of the models are specifically oriented towards a traditional legal way of thinking, whereas others operate with unambiguous assumptions that one ought to be inspired by other forms of science. Should the jurists not concentrate particularly on the models that they are specifically qualified to work on? Well, you might think so. However, I suppose that it is decisive which models – or possibly combinations of models – it is relevant to work on in different situations. Therefore, it appears to me that it is not particularly sensible to work on a traditional legal model when it is imperative to succeed in finding the assumed consequences of the different types of regulation or to reflect on what type of regulation appears to be especially needed in a modern society.

My intention with this article has certainly not been to make a complete list of all imaginable models. In the debate about the character of policy of law that was started several years ago, the subject has been defined on the basis of a large number of interesting perspectives, which I have not been in a position to discuss in this article.[20] On the contrary, my primary wish has been to argue in favour of the view that the field of policy of law is an essential part of legal science which in the future ought to be developed far more than is the case nowadays. This is the reason why I have endeavoured to prove that this field is open to widely different types of analyses. I wish that more researchers would concentrate partly on analyses of basic prob-

[20] Koller – Varga – Weinberger (n. 3); W. Schreckenberger (ed.) *Gesetzgebungslehre* (Stuttgart: Kohlhammer 1986); J. Rödig (ed.) *Studien zu einer Theorie der Gesetzgebung* (Berlin: Springer 1976).

lems of policy of law and partly on concrete legal-political analyses based on the ideal types mentioned above or completely different types which might correspond even better to the challenges of today which are to a great extent a consequence of the increasing globalization of all legal matters.

Kirchenrechtliche Aspekte der Bischofssynode Eine Institution in der Entwicklung

Péter Erdő (Budapest)

1 Einleitende Bemerkungen

Unter den unmittelbaren theologischen Grundlagen der Rechtsnormen, welche das Institut der Bischofssynode seit 40 Jahren regeln, ragen jene Prinzipien hervor, die sich in den Texten des Zweiten Vatikanischen Konzils über das Bischofskollegium finden, besonders *Lumen Gentium* 22 mit der Nota explicativa praevia, die ausdrückliche Erwähnung der Bischofssynode im Dekret *Christus Dominus* (5) die nach der mit dem Motu Proprio des Papstes *Apostolica sollicitudo*[1] erfolgten Einrichtung der Synode formuliert wurde. Darüber hinaus haben uns die Päpste Paul VI. und Johannes Paul II. in ihren Äußerungen vielfältige Anregungen hinterlassen. Besonders Johannes Paul II. lag die Bischofssynode am Herzen, und er hat in den Jahrzehnten seines großen Pontifikates Grundlegendes zu ihrer Entwicklung beigetragen. Da die grundlegenden Kennzeichen der Synode bei der Feier des 20. Jahrestages ihrer Einrichtung vom damaligen Generalsekretär der Bischofssynode, Card. Jozef Tomko, im Hinblick auf die Sicht Johannes Paul II. dargestellt worden sind,[2] beschränke ich mich hier auf eine kurze Darstellung des rechtlichen Erscheinungsbildes der Synode, wie es uns im geltenden Kirchenrecht entgegentritt, und versuche dabei, die rechtliche Natur der Synode als solcher und ihrer verschiedenen Formen, Funktionen und Ausdrucksweisen darzustellen, wie sie sich in den letzten Jahrzehnten herausgebildet haben. Abschließend versuche ich, die Grundlinien ihrer Entwicklung

[1] Paul VI. "Motu Proprio *Apostolica sollicitudo*, 15. September 1965" *AAS* 57 (1965), 775–80.

[2] J. Tomko "Il Sinodo dei Vescovi e Giovanni Paolo II" in Idem (Hrsg.) *Il Sinodo dei Vescovi. Natura, metodo, prospettive* (Città del Vaticano: Libreria Editrice Vaticana 1985), 13–44.

und einige zentrale Punkte herauszuarbeiten, um die Rolle zu beschreiben, welche der Synode im Kontext der Kollegialität der Bischöfe und der *Communio*, sowie beim Studium und der Lösung von Problemen zukommt, die die Sendung der Kirche in der Welt von heute betreffen.

2 *Die rechtliche Natur der Bischofssynode*

2.1 *Nach den Errichtungsdokumenten der Synode*

Nach einer Reihe theoretischer Diskussionen[3] wird heute allgemein davon ausgegangen, daß die Bischofssynode von ihrer Natur her kein Organ ist, dem in der Kirche Leitungsgewalt zukommt. Ihre Natur und ihre Aufgaben sind schon im Motu proprio *Apostolica sollicitudo* beschrieben und im *Ordo Synodi Episcoporum*[4] näher ausgestaltet worden.

Das päpstliche Dokument zur Errichtung der Synode präzisiert die Natur der Synode, indem es feststellt: "a) die Synode ist eine zentrale kirchliche Einrichtung; b) sie vertritt das ganze katholische Episkopat; c) sie ist ihrer Natur nach dauerhaft."[5] Nach dem gleichen Motu proprio bestehen die Zielsetzungen der Synode darin, "a) eine engere Einheit und Zusammenarbeit zwischen dem Papst und den Bischöfen der Welt zu fördern; b) eine direkte und genaue Information über die Probleme und die Situationen zu ermöglichen, welche das innere Leben der Kirche und ihre Tätigkeit in der Welt von heute betreffen; c) eine Übereinstimmung im Hinblick auf die wichtigsten Fragen der Lehre und das konkrete Handeln der Kirche zu erleichtern."[6] Bezüglich der Funktion der Synode heißt es im Motu Proprio: "Von ihrer Natur her hat die Bischofssynode die Aufgabe, zu informieren

[3] Eine Zusammenfassung dieser Diskussionen findet sich bei Tomko (Anm. 2), 23–9; G. P. Milano *Il Sinodo dei vescovi* (Milano: Giuffrè 1985), 67–8; Idem "Il sinodo dei vescovi. Natura, funzioni, rappresentatività" in *La synodalité. La participation au gouvernement dans l'Église.* Actes du VII congrès international de Droit canonique. Paris, UNESCO, 21–28 septembre 1990. (Paris 1992) (=*L'Année Canonique* Hors série, Vol. I), I, 167–82; J. I. Arrieta *El Sinodo de los Obispos* (Pamplona: EUNSA 1987), 70–1; F. Dupré la Tour *Le Synode des Eveques dans le contexte de la collégialité. Un étude théologieque de Pastor Aeternus à Apostolos Suos* (Romae: Pontificia Universitas Sanctae Crucis 2002), 217–37.

[4] "Ordo Synodi Episcoporum Celebrandae 1966" *AAS* 59 (1967), 91ff; "Ordo Synodi Episcoporum Celebrandae Recognitus et Auctus 1969" *AAS* 61 (1969), 525–39; *Ordo Synodi Episcoporum Celebrandae Recognitus et Auctus cum Additamentis* (Typ. Pol. Vat. 1971).

[5] Paul VI. (Anm. 1), Nr. I, 776.

[6] Ibid. Nr. II, 776f.

und zu beraten. Es kann ihr auch ein beschließendes Stimmrecht zukommen, wenn es ihr vom Papst übertragen wird, dem es dann auch zukommt, die Beschlüsse der Synode zu bestätigen."[7]

3 Nach dem geltenden Codex Iuris Canonici

Der gültige Codex des kanonischen Rechts widmet der Bischofssynode ein ganzes Kapitel (can. 342–348), das sich in der 1. Sektion des II. Buches findet, wo es um die höchste Autorität in der Kirche geht. Die Regelungen des Codex geben die Bestimmungen des Motu Proprio und des *Ordo Synodi Episcoporum* getreu wieder[8] oder verweisen auf diese Dokumente als das entsprechende Eigenrecht der Synode. Im Verhältnis zu den vorausgehenden Dokumenten ist aber eine gewisse Entwicklung festzustellen. Während das Motu Proprio von drei Formen der Synodenversammlung spricht,[9] nämlich der Generalversammlung, der außerordentlichen Versammlung und der Spezialversammlung, unterscheidet der Codex zwei hauptsächliche Formen: die Generalversammlung und die Spezialversammlung, wobei im Hinblick auf die Generalversammlung noch einmal zwischen der ordentlichen und der außerordentlichen Generalversammlung unterschieden wird (can. 345). Der Spezialversammlung ist die sogenannte *Partikular*versammlung – wie sie für die Bischöfe der Niederlanden veranstaltet wurde[10] – nahezu gleichzustellen.[11] Daß für diese Versammlungen der Begriff "partikular" verwandt wird, steht in Übereinstimmung mit der kirchenrechtlichen Sprachregelung, nach der jene Gesetze "partikular" genannt werden, die sich nur auf ein bestimmtes Gebiet beziehen, während die "Spezialgesetze" eine bestimmte Gruppe von Personen betreffen, und anderen Kriterien als dem territorialen Prinzip folgen. Man könnte also auch die "Spezialversammlungen," welche für die verschiedenen Kontinente einberufen worden sind, als "Partikularversammlungen" bezeichnen. Jedenfalls ist eine Zunahme des partikularen Aspektes festzustellen: die Versammlungen, die keine Generalversammlungen sind (Kontinentalsynoden und andere) stellen schon jetzt im konkreten Leben der Kirche eine wichtige Form der Durchführung der Bischofssynode dar.

[7] Ibid. Nr. III, 777.

[8] Zur Geschichte der Kodifikation in diesem Bereich vgl. M. Bravi "Revisione e legislazione codiciale (del Sinodo)" in *Il Sinodo dei Vescovi* (Roma: P. U. G. 1995), 169–86.

[9] Paul VI. (Anm. 1), Nr. IV, 777.

[10] Vgl. *AAS* 72 (1980), 215–50.

[11] Vgl. Tomko (Anm. 2), 17.

3.1 Die Frage nach der Repräsentation

Schon auf Grund der Bedeutung des partikularen Aspektes wird verständlich, warum der Codex, anders als das Motu Proprio und des Dekret *Christus Dominus*, bei der in can. 342 enthaltenen Definition der Synode nicht mehr davon spricht, daß die Synode "eine Versammlung der Bischöfe ist, die den ganzen katholischen Episkopat vertreten (*totius Episcopatus catholici partes agens*)." Die Gründe, warum der Ausdruck *utpote totius Episcopatus catholici partes agens* im Text des can. 342 ausgelassen wurde, werden in der Anlage zu einer Antwort der Päpstlichen Kommission für die Reform des Codex des kanonischen Rechts vom 20. September 1983 dargelegt.[12] Der Verfasser dieses Textes ist Msgr. Willy Onclin, beigeordneter Sekretär der Kommission und Relator des coëtus De sacra Hierarchia. Er benennt folgende Gründe:

(1) Der Ausdruck "Vertreter des katholischen Episkopates" ist "rechtlich ungenau", kann aber selbstverständlich "im Zusammenhang einer theologischen Darlegung richtigerweise als Ausdruck jener Sorge verstanden werden, die alle Bischöfe nicht nur im Hinblick auf ihre Teilkirche, sondern auch auf die anderen Kirchen und die Gesamtkirche haben." Denn jeder Bischof ist – nach *Lumen Gentium* (22–23) und *Christus Dominus* (6) "durch göttliche Fügung und die Notwendigkeit des apostolischen Dienstes, gemeinsam mit den anderen Bischöfen, Garant der Kirche."[13] Aus rein rechtlicher Sicht kann man hingegen nicht sagen, daß ein Bischof auch eine Rolle in den anderen Teilkirchen hat, denn – so wieder die Konstitution *Lumen Gentium* (23) – "die Bischöfe, die einer Teilkirche vorstehen, üben ihr pastorales Leitungsamt im Hinblick auf den Teil des Gottesvolkes aus, der ihnen anvertraut wurde, und nicht im Hinblick auf die anderen Teilkirchen oder die Gesamtkirche." Theologisch kann man sagen, daß die zur Synode versammelten Bischöfe sich auch um die Kirchen sorgen müssen, denen sie nicht vorstehen, aber im rechtlichen Sinn "kann man nicht sagen, daß die Bischöfe in der Synode auch die anderen Kirchen vertreten, oder als ihre Delegierten handeln."[14] Vor dem Hintergrund der Terminologie des Codex kann an dieser Stelle ergänzend darauf hingewiesen werden, daß die Bischöfe von Rechts wegen Vertreter ihrer Diözese sind (can. 393), nicht aber der anderen.

[12] Prot. N. 5150/83. Diese Antwort wurde mit der Anlage veröffentlicht in Tomko (Hrsg.) (Anm. 2), 179–81.

[13] Ibid. 180.

[14] Ibid.

(2) Sodann weist Msgr. Onclin des weiteren darauf hin, daß die Bischofssynode – würde sie wirklich alle Bischöfe vertreten – dem Konzil gleichkäme und daher auch entscheidendes Stimmrecht haben müßte, was aber im geltenden Kirchenrecht nicht vorgesehen ist.

(3) Als dritter Grund wird auf eine Tatsache hingewiesen, die heute, bei der steigenden Bedeutung der Partikularversammlungen, immer wichtiger wird: an den Spezialversammlungen nehmen vor allem jene Bischöfe teil, die in den Regionen gewählt wurden, für welche die Synode einberufen worden ist. Man kann also nicht von der Vertretung des ganzen katholischen Episkopates als herausragendes Charakteristikum der Bischofssynode als solcher sprechen.

Daraus folgt, daß in der Bischofssynode nicht das ganze Bischofskollegium agiert, und folgerichtig die Handlungen der Synode nicht im rechtlichen Sinn dem Kollegium zugeschrieben werden können (Synodus Episcoporum, Decl. Part., *Pastor Aeternus*, 1967. X. 27, Nr. II, 2: Leges IV, 5669: "Celebratio Synodi Episcoporum proprie actus Collegii Episcoporum dici nequit"). Nach der fundierten Ansicht von Card. Jozef Tomko war dies wohl der Grund dafür, daß Papst Paul VI. im Motu Proprio *Apostolica Sollicitudo* den Gebrauch des Wortes "Kollegialität" streng vermieden hat. Dieser Begriff "wurde auch in den Diskussionen des Konzils zu oft im kirchenrechtlichen Sinn verstanden."[15]

Wenn wir die Rechtsstellung der Synode mit den anderen Formen der Ausübung der obersten Leitungsgewalt durch das Bischofskollegium vergleichen, wie sie im can. 337 benannt werden, wird der Unterschied mehr als deutlich. Neben dem ökumenischen Konzil gibt es zwei weitere Formen der Ausübung dieser *suprema potestas*: die vereinten Amtshandlungen der auf dem Erdkreis verstreut weilenden Bischöfe, die als solche vom Papst angeregt oder frei angenommen werden (§2), oder andere, vom Papst zu bestimmende Weisen der kollegialen Ausübung der Leitungsgewalt (oder anderer Aufgaben des Bischofskollegiums) (§3). Da das Recht, welches dem Institut der Bischofssynode zu Grunde liegt und es regelt, ausdrücklich feststellt, daß ihr im Allgemeinen keine Entscheidungsgewalt zukommt, d.h. keine Leitungsgewalt im technischen Sinn des geltenden Codex (can. 343), ist die Bischofssynode auch keine der Formen der Ausübung der obersten Leitungsgewalt durch das Bischofskollegium, die im §3 des can. 337 erwähnt werden. Ohne die Zustimmung des Papstes könnten die Bischöfe der Welt gar keine Vertreter zur Ausübung dieser Leitungsgewalt des Kollegiums delegieren, denn schon eine solche Delegation müßte eine Handlung des ganzen Kollegs sein,

[15] Tomko (Anm. 2), 20.

die ohne die Zustimmung seines Hauptes nicht zustande kommt. Darüber hinaus werden die gewählten Mitglieder der Bischofssynode nicht von allen katholischen Bischöfen der Welt gewählt, d.h. nicht von allen Mitgliedern des Bischofskollegiums (vgl. *Lumen Gentium* 23; can. 336), sondern von den nationalen Bischofskonferenzen, zu denen von Rechts wegen die emeritierten Bischöfe (can. 450) nicht gehören, die aber seit einiger Zeit einen wichtigen, weil zahlenmäßig großen Teil des Episkopates darstellen und die selbstverständlich mit allen Rechten Mitglieder des Bischofskollegiums sind (can. 336). Diese Überlegungen verlieren nichts von ihrer Gültigkeit, wenn man davon ausgeht, daß – nach einer Antwort der Päpstlichen Kommission für die Interpretation der Gesetzestexte vom 10. Oktober 1991 – auch die emeritierten Bischöfe (vgl. can. 402 §2) als Mitglieder der Versammlung der Bischofssynode gewählt werden können.

Was nun die Frage nach der Vertretung der Bischofskonferenzen angeht, welche einen Teil der Mitglieder der Synode wählen, so ist offiziell festgestellt worden, daß die zur Synode delegierten Bischöfe "ihre eigenen Überzeugungen zum Ausdruck bringen können und in den Abstimmungen frei sind, nach eigenem Wissen und Gewissen zu entscheiden." Diese Feststellung erhält eine erhöhte Bedeutung, wenn wir die Natur der Bischofskonferenzen und ihre Kompetenz in Fragen der Lehre bedenken, wie sie im Motu Proprio *Apostolos suos* vom 21. Mai 1998 beschrieben wird. Zur Physiognomie der Synode gehört nun einmal eine wechselseitige Kommunikation. Oder, wie es der damalige Kardinal Karol Wojtyla am 15. Oktober 1969 in einem Beitrag in der Synodenaula ausdrückte: "Gemeinschaft ... bedeutet auch eine gewisse wechselseitige Kommunikation. ... Diese Kommunikation besteht nicht nur in einem äußeren Austausch von Gütern, sondern beinhaltet auch eine innere Teilnahme der betreffenden Personen. Und sie hat es auch mit dem Empfangen von Gütern zu tun." Dieser so reiche Prozeß des Austauschs der Güter kann nicht wirklich zu seinem Ziel kommen, wenn sich die Diskussionen in der Aula nicht auch in den Abstimmungen niederschlagen. Ein gebundenes Mandat der Synodenväter, die von der Bischofskonferenz in ihrem Handeln begrenzt würden, wäre also eine Schmälerung der Funktion der Synode.

3.2 Welche Vollmacht hat nun die Synode?

Wie wir bereits festgestellt haben, kommt der Bischofssynode in der Kirche keine Leitungsgewalt zu. Dabei muß aber mitbedacht werden, daß die Herausarbeitung dessen, was tatsächlich dem Begriff der *potestas regiminis*

in der Kirche entspricht, in gültiger Weise mit der Promulgation des Codex des kanonischen Rechts 1983 (besonders in den cann. 129–135) erfolgt ist. Früher sprach man oft von *potestas iurisdictionis* und *potestas ordinis* oder – im Kontext der Lehre des Zweiten Vatikanischen Konzils – auch von der *una sacra potestas*. Im kirchenrechtlichen Sprachgebrauch versucht man heute, den Gebrauch des Begriffs *potestas* für Funktionen oder Fähigkeiten, die nicht mit der Leitungsgewalt zusammenhängen, zu vermeiden. Für einige der Befähigungen, die mit der Ausübung des Weihesakramentes verbunden sind, bevorzugt der Codex den Gebrauch des Begriffs *facultas*, auch wenn der CIC/1917 hier noch von Jurisdiktion sprach. Schon in der *Nota explicativa praevia*, welche der Konstitution Lumen Gentium beigefügt wurde, ist herausgestellt worden, daß zwar jeder Bischof mit der Weihe eine besondere ontologische Teilnahme an den tria munera, d.h. am dreifachen Dienst oder Sendung Christi (Nr. 2) erhält, daß er aber, um eine bestimmte *potestas* ausüben zu können, von der zuständigen Autorität die sogenannte rechtliche Bestimmung (*determinatio*) erhalten muß. Nach can. 129 des geltenden Kirchenrechts erhält man mit der Weihe die Fähigkeit, die Leitungsgewalt übertragen zu bekommen (*potestas regiminis habiles sunt, qui ordine sacro sunt insigniti*). Inzwischen spricht man im Recht ungern von "Gewalt", wenn es um diue ontologische Befähigung oder einfach um subjektive Rechte geht.

Auf Grund der im Hinblick auf den kirchenrechtlichen Sprachgebrauch vor sich gegangenen Entwicklung kann man heute im technischen Sinn nicht mehr davon sprechen, daß der Bischofssynode eine *potestas consultiva* zukommt, wie dies seinerzeit W. Bertrams getan hat, zumal diese zudem der Synode als ordentliche und eigenberechtigte (*ordinaria et propria*) zueignen sein müßte. Der geltende Codex kennt die Unterscheidung zwischen "ordentlicher und delegierter Leitungsgewalt" (can. 131). Daher hat es kaum Sinn, hier technische Konzepte wie *potestas* zu verwenden, wenn es darum geht, die beratende Rolle darzustellen, welche der Bischofssynode wirklich eigen ist und ihr Bedeutung gibt. Die Synode hat das vornehme Recht, dem Papst jene Überzeugungen zur Kenntnis zu bringen, welche auf kollegiale Weise erhoben wurden. Aber dieses Recht kann nicht als Leitungsgewalt bezeichnet werden.

Wir haben schon weiter oben festgestellt, daß die Bischofssynode auch eine von Seiten des Bischofskollegiums delegierte Gewalt hat. Es ist wichtig, darauf hinzuweisen, daß ihr auch die einzelnen Bischöfe keine Leitungsgewalt delegieren können, denn – entsprechend can. 135 §2 – darf z.B. die gesetzgebende Gewalt allein von der höchsten Autorität der Kirche delegiert werden. Aber auch im Hinblick auf die dem Bischof eigene ausführen-

de und die richterliche Gewalt gilt, daß einzelnen Diözesanbischöfe keine Leitungsgewalt besitzen, welche sie auch über andere Teilkirchen oder über die Gesamtkirche ausüben könnten. So heißt es etwa in Nr. 23 der Konstitution *Lumen Gentium*: "Die Bischöfe, die den Teilkirchen vorstehen, üben als einzelne ihr Hirtenamt über den ihnen anvertrauten Teil des Gottesvolkes, nicht aber über andere Kirchen und nicht über die Gesamtkirche aus."

4 Die Aufgaben der Synode

4.1 Von der Synode zu behandelnde Gegenstände

Der geltende Codex faßt die Zielsetzungen, die Recht und Pflichten der Bischofssynode in einem gegenüber dem Motu Proprio *Apostolica Sollicitudo* verdichteten Verzeichnis zusammen. Es wird nicht mehr zwischen den *allgemeinen* und den *besonderen* Zielen der Synode unterschieden. Nach can. 342 hat die Synode das Ziel, "die enge Verbundenheit zwischen dem Papst und den Bischöfen zu fördern" und dem Papst "bei Bewahrung und Wachstum von Glaube und Sitte und bei Wahrung und Festigung der kirchlichen Disziplin mit ihrem Rat hilfreich beizustehen" sowie "Fragen bezüglich des Wirkens der Kirche in der Welt zu beraten." Aus diesem Verzeichnis gehen die Fragen hervor, die auf der Synode behandelt werden können. Einerseits werden drei Themenbereiche genannt, andererseits wird im canon auch die Perspektive bezeichnet, aus der heraus die Themen behandelt werden sollen.

Über Glaube und Sitte muß gehandelt werden, um sie zu schützen und zu vertiefen, d.h., "der Glaube der Kirche kann nicht in Zweifel gezogen werden." Aber, man kann die Ausdrucksformen des Glaubens untersuchen, und versuchen, die entsprechenden Formen zu finden, nicht nur im Hinblick auf die Sprache, "sondern in verschiedener, wirklicher Weise." Genauso wenig können die Dokumente des Papstes als solche Gegenstand der Diskussion sein, "denn die Autorität der Synode kommt von der des Papstes, und auch das ökumenische Konzil, als Versammlung des Bischofskollegiums, hat weder gegenwärtig noch möglicherweise eine Autorität, die sich gegen das Haupt des Kollegiums richten könnte." Das bedeutet aber nicht, daß man sich nicht darum bemühen dürfte, eine bessere Erklärung oder einer vertiefte Darlegung der behandelten Themen zu finden. Im Hinblick auf die Behandlung der Dokumente der römischen Kurie, die in einfacher Form vom Papst approbiert wurden, scheint eine respektvolle Diskussion durchaus denkbar zu sein. Die Synode könnte durchaus auch – wie es Papst Benedikt XVI., damals noch Kardinal Joseph Ratzinger geschrieben hat – einen Rat

zu Ausdruck bringen, um eine disziplinäre Regel zu bestätigen oder zu modifizieren. So sind wir beim disziplinären Aspekt der Aufgaben der Synode angekommen.

Was die *Bewahrung und Festigung der kirchlichen Disziplin* angeht, so läßt die vom CIC gewählte Ausdrucksweise erkennen, daß es nicht Aufgabe der Synode ist, die Disziplin der Kirche zu schwächen, oder Reformen nur um der Abwechselung willen vorzunehmen. Die Änderung einer kirchenrechtlichen Norm ist nie Selbstzweck, sondern soll jene Disziplin der Kirche stärken, die der theologischen Realität der Kirche, den Sakramenten und allgemein der Sendung der Kirche am besten entspricht. All dies ist – auch im Hinblick auf die Realität des Alltagslebens – mit großer theologischer Sensibilität zu bedenken. Die Synode stellt eine nützliche Einrichtung dar, um diese Situation kennen zu lernen, und bietet die Gelegenheit, Erfahrungen und Informationen auszutauschen. Dies gilt sowohl im Hinblick auf den Austausch zwischen den Teilkirchen und dem Papst, als auch auf den Austausch zwischen dem Papst und den einzelnen Bischöfen, und den Bischöfen untereinander. Bezüglich des rechtlichen Charakters und der Form der Tätigkeit der Synode, klärt der can. 343, daß es nicht Aufgabe der Synode ist, die anstehenden Fragen zu entscheiden "und über sie Dekrete zu erlassen, wenn nicht der Papst ihr in bestimmten Fällen Entscheidungsgewalt übertragen hat. In diesem Fall ist es seine Sache, die Entscheidungen der Synode in Kraft zu setzen." Für eine solche Übertragung kennen wir kein Beispiel aus der Geschichte dieser Einrichtung. Entsprechend dem, was bisher zu den Fragen der Lehre gesagt worden ist, gilt auch im Hinblick auf die Disziplin, daß die Synode jene Normen der Disziplin der Kirche, welche zum göttlichen Recht gehören, nicht zu Diskussion stellen kann. In diesen Zusammenhängen kann es nur darum gehen, die Art und Weise ihrer Umsetzung zu verbessern. Im Hinblick auf das rein kirchliche Recht sind Änderungsvorschläge denkbar, die dann an den Papst zu richten wären.

Der dritte Bereich, in welchem die Synode berufen ist, dem Nachfolger Petri zur Seite zu stehen, ist *die Beratung von Fragen bezüglich des Wirkens der Kirche in der Welt*. Diesbezüglich scheint der Austausch von Nachrichten und Informationen noch wichtiger, und dies nicht nur für die Bischöfe und die Teilkirchen, die in besonderer Weise an den behandelten Fragen interessiert sind, sondern auch für alle anderen, die dadurch in die Lage versetzt werden, geistliche und materielle Hilfen für die Bedürftigen zu organisieren, und ihre eigene Situation im größeren Kontext der Gesamtkirche und der Welt zu betrachten. Dieser Austausch scheint auch sehr bedeutsam zu sein, wenn es darum geht, Konflikte oder theologisch bedenkliche Vorstellungen, die ggf.

in der eigenen Teilkirche aufgetreten sein können, zu bewerten oder – sollte dies erforderlich sein – zu bereinigen. Auch, wenn die Synode in erster Linie dem Papst mit ihrem Rat zur Seite zu stehen hat, kann es manchmal erforderlich werden, daß sie angesichts der großen Probleme der Welt einmütig ihre Stimme ihre Stimme erhebt. Die Wirksamkeit einer solchen Unternehmung ist um so größer, wenn auch diese Stellungnahmen nicht an die Massenmedien, sondern an den Papst gerichtet werden, der dann mit Bezug auf den Rat der Synode eine entsprechende Erklärung veröffentlichen kann. Wenn aber die Synode oder irgend ein anderes Organ der Kirche in diesen allgemeinen Fragen der Welt Stellung bezieht, muß immer berücksichtigt werden, daß diese Organe an der Ausübung der Sendung der Kirche in der Welt teilnehmen. Die Kompetenz, welche der Kirche in diesem Bereich zukommt, umfaßt zwei besondere Bereiche, die vor dem Hintergrund von *Gaudium et Spes* 76 von can. 747 §2 zusammengefaßt werden. Es handelt sich dabei um die Verkündigung der sittlichen Grundsätze der sozialen Ordnung und die Beurteilung der menschlichen Tätigkeiten, so weit dies die Grundrechte der menschlichen Person und das Heil der Seelen erfordern.

Die Lage der Welt kann auch von einem anderen Gesichtspunkt her betrachtet werden, nämlich im Hinblick auf die Tätigkeit der Kirche, die manchmal unter außergewöhnlichen oder ganz neuen Umständen stattfindet. Es könnte diesbezüglich manchmal sinnvoll sein, wenn die Synode nicht nur theologisch-moralische Erklärungen anregen, sondern dem Papst vorschlagen würde, einzelne kirchenrechtliche Normen zu erlassen, damit die Tätigkeit der Kirche den Lebensumständen der Welt besser entsprechen kann.

4.2 Die Art und Weise, in der die Synode ihre Aufgabe ausübt

Die in can. 342 gewählte Ausdrucksweise klärt eindeutig, daß die an der Synode teilnehmenden Bischöfe ihre Vorschläge an den Papst richten, d.h. weder an das Bischofskollegium noch direkt an das ganze Volk Gottes und auch nicht an die politischen Führer oder die Welt. Dieser rechtlichen Klärung entspricht in besonderer Weise die literarische Gattung der post-synodalen Apostolischen Schreiben, in welchen sich der Papst der Vielfalt der Vorschläge der Synode bedient, und sich an die ganze Kirche oder einen Teil von ihr richtet. Auch, wenn das Motu Proprio *Apostolica Sollicitudo* davon sprach, daß die zur Synode versammelten Bischöfe "dem obersten Hirten der Kirche eine Hilfestellung leisten," hat es doch noch nicht klargestellt, daß die Ratschläge der Synode an den Papst gerichtet sind. Die eindeutige-

re Ausdrucksweise, die der Codex verwendet, stimmt mit der allgemeinen Feststellung überein, die sich in can. 334 findet, wo im Zusammenhang mit der Amtsausübung des Papstes klargestellt wird, daß die Bischofssynode (gemeinsam mit dem Kardinalskollegium oder auch anderen Einrichtungen, zu denen, nach der Ansicht einiger Kommentatoren, die Dikasterien der Römischen Kurie gehören), ein Ausdruck der Unterstützung, welche die Bischöfe dem Nachfolger Petri leisten, und der Zusammenarbeit zwischen Papst und Bischöfen ist. Die Synode hat also das Recht, ihre eigene Meinungen und Wünsche gegenüber dem Papst zum Ausdruck zu bringen, wenn er danach fragt, aber der Papst ist rechtlich nicht verpflichtet, den Rat der Synode einzuholen. Daraus folgt, daß es keine Handlungen des Papstes gibt, die zu ihrer Gültigkeit eine solche Beratung im Sinne des can. 127 voraussetzen.

"Die Tatsache, daß der Synode normalerweise beratende und nur in Ausnahmefällen beschließende Funktion zukommt – wies es Johannes Paul II. in seinem nachsynodalen Apostolischen Schreiben *Pastores gregis* herausstellt – mindert ihre Bedeutung nicht. In der Kirche ist nämlich der Zweck eines jeden Kollegialorgans, sei es beratend oder beschließend, immer auf die Wahrheit und das Wohl der Kirche ausgerichtet. Wenn es sich dann um die Feststellung des gemeinsamen Glaubens handelt, wird der *consensus Ecclesiae* nicht durch die Auszählung der Stimmen gewonnen, sondern ist Frucht des Wirkens des Geistes, der die Seele der ganzen Kirche ist."

Was die Arbeitsweise betrifft, die sich im Lauf der Jahrzehnte herausgebildet hat, können wir festhalten, daß sie ganz und gar kollegial ist, und zwar in dem Sinn, daß die synodale Dynamik von diesem Geist inspiriert wird. Einer Auflistung von Kardinal Jozef Tomko folgend ergibt sich vor dem Hintergrund der Entwicklung der letzten Jahre folgendes Bild.

(1) Die Wahl des *Themas* der Synode erfolgt in kollegialer Weise, denn das Synodensekretariat bittet die Bischofskonferenzen, Themenvorschläge für die kommende Versammlung zu machen. Die Vorschläge werden vom Rat des Generalsekretariates gesichtet. Der Rat legt dann das Ergebnis seiner Analysen und seine eigenen Vorschläge dem Heiligen Vater vor.

(2) Darauffolgend erarbeitet der Rat die *Lineamenta*, die wiederum an die Bischofskonferenzen geschickt werden. Seit der Vorbereitung der Synode von 1983 über Versöhnung und Buße werden die *Lineamenta* veröffentlicht. Das fördert sicherlich eine breite Diskussion des Themas.

(3) Die Reaktionen und Vorschläge werden von den Bischofskonferenzen zusammengefaßt und an das Synodensekretariat geschickt. Auf dieser Grundlage erarbeitet der Rat des Generalsekretariates der Synode mit Hilfe von Fachleuten das *Instrumentum Laboris*. Dieses Dokument dient der Arbeit

der Synode als Grundlage. Daher erhalten zunächst die Bischöfe, welche von den Bischofskonferenzen als Teilnehmer der Synode gewählt wurden und die Vorsitzenden der Bischofskonferenzen das Dokument. 1983 wurde es an alle Bischöfe verschickt und ungeachtet seines vorläufigen und unterstützenden Charakters publiziert. Allerdings ist die Veröffentlichung auch ein Zeichen dafür, daß die öffentliche Diskussion des Synodenthemas auch den Austausch von Erfahrungen und Vorschlägen unterstützen kann, der zu den Zielsetzungen der Synode gehört. In den folgenden Jahren – etwa 1987 – sind weitere *Instrumentum laboris* veröffentlicht worden.

(4) Neben ihren eigenen Überlegungen können die Bischöfe, welche an der Synode teilnehmen, der Versammlung auch die Vorschläge der Bischöfe ihres Landes bekanntmachen, auch wenn sie nicht im streng rechtlichen Sinn des Wortes Gesandte ihrer Bischofskonferenzen sind, sondern in ihren Abstimmungen frei (vgl. weiter oben). Wenn es um Fragen der Lehre geht, ist es im übrigen sehr schwer, die Meinung einer Bischofskonferenz zu erheben, sei es im Hinblick auf die erforderliche Mehrheit, sei es im Hinblick auf die Qualität der entsprechenden Stellungnahmen. Viel wichtiger scheint hingegen die Möglichkeit zu sein, daß die Synodenväter ihre konkreten Erfahrungen im Hinblick auf das Glaubensleben austauschen, und vor diesem Hintergrund versuchen, Leitlinien zu formulieren. Während der *Generalversammlung*, und zwar sowohl bei den Beiträgen in der Aula, als auch später bei der Diskussion in den *circuli minores* und schließlich bei der Beratung und Abstimmung über die *Präpositionen* oder Schlußfolgerungen ist ein breiter Raum für den Austausch der Gaben vorhanden. Nicht zuletzt deswegen kehren viele Synodenväter mit dem Gefühl, viel gelernt zu haben, in ihre Heimat zurück.

(5) Der kollegiale Geist und die kollegiale Methode sind auch am Ende der Synode und in der ihr folgenden Zeit spürbar, welche immer stärker mit der Erarbeitung der Dokumente unter besonderer Beteiligung des Rates des Generalsekretariates verbunden ist. Nach can. 348 §1 wird dieser Rat von Bischöfen gebildet, "von denen die einen nach Maßgabe des besonderen Rechts von der Bischofssynode selbst gewählt, die anderen vom Papst ernannt werden; ihre Aufgabe endet mit dem Beginn der nächsten Generalversammlung." Das Abschlußdokument oder die Dokumente der Synode können verschiedene Formen haben. Am Ende der Generalversammlung von 1971 wurden mit päpstlicher Approbation zwei Erklärungen der Synode veröffentlicht. Bei der Synode von 1974 ist es nicht gelungen, ein Abschlußdokument zu verfassen, und man wandte sich an den Papst, mit der Bitte, auf der Grundlage der Synodenarbeiten ein Dokument zu erarbeiten. Das

päpstliche Dokument wurde dann offiziell als "Apostolisches Schreiben" bezeichnet. Von Seiten er Synode von 1977, 1980, 1983 und den folgenden Versammlungen wurde eine *Botschaft der Synodenväter* veröffentlicht, während die Präpositionen dem Papst übergeben wurden, der die Früchte der Synodenarbeit in Apostolischen Schreiben zusammenfaßte, die er kraft seiner eigenen Autorität veröffentlichte. Diese Vorgehensweise ist auch später befolgt worden, mit dem Unterschied, daß das päpstliche Dokument, das der Synode folgte, seit *Reconciliatio et poenitentia* als "Nachsynodales Apostolisches Schreiben" bezeichnet wird. Auch die am Ende der Versammlungen angenommenen Präpositionen sind seit 1987 wiederholt veröffentlicht worden. Während die Veröffentlichung des *Instrumentum laboris* von der Natur der Sache her die Vorbereitung der Synode fördert, scheint die Veröffentlichung der Präpositionen von der Natur der Sache her nicht erforderlich, denn dieses Dokument richtet sich allein an den Heiligen Vater, denn die Synode hat nicht den Auftrag, die Welt zu beraten, sondern in besonderer Weise den Papst. Im Zusammenhang mit dem Apostolischen Schreiben *Familiaris Consortio* hat der Generalsekretär der Generalversammlung von 1983 im Hinblick auf Methode und Bedeutung der Apostolischen Schreiben, welche die Ergebnisse der Synodenarbeit aufgreifen, im Auftrag von Johannes Paul II. mitgeteilt, daß diese Form der Publikation "die moralische Autorität einer so hoch qualifizierten Versammlung hat und andererseits eine für die ganze Kirche verbindliche Autorität, die nicht nur moralischer sondern auch rechtlicher Art ist, da die Schreiben ihre Quelle haben *ex munere petrino Summi Pontificis adprobantis*. Auf diese Weise können die Dokumente ein weiteres Zeichen der Kollegialität und einer deutlicheren Synodalität werden." Der Verweis auf den juridischen Charakter des nach der Synode veröffentlichen päpstlichen Schreibens, drückt zunächst einmal die Tatsache aus, daß die lehramtlichen Dokumente des Heiligen Vaters auch rechtlich verbindlich sind. Implizit enthält diese Erklärung der Natur des päpstlichen Dokumentes auch die Möglichkeit, daß der Papst, indem er die Ergebnisse der Arbeit einer Bischofssynode aufgreift, bei der er etwa von den praktischen Schwierigkeiten in den verschiedenen Teilkirchen gehört und die synodalen Vorschläge zur Kenntnis genommen hat, eine rechtliche Norm strikt disziplinären Charakters erläßt. Auch ein solches Dokument könnte sich auf die Synodenarbeiten beziehen, die ihm vorausgegangen sind. In diesem Sinn scheint es jedenfalls zukünftig möglich zu sein, auch ein Nachsynodales Apostolisches Schreiben mit disziplinär-normativem Inhalt zu promulgieren.

5 Schlussfolgerungen

Wenn man die verschiedenen Facetten der Entwicklung der Bischofssynode überblickt, wird zunächst deutlich, daß sie eine Möglichkeit schafft, daß die großen Probleme des Lebens der Kirche und der Welt in einem Umfeld aufgegriffen werden, wo alle die Möglichkeit haben, ihre eigenen Gedanken zum Ausdruck zu bringen. Das trägt zur Stärkung der Einheit der Bischöfe untereinander und mit dem Papst bei. Allen wird die Möglichkeit gegeben, die Haltung des Nachfolgers Petri und des Heiligen Stuhls kennen zu lernen, und mit den anderen Bischöfen Meinungsaustausch zu betreiben. Die Erfahrung der vergangenen vierzig Jahre zeigt, daß die Synode ein nützliches Instrument darstellt und der Stärkung der Gemeinschaft in der Kirche sowie der Ausübung des Hirtendienstes einen großen Dienst erwiesen hat.[16]

Die Tatsache, daß die Ergebnisse der Synode immer häufiger in Form eines *Apostolischen Schreibens* veröffentlicht werden, und daß dieses Schreiben seit Mitte der achtziger Jahre offiziell als *nachsynodal* bezeichnet wird, scheint sehr angemessen zu sein, oder besser gesagt, viel angebrachter, als die anderen Formen, die zu Beginn der Geschichte der Bischofssynode gebraucht wurden, denn es ist tatsächlich der Heilige Vater, der sich die Ratschläge der Synodalen zu eigen machen muß, die der Natur der Synode entsprechend an ihn und nicht direkt an die Öffentlichkeit gerichtet werden. Auch die Tatsache, daß der Papst die synodale Basis seiner Dokumente erwähnt, stellt eine glückliche Lösung dar.

Einige beschweren sich über die *Länge* dieser Dokumente. Dieses Problem ist in der Kultur des Westens sehr verbreitet. Die Öffentlichkeit liest weniger, und viele erlangen ihre Kenntnisse über ausführliche Dokumente aus den Massenmedien. Wenn es sich um ein Apostolisches Schreiben handelt, ist es in keiner Weise angemessen, sich auf diese Art der Information zu beschränken, denn sie sind reich an theologischen und pastoralen Nuancen. Die Tatsache, daß diese Dokumente auch ins Internet gestellt werden, erleichtert die direkte Konsultation sehr. Es scheint allerdings erforderlich, auch andere, entsprechende Formen zu finden, damit die Stimme des Papstes und der Bischöfe bei den Priestern und den Gläubigen in der Welt ankommt. Dieses Probleme betreffen nicht nur die Bischofssynode, denn sie sind kennzeichnend für die heutige Kultur. Auf der einen Seite wächst die Quantität der Information, auf der anderen Seite wird es für den Leser immer schwieriger, all das, was angeboten wird, zu studieren und vertieft zu verstehen. Um einen gewissen sozialen Effekt zu erreichen, ist es allerdings

[16] Dupré la Tour (Anm. 3), 322.

auch erforderlich, in einem gewissen Maß auch in den Massenmedien präsent zu sein. Die Konsultation verschiedener Gruppen von Personen müssen eine bestimmte Frequenz und einen bestimmten Umfang haben; ungeachtet der Last für die Teilnehmer. Es scheint, daß es der Synode gelungen ist, auch in dieser Hinsicht ein entsprechendes Gleichgewicht zu finden.

Im Hinblick auf die synodale Beratertätigkeit im disziplinären Bereich scheinen auch andere Formen von Dokumenten denkbar, nämlich solche mit juridisch-normativem Charakter, durch welche der Papst, nach einer so bedeutenden Beratung mit den Bischöfen, wie es bei der Synode der Fall ist, den Teilkirchen dabei hilft, ihre disziplinären Probleme in Einheit mit der Gesamtkirche zu lösen. Es würde sich dabei nicht um eine kollektive Form der Gesetzgebung handeln, sondern um eine nuancierte Zugangsweise zur Realität.

Ein anderes Phänomen, das die Entwicklung des Instituts der Bischofssynode charakterisiert, ist, daß die Sonder- oder Partikularversammlungen, besonders die kontinentalen, inzwischen regelmäßig zu werden scheinen. Da die Synode im juristischen Sinn nicht das ganze Bischofskollegium vertritt, entspricht diese neue Form auch ihrer Natur. Das Gesamt der Teilkirchen eines Kontinentes ist dabei, überall zu einer besonderen Wirklichkeit von großer pastoraler Bedeutung zu werden.

Bitten wir voll Vertrauen die göttliche Vorsehung, daß die Synode, dieses ausgezeichnete Instrument der Gemeinschaft, auch in Zukunft kostbare Früchte tragen kann.

Challenges in Contemporary Legal Philosophy

Carla Faralli (Bologna)

Following a period in which legal philosophy, under the push of language analysis, was characterized by interpretations that achieved great formal refinement but was to that extent removed from historical concretion and social life, there came a turning point, roughly in the 1970s, in which legal philosophy went back to an interest in questions of substantive moral and political import.[1]

The factors that led to this turnaround were both cultural and historical. John Rawls' *Theory of Justice*[2] in the United States and the revival of practical philosophy in Europe brought about, in the late 1970s, a shift from metaethics to normative ethics whereby inquiry into the nature and foundations of morality – analyzing the meaning of moral terms and different models of moral reasoning – gradually gave way to a renewed interest in concrete moral problems.

Because morality is contiguous with law – recall that law as a category did not become autonomous from morality until the eighteenth century, with Christian Thomasius and then with Immanuel Kant – these developments have influenced legal scholars, too.

The paradigm shift of the late 1970s came in parallel with a process of deep and rapid societal change: information technology entered the everyday in various departments of life, setting off a sort of revolution that some have compared to the one introduced by movable-type printing; advances in scientific research were affording increasingly greater control over nature, and medical research in particular contributed to this process with techniques (such as artificial insemination, organ transplant, and cloning) that raised poignant questions about where to draw the line when it comes to

[1] Cf. C. Faralli *La filosofia del diritto contemporanea: I temi e le sfide* (Rome–Bari: [2]2005)

[2] Cambridge, Mass.: 1971; rev. ed. Oxford: 1999.

intervening in human and nonhuman life; and large migratory flows from poor countries to industrialized ones changed the makeup of the old nation-states, thus provoking a marked legal pluralism and causing us to rethink such long-established concepts as sovereignty and citizenship.

So it is from these sources that come the challenges now facing contemporary philosophy of law: I will focus in particular on bioethics and multiculturalism.

The term *bioethics* – literally, "the ethics of life," and more broadly of "any living thing" – was introduced by the American oncologist V. R. Potter in a 1971 book titled *Bioethics: A Bridge to the Future*.[3] Potter described bioethics as engaged in a basic effort to bring biomedicine and the biological sciences to operate in consort with the human sciences, so as to improve the quality of life, and indeed to ensure the survival of humankind.

The term became mainstream with the publication of the *Encyclopedia of Bioethics*, edited by W. Reich,[4] where we find a definition of *bioethics* as the study of human conduct in the life sciences and in health care, in the light of moral values and principles.

It may be discussed whether bioethics is in fact a new discipline or a new ethic: certainly, it can be described as a family of inquiries, discussions, and practices, generally cross-disciplinary, aimed at clarifying and solving ethical questions raised by scientific and technological advances that have made it possible to act on life phenomena in ways until a few decades ago unimaginable.

The subject matter covered by this word ranges widely and keeps expanding as scientific research makes headway and more applications are found: the issues include abortion, euthanasia, the doctor–patient relationship, organ transplant, genetic engineering, cloning, etc. And in addition to these strictly biomedical issues, bioethics broadly understood also concerns itself with environment protection and animal rights.

There are certain fundamental questions that bioethics has been entrusted with, questions such as When does life begin? When can a "person" or "human life" be said to exist, and how long? How much autonomy should individuals be afforded in deciding over their own life and death? How long should life support be maintained and when should someone simply be left to die? When should protection be given to the mother and when to the fetus, or even to the *in vitro* embryo? What limitations should be imposed on treatment and on experimentation on human and nonhuman life?

[3] Englewood Cliffs, N.J.: 1971.
[4] New York: 1978.

As can be appreciated, reflection ranges from the strictly biological (how to define the beginning of life) to the philosophical and religious (the sacredness of life and death) to the legal-philosophical (whether to set out rules, and if so how) – and it all brings into play different ideologies, religious faiths, cultural models, and systems of values; in a word, different criteria for regulating conduct. In pluralistic societies, the need to bring these issues under the scope of the law fetches up against a lack of shared values, with the risk of establishing limitations that reflect the moral values of only a small group, or with the risk of hindering the progress of science.

Then, too, as was mentioned a moment ago, bioethics does not exhaust itself in medical bioethics: the discipline has grown to include animal bioethics and environmental bioethics, the former concerned with animal treatment and the latter with the relation between humans and nature and the principles under which this relationship should be regulated.

Animal bioethics came into being in the early 1970s with the publication of *Animal Liberation*, by the Australian philosopher Peter Singer.[5] The other great defender of animal rights, Tom Regan, attempts in his most widely read work, *The Case for Animal Rights*,[6] a full theory of rights, animal and otherwise, proceeding on the distinction between moral agents (adult rational beings) and moral patients (all conscious and sentient beings, that is, all beings capable of feeling pleasure and pain and having expectations, memories, and emotions, all of which Regan regards as bearing inherent value).

Environmental bioethics, for its part, has developed in two opposite directions: on the one hand we find conservationism, an anthropocentric conception that argues nature to be a resource in the service of humans, and hence a resource to be protected for its utility in this role (one of the most representative voices in this camp is John Passmore[7]); and on the other we have preservationism, a biocentric conception that recognizes Earth and the environment generally as inherently valuable, and hence as in themselves worthy of respect (an interesting preservationist view is that of Paul W. Taylor[8]).

[5] London–New York: 1975; cf. P. Singer *Practical Ethics* (Cambridge: 1979)

[6] Berkeley: 1983.

[7] Cf. J. Passmore *Man's Responsibility for Nature* (London: 1974).

[8] Cf. P. W. Taylor *Respect for Nature: A Theory of Environmental Ethics* (Princeton: 1986). The biocentric view can be traced to the Earth Ethic expounded in A. Leopold *A Sand Country Almanac* (Oxford: 1949): the same view was later taken up by the Deep Ecology movement, so called in distinction to Shallow Ecology (cf. B. Devall – G. Session *Deep Ecology: Living as if Nature Mattered* [Salt Lake City: 1985]). We can account to be an extreme development of the biocentric view the Gaia Theory expounded in J. Lovelock *Gaia. A New Look at Life on Earth* (Oxford: 1979).

There is also a third position (its chief representative being Eugene C. Hargrove[9]), which bases environmental protection on aesthetic values.

From the legal point of view, the problem is whether to regulate such issues, and if so how. Here, too, there are two broad camps that can be identified, albeit with some simplification: on the one hand are those who doubt or even reject the idea of making bioethical issues subject to any legal regulation; on the other hand are those who think it useful, if not necessary, to have a biolaw regulating the different areas with which bioethics is involved.[10]

But as we take a closer look at these two positions, we will see how composite and diversified they actually are. In the camp opposed to making bioethical issues subject to regulation under the law we find, in the first place, those concerned that biolaw can hinder scientific progress; others, especially those who espouse religious faiths, believe that no matter how strictly and restrictively we regulate certain practices (such as *in vitro* fertilization and euthanasia), the very fact of regulating them amounts to legitimizing them; still others hold that guaranteeing a correct practice requires no more than self-regulation of the scientific community (as through deontological codes) and a reliance on the opinions of ethical committees and on the declarations of principle adopted by the international community of scientists; finally, some object to placing bioethics under legal restraints on the ground that this amounts to an unwarranted encroachment of the public sphere on the private sphere.

These positions meet at least two objections: first, deontological codes and international declarations can have any value only to the extent that they are spontaneously adhered to; second, there is no obvious reason why the power to regulate questions so personal should rest solely with healthcare professionals.

A case apart in the camp opposed to regulating bioethics by law are those who argue that the law we already have suffices of itself to do what biolaw is specifically designed to do: bioethical controversies can be resolved if we only extend existing law, by reasoning from analogy or by invoking the principles embedded in the constitution. This point shows up the great difference between the more flexible systems of common law and the more rigidly structured ones of civil law.

In common-law and civil-law countries alike, appellate-court judges, as well as trial-court judges, often face situations that they deal with now adopting existing law, now modifying precedent, now issuing rulings that intro-

[9] Cf. E. C. Hargrove *Foundations for Environmental Ethics* (1989).

[10] For a full analysis, see P. Borsellino *Bioetica tra autonomia e diritto* (Milan: 1999).

duce new case law (giving place to what has been described as a "stealthy yet indispensable source" of biolaw). Empirical surveys reveal, especially in Europe, an uncoordinated patchwork of rulings, gappy and limited to certain issues that claim priority, such as abortion and organ transplant.

It emerges from this brief overview that opposition to the legal regulation of bioethics occurs on a wide spectrum, ranging from an unconditional no – no form of law should ever be allowed entry into bioethical issues – to a qualified rejection: only the specific form of law which is legislation should be kept out.

If we look now at the side advocating the legal regulation of bioethics, here too we will find different positions that, again, can be reduced in essence to two: on the one hand is the view that bioethics should be regulated in accord with certain preferred moral values; on the other hand is the view that law should so regulate bioethics as to enable individuals to pursue their own values without causing harm to others, thus achieving a balance of interests that does not impose any specific moral conception and thus protects individual autonomy.

The first position is traceable to the broader view often referred to as legal moralism: this view assumes the existence (and knowability) of moral values and principles possessed of inherent rightness, or at least of an ability to draw a general consensus, and this becomes the basis on which to argue that such values and principles should be afforded legal protection by bending the law's coercive apparatus to their service.

This approach calls for legislation establishing rigid models with strict prohibitions and stringent limitations, and an authoritative framework that posits a particular moral conception as superior and will not be able to adequately resolve incompatibilities among the moral conceptions present in modern pluralistic societies, in which shared values are hard to come by, and in which, as Stefano Rodotà[11] has pointed out, we resort to law as a substitute for a shared morality that does not exist, to the effect that we end up entrusting law with the task of forcing on society the certainties it lacks.

The second position is traceable to the broader view often referred to as legal liberalism: this view appreciates the difficulty involved in appealing to shared moral criteria; so – in sympathy with John Stuart Mill's argument that the law cannot be tasked with making citizens virtuous – it regards law not as a means with which to impose a chosen moral conception but as a means with which to achieve coexistence in society, thus seeking to bring about an interchange among different conceptions, recognizing that every adult and

[11] S. Rodotà *Tecnologie e diritti* (Bologna: 1995).

cognizant individual is entitled to live according to a freely chosen moral conviction so long as this does not cause harm to others.

This approach calls for legislation that might be described as "trim" and "open-ended": "trim" because it must limit the amount of legal rules and must relieve them of moral content, so that they mostly address technicalities and procedure; "open-ended" because it must make possible the pursuit of different models of life without favoring any one moral perspective to the detriment of others.

This last point brings up another challenge facing contemporary legal philosophy, namely: multiculturalism. As is known, this term can be used descriptively simply to designate a society in which different cultural groups coexist, or it can be used normatively to point to an ideal polity and legal framework to be brought about in cooperation with the state, primarily through legislation and education. Descriptive multiculturalism is a subject of study for sociologists, including sociologists of law; prescriptive multiculturalism is instead studied by political, social, and legal philosophers.

Prescriptive multiculturalism emerged out of a debate that swept across sociopolitical philosophy in the late 1980s as a dialectical antiphony unfolded between liberal and communitarian thought. A contentious issue in this debate was, in particular, how to treat socially rooted and imparted values and conceptions of the good, with the liberals striving to free the individual from the grip of such values and the communitarians looking instead to limit the disconnect.

The multicultural vision takes up both of these concerns and coordinates them, for it values and seeks to protect the cultural traditions present in modern pluralist societies, but it does so with a view to securing the freedom of individuals and enabling them to each develop an identity in full. In this effort, a new breed of rights has emerged affording protection not to individuals, as happens in the liberal-democratic tradition, but to cultural groups. Yet this notion of group rights (or of the group as a subject of rights) runs into serious difficulties involving matters of theory and practice alike.

The chief practical problem is the risk of further tilting the balance of power within the group in favor of the stronger members, who will thereby find it even easier to oppress the weaker members. Whence the proposal of establishing a right of exit entitling group members to leave the group if they feel oppressed.

A cornerstone of traditional liberal theory is the principle establishing the separation between the public sphere and the private sphere, the one restricted to matters of political relevance and the other embracing the lives of

citizens *qua* persons each having an identity, in matters of religion, the affections, sex, and so on. This principle requires the state and public institutions generally not to interfere in the private lives of citizens, and in contemporary liberalism this has taken the form of state neutrality with respect to anything bearing any connection with the citizens' conceptions of the good. On this view, the state should only concern itself with securing for everyone equal access to "primary goods," which constitute the precondition for effecting any conception of the good whatsoever that citizens might pursue; the state, however, must remain neutral with respect to the support it lends to particular identities.

However, observation of societies having a mixed cultural makeup – primarily in English-speaking countries, where this phenomenon is historically more rooted – has led some scholars to find that people's sense of belonging to a group and to a cultural tradition and identity should itself be accounted as a primary good. Joseph Raz,[12] a philosopher of Jewish background, and hence someone intimate with a culture that has struggled for millennia to defend its identity, points out three ways in which our lives depend essentially on our belonging to a culture: first, it is only through the practices and the horizon of meanings provided by culture that individuals can seize and discern the options which can make a life meaningful; second, our sharing a culture (its language, social values, traditions, etc.) makes possible a mutual understanding among ourselves and in this sense forms a prerequisite of socialization; and third, group membership plays a role more important than most other factors in shaping individual identity.

Similarly, Charles Taylor[13] argues that individual identity is not anything that we can create out of thin air: it rather needs a cultural and social background that moulds it by a dialogic process. Now, if culture plays a role so essential in enabling its members to forge an identity, and if plural cultures coexist in society, and some of these cultures get marginalized in a society dominated by other cultures (as is the case with the Afro-American culture in the United States), the members of a minority culture will find themselves marginalized, this because in developing an identity, they will have to reckon with a belittling self-image reflected in the way their culture is regarded in society.

[12] J. Raz *The Morality of Freedom* (Oxford: 1986). See also *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: 1994); "Multiculturalism" *RJ* (1998) and *Value, Respect and Attachment* (Cambridge: 2001).

[13] Cf. C. Taylor *Sources of the Self: The Making of Modern Identity* (Cambridge, Mass.: 1989) and *Multiculturalism and the Politics of Recognition* (Princeton, N.J.: 1992).

So everyone has an essential interest in the open recognition of their culture in society – for this will bring into effect the principle establishing the equal dignity of all citizens with respect to the state and to public institutions. This purpose can be achieved working in two parallel directions, one of them being legislation and the other education (multicultural education in particular, encouraging students to explore and understand cultures other than their own, and hence to appreciate that society no longer consists of a dominant cultural majority that by its sheer mass subdues a congeries of minorities, but has shaped up instead as a plurality of groups of equal standing).

Raz has argued in this regard that the state, far from taking a neutral stand, should occupy itself with promoting the good of its citizens, taking into account that this good cannot be achieved on an individual basis, separately from the cultural communities that alone can recognize our ends and endow them with value and meaning. Whence the active role the state must play, working as well through the law, to foster within it the growth of different cultures thriving in harmony. This multicultural perspective – calling on us to revise at root our vision of society – therefore poses a challenge for everyone of us, and not just for legal philosophers.

(Translated by Filippo Valente)

*In the Matrix of Global Governance Reflections on the Transformation of Statehood in the Age of Global Governance**

Balázs Fekete (Budapest)

1 New, Global Challenges

Today's current state of affairs suggests that the phenomenon of globalization has been profoundly changing the conceptual framework of politics. This fundamental transformation has not been unexpected, indeed, certain signs have made such a fact foreseeable. However, all of these signals – the growing world wide economic interdependence,[1] the gradual rise of the global civil society,[2] the emergence of new political ideas as for example environmental protection[3] or global thinking[4] and the slow formation of global decision-making processes[5] – were rather fragmented. So, traditional background of politics has not been capable of integrating all of them simultaneously and developing a new background adjusted to these new, global challenges. Today

* The author is very grateful to John H. Mittelmann and Roger A. Coate for their encouragement and support.

[1] Cf. N. Woods "The Political Economy of Globalization" in Idem (ed.) *The Political Economy of Globalization* (London: Macmillan 2000), 1–3.

[2] About the expansion of global civil society see J. A. Scholte "Global Civil Society" in Woods (n. 1), 173–90.

[3] Cf. C. Rootes "Environmental Movements: from the Local to the Global" in Idem (ed.) *Environmental Movements* (London–Portland, Oregon: Frank Cass 2002), 1–10.

[4] On the relationship between "deterritorialization" and global thinking see Scholte (n. 2), 178–82, 183.

[5] Cf. T. Brühl – V. Rittberger "From International to Global Governance: Actors, Collective Decision-Making, and the United Nations in the World of Twenty-first Century" in V. Rittberger (ed.) *Global Governance and the United Nations System* (Tokyo: UN U. P. 2002), 1–6.

it can clearly be seen that our post-post Cold War world largely differs from the prior one due to these factors.

Because of this transformation process a revision of the traditional political concepts is unavoidable. The present study aims to begin this revision, through attempting to give an analysis of one of these traditional concepts: that of the state. Since globalization is a phenomenon of largely international nature, that is to say, globalization can not be forced among national borders, our questions must be posed from the aspect of international dimension. How to appreciate the role of the state within the system of nowadays' new global international relations? How to conceive of the traditional cornerstones of statehood – sovereignty, law, and politics – in this global context? How does global governance influence the concept of modern state? Evidently this article is not aimed to be a treatise on these complex and interrelated problems, it is only intended to represent an attempt to draw up certain contributions to assist the general understanding.

2 The State: a Constant Variable of Politics

1. Before going into details, it is necessary to scrutinize the "state" as a general societal phenomenon. Having studied the history of theoretical political thinking one can easily recognize the significant role of the state. From the classics of Greek political theory to the recent developments state takes up an important place in the works of political nature. State is often treated by various authors as the framework for social coexistence, or as the entity responsible for the maintenance of this framework. The famous work of Hobbes on Leviathan or Hegel's ideas about the state can be treated as symbols of this way of thinking. Other authors did not regard the state as significant an actor in social life as it had been treated by the earlier thinkers and they also argued against the influence of state in a part of social affairs. Classical liberal thinkers, as for instance Wilhelm Humboldt, influenced by the idea of liberty and its economic corollaries argued for the separation of the *société civile* and the *état politique* and they proposed to draft a serious dividing line between private and public affairs. Marxists, pluralists, anarchists and current neo-liberals have continued this "relativization of statehood" and made severe attempts to develop competing theories which could be used to challenge the traditional role of the state in the Western political thinking.

Which approach can be regarded as the correct one in this long debate is of course an important question, but this question would get us far away from the core problem, therefore this study is not intending to answer it. For our

purposes these preliminary considerations can obtain a different significance. They suggest that the expression "state" can imply a number of different meanings, and therefore its interpretations must also be different, according to the intellectual background or the political intentions of a given author. This is why a research on the nature of the state is a very difficult enterprise in social sciences, and it may also be the main reason for most controversies and confusion connected to the phenomenon of state. It needs hardly be said that only scientific self-restriction and a correct methodology can offer a way out of this confusion of social science research, political intentions and disguised value judgments.[6]

2. It is not a coincidence that distinguished scholars engendered important findings regarding the nature of the modern state around the end of 19th century and the beginning of the 20th century. The oeuvre of Georg Jellinek and that of Max Weber examined exhaustively the phenomenon of state via drafting a serious dividing line between the modern state and its prior forms. They made significant contributions to the theory of the modern state, which can help us to sketch the idealtype of the modern state. This idealtype is essential for the purposes of this research, because, it is argued, by comparing it with the phenomenon of global governance it will be easier to find answers to the questions raised in the introductory part of the present article.[7]

As an analytical starting point it will be useful to recall Weber's findings on the nature of the modern state. Weber argues that, from a sociological aspect, the most distinctive feature of the modern state is the successful mo-

[6] Due to the aforementioned problems this paper intends to follow Max Weber's methodological principles. In Weber's view (1) a researcher must separate the descriptive statements from the hard value judgments in the process of research and (2) he must define his starting points very precisely, that is, the source of his findings and his relation to the general questions of research. And the paper will back the Weberian concept of idealtype in order to facilitate the process of the present research by creating an "idealtype of modern state." For details see M. Weber "The Meaning of 'Ethical Neutrality' in Sociological and Economic Sciences" in Idem *The Methodology of Social Sciences* (New York: The Free Press 1949), 1–50 and "'Objectivity' in Social Science and Social Policy" in ibid. 50–112.

[7] On the formation of the unique German science of the general state theory see O. Jouanjan "Carl Friedrich Gerber et la constitution d'une science du droit public allemande" in O. Beaud – P. Wachsmann (eds.) *La science juridique francaise et la science juridique allemande de 1870 à 1918* (Strasbourg: Presses universitaires de Strasbourg 1997), 11–4 or Z. Péteri *Természetjog – államtudomány. Eszmetörténeti, rendszer- és módszertani alapok [Natural Law – State Theory. Some historical, systematic and methodological basics]* (Budapest: Szent István Társulat 1998), 25–43.

nopolization of coercion. So, in this Weberian context, the modern state is a territorial political organization which possesses the legitimate monopoly of coercion.[8] Here Weber sets this monopoly of coercion against the fragmentary and personal exercise of power in the medieval kingdoms and principalities. Thus Weber defines modern state as a political organization which can legitimately use, via its rational legal system and bureaucracy, the instrument of coercion in order to reach its governance goals. Weber's position thus indicates the importance of a concentrated, but legitimate power in modern states. The next question is how and in which form the modern state can exercise this concentrated power and why the modern state differs from its prior historical forms.

Jellinek's *opus magnum* offers comprehensive conceptual answers to the above questions.[9] In Jellinek's view the principle of monarchy, which profoundly dominated the medieval and post-medieval political thinking, is no longer relevant for the comprehension of the modern state. The principle of monarchy means, in a nutshell, that the entire state power is united in the person of the monarch who, as a consequence, is the only sovereign in a monarchy. At this point sovereignty is the synonym of omnipotence, the unrestricted power. Jellinek argues that this approach is hardly anything but a simple fiction that has no connection with reality.[10] As a contrast to the medieval state, the modern state can be characterized by the principle of constitutionalism.

The main features of the concept of constitutionalism are the idea of autonomy and that of "autolimitation" (self-limitation).[11] Autonomy means the independent possibility of constitutional revision, i.e. a modern state can modify its governmental organization via certain constitutional processes. In this study, however, the conception of "autolimitation" might prove to be more important than that of autonomy. Jellinek points out that sovereignty is, in his view, the exercise of constitutional competences. Therefore sovereignty, since it is absolutely encompassed by the legal order, is no longer omnipotence as it had been before. Thus the legal order absorbs the concept of sovereign state. From a legal point of view the state is identical with its legal order, or the whole legal order can be treated as the state. So, the modern

[8] For the origins of this "Weberian" concept see P. Cserne "From Law to Social Science and Back Again – the First Step. Remarks on the Juristic Origin of Some Weberian Concepts" in I. H. Szilágyi – M. Paksy (eds.) *Ius unum, lex multiplex. Liber amicorum studia Z. Péteri dedicata* (Budapest: Szent István Tărsulat 2005), 463.

[9] G. Jellinek *Allgemeine Staatslehre* (Berlin: Verlag von O. Haring 1914).

[10] E. Maulin *La théorie de l'Etat de Carré de Malberg* (Paris: P.U.F. 2003), 52.

[11] Ibid. 51–6 and 78-88.

state is necessarily limited by theist own constitutional legal order. Jellinek argues that this so-called "autolimitation," the supremacy of law, is one of the most important features which distinguishes the modern state from its earlier historical types, as for instance the Greek *polis* or the medieval *regnum*. In sum, due to this "autolimitation" by legal order, law acquires a prominent role in the concept of the modern state.

As a result of investigations concerning the concept of "autolimitation" the essence of the modern state has appeared. In the light of these intellectual achievements the distinguishing characteristic of the modern state is the limited nature of governmental or state power in contrast to the earlier historical forms of state. In the limitation of state power law as a general social phenomenon obtains a crucial role. The impersonal legal system and especially the guarantees of public law provide an efficient framework for this inner limitation. Thus the core of the idealtype of the modern state is the legal order and its historically novel role. Through this well-established legal system the modern state can offer a new historical perspective; an inherent limitation of sovereign governmental power.[12]

3 *Global Governance: a New Variable*

1. Following the above brief study of the idealtype of the modern state we shall reorientate our scientific investigations to focus on a phenomenon which is related to the recent transformation of today's global scene. This phenomenon is the so-called global governance, which might imply serious consequences for the future of the modern state in the 21st century. Therefore, the setting of our analytical focus includes some change in the time dimensions, a jump to the early years of the 21st century, as well as a reference to sharpening our analytical lens, by using the relatively newest findings of international relations theory instead of classical works of political theory.

Global governance is indeed one of the newest and most cited ideas of the recent international relations theory. Various authors have tried to apply this concept in order to illustrate the recent transformation of the international playground.[13] But the core of this concept seems to be highly ambiguous

[12] Cf. C. J. Friedrich *Limited Government. A Comparison* (Englewood Cliffs, N. J.: Prentice Hall 1974), 13–23 and A. Sajó *Limiting Government. An Introduction to Constitutionalism* (Budapest: Central European U. P. 1999), 205–23.

[13] The review Global Governance, which exclusively deals with issues closely related to global governance, may adequately illustrate the fast proliferation of the concept within the international community of IR researchers.

because authors, in most cases, attach very different meanings to it.[14] These competing and diverging definitions of global governance can pose numerous questions, and reaching a common interpretation, or at least a common denominator, seems to be very difficult. Therefore, this study will solely focus on certain dimensions without attempting to build a comprehensive definition of global governance.

2. The first key point attains some historical bearing. Does global governance have any historical antecedents, or is global governance an absolutely new phenomenon that immediately followed the collapse of the bipolar world order? Certain authors argue[15] that global governance is a qualitatively new phenomenon which emerged as a result of today's global circumstances. However, they also state that some antecedents have appeared during the bipolar world order. The most relevant feature of the interstate governance regime of the bipolar world called international governance was the regulation of the behavior of states and international actors via a non-hierarchical network.[16] This non-hierarchical feature of the so-called international governance might have forecast a highly relevant characteristic of the recent global governance system. Nevertheless the unexpected and fast disintegration of the bipolar international environment after the fall of the iron curtain has raised serious challenges toward this regime of international affairs. In addition, both the advent of technological revolution and the impact of economic globalization, as argued by Brühl and Rittberger, proved to be such several challenges that the establishment of a new governance regime seems to be necessary.[17]

Taking up a different point of view one can recognize that the ontology of today's international relations, that is said, the basic conditions of international affairs have transformed dramatically. In James Rosenau's view the "fragmegrative"[18] dynamics of our epoch which includes both an un-

[14] For a historical approach see M. Tehranian "Globalization and Governance: an Overview" in E. Aksu – J. A. Camilleri (eds.) *Democratizing Global Governance* (New York: Palgrave 2002), 3–27; for an analytical approach see J. N. Rosenau "Toward an Ontology for Global Governance" in M. Hewson – T. Sinclair (eds.) *Approaches to Global Governance Theory* (New York: SUNY Press 1999), 287–301.

[15] Brühl – Rittberger (n. 5), 1–47.

[16] Ibid. 2.

[17] Ibid.

[18] Fragmegration is an expression coined by James Rosenau. Fragmegration is "...a contrived word designed to capture in a single phrase the fragmentation-integration, localization-globalization, and decentralization-centralization tensions so pervasive through-

precedented pace of change and the general "disaggregation"[19] of authority render the rethinking of our common ideas about governance on an international level necessary. Because of these ontological changes the emergence of global governance, as both a theoretical concept and an extant form of governance, seems to be inevitable.

The evolving regime of global governance, to a small degree, partially includes some elements of the earlier international regime *inter alia* the aforementioned non-hierarchical approach. However, in contrast to the prior regime "global governance is characterized by the decreased salience of states and the increased involvement of non-state actors"[20] and it works as a special multilevel governance. This new multilevel style of governance involves new levels of decision-making as for instance global, supranational, and subnational, (local and regional) levels besides the traditional ones (national, international).[21] Thus, stemming from the new ontological conditions, said to be "fragmegrative" in Roseanu's terms, and the "disaggregation" of the traditional political decision-making centers,[22] the current regime of global governance can be regarded as a historically new, a *sui generis* phenomenon.

3. Our next question, which aims to investigate an operative dimension of global governance, is the following. Who are the main actors in this non-hierarchical web and how does it really work? According to the findings of Brühl and Rittberger the interaction of a triad of actors determines the functioning of global governance. This triad comprises three main groups

out the world that it can fairly be said the present age is not one of globalization, but one of fragmegration. [...] one can discern fragmegrative dynamics in virtually any situation at every level, from the individual to the local community to the national state to the global system." J. N. Rosenau "Stability, Stasis, and Change: A Fragmegrating World" in *The Global Century: Globalization and National Security* Vol. I (Washington, DC: National Defense University 2001), 129. For further discussion see Rosenau (n. 14), 293–5.

[19] For details see J. N. Rosenau "Governing the Ungovernable: The Challenge of a Global Disaggregation of Authority", paper presented at the *Annual Meeting of the International Society for New Institutional Economics* (Tucson, September 30–October 3, 2004).

[20] Brühl – Rittberger (n. 5), 2.

[21] Ibid.

[22] According to the insights of James Rosenau the analytical units of today's global relations are not the states any longer but various spheres of authority (SOAs). SOAs can be *inter alia* special interest organizations, corporations, NGOs, and, of course, states. Rosenau (n. 14), 295–7.

of actors: states and IGOs,[23] market forces[24] and civil society actors.[25] This triangle of actors determines international affairs and politics nowadays, so that their interactions establish the essence of global governance.

What can be the real extent of global governance? In accordance with certain theoretical considerations the primary aim of governance is to maintain a certain societal framework.[26] So, the focal point of governance activities is to guarantee a safe framework for social coexistence, mainly by the maintenance of a predictable legal order or effective mechanisms of dispute settlement. In addition, governance can contribute to the physical security of the population, the protection of environment or the distribution of wealth.[27] Thus governance comprises active and passive governmental practices, and its focal point changes parallel to the challenges of the actual historical situation.

It is obvious, that a system of global relations can contribute to the realization of the so-called governance goals on a global level. Nevertheless, for the purpose of this study the most significant finding is that global governance is such an interplay of the activities of the aforementioned actors whose outcome can facilitate the achievement of governance goals. Thus, global governance is a dynamic process which implies the continuous interplay, mostly cooperation or competition, of different actors.

4. As a next step, this analytical model should be further scrutinized. Brühl and Rittberger write about a triad of actors, however, applying a different approach, shifting to a new analytical level, we may simplify to some extent this fairly complex picture. Whether is there any real difference between states, IGOs and global civil society actors, between the two opposite poles of the triangle? On the basis of the Aristotelian heritage it is easy to find a common element which may be able to bridge them. If we conceive politics as the way to reach the common interest we can, indeed, easily regard these two groups of actors of the earlier triad as similar or identical.[28] Either of them strives

[23] International governmental organizations: the UN, UN organs, and other organizations with international competence or aim.

[24] TNCs, MNEs, and other organizations responsible for the administration of the international trade system (IMF, World Bank, WTO).

[25] NGOs and diverse transnational social movements.

[26] Cf. M. Oakeshott "On Being Conservative" in Idem *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Press 1991), esp. 422–34.

[27] Brühl – Rittberger (n. 5), 6.

[28] Cf. *Aristotle's Politics* (transl. by B. Jowett), Book One, Part I; Book Three, Part VII (http://classics.mit.edu/Aristotle/politics.html).

for political aims and it should imply, in all cases, a certain pursuit of some aspect of the common interest. Governments and IGOs follow their own political interests while transnational NGOs also attempt realizing their different aims in order to shape policies or even the whole society.[29] They are actors governed by politics on the playground of the global scene.

So, governments and the global civil society may be identical from an Aristotelian political perspective, because they work and struggle for certain dimension of the common interest, so for different governance goals. It is easy to point out that the summary of their activities establishes the political dimension of global governance. Of course, this political dimension is quite fragmented due to the general and inherent diversity of politics (there was, there is and there will be a number of competing ideas on the common interest throughout the centuries of human history), so it does not offer us an undisturbed and balanced picture. Our picture of this political dimension looks like a modern expressionist painting which has both strong and opposite colors and which has no any particular focus because its dynamism is dominated by an intensified inner tension.

Contrary to the political dimension, the market forces that include different economic actors and their activities can be treated as the economic dimension of global governance. This economic side differs fundamentally from the political one. Plausibly, one can argue that market forces on the global level are primarily led by economic interests, and that this economic interest can be contrasted with politics.[30] As mentioned above, for the purposes of the present research, politics is conceived of as deliberate attempts to influence policies toward the common interest, that is to say, politics is perceived as a social practice which strives to take into consideration the interests of the whole community. That is why the functioning of economic interest fundamentally differs from politics. Indeed, economic activities are mostly particular in that they always represent the partial interest of an economic actor, mostly increasing of its profit, and not the interest of a community in general. Naturally, the sphere of economics and politics can interfere in many cases, corporate lobbying techniques or different forms of partnerships between the business life and the private sector offer us good examples, but, in general terms, their underlying internal logic works differently.

[29] Cf. Scholte (n. 2), 175.

[30] Some authors – mainly non mainstream authors from the neo-liberal perspective – strongly argues for a fundamental differentiation between politics and economics. See *inter alia* C. Schmitt *The Concept of the Political* (Chicago–London: The University of Chicago Press 1996), 23 and T. Molnar *L'hégémonie libéral* (Lausanne: L'Age d'Homme 1992).

This aforementioned particularity of economic interests was clearly recognized by Adam Smith when he wrote about the phenomenon of the "invisible hand."[31] Smith wrote about this particularity in an optimistic way, he hoped that through a silent aggregation of individual economic decisions the market will be capable of facilitating the realization of common goals. The events of post World War I era raised serious doubts in many economists with regard to this theory and they argued for the enhanced intervention of governments into the economic sphere.[32] This newer debate on the limits of state interventions seems also to strengthen the fundamental difference of economics and politics.

In today's global scene the above-mentioned particularity of economic interest strongly appear in the general promotion of deregulation, liberalization and privatization as formulated by the "Washington Consensus."[33] This all-inclusive promotion has been led by neo-liberal thinkers on ideological level.[34] And these buzzwords represent a strong effort toward the creation of such a global market economy through which the realization of the aforementioned particular interests of economic actors can be more efficient, in economic terms, than ever before. International financial and commercial institutions, such as WTO, IMF, and World Bank and corporate lobbies strongly support their diffusion in national policies and in public debates.

Due to the above analyzed particularity of economic interests and due to other sociological factors, as for instance the materially and ideologically advantageous position of economic actors, the economic dimension of global governance indeed seems to be more coherent and unitary than the political one.

5. At this point it is worth summarizing the latest findings. A new regime of international relations has emerged and replaced the prior regime of international governance during the last two decades. This new regime is that of global governance which may be more able to find adequate answers to the complex challenges of our age than the former international regime had been. The regime of global governance comprises numerous actors; states,

[31] A. Smith *An Inquiry into the Nature and Causes of the Wealth of Nations* (Oxford–New York: Oxford U. P. 1993), 291–2.

[32] Cf. N. Kaldor "Keynesian Economics after Fifty Years" in D. Warswick – J. Trevithick (eds.) *Keynes and the Modern World* (Cambridge: Cambridge U. P. 1983), 1–6.

[33] Brühl – Rittberger (n. 5), 37.

[34] Cf. J. H. Mittelman *Whiter Globalization? The Vortex of Knowledge and Ideology* (London: Routledge 2004), 47–55.

IGOs, market forces and the global civil society. But global governance possesses two fundamentally divergent dimensions; the political one and the economic one. The differentiation between these two dimensions is based on the nature of their underlying functioning. From the aspect of the society the economic dimension represents only particular interests, that is to say the interests of economic actors, contrary to general efforts of the political dimension. It must also be mentioned that the economic dimension is more coherent and unitary because of the current state of global economic affairs, that is, the growing global economic interdependence and the widespread influence of neoliberal ideology.

So the constant interaction of the political and the economic dimension determines the outcome of this regime of global decision-making. In consequence of the "fragmegrative" dynamics of our age these two different dimensions cooperate and compete simultaneously. That is why global governance, from an external point of view, can also be conceived as a very fragmented and ambiguous turmoil of the political and economical sphere.

4 *Toward Certain Conclusions*

1. The great French intellectual and jurist, Charles-Louis Montesquieu affirmed that only change is constant in human history.[35] This insightful remark summarizes the core arguments of the last part of the present article. First of all, as a staring point, it should be emphasized that the modern state is neither a perpetual nor a final form of statehood; it had appeared as a result of a special historical context at a certain point in time. The birth of the modern state is usually associated with the emergence of the modern bourgeois class as well as the formation of modern capitalism in the scientific literature. It represents a claim for such a politico-legal structure which respects individual rights *inter alia* the right to property and freedom of conscience.

However, our post-post-Cold War age largely differs from the age of peaceful bourgeois who believed in the idea of individual freedom, equality before the law and in the republican spirit. The two world wars and the collapse of American-Soviet bipolarity, which seems to be a Copernican turn in the ontology of international relations, had gradually changed this classical international environment. Parallel to this change in world politics the overall volatility of international relations has significantly been increased because of the underlying "fragmegrative" dynamics generated by the emerging new actors and interests. Thus, a comparison of the idealtype

[35] Montesquieu *The Spirit of the Laws* (Cambridge: Cambridge U. P. 1992), 5.

of the modern state and the earlier analyzed characteristics of global governance is unavoidable. Neither states nor international organizations based on intergovernmental principles can escape the above mentioned ontological changes.

As mentioned above, a well-defined sovereign legal system is the precondition for the existence of the modern state, because it guarantees the limitation of the arbitrary exercise of governmental power. The crucial question is whether global governance can influence this sovereign legal order? A positive answer would entail very serious theoretical consequences. On the other hand, if global governance has hardly any influence on the sovereign legal order, this means that the core of the modern state shall remain intact.

2. At the first glance a political approach of this problem seems to be very evident. As we have already known it the political dimension of global governance comprises states, international organizations and their political decisions which, of course, also acquire legal relevance in the form of international agreements. It is obvious that international treaties restrict legal sovereignty in certain fields; the web of human rights treaties offers a good example.[36] Regional political and legal integrations can have similar implications. Interstate cooperation thus, whether international or regional, affects legal sovereignty in domains related to the sphere of public law or, in certain conditions, to some aspects of external trade law.[37] However it must be supported by the political will of a given state or states, therefore it works exclusively on intergovernmental basis. Due to the armada of intergovernmental guarantees states can preserve their special interests, in other terms, states give pieces of their legal sovereignty if it is beneficial for their politics. Owing to this governmental support the political dimension of global governance does not influence fundamentally the idealtype of the modern state.

Does the economic dimension of global governance also acquire relevance in this question? The very recent theoretical achievements, related to the oeuvre of Gunther Teubner,[38] might imply some consequences on this problem. Following Teubner's central argument we can easily recognize, parallel to the deepening of world-wide economic interdependence, the gradual

[36] For details see T. G. Weiss – D. P. Forsythe – R. A. Coate *The United Nations and Changing World Politics* (Boulder, Colorado: Westview Press 2004), 143–4.

[37] The emerging supranational legal system of the European Union is an obvious exception, because its rules affect the private laws of member states.

[38] G. Teubner (ed.) *Global Law Without a State* (Aldershot etc.: Darmouth 1997).

emergence of a global legal regime. The existence of this qualitatively new legal phenomenon might even be able to restructure our traditional picture of legal sovereignty coined by the 19th century's political literature. According to Teubner "... the most characteristic feature of the global legal regime is its lack of any form of political and institutional supports and its strong connection with socio-economic processes."[39]

So, in this approach, the main source of global law is not the political will of governments, as it was in the case of international or supranational law, but the demands of global economic actors. Thus global law, although its boundaries are constantly blurring,[40] is generally independent of national law-making. The emerging regime of global law consists of numerous types of law or "proto law," such for instance it includes *lex mercatoria* (law of global commercial transactions), the internal regulatory regimes of MNEs, *lex laboris internationalis* (international labour law), certain technical standards and professional regulations.[41] In sum, global law converts the interests of economic sphere into legal norms. And due to its strong connection to socio-economic processes as well as its independence of traditional political processes global law can be regarded as a legal "representative" of the above-analysed economic dimension of global governance.

3. Does this regime of global law have any relevance from the aspect of legal sovereignty? Although a detailed answer for this question obviously requires a much more elaborated research, it is not too difficult to recognize two implications. On the one hand global law may be relevant from the aspect of sovereignty, because by using the rules of global *lex mercatoria* – in a broad sense – MNEs or TNCs can easily lift themselves out of the general jurisdiction of a given state via arbitration or other alternative dispute resolution methods administered by international commercial institutions. So MNEs and TNCs can avoid the application of certain legal rules or governmental standards by using rules of global economic law, especially in transborder investment affairs. In such situations, which may have high importance in the world of global economy, governments can hardly be sure in their capacities to regulate the behaviour of market actors even though the activities of these market actors can seriously affect national economies.

[39] G. Teubner "Global Bukowina: Legal Pluralism in the World Society" in Teubner (n. 38), 4.

[40] Ibid. 3–28.

[41] For further details see G. Teubner "Breaking Frames. Economic Globalization and the Emergence of lex mercatoria" *Eur. J. Soc. Theory* 5 (2002) 2, 206.

The financial crises of the last decade and the debates on investment mechanisms in the developing world are an appropriate illustration for the above. So, traditional legal sovereignty seems to be incapable of guaranteeing predictability in the affairs of global economics.

On the other hand global law can affect the national legal systems from another direction, too. As indicated earlier the internal regulatory regimes of MNEs are an emerging field of global law.[42] This part of global law contains primarily diverse intraenterprise codes of conduct and a system of contractual relations among the given company and its affiliations. It works mainly as "proto law" because these internal regimes demonstrate a considerable degree of consistency and generality of practice whilst they are not generally recognized by every actor. For example a given code of conduct can be recognized by a group of companies but not by the global business community as such.[43]

However, many different channels exist for the conversion of these special norms into the national legal systems. It is a commonplace in toady's business life that corporate lobbying activities can largely influence the national legislation. Hence under the umbrella of lobbies and professional support activities certain norms stemming from the economic practice have silently penetrated into the internal legal systems. This silent penetration of norms having a business background into the legal orders has transformed the content of national legal systems to a certain degree. Legislative acts and administrative measures in the field of business, for instance in cases related to investment practices or taxation problems, and of general private law, which regulates certain aspects of commercial transactions, may be considerably influenced by economic actors.

4. Following the earlier inquiry the present paper attempts to propose a fundamental conclusion. The legal sovereignty, which once was the essence of the modern state from an analytical aspect, seems to slowly fade or erode within the recent global conditions. Global economic actors, that is to say multinational or transnational companies which are obviously the most important players within the economic dimension of global governance, have gradually begun to opt out from the jurisdiction of national legal orders. In other cases these actors have strongly influenced the national legal sys-

[42] For further details see P. T. Muchlinski "Global Bukowina Examined: Viewing the Multinational Enterprise as a Transnational Law-Making Community" in Teubner (n. 38), 79–108.

[43] As a good example see the emergence of Global Compact as a widely recognized code of conduct within business actors. Weiss – Forsythe – Coate (n. 36), 303.

tems in order to reach their special interests. Therefore the relevance of legal sovereignty has begun to disappear with respect to the economic affairs, which means that we witness the fading away a considerable part of the legal aspect in the idealtype of the modern state. Parallel to this partial diminishing of the traditional hierarchical legal center of the modern state a new global legal regime has emerged, established primarily on the theory of legal pluralism and the idea of heterarchy.[44]

This decreased relevance of legal sovereignty may predict the future profound transformation of the modern state. It might mean the emergence of a new historical form of state, especially if we take into consideration another factor, too. The increased pace of changes on the global scene, which stems from the "fragmegrative" dynamics of our age, forces states to make more and more decisions of political nature[45] in order to successfully adjust to the newest global challenges. In the matrix of global governance, and within its constant tensions between politics and economics, politics seems to be more appropriate to reach governance goals than law which can only much more slowly adjust to the new conditions as well as challenges.[46] Hence the recognition of a shift of the center of gravity from law to politics in the inner structure of the modern state, on an analytical level, is inevitable. Whether this shift does mean the birth of a new historical form of state is now highly questionable, and it should be one of the most important theoretical problems discussed in future researches.

[44] Cf. Teubner (n. 39).

[45] This paper emphasizes the decisive and individual nature of politics contrary to the predictability and generality of legal order. At this point it accepts Carl Schmitt's arguments, however it can not agree with that approach that the essence of the political is a decision between friend and enemy. Cf. Schmitt (n. 30), 26–7.

[46] Let see for example the behaviour of United States after 9/11. The Patriot Act illustrates a serious change of attitude toward classical liberal legal principles and personal liberties, and toward law in itself. Cf. I. Ramonet *Guerres de XXIe siècle* (Paris: Galilée 2002), 45–69; from a different perspective cf. R. Kagan "Power and Weakness" (www.policyreview.org/jun02/kagan.html).

*Regulation and Support International Business in a Global Legal Culture**

Volkmar Gessner (Bremen)

1 Global Legal Culture

The obvious phenomenon in what is sometimes called the "world society" is not the existence of a common legal culture but global legal pluralism.[1] State law (including international law), hybrid norms like international standards or codes of conduct, regime norms, norms of global actors (churches, mafias, sport organizations) and finally NGO norms are all competitors in regulating or supporting global interaction. State law is embedded in a multitude of (national) legal cultures as are all other formal or informal normative systems. It is assumed that this picture of a colourful patchwork will soon become outdated due to the harmonisation efforts effected through international agreements, and due to the integrative influences of regionalization and globalization processes.

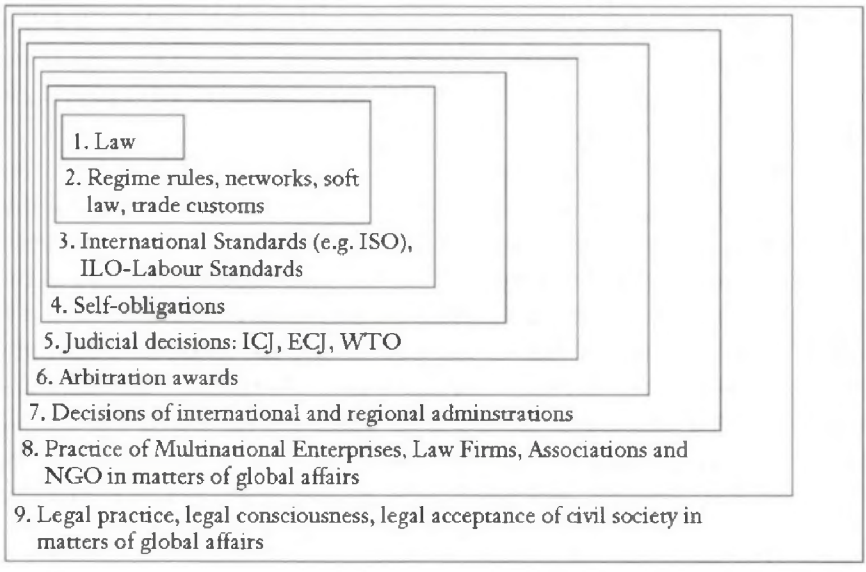
The European Union is the most advanced in this respect and may be a test case for the potential of emergent supra-state legal cultures. But so far European legal cultural commonalities are lagging far behind common structural/institutional developments. Historical experience is ambiguous. The European state building process, culminating in the Treaty of Westphalia (1648), initiated a long period where state law assumed a central role among the norms and rules in societies. Earlier, local and customary norms were considered legitimate, leaving little space for legislated law and intellectually created Roman law. Following Westphalia, state bureaucracies reversed this relationship. Non-legal rules became semi-autonomous due to

* This paper builds on a long lasting and successful cooperation with Csaba Varga when we prepared and published the textbook *European Legal Cultures* (Aldershot: Dartmouth 1996).

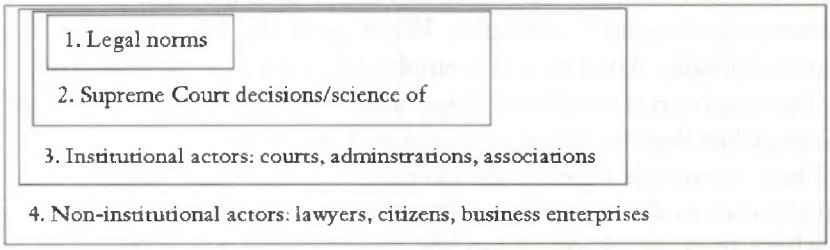
[1] V. Gessner "Rechtspluralismus und globale soziale Bewegungen" Zeitschrift für Rechtssoziologie (2002), 277–305.

the fact that they were embedded in a legal system which was either tolerating or suppressing them. Legal pluralism within nation-states became precarious and almost irrelevant for most areas of regulation. The situation has changed again, this time due to globalization. The emergence of norms and rules above the level of the nation-state is forcing legal norms to compete with other societal norms on an equal footing. Legal pluralist approaches which had in European nation-state legal cultures held a rather limited explanatory power and which tended to overstate the importance of autochthonous rule-making are now in high demand in a Sociology of Global Law.

National legal cultures could be described with a relatively simple model putting legal norms at the centre of regulatory activity. The regulatory effect of legal norms is complemented, as shown in Fig. 1, by Supreme Court decisions and legal scholarship (second level), decisions by lower courts, administrative standards, practices of other institutionalized actors (third level) and finally by routines and practices of non-institutionalized actors like lawyers, business enterprises and citizens (fourth level). Using this four level approach one gets an adequate picture of the complexity of national *legal cultures* whereas levels 1 and 2 are sufficient in a lawyer's *legal order* perspective (*legal order* is a much more narrow concept than legal culture).



By contrast, the elements of a global legal culture resemble a colourful patchwork quilt with at least the nine elements shown in Fig. 2. Not only the number of elements but also their position on certain levels and in particular the centrality of legal norms in level 1 is highly debatable.



Empirical research on global legal phenomena does not verify explanations offered by modernization or rationalization or legalization theories.[2] Given the complexities of legal cultures in global regimes, in some 180 different nation states, in an indefinite number of economic sectors, any unidirectional hypothesis would be hard to defend. Western legal cultural dominance (as implemented by Transnational Corporations; in the practice of International Law Firms; in the law & development activities or the conditionalities of global financial institutions, in particular the International Monetary Fund) has to a certain degree been effective in implanting some elements of Western legal cultures in most non-western societies, but this is strongly resisted by locals and criticised by most Non-Governmental Organizations. As long as basic legal values like social solidarity, human rights, due process or nature conservation are consistently violated within Western legal cultures and more so in global confrontations, the Western model remains unattractive for an emergent World Society.

The Sociology of Global Law will benefit from economic studies of institutions and of the configuration of these institutions in social systems of production whose main focus is on modes of coordination: horizontal modes of coordination are markets and communities, vertical modes of coordination are firms and the state.[3] In addition – placed between the horizontal

[2] L. M. Friedman "Borders: On the Emerging Sociology of Transnational Law" *Stanford J. Int'l L.* 32 (1996), 65–90.

[3] J. R. Hollingsworth – R. Boyer "Coordination of Economic Actors and Social Systems of Production" in J. R. Hollingsworth – R. Boyer (eds.) *Contemporary Capitalism – The Embeddedness of Institutions* (Cambridge: Cambridge U.P. 1997), 1–47.

and vertical modes – networks and associations contribute to the regulatory system. Both horizontal and vertical modes make use of two different incentives (called action motives): economic actions are either guided by self-interest (market and firms) or by obligations (communities and state). Modes of coordination cannot easily diffuse across countries or converge toward the Western or American model. Asian states and societies operate on radically different organizational principles. Whereas in the West laws regulate the actions of people, Asian societies emphasize regulation through roles. Chinese institutions rest on relationships rather than jurisdictions, on obedience to roles rather than bureaucratic command structures

These economic debates are akin to the discourses on the varieties of legal cultures in the sociology of law where similar terminologies are used but where the elaboration of models for cross-cultural comparisons is lagging behind. The distinction between self-interested and obligational action motives can easily be translated into Luhmann's distinction between cognitive and normative expectations.[4] Expectations can either be maintained in case actors do not comply (normative expectations) or they can be adapted to the new "unexpected" situation (cognitive expectations). This adaption is a learning process, mostly accomplished through rational communication. Social organization is achieved in all societies both by normative and cognitive expectations – although in varying degrees: more stable societies are marked predominantly by the former, while more dynamic and more complex societies predominantly by the latter. Legalization, in the manner it is currently transmitted from the West to the South and to East Asia may destroy traditional or modern cognitive structures. In recent decades, Western societies have developed a greater number of cognitive structures (as opposed to formal legal structures) in order to cope with problems of order and change. The complex global environment shows similar cognitive elements. Economics and other social sciences emphasize the crucial role of intercultural learning in global exchanges and communication. Translated into legal sociological understanding, the overemphasis on normative expectations in discourses around the globalization of law ignores the learning capacity of the global actor. If any generalization about a legal culture in the global environment is permissible, it should state that cognitive rather than normative attitudes are and will be predominant.

[4] N. Luhmann "Die Weltgesellschaft" *ARSP* 57 (1971), 1–35.

2 *Legal Certainty in Global Business Transactions*

2.1 Regulation and Support

Global business transactions appear to be embedded in a common culture shaped by economic rationality, the English language, common law contracts, arbitration and to some degree a common legal framework. They are also subject to "an enormous enterprise of legal construction"[5] by global agents of reform such as the World Bank, the IMF, regional banks, OECD and other multinational negotiating forums. But on closer inspection, we see that diversity prevails also in the business world as well; the division is not created by state borders but by invisible lines between branches, networks and production chains. Legal as well as social regulation varies just as do attitudes toward regulation.[6]

As all other areas of law also business law has two faces: *regulation* and *support*. Both faces or functions should be clearly separated when one is interested in their sociological description. Global *regulation* of business concerns international trade (GATT/WTO, EU, NAFTA and many other trade and free market conventions), tax issues, environmental protection, labour standards etc. The ongoing debates about the declining role of the nation-state, the importance of Multinational Enterprises, the phenomenon of codes of conduct and the participation of NGOs in the law-making process refer to the regulatory function of global law.

The *support* function of global law is currently not at the centre of the global law debate but will be the main focus of the remaining part of this paper. In nation-states' jurisdictions law is supporting economic transactions with its contract law, company law, insolvency law, and state law offers conflict resolution in civil procedures. From the times of Roman Law until the 19th century this support was almost the only task of state law. Still today, in legal practice (lawyers, courts, legal education) this is predominant whereas regulatory aspects play a minor role. The reason behind state support for the economy is, as Max Weber has prominently emphasized, legal certainty.

> "The modern capitalist enterprise rests primarily on *calculation* and presupposes a legal and administrative system, whose functioning can be rationally predicted, at least in principle, by virtue of its fixed general norms, just like the expected performance of a machine"[7]

[5] T. Halliday "Crossing Oceans, Spanning Continents: Exporting Edelman to Global Lawmaking and Market-Building" *L. & Soc'y R.* 38 (2004), 213–20, at 216.

[6] V. Gessner "Global Legal Interaction and Legal Cultures" *RJ* 7 (1994) 2, 132–45.

[7] M. Weber *Economy and Society* G. Roth – C. Wittich (eds) (New York: Bedminster Press

This core idea of sociological and economic theory on law is generally accepted as justification for the centrality of legal reasoning in Western societies and seems to support legal initiatives in developing countries, in the transformation societies, in efforts for creating legal structures for global exchanges. But there is critizism of "one-size-fits-all" models developed by Global Agents and doubts are raised whether law is the only or the most important instrument for achieving legal certainty.[8] The centrality of law in Weber's theory has to be qualified not so much because of his "England problem" but for empirical assumptions which hold true neither for developing or transformation countries nor for structures created by the globalizing economy. The observation that England, the birthplace of capitalism, seemed to lack the calculable, logically formal, legal system that he identified as necessary for capitalist development, troubled Weber.[9] His discussion on that issue is often considered ambiguous and contradictory.[10] England is certainly a deviant case for a theory of formal legal rationality but not necessarily for a theory of the centrality of law in modern society. Weber criticised the English common law for its lack of formal rationality and its class bias but he recognized its importance for the English economy. Due to strong links between the capitalist class and English lawyers and the lawyers' crucial role in generating precedents the English legal system was predictable – if only for for social and economic elites.[11]

Weber's empirical assumptions leading to his thesis regarding the centrality of law read as follows:

> "an economic system, especially of the modern type, could certainly not exist without a legal order with very special features which could not develop except in the frame of a public legal order. Present-day economic life rests on opportunities acquired through contracts. It is true, the private interests in the obligations of contract, and the common interest of all property holders in the mutual protection of property are still considerable, and individuals are still markedly influenced by convention and custom even today. Yet the influence of these

– Berkeley: University of California Press 1968), 1394.

[8] V. Gessner "Legalization and the Varieties of Capitalism" in C. Antons – V. Gessner (eds.) *Globalization and Resistance. Law Reform in Asia since the Crisis* (Oxford: Hart 2007 [forthcoming]).

[9] M. Weber (n. 7), 719, 724 and 1036.

[10] D. M. Trubek "Max Weber on Law and the Rise of Capitalism" *Wisconsin L. R.* (1972), 720–53, at 747

[11] Weber (n. 7), 1049; C. W. Francis "The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England" *Columbia L. R.* 83 (1983), 35.

> factors has declined due to the disintegration of tradition, i.e., of the tradition-determined relationships as well as of the belief in their sacredness...Modern economic life by its very nature has destroyed those other associations which used to be the bearers of law and thus of legal guaranties. This has been the result of the development of the market. The universal predominance of the market consociation requires on the one hand a legal system the functioning of which is *calculable* in accordance with rational rules. On the other hand, the constant expansion of the market... has favored the monopolization and regulation of all "legitimate" coercive power by *one* universalist coercive institution through the disintegration of all particularist status-determined and other coercive structures which have been resting mainly on economic monopolies."[12]

The assumption is that "modern economy" has destroyed conventions and customs in particularistic structures which previously had guaranteed contract enforcement and the protection of property. The enlargement of markets replaced small scale regulation by universalistic coercion. Weber thus clearly recognizes informal norms and institutions as equivalent to legal coercion in providing calculability and legal certainty. He only believes that those nonlegal norms and nonstate institutions have ceased to be relevant in a modern economy.

It is already questionable whether this assumption is correct for modern Western economies. Legal sociology and anthropology have produced numerous examples of particularistic regulatory structures around us as well as informal universalistic rules. But the absence and irrelevance of non-state regulation in general and within the economy in particular can definitely not be assumed for developing and transition countries or the global economy. Hence Weber's main thesis on the central role of law proves not to be universally applicable. If – which is questionable – calculability is the only problem for economic actors law in most societies is not the only remedy.

For example, cultures differ as regards the establishment of stable business exchanges (legal certainty): exchanges may be secured (1) by legal provisions and their effective implementation, (2) by autonomous rules created by merchants, their associations and by arbitrators (*lex mercatoria*), (3) by complex contracts and innovations created by international law firms, and (4) by relational contracts between firms which emphasize mechanisms of trust rather than of law (in particular the *guanxi* relationship in Chinese business). There may even exist a fifth economic culture where the stability of business

[12] Weber (n. 7), 336–7.

relationships is regarded as of secondary importance due to instantaneous, constantly changing forms of exchanges as e.g. in the global financial market (Scheuerman 2001).[13] These elements of legal certainty in a global business environment have been elaborated in previous publications.[14] Like in the regulatory area the support tasks of law compete with non-state structures and institutions. Two additional aspects of the new global ordering of international business, namely the reconstitution of power and the problem of agency in structuration processes, may complement the picture and will briefly be discussed in the remaining part of this paper.

2.2 Reconstitution of Power within Global Support Structures

Power structures, inequalities, discrimination, protection, distribution effects are predominantly discussed within the *regulatory* function of law. This is true for tax law, environmental law, criminal law, competition law etc. Within legal *support* structures privileges and discriminations are somewhat hidden but equally discernible. Contract law may favour the supplier (*caveat emptor*), insolvency law the secured creditor (like the banks), procedural law the repeat players (like insurance companies) etc.

On the nation-state level, legal science, lobbies, courts together with the legislatures largely control the power distribution effects of law. This is neither true any more in global legal nor and less so in non-legal global orders which has led to the critique of globalization in general and of global actors like IMF or WTO in particular. Again, the debate is currently mainly dealing with regulation and less so with support. Global legal support structures will equally have to come under critical examination. Only the non-state character of informal support structures is currently discussed,[15] providing an illustration for the so-called autopoiesis in world systems. But the retreat of the nation-state is only a symptom of what is empirically going on in the reconstitution of power relations by global actors involved in the production of support structures such as trade associations, arbitrators and large law firms.

[13] W. Scheuerman "Global Law in Our High-Speed Economy" in R. P. Appelbaum – W. L. F. Felstiner – V. Gessner (eds.) *Rules and Networks – The Legal Culture of Global Business Transactions* (Oxford: Hart 2001), 103–21.

[14] V. Gessner – A. C. Budak (eds.) *Emerging Legal Certainty: Empirical Studies on the Globalization of Law* (Aldershot: Dartmouth – Ashgate 1998); V. Gessner – R. P. Appelbaum – W. L. F. Felstiner "The Legal Culture of Global Business Transactions" in Appelbaum – Felstiner – Gessner (n. 13), 1–36.

[15] G. Teubner "'Global Bukowina': Legal Pluralism in the World Society" in Idem (ed.) *Global Law without a State* (Aldershot: Dartmouth 1997), 3–28.

We know what international arbitrators do.[16] They are competent, even neutral but only accessible for big businesses. A case of say less than 10 Mio $ is hardly worth to be taken to arbitration considering the fees of the arbitration panel, of the lawyers and the cost of procedure. Historically, international arbitration was created for the Western Oil Industry in order to get protection from jurisdictions in Arabic Countries. If this can be generalized, arbitration privileges not only big business but in particular big Western business.

We also know what big "mega" law-firms do.[17] They advise big business, some private billionaires and even states, providing expert knowledge on national and global legal cultures and billing 500 $ and more per lawyer/hour. Freshfields, a mega law-firm with 700 lawyers in 1994, describes itself as giving advice on:

(1) The taxation of domestic and international groups of companies, partnerships, joint ventures and financial institutions, their directors and employees;
(2) The tax implications of financing, leasing and property transactions;
(3) The structuring of mergers, acquisitions and company flotations and reorganisations.[18]

Since the big (US-American and English) mega law-firms have subsidiaries all over the world there may not be a significant north-south bias but their clients are large international companies which are predominantly Western.

Middle-sized and small business and consumers remain completely without competent legal advice whenever they happen to have a legal claim of a cross-border nature. We have such a bias also within nation-states but this privilege in legal advice for big business and the hopeless legal vacuum for the rest of economic actors is much more accentuated in global circumstances.

Hence, the lack or the weakness of global rules of support for economic action, the availability of legal advice and of arbitration procedures only for the top actors and the very limited role of domestic courts for enforcing cross-border claims signifies an important power shift away from normal citizens and toward large international enterprises.

[16] Y. Dezalay – B. Garth *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: U. C. P. 1996).

[17] E. g. J. Flood "Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice" *Int. J. of the Legal Profession* 3 (1996), 169–214.

[18] Ibid. at 184.

3 *Structuration of Global Legal Certainty*

This observation of a power shift from support for all economic actors as in Weber's theory of legal certainty toward support only for a few wealthy actors in a global legal culture may be explained by the "needs" of global business as in transaction costs theory or by purposeful behaviour and planning within the clubs of international managers as in conspiracy theories. As an alternative we will discuss the potential of more sociological approaches which emphasize the "agency" aspect of institution building (rather than the image of institutions as external to and merely coercive of social action). The basic argument is that actors (1) do not "follow" rules but constantly create and re-interpret rules, and (2) they act rationally only in a limited way. No matter how rational or purposeful actors might be initially they will never be able to fully control the structural consequences of their actions (Wind 1996).[19]

This conception of structuration, the building of social structures in daily interaction, was developed against structural-functionalism (Parsons) in a cognitive turn of the social sciences. But Giddens, who's structuration theory is the most explicit theory of social change, is – when he emphasizes the actor's role in rule making – cautious not to overemphasize agency and to underestimate the "systemness" of societies: there are variances in how structures can be moulded by individual interpretation and purposive action:

> "Among the structural properties of social systems, structural principles are particularly important, since they specify overall principles of society. It is one of the main emphases of structuration theory that the degree of closure of societal totalities – and of social systems in general – is widely variable. There are degrees of 'systemness' in societal totalities, as in other less or more inclusive forms of social system. It is essential to avoid the assumption that what a 'society' is can be easily defined, a notion which comes from an era dominated by nation states with clear-cut boundaries that usually conform in a very close way to the administrative purview of centralized governments. Even in nation-states, of course, there are a variety of social forms which cross-cut social boundaries"[20]

In our context there are two variations of "systemness" which should be

[19] M. Wind *Integrating Agency and Structure: A Sociological Alternative to Neofunctionalism and Intergovernmentalism. Florance, European University Institute.* Paper prepared for the workshop on "Sociology of European Union Law" 1996 [May 13] (Draft).

[20] A. Giddens *The Constitution of Society: Outline of the Theory of Structuration* (Cambridge: Polity Press 1984), 283.

emphasized. First, national legal cultures are more structured (by legislation, bureaucratic administration and other institutional rule making) than global legal cultures. And second, within the regulatory function of law institutional structures prevail as elements external to the actor whereas within the support function of law individual actors are given more space to contribute to rule-making, rule change and institution building.

These assumptions can be illustrated in international business by discussing the establishment and maintenance of business relationships, the work of international law firms and the decision practice of international arbitrators. In all three areas legal certainty or, more generally, the security of expectations, is mainly established by micro-processes of structuration. Macro-structures are not absent but they are weak and can be moulded and adapted to individual situations.

International business relationships could theoretically make use of macro-structures for securing mutual expectations. They could abide by the UN Convention on Contracts for the International Sale of Goods or choose a state law or leave the choice of law to the Private International Law when and where a case is taken to court. But this is not what happens, at least not in more important international deals. The contracting parties either develop interdependent relationships (relational contracts), secure their claims, create or make use of debt collection agencies, make use of reputation mechanisms or black lists or choose only family members for their cross-border deals (like the Chinese communities). From the point of view of economic value, the most common way of avoiding macro-structures is the creation of multinational enterprises or joint ventures where all global deals are carried out within a self-made organisational structure making any support from outside superfluous (except in the phase when the company is constituted).

International mega-law firms are famous for their complex contracts, creating an autonomous legal structure for their clients on hundreds of pages in a language hardly understandable for laymen. These contracts in addition to organising a specific business exchange contribute to the creation of larger social structures by typifying solutions for other and similar cases. The best example for such larger structures are the INCOTERMS which have grown out of contract clauses and have slowly become universal rules. This is macro-structuration from below but with an emancipatory effect: the INCOTERMS are now continuously updated and changed by the International Chamber of Commerce, a middle-range institution which develops

its own expert knowledge and is not any more dependent on legal inventions produced by law firms or legal counsel.

In international arbitration the structuration process is different. At the outset it is state law they have to apply and their working conditions are defined by macro-structures (arbitration law mostly based on a UNCITRAL model law). But arbitrators have used their – in comparison with domestic judges – more flexible situation to develop new legal principles, new rules and case law. As a good example for arbitrators's contribution to macro-structures may serve a recent book on the law of long-term international commercial transactions which cites no less than 151 arbitration awards (plus 95 awards of the Iran-United States Claims Tribunal) and only 47 cases decided in state courts.[21] It seems to be obvious from these numbers that at least as regards the important area of contractual obligations in cases where longterm contracts break down or cause unforseen damages to one of the contracting parties, the bulk of innovations comes from non-state actors and is considered–at least in the Common Law world–as a source of law.

4 Conclusions

There is so much talk about globalization that every contribution has to be justified by a new aspect it adds to the discussion. Few contributions in the globalization of law debate fulfil these expectations since it is by now sufficiently known that the role of the nation state is declining, that new actors like the NGOs are part of the law-making process and that legal pluralism is the major characteristic of the global normative order. Many authors justify the modest progress in the debate by the absence of empirical studies about the role law plays in the world society but they seem to be unaware of existing research efforts. Empirical approaches in legal sociology, legal anthropology, political science and law and economy research offer knowledge which waits to be taken into consideration.

The present paper could be justified by its use of Giddens' structuration theory for new forms of law creation in the world outside the nation-state. But Giddens' approach is important in international relations theory[22] and there is at least one publication which argues with Giddens and other

[21] N. Nassar *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions* (Dordrecht etc.: Martinus Nijhoff Publishers 1995).

[22] E. g. J. Ruggie "International Structure and International Transformation. Space, Time, and Method" in E. O. Czempiel – J. N. Rosenau (eds) *Global Changes and Theoretical Challenges: Approaches to World Politics* (Lexington, Ma.–Toronto: Lexington Books 1989).

"constructivists" in a legal context. Marlene Wind analyses the institutional dynamics of the European Union and its law and legal actors emphasizing European transformations as an unintended result of institutional practices, individual roles and power configurations.[23]

This paper's contributions then mainly consists of pointing to a distinction between regulatory and support structures of law in the world society. Legal and non-legal rules, legal and non-legal rule-making and the social constellation of actors are so different in both areas that generalizations about global law are misleading if this distinction is ignored.

[23] Wind (n. 19).

Kelsen's Kairos
*The Secessionary Moment and Its Validation**

Christopher Berry Gray (Montréal)

The *kairos* is a moment of passage. It is the ford from past to future, the watershed where the old precipitates into droplet of decision that will spread into new streams of a person's life thereafter. The term today usually refers to the Christian event of God taking humanhood, and reversing personal entropy in history. It also refers, there, to anyone's appropriation of that moment into one's own life. With yet greater catholicity the term refers to any still point when one's choice breaks the remorseless momentum of habitual choices. Depending on one's philosophy, many believe that never happens; others discover it happening constantly.

Kairos certainly occurs in political institutions. States bring themselves into being; rather, their citizens do. Between the former regime of legal authority, and the new, there is a crossover, often prolonged. Old obligations cease, new ones begin, even if their behavioural content remains the very same, as Hans Kelsen puts it. The transition holds the interest. Does what happens afterwards affect what went before? Or is there simply replacement, not change; an annihilation followed by a creation? Is political *kairos* a legal vacuum between authorities, the "Alsace" of obligations to use a European trope?

1 Secession Reference

The Supreme Court of Canada (SCC) stripped the metaphor and in August 1998 answered the question of whether Quebec is entitled to secede

* A version of this unpublished paper was presented to the World IVR Congress at Pace University in New York City in 1999. Kelsen's works are referred to as follows: GTLS=General Theory of Law and State; PTL=Pure Theory of Law; LUN=Law of the United Nations.

from Canada by a unilateral declaration of independence (UDI).[1] While the answer at both domestic and international law is negative, the strong condition upon that "no" is that both federalists and secessionists must fulfil a legal obligation, innovated from constitutional principles, namely, to negotiate any proper request to amend the constitution by secession, as did Montenegro in May 2006. If the former refuse, secession is legitimated; if the latter refuse, secession is illegitimate.

The court declined jurisdiction to invoke domestic or international sanctions upon illegal secession, or upon its illegal blockage. Domestic sanctions range from expressions of dismay, through trade obstacles, to military and police force. International sanctions include non-recognition for illegal secession, or recognition for illegally blocked secession. These are treated as matters of fact; the court will not treat them, but only their legal import.

The legal import of positive responses to secession is put negatively. Recognition by other states cannot cure any illegality in seceding.[2]

It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.

In this way, a change in the factual circumstances may subsequently be reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place.

The reason why anyone might think it could cure illegality is that the illegal secession is a law-generating fact. Secession calls for recognition of a new state, and recognition can legitimate that new state. If the outcome is legitimate, how can its origin remain illegitimate? The normative quality of the two points in history cannot be contradictory.

While this intuition remains entrancing, it does not stand scrutiny. Why think that any result ever has the features of its cause? Normative qualities are always preceded by non-normative facts, in social contract theory if not natural law. If non-normative can precede, certainly the opposite normative state can.

This legal characterization bears great political weight. For a lawabiding secessionary citizenry, their belief that a successful UDI was never legally

[1] *Secession Reference* [1998] 2 Supreme Court Reports 1 (Canada)
[2] *Ibid.* paras 144, 146.

wrong from the start can be just the reassurance they need in order to win their support for the UDI.

Just what is it that the SCC is refusing to countenance? The first event in the problem is an illegal act. As illegal, it cannot validate any act performed under its authority; in that sense, it cannot be a norm-creating act. Secondly, a state of affairs may follow which is undeniably the fact of a sovereign state, namely that over the seceded territory and population a working authority becomes effective. This can come about whether or not any such valid event preceded it, or any follows it. Thirdly, a state or states recognize the fact of effectiveness, and by that recognition provide legitimacy to that state of fact. The dispositions of the working authority have legal force domestically; this is the fact, whose normativity the fact of recognition establishes domestically, and whose international legal force is constituted by the recognition. None of this the SCC denies.

What SCC denies is not that the third event validates (gives legal force) to the second event, but that it validates (makes non-wrongful) the first event. Recognition is the law-creating fact, so far as the effective order is concerned; that order is a fact contemporaneous with the recognition. The recognition does not recreate as lawful the initially lawless secession; that fact is over, and inaccessible in the past for validation in the present.

2 *Doctrinal Analogies*

Initially, this flies in the face of what seems to be done constantly in the law as elsewhere, to reach into the past so as to change the features of what occurred then. This is not a literary fiction, but a legal fiction, and is constitutive of fact. The formation of contract is later laden with all the obligations from general law and public order which the parties never considered. The causation of harm is found faulty although the tortfeasor thought she was acting as the very ideal of a reasonable person. The earlier law-creating acts are given different normative characterizations perhaps long after the occurrence.

The SCC's own two examples carry this in a different direction, however. First the court points out that, simply because one succeeds in committing a crime (in their words, "breaking the law") without getting caught, this success does not mean that he did not break the law, nor that his lawbreaking was made right.[3] Second, the court recalls that while adverse possession

[3] *Ibid.* para. 108.

along with acquiescence may result in the acquisition of title, this success, too, does not mean that the possession was any the less adverse or wrongful.[4]

2.1 Crime

Their two examples do not say what they appear to say about unilateral secession. The crime example appears the most germane, since in that and the constitutional case there is a requirement that conduct must be lawabiding in order for it to be acceptable, and not to be outlawed. Failure to meet those requirements makes the conduct criminal, whether an embezzlement among possessory crimes, or a treason among public order crimes. Escaping detection, prosecution or conviction does not change the initial act's unacceptability.

Conviction. That is not fully plausible. To escape conviction is equivalent to the assertion that sufficient evidence for the offense could not be gathered or presented. Only in the case where all the evidence that could be relevant is available and admissible, and still the court decides that there is no offence, is the analogy to the secession correct. Even here, the offense may be made out, but not the accused's participation. Only when the accused is a party, but the action lacks the *actus reus* of embezzlement, is there a proper analogy to the secession.

But this is just what is not claimed. Every element of the offense, illegal secession, is taken to have been shown, if not flaunted. The claim then is that this, illegal to start, is not illegal at its end. The proper analogy, if any, then, is to escaping neither detection nor conviction, but to escaping prosecution, followed by condonation. No one with authority to undo the act has penalized it; instead, that these other states have authorized it, retroactively, is the claim.

Prosecution. To the extent that escaping prosecution is merely an administrative decision that the effort is not a worthwhile use of public resources, there is an analogy to the case of countries. While non-recognition may be attractive in view of outrages in the achievement of sovereignty, the non-recognition may not seem worthwhile in view of keeping peace and promoting progress and development. What is the point of refusing recognition?

[4] *Ibid.* para. 146.

But there may well be a point, for example, discouraging the outrages or illegalities by future pretenders to statehood. Keeping the offense current, just as letting it slip away, can have a utilitarian rationale in terms of general deterrence.[5]

The actuality of offense is intended to be more than utilitarian, however, in the SCC opinion. Even if all the advantages point towards letting the wrongfulness of the past turn into its validation, the offense is declared to remain unvarnished. The reason for this has to lie elsewhere than in its advantageousness.

The wrong attributed to secession can be understood in terms of its inherent wrongfulness. As a violation of law, the wrong is attached to the moment in time when it occurs, and persists, in the way that a fact is unable to be gainsaid and persists under the law of noncontradiction. The truth value of the factual proposition, if said now in a sentence, may be negative; but a sentence remains true if said now with regard to the moment when it was current.

Forgiveness, Pardon. Whether this is possible for normative sentences, also, is put into doubt by the possibility of forgiveness and condonation. These acts may appear to remove the wrongfulness from the start, and to do so retrospectively from the later moment when they are performed. In fact, however, that is not the case. Forgiveness requires that at least the forgiver, and perhaps also the forgiven, acknowledge first that something wrongful was done, in order that there may be something to forgive. Denial by the offender that he did anything wrong can block the forgiveness. Even if forgiveness can occur, due to acknowledging the initial wrong, the forgiveness does not deny that the offender is responsible for the wrong, so that he is answerable and liable for it. In an executive pardon or crown prerogative, for example, the forgiveness announces only that the forgiver is not going to call the offender to render that account or to pay that penalty, and cannot do so thereafter. A legal pardon may blot out the criminal record which is available to the public, but it does not expunge the case with its conviction from court records and their official reports.

[5] Varga refuses this finessing of illegal acts into legal either by misplaced claims of principle (e.g. self-serving strikes as civil disobedience), or by bald utility (e.g., statutory limitation by mere passing of time). "I cannot argue that the sheer number of illegal acts suspends law's validity", as by making "unlawfulness ... appear as lawfulness by conceptualization mirroring mere political wishes." Cs. Varga *Transition to Rule of Law. On the Democratic Transition in Hungary* (Budapest: TEMPUS – Eötvös Loránd University 1995), 100 and 87.

Discharge, Stay. Complete discharge after conviction does no more than this; even less does a stay of proceedings before conviction. A discharge permits its holder to reply that he received a discharge from his conviction, but not that he was never convicted. Discharge allows its holder to escape social or civil penalties which may be attached to "having a criminal record"; as pardon eliminates that record after punishment, discharge does before punishment. Neither eliminates the conviction, nor the offense which the conviction determined to have occurred.

Condonation. Condonation, for its part, may have two different relations to the offense. First, it may be an acquiescence in the offense by someone who is not a party to it; all that accomplishes is to make the condoner a party oneself liable for the offense. One condoning embezzlement or rape or treason becomes complicit in that same offense. Otherwise, condonation may be the conduct of someone against whom the offense is done. In criminal law, this is not the victim of the crime; the party offended is the state, so condonation is assimilated to one of the legal dispositions already discussed. In a system which provides for private prosecution, the victim or even a third party may be able to bring public force to bear even if the state prosecutor condones and declines, although that is rare; but this is simply the refusal to allow the state to condone, similar to the opposite procedure where the refusal of a victim to lay a complaint need not halt the state's prosecution.

In instances where an element of the crime is lack of consent, the crime may be condoned by the victim's consent, say by consent to the embezzlement or the rape. If the consent occurs after the offense is committed, this approaches the retroactive validation of the offending acts which the secession issue poses. That it does not reach that conclusion, however, is illustrated by the possibility, perhaps remote, that the state continues to proceed against the offender while calling the victim as a hostile witness against whom the state presents evidence to show that consent was absent at the time of the offense. For most other crimes, condonation by consent is not possible, since they are crimes against the "state, people, crown, public" as the casename shows.

2.2 Prescription

Criminal law does not provide the retrospective validation which it promised contrary to the SCC's initial example. The court's second example, prescription by adversarial possession, does not do that, either. The occupation of

another person's property in a manifest way, while that other "sleeps" upon his rights and does nothing to eject the trespasser, may end with the transfer of title to the occupier. The outcome is a legal occupation, the beginning is an illegal occupation, and all that has changed is the fact that the latter has taken place.

There are clear indications that this outcome does not legitimate the initial occupation. If the adversarial possession is interrupted partway through the prescriptive period, no partial title has been acquired. Dispositions of the property which the occupier has made in the course of her successful adverse occupation are voidable if not void *ab initio*, despite the final transfer of title. The burden upon the title is made no greater than was the adversarial use, so that title to a complete property is not transferred upon prescription by use of only a portion of the property in question. That is, adverse possession is not like a price which is paid for a sale, following a fair estimate of its consideration; instead, adverse possession is a wrong penalized by strict interpretation of its scope in order to limit its spread, while protecting third parties' expectations.

2.3 Contract

If criminal and proprietary retrospectivity does not import redemption of the initial legal wrong, still less do the examples of revised interpretations in contract or tort. In both examples, there is no change of the initial wrong in view of its outcomes in the future. In contract the legal obligations unknown to the contractant were present from the start; only the awareness of the contractant was absent until later on.

2.4 Tort, Delict

In the example of tort, as well, the factual conditions of the tortfeasor's legal obligation are unknown to him; but they were present from the start, and only his awareness of them changes later. There is no change in the normative features of the act. In economic terms, the compensation ex post, demanded under a Paretian interpretation of the Hand algorithm, is never able to be assimilated into compensation ex ante on the Coase formula, especially not Epstein's moralized version. No more than in the transfer of entitlements under adversive or eminent domain (prescriptions or "takings") can an outcome preferable because of its effectiveness be confused with the giving of consent (anterior condonation).

3 Doctrinal Concepts

3.1 Attempts

The attempt to secede by UDI, as any other attempt, is under way from the time of its definitive preparatory step, whatever that may be. That step is the fact whose legal validity is absent, ex hypothesi, and whose validity is to be supplied by the successful conclusion to the attempted act. Such would be, in the secessionary case, the promulgation of a UDI. If this step is as ongoing as the attempt itself, then it is not out of range for validation at the later date, at the time when the attempt to secede is concluded by its successful achievement.

That act, however, is individuated in a way the attempt as a whole is not. The dates of the UDI's proposal, approval and coming into force are all explicitly defined. While the UDI itself continues to have whatever effect it does, legal or illegal, over a duration of time, the definitive acts themselves do not, but are individuated at their dates. If this endurance of the acts is all that is thought to make them capable of subsequent validation, this is what they lack.

3.2 Conditions

What is clear, is that the status of a secessionary attempt is ambiguous until sufficient recognition has been achieved. The gap between past and future is glimpsed once more. One legal mode in which indeterminacy is accommodated is through the concept of conditions. In application to secession, the legality of attempted secession might be presented as a matter of law which awaits the achievement of factual success, as the condition for its legality to be achieved, as well. Which sort of condition is contemplated in this suggestion, however, will make for a significant difference in whether this accommodation will work.

Resolutive condition is a state of affairs pending whose achievement the conditioned event has occurred, but upon whose failure the conditioned event is voided ab initio. For example, under a hypothec, ownership of the hypothecated realty passes to the debtor but, upon his failure to pay the debt, ownership reverts to the hypothecary creditor. Another famous use of this sort of condition is to claim that the nasciturus principle attributes personhood to the foetus from conception, pending its resolution by the child's failure to be born viable. The application to the secession case is that the legal right

to secede commences with the attempt to achieve recognition, but lapses when no recognition is forthcoming. This application is unlikely, however, because the attribution of validity to the secession attempt would require the agreement of both parties at the start, if it is to be closely analogized to the examples; but this is just what is missing. If it were present, not a conditional validity but an outright validity would be in place, perhaps resoluble by the withdrawal of recognition.

Suspensive condition, on the contrary, is a set of occurences which are agreed to bring into effect what was legally provided for in advance. The mortgaged property's ownership in all its forms passes to the buyer when payments are complete. The unborn child is taken for person when born viable. The effects of fulfilling the conditions of mortgage commence from their fulfilment only. The effects of fulfilling the *nasciturus* conditions revert to conception; some gifts and harms, for example, to the child during her intrauterine life are validated. This condition is the sort of analogy to legitimating secession that is sought, for it provides legal status to the factual event retroactively.

While suspensive condition seems more apt to serve the purpose of validating the secessionary act than is resolutive condition, nonetheless the suspensive condition cannot provide this service. One feature which attaches to suspension of initial validity until success has been achieved, is that the initial step not be contrary in normative quality to the outcome. Nothing opposed to ownership, nothing resisting personhood, is present in the initial stages of the property and personhood examples. In the case of secession, however, what is being cured retroactively is contrary to the outcome, by hypothesis. The secessionary attempt not simply lacks and awaits legal validity, but is affirmatively contrary to legality; it is not non-legal, but illegal. Again, then, changing past normative reality is no more feasible than changing factual history.

4 *Legal Theory*

4.1 *Holmes*

The contrary view about the effect of recognition agrees with Holmes' view of legal duty. Stripping law of its higher and moral character meant for him to relieve law also of any further features of legal obligation than the likelihood that public force would be brought against some conduct. The instance

of successful secession has the look of a Holmesian paradigm for the absence of legal duty.

Holmes, however, or at least the realism said to spawn from his predictive view, was seldom liable to this reduction: that no legal norms precede actions; that the only norms are those which follow the judgment on actions; that all legal wrongness to actions follows the judgment upon them; and that people become offenders only ex post facto. Instead, appreciation by Kantorowicz is more apropos, that the law involves more the skills of Mr. Justice Holmes than those of Mr. Sherlock Holmes, that it is more a matter of judging under norms than of apotheosizing facts.[6]

The apparent *Realpolitik* that prompts secessionary rehabilitation does not stem from a global Holmesian antinormativism, however, if such it is. For it is peculiar to the international order and does not extend to the domestic legal order. The peculiarity is not supposed to be that, between states, no obligatory norms but only power politics occur; for the outcome of successful secession explicitly is taken to involve claims between the resulting states. Among these claims are renvoi to the domestic legal norms of the relating states. Neither the international nor the municipal legal order is presented by the secessionary argument as bereft of norms. If in neither of these systems, then in the passage between them must lie the opposition to this aspect of the SCC's judgment.

4.2 Kairos

This is the dimension of prolonged gap or vacuum or *kairos* that attends the SCC's opinion. Between the domestic illegality and the international legality is where the validation takes place. The international recognition forms a domestic validation of the secession. It is not an international validation that is achieved, for there was no wrong at that level to be legitimated. The international obligation imposing the integrity of sovereign territory is an obligation upon other states not to carve sections out of one another; it is not an obligation internal to any given sovereign territory.

The SCC's judgment shows cognizance that the obligation falls between these levels; for, while the SCC answers two distinct questions about whether Quebec can legally secede in a unilateral action (the first question in domestic law, and the second at international law), the questions are mutually de-

[6] Varga uses this balanced appreciation of Holmes, since while "practice has the power to create criteria", "there is one thing one cannot do without destroying law: questioning its legal character and validity." Cs. Varga *Law and Philosophy. Selected Papers in Legal Theory* (Budapest: TEMPUS – Eötvös Loránd University 1994), 3; and Idem (n. 5), 87.

pendent. If the answer to the domestic question is yes, there is no need to pose the second. If the first answer is no, the international question is posed. Even if the second answer is yes, that answer will not change the first answer. But the court's main message is that a no answer to the first question, on domestic validity, makes more likely a no answer on the international validity; this happens when the secessionist party resists negotiation. The other part of the court's message, however, is that a yes answer is possible to the domestic question, and that this will make more likely a yes answer on the international validity; this happens when it is the federal party who resists negotiation.

4.3 Kelsen

Kelsen's positivism, perhaps objectionable or dated on other grounds, helps to situate this stillpoint.[7] Kelsen highlights both the radical character in law of the break, although "by mere revolution or coup d'etat, the legal continuity, though interrupted under national law, is not interrupted under international law"[8] and this necessitates his extended reflection on how to comprehend it. He locates the issue as one of law, not of morals, while heightening the normative dimensions of the question, rather then dissipating the norms into predicted facts. In this he accords with the SCC's strong separation between matters of fact (powers, in the sense of natural capacities) and matters of law (rights and legitimacy).

He shares a reduced degree of the SCC's enthusiasm for legitimacy over effectiveness, when he posits that "the principle of legitimacy is restricted by the principle of effectiveness."[9] But this is only a matter of emphasis, since it is also true that the principle of effectiveness within a national legal order is not its ultimate reason for validity.[10] The relation between the two spheres is set by concluding that the international is the universal legal order delegating all national legal orders.[11]

[7] Varga affirms Kelsen's importance on this point, for while Kelsen's emphasis on legal validity is a jockeying and so an equating with factual effectiveness (ibid. 213–4), and "mainly a theoretical question, in practice it can be found in limiting cases, arising in critical situations" when there is a demand for concepts "to illumine their own preconditions" (Varga, [n. 5], 178).

[8] Principles, 387.

[9] GTLS, 119.

[10] PTL 2, 340–41.

[11] Ibid. 341–2.

He agrees with SCC again that international law obligates by sanctions (war, reprisals),[12] and that these enforcement measures are truly sanctions, and not merely political measures.[13] By their removal, "international law legitimates a successful revolution as a law-creating procedure."[14] That is,

> "if [revolutionaries] succeed, if the old order ceases, . . . in conformity with the new order, then this order is considered as a valid order. . . . If the revolutionaries fail, their undertaking is interpreted, not as a legal, a law-creating act, . . . but as an illegal act, . . . according to the old . . . specific basic norm."[15]

The time of revolution is the beginning of the moment of decision; the illegal change's achievement of effectiveness is the end of that moment. The question for Kelsen as for the SCC is the legality of the beginning of this extended *kairos*, in view of its distant end.

Recognition is the procedure for bringing this moment to an end, by ascertaining that "state" is a fact.[16] That fact exists when the domestic legal order has become effective, and ceases when that ceases.[17]

This firm footing of legality upon fact, however, is far from diminishing the normative dimensions of the process. "No fact has, by itself, legal effects; it has legal effects only together with the act by which the existence of the fact is ascertained."[18] Not recognizing a state can never violate international law.[19] But, for example, recognizing as a state a pretender which does not fulfil all conditions for statehood (a group of individuals, living in a territory, under an independent and effective government),[20] and ceasing to recognize one which does, both violate international law.[21]

As well, the procedure of recognition makes the state a law-creating fact only relatively,[22] both to the particular state and to the particular time. Because a state comes legally into existence only in relation to the recognizing state, it is possible and commonplace that international law applies to the

[12] Ibid. 215.
[13] LUN, 732, #9.
[14] PTL 2, 215.
[15] GTLS, 118.
[16] PTL 2, 222.
[17] Principles, 382.
[18] Ibid. 394
[19] GTLS, 223; but see LUN, 946 and note 4, regarding the effect on a member state of the Security Council's giving credentials to a pretender not recognized by that member.
[20] GTLS, 221.
[21] Ibid. 223, 224.
[22] Principles, 394.

relationship with one state, but not to another, the recognizing and the non-recognizing respectively[23] As well, since the recognizing state is not obliged, but only empowered, to determine whether another has begun or ceased to be a state, it can establish this at any time, regardless of the date when it found the other to begin or to cease to fulfil the conditions for statehood. That is to say, it may recognize the other, or withdraw its recognition with retroactive force, by declaring that the other began or ceased to fulfil those conditions before the date of its recognition or withdrawal of recognition. "Legal acts with retroactive force are possible according to general international law."[24]

This last conclusion sounds like an adoption of the secessionary party's position on the principle of effectiveness, redeeming the original illegality of the UDI. In fact, however, Kelsen affirms just the opposite, by reiterating his fundamental normative principle:

> "Facts are never a source of legal rights, let alone facts which are the result of conduct violative of international law. Not facts, but norms are the source of legal rights. It is only the validation of facts through a principle of law which in effect considers these facts as law-creating facts that can give rise to new legal rights and duties. It is precisely this latter function, the validation of facts, that forms an important part of the content of the rule of effectiveness."[25]

More succinctly,

> "according to the principle of effectiveness acts are law-creating, even though violative of rules of general international law, once they are no long effectively contested by the interested states."[26]

The outcome of this position is that "the illegal act is not legalized. But the results of the illegal act are not a legal nullity."[27] What this statement of the law mediates are two extreme claims. The first is that, because the initial act was illegal, the situation which results from it is illegal and a legal nullity. This both flies in the face of practice, and upsets peace and order by keeping in reserve for centuries the resentment to be brought forth as justification for unrest once the time is ripe.

[23] Ibid.
[24] GTLS, 226 # 3.
[25] Principles, 422.
[26] Ibid. 423.
[27] Ibid. 425, n. 124.

The second extreme claim is that, since effective governments must be recognized as legitimate, but since once again a legally obligatory result cannot issue from an illegal source ("the problematical presumption that ... *ex injuria jus non oritur*")[28], then the initial legal defect must be cured by the recognition of effective legal order. Kelsen rejects the presumption because it licenses intrusion by other states into domestic legal order (the "Stimson Doctrine"). "If the change has been brought about illegally, it is difficult to see how it can be validated by the interference on the part of other states."[29]

What began as the paradigm of *Realpolitik*, by this last position would have become the extremity of legal idealism, if retroactive recognition of the legal validity of outcomes were equivalent to retroactive healing of the legal fault. A fortiori, if the claim is the more extreme one that, because such retroactive healing is possible and likely, there is no legal fault from the start. Kelsen both radicalizes the moment of legal change, empty of all authority, and also identifies the remedy to that emptiness, without obliterating the breathless moment in that process. In these moves, the SCC decision is clarified and fortified.

5 *Ending*

The SCC leaves much scope for legal idiosyncrasy, or pluralism, by founding the illegitimacy of secession not upon universal principles but upon those principles peculiar to Canadian law. Neither the principles, nor the validation of secession which is founded upon them, need be discovered elsewhere. But, revising a phrase from *Perka v. The Queen*[30], when discussing the distinction between excuse and justification, success of secession "carries with it no implicit vindication of the deed." More than an issue of manner and form, as if the invalidity of a Canadian UDI can be cured by redoing it rightly (that is, following good faith discussion), the SCC has entered an opinion on the inaccessibility of past normative reality to merely procedural rewriting. The court's natural law characterization of secession (that reality, even legal reality, resists abusive exercises of positive will)[31] involves an application of this characterization not only to factual history, but to normative history as well.

[28] Ibid. 415.
[29] Ibid.
[30] 30 [1984] 2 Supreme Court Reports (Canada).
[31] This is the version that Varga, too, adopts from Villey. Varga (n. 6), 4.

Jurisprudence of Reasons? The Dworkin–Schauer Debate

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Professor Csaba Varga's writings encompass a wide range of important problems of jurisprudence. He has written extensively on the history of codification, the establishment of facts in the judicial process and the macro-sociological approach to legal theories, among other things. However, I personally have profited most from his writings on the patterns of judicial reasoning. His studies furnish important arguments to support the idea that for a significant period of time legal decisionmaking has been quite different from the process that modern legal systems employ. He guides his readers through different periods of time and different legal systems with considerable erudition, in order to substantiate the claim that the emergence of formal-rational legal thinking, as labelled by Weber, is a relatively new phenomenon in legal history. His most important conceptual tool in arranging the historical data is a distinction between open and closed models of legal reasoning.

> A reasoning is open if it allows any set of solutions without previous determination. It is open if it may refer to or rely on anything the parties recognise as helpful in finding the individually just solution. A reasoning is open when it sets the only goal to arrive at a decision acceptable for the community. Well, to better understand the issue let us contrast open argumentation to what it negates, closed reasoning. Let us imagine a hierarchical relationship with rigid subordination schemes, for example, the one established in the army. The service regulation in the army provides a one-way commanding chain including the exclusivity of closed argumentation. That is to say, whatever event is to be faced, the subordinate can communicate only by choosing and applying one form among the previously codified set of patterns.[1]

[1] Cs. Varga *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai 1999), 16–7.

Not being a legal historian myself, it is beyond my competence to judge how close different legal cultures analyzed by Varga came to these models. Instead, I would like to elaborate on the relevance of this distinction in a contemporary jurisprudential debate between the proponents of legal positivism and Ronald Dworkin. My hope is that the present exposition will contribute to the analytical precision of the aforementioned distinction, and shed some light on the arguments used to support these models.

As with many issues in contemporary jurisprudence, the debates concerning the relation of rules to legal positivism were set into motion by Dworkin's seminal article, *The Model of Rules I.* According to Dworkin, it is a fundamental tenet of legal positivism that legal reasoning is necessarily rule-based. He claims that this thesis cannot be true since judges often appeal to principles besides rules. Many positivists, including Herbert Hart, tried to meet this challenge simply by denying that positivism is committed to rule-based decisionmaking, or in Dworkin's terms, to the model of rules.[2] While I believe that Hart's answer is basically correct, however, there is a line of counterargument offered by Frederick Schauer that seems more interesting with regard to the subject matter of the present article.

Contrary to some of the leading figures in legal positivism, and most notably to Jules Coleman, Schauer believes that positivists cannot be content with making conceptual claims about the nature of law. According to Schauer, the conceptual claim of positivism that morality does not have to be among the truth conditions of legality in all possible legal systems *(the separability thesis)*, is true, but trivial.[3] In order to contribute to the understanding of modern legal systems, positivists have to make empirical claims about these systems, and Schauer labels the most important empirical claim of positivism "the limited domain thesis". This asserts that law consists of a limited and pedigreeable set of norms which is extensionally divergent from the non-pedigreed set of norms then accepted within a society and available to all of its decisionmakers.[4] This particular thesis has been the core tenet of the positivist tradition from Hobbes to Hart,[5] says Schauer, and if we reduce positivism to an uninteresting conceptual claim, we risk losing an important

[2] H. L. A. Hart *The Concept of Law* (Oxford: Clarendon Press [2]1994 [Postscript ed. by P. A. Bullock – J. Raz]), 263.

[3] F. Schauer – V. J. Wise "Legal Positivism as Legal Information" *Cornell L. R.* 82 (1997), 1080, 1087 (hereinafter LPLI).

[4] F. Schauer "Rules and the Rule of Law" *Harvard J. L. & Public Policy* 14 (1991), 645, 666 (hereinafter RRL).

[5] F. Schauer "The Limited Domain of the Law" *Virginia L. R.* 90 (2004), 1909, 1951–3 (hereinafter LDL).

part of that tradition. Moreover, he claims that the limited domain thesis not only belongs to the fundamental tenets of positivist tradition, but provides us with arguably the best descriptive account of the legal systems we are familiar with.[6] Some readers, especially those socialized in the continental legal tradition, may find the limited domain thesis as trivial as the separability thesis. Schauer argues plausibly, however, that many schools of thought in American legal theory, like Legal Realism, Legal Pragmatism, Critical Legal Studies and Dworkinian interpretivism can be understood as challenging the limited domain thesis.[7] Furthermore, this shift from a trivial conceptual claim to a more interesting empirical one, that is, from the separability thesis to the limited domain thesis, implies that *these* schools of thought are the chief opponents of legal positivism, instead of natural law thought. Schauer believes that Dworkin's theory represents the most sophisticated and influential critique of the limited domain thesis and hence of legal positivism,[8] and for this reason I will use the jurisprudential debate between legal positivism and Ronald Dworkin to put the evaluation of different models of legal decisionmaking into context.

The close affinity of the concept of closed legal reasoning used by Varga to that of the limited domain used by Schauer should already be striking to the reader. Without further argument I will assume that the basic idea behind the two concepts is essentially identical. Thus, the rest of my discussion will fall into two parts: in the first part I will make an attempt at clarifying the idea of limited domain, and argue that to a certain degree this thesis misrepresents the true essence and importance of Shauer's jurisprudence; and in the second part I will discuss the contrast between Dworkin's and Schauer's position, and argue that it is not as stark as Schauer claims, and that Schauer's contention that Dworkin's jurisprudence is inconsistent with the limited domain thesis is no longer feasible.

[6] RRL, 678–9. Schauer makes somewhat weaker claims in other places. In LDL he formulates limited domain as a hypothesis yet to be established by further empirical research (LDL, 1933–4.), and LPLI wants to contribute exactly to that research. In *The Jurisprudence of Reasons* he admits that due to a change in the pracice of adjudication, the limited domain thesis may no longer give an adequate description of American law (F. Schauer "The Jurisprudence of Reasons" *Michigan L. R.* 85 [1987], 847 [hereinafter: JR]). He also admits that the limited domain thesis may give a good decription of certain aspects of the legal practice but may fail to do the same concerning others, as common law and constitutional adjudication (ibid. 869).

[7] LPLI, 1096.

[8] JR, 847.

1 Limited Domain Thesis Clarified

Schauer's possibly most important contribution to legal theory is his thorough analysis of rules and the delineation of different models of decisionmaking. He distinguishes between four different models of decisionmaking. (1) Under *simple particularistic* decisionmaking, prescriptive generalizations are heuristic devices, rules of thumb, offering no independent reasons for decision when the result indicated by the rules is different from the result indicated by the full range of sound practical reasons. This model expects decisionmakers to make the best all-things-considered decisions on each and every occasion. (2) *Rule-sensitive particularism* "expects decisionmakers to make the best all-things-considered decision on each occasion, but also expects them to take into account as one of the all-things-to-be-considered the value of having a rule."[9] (3) *Presumptive positivism*, Schauer's own preferred model, combines the features of rule-based and particularistic decisionmaking by giving prescriptive generalizations a presumptive but non-conclusive force in the reasoning process. (4) Finally, under *rule-based* decisionmaking, rules are prescriptive generalizations that provide conclusive reasons for decision, that is they determine the result of the decision, even if the result indicated by the rule is different from and suboptimal to the result indicated by the full array of sound practical reasons.

Schauer claims that presumptive positivism, which he regards essentially as a variant of rule-based decisionmaking, is not only normatively superior to other models, but gives the best descriptive account of modern legal systems we are familiar with. However, does this descriptive claim amount to asserting that the limited domain thesis is true with regard to those legal systems? Schauer argues that there is *affinity* between the limited domain thesis and rule-based decisionmaking.

> This affinity stems from the fact that both the idea of a rule and the idea of positivism as a limited set of norms entail some extensional divergence between the set of results indicated by a rule or set of rules, or the set of results indicated by a set of pedigreeable rules, and the set of results indicated by the full array of norms otherwise accepted by some decisionmaker.[10]

I believe that the relationship between the limited domain thesis and the different models of decisionmaking is far from clear and can be the source of

[9] RRL, 649–50.
[10] Ibid. 667.

confusion. Hence the formulation of the claim is not just a semantic question, but involves the substance of the claim itself.

The uncertainty surrounding the relationship between the limited domain thesis and the different models of decisionmaking consists in part of the ambiguity of what the thesis refers to. The thesis has at least three possible readings: (i) the set of *legal norms* is extensionally divergent from the full range of sound practical reasons. In this view, the thesis helps us to draw the division line between law and non-law.[11] (ii) The set of *relevant reasons*, that is, reasons judges can appeal to in legal argumentation, is extensionally divergent from the full range of sound practical reasons. (iii) The set of *results* of legal decisionmaking is extensionally divergent from the set of results indicated by the full range of sound practical reasons. My contention is that whichever interpretation we accept, it cannot capture what is really important in Schauer's argument.

Before turning to the different interpretations of the limited domain thesis, let me introduce an important distinction that I borrow from Gerald Postema. Postema suggests that every branch of practical philosophy has to face two critical questions: the domain question and the structure question.

> The paradigm *domain* question is: What counts as good or relevant reasons for action? The paradigm *structure* question is: How does one properly reason from these considerations to decisions and actions?[12]

Is the limited domain thesis a claim about the domain or the structure of legal reasoning? The term "limited domain" strongly suggests that Schauer is occupied with the first question, however, I will argue that his contribution to jurisprudence can be better understood as a theory about the structure of legal reasoning.

(i) The first version of the thesis asserts that the set of legal norms is extensionally divergent from the full range of sound practical reasons. The problem is that this version of the thesis does not disqualify any of the decisionmaking procedures from (1)–(4). The only scenario it would rule out is an all-things-considered decisionmaking that lacks prescriptive generalizations altogether. All other models presuppose that we have some criteria to identify a limited set of legal norms. In other words, all models presuppose that we can identify valid legal norms, or, in Dworkin's terms, true legal propositions. Even particularistic decisionmaking employs rules, how-

[11] Ibid. 666.

[12] G. J. Postema "Positivism, I Presume?... Comments on Schauer's 'Rules and the Rule of Law'" *Harvard J. L. & Public Policy* 14 (1991), 797, 805.

ever weak these may be. Rules of thumb are still rules that have to be identified somehow. Since all models are consistent with the claim that law (as a system of norms) is a limited domain, this interpretation cannot be used to distinguish between different jurisprudential approaches and certainly cannot capture what is unique to positivism (or at least the positivism Schauer represents).

(ii) On the other hand, if the thesis claims that the set of relevant reasons, that is, reasons properly appealed to in legal reasoning, is not coextensive with the full range of sound practical reasons, none of the aforementioned models satisfy the limited domain thesis, since none of them delimit the set of relevant reasons. All sound practical reasons are potentially relevant in justifying judicial decisions. If my argument is correct, this version of the thesis creates the same difficulty for Schauer as the previous one, as he will find himself again in the same camp as his rivals. What distinguishes these models is not that they operate with different domains of legal norms or relevant reasons, but that they assign different weight or force to legal norms in the process of legal reasoning. According to the simple particularistic model, legal norms have no special weight; whereas according to both rule-sensitive particularism and presumptive positivism, legal reasons have special, yet non-conclusive force; and, finally, according to rule-based decisionmaking, legal norms have conclusive or preemptive force. As the weight of reasons seems to raise the question of structure, my conclusion is that Schauer's real insight has to do with questions of structure and not those of domain.

One may object at this point that my argument mischaracterizes rule-based decisionmaking. Contrary to my characterization, so the argument runs, this model does not allow non-legal practical reasons to be considered as sound or relevant arguments in legal decisionmaking. I must admit, as far as regulated cases are concerned, it is possible to give account of rule-based decisionmaking in terms of both domain- and structure-based considerations. The proposition that under rule-based decisionmaking judges can appeal only to legal norms (domain-based explanation) and the proposition that under rule-based decisionmaking legal norms exclude all other otherwise sound practical reasons (structure-based explanation) has the same practical effect. However, in unregulated or hard cases it becomes obvious that even a judge committed entirely to rule-based decisionmaking does consider non-legal practical reasons relevant to legal decisionmaking. Pedigreed legal norms will not invalidate these reasons in legal argumentation, but determine the legal outcome in all the cases to which they apply. In other words,

even rule-based decisionmaking considers sound practical reasons relevant to legal decisionmaking, but in the regulated cases rules preempt other sound reasons.

But even if my characterization is mistaken on this matter, the second interpretation of the limited domain thesis still poses a great difficulty for Schauer's position. Even if we can distinguish rule-based decisionmaking from others on this count, thesis (ii) will still not create a clear distinction between the remaining decisionmaking procedures. Schauer's preferred position being presumptive positivism (3), his position is still indistinguishable from (1) and (2) on the grounds that the range of reasons relevant to legal decisionmaking is the same for (3) as for (1) and (2). As I pointed out earlier, considerations of structure (the weight of legal norms) and not domain are responsible for the differences between (1), (2) and (3).

(iii) According to the third reading of the limited domain thesis, the set of results indicated by legal rules and the set of results indicated by the full range of sound practical reasons are extensionally divergent. All decisionmaking models will satisfy this requirement except for (1). This creates the same difficulty for Schauer as theses (i) and (ii) did. In that case the limited domain thesis would be weak to the degree of becoming unsuitable to figure as the distinctive claim of legal positivism. This conclusion, however, would be too quick. The extensional divergence between the results of different decisionmaking models is a matter of degree, and the extent of that divergence is a plausible criterion for classifying the models of decisionmaking, as well as jurisprudential positions.[13] The problem with this particular interpretation is that the divergence of the results of different decisionmaking procedures is itself an *explanandum*, and not an *explanans*: something to be explained and not an explanation itself. If the limited domain thesis is to remain an important theoretical claim about modern legal systems, we should know why legal decisionmaking produces different results from all-things-considered practical decisionmaking. We have already explored two potential answers, namely that divergence is due to the fact that the domain of (a) valid legal norms, or (b) relevant reasons is extensionally divergent from the full range of sound practical reasons. In this case we are back to thesis (i) or thesis (ii). Even if these factors are relevant in the explanation we seek, they are, as I outlined it above, unsuitable to support the claim that the limited domain thesis, or a particular form of it is unique to positivism. Schauer, however,

[13] LDL, 1915. Although the extensional divergence between the set of valid legal norms and the full range of sound practical reasons is also a matter of degree, we cannot distinguish the competing jurisprudential positions based upon the extent of that difference.

does have an adequate explanation, and it is a convincing one in my view. According to him, the extensional divergence between the results of legal and all-things-considered decisionmaking is due to the fact that the former assigns valid legal norms special, sometimes presumptive, sometimes conclusive weight. If this is the essence of the limited domain thesis, it does not say anything about the *domain* of law; it is simply the corollary of Schauer's theory on the *structure* of legal reasoning. If, on the other hand, the thesis is to be understood to concern the domain of legal reasoning, it is, as my points against (i) and (ii) tried to assert, not specific enough to single out legal positivism as Schauer understands it.

2 *Jurisprudence of Reasons?*

The significance of Dworkin's theory for Schauer lies in the fact that it provides a new and more sophisticated version of a long jurisprudential tradition, which goes as far back as Aristotle, and has been quite influential in American legal theory. The jurisprudence of reasons, as Schauer labels the tradition in question, does not tolerate the rigidity of rules and attempts to reach the best possible decision in each and every case, which entails, so the argument runs, the rejection of the limited domain thesis.

First, I would like to address the question whether there are independent domain-based considerations that differentiate the position of Dworkin from that of Schauer. I have discussed three different versions of the limited domain thesis in the foregoing section and argued that only two of them, theses (i) and (ii), are based on domain-specific considerations. Thus we have to raise two questions: (a) is the domain of law extensionally divergent in these two theories?; (b) is the domain of relevant reasons extensionally divergent in these two theories? I am inclined to answer both questions affirmatively, but none of the answers support the claim that Dworkin's theory is inconsistent with the limited domain thesis.

(i) As far as the first question is concerned, the difference between the two positions can be easily ascertained. For the positivist Schauer, the domain of law extends only to encompass the set of pedigreeable norms. For Dworkin, on the other hand, the limits of law are not defined merely by pedigreaable rules. "[P]ropositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[14] Without taking sides in this debate, we can conclude that Dworkin's

[14] R. Dworkin *Law's Empire* (Cambridge, Mass.: Harvard U. P. 1986) [hereinafter LE], 225.

position is consistent with the limited domain thesis, since his theory has the resources to distinguish law from non-law. Even if his early critique of legal positivism, *Model of Rules I*, could be read as supporting Schauer's interpretation, from *Hard Cases* on Dworkin made it abundantly clear that the principles he is concerned with are legal principles. Legal principles, unlike their moral counterparts, have to have some institutional support and have to fit the existing corpus of law. We could accuse Dworkin of violating the first reading of the limited domain thesis only if we ignore his insistence that legal principles must follow from the interpretation of settled law. Since not all moral principles can be plausibly considered as interpretations of the settled law, the set of legal principles is not coextensive with the set of moral principles.

(ii) As far as the second question is concerned, Schauer does not draw limits to the set of reasons potentially relevant to judicial reasoning. For him, the fundamental question is how transparent rules are vis-a-vis other relevant reasons, regardless of what these reasons may be. Dworkin's legal theory, on the other hand, bears at least one important implication to the second interpretation of the limited domain thesis. The right answer thesis implies that in sophisticated legal systems judges can almost always decide the case by appealing to legal norms.[15]

> "That instruction does not deny the theoretical possibility of a tie, but it does suppose that, given the complexity of the legal materials at hand, judges will, if they think long and hard enough, come to think that one side or the other has, all things considered and marginally, the better of the case."[16]

In other words, Dworkin claims that, as a practical matter, in advanced legal systems the set of legal norms is extensionally identical with the set of relevant reasons. This is not so because all the reasons to which judges appeal are by definition legal norms, but because the pool of legal norms is almost always rich enough to supply with a solution to the case at hand.

Having examined the domain-based versions of the limited domain thesis, let us now turn to the structure of legal decisionmaking and have a closer look at what role rules play in "law as integrity," as Dworkin coins his own theory. The analysis given by Schauer first suggests that his own legal theory and Dworkin's jurisprudence represent two diametrically opposed

[15] I use the term "norm" to cover both legal rules and Dworkinian legal principles.

[16] R. Dworkin *Taking Rights Seriously* (Cambridge, Mass: Harvard U. P. 1978) [hereinafter TRS], 286.

archetypes of legal theories: the jurisprudence of rules versus the jurisprudence of reasons. The jurisprudence of reasons is seemingly depicted as just another label for simple particularism. It thus seems that decision-making models (1) and (4) are in question.[17] This characterization is, however, misleading. As I have already mentioned, Schauer's own preferred position is (3) and not (4). In the following I will argue that (2), rule-sensitive particularism, provides a better interpretation for Dworkin's position than simple particularism. That being the case, one is inclined to conclude that Dworkin's and Schauer's views are much closer than the stark opposition between the jurisprudence of reasons and rules initially suggests.

It is not an easy task to assess whether Dworkin's theory is really incompatible with the structure-based version of the limited domain thesis, since he consciously rejects some conceptual distinctions that appear to be presupposed by our previous discussion of the different decisionmaking models. It seems, for example, that the only way we can make sense of different decisionmaking models is if a conceptual line between easy and hard cases can be drawn. Decisionmaking models from (1) to (3) presuppose that sometimes the decision by the judge departs from the rule itself, instead of merely providing a contested interpretation for it. In such a case the judge's decision is not defined by the controversial nature of the rule, but by the fact that he chooses to ignore the rule which clearly applies to the case altogether. However, it is well known that Dworkin's theory blurs the line between easy and hard cases.[18] In addition, we have also assumed that under decisionmaking models (1)–(3), what judges depart from are not simply rules, but valid legal norms. In Dworkin's theory, however, the concept of validity has no place in the usual sense.[19] In my view these difficulties notwithstanding, we can intelligibly recast the questions of whether the law's empire is a limited domain[20] and what place rules take in Dworkin's theory, if the interpretive character of his undertaking is kept in mind.

Although Dworkin blurs the line between easy and hard cases, this does not mean that he finds the idea that words have an context-independent meaning unintelligible.[21] Thus the relevant question for us becomes what

[17] I must admit, Schauer says explicitly (JR, 864) that Dworkin is not particularistic. The term particularistic, however, here refers not to a model, but to the interest in the moral attractiveness of the parties, its opposite being not rule-based but principle-oriented.

[18] LE, 350–4.

[19] Dworkin employs the term of true legal proposition instead.

[20] The question is intelligible even if Dworkin himself asserts that law's empire is an attitude rather than a domain. LE, 413.

[21] Ibid. 352.

the judge should do when the result indicated by the context-independent meaning of the rule departs from the result indicated by the full range of practical reasons. Contrary to Schauer, I believe that "law as integrity" does not commit Dworkin to a position which gives priority to the decision indicated by the full range of reasons at all times. Let us further clarify the question by focusing upon how law as integrity instructs judges to decide hard cases.

When Hercules, Dworkin's imaginary judge with superhuman skills, confronts a case, he has to give a holistic interpretation of the existing law. As I have already quoted: "According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[22] Having interpreted the law, Hercules, however, is likely to realise that even the best available interpretation is incapable of accommodating all legal materials. Even the most coherent reading of previous judicial decisions, for example, may consider some decisions erroneous. In such cases the demands of integrity and rule-following are in conflict. The critical question for us is what Hercules must do with such "mistakes".

Even Schauer admits that *Law's Empire* has some important passages which seem to give strong support to the position that Hercules, committed to the idea of law as integrity, gives special, albeit non-conclusive force to legal rules. For Schauer this conclusion follows from the idea of "local priority:"

> "In most of the cases Dworkin seeks to explain, some item of law, conventionally conceived, points in the direction of an answer other than the one courts sometimes give and which Dworkin sometimes applauds. If the responses of Dworkin and the courts are legitimate, then the most immediately applicable norm must have, despite its immediacy, less than absolute force."[23]

My position in support of my contention would be easier if I agreed with the interpretation Schauer gives for the idea of local priority. According to Schauer's interpretation, the idea of local priority implies that even if the closest applicable norm has no absolute weight, it still has special force compared to other non-legal considerations. This alone would prove that Dworkin's preferred decisionmaking model is not simple particularism (1). However, I am reluctant to follow this line of reasoning, as I disagree with

[22] Ibid. 225.
[23] JR, 857.

Schauer's interpretation of local priority. The idea of local priority, as I understand it, has to do with the compartmentalization of law and concerns the relationship of local and global integrity, and not the relationship of the most immediate applicable rules to other factors of decision. Integrity on a local scale may still require Hercules to depart from the literal reading of the rule, so the idea of local priority does not support rule-based decisionmaking.

Instead, I prefer to base my contention upon the concept of *inclusive integrity*. Contrasting inclusive to pure integrity, Dworkin says that Hercules is prevented from achieving the most coherent system of law, in other words, he considers certain parts of the law wrong.

> "When judges interpret legal practice as a whole, they find reasons of different sorts, specifically applying to judges, why they should *not* declare as present law the principles and standards that would provide the most coherent account of the substantive decision of that practice."[24]

The reason for that constraint is that inclusive integrity instructs judges to take into account the virtues of fairness and procedural due process besides substantive coherence of law. Institutional constraints, like strict doctrines of precedent and legislative supremacy stem from exactly these virtues. In *Hard Cases*, when Dworkin sketches a theory of mistakes for Hercules, he makes a critical distinction between the specific authority and the gravitational force of legal materials. A legal rule that is considered mistaken loses its gravitational force, that is, the judge does not have to expand the justification behind the rule to new cases. By contrast, the specific authority of a mistaken rule can remain intact, that is, it will control cases within its ambit.[25] The separation of specific authority from gravitational force proves that pure integrity is an asymmetrical ideal. Hercules is required to enforce pure integrity when the case is controversial and strong countervailing reasons of fairness and due process are absent, but he is not required to do so when these reasons come into play. His obligation to respect integrity in its totality, and the institutional constraints that derive from it, establishes the claim that Dworkin's preferred decisionmaking model is not simple particularism. When making his all-things-considered judgments Hercules must assign special weight to the value of the existence of rules.

I believe that the idea of inclusive integrity is very much relevant in revealing an important flaw in Schauer's critique of Dworkin. Schauer claims that Dworkin is right to point out that judges sometimes depart from the

[24] LE, 401.
[25] TRS, 121–2.

rule, that is, legal decisionmaking is not strictly rule-based. However, he claims that Dworkin cannot account for the fact that judges sometimes follow rules even if they know that the rule-generated results are inferior to the results indicated by the full range of sound practical reasons.[26] The most important reason for Schauer for regarding presumptive positivism as superior to other models of judicial decisionmaking is that it can simultaneously account for both types of judicial behaviour: it can explain in a single model why judges sometimes depart from established rules and why the same judges sometimes follow established rules even if they know that those rules are wrong. Schauer is right to claim that Dworkin is preoccupied with the first prong of the dilemma. But this is not to mean that his theory lacks sufficient resources to account for the second problem. As I noted above, inclusive integrity and the accompanying considerations of strict doctrine of precedent and legislative supremacy can explain why judges should sometimes follow rules even if the result dictated by the rules violates the ideal of pure integrity.

But how much weight should Hercules give to Rule of Law values, like legislative supremacy and strict doctrine of precedent? I believe that Dworkin's position is ambiguous on this point. Sometimes his position seems to be that the canonical terms of a statute put a tight constraint on the judge's decision. "If a judge is satisfied that a statute admits of only one interpretation, then, barring constitutional impediment, he must enforce this as law even if he thinks the statute inconsistent in principle with the law more broadly seen."[27] At other places, however, he suggests that a case can be hard, even if the literal meaning of the words is clear.[28] For Schauer, Dworkin's analysis of *Riggs v. Palmer* illustrates this latter position proper. Since Dworkin himself admits that in this case the text of the applicable statute was clear,

[26] RRL, 674.

[27] LE, 401. See also the following passage: "[It] is important to notice how great a role the canonical terms of the actual statute play in the process described. They provide a limit to what must otherwise be, in the nature of the case, unlimited. The political theory Hercules developed to interpret the statute, which featured a policy of providing federal enforcement for dangerous crimes, would justify a great many decisions that the legislature did not, on any interpretation of the language, actually make. It would justify, for example, a statute making it a federal crime for a murderer to leave the state of his crime. The legislature has no general duty to follow out the lines of any particular policy, and it would be plainly wrong for Hercules to suppose that the legislature in some sense enacted that further statute. The statutory language they did enact enables to this process of interpretation to operate without absurdity; it permits Hercules to say that the legislature pushed some policy to the limits of the language it used, without also supposing that it pushed that policy to some indeterminate further point." (TRS, 109–10).

[28] LE, 351.

according to Schauer, that decision represents a departure from the rule and not a controversial interpretation of it. Notwithstanding that Schauer has the stronger argument on this point and that Dworkin does not seem to take rules as seriously as the previous quotation suggests, this does not cast doubt upon the claim that Hercules must assign special weight to authoritative legal material. If my argument is correct, the difference between Dworkin's and Schauer's analysis of the structure of legal reasoning is not as significant as Schauer claims. Dworkin's preferred decisionmaking procedure is (2) and Schauer's is (3). They both give authoritative legal material special, yet non-conclusive force,[29] which fact establishes the conclusion that Dworkin's jurisprudence is consistent with both the domain- and the structure-based versions of the limited domain thesis. I doubt that this conclusion is capable of demonstrating the soundness of either Schauer's or Dworkin's position. My ambitions were much more modest: I only intended to clarify the terms of the debate. This conclusion leaves ample room for further debate and I believe that in the end we will have to choose between the two positions by deciding which one gives us a normatively more attractive theory concerning the virtues and setbacks of rule-based decisionmaking.

[29] Some commentators, most notably Gerald Postema, even argued that actually there is no logical difference between these two models and presumptive positivism is destined to collapse into a form of rule-sensitive particularism. Postema (n. 12), 813–7.

Barna Horváth's Genius

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In a previous study[1] I attempted to give a comprehensive account of Barna Horváth's works who was an outstanding Hungarian legal philosopher of the inter-war period.[2] My assessment was founded on the insight that – against the widely accepted view, which reflects partly Horváth's own self-valuation – Horváth did not resolve the peculiarly neo-Kantian problem in the frame of his theoretical presumptions. His "synoptic theory"[3] could not find a philosophically defendable answer to how we could sharply separate the facts *(Sein)* and values *(Sollen)* and simultaneously overarch the gap between them in a theory of law. The convincing force of his writings thus does not arise from the truthfulness of his theoretical statements, but from his individual style in which he combines the dialectic reasoning with the drama as literary genre. He balances between the dialectic tensions presenting in the dramatic suspense and the dramatic tensions of the dialectic thought in his writings exploiting – with more or less success – the energies springing from these tensions to express his ideas.

[1] I. H. Szilágyi "Circus Juris, Dráma és jogfilozófia Horváth Barna életművében" [Circus Iuris: Drama and Legal Philosophy in Barna Horváth's oeuvre] in S. Loss – J. Szabadfalvi – M. Szabó – I. H. Szilágyi – Zs. Ződi *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből [Portraits from the history of Hungarian legal philosophy]* (Miskolc: Bíbor 1995), 211–66.

[2] Barna Horváth (1896–1973) About his life and his bibliography see Cs. Varga "Barna Horváth" in B. Horváth *The Basis of Law/ A jog alapjai* (ed. Cs. Varga) (Budapest: Szent István Tărsulat 2006), XIX–XXV, XXV–XXXVII.

[3] Horváth developed the so-called "synoptic theory of law" in his *opus magnum, Rechtssoziologie. Probleme des Gesellschaftslehre und der Geschichtslehre des Rechts* (Berlin & Grunewald: Verlag für Staatsrechtswissenschaften und Geschichte GmbH 1934) [hereinafter *Rechtssoziologie*] see especially 43–76; 2nd abr. ed. *Probleme der Rechtssoziologie* (hrsg. E. E. Hirsch & M. Rehbinder) (Berlin: Duncker & Humblot 1971); in Hungarian: *Jogszociológia. A jog társadalom- és történetelméletének problémái* (trans. Á. Zsidai) (Budapest: Osiris 1995).

The Trial of the Genius[4] acquires special importance in this perspective, since Horváth tried to test his synoptic theory on a concrete historical material analysing Socrates' and Joanna of Arc's trials in it. From a scholarly point of view Horváth's masterpiece can be regarded as a legal-sociological case-study or a legal historical or philosophical work, but we can also read it as a literary work when it appears as a historical drama.

In the present study I would like to unfold *The Trial of the Genius*' appraisal leaning on the above sketched conception paying with this a tribute to professor Csaba Varga who has taken the lion's of share in the revival the Hungarian legal philosophical traditions.

1 Drama and legal philosophy

The Trial of the Genius begins with exposing the concept of genius. According to Horváth, the genius is able to confront by his/her social milieu on the most dramatic way and this conflict gains its most dramatic form in the trial of the genius.[5] The drama and the trial have many similarities: the conflict and the organised procedural character are the central elements in both of them, and both their psychical effects are based on the simultaneous presentation and experience of the opposing human desires. Many scholars have already discovered this parallel between the drama and the trial, but from a legal theoretic point of view, eminently the American new realism and especially Thurman Arnold tries to exploit this systematically.[6]

[4] B. Horváth "A géniusz pere. Sokrates – Johanna" *Acta Univ. Francisco-Josephina, Kolozsvár, Juridico-Politica* 3 (1942) (2nd ed. Máribesnyő–Gödöllő: Attraktor 2003); in German: "Der Rechtsstreit des Genius: I. Sokrates; II. Johanna: a) Der Tatbestand, b) Das Verfahren" *Zeitschrift für öffentliches Recht*22 (1942) 1, 126-62; 2–3, 295–342; 4–5, 395–460 [hereinafter *Rechtsstreit* I, IIa, IIb].

[5] Lajos Cs. Kiss points out in his analysis that Horváth – in opposition with the modern tradition of genius-interpretation – reaches back to the classical interpretation: the genius is an inferior or half-god, a "transitional being", a god manifesting itself in male or female form. Horváth emphasises with this classical concept the genius' ethical and metaphysical aspects in opposition to the modern, romantic approach focusing rather on its aesthetical or poetical aspects. See Lajos Cs, Kiss "A tragédia metafizikája a jogban" [The Metaphysics of Tragedy in the Law] in Horváth *A géniusz pere* [2nd ed.] (n. 4), 210–238.

[6] "Was ist denn das Repertoire des Theaters des Rechts? Die Abteilung großer und tiefer, anders nicht lösbarer Konflikte. Indem wir sie vorspielen, zum Ausdruck bringen, vollständing aufschließen, werden wir sie zugleich los. Hirein liegt vielleicht der Sinn der Katharsis, der dramatischen Reinigung. Der Held fällt, wird aber noch in seinem Sturz erhöht, und die Zuschauer gehen beruhigt fort. Hinter dem vorgetragenen Stück rollt das ewige menschliche Schauspiel: wir erleben den unheilbaren Gegensatz von Idee und Wirklichkeit, von Wert und Tatsache, von Sollen und Sein, von Freiheit und Notwendigkeit, und inzwischen heilen un-

Socrates' trial is seen as a typical example of the genius' trial, nevertheless the available data are very poor in fact, so the authentic reconstruction of the process is nearly impossible. Another disturbing factor is Plato's authority who certainly idealised Socrates' character in his dialogues. Horváth points out as well that even if the Platonic texts' historical authenticity is questionable, we could not have any doubt in their artistic authenticity.

Following this, the author makes a thorough legal historical inquiry presenting the ancient Attic trial process: the constitution of the 501 members *Heliaia* jury, the phases of legal process, those procedural reforms that had been introduced before Socrates' trial, the order of hearing, and the rules of sentence execution. Horváth carefully analyses the accusations brought against Socrates – that is Socrates does not respect the gods of city, but he imports "daimonic things", and he corrupts the Athenian youth – that were summed up in the charge of *asebie*. Horváth considers this formulation of charge as a legal masterpiece the power of which lay in its ambiguous character, since it was almost impossible to deny it.

Horváth finds the "convex lens" of the trial and of Socrates' personality in the Socratic *daimonion*. He turns to the psychoanalysis understanding the nature of the "Voices". The psychologists see these phenomena as a consequence of sexual suppression: these are but projections of Socrates' *super ego* repressing his unconscious desires, certain sublimation of his homosexual inducements. Socrates transforms these base desires, he turns his corporal desires felt towards the young boys into a passionate care of their bravery when he tries to teach them just ruling their desires. Yet the youth feel this erotic impulse in his personality, thus Socrates replaces their fathers who, on the other hand, want to put an end on his working, of course. At the same time Socrates' personality can be explained considering the inner conflict of a man who has powerful physical and spiritual abilities, but hideous outward appearance.

The erotic revolution hiding in Socrates' personality feeds the mystical revolution with which Socrates wants to replace the conventional communal values by the rule of reason and superior moral ideas refusing the traditional religious forms in his teaching. Socrates' work consequently endangers the entire Athenian worldview so his tragic confrontation with his milieu was

sere durch diesen Gegensatz gerissenen Wunden zu. Wir werden vom seelischen Konflikt um so leichter befreit, je stärkeren Ausdruck wir unseren zwishen Idee und Wirklichkeit schwankenden Wünschen verleihen, je glücklicher wir den Wunschkonflikt zum Ausdruck bringen, daß wir sowohl ihre Einheit als auch ihren Gegensatz wollen." *Rechtsstreit* I, 128.

almost inevitable. The right question is then why this took place just so late, why his fate overtook him only in his old age?

This problem leads Horváth to shed a light on the political background of the trial. Against the widespread view that attributes Socrates' disaster to the accusers' – Meletos and Lykos – offendedness and narrow-minded malice, Horváth calls attention on the role of Anythos, an excellent and temperate statesman. Anytos took part in the trial as a *synegoros* on behalf of accusers, but the weight of his personal authority was far greater than that of accusers'. Nevertheless Anytos was not driven by his personal motives and he even might not have wanted Socrates' death. Moreover, it is also clear from Socrates' biographical data that there were not any concrete political debate between him and Anytos, indeed, Socrates stood above the parties' discord dividing Athen's public life. Thus the motive of charging could not be a political one either in the case of Anytos. His real aim was not any kind of retaliation, but the re-establishment of Athenian democracy. He regarded it a request of public interest: it was necessary to stop Socrates' work for the sake of the desired political evolution. However, if we want to understand Anytos' anxieties, we should become acquainted with the animated period of Athenian history which spanned Socrates' life and which coincided with Athens' rise, golden age and fall. The fatal inevitability of Socrates' trial becomes clear just from this historical point of view, since he raised antipathy against himself everywhere: all among the supporters and the enemies of democracy, among the Sophists and their enemies, among the old patriots and as well as among the reformers.

After this Horváth inspects the trial itself as we can bring it to mind leaning mainly on Plato's Apology. Concerning Socrates' pleading, the author emphasises that Soctrates does belittle his accusers, even the jury itself meanwhile he does not defend himself against the charge on its merits. The philosopher becomes silly entangled in the masterly woven web of the charge. Socrates further worsens his position by referring to the Delphic oracle and his divine mission, as well as by his motion – for his free full board in the Prytaneion – in the course of assessment process of the penalty. Horváth's opinion is supported by the fact that the jury brought the capital punishment with greater majority of votes than previously when the jury had decided the question of guilt.

> "Wofür ist er also gestorben? Für eine eigenartig durchmoralisierte Geschlechtsliebe und für eine unmittelbare Göttliche Eingebung, wodurch er die Gemeinschaft verbessern wollte. Er starb für eine aus solcher Eingebung ernährte ideale Gemeinschaft, in welcher der

> Grundsatz herrscht, daß ohne Selbstprüfung und Prüfung anderer das Leben nicht lebenswert ist. Diese Gemeinshaft hat vielleicht eine gewisse Ähnlichkeit mit der stoischen Republik der Weisen. In dieser Gemeinschaft schadet es dem starken und scharfsinnigen Mann nicht, wenn sein Äußeres häßlicht ist, wenn seine Gestallt vom griechischen Schönheitsideal absticht. Die Leidenschaft für Schöne Knaben klingt hier in der leichten Tortur langer, moralisierender Dialoguse aus. Der Alleinbesitz der göttliche Stimme macht den Meister alleinherrschend in der Gemeinschaft, und so gelangt sein infolge seiner Häßlichkeit unterdrückter Geltungsanspruch endlich zu voller, ein wenig grausamer Befriedigung. Er starb nicht nur für die Autonomie des Einzelnen, sondern auch für die Herrschaft des Wiesen, der mit seiner Liebe und Göttlichen Eingebung die Gemeinschaft Beherrscht."[7]

In the second part of his work Horváth analyses Joanna of Arc's trial. For an introduction he compares Socrates' and Joanna's genius. It is the differences that strike first our eyes: the seventy years old, city-dweller sage does not so much resemble the nineteen years old peasant girl who is a "lily of the fields and battlefields" and intellectual simplicity itself. In a closer look, however, we can also discover many common features: both had strong a body and military virtues, and they were equally unbearable for their milieu. Joanna's visions – which she called *conseils* – are comparable to Socrates' Voices. In Joanna's case the psychologists also find the tightening force of sublimated sexual energies in the background of these phenomena, too. Just while these are the consequences of sexual suppression in Socrates' case, in Joanna's one these flow from the undeveloped female sexuality. Both of them are people's genius, and both have a kind of ironic "common sense". This makes Socrates a witty inquirer and Joanna give smart answers in her trial. Concerning the trials, the greatest difference between them is that while we have just a fragmented knowledge of Socrates' trial, Joanna's trial is one of the most well-documented ones. Exactly the documents of her trial enable us to reconstruct Joanna's personality more authentically and precisely than that of Socrates.

Horváth draws more details in the picture of relation between the genius and the trial by viewing four documents: the first sentence in Joanna's case which was announced after she had solemnly denied her *conseils*; the second sentence – dated six days later – in which she was stigmatised as heretic because withdrawing of her denial; the sentence brought in her rehabilitation trial after twenty five years; and lastly the Pope's official letter – nearly five

[7] Ibid. 161–2.

hundred years after the trial – in which he canonised Joanna of Arc as a saint of the Catholic Church. To be burnt or martyrdom, in fact, does more for the genius than her canonisation. The genius grows higher above us with burning, while with canonisation it is us who can get closer to her, we become worthier of her.

Having a closer look at Joanna's genius, Horváth first puts her character in a historical perspective. He follows through the events of the Hundred Years War exposing Joanna's role in bringing about the turn favourable for the Frenchmen.

> "Man ersieht aus diesem kurzen Überblick, daß Johanna im kritischen Augenblick den Sclüssel der Lange fand. Sie erhob den Schattenkönig. Sie reahnte, daß die Entsetzung von Orléans infolge der Schwerigkeiten der Engländer möglich geworden sei. Sie hatte einen unerklärich großen kriegserfolg. Endlich gehört ihr die politische Weisheit der Reimser Königsweihe.
>
> Sie hat den Ausgang des Krieges, das Schicksal Frankreichs und das Rad der Weltgeschichte umgedreht. Die Entesung von Orléans ist eines der verblüffendsten Ereignisse der Weltgeschichte. Denn das Größte ist es nicht, die notwendig wirkenden Naturkräfte auszuschalten. Sondern das Größte ist das Vorhersehen Herbeiführen des plötzlichen, einmaligen, ungeahmten Umschwungwes der naturnotwendigen Vorgänge!"[8]

Inquiring Joanna's natural endowments, Horváth points out two physical aspects: her virginity and mannishness. All notes attest that Joanna had such a radiation that cooled down men's desires like an icy shower. On the other hand, it is extraordinary in itself that a seventeen-year-old peasant girl learns how to handle horses and arms, and she was a master of warfare from the beginning. Moreover, she dressed in men's clothes at the age of eighteen and she kept this till the end. Another aspect is the physical manifestations of her spiritual radiation. The author tries to give an unbiased account of Joanna's "psycho-therapeutic influence", telepathic capability and that of levitation carefully deliberating the available sources.

Scrutinising Joanna's psychical features Horváth emphasises the faculties of sensible perception, sharp observation and ability to size up the situations quickly. Regarding her intellectual capacities, she is the manifested simplicity: in opposition with her "common sense" stands her poor education. At her canonisation it came even to the Pope's mind that God chooses the fool

[8] *Rechtsstreit* IIa, 305–6.

to confuse the sage and the weak to perplex the strong. Among the theological virtues – faith, hopefulness, love – and the moral virtues – love, prudence, temperance and fortitude – Joanna's genius joins, above all, fortitude, faith and hope in itself. However, we should also add the shadows of her personality to this portrait of Joanna, if we want to paint a realistic picture. Disrespect for the parents, casual lack of truthfulness, braggadocio, outrage of wearing men's clothes, and, as the most important, the solemn denial of her divine mission and *conseils* in the trial – these faults shade and the at same time make her portrait more vivid.

Nevertheless, the shadows enhance the light of Joanna's genius whose signs Horváth analyses one by one. Using psychoanalytical means – inquiring the phenomena of intuition and memory –, first he tries to explain the nature of "creating vision" with which Joanna could recognise her own divine mission and the key to the historical situation. Horváth takes account of the "small signs" – the recognition of the king in Chinon, the case of the sword of Fierbois, the wind by Orléans, the jump at Baurevoir, and the cases of future-telling and telepathy – and following this the "great signs" – the sign brought to the king, the relief of Orléans, the royal council's revelation, the case of child of Lagny, and finally the withdrawal of denial of her divine mission.

However, Horváth is not content with his own reconstruction of Joanna's genius so he calls the "artistic authenticity" to help and he looks through the literature – beginning with Shakespeare through Voltaire, Schiller and Mark Twain till Shaw – in the frame of a literary essay presenting how writers interpret Joanna's character in different historical epochs.

Up to a short excursion, Horváth returns to the analogy of drama and trial when he discusses the sociological importance of the trial, this time emphasising the role of a genius' trial – and that of law generally – in the change of social values. After this introduction he presents the legal, political and diplomatic aspects of the trial. One of the most characteristic features of the trial is just interweaving these aspects.

At this point Horváth at last arrives at the territory on which he truly feels in his element – that is the field of legal aspects of the trial. He analyses the problems of establishing of the trial, the arrest, the extradition, the judicial authority and the competence. He takes the participants of the trial one by one paying special attention to recalling the figure of presiding judge, Pierre Cauchon – a talented diplomat who was captured in the web of his own tricks at the end, and all of the trial's odium fell on his head in the eye of posterity. The author emphasises that the trial shows the elaborateness of

canonical law in the respect of interrogative process and trial's documentation, and the judges tried to maintain the semblance of "fair trial". We could understand the importance of this, however, only if we know the peculiarities of canonical trial, of course, which Horváth enlightens comparing the inquisitorial and the adversary proceeding. The charge – which was evolved from the seventy questions of the trial's *promoteur* – is a masterpiece like in Socrates' case. The common characteristic of the twelve points of indictment that the facts are proved in all of them and their qualification is only a matter of assessment. This makes way for the unhindered predominance of political, diplomatic and church-political interests in the frame of strict legal formalities. The miserable role played by University of Paris calls special attention in this respect, since its theological "advisory opinion" seems to be more fanatic than the proceeding judges' views.

The dramatic culmination of the trial is the scene of the announcement of the first sentence: the announcement has to be interrupted, because in the middle of it Joanna declares that she withdraws her statements on her divine mission.

> "So endet diese unvergleichliche Szene. Mit Tumult und Steinhagel, mit gefoppten und wütenden Engländern, mit lachender Johanna und mit lachenden Franzosen, mit einem große Form zeigenden und diplomatisch lächelnden Cauchon. Ich glaube, daß diese Szene sämtliche Fäden der Geschichte und des Prozesses der Jungfrau am besten bildhaft zusammenfaßt.
>
> Keine menschliche, sondern göttliche Komödie wird auf diesem Bilde dargestellt. Denn sämtliche Teilnehmer sind Herren und Sklaven der Lage zugleich. Ein jeder von ihnen ist Sieger und Besigter zugleich. Ein jeder überlistet die anderen und wird zugleich vin ihnen überlistet. Die lehre des ganzen Bildes ist: vanitatum vanitatis!"[9]

Comparing to this, the tragic end is only a quick succession of events – Joanna's withdrawing her denial four days later, the announcement of the second sentence and the execution by burning –, these flow from the logic of the situation: soaring of Joanna's genius.

The movement aiming Joanna's canonisation was born by the foot of the stake – as Horváth notes – what clearly shows the change of social evaluation due to the clash of genius and law. The author examines the rehabilitation trial held twenty-five years later in the light of this consideration. For the judges the resolution was obvious: declaring the twelve points of indictment false, since – as we have seen it – the charge had been shaped in such a way

[9] *Rechtsstreit* IIb, 438.

that bringing guilty sentence depended solely on the qualification of the established facts. Concerning the moral responsibility for Joanna's destruction Horváth thinks that it was not the judges of the trial to have the heaviest responsibility but king Charles VII and the University of Paris.

Finally, in the last train of thought Horváth summarises the theoretical conclusions drowned from the comparison of the two trials. He re-examines the relations of genius and trial displaying their interactions in which the law contributes to the genius' creation as social phenomenon, while the genius fertilises the law with new values. Horváth actually draws a parallel between the psychological tensions aroused from the conflict of opposing desires and the intellectual tensions due to the contradiction of facts and values, and of legal cases and norms.

2 *Horváth's genius*

For an unbiased assessment of *The Trial of the Genius*' importance at first we should take in account what problems the author could or could not resolve within his own theoretical settings and what kind of new approaches could be opened up by it. From this point of view we should point out the following results and theoretical issues of Horváth's synoptic theory:[10] the logical formulation of the relation of facts and values; the elaboration of synoptic

[10] The presuppositions of the synoptic theory are identical with Kelsen's one's: the epistemological separation of facts and values and the acceptance of the requirement of methodological pureness. However, while Kelsen concludes from this that we have to decide whether law belongs to the facts' or to the values' empire, Horváth tries to overarch the opposition between facts and values by stripping the law of the rank being an autonomous object of cognition. If law is not an autonomous object of cognition then it has not any object-constitutive method in a Kantian sense. The law's proper method is the so-called synoptic method that is nothing but the constant changing of the methods of fact-cognisance and value-cognisance. "Die Methode der Rechtssoziologie ist also bloß eine spezielle Technik der Anwendung der naturwissenschaftlichen und der normwissenschaftlichen Methode, eine Methode der aufeinanderbeziehenden Beobachtung der Arbeit der beiden Methoden, eine Methode der funktionalen Sicht von Sein und Sollen, kurz: eine Methode der Methoden. Sie erweitert nicht die Erkenntnis, erobert kein neues Land des Alogischen für die logische Erfassung, sondern hilft bloß, das bereits gegenständlich Eroberte, in seiner Eigengesetzlichkeit Erkannte, durch gedankliche – vom Standpunkt seiner Eigengesetzlichkeit: willkürliche – Kombination, Aufeinanderbeziehung, in seiner praktischen Verwertbarkeit zu beleuchten. Sie will durch Zerstückelung des Gegenständlichen und Zusammenlegung heterogener Gegenstandselemente ein Denkgebielde erfassen, das durch die auf es gerichtete Schau und nur in ihr lebt. Es steht der Erkenntniss nicht entgegen, sondern schwebt bloß dem denken vor." (*Rechtssoziologie*, 62.) Consequently law is not an object of cognition but only a structural phenomenon appearing in the functional perspective of synoptic view.

method; the assertion of procedural attitude to the definition of law's concept; the exploration of law's social bases; the ascertainment of diminishing performance principle on the relation between social and legal evolution; the clarification of relations of social and legal rightness in the field of legal axiology; and last the working out the doctrine of legal positions in the frames of law's concept.

As I indicated in the introduction, according to my opinion Horváth could not correctly resolve the problem of separation and mediation of facts and values. The main reason for this is that Horváth did not work out the concept of subject – in whose mind the synoptic "picture" of law appears –, more precisely he sometimes used it in a concrete sense (psychological subject), sometimes in an abstract sense (transcendental subject). Several contemporary Hungarian scholars – eminently Lajos Cs. Kiss and Ágnes Zsidai[11] – pose that Horváth attempted to surpass Kelsen's theory relying upon the results of phenomenology and hermeneutics in his synoptic theory. Against this suggestion I have to underpin that Horváth never attained the use of phenomenology or hermeneutics in his theory. Although he studied Edmund Husserl's and Max Scheler's works – indeed he quoted them sometimes[12] – and they even might have inspired his theory, but the synoptic view has nothing to do with phenomenology: the value-selected knowledge of facts and the fact-selected knowledge of norms are quite different from the "phenomenological insight". It seems that the requirement of methodological pureness, (over)emphasised by Kelsen, prevented Horváth from seeing the thorough criticism developed by phenomenology on Kant's theory of methodological object-constitution which had been previously presented as a "Copernican turn" in epistemology.

As for hermeneutics, Horváth did not followed Martin Heidegger's work with attention – at least he never referred to Heidegger's works. However, the statement that neither the phenomenology nor the just unfolding hermeneutics influenced Horváth's theory seriously, is also true for most of Horváth's contemporary legal philosopher colleagues, among them for Kelsen, too.[13] On the other hand, it is obvious that Horváth came very close to such

[11] Cf. Zsidai (n. 3), 11–58.

[12] See *Rechtssoziologie*, § 14, n. 4, 35–36, § 52, n. 3, 164–165. Horváth refers to Husserl's thoughts about the differentiation of absolute form, *apriori* form and general form in the first mentioned note, while in the second note he cites Scheler's assertions on the war's positive role in the life of state.

[13] Cf. M. Paksy "Hippokratész ikrei: jog és filozófia a kelseni értelmezéstanban" [Hippocrates' twins: law and philosophy in the Kelsenian doctrine of interpretation] *Világosság* [Kelsen II] 2005/11, 55–66. Cs. Varga "Kelsen's Theory of Law-application" *AJH* 36 (1994)

an insight. Let us recall his explanation in *The Trial of the Genius*' last chapter in which Horváth describes the process of legal evolution as a constant exchange of the fact and value elements![14]

Thus, regarding it from a strictly philosophical point of view, Horváth was not able to resolve the epistemological problem of separation and mediation of facts and values. To reach this, he should have re-considered all his philosophical presuppositions, what he did neither in *The Trial of the Genius*, nor in his subsequent works. However, what he could not conceptualise as a philosopher, he could realise in *The Trial of the Genius* as a historian. Since, as we know it, the historian speaks to us in two ways at the same time: on the one hand he tells us what happened (narrative), on the other hand what that means for us (theory).[15] The meaning is just born from the observer's (historian's) evaluating the facts. It is the historian's task to make a balance between the two kinds of speech. He should not sacrifice the details for the sake of certain pre-empted interpretative scheme or value desired to be justified, nevertheless he should not be lost in the presentation of details at the same time. One of the greatest virtue of *The Trial of the Genius* is that Horváth harmonises the narrative and theory in a masterly manner and not only in the structure of the work but also in the material of the text. Simultaneously these two kinds of speech make it possible for the author to overcome the theoretical vagueness of the subject of cognisance. Sometimes we hear the impartial, "objective" and impersonal voice of a scientist's "abstract subject" talking about the facts, other times the personal voice of the author who deliberates on the facts and who forms an opinion about them.

Horváth does not bring his earlier explained ideas on the value-bases of law (its rightness and its social performance) and the change of law into the discussion in *The Trial of the Genius*, even if it was evident. However, the genius' trial obviously is not an example for the "typical working" of law when the judges curve the law to the new values by the "free finding of law" and

1–2, 3–27; S. Paulson "Kelsen on Legal Interpretation" *Legal Studies* 1990/10, 136–52; Ch. Perelman "La Théorie Pure du droit et l' Argumentation" in *Law, State and International Legal Order. Essays in Honour of Hans Kelsen* (Knoxville 1964), 221.

[14] "Gerade der Rechtsstreit des Genius belehrt uns nämlich darüber, daß die Rollen ausgetauscht werden. Der Rechtsfall und die lebendige Seele in ihm bringen den neuen, höheren Wertgesichtspunkt, im Vergleich zu welchem die Wertung des Rechtssatzes auf die Ebene einer veralteten Tatsächlichkeit zurücksintkt. Das zeigt die Relativität und den Austausch der Wertgesichtpunkte." *Rechtsstreit* IIb, 459.

[15] Cf. J. B. White*The Legal Imagination* (Abr. Ed.) (Chicago: Chicago U. P. 1985), 263; Idem "Fact, Fiction, and Value in Historic Narrative: Gibbons' Road of Rome" in *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Madison, Wisconsin: The University of Wisconsin Press 1985), 139–67.

the natural law is breathed in the law through the pores of legal cases. The genius' trial demonstrates another phase or way of a legal change: the law strikes down on the genius who embodies the new value, but this dramatised clash between the old and new values starts to change the social value system, so the new value shapes the law through such a historical roundabout in this case. From this point of view *The Trial of the Genius* could be seen as an implicit complementation of Horváth's earlier theory, rather than as its organic further development.

On the other hand – as István Bibó, Horváth's former disciple, already emphasised[16] – the procedural view of law plays an important role in the interpretative theoretical structure of the genius' trial's material. Horváth pays much attention to the theoretical analysis and description of the two trials' procedural aspects exposing the difference between the "acoustics" of the modern, adversary and that of the Attic or inquisitorial proceedings. The characters' scope of action becomes much clearer in this perspective and it is also clearly seen what a pre-eminent role law plays in the development of the dramatic action in general. Recognising the importance of procedural view of law certainly helped Horváth discover the potentials inherent in the combination of drama and trial when he studied the American legal realism.

Obviously, this insight is Horváth's most original theoretical result, even if we take in account that he borrowed his invention partly from Arnold's ideas, because he creatively re-interpreted that. Although Horváth was far from realising all the potentials lying in the concept of drama, still we can say that he made important steps towards – saying it with Józef Tischner's words – converting his legal theory from a "philosophy of stage" into a "philosophy of drama".[17] The philosophy of law will remain a "philosophy of stage" until it presents law as a social institution or as a system of norms ruling the social actions and focuses its attention on the relation of law and man. The first step towards a "philosophy of drama" is standing the man–man relation in the centre of legal theory, considering the dialogical openness of law. In this respect Horváth's genial intuition – about an intuitive advance of Emmanuel Lévinas' philosophy – is that deep and careful attention with which he paints Socrates', Joanna's, and Cauchon's portraits: these vivid faces speak to us.[18]

[16] I. Bibó "Horváth Barna: A géniusz pere: Socrates – Johanna" [Barna Horváth: The Trial of the Genius: Socrates – Joanna] *Szellem és Élet* 6 (1943) 3–4, 174–7.

[17] J. Tischner *Filozofia dramatu [The philosophy of drama]* (Cracow: Znak 1998).

[18] E.g. Horváth writes about Joanna: "Man versteht dieses Antlitz, wenn man dem Bruckstück des Trocadero in die Augen blickt, dessen Abbildung man bei Blennerhasset auf S. 112 findet. Viele der aufgezählten Züge sind ihm abzulesen. Man findet daran die Tapferkeit

Cs. Kiss sees rightly that the concept of drama opens possibilities for Horváth to make reflections on the metaphysical bases of law, although he explicates them even less than the concept of drama itself: in fact, he limits himself just to a few remarks. However, the outlines of basically optimistic and humanistic metaphysics are taking shape from these references. That is the man's striving after Good is not a futile one and the change of law is not an aimless or meaningless movement. "Der Genius versetzt der Rechtsentwicklung von Zeit zu Zeit mächtige Stöße. Es gibt auch einen Fortschrift auf einer einzigen Entwicklungslinie in dem Sinne, daß das Recht immer neuere, gereinigtere sittliche Wertungen absorbiert."[19] The law's "metaphysical excellence" stems from the fact that it serves the human evolution even when it scaffolds the stage for the dramatic clash between the social milieu and the genius personifying the new value.

Another important aspect of the originality of the work is the multifaceted character of its theoretical structure. Horváth successfully integrates the historical, sociological, political, social and gestalt psychological, literary theoretical, philosophical, and legal philosophical points of views in his analysis establishing a kind of – saying it with the nowadays so popular term – a "holistic view". Although Horváth does not confine himself to combining different scientific points of view but he further progresses on the way of elaborating the forms of expression towards integrating science and art, law and literature. That is why Cs. Kiss accurately calls *The Trial of the Genius* a "scientific work of art".[20] In the present study I do not want to engage in analysing the purely aesthetic values of this new quality creating work in details, but only to refer to the two earlier exposed elements which are also the sources of the work's aesthetic values. One of them is Horváth's proper technique of argumentation, that is, the combination and alternation of the dialectic intellectual tensions inherent in the drama and the dramatic ten-

und die Todesverachtung. Man findet den spöttischen Humor im Lächeln. Man sieht eine gleichsam asketische Entschlossenheit und Ausdauer. Am wenigsten ist ihm das Bauernwesen anzusehen. Um so mehr aber die jenseitige Erleuchtung, die Einsamkeit und das mystische Sich-Hinwegsehnen. In diesem Sich-Hinwegsehnen, im jenseitigen Glanz des Gesichts kommt eine spirituelle Schönheit zum Ausdruck, die jede körperliche Leidenschaft entwaffnet und in eine Hindebung zur Zache verwandelt. Es schwebt über dem Gesichtsausdruck ein mystisches Lächeln, das von der Verachtung der Furcht und des Leidens spricht und die Waffen des Humors gegen die Erdenreste des Lebens aufblitzen läßt. In diesem Lächeln strahlt die Kraft einer vergeistigten Ruhe, die rhytmischen Flügelschlägen zu den Geheimnissen emporhebt, die diese träumenden Augen, mit denen sie in dieser Welt schlafwandlerisch herumging, klar gesehen haben." *Rechtsstreit* IIa, 315.

[19] *Rechtsstreit* IIb, 459–60.

[20] Cf. Cs. Kiss (n. 5), 11; 232–3, 234.

sions inherent in the dialectic thought. The other is treating the tensions between the narrative and theoretical structural elements in a masterful way.

For better understanding Horváth's genial attempt to combine law and literature – which was certainly path breaking in his own time – it is worthy to recall James Boyd White's thoughts. White emphasises that the field of "law and literature" is an interdisciplinary one. Nevertheless we should not treat interdisciplinary studies in the way subordinating one scientific field to the other as e.g. using literary methods and terms in inquiring of law or *vice versa*. Interdisciplinary studies demand an integrative approach.[21] That is, we have to consider that when combining law and literature we create a new quality which does not exist either in the field of law or in that of literature. In this new quality both law and literature save their autonomy but their combination opens a new perspective in studying law. Viewing law from this perspective "[j]ustice and ethics its natural subject, art its natural method".[22]

[21] J. B. White "Intellectual Integration" in *Justice as Translation. An Essay in Cultural and Legal Criticism* (Chicago–London: University of Chicago Press 1990), 3–21.

[22] White (n. 15), 44.

Critical Remarks on Alexy's Theory of Principles

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1 What are Principles?

In recent decades, various theories have postulated that principles have a structure distinct from that of rules (or norms).[1] This contribution introduces and critically analyzes these theories (esp. the one of Robert Alexy) in order to develop a new approach to the concept and function of principles.[2] Its main thesis is that "principles" should not be conceived as structurally different from "rules"; a "principle" means simply a "very *important* rule", so the differentiation is of rhetorical nature. This result does not deny, however, the existence of special functions bound to "principles". It simply wants to get rid of a superfluous common place on the distinct logical structure of principles. It is superfluous because the phenomena explained by it can also be otherwise (i.e. by the traditional rule paradigm) explained. Its introduction, thus, only superfluously, unnecessarily complicates the explanation.

1.1 Key Authors of the Second Half of the Twentieth Century

One of the most influential, German-language works on the problematics of principles is Josef Esser's book, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956).[3] As a predecessor to Esser, the Austrian

[1] I am very grateful to Stefan Häußler and Matthias Goldmann for their valuable criticism and comments.

[2] J. Esser *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (1956); R. Dworkin *Taking Rights Seriously* (1978) [hereinafter TRS]; R. Alexy "Zum Begriff des Rechtsprinzips" *Rechtstheorie* Beiheft (1979) 1, 59–87 [hereinafter ZBR]; R. Alexy *Theorie der Grundrechte* (1985) [hereinafter ThGr]; R. Alexy "Zur Struktur der Rechtsprinzipien" in B. Schilcher et al. (eds.) *Regeln, Prinzipien und Elemente im System des Rechts* (2000), 31–52 [hereinafter ZSR].

[3] Esser (n. 2).

Walter Wilburg comes to mind. Under "elements", he understood fundamental principles of a legal subject-matter or of a legal concept. Elements, according to him, have a more-or-less structure and play an orienting and systemizing role.[4] As a point of origin, then, a comparison with the most influential book in the Anglo-Saxon area, namely, Ronald Dworkin's *Taking Rights Seriously* (1977), may be instructive.[5]

Both authors stress that, in a legal order, principles (*Grundsätze*) and rules (*Normen*) exhibit differing logical structures, not with a merely gradated differentiation but with strict separation. What according to the authors is the difference between principles and rules? To answer this question, we now turn to Robert Alexy, who departs from Dworkin but is also well aware of Esser.[6] Alexy elaborates on the distinction in more theoretical detail and with more analytical sensitivity than the other two authors.[7]

Alexy dismisses as unsound the Dworkinian criterion for distinction, which attributes to rules – as opposed to principles – an all-or-nothing character and maintains that exceptions can generally be listed out exhaustively.[8] Alexy asserts that *both* rules and principles have exceptions which cannot be exhaustively listed. According to him rules only have an all-or-nothing character when one assumes a proviso limiting application of the rules to cases "when no principle legally requires something else" or "when no legally essential reasons demand something else." But the problem is that, in this sense, even principles have an all-or-nothing character; thus, this distinguishing criterion can be dismissed.

Instead, Alexy suggests applying "optimization" as the differentiating criterion.[9] In this sense, principles are optimization imperatives, that is, imper-

[4] See W. Wilburg *Elemente des Schadensrechts* (1941); Idem *Entwicklung eines beweglichen Systems im bürgerlichen Recht* (1950).

[5] We are not dealing with later changes in Dworkin's point of view concerning principles, cf. R. Cotterrell *The Politics of Jurisprudence* (2003), 166f.

[6] See ZBR, 67; ZSR, 31.

[7] See n. 2.

[8] ZBR, 68ff.

[9] Alexy still speaks of "ideal" and "real" obligations (*Sollen*). See ZBR, at 79ff. In this sense, an ideal obligation is any obligation that does not require that its content actually and legally be possible in its entirety, but requires that fulfillment be as extensive or approximating as possible. (Ibid. 81.) The other differences (degree of universality or how they handle cases of conflict; these will be addressed below) can be explained on the basis of this difference. However, in his most recent summary, he no longer mentions the concept, instead discussing optimization as criterion for distinction. (See ZSR, 31ff.) Thus, we will not deal with the complicated and vague criterion of "ideal obligation" here; rather, we will focus only on Alexy's most recent formulation of the distinguishing criterion.

atives that can be fulfilled to varying degrees (optimization postulate). In contrast, rules are norms that can always only be either fulfilled or not fulfilled.[10] They are, thus, definitive imperatives. With this formulation, Alexy basically reformulates the Dworkinian criterion, so that it is no longer vulnerable to the abovementioned objection regarding provisos.

The other difference – asserts Alexy – becomes clear in cases of conflict. In conflict of rules, the collision is either resolved by rules of conflict (for example, *lex posterior*), or one of the rules is declared invalid. Conflicts of principles, however, are settled within a contingent relation of precedence between the two relevant principles, considering the circumstances of the case.[11] Precedence means that the legal consequence attached to the given supreme principle obtains, as opposed to the consequence of the conflicting principle. Typical conflicts of principles include conflicts between two fundamental rights.

And the final difference between rules and principles according to Alexy is that principles involve a "the more X, the more Y" formula. The reasoning proceeds thus: if one violates a principle in the name of another principle, then the more the intrusion in the former, the more the need for justification by the latter.[12] Thus, the judge need not subsume in such cases (as opposed to cases involving rules); rather, she or he must balance competing principles. It follows from this weighing and balancing that the theory of principles implies the principle of proportionality, and the other way around.[13]

The following analyzes potential objections to this concept.

1.2 Objections

Balancing? An objection brought forth by Jürgen Habermas counters that such balancing cannot be characteristic of principles because this would mean that rights were no longer trump.[14] That is to say, fundamental rights would become limitable.

Indeed, following this (Alexian) concept of principles, fundamental rights are not illimitable. Yet they have a solid core; and the greater the intrusion, the stronger is the protection of the given fundamental right. Fundamental

[10] ZSR, 32.
[11] Ibid. 34.
[12] Ibid. 36.
[13] Ibid. 35.
[14] J. Habermas *Die Einbeziehung des Anderen* (1996), 368.

rights, then, can be limited, but only in accord with the principle of proportionality.[15] The Habermasian objection thus fails to persuade.

Optimization? Others direct their objections toward the optimizational quality of principles. One such example comes from Aulis Aarnio and Jan-Reinard Sieckmann.[16] They object that principles and rules are not distinct in character, since even in the case of optimization "[e]ither one does or does not optimize. For example in the case of conflict between two value principles, the principles must be brought together in the optimum manner, and only in the optimum manner."[17] Optimization imperatives, therefore, have the structure of rules.

The problem with this objection is its intermingling of the object level and the meta-level.[18] That is, (1) the "optimization of *A*" cannot be equated with (2) an "imperative to optimize *A*". The latter, as optimization imperative, need not be optimized itself, but must rather be *followed* (or *fulfilled*) by way of optimizing.

Another objection with respect to optimization can be associated with Jürgen Habermas.[19] The objection states that principles have a teleological character irreconcilable with the binary character of law (teleological objection). Specifically, law implies either a *Yes* or *No* (binary encoding of claims to validity; unequivocal correctness).

In response to this objection, one might point out that many situations under law cannot be resolved in a simple binary scheme.[20] For instance, claims for damages always involve balancing.

The counterarguments against these objections to the optimizational quality, then, seem persuasive.

Distinct Structure of Principles as Shown by Conflicts? Manuel Atienza and Juan Ruiz Manero raise a further objection, by which principles could be reformulated as all-or-nothing rules.[21] Every principle (generally, a fundamental right) could then be qualified with a conditional clause, such as "and

[15] For Alexy's answer, see ZSR, 50ff.

[16] A. Aarnio – J.-R. Sieckmann "Taking Rules Seriously" *ARSP* Beiheft 42 (1990), 187; J.-R. Sieckmann *Regelmodelle und Prinzipienmodelle des Rechtssystems* (1990), 65.

[17] Aarnio – Sieckmann (n. 16), 187.

[18] For Alexy's answer, see ZSR, 38f.

[19] J. Habermas *Faktizität und Geltung* (⁴1994), 310f.

[20] Alexy's answer, see ZSR, 47ff.

[21] M. Atienza – J. R. Manero *A Theory of Legal Sentences* (1998), 9ff.

so long as no contrary principle *of greater weight* requires something else." Thereby principles become all-or-nothing rules.

Here, the problem is that the term *greater weight* itself implies balancing.[22] That is, which principle carries greater weight is itself a question of balancing to determine respective weights. So balancing is not avoided; instead, it is made explicit in the conditional clause.

Another answer could be that, while the conditional clause may convert principles into all-or-nothing rules, this is still far from their becoming all-or-nothing rules themselves. Otherwise, the conditional clauses would of course be superfluous. The addition of the conditional clause simply serves to take in the meta-imperative to optimize. Thus, Ruiz Manero and Atienza make the same error as Aarnio and Sieckmann (see *supra*), who mix the all-or-nothing character of the meta-imperative with the balancing nature of principles on the object level.

The More X, the More Y? With a critique, partially directed against the above-described Alexian concept, Ota Weinberger denies the "the more X, the more Y" character of principles.[23] A good counterexample is *ne bis idem*, which is the fundamental principle of criminal law in most modern legal orders, though it obviously lacks this formulaic "the more X, the more Y."

The Alexian concept should thus – Weinberger proceeds – be altered so that, while principles remain optimization imperatives, they do not necessarily have a "the more X, the more Y" character.[24] Whether and to what extent optimization imperatives without such character are possible, is beyond the scope of this discussion, not least because a much more persuasive objection *(Superfluous Concept, infra)* makes this logical distinction completely superfluous.

Superfluous Concept. According to the final and decisive objection, the concept of "principles logically distinct from rules" is simply superfluous.[25]

In order to understand fully this objection, we must digress briefly through the nature of the concepts of legal theory. Such concepts serve to

[22] For Alexy's answer, see ZSR, 45.

[23] O. Weinberger "Revision des traditionellen Rechtssatzkonzeptes" in Schilcher et al. (n. 2), 64; cf. ZSR, 36 (Alexy's opposing opinion).

[24] Weinberger (n. 23), 64 (recognizing the logically different form of principles but not as "the more X, the more Y" norms).

[25] A. Jakab "A magyar jogrendszer alapelemei" [Basic elements of the Hungarian legal order] *Jogelméleti Szemle* (2003) 1, 2.4 [http://jesz.ajk.elte.hu].

describe the mechanisms and structures of a legal order.[26] Such concept's definition is not "true" or "false"; rather, it is more or less expedient. One can speak of the truth or falsehood of the definition of a concept of positive law. For example, §13 of the German Civil Code fixes the definition of "consumer" for purposes of the Civil Code. Anyone who uses a conflicting definition in the context of the German Civil Code, then, might be blamed to use a *false* definition. Concepts of legal theory, however, are significantly more complicated in this respect. Specifically, they do not employ any direct standard.[27] All that matters is the expediency, which is to say, its explanatory force, its ability to explicate. A given conceptual system of legal theory, therefore, is better, if within its framework (1) the greater number of legal phenomena can be explained (2) coherently and (3) with the highest possible degree of simplicity (and (4) sometimes political and ideological factors also play a role[28]).

This yields another important difference between the conceptual approach of positive law and that of legal theory. We may not simply "forget" concepts in the positive law. We can debate over various definitions; but one thing we may not do: dismiss a relevant concept as superfluous. This we may only do with legal theory concepts, specifically, when they have less explanatory force than the definitions of other (competing) concepts of legal theory. When we can better deliver an explanation of the given legal order with a new concept(ualization), then we can toss the old one into the trash.

Our thesis postulates as follows: the concept in legal theory that describes a principle as having a logical structure distinct from that of rules is simply superfluous. The phenomena explained by the concept can also be otherwise

[26] F. Koja – W. Antoniolli *Allgemeines Verwaltungsrecht* ([3]1996), 2. For a similar analysis using different terminology, see G. Radbruch *Rechtsphilosophie* ([8]1973), 215 (distinguishing *Rechtsbegriffe* [concepts of law]) and *rechtswissenschaftliche Begriffe* [concepts of legal academia]).

[27] Unless we were to use definitions such as "the concept of principles, for Alexy, means..." or "under principles, such and such is usually understood." In these cases, one can of course say that the definition is true of false. But these would only be secondary statements of legal theory, dealing with what others have thought about the law. This is, however, not the case with primary definitions, which aim at a direct explication of certain legal phenomena.

[28] Generally, see Cotterrell (n. 5), at 11ff. As to the ideological background of the division of the legal order into public and private law, see Speech of Robert Walter (in Strobl am Wolfgangsee, Austria, on June 6–7, 1969), in *Zur Erneuerung der Struktur der Rechtsordnung: Gespräch über Wege zur Vermeidung der Zersplitterung des Privatrechts und zur Überwindung des Dualismus von öffentlichem Recht und Privatrecht* (year of printing unavailable), 49ff, esp. 50ff. As to the ideological background of the *Stufenbaulehre* (doctrine of hierarchical, or "step-structured," legal order), see T. Öhlinger *Der Stufenbau der Rechtsordnung: Rechtstheoretische und ideologische Aspekte* (1975), 32ff.

explained. Its introduction, thus, only superfluously, unnecessarily complicates the explanation, since the presence of multiple concepts of legal theory explains more complicatedly.

And what exactly does this concept – that is, principles logically distinct from rules – explain? The query is whether there might be a simpler (conceptually more economical) explanation without this concept. We believe there is. Which is to say, "principles logically distinct from rules" can also be understood as indefinite, abstract rules that are to be concretized through legal application.

Here, we will consider the German Federal Constitutional Court's decision in *Lebach* – which Alexy also analyzed – as our case study.[29] This judgment is intentionally selected, so that Alexy's "good example" can be repudiated.

The case involved the television station ZDF, which wanted to air a program about a murder in the town of Lebach. The program included the naming of an accomplice. After a court rejected the accomplice's motion for a preliminary injunction preventing the broadcast, he filed a constitutional complaint with the Federal Constitutional Court.

The constellation of the case, *explained by way of principles* (which is how Alexy describes it), is as follows.[30] The principle of the protection of personality (article 2(1) in connection with 1(1) *Grundgesetz* (German Constitution; hereinafter "GG")) and the principle of the freedom of reporting by means of broadcast (second sentence of article 5(1) GG), here, stand in conflict with each other. The determination of which principle takes precedence depends on a weighing and balancing of the *concrete circumstances*. Based on this balancing of competing factors, the Constitutional Court ultimately gave precedence in this concrete case to the protection of personality.

But we can explain this case using (Alexian) *rules*, as well. Both rules (articles 1(1) in connection with 2(1) GG on the one hand, and article 5(1) GG on the other) are very general rules which must be concretely interpreted in a concrete case. The Federal Constitutional Court held the freedom of reporting, here, inapplicable (that is, it interpreted this constitutional provision such that it did not encompass this concrete case). In contrast, the Court found article 2(1) in connection with 1(1) GG applicable to the case. This, *not* because "balancing prefers the one principle or the other," but because "the relevant rules were interpreted such that the case only falls within the scope of the one." Once we drew the borderline between the two principles,

[29] BVerfGE 35, 202.
[30] ThGr, 84ff.

there remains no doubt or discretion whether our case is under the scope of the one or of the other. It is either under it or not, *tertium non datur*. If there is a different case we might be detail the borderline more precisely which now also should deal with the special new problem occurred, but if the material facts of the two cases are the same, then there is no need to deal with making the borderline more detailed or precise. A balancing only takes place insofar as is always the case with teleological (or purposive) interpretation and only before drawing the borderline.

So we can deduce that the concept, "principles logically distinct from rules," is simply *superfluous* since the problems of applying the law it explains can be explained without it.

1.3 So What Are *Principles?*

Thus, principles are not logically different than rules in structure. Principles are *very important* (or fundamental, or basic) general rules (or more accurately: structural decisions). The designation as a "principle" expresses this importance. So whether or not we designate a general rule as a principle functions as a *rhetorical* handle. Such a terminological handle, however, is only to be used in cases of very general rules.[31] It would be implausible to speak of the fundamental *importance* of a minutely concrete rule.[32]

This rhetorical nature of principles should not be (mis)understood as pejorative. It simply indicates that the difference between principles and other general rules does not pertain to its normative, theoretical nature. To put it another (better) way: the designation as a principle can only have normative, theoretical meaning, when construed so as evidence of the legislature's decision about the rule's importance. Thereby, in turn, (by historical or subjectively teleological interpretation) precedence is to be given to whichever of two possible interpretations conforms with so called "principles".

And why are the various principles to be considered important? Of course, there is no simple, single answer.[33] Some would emphasize the explicitness of their evaluative content;[34] their referentiality to the legal idea[35] or to a

[31] Cf. J.-L. Bergel *Théorie générale du droit* ([3]1999), 91 ("c'est la généralité...").

[32] Even more rhetorically emphasized is the expression "general principle" (*principe général, allgemeiner Rechtsgrundsatz*). If principles are to be understood as "very important" rules, then the expression "general principle" can be decoded as "very, very important" rule.

[33] The following overview is based on ZBR, 65f.

[34] C.-W. Canaris *Systemdenken und Systembegriff in der Jurisprudenz* (1969), 50.

[35] K. Larenz *Methodenlehre der Rechtswissenschaft* (1979), 207, 410.

supreme legal rule;[36] their significance to the legal order;[37] the certainty of their insight; or their universality. Others would speak of principles' specific meta-normative functions. These will be discussed below *(Section 3.3)*.

It seems appropriate at this point to mention some relevant differences of opinion between Esser and Dworkin. Firstly, for Esser, a principle implies greater discretion for the judge, since she or he must shape such principles. For Dworkin, in contrast, a principle serves to restrict judicial discretion.[38] Esser sees principles as the justification for decision; Dworkin sees them as instructive (legally binding guidelines).[39] Secondly, Esser characteristically excludes ethics from the analysis,[40] but Dworkin considers principles to be ethical principles, whose very presence in the legal order evidences the untenability of the positivistic division between law and morality. And, thirdly, legal principles for Esser are only created by way of their use in judicial decision-making.[41] For Dworkin, legal principles are valid *because they are just* (assuming they are coherent with the respective legal order).[42] Which author correctly answers these questions will be discussed now in turn.

Firstly, the question, whether the presence of principles in a legal order contradicts the positivistic division between law and morality, can be answered with an unequivocal No. Even were we to recognize structurally distinct principles, this would not necessarily imply the end of the positivistic division between law and morality.[43] At any rate, we have just finished refuting the logical difference. Secondly, the two authors disputed the nature of principles' validity. But nothing compels the acceptance of a (non-positivistic) nature of validity that is distinct from that of (other) rules.[44] Thirdly, Esser and Dworkin dispute whether a principle gives a judge

[36] H. J. Wolff "Rechtsgrundsätze und verfassungsgestaltende Grundentscheidungen als Rechtsquellen" in O. Bachoff (ed.) *Festschrift für Walter Jellinek* (1955), 37ff.

[37] Larenz (n. 35), 464; A. Peczenik "Principles of Law: The Search for Legal Theory" *Rechtstheorie* (1971), 30.

[38] See J. A. Pascua "Die Grundlage rechtlicher Geltung von Prinzipien: eine Gegenüberstellung von Dworkin und Esser" in *Prinzipien des Rechts* (1996), 24.

[39] Cf. Esser (n. 2), 51f.

[40] See Pascua (n. 38), 22, n. 31. This is why Esser can be counted among the positivists. See E. Wiederin "Regel – Prinzip – Norm: Zu einer Kontroverse zwischen Hans Kelsen und Josef Esser" in S. L. Paulson – R. Walter (eds.) *Untersuchungen zur Reinen Rechtslehre: Ergebnisse eines Wiener Rechtstheoretischen Seminars 1985-86* (1986), 155. On similarities between Hart and Esser, see Pascua (n. 38), 18.

[41] See Pascua (n. 38), 19f.

[42] Ibid. 28.

[43] J. Raz "Legal Principles and the Limits of Law" *Yale L. J.* 81 (1972), 823, 851ff.

[44] See ibid. 852 (coming to the same conclusion).

greater or less discretion; the answer depends on the moment of analysis and whether the principle is "positivized". (a) When dealing with a positive (or "positivized") principle, that is, when the principle can be found in a normative text (like a statute), then the moment of analysis makes no difference. The interpretive discretion, here, is certainly greater than with rules because the principle's higher generality permits more room for interpretation.[45] Discretion is, of course, less than with a rule that itself confers discretion. (b) A principle developed by judicial practice, however, restricts previous discretion, but only from the moment at which the principle becomes actually binding. Thus, this does not apply to the initial point in time, for example, when the principle is first formulated in an opinion. This restrictive effect, then, only becomes observable in later judgments.[46]

2 How Can Principles Be Ascertained (Recognized)?

The next question regarding principles asks how they can be ascertained, or recognized, in a concrete legal order. This inquiry may not be as decisive as if the difference between rules and principles was a logical, structural one, but it remains nonetheless unavoidable.

(1) The first case is when a principle is explicitly anchored in a legal text.[47]
(1/A) Within this category, the text itself can call its rule a "principle."
(1/B) In other instances, only the general rule is anchored, without being dubbed a "principle" by the text itself. Such a designation usually occurs in the course of judicial application or among legal scholars. In these examples, it is more appropriate to speak of the *recognizing* of principles.

(2) Another constellation has the principle ascertained (or manufactured)

[45] Cf. ibid. 846.

[46] In this sense, too, we can understand the effect that codification (or "positivization") of principles has on the separation of powers. (1) The judiciary exercises greatest discretion when the legislature has prescribed neither concrete regulation nor principles. This is of course practically irrelevant, as in such a case the judiciary has not been given jurisdiction to decide (without at least a prescription of principles, the empowerment would at any rate only be based on arbitrary decision). (2) When the legislature does not pass any detailed regulation (instead, only a *principle*), greater discretionary room is left open to the judiciary than with concrete regulations. (3) But, when the legislature passes concrete regulation and positivizes an (underlying) principle, it thereby actually restricts the judiciary's room for discretion (as against the legislature), because principles further restrict judicial interpretation of concrete provisions (which leave less room for discretion anyway).

[47] Weinberger (n. 23), at 60.

through analysis of positive law.[48] This analysis can take place by way of either abstraction[49] from concrete rules or scrutiny of the political and moral context. The former is the traditional method; Dworkin makes use of the latter. According to Dworkin, the principles of a given society's political morality manifest themselves in the constitution, the laws, and legal precedence.[50] Thus, the emergence of a principle out of the positive law requires that political morality be kept in view. Only in this way can the legal system be justified, thereby also justifying the ascertainment of its most important norms as proceeding from political morality.[51]

(3) Principles can ultimately also be newly introduced simply through judicial practice or within legal scholarship.[52] This, however, seldom occurs, since such principles are vulnerable to accusations of arbitrariness. In such cases, the lack of a basis in positive law is offset by moral arguments (for example, natural law).[53]

(4) Finally, a combination of the above-named methods is of course possible, as well. If, for instance, a general rule is explicit in a legal text *and* has been given shape through much detailed regulation, then it has a good chance of being promoted by legal academia or in judicial practice to the rank of "principle."

3 *What Is the Function of Principles?*

And what, then, is the function of these *very important* general rules? They can, naturally, have the usual function of norms: they can be rules of conduct.[54] Due to their usually very general nature, this means they would act

[48] Ibid.; see also S. Vogenauer *Die Auslegung von Gesetzen in England und auf dem Kontinent* (2001), 1257ff, 1273f. (discussing British and French courts' role in this respect).

[49] For Pütter's attempt, see S. Jacoby *Allgemeine Rechtsgrundsätze* (1997), 38ff. The legislature's introduction of a legal principle is outside the scope of the present article, since a *single* legal order is prerequisite for such an analysis.

[50] TRS, 66, 126.

[51] J. F. Reitemeier (1755–1839) made a similar attempt, seeking to derive the general legal principles from the constitution, customs, and religion of a given country. See Jacoby (n. 49), 45.

[52] Weinberger (n. 23), at 60.

[53] G. del Vecchio "Les principes généraux du droit" in *Recueil d'études sur les sources du droit en l'honneur de François Gény* (1934), 73ff. (asserting that principles cannot be ascertained through induction from the rules).

[54] For an erroneous analysis, see H. Gross "Standards as Law" *Annual Survey of American*

indirectly, though not directly, to control conduct (that is, by way of interpretation of concrete rules). At the same time, this does not rule out principles' direct control of conduct.[55] But we are interested here in the particular functions of principles, which is to say, those *not* also characteristic of other rules. Let's have a look, shall we?

3.1 Heuristic Function

Legal principles, ascertained through analysis of positive law, often have a heuristic function. They assist in structuring and systematizing legal material to make it manageable.[56] This use of principles was characteristic of, for example, the Germanists (lawyers dealing with traditional non-Roman law in 19th century Germany), who confronted an unmanageable and contradictory mass of laws. Therefore, they attempted to trace particularist rights and customary rights back to so-called "leading principles" in order to effect a manageable, comprehensible structuring of the law.[57] A similar function, among others, is ascribed to the respective principles of democracy, the Rule of Law, and federalism in Konrad Hesse's standard textbook on German constitutional law.[58]

Structure and manageability of the law are also necessary for legal certainty,[59] which is in turn indispensable to the efficient operation of any society. It should also be noted here that a structure that serves purely epistemological purposes can also have normative effect. Namely, when we describe the law, and this is broadly accepted, we thereby also alter the law.[60]

Law (1968–9), 575–80, esp. 578. For him, principles are only rules of argumentation (as opposed to rules, which are rules of conduct). This, indeed, is one of their functions, but not the only. For an equally misguided opinion, see T. Eckhoff "Guiding Standards in Legal Reasoning" *Current Legal Problems* (1976), 205–19, esp. 207.

[55] Raz (n. 43), 841 ("Principles as the sole ground for action in particular cases").

[56] Compare Betti's viewpoint on principles as general educational figures, in Pascua (n. 38), 8.

[57] Jacoby (n. 49), 139ff.

[58] See K. Hesse *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* ([20]1999), 55ff. For the Hungarian counterpart in constitutional scholarship, see J. Petrétei *Magyar alkotmányjog [Hungarian constitutional law]* (2002) I, 83ff.

[59] Cf. A. von Bogdandy "Europäische Prinzipienlehre" in Idem (ed.) *Europäisches Verfassungsrecht* (2003), 152f.

[60] A. Sajó *Kritikai értekezés a jogtudományról [A critical treatise on jurisprudence]* (1983), 25f., 108f.; G. Jellinek *Allgemeine Staatslehre* ([3]1913), 50; N. MacCormick *Questioning Sovereignity: Law, State, and Nation in the European Commonwealth* (1999), 113.

3.2 Practical Legal Functions in Applying the Law

In application of the law, principles have practical legal functions, as well. *(1)* They play an important role in legal argumentation; in this sense, they are rules of argumentation.[61]

(1/1) The most apparent function is the interpretive function.[62] Specialized regulations must be interpreted in conformity with general regulation.[63] Thus, where two interpretations of a law are possible, preference is given to whichever is (more) compatible with legal principles.[64] This method, however, is inapplicable when dealing with clear wording; from what, again, exceptions are possible depending on the individual legal order.[65] Legal provisions which limit principles must themselves be interpreted restrictively.[66]

(1/2) Principles can also act as a corrective and as argumentative support for a desired outcome, to which the concrete rules would not lead (or would not *unequivocally* lead).[67] Principles carry out this function particularly in the application of law wherever the method of applying the law is inherent in the system – that is, where only valid *positive law*, *currently in force*, can be cited. An example is the Romanists of the historical school in 19th century Germany.[68] Here, the function pertains to one level of rules. The Romanists used these legal principles as a corrective and as argumentative support when the positive law failed (unequivocally) to yield the desired result.

Furthermore, the US case law which Dworkin made famous also can be, in my view, classified here.[69] In the first case, *Riggs v. Palmer*,[70] the concrete rules foresaw inheritance by a grandson, but these rules failed to answer in the case because he had killed his grandfather. Invoking the principle, "no one shall be permitted to take advantage of his own wrong," the court identified an exception to the concrete provisions. In the second case, *Henningsen*

[61] Eckhoff (n. 54), 205–19, esp. 207; Gross (n. 54), 575–80, esp. 578.
[62] J. A. Usher *General Principles of EC Law* (1998), 122f.
[63] Raz (n. 43), 839 ("Principles as grounds for interpreting laws").
[64] Vogenauer (n. 48), 1274.
[65] Ibid.
[66] Ibid. 1275.
[67] Raz (n. 43), 840 ("Principles as grounds for particular exceptions to laws").
[68] Jacoby (n. 49), 115ff.
[69] TRS, 23f.
[70] 115 N.Y. 506, 22 N.E. 188 (1889).

v. Bloomfield Motors, Inc.,[71] the court held, contrary to the concrete contractual provisions, for an ordinary consumer in the name of the principles of justice and equity.

(1/3) Reaffirmation of the holding. In Austria, § 7 of the General Austrian Civil Code (ABGB) was often applied, though only as additional authority for the reasoning and the holding, which had already been derived from the concrete positive law.[72]

(2) A principle's abstractness also permits for the possibility of *formally* applying rules *not in force* within the legal order of law that *is* in force.

(2/1) Gateway for legal rules *no longer* formally in force. In this way, for instance, after the passing of the *Code civil* in France, the Roman law could continue to have effect in the *principes généraux*, although the legislator had actually derogated from the Roman law.[73] The "general principles" (*allgemeine Rechtsgrundsätze*) of § 7 of the Austrian Civil Code (1811 in Austria) had a similar function.[74] They meant, in reality, "principles of Roman law." Similar interpretations were foreseen for the equivalent provisions of the *Codex Maximilianeus Bavaricus Civilis* (1756 in Bavaria), the Prussian *Allgemeines Landrecht* (1794 in Prussia), and the *Badisches Landrecht* (1810 in Baden).[75]

Whether and how these provisions were applied in *practice*, however, is a separate matter. The two poles are Prussia and France. In the former, application of law based on introductory article 49 of the *Allgemeines Landrecht* virtually never took place.[76] But in France the *principes généraux* truly were the normative bases for numerous decisions, namely, the basis for application of the rules of the (formally no longer in force) Roman law.[77]

[71] 32 N.J. 358, 161 A.2d 69 (1960).

[72] Jacoby (n. 49), 89ff. § 7 ABGB: "If a case cannot be decided with reference to the words of the law, regard shall be had to analogous cases explicitly dealt with in the Code and to the policies underlying other kindred laws. If the case still remains in doubt, it shall with careful consideration of the surrounding circumstances, be decided according to the principles of natural law."

[73] Ibid. 75ff.

[74] Ibid. 63ff.

[75] Ibid. 57ff., 81ff.

[76] Ibid. 100ff.

[77] Ibid. 104ff. Austria's middle position has already been mentioned above (as "reaffirmation of the holding").

(2/2) Gateway for rules of *other* legal orders, or bridging function between *differing* legal orders. Principles permit the discovery of common ground among multiple legal cultures. This function has a heightened importance where representatives of multiple legal cultures simultaneously participate in the determination of law (as with Community law or international law)[78] without any detailed procedural regulation. In such cases, the legal solutions of state legal orders are applied. Thus, legal principles play a very important role (especially in the two mentioned legal orders).

(2/3) Gateway for (social and political) notions of morality. Interestingly, both positivists (Kelsen, Merkl) and the natural law scholar Giorgio del Vecchio emphasized this function of principles. The positivists always saw within the very general rules a possibility for discretion.[79] And "discretion is the doorway in the legal building through which extralegal motivations can break in."[80] For these two authors, extralegal motivations would include, for example, notions of morality. The Italian natural law scholar Giorgio del Vecchio proceeds from an entirely other origin to a similar endpoint. He considers the presence of principles in various legal codes to be an indication that even the legislator agreed: without these moral rules, no legal code can operate.[81] Thus, Vecchio does not only contemplate principles as an open door for any and all notions of morality (as do Kelsen or Merkl); rather, principles themselves are natural law merely codified into positive law.[82]

(3) And one last function follows from the previously discussed practical legal functions, namely, development of law.[83] A decisive novelty of Esser's theory – as opposed to the earlier methodological theory which had judges "discovering" principles – is precisely its emphasis on principles' law development function.[84] This function is characteristic in legal practice, in par-

[78] See ibid. 184 ff. (citing examples from international law); see also ibid. 210 ff. (citing examples from Community law based on article 215(2) of the EEC Treaty).

[79] Kelsen, however, is skeptical of law development by the judiciary. See Wiederin (n. 40), 146; H. Kelsen *Allgemeine Theorie der Normen* (1979), 97.

[80] A. Merkl *Allgemeines Verwaltungsrecht* (1927), 152 (author's translation of German original).

[81] Vecchio (n. 53), 78f.

[82] Ibid. 82.

[83] Raz (n. 43), 841 ("Principles as grounds for making new rules").

[84] Wiederin (n. 40), 139; Esser (n. 2), 83. Gény also emphasized this instructive function. See F. Gény *Méthode d'interprétation et sources en droit privé positif* (²1919) I, 41ff.; Bergel (n. 31), 98.

ticular where the legal order in certain aspects is underdeveloped and, thus, more dependent on the borrowing of other legal orders' solutions (again, as in international law or Community law.)[85]

Some argue that the legal force of acts of law is sometimes made dependent on their correspondence with legal principles (function as criterion of validity).[86] But one must keep in mind that this point of view can mislead. Granted, important rules are indeed often packed into higher ranking acts of law (for instance, into constitutions) as principles, subsequently serving as a standard, against which the validity of lower rules is tested. And a given constitutional court (or the ECJ) sometimes develops principles, treating them as constitutional law, though without an explicit constitutional reference (invisible constitution).[87] However, it is essential to bear in mind that these principles act as standard, not because they *are* principles, but because the have a higher rank (or, perhaps, because they are treated thus: invisible constitution). Naturally, principles have a greater chance of being incorporated into the constitution or being treated as constitutional law by the given constitutional court. But, while the correlation is certainly probable, it is also not inevitable. Some principles (such as the principles of civil law) are not incorporated into the constitution. This function as a criterion of validity, thus, is not specifically related to the nature of *principles* but instead relates to *hierarchy*.

3.3 Meta-Normative Functions

Principles can also fulfill meta-normative functions. Namely, (1) *ex ante* (e.g. programming the legislation)[88] and (2) *ex post* (the justification of rules).[89]

The literature emphasizes especially this justifying function, which can be based either on the legal order as a whole (the ideological-legitimizing function)[90] or, more often, only on a concrete rule or group of rules and

[85] Jacoby (n. 49), 170ff., 209ff.

[86] Usher (n. 62), 123f.

[87] The Hungarian Constitutional Court serves as an example. See e.g., 23/1990. (X. 31.) AB, translated in L. Sólyom – G. Brunner *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (2000), 126.

[88] See Pascua (n. 38), 10 (explaining the programming or orientating function); Raz (n. 43), 840 ("Principles as grounds for changing the laws").

[89] See Raz (n. 43), 839 (analyzing principles as values in law); N. MacCormick "'Principles' of Law" *Jurid. Rev.* (1974) 19, 224 ("underlying reasons and values").

[90] TRS, 105.

institutions. It is another question, whether these justifying principles themselves can be used in application of the law.[91]

It stands to reason that principles themselves can apply, assuming they have been "positivized," that is, they exist either in a legal norm or within judicial practice. But the mere fact that they justify and underlie other norms, of course, does not alone make them directly applicable.

3.4 Social Functions

Noteworthy social functions of a principle include (1) the reconciliatory integrating function and (2) the rhetorical integrating function.

The former signifies that the generality of principles also covers (regulates) those social conflicts not covered by concrete rules. Thus, such conflicts can be resolved in a legal framework, so there remain no legally unresolved conflicts leading to disintegration. This function, however, characterizes any very general regulation.

The latter signifies that the designation as "principle" underscores importance. This permits emphasis and explication of a society's common, important values, which in turn tends to promote integration.[92] After all, that which is highlighted as "important" – those general rules worthy of the noble title of "principle" – is a question of valuation.

[91] Cf. Larenz (n. 35), 207, 410 (answering negatively), and F. Bydlinski *Juristische Methodenlehre und Rechtsbegriff* (1991), 132ff. (answering negatively), with Bergel (n. 31), 97 (answering affirmatively).

[92] See Bogdandy (n. 59), 154 (detailing the task of a European doctrine of principles to promote identity).

*Legal Pluralism in Islamic and Jewish Law during their Formative and Classical Period**

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1 Introduction

According to current legal anthropology, legal pluralism has a variety of meanings. Lévy-Brühl's definition diverges in main points from that of Vanderlinden, Van den Berghe, Falk Moore, Pospisil and Griffiths, to name only the outstanding scholars debating the definition of the term.[1] In this article the term "legal pluralism" will be understood inclusively as a multiplicity of legal forms present in a given society.

Legal pluralism is not a modern phenomenon. The empire of the Achaemenians in Ancient Persia (6th–4th Centuries BCE) is probably the best example for legal pluralism in the ancient Near East. According to the Persian imperial policy each group could live according to its own laws and customs, and there was no attempt to promulgate an imperial law, nor was there any move to impose Persian law upon subject peoples. This autonomy granted for the conquered made it possible for the Jews to establish the final version of the "laws of Moses."[2] The legal system of Rome was clearly pluralistic, tolerating local customs which were at variance with Roman law. So were the so called barbarian kingdoms which followed the *Personalitätsprinzip*, se-

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[1] The definitions of legal pluralism of the authors mentioned are discussed in detail by N. Rouland *Legal Anthropology* (Stanford, Calif.: Stanford U. P. 1994), 42–65.

[2] It is now a widely accepted fact that the *Tōrah* as we know it at present was compiled during the Persian period. It is an open question, however, whether or not it was authorised by the Persian government. For the conflicting opinions about this problem see W. Watts (ed.) *Persia and Torah. The Theory of Imperial Authorization of the Pentateuch* (Atlanta: Society of Biblical Literature No. 17), containing the views of Peter Frei, Lisbet Fried, Joseph Blenkinsopp, Lester Grabbe, Gary Knoppers.

curing for each individual the law of his/her own people. But these were states, huge empires indeed, consisting of various nations, so the pluralism was in effect between different groups of peoples belonging to various religions, ethnicities, having different languages and writing systems.

Now, for the present purposes, we should narrow our understanding of legal pluralism restricting its application to one system of law and examining the inner pluralism of each system. Legal systems called by most taxonomies "religious," a term under heavy attack by some specialists are the case in point.[3] These systems have been developed during centuries following various legal doctrines advanced by legal scholars and legal schools. Islamic law is an evident example, so are Jewish and Hindu law, too. Zoroastrian law, although not as characteristically pluralistic as the other legal systems mentioned, is similar.[4] In this essay we examine the Jewish and the Islamic legal system according to their relation to legal pluralism and the role jurisprudence played in framing legal doctrines.

In modern scholarship the comparison of Islamic and Jewish law begun already at the beginning of the 20th Century. It was Robert Roberts who first devoted a detailed study to this question.[5] His undertaking was further carried on by Neusner and Sonn, whose work focused primary on the legal sources and main characteristics of the legal systems in question, rather than on legal institutions, as contrary to the approach of Roberts.[6] Judith Wenger took a step further in claiming that the basic features common in both systems are not only similarities but reflect to historic continuity, Islamic law thus being based on Jewish legal thinking, at least concerning the most important items.[7] Gideon Libson in his most current publications has shown the intense interaction between Islamic and Jewish law during the Geonic

[3] According to Werner Menski, the term "religious law" has no merit at all, because "it seems to indicate that, from a European perspective, such systems are somehow 'traditional,' 'backward,' and thus dismissible as deficient." Other scholars who are ready to accept this term have very divergent understanding about it. Huxley's *Religion, Law and Tradition. Comparative Studies in Religious Law* (London: RoutledgeCurzon 2002) contains the various approaches of Carmichael, Jackson, Ferrari, Welchman, Peerenboom, Menski, Huxley and Vanderlinden.

[4] About Zoroastrian legal pluralism see my forthcoming article: "The Jurisprudence of the Sasanian Sages" *Journal Asiatique* (2006) 2.

[5] R. Roberts *The Social Laws of the Qoran. Considered, and compared with those of the Hebrew and other codes* (London: Curzon Press 1925).

[6] J. Neusner – T. Sonn *Comparing Religions through Law. Judaism and Islam* (New York–London: Routledge 1999).

[7] J. R. Wegner "Islamic and Talmudic Jurisprudence: The Four Roots of Islamic Law and their Talmudic Counterparts" *Am. J. Legal Hist.* 26 (1982), 25–71.

period, in which Jewish legal practice adopted a number of Islamic norms and customs.[8]

2 *Legal pluralism in Jewish law*

It is an often repeated claim that legal pluralism stems from sociological pluralism because no society is homogenous, even segmentary societies are divided, though, evidently, not as much as modern societies are. It is hard to find a better example supporting this claim then Jewish law, particularly during its history between the final codification of the *Tōrah* and the redaction of the *Talmūdīm*.

2.1 *Legal pluralism during the second Temple period*

We are not informed in detail about the history of Jewish law after the Persian period and before the Maccabean revolt. The sources are meagre and in some cases unreliable. Inspite of this, we know that the outcome of the final redaction of the *Tōrah* was not a unified legal practice. By contrast, during these centuries we observe a legal pluralism never seen before, following the various interpretations of the law of the different religious groups and movements within Jewry. During the second Temple period Palestinian Jewry became divided by religious movements each distinguishing itself from the rest of the people according to its own interpretation of the law. The Samaritans, the Sadducees, the Pharisees, the members of the Qumran community, and the followers of John the Baptist and Jesus all had had their own interpretation of Mosaic law. There was none, however, who rejected to accept the *Tōrah* and its legal rulings, it being the fundamental text of religion and law. On the other hand, it was far from clear whether or not one should rely only and exclusively on the *Tōrah* or other (legal) sources are also to be taken into consideration. The answer of the Samaritans reflects a minimalist approach: only the *Tōrah* counts, and any other traditions and texts should be rejected. The agenda of the Sadducees seems to be very close to that interpretation, but – as we shall see later – the members of this aristocratic group were not pure literalists as they are often called. The Pharisees had their own tradition, containing a great deal of extra-Biblical rulings, rejected by both

[8] G. Libson "On the Development of Custom as a Source of Law in Islamic Law" *Islamic L. & Soc'y* 4 (1997) 2, 131–55; Idem *Jewish and Islamic Law. A Comparative Study of Custom during the Geonic Period* (Cambridge, Mass: Harvard U. P. 2003) [Harvard Series in Islamic Law 1].

the Samaritans and the Sadducees. The members of the Qumran community enacted new laws for themselves, which regulated everyday life based on their own interpretation of the Scripture. The Damascus Covenant, the Manual of Discipline and the Temple Scroll are the most important statutes to mention. For John the Baptist the law and its enforcement was of crucial importance: he was put to death because he insisted that even the king has to follow the rules of Mosaic law and is not empowered to disregard it and act against its rulings (Mark 6. 14–29). Law and its interpretation was an important agenda in the debates between Jesus and the Pharisees: the Gospels contain a great deal of questions put to Jesus by the Pharisees, which were in fact problems that stood in the spotlight of contemporary legal debates: the definition of work prohibited during Sabbath, washing of hands before meals, the wages of the worker, etc. Social pluralism, religious fragmentations, and legal pluralism thus went hand in hand.

2.2 The Pharisaic tradition

The Pharisees, a religious and political "party" emerging after the revolt of the Hasmoneans (165–160 BCE), had in many points different views from the Sadducees both in legal and theological matters. Their name *(p'rūshīm)*, stemming from the root *p-r-sh*, denoting to separate, is a symbol referring to the unique position they held in many points of ritual and law. In theological matters, their view differed in two points from that of the Sadducees: the Pharisees believed in divine providence and the resurrection of the dead, both beliefs rejected by their opponents.[9] For the Pharisees ritual purity was of extreme importance: being lay members of the community, they sought to follow purity laws prescribed for the priests only. They stressed the importance of the teaching, notably the teaching of the law.[10] We learn from Josephus Flavius that the Pharisees were very proud of their knowledge of the law, and regarded themselves as the favourite of God, being ready to resist the king both openly and by intrigue. They even rejected to swear allegiance to the Romans and their king, Herod. When the ruler imposed a fine for those six thousand who rejected to swear alliance, a noble woman paid the fine instead of them.[11] The most important item which separated

[9] Josephus *Antiquities* 18.1.

[10] D. Piattelli – B. Jackson "Jewish Law during the Second Temple Period" in Hecht et al. (eds.) *An Introduction to the History and Sources of Jewish Law* (Oxford: Clarendon Press 1996), 44.

[11] Josephus *Antiquities* 18.2.

the Pharisees from other groups was their own legal tradition, which was rejected – having no Biblical basis – by all of their opponents.

The Pharisees were considered in modern scholarship for a long time as a powerful political party. This view is under challenge at the moment. It was Ellis Rivkin who has shown that the expression *pᵉrūshīm* denotes in some cases not the Pharisees, but other groups who "separated" themselves. Consequently, we have to reconsider our view about the Pharisees, excluding from the sources those texts which denote other separatists as *pᵉrūshīm*. His view was followed by E. P. Sanders.[12] Jacob Neusner adopted another method to discover the social standing of the Pharisees: he studied the traditions about the leading figures of the Pharisaic party and came to conclusions based on these passages. According to him, the Pharisees were a "pure food club" for whom ritual purity and particularly the purity of their food was of crucial importance. It was Hillel, the outstanding legal scholar of the first Century BCE who transformed the Pharisees from a political group into a "food club." Consequently, the Pharisees, having neither religious, nor political power at their disposal, were no political party with considerable influence. E. P. Sanders, otherwise an opponent of Neusner's claims and methods, agrees with him at this point, claiming that the Pharisees were in fact not the leading figures of their times in political and religious matters, rejects, however, the view that they constituted only a "food club". For Sanders, the Pharisees were rather a "purity club," who did not govern Palestine indirectly and were not *the* legal experts, as contrary to the long held wisdom. On the other hand, they did not enter into their own world, not caring for society at all, as Neusner suggested, the truth being between these two extremes.[13]

Now, for our purposes it is the Pharisaic tradition which is of importance. According to the Jewish legal thinking, there are two kinds of legal rulings: the written and the oral law. The written law consisted of the precepts of the *Tōrah* revealed by God to Moses. Following rabbinic interpretation, there was another corpus of law revealed by God to Moses orally, thus constituting the oral law. Oral law is equated by the majority of scholars with the

[12] E. P. Sanders *Jewish Law from Jesus to the Mishnah* (London: SCM Press 1990), 152.
[13] Ibid. 242–5.

tradition of the Pharisees,[14] a view proven to be false by Sanders.[15] Whether or not the tradition of the Pharisees was in fact the Oral law of rabbinic legal understanding we leave to Jewish legal historians. The fact is that the Pharisees had their own tradition which made them Pharisees; these legal rulings were followed only by them at this time, rejected by all the Samaritans, the Sadducees and the Qumran community. Pharisaic law as a tradition of a religious group is thus a clear evidence for legal pluralism.

2.3 The Sadducees

The Sadducees *(ṣedūqīm)*, deriving their names from the high priest Ṣadōq, was an aristocratic group, consisted of priests and wealthy merchants, having considerable political and economic power. They rejected the fundamental teachings of Phariseism, denying the existence of angels, the resurrection of the body, the divine providence and the immortality of the soul.[16] The high priest was a Sadducee, so were the majority of the members of the Great *Sanhedrīn*, headed by the high priest. Their agenda was not only teaching and interpretation of the law, but also the offering of the cult, since they were priests, as contrary to the lay Pharisees. Temple cult, as their focus point of activity explains why the Sadducees disappeared after the destruction of the Temple in Jerusalem: having no proper place for cultic activity any more, they ceased to exist leaving almost no trace behind them. This unpopular group, which emphasised its seclusion from the ordinary people, came to term with the Romans, and were the advocates of severe prosecution of the Christians.[17]

The Sadducees were regarded for a long time as literalists, interpreting Biblical law very rigidly. This view was challenged by David Daube, who verified that they were not; the only reason why modern scholarship believed just the opposite is that we know the approach of the Sadducees only from rabbinic sources written with a polemical intention. Having no genuine written record from the Sadducees, these rabbinic sources are not completely reliable for the reconstruction of the Sadducees' original view.

[14] According to Piattelli – Jackson (n. 10), 44, the Pharisaic tradition was the oral tradition given to Moses. A view similar to that, though not so explicitly stated was followed by A. Cohen *An Introduction to Jewish Civil Law* (Jerusalem: Feldheim Publishers 1991), 27–53, and M. Elon *Jewish Law. History, Sources, Principles* (Philadelphia–Jerusalem: The Jewish Publication Society 1994) I, 190–94.

[15] Sanders (n. 12), 127.

[16] Josephus *Antiquities* 18.1.

[17] *Encyclopaedia Judaica* (1973) XIV, 620–22.

According to David Daube, the fact that the Sadducees did not accept the tradition of the Pharisees does not make them literalists. By contrast, the Sadducees hold themselves firm to the Biblical texts, while the Pharisees were those who enlarged the law by innovations, that is, their own extra-Biblical traditions. The Sadducees, denying the validity of the pharisaic traditions, relied on free, rational proposals in matters not covered by Scripture, otherwise on reasonable interpretation. It is the reason why Josephus notes that "they held it a virtue to dispute with their teachers." The best example, provided by Daube, to show that the Sadducees were not literalists, but were willing to interpret the law quite liberally, is the question of the liability of the owner of a slave for damages. Scripture has no rule for this matter; yet *Exodus* 21:35–36 is clear concerning the liability of the owner of the goring ox. Following this rule, the owner of the goring ox is liable for the damages caused by his animal in alien property. The Sadducees interpreted this Biblical text *a fortiori*, establishing the rule that the owner of a slave is also reliable for the damages. According to the interpretation of the Sadducees, Scripture imposes no duties on a man regarding his animal, meanwhile it imposes certain duties regarding his slave (circumcision, release on the *Sabbathical* year, etc.). If an owner, having no duties concerning his animal is liable for it, he is the more liable for his slave, regarding which he has indeed some duties prescribed by law. This interpretation, following one of the most popular rabbinic technique of legal interpretation, *a fortiori*, is far from being literal; it is, by contrast, a liberal approach. It is the more interesting, because this rule was at variance with the economic interest of the Sadducees: being that social group which was more likely to own slaves than the Pharisees, they established the protection of property at the cost of their own liability. This strange fact is supported by Josephus, who claims that the Sadducees "are rather savage even among themselves."[18]

Sanders takes a step forward and claims that it is not true at all that the Sadducees did not accept extra-Biblical traditions. By contrast, they did accept traditions which had no Biblical support. These traditions came into being during the long period between the Persian domination and the Maccabean revolt. These traditions were accepted not only by the Pharisees, but also by others, disregarding their positions vis-à-vis the Bible. The calendar, which was not based on Scripture, but accepted both by the Pharisees and the Sadducees is a case in point. How could both the Pharisees and the

[18] D. Daube "Texts and interpretation in Roman and Jewish Law" *Jewish J. Sociol.* (1961). Reprinted in *Collected Works of David Daube* (ed. C. Carmichael), vol. I, (Berkeley: University of California 1992) 182–9.

Sadducees accept the same non-biblical calendar, if the Sadducees did not accept any tradition? It is only a rhetorical device, Sanders believes, that the Sadducees did not accept extra-biblical tradition. The real dissenters, the members of the Qumran community, had their own calendar. Thus, if the Sadducees had not accepted extra-biblical traditions, they could not have agreed with the Pharisees about the calendar and other matters on which they did agree. The Sadducees, then, Sanders believes, "found biblical support for customs of which they approved, or at least asserted that they had it; they rejected traditions which they did not wish to accept; they attacked these as non-biblical; in some cases the Pharisees cheerfully admitted the charge, but kept the tradition anyway. The Pharisees defended their peculiar traditions not by appeal to the Bible, but to antiquity."[19]

It was the great scholar, Hillel the Elder, Daube thinks, who accepted the agenda of the Sadducees, and convinced his party that the Sadducean approach should be followed, according to which there could be no law independent of Scripture (that is, in Sanders' view, the Sadducean rhetoric, and not legal position). From this time on, the Pharisaic traditions were not sanctioned only by their antiquity and by the religious leaders and sages, but were derived from Scripture. In doing this, the Pharisees accepted the notion of the Sadducees, while could maintain all of their traditions claiming that they are deriving from the written law. It was not easy in every case to find scriptural support for a tradition; that is the reason why even the *Mishnah* admitted that there are legal rulings which are "as mountains hanging by a hair."[20] Subsequent scholarship, particularly Jacob Neusner has shown, however, that it is quite impossible to find the authentic voice of Hillel from the Hillel material in the rabbinic sources, because they are reflecting much more the concern of the post-70 period, being, therefore, unreliable and not authentic.[21] The authenticity of the Hillel material is one thing, the operation of the rabbinic legal interpretation and hermeneutics is quite another. Since back projecting is a common device of argumentation in Jewish legal thinking, it is no wonder that the Hillel material, or at least the majority of it, is not historically authentic. It is quite probable that the change was a longer process and not the achievement of an individual scholar. But it does not eliminate the claim that the Pharisees sought to base all their rulings on Scripture, originally a Sadducean agenda, a notion prevailing for centuries.

[19] Sanders (n. 12), 103–7.

[20] Daube (n. 18), 189–95.

[21] See J. Neusner *The Rabbinic Tradition about the Pharisees before 70* (Leiden: Brill 1970); Sanders (n. 12), 112.

2.4 Legal debates

As mentioned previously, the Sadducees and Pharisees differed in law, theology and social status. Yet the antagonism between them was not irreconcilable. Although each group had its own purity law, they did not consider each other ritually unclean; the Pharisees continued to worship in the Temple, headed by the Sadducean high priest who did not follow the purity laws of the Pharisees. The fact that the Pharisees considered the Sadducean priests clean is proven by a rather violent attack of Yōḥanān Ben Zakk'ay, a leading Pharisee of his time, who slit the ear of the high priest in order to disable him from cultic service. In other words, had the high priest already been considered unclean by the Pharisees, the attack of Ben Zakk'ay would have made no sense.[22] But things were normally settled not by such means, but by legal debates, the place of which was the *Sanhedrīn*, where originally the Sadducees formed the majority, but were later replaced by the Pharisees.

Legal debates were in the spotlight not only between the various social and religious groups, but among the members of each group, too. I mentioned previously the judgment of Josephus who said that the Sadducees favoured debates and hold that to dispute with their teachers was a virtue. There was no consensus among the Pharisees either. The emergence of the two schools of oral law named after Hillel and his adversary Shamm'ay, both living at the end of the first Century BCE, and at the beginning of the first Century, is a clear sign of disagreement and the advancement of legal pluralism. The rabbinic sources are not happy about it. As the *Tosefta'* put it: "From the time that the disciples of Shamm'ay and Hillel who had not served their master so much as was necessary became numerous, dissentions became many in Israel."[23]

The controversies between the schools are discernable in the field of *halakic* rulings, legal reasoning and interpretation, and *aggadah*, that is, religious philosophy and ethics. Only three controversies of the founding masters have been preserved, though more than 350 debates of the schools are reported. According to rabbinic sources the Hillelites adopted the lenient, while the followers of Shamm'ay the strict, interpretation of the law. Several explanations have been formulated in modern scholarship to discern the underlying principles of divergence between the schools. According to

[22] D. Daube "Three Notes having to do with Yohannan Ben Zaccai" *J. Theol. Stud.* 11 (1960). Reprinted in *Collected Works of David Daube* (n. 18), 431.

[23] *Tosefta'* 7:1 R. *The Tosefta. Translated from the Hebrew with a New Introduction by Jacob Neusner* Vol. II (Peabody, Mass. 2002). So also in the *Babylonian Talmud, Tractate Sanhedrin* 88b.

a generally accepted, but inadequate view, the doctrines of the schools refer to the individual character of the eponymous master, Hillel being gentle and kind, Shamm'ay stern and short-tempered. Others interpret the conflict of the schools by sociological and economic factors. According to this view, the followers of Shamm'ay represent the wealthy upper and middle class, while the Hillelites the lower strata of society. Probably various factors contributed to the framing of different views. Be that as it may, neither of the schools gained supremacy above the other until the Jabneh period, that is, the period of the destruction of the Second Temple. Till this time, the doctrines of both schools were regarded as "the words of the living God," thus permitting to follow either the doctrines of the *Bēt Hillel* or that of the *Bēt Shamm'ay*. Although disputing in many cases, the followers of the two schools did not refrain marrying women from each other's families, limiting the controversies to *halakic* questions. Social interactions thus were friendly, though outrages are also reported: once the debate about a *halakic* question ended in bloodshed.[24] After the *Jabneh* period, however, the Hillelites gained ascendancy and formulated the *halakic* ruling according to their own view. This is the reason why many of the accepted *halakōt* (the plural of *halakah*) are based on the doctrines of the *Bēt Hillel*.[25]

2.5 Rabbinic interpretations

Following the disappearance of the Sadducees and the Qumran community after the devastating consequences of the war with the Romans and the revolt of Bar Kokba' the rabbinic interpretation of religion and law remained without rivals. Thus, legal pluralism was no longer an outcome of debates between religious groups, but was transformed into a pluralistic approach of one and the same group. After the destruction of the Temple the centre of jurisprudence was no longer the Jerusalem Temple but the so called "academies" established in various towns in Palestine like Usha, Jabneh, Sephoris, Tiberias, Caesarea and Lydda. *Halakic* questions still continued to be matters of dispute between the members of the "academies" and individual scholars even during war times. R. ᶜAqībah, one of the most prominent sages of his time, worked on legal problems and taught disciples while participating at Bar Kokba's revolt, an undertaking which finally led to his destruction by the Romans. The uninterrupted legal debates between *Bēt Hillel* and *Bēt Shamm'ay* until their disappearance at the beginning of the second Century

[24] *Enc. Judaica* II, 200.
[25] *Enc. Judaica* IVB, 737–40.

CE, the vivid polemics of the members of the "academies" had produced a large body of *halakic* rules which formed the basis of the first great *halakic* compilation, the *Mishnah*.

The institutions usually called "academies" were designated as *bēt midrāsh* or *bēt talmūd*, the term *yeshībah* is only a latecomer. These institutions came into being for the sake of further teaching, open before boys who were fit to study (finished the elementary school at the age of twelve or thirteen) and wished to pursue deeper knowledge in Jewish religion and law. The Houses of Hillel and Shamm'ay were not such institutions: as their names indicate, instruction was usually given in the very house of the master, lacking any organised structure. Probably the only "academy" with organised structure was that of the *Nāsī* (the head of the *Sanhedrīn* and the political leader of the Jews in the Roman Empire), because it was linked with the law court residing there.[26]

This period of Jewish law, called the Tannaitic period (*tanna* is designating the reciter of the law) witnessed the emergence of various legal doctrines promulgated by such well known authorities as Rabban Gamalī'el, Yōḥanān ben Zakka'y, 'Elī^{c}ezer ben Hyrcanus, R. ^{c}Aqībah and Rabbi Yūdah ha-Nāsī, the alleged compiler of the *Mishnah*. These sages were those who established the techniques of legal reasoning in Jewish law and at the same time pronounced a great deal of *halakic* rulings. Beyond any doubt, the leading figure of his time was Rabbi Yūdah ha-Nāsī, who came to be known as Rabbi, that is, *the* rabbi. His pre-eminence won him later the honour of being known as the compiler of the *Mishnah*, an oft-repeated claim in rabbinic literature, challenged, however, by modern scholarship.[27]

Legal pluralism became more widespread when "academies" were found also in Babylonia in the third Century, now under the control of the Persian Sasanians. These "academies" were not organised institutions during this period, but were circles of an eminent teacher and his disciples. These small groups of students were taught by the rabbis in their own homes or school houses, but were disbanded at the time of the master's death. Such "academies" were founded at Sura by Rab, a younger contemporary of Rabbi Yūdah, at Nahardea by Mār Shamū'el, a personal friend of the Persian king Shābuhr, the author of the famous dictum *dina demalkūta dina* (the law of the kingdom is law, thus accepting the Persian law in some field). After the

[26] G. Stemberger *Introduction to the Talmud and Midrash* (Edinburgh: T&T Clark 1996), 8–10.

[27] According to modern understanding, the *Mishnah* was not the personal work of one author, but the work of a group, headed by Rabbi: ibid. 138.

destruction of Nahardea, Pumbedita became the rival centre of legal scholarship for Sura. The "academies" of the Tannaitic period were still based on a master-disciple relationship, only during the first Islamic centuries (the Geonic period) did they develop into organised institutions.[28]

It is noteworthy that the most prominent works of rabbinic Judaism, the *Mishnah*, the *Tosefta'* and the two *Talmūdīm* (the Palestinian and the Babylonian Talmūd) are the literary outcome of the debates over *halakic* matters in the "academies." There is, however, a considerable difference between the approach of the *Mishnah* and the *Talmūdīm*, which reflects different attitudes toward legal pluralism. The compilers of the *Mishnah* – whoever they were – sought to establish the *halakah* and thus to restrict debates about legal norms for the future. Rabbi Yūdah was even ready to accept some details of the law he has not agreed with in order to arrive at a universally acceptable corpus of *halakah*.[29] By contrast, the *Talmūdīm*, in the majority of cases, do not contain the result of the *halakic* debates, leaving questions open for successive generations in order to work more on these. As Lightstone has put it: "the redactors imply that the process of inquiry is of greater importance than reaching any conclusive end, even where such an end is at hand. Inquiry, then, is an open-ended process of the highest intrinsic value in and of itself, quite apart from any probative stance which may thereby be attained."[30] The approach of the *Talmūdīm* is, therefore, more pluralistic.

The attempt of the compilers of the *Mishnah* to unify legal doctrines is in accordance with the process, begun after the destruction of the Temple, to put a halt to the traditional freedom of *Tōrah*-teaching. The instrument available to this end was the majority rule, according to which *halakic* rulings had to be decided by voting, the opinion of the majority being the rule. Legal pluralism prevailed after voting only as a private matter, since a scholar dissenting with the majority vote could continue to teach his own doctrine in the belief that the majority has erred, but is strictly forbidden to enact legal advice and give judgment contrary to the rule established by the majority.[31] If a scholar continued to give judgment according to his own, minority view, he was called *zāqēn mamre* (rebellious elder), and was excommunicated. Jewish scholars took this seriously: it was Gamalī'el II, the *Nāsī*, who had to

[28] D. M. Goodblatt *Rabbinic Instruction in Sasanian Babylonia* (Leiden: Brill 1975), 267–72; Stemberger (n. 26), 11.

[29] Stemberger (n. 26), 138.

[30] J. N. Lightstone "The institutionalization of the rabbinic Academy in late Sassanid Babylonia and the redaction of the Babylonian Talmud" *Stud. Relig.* 22 (1993) 2, 182.

[31] *Tosefta'*, *Sanhedrīn* 14:12.

excommunicate his brother in law, R. 'Elīᶜezer ben Hyrcanus, when the latter was not ready to follow the majority decision relating to a question of ritual purity. The case, known as the Oven of 'Aknay, was a turning point in R. 'Elīᶜezer's life: after his excommunication everybody broke social contacts with him, his disciples left him, his teachings and traditions were declared null and void. It is the more noteworthy because R. 'Elīᶜezer was a leading scholar of his time, and according to the rabbinic sources even a Heavenly Voice *(Bat Qol)* declared his ruling as being in agreement with the law! But he broke with the decision of the majority, and it was regarded as a grievous sin regardless of the content of his teaching.[32]

The same development is discernible in another aspect of legal pluralism, ordination *(semikah)*. By *semikah* a disciple was raised to the rank of a rabbi, granting him this honour and all the rights incumbent upon it, above all to teach law and give judgments. It was in fact an outstanding event in the life of a disciple which could be achieved only by the most excellent students, never before the age of forty. In the beginning each scholar ordained his own disciples, later the *Nāsī* alone possessed authority to do so; after the death of the last *Nāsī* during the fifth Century, the "academies" were allowed to ordain disciples.[33] Thus, as the majority decided about *halakic* matters, so the majority in the academies decided about the knowledge of individual scholars, who, in turn, could participate in formulating the *halakah* for the future.

During the *Saboraic* and the *Geonic* period things were not changed gradually, though, evidently, progress was made, notably in the inner structure of the academies, which became more and more institutionalised. Perhaps, as Stemberger thinks, changes could be due to the model of Islamic legal scholarship offered to the Babylonian Jewry. It is thus in order to turn to Islamic law now.

3 *Legal pluralism in Islamic law*

Legal pluralism in Islamic law was due to political, social factors and inherent features of the legal system itself. Although the early leaders of Islam made

[32] Y. D. Gilat *R. Eliezer Ben Hyrcanus. A Scholar Outcast* (Ramat-Gan: Bar-Ilan U. P. 1984), 483–5; S. Shilo "Majority Rule" in M. Elon (ed.) *The Principles of Jewish Law* (Jerusalem 1974), 163–4. The rules about a rebellious elder rebelling against the ruling of the *Bēt Din* are to be found in *Mishnah, Tractate Sanhedrīn* 11:2, *Babylonian Talmūd, Tractate Sanhedrīn* 86b–88b; *Tosefta', Tractate Sanhedrīn* 3:4.

[33] H. Mantel *Studies in the History of the Sanhedrin* (Cambridge, Mass.: Harvard U. P. 1965), 206–21.

every effort to avoid schism, they were unsuccessful. The breaking off the *Shīʿis*, the *Khārijīs* and other religious groups is a clear proof for the dissent at an early stage of Islamic history. Since every group had its own legal interpretation, legal pluralism became widespread, though the doctrines of the various groups differed in the majority of the cases only in details.[34] Where dissent was of crucial importance for the agenda of each religious movement, legal doctrines differed in major points, too. For example, since it is the position and inheritance of ʿAlī and his descendants that makes *Shīʿa* radically different from the majority, later called the *Sunnīs*, the law of inheritance is thus different from that of the *Sunnī* legal schools both in theoretical considerations and in legal rulings.[35]

In framing Islamic law, two questions were to be resolved: (1) was it the aim of the Prophet to establish a new, Islamic, law and (2) if it was, how could norms not known through revelation be formulated? The majority of the Muslim scholars did believe that it was in fact the aim of the Prophet to break off with the legal practice of the *jāhiliyya* (the period before the advent of Islam) and to establish a new legal system based on the teaching of Islam. Joseph Schacht, the best known scholar of Islamic legal history, believed that it was not; the Prophet wanted only to alter contemporary legal practices which were at variance with the ethics of his religion. The minority of the Muslim scholars also rejected the view of the majority, but it was the latter which became dominant for centuries. So the second question inevitably arose.

Since Islamic legal theory did not authorize the caliph with legislative power in the field of the *sharīʿa*, new norms could not be formulated by the state or any other authority outside the domain of the *sharīʿa*. This state of affairs granted to the Muslim jurisprudents an exalted position: they were the only members of Muslim society who were empowered to formulate legal doctrines.

[34] Concerning the legal philosophy of the *Shīʿis* see H. Löschner *Die dogmatischen Grundlagen des šīʿitischen Rechts* (Köln–Berlin: Carl Heymanns 1971).

[35] The historic and ideological background of the various legal doctrines concerning the law of inheritance was elucidated by David S. Powers in his *Studies in Qur'an and Hadith. The Formation of the Islamic Law of Inheritance* (Berkeley: University of California Press 1986). For the critique of Powers' illuminating theory see R. Kimber "The Qur'anic Law of Inheritance" *Islamic L. & Soc'y* 5 (1998) 3, 291–325.

3.1 The theory of ijtihād

It was the theory of *ijtihād* which granted such a right to them. According to this theory, God did not want to promulgate all his laws for mankind, but there are norms which remained hidden from us. The rules of the *sharīʿa (aḥkām sharīʿa)* constitute not a complete system of law, only a part of it, because God demands from his believers to participate in the process of uncovering them. God thus wants not blind following, but active participation from his followers. It is of importance that the sole legislator is God; the *mujtahid*, that is, the legal scholar engaged in *ijtihād* only recognizes the law from the revealed sources *(naṣṣ: Quran* and *sunna)*, but has no right to legislate. The law of God as an objective reality is independent from the capacity of the *mujtahid* to realise it after studying the sources. On the other hand, only the *mujtahid*s are allowed to pronounce the law which they believe is in accordance with the law of God. In this sense Schacht is right in claiming that Islamic law is jurist's law[36] because only *mujtahid*s were capable of pronouncing legal doctrines. The legal doctrines of the *mujtahid*s were not regarded as leading to solid knowledge, because it was only their understanding of God's law, but not necessarily identical with it. Thus legal doctrines of the *mujtahid*s were not *ʿilm* (firm knowledge), but only *ẓann* (opinion). Since every doctrine of the *mujtahid*s are to be classified as *ẓann*, no doctrine could gain supremacy above the other, having the same epistemological value. In matters of behaviour, however, *ẓann*-opinion is also binding, because it is not incumbent to arrive to *ʿilm*, leaving it only to the most important questions of religion (the existence of God, the prophecy of Muhammad). Reasoned *ẓann*-doctrine is, therefore, binding in law: *al-ẓannu wājibu'l-ittibāʿ fī'l-sharʿ*.[37]

The *mujtahid* was allowed to change his position when he found evidence supporting his new doctrine in the textual sources. If, however, a judgment of the court was based upon one of his opinion, it was no longer possible for him to make up his mind and change ruling.[38] It was far from being a restriction of legal pluralism, but a measure to guarantee the security of law at a necessary level. The judgment of the court made it impossible to enact a new rule only for the *mujtahid* who participated in the process; others, however, were free to pronounce their own doctrine, whether dissenting with

[36] J. Schacht *An Introduction to Islamic Law* (Oxford: Clarendon Press 1966), 209.

[37] B. G. Weiss "Interpretation in Islamic Law. The Theory of Ijtihād" *Am. J. Comp. L.* 26 (1978), 199–203.

[38] Ibid. 204–5.

the opinion of their colleague or not. In other words, no consensus *(ijmāᶜ)* could be enforced by judgment of the court.

Ijtihād was a communal obligation; *mujtahid*s were, therefore, not allowed to agree with a doctrine already pronounced, but were compelled to research and formulate their own doctrine. If, after performing the greatest efforts possible (the very meaning of *ijtihād*) to uncover the law, they arrived at a similar conclusion, could they agree with a doctrine already formulated by another *mujtahid*.[39]

It was more often the case than not that in a *madhhab* one of the several doctrines of the scholars belonging to the same school gained supremacy, without the effect of annulling other doctrines of the same school. These opinions were called *mashhūr* ("famous"), being the most cited doctrine upon which court judgments were usually based. In cases, however, when the *mashhūr* doctrine led to injustice or was not appropriate for whatever reasons, no *mashhūr* opinions could be used to decide a given case at the court. By contrast, a valid but not *mashhūr* doctrine should be followed if according to it the decision was more appropriate. Legal pluralism, therefore, made it possible to reach a proper decision at hand.[40] This feature of Islamic law gave enough flexibility to apply legal rules to individual situations and it was in a long run a clear means to adopt the law to changing circumstances. Islamic law was, therefore, contrary to the widely held opinion, not sunk into rigidity and inflexibility, but had through legal pluralism a possibility to develop.

3.2 Consensus

In theory, *mujtahid*s working on the same question could have the same solution to the problem at hand. If it was indeed the case, the *mujtahid*s' agreement was sanctioned as consensus *(ijmāᶜ)*, being one of the accepted sources of law, at least, after the time al-Shāfiᶜī's theory gained universal acceptance within *Sunnī* Islam. Although the authority of *ijmāᶜ* was questioned by some legal philosophers (Juwaynī, Rāzī),[41] it was nevertheless accepted by the ma-

[39] W. B. Hallaq *A History of Islamic Legal Theories* (Cambridge: Cambridge U. P. 1997), 117.

[40] Concerning *mashhūr* opinions and their relationship to *ᶜamal* (legal practice) see J. Berque "ᶜAmal" in *The Encyclopaedia of Islam* vol. 1 (Leiden: Brill 1986), 427–9; *ᶜAmal* in contemporary Marokko was studied in details by Rosen *The Anthropology of Justice. Law as Culture in Islamic Society* (Cambridge: Cambridge U. P. 1989).

[41] For the theory of Juwaynī see: W. B. Hallaq "On the Authoritativeness of Sunni Consensus" *Int'l J. Middle E. Stud.* 18 (1986), 439–44. Rāzī's position is elaborated by Kholeif *A Study on Fakhr al-Dīn al-Rāzī and his Controversies in Transoxania* (Beyrut: Dar el-Machreq Sarl Publishers 1984), 47–55, 70–6, 150–88.

jority. It was beyond any shade of doubt (at least for those who adopted *ijmāᶜ* as a source of law) that *ijmāᶜ* resolves a question of law also for the future, thus the individual opinions of the *mujtahid*s (being only probable as an individual opinion) sanctioned by consensus became a legal ruling, bringing probable opinions to a higher level. Thus, this issue could not be opened again by future generations discussing the same question because *ijmāᶜ*ic ruling fixed the norm, limiting the possibility of legal pluralism for the future.[42]

In shaping an *ijmāᶜ*ic ruling all the *mujtahid*s should take part, otherwise the consensus was binding only for those who participated in the process. If there were other *mujtahid*s dissenting with the norm, the legal debate should be carried on until the majority could convince their colleagues to join to the majority. If they were successful, an *ijmāᶜ*ic norm was established, if not, no norm was produced, the debate being carried on. To understand this we should bear in mind that in Islamic law every *mujtahid* could pronounce his own doctrine, and his freedom could not be restricted by whatever institutions or vote of the majority. The only means at hand for the majority and for the individual scholar, too, is argumentation, to convince the opponents and defend their own opinion.

It was not an easy question, though, to establish who could participate in framing a consensus. Although for al-Shāfiᶜī and al-Āmidī it was the consensus of the Muslims, and not that of the *mujtahid*s, which was authoritative, the majority rejected this view restricting consensus to the *ijmāᶜ* of the *mujtahid*s.[43] There remained, however, several questions to be resolved. One of the most controversial questions was whether a silence responding to a new *ijmāᶜ*ic ruling is constitutive or not. Opinions were differing. According to one view, it was constitutive, because it is the very nature of *mujtahid*s to pronounce their disagreement and own doctrine; thus, if they remained silent, it is a proof for their agreement. Others did not follow this argumentation, stating that a silence could be due to several reasons (political oppression, lack of knowledge about a rule already pronounced, etc.), thus silence is not conclusive. *Ijmāᶜ sukūtī*, tacit consensus, as such *ijmāᶜ* came to be known,[44] was – according to al-Āmidī – not a binding consensus, with which disagree-

[42] B. G. Weiss *The Search for God's Law. Islamic Jurisprudence in the Writings of Sayf al-Dīn al-Āmidī* (Salt Lake City: University of Utah Press 1992), 210–11.

[43] Ibid. 213.

[44] B. G. Weiss *The Spirit of Islamic Law* (Athens–London: The University of Georgia Press 1998), 124.

ment is not permitted, but only of probable authority, leaving open the door for future discussions.[45]

Failing to reach a consensus, the diversity of doctrines remained among the schools and within the individual *madhhab*s. These doctrines were taught not only within a *madhhab*, but also in another schools, constituting a kernel of a legal literature called *ikhtilāf*. *Ikhtilāf* literature thus adopted a real comparativist approach, comparing the most widely known doctrines of the schools and individual scholars. Probably the best known work in this genre is the book of Ibn Rushd, devoted solely to this topic.[46] *Ikhtilāf* literature, therefore, became not only a literary genre in its own right, but was a helpful means to uphold legal pluralism throughout the Islamic world during the classical period.

3.3 Qualifications of the mujtahids

Having no authoritative body to decide matters in questions of law and authority, it was necessary to find a mechanism through which one could be declared a *mujtahid*. This problem was important in deciding individual cases and, more importantly, to define those who could take part in reaching consensus. To this end, the qualifications prescribed for a *mujtahid* were established. Although there were some discussions relating this matter (see the differences between, say, Ḥusayn al-Baṣrī, al-Shīrāzī, al-Ghazālī), the requirements were accepted at large.[47] Accordingly, a *mujtahid* should be well versed in the *Quran*, in theology and *hadīth*-criticism, in the various methods of legal hermeneutics, in Arabic lexicography, and in matters which were by former consensus already settled, in order not to formulate a legal opinion to questions which no longer demand it.[48] Lacking any institutions, it was the professor of the disciple who could decide relating to his qualification, and it was he who was empowered to give him the licence to teach law *(ijāzat al-tadris)*. Having such a licence was only the first step of the disciple to become a *mujtahid*. He was to fight for this honour in legal debates *(al-jadal al-fiqhī)*. If he was successful, that is to say, he could defend his or his masters' doctrine, he was regarded as a *mujtahid* both by other *mujtahid*s and the society at large. Having established himself as a *mujtahid* he was asked concerning

[45] Weiss (n. 42), 226.

[46] Ibn Rushd *Bidāyat al-Mujtahid* English translation: *The Distinguished Jurist's Primer* vols. I–II. (tr. Ib. Nyazee) (Reading: Center for Muslim Contribution to Civilization–Garnet Publishing Ltd 1994–1996).

[47] W. B. Hallaq "Was the gate of Ijtihād closed?" *Int'l J. Middle E. Stud.* 16 (1984), 5–7.

[48] Weiss (n. 42), 688; Hallaq (n. 39), 118.

legal problems by lay members of the society and by the court, for which he could give advice following the request of the *qāḍī*, being a member of a consultative organ called *shūra*.[49]

As we have seen, legal pluralism reflected the freedom of the *mujtahid*s, but led to difficulties in deciding legal cases in everyday legal practice. It was the outstanding Persian scholar, *Ibn al-Muqaffaʿ*, who figured out the agenda to restrict such a freedom first in Islamic legal history. In his view, legal pluralism should be stopped by the caliph, who was the sole authority to promulgate law, depriving the schools of this right. The judge could follow only the code established by the caliph, which could be modified only by the caliph and his descendants.[50] *Ibn al-Muqaffaʿ*'s proposal failed, and nobody put up this proposal after his cruel assassination. It was the *madhhab*, however, which led to the restriction of legal pluralism.

The schools of the formative period should be considered rather as a personal relationship between the master and his disciples, lacking any organisation. As a result, the teachings of the scholars of this time differed from each other both in methods and doctrines. It was rather common that a disciple – later, as a scholar – has taught quite different doctrines than his master did, and nobody found it objectionable.[51] In classical times, when the schools became more and more institutionalised, their methods and doctrines were more and more established, and it was no longer possible to hold a view fundamentally different from the eponymous master and the school. The method of the school and its outcome, that is, the legal doctrines formulated became the kernel of the *madhhab*, constituting an inner cohesion. New doctrines were introduced by back projecting them as the "original" doctrine of the eponymous master, because members of the successive generations were no longer authorised to promulgate doctrines in their own right. As a result, *madhhab*, originally meaning "doctrine," was transformed more and more into a school, or more precisely, into the corpus of the legal

[49] Weiss (n. 42) 689–90; Hallaq (n. 39), 94.

[50] A. K. S. Lambton *State and Government in Medieval Islam. An Introduction to the Study of Islamic Political Theory: The Jurists.* (Oxford: Oxford U. P. 1981), 53.

[51] According to J. Schacht *The Origins of Muhammedan Jurisprudence* (Oxford: Oxford U. P. 1950), the schools of the formative period were not personal, but regional schools. His view, for decades an unquestionable wisdom, was challenged simultaneously by N. Hurvitz "Schools of Law and Historical Context: Re-examining the Formation of the Ḥanbali Madhhab" *Islamic L. & Soc'y* 7 (2000) 1, 37–64, and W. B. Hallaq "From Regional to Personal Schools of Law?" *Islamic L. & Soc'y* 8 (2001) 1, 1–26, who verified that the schools of the formative period were in fact personal, and not regional, schools. The thesis of Schacht is currently defended by Chr. Melchert "Traditionist-Jurisprudence and the Framing of Islamic Law" *Islamic L. & Soc'y* 8 (2001) 3, 385–8.

doctrine of a school. From this period onward, no original doctrine could be pronounced, and *ijtihād* gave way to "imitation," *taqlīd*.[52]

Following these changes, the theory of the "closing of the gates of ijtihād" was formulated *(inṣadda bābu'l ijtihādi)*. This theory was further strengthened by the fact that the number of *mujtahid*s was showing a reducing tendency. This does not mean, it should be emphasised, that there were no *mujtahid*s after the third Islamic Century. This problem rooted in the question of definition: since *mujtahid*s were classified into several subcategories according to their knowledge and qualification, authors of legal philosophy understood the same category rather differently. For example, the term *mujtahid muṭlaq* was interpreted by al-Ghazālī as a *mujtahid* of full capacity who was working, however, along the lines of a school, while for Ibn Taymiyya they were the eponymous masters of the four established schools (Mālik, Abū Ḥanīfa, Ibn Ḥanbal, al-Shāfiᶜī).[53] According to Ibn al-Ṣalāḥ, *mujtahid mustaqill* designated the eponymous masters; in this sense he was right to state that such authorities no longer existed.[54] To overcome difficulties arising after the establishing of the schools as corporate bodies, guilds, as Makdisi called them,[55] a new term, that of the *mujtahid fi'l-madhhab* was invented. Accordingly, though he was a *mujtahid*, he was allowed to work only within the boundary of the *madhhab*.[56]

Following the experience that the majority of the scholars could not meat the very strict requirements established for a *mujtahid*, later it was allowed to call a legal scholar *mujtahid* only in a specified field of law. If, for example, one was an expert in the law of inheritance, a branch of law in fact very complicated in Islamic law, he could be denoting a specialist only in this field. Such authorization was called *tajzi'at al-ijtihād*, an institution opposed by many, but proven to be successful in the long run.[57]

[52] For a very new interpretation of *taqlīd* and the role of the *madhhabs* see W. B. Hallaq *Authority, Continuity, and Change in Islamic Law* (Cambrige: Cambridge U. P. 2001), 57–85, 86–120.

[53] Hallaq (n. 47), 25.

[54] W. B. Hallaq "Ifta' and Ijtihād in Sunnī Legal Theory" in Masud – Messick – Powers (eds.) *Islamic Legal Interpretation. Muftis and thier Fatwas* (Cambridge, Mass.: Harvard U. P. 1996), 36–7.

[55] G. Makdisi "The Guilds of Law in Medieval Legal History. An Inquiry into the Origins of the Inns of Court" *Zeitschrift für die Geschichte der arabisch-islamischen Wissenschaften* 1 (1984), 233–52.

[56] Hallaq (n. 54), 36.

[57] Hallaq (n. 39), 119.

4 *Conclusion*

Now, after this brief outline it is time to summarise our results. In both Jewish and Islamic law we can observe a tendency from almost unlimited pluralism into a more restricted freedom of thought, a process of de-pluralisation, properly so called. Originally, legal pluralism was based in both legal systems on social pluralism, which was based, in turn, on religious fragmentation. The greatest part of the *corpus iuris* was developed by the sages, although, in theory, legal norms were based on Scripture. In Jewish law, the concept of oral law, in Islamic law, the theory of *ijtihād* authorised the legal scholars to formulate legal norms which were in fact outside the texts of revelation (the laws of Moses and the legal norms in the *Quran*).

In both legal systems the schools were originally based on the relationship of master and disciples, being thus personal and not institutionalised schools. Jewish schools remained personal for centuries, and Islamic schools developed into organised bodies only during the classical period, followed, perhaps on this model, by Jewish schools, too.

The tendency of de-pluralisation was an organic process, and not the result of the violent intervention of the state or any other authority (contrary to the proposal of Ibn al-Muqaffa^{c}). After the physical disappearance of the Sadducees and the Qumran community, it was the change of the sociological structure of society which enabled rabbinism to remain the only surviving party. The restriction of legal pluralism to the inner debates of the rabbis is, therefore, the consequence of the change of the political and sociological circumstances. Legal pluralism within rabbinic Judaism was no longer due to sociological fragmentation, but rather to interscholarly debates, personal and intellectual disputes. Legal pluralism within rabbinic Judaism became restricted by the majority vote and its sanction, the ban.

In Islamic law, the situation was different, because religious groups dissenting with the majority, called later the *Sunnīs*, did not disappear. The *Shī'is*, the most powerful dissenting group which remained a constant rival for the *Sunnīs*, have their own legal tradition, so have also other minority groups. Legal pluralism among the *Sunnīs* remained for centuries a reality, which was later restricted by two means: either by consensus, or by the institutionalization of the *madhhab*s, the latter functioning similarly to the majority vote of Jewish law, although with different methods and means. The restricting function of the school was alien to the Jewish schools, because they remained personal before the advent of Islamic times.

Semikah in Jewish law had the same function as *ijāzat al-tadris* had in

Islamic law: to ascertain the leading figures in jurisprudence and religion. Originally, in both systems the ordination was the prerogative of the master, only in Jewish law was it transformed into the right of an institution (the *Nāsī*, and later, the academy). Common in both legal systems is, moreover, that by conferring the title *rabbi* or *mujtahid* on the individual guaranteed him enormous power both in legal and social life. This authority had to be defended by constant debates; it was indeed a moral and religious duty of the scholars to take part in them.

It is also a point of interest that both systems developed a device to recognise also those who could not meet the strict requirements of a *rabbi* or a *mujtahid*, but operated in the field of law. *Tajzi'at al-ijtihād*, which gave authority to a scholar to be an expert in a special field of law, has its equivalent in the Jewish *mumḥeh le-bet din* ("expert of the court"), which was a designation of a scholar versed in some branches of the law, without, however, being an ordained rabbi.[58]

Obviously, in a short paper like this there remained a lot of important aspects of legal pluralism unexplained. I hope that these common features of Islamic and Jewish law could be elaborated in another essay.

[58] Allon identifies *semikah* with *mumḥeh*; Mantel, however, demonstrates that the two expression were not synonyms, see Mantel (n. 33), 208.

Legal Hermeneutics in German Jurisprudence

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The origins of legal hermeneutics go back to the time when the foundations of Graeco-Roman thought were laid and, in terms of themes, it is related both to disciplines outside law (as for instance, philosophical hermeneutics, philological hermeneutics and theological hermeneutics), those within law (as for instance, legal methodology, legal dogmatics and the study of legal argumentation) and those occurring within and without law (as for instance, rhetoric).

Attractive as it seems, it is misleading to compare the relationship between legal hermeneutics and philosophical hermeneutics to that of the *philosophy of law* and *philosophy*. It would be a mistake to draw a parallel between the two relationships because the philosophy of law was confined to absorbing philosophical impulses and, in fact, until the 18th and 19th centuries, its history remained within the confines of philosophy. By contrast, legal hermeneutics played a *constitutive* role in the formation of philosophical hermeneutics. The major part of the issues addressed by legal hermeneutics lay outside philosophical hermeneutics. What is more, it was legal hermeneutics that lent impetus to philosophical hermeneutics – as pointed out by Hans-Georg Gadamer in his seminal work: *Wahrheit und Methode*.

During the early decades of the 20th century the several rival tendencies in legal thought varied in the importance they ascribed to legal hermeneutics. For Ehrlich who laid the foundations of legal sociology and dealt with sociology as a factual scholarship, the methodological problems of understanding (as for instance, the understanding of legal norms) were only of secondary importance. Only with the works of Max Weber did understanding *(Verstehen)* become a constitutive issue of sociology. That opened the road to the discussion of the hermeneutic problems of legal sociology. At that time however the practitioners of legal sociology (which was on the way of becoming a discipline in its own right) failed to utilize that opportunity

even if they could have received powerful inspiration both from Weber's "understanding" methodology and from the field of philosophy or, to be more exact, Dilthey, who redirected attention to hermeneutics.

Among adherents of legal positivism in the first half of the 20th century, Kelsen and Radbruch voiced noteworthy ideas on legal hermeneutics in their early works. In his chief work on legal theory, entitled *Reine Rechtslehre*[1], Kelsen discussed hermeneutics in connection with what he called a hierarchical arrangement of law, which for him meant that higher norms regulated and thus explained lower norms. At the bottom of the hierarchical order there is a judicial sentence, i.e. a norm that is only valid for a single case. Higher norms only determine the framework for judicial action. There is always a smaller or greater room of manoeuvre left for deliberation, and that is filled by interpretation. Kelsen makes it a point to emphasize that there is no so-called *single* right interpretation. Interpretation is an unremovable concomitant of the activities of legal practitioners because applicable norms always allow room for manoeuvre.

Radbruch, in the first stage of his career, when his thought could be more or less identified with legal positivism, voiced rather astonishing views on legal interpretation. He did not challenge the opinion that a legal practitioner has various well-tested aids for interpretation. However, he added: "Unfortunately, there is no rule that would say when to use this and when to use that aid. [...] The legal practitioners only select the instrument of interpretation when they are certain of the result. Actually, the so-called instruments of interpretation are merely used to justify retrospectively that the legal practitioners have already found in the course of a creative and interpretative reading of the text of the law."[2] In other words, the instruments of interpretation are there but they are less important in the "creative" decision-making of legal practitioners and more important in the *post festa justification* of decisions. Later on Radbruch devoted a separate essay of limited length to the issue of interpretation.[3] He points out there that modern laws are not formulated by a single legislator, instead, they are the sum total of the views and efforts of several persons. The legislator whose intentions the researcher wishes to reveal, is not a person whose job it is to formulate the text of a law, instead, it is the state. "A law can be wiser than its framer; and an interpreter can

[1] H. Kelsen *Reine Rechtslehre* (Wien: Deuticke 1934).

[2] G. Radbruch "Einführung in die Rechtswissenschaft" (7–8. Auflage) in Idem *Rechtsphilosophie* I. [1929] (Gesamtausgabe Bd. 1) (Heidelberg: C. F. Müller Juristischer Verlag 1987), 325–6.

[3] G. Radbruch "Arten der Interpretation." in Idem *Rechtsphilosophie* III. [1935] (Gesamtausgabe Bd. 3) (Heidelberg: C. F. Müller Juristischer Verlag 1990) 23–8.

have a better understanding of a law than those writing it. Moreover, it is *imperative* that he should better understand it, as the law must be applied also to cases that might have never occurred to legislators. The legislators' intention is not an instrument but rather the goal of interpretation." Then he carries on the following train of thought: "legal interpretation is not a retrospective reconstruction of an idea someone thought of in the past, instead, it is weighing and unfolding those ideas. It is an inseparable mixture of reproductive and productive, theoretical and practical, cognitive and creative, objective and subjective, scholarly and other than scholarly components."[4] The phrase that "a law is wiser than its framer" clearly assigns Radbruch's position to the so-called objective schools of interpretation. That approach broke with the tendency of legal hermeneutics that had been prevalent since Savigny, according to which interpretation equals the reconstruction of a text, and reconstruction means the recreation of the *original* meaning of the text.

As from the second half of the 1930s, the application of law by way of interpretation became dominant in Germany. Forsthoff carried out a theoretical analysis of that phenomenon (in the period 1940–1964) and referred to it as "judicial hermeneutics." Mostly essays related to legal policy were published in the field of hermeneutics in Germany in the after-war years and only few theoretical analyses. That shift of emphasis was because the era of National Socialism demonstrated that interpretation could easily turn into reinterpretation and as such could be used for the political aims of a repressive regime.[5]

Helmut Coing, a philosopher of law and a historian of law, came out with a comprehensive work on the relation between the study of legal argumentation and hermeneutics in 1959, just one year before Gadamer published his definitive work on hermeneutics. Coing – who offered a synthesis of the thoughts of Savigny and Schleiermacher – posited that legal hermeneutics should rely on general (philosophical) hermeneutics and the rules of interpretation established in it.[6] Coing clearly saw legal hermeneutics as a set of methods. He formulated the following rules for interpretation: (1) *the rule of objectivity*: effort should be made to understand the text in itself; (2) *the requirement of unity*: individual tenets should be related to the whole and, si-

[4] Ibid. 23–4.

[5] B. Rüthers *Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich* (München: Beck 1989), Idem *Die unbegrenzte Auslegung* (Heidelberg: Müller 1991).

[6] H. Coing *Die juristischen Auslegungsmethoden und die Lehren der allgemeinen Hermeneutik* (Köln–Opladen: Westdeutscher Verlag 1959).

multaneously, the whole should be related to the several parts; (3) *the rule of historicity*: each text expresses individual thoughts in a language that has evolved in the course of history. In the course of application, that rule defines two contexts: one that is subjective and biographical and another that is objective and related to the history of ideas; (4) *exploring the meaning of the object*: it is a characteristic feature of the structure of statements that they refer to objective interrelationships that lie outside the realm of language. By applying that rule of interpretation, one can reveal the meanings of a text that are there "in addition" to the ones accorded to it by its author; (5) *the rule of comparison*: it is necessary to collate various texts of the same author, various texts written at the same time and/or texts of the same kind. Such a comparison can help explore the characteristics of texts.

The publication of Gadamer's *Wahrheit und Methode* in 1960 and the related debate between Gadamer and Betti played a key role in the 20th-century history both of philosophical hermeneutics and legal hermeneutics. Emilio Betti, an Italian jurist, worked in relative isolation, which means he did not influence the legal thought of his country for a long time. He was so closely associated with the German philosophical and legal culture that he first published his hermeneutic views in Germany.[7] After seeing that there was no public response to his hermeneutic ideas as published in a comprehensive work in Italian, he republished them in German translation. That made it possible for him to join the debate on Gadamer's hermeneutics.[8]

Betti accepted Vico's important proposition that, from the viewpoint of human cognition, there is a fundamental difference between the natural world and the world of human societies. As for the latter, cognition can be complete because the world of human societies has been created by people; consequently, it is possible to reconstruct the life experiences of the subjects that created them. Such a premise associates Betti with the classical hermeneutic tradition of Schleiermacher and Savigny's tradition of legal interpretation, both of which postulate that understanding and interpretation are, in the final analysis, recreation. That, by the way, is not the only issue where Betti carries on the classical hermeneutic tradition: for Betti hermeneutics is a *method*. He disagreed with Gadamer, who emphasized that hermeneutics is not a method. Gadamer stated that interpretation is insep-

[7] E. Betti "Zur Grundlegung einer allgemeiner Auslegungslehre. Ein hermeneutisches Manifest." In H. Dölle (Hrsg.) *Festschrift für Ernst Rabel* II. Bd. (Tübingen: Mohr 1954) 79–168.

[8] E. Betti *Teoria generale della interpretazione* I–II. (Milano: Giuffré 1955), Idem *Die Hermeneutik als allgemeine Methodik der Geisteswissenschaften* (Tübingen: Mohr 1962).

arable from understanding and rejected the view that interpretation was an auxiliary (external) instrument of understanding. Instead, Gadamer postulated interpretation as a characteristic of there-being *(Dasein)*. Despite of this difference in opinion, and although Gadamer criticized Betti for regarding hermeneutics a method, he highly appreciated Betti's contribution to hermeneutics.

Gadamer stated that the tradition of legal hermeneutics *showed an example* for the renewal of philosophical hermeneutics. That it was exemplary was due not to the accomplishments of jurisprudence but to the *practical* character of the activities of jurists. It is impossible to eliminate the distance between the universality of a law and the concreteness of an individual legal case, which means that jurists repeatedly face hermeneutic tasks. The source of the problem is not any deficiency of legislative activity. In other words, even if legislation were more circumspect, the text of the laws would still need interpretation. Indeed, in *every* system of legal regulation rules are supposed to be flexible, which at all times necessitates interpretation. Such interpretation, says Gadamer, always involves the creation of a new *right* because the administration of justice by the courts can never be fully explained with the logic of subsumption. (Let me mention in passing: Gadamer left the classical, i.e., Savigny's, tradition also in that respect because he considered legal hermeneutics as the emergence of a *new* right.)

As could be seen above, jurists seek to concretize laws, that is, to *apply* them. In Gadamer's view it is the situation of application that ensures the opportunity for interpretation. Interpretation and application are each other's conditions. If we take that as granted, inevitable is the following question: What can we say about the hermeneutic situation of a legal historian who wishes to interpret a law without anyone's intention to apply it? That is exactly the question that pitched Gadamer's position against Betti's.

In the course of his studies on legal hermeneutics, Betti separated cognitive interpretation from normative one. He claimed that interpretation is normative if the understanding of a text is followed by application, i.e. compliance with the rules enshrined in the text. However, law cannot be identified in its entirety with application. For the contemporaries law is a *norm*, for posterity it is *history*. Hence it follows that a legal historian has the task of cognitive interpretation. The legal historian needs to understand the text of the law, which does not mean that his intention is to apply that law. No, what he does is examining its application *in the past*.

Not that Gadamer has ever challenged the difference between the work of a legal practitioner and that of a legal historian (it was part of his creed that

a legal practitioner always grasps the meaning of a law in connection with a concrete case, while no concrete case is posited for a legal historian), yet that difference never assumed fundamental importance in his hermeneutics. In Gadamer's opinion a legal historian has to carry out the same inquiry as a legal practitioner. We have every to reason to ask: Why? The answer Gadamer offers is only partially satisfactory, even if there are two – albeit similar – answers in his book.

First of all, let us note that in Gadamer's opinion an inquiry of a historical type is only possible if the analyst considers the past in continuity with the present. In some more detail: a legal historian can understand and interpret a law if he can find continuity between its original and present-day application. Gadamer's position has a theoretical deficiency: it can only be applied to the interpretation of laws that are still valid today. However, legal historians rarely analyse such laws. They more often examine laws that only had a normative effect in the past. No doubt, it is conceivable that a legal practitioner who is facing concrete legal problem – so as to get a more precise interpretation of the law in force – embarks on a historical study by collecting information about the application of that law in the past. I emphasize however that it would be a mistake to conclude that the work of a legal practitioner who examines the historicity of a law and the analytical activity of a legal historian are identical.

Gadamer's second answer to the above question can be found in those passages where he takes the example of understanding an order to illustrate the similarity between the hermeneutic situation of a historian and a legal practitioner. Where there is an order (command), there have to be persons obliged to fulfil it. The historian however does not belong to that circle, he is not an addressee of the order. However – and that is the key sentence in Gadamer's train of thought – "[...] if he really wants to understand the order, then he must, idealiter, perform *the same act* performed by the intended recipient of the order. The latter also, who applies the order to himself is well able to distinguish between understanding and obeying an order. It is possible for him not to obey even when – indeed, precisely when – he has understood it."[9] Here again Gadamer position needs to be augmented because it is one case when the addressee of an order understands the order and that is why he does not obey it. It is another case when a historian understands an order and he does not obey it because in his world that order has no relevance or legal effect. Let us imagine the following situation: in

[9] H.-G. Gadamer *Wahrheit und Methode* (Tübingen: Mohr 1960), *Truth and Method* (London: Sheed & Ward 1975), 299 (italics by A. K.).

a country occupied by a foreign power, the laws oblige the residents to collaborate with the occupiers. Some of the residents understand that order but do not obey it as it runs contrary to a command of another type: their moral conviction. Needless to say, rejecting orders is risky. Occasionally that may even endanger the life of the addressee of the order. But when a historian examines that order and wishes to understand it, his theoretical rejection of the order (that he understood) is an entirely different business from what the residents of the occupied land do. Summing up: being in a different historical situation, in the course of his hermeneutic analysis a legal historian cannot "accomplish" the same deed as the addressee of such an order.

Betti disagreed with Gadamer on evaluating the role of application. Gadamer saw it as the central component of legal hermeneutics, while Betti only treated it as a part of the work of legal practitioner. In Betti's view Gadamer overlooked the difference between the situation of a legal historian and that of a legal practitioner. Betti claimed that in the field of law historical on research on a law that is still valid today is different from the case when that law is not valid any more. Betti stated that only in the latter case could we speak of a purely historical interpretation. As rule, a legal historian examines laws that do not exert any normative influence on present-day attitudes. Historical hermeneutics and normative legal hermeneutics are not analogous. The application of law requires legal interpretation with reference to present-day society. In that respect it is essential that the legal practitioner has to concretize the law, i.e., he has to carry out *application*. By contrast, there is no application in the case of historical interpretation of a contemplative nature.

We can notice a conspicuous influence of Gadamer's legal hermeneutics (as expounded in his philosophical hermeneutics) on the German legal thought of previous decades. During the 1960s and 1970s the hermeneutic approach struck roots both in German legal dogmatics and legal methodology, as for instance, in the writings of Arthur Kaufmann and his disciples (Winfried Hassemer and Ulrich Schroth). We might also mention Karl Larenz, an eminent analyst of methodological problems. Originally, he kept at a distance from legal hermeneutics. However, as from the 1960s, he came close to a Hegelian dialectical-hermeneutic interpretation of law. What is more, his disciple, Joachim Hruschka[10] began his career as an analyst of theoretical legal problems as an advocate of hermeneutics. Esser[11] who used to

[10] J. Hruschka *Das Verstehen von Rechtstexten* (München: Beck 1972).

[11] J. Esser *Vorverständnis und Methodenwahl in der Rechtsfindung* (Frankfurt am Main: Athenäum–Fischer-Taschenbuch 1972).

belong to a school other than hermeneutic, with time also contributed to the hermeneutic line of thought.

In the final section of this survey I am going to describe briefly some more recent theoretical accomplishments in this rather heterogeneous field. Kaufmann sought to build a bridge between traditional legal hermeneutics and Gadamer's approach. He was of the view that the basic premises of general hermeneutics could be transferred to legal hermeneutics.[12] To illustrate how seriously Kaufmann was devoted to the study of hermeneutics, suffice it to mention that the *Festschrift* issued by his disciples and followers on his 60th birthday was entitled: *Dimensionen der Hermeneutik*.[13]

Kaufmann associated hermeneutics with both legislative activity and the application of law. He wrote that in legislation the hermeneutic process can be grasped in that a legislator needs to find mediation between the universal legal rules and supposed possible cases, and the two have to be continuously cross-referenced. It goes without saying that a law will never be "completed," it can never become reality, only an opportunity for legal action. However, what we have here is not a deficiency or the absence of something. That situation derives from the essence of legislative work. Even if that were possible, it would still be a mistake to give unequivocal wording to laws because of the unlimited diversity of life situations.[14]

For a judge the abstract norm that is "objectively" there and the amorphous legal case are only raw material. He has to transform the abstract factum into a concrete one. He may not proceed by making isolated acts; instead, his steps need to be circularly cross-referenced. For Kaufmann the hermeneutic circle was not a methodological issue. With reference to Heidegger, he stressed that what matters is not leaving that circle but entering it in the right way.[15] The hermeneutic process is simultaneously objective and subjective; the role of the interpreter is not passive; what he does is not "subsumption" of a case under a law. Instead, the role of the interpreter is active and formative. That however does not involve subjectivism as it stands on the ground of tradition. The logic of subsumption is untenable also because one has to match a factum with a norm. In other words, at a concrete legal decision, one has to transcend the methodological dualism of being

[12] A. Kaufmann *Beiträge zur Juristischen Hermeneutik* (Köln–Berlin–Bonn–München: Carl Heymanns 1984), 92–5.

[13] W. Hassemer (Hrsg.) *Dimensionen der Hermeneutik. Arthur Kaufmann zum 60. Geburtstag* (Heidelberg: R. v. Decker–C. F. Müller 1984).

[14] Kaufmann (n. 12), 61–3.

[15] Ibid. 74–7.

and norms, and that is "not exclusively a logical act of subsumption but is an extremely complex analogous and creative act of interconnection".[16] That thought was Kaufmann's novel contribution to legal hermeneutics. When he spoke of matching *Sein* and *Sollen*, he did not mean either the identity or the difference of those two spheres, instead, their *analogous* character. That has exerted considerable influence on hermeneutics inasmuch as it challenged the dogma about the essential difference between interpretation and analogy.

The writings on legal hermeneutics by Kaufmann's disciples made further contributions to that field. Let me only refer here to a noteworthy thought by Neumann. In his search for the specificity of legal hermeneutics Neumann firmly claimed that "the need for a self-sufficient legal hermeneutics arises exactly when a text is seen as the expression of compulsory and valid legal norms and legal principles, in other words, when a text *transcends* the status of being only seen as a text".[17] A legal text is normative when it defines a compulsory course of action, which means it qualitatively differs from, say, the interpretation of a work of art. As law involves validity in addition to texts, "there is more to the normative character of legal texts than their correct understanding, namely, *correct action* as well".[18] That is why he sums up his position as follows: "legal hermeneutics has the task both of understanding a text and understanding related action".[19] Neumann added that Gadamer's notion of application was "overburdened." As that term is "multilayered," there is the danger of identifying understanding by a historian and by a legal practitioner. Application spanned two types of "gaps" simultaneously: one that separates the past from the present, and the one that divides the universality of the text of a law and the particularity of a factum that needs judicial decision on the basis of a legal text.[20]

For several decades Karl Larenz has been studying, and published important works on, legal dogmatics on the basis of how judges pass decisions on individual cases. He proposes the following premise: methodology is normative inasmuch as it is the meta-science of a normative scholarship (jurisprudence). For legal methodology notions like "sub-section of a rule of law," "legal consequence" and "validity" have the same meaning as for jurisprudence.

[16] Ibid. 122.

[17] U. Neumann "Zum Verhältnis von philosophischer und juristischer Hermeneutik" in Hassemer (n. 13), 49–56, 50.

[18] Ibid. 53.

[19] Ibid. 55.

[20] Ibid. 51.

As for technical terms of methodology (as for instance, narrow or extended interpretation, analogy, concretizing a value standard, etc.), they only appear in the vocabulary of jurists if and when they carry out a method-conscious activity. How to identify the connection between this legal methodology and hermeneutics? At the level of general definitions Larenz states that methodology is the hermeneutic self-inquiry of jurisprudence and hermeneutics is the scholarship of the preconditions of cognition. Larenz offers a more concrete definition, where he also outlines the competence of legal hermeneutics: "As jurisprudence always has to deal *also* with texts (laws, judicial decisions, contracts between individuals, documents expressing the intentions of people), in a broader sense, hermeneutics – which is the scholarship of understanding – has outstanding importance for characterizing these aspects of the activities of jurists, though in itself, it is insufficient for that purpose".[21]

Challenging Gadamer's opinion, Larenz stresses the differentiation between understanding and interpretation. For him the latter is understanding *plus the way the inquirer relates to his subject.* In Larenz's view interpretation varies from understanding also because it is called into action when the direct understanding of a text becomes *problematic*. Such problems can arise due to various causes: for instance, the text is obscure or has several readings or it refers to other, less known texts. When a text is to be interpreted, the interpreter needs to choose the correct meaning from among several possible ones. When Larenz states[22] that a text can be "problematic" not only because of its obscurity, internal contradictions, etc., but due also to the fact that, when jurists read legal texts, problems inevitably arise because texts always allow room for the readers to find more than one meaning in them – well, with such a statement Larenz tacitly implies that both legal practitioner and legal scholars inevitably have to interpret legal texts.

From a legal point of view the purpose of law interpretation is "finding out the normative meaning of laws." That, in Larenz's opinion, cannot be ascribed to the so-called "will [volition] of the law." Those who identify the normative meaning of laws with an alleged "will of the law," unjustifiably personify laws. After all, only a person can will something or a certain number of persons can have a common will. Larenz says the notion of "will of the law" is used to hide the contradiction that might arise between the original intentions of the legislator and the misinterpreted content of the law con-

[21] K. Larenz *Methodenlehre der Rechtswissenschaft* (Berlin etc.: Springer ^{6}1991 [^{1}1960]), 7.
[22] Ibid. 204–5.

cerned. When we use the word "will," we may only relate it to the volition of the legislator.[23]

It is a widely held view among practitioners of legal hermeneutics that the normative meaning of legal texts can only be reconstructed in consideration of the validity requirement concerned. Hence it follows that legal hermeneutics has practical as well as theoretical tasks. Due to that orientation to praxis, interpretation focuses not just on the issue of truth, but also on questions of decision-making. At the beginning of the 1980s Krawietz wrote that, despite the lively theoretical and methodological discussion of Gadamer's fundamental work, the hermeneutic approach could not regain the high prestige it used to have, for instance, in the 17th–19th centuries. Krawietz explained that in the following way: legal hermeneutics connected itself too intimately and uncritically to philosophical hermeneutics. Proof of that is an excessively broad definition of "text." Put ironically, many people treat everything under the sun as "text." By contrast, traditional legal hermeneutics applied a narrow interpretation of legal texts. It only dealt with legal texts that it considered relevant from a normative point of view; texts that "in the legal system functioned with a mandatory effect as valid legal prescriptions for all addressees".[24]

In the field of legal hermeneutics Krawietz clearly separated interpretation carried out when a legal text was created from the one carried out during later stages of its validity. Such differentiation, he argued, is justified because the context of the text might change in the meantime. Such changes in context can be temporal and can refer to the social status of interpreters. Krawietz called the time of formulating the text as primary context and subsequent stages in its validity secondary context. In its relation to primary context, legal hermeneutics is reconstructive, while in its relation to secondary context, it is applicative.[25]

Having surveyed some key matters of legal hermeneutics and certain theoretical propositions of its most outstanding scholars, let me briefly examine an issue that has been partly discussed above. As has been mentioned, Radbruch wrote that the instruments of interpretation are used for retrospective justification rather than making the rights decision. Even if such a straight-

[23] Ibid. 318–9.

[24] W. Krawietz "Juristische Argumentation in rechtstheoretischer, rechtsphilosophischer und rechtssoziologischer Perspektive" in N. Achterberg – D. Wyduckel (Hrsg.) *Recht und Staat im sozialen Wandel. Festschrift für Hans Ulrich Scupin zum 80. Geburtstag* (Berlin: Duncker & Humblot 1983), 347–90, 380.

[25] Ibid. 381–2.

forward opinion is received with reservation, we cannot sidestep the question whether or not interpretation is connected to the justification of legal decisions. Supposing such a connection exists – namely, that interpretation both supports decision-making and its justification – then we have to talk about another contextual function of interpretation, namely, its role in promoting the reception of decisions. Strictly speaking, those issues belong to the study of argumentation; and the relationship between the study of argumentation and legal hermeneutics has been hardly explored.

Various arguments can be deployed to justify a judicial decision: the court can refer to the security of the legal system, the evaluation of consequences, people's sense of legitimacy, common sense, the unity rules of law, etc. It is a pivotal question of the various theories of argumentation how to rank arguments. As long the parties to a legal action only rank arguments by the strength of those arguments (as some arguments may ensure winning a suit and others losing it), the judge will need the arguments to justify the "correctness" of his decision. Occasionally it seems as if supposing a law's claim for rightfulness was a part of hermeneutic *a priori* understanding. However, a legal text's "claim for sense" and "claim for rightfulness" cannot be found on the same level because the dichotomy of just and unjust is a differentiation to be found *within* the sphere of the understandable. It is that very fact that proves that legal hermeneutics is indispensable in the day-to-day administration of justice.

A la recherche du meilleur droit possible
Trois aspects de l'ontologie juridique leibnizienne

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Philosophe, juriste, mathématicien, linguiste, historien, diplomate, géographe, théologien, moraliste... Leibniz est un des génies universels *et* continentaux. Membre de plusieurs Académies, il entretient une correspondance soutenue avec de nombreuses personnalités allant des mathématiciens aux théologiens, de son époque. Pour ne mentionner que quelques uns de ses contacts parmis les plus renommés : Arnauld, Malebranche, Huygens à Paris, le physicien Boyle, les mathématiciens comme Wren, Pell, et plus tard Newton à Londres. Il n'a cessé de voyager et il a participé à la création d'une revue scientifique (*Acta eruditorum* [Leipzig, 1682]) et la fondation de la société des sciences de Berlin devenue académie des sciences. Son esprit libre s'accompagnait de manière paradoxe d'une servitude quasi religieuse de l'Etat tant en tant que juge à Mayence et à Hanovre, que bibliothécaire ou diplomate.

Cependant, aux nos yeux il reste avant tout un juriste même si nous acceptons que ses études mathématiques ont une grande influence et des conséquences dans sa recherche du *meilleur droit possible*.[1] Il est de même un auteur incontournable pour celui qui travaille sur les ontologies et le langage juridique, et ses écrits nous intéressent essentiellement à ce titre. Et pourtant, la philosophie droit de Leibniz n'est guère connue, regrettait Villey au début des années soixante.[2] Aujourd'hui ses écrits redécouverts et réédités ont permis une plus grande diffusion de sa pensée et une multiplication des recherches. La littérature secondaire devient par ailleurs tellement riche dans le domaine de la philosophie du droit, qu'il prend une place comparable à

[1] J.-L. Gardies "La rationalité du droit chez Leibniz" *APD* 23 (1978), 116.

[2] M. Villey "Les fondateurs de l'école du droit naturel moderne au XVIIe siècle" *APD* 6 (1961), 97 : "Sa philosophie du droit est forte peu connue. ... Aucune étude générale de la doctrine de Leibniz concernant le droit n'avait encore été donné ... en France."

celle d'auteurs classiques de la même époque, tels que Hobbes ou Spinoza. Pour autant, restituer certaines de ses analyses sur le droit reste une tâche laborieuse et il est plus aisé de se perdre dans les méandres de sa pensée justement éclairée par des points de vue très différents. Y pénétrer représente dans ces circonstances un réel défi mais qui vaut la peine d'être relevé tant l'apport de ses enseignements est conséquent et à certains égards actuel. Pour toutes ces raisons, il nous a paru utile de revisiter quelques textes qui évidemment ne constitue qu'une tout petite partie de ses œuvres, des quelque 200.000 pages manuscrites conservées à la bibliothèque de Hanovre.

1 Les trois aspects de l'ontologie juridique chez Leibniz

Nous nous proposons de présenter un bref aperçu sur la philosophie juridique leibnizienne[3] en abordant d'abord trois questions : *Qu'est ce que "l'ontologie juridique" ?*[4] *Quelle est sa conception du droit naturel ? Que faut-il en déduire sur la nature spécifique des normes ?* Les réponses à ces questions nous permettrons de mettre en évidence l'architectonique de la théorie du droit de Leibniz. Son ontologie *essentialiste*, sa conception *objectiviste* de la morale et son épistémologie *cognitiviste* apparaissent dans les divers fondements du système métaphysique, tels que dans les notions de la justice, de la bonté de l'homme ou de Dieu, de l'harmonie préétablie du monde, ou même dans la doctrine logique de *predicatum inest subiecto*. Certes, il n'utilise jamais le terme d'"ontologie du droit" ou "ontologie juridique", et malgré cela, il est possible d'identifier son ontologie selon des distinctions contemporaines.

Dans une perspective le "choix ontologique" de Leibniz dans le champ de la philosophie du droit ne souffre aucune ambiguïté : il dénonce la théorie positiviste selon laquelle le droit est une production de la volonté, dont le contenu est indifférent du point de vue moral, et rejette comme non appropriée la méthode empirique utilisée par les théoriciens positivistes conduisant à la connaissance du fondement du droit. Il affiche des préférences pour une autre une ontologie, et défend l'idée que le droit se compose d'entités

[3] Sur quelques problèmes du formalisme leibnizien v. Cs. Varga "Leibniz und die Frage der rechtlichen Systembildung" *ARSP* Beiheft 31 (1987), 114–27.

[4] Pour le sens de l'ontologie juridique en théorie du droit contemporain cp. P. Amselek – C. Grzegorczyk (sous la dir.) *Controverse autour de l'ontologie du droit* (Paris : P.U.F. 1989), particulièrement, 11–26, 27–49, 53–68, 211–26. C. Perelman "Ontologie juridique et sources du droit" *Etudes de logique juridique* IV. [Actes du Colloque de Bruxelles : 1969] (Bruxelles : Bruylant 1970), 65–90. V. aussi à notre propos J.-B. Rauzy *La doctrine leibnizienne de la vérité. Aspects logiques et ontologiques* (Paris : Vrin 2001) ; R. Sève *Leibniz et l'Ecole moderne du droit naturel* (Paris : P.U.F. 1989).

idéales, dont l'existence dépend de leur adéquation aux valeurs objectives, et dont la connaissance ne se distingue pas de celle de la philosophie morale.

Pour mieux situer cette ontologie, on va la contraster avec celle qui est élaboré par son adversaire, Hobbes.[5] Il est possible d'opposer d'abord les *ontologies simples*, défendues par les positivistes classiques, considérant que le système juridique est composé de règles, et les *ontologies complexes*, supposant des systèmes juridiques composés de règles juridiques, de principes, fondés sur les préceptes de la justice, commandements élémentaires reconnues par la théologie naturelle etc. Dans ce sens l'ontologie de Hobbes peut être qualifiée de simple puisqu'il réduit le système juridique à l'ensemble des commandements positifs du souverain, et en exclut le droit naturel lorsqu'il prend en considération le droit postérieurement au contrat social. En revanche l'ontologie de Leibniz peut être dite complexe. Il reste en effet dans le domaine de la métaphysique en élaborant un système juridique idéal, composé de règles et de principes. Dans la philosophie du droit contemporain, *mutatis mutandis* nous pourrions opposer dans le même sens successivement comme relevant d'une ontologie simple, celle de Hart et de l'ontologie complexe de Dworkin.

Une autre distinction peut être opérée entre les *ontologies autonomes* et les *ontologies hétéronomes*. Nous entendons par autonome un système fermé qui se reproduit lui-même, le système hétéronome désignant quant à lui les systèmes ouverts. La classification de la pensée de Leibniz comme d'ailleurs celle de Hobbes n'est pas aisée. Elle dépend des éléments pris en considération. Ainsi en ce qui concerne Hobbes, nous pouvons le ranger dans le premier groupe car du point de vue du droit positif : l'élément central dans sa philosophie du droit c'est la volonté du souverain. Mais suivant d'autres éléments le système peut être dit hétéronome. Deux éléments de sa philosophie du droit autorise une autre lecture de son ontologie notamment le contrat social faisant appel à un élément extra-juridique et le souverain se définissant comme une personne ou un ensemble de personnes habituellement obéie(s) et n'obéissant à personne, ayant un contenu politique ou faisant appel à la sociologie ou plutôt la philosophie politique. La pensée de Leibniz est aussi rattachée à une ontologie autonome par la doctrine majoritaire en raison du fait que le droit naturel est autonome, mais aussi en raison de la méthode d'axiomatisation elle même. En effet les théorèmes mathématiques n'ont pas

[5] Pour la comparaison entre Hobbes et Leibniz v. l'étude introductive de T. Ascarelli dans *Th. Hobbes. A dialogue between a philosopher and a student of the Common Laws of England. G. W. Leibniz. Specimen questionum philosophicarum ex iure collectarum. De casibus perplexis. Doctrina conditionum. De legum interpretatione* (Paris : Dalloz 1966), 3–67.

besoin d'être fondés sur des éléments matériels pour être vérifiés. Même le recours au droit romain, qui est un droit historique et daté, pour fonder son système, n'invalide pas sa prétention à formuler un système de droit naturel parfaitement autonome à partir de ce matériel. Une perspective autonome peut, dans la théorie du droit, se trouver dans la pensée juridique de l'auteur de la *Théorie pure du droit*, alors que l'ontologie hétéronome caractérise la pensée des fondateurs de l'Ecole historique.

Et finalement si l'on devait essayer d'intégrer l'ontologie leibnizienne dans la classification opposant l' *ontologie expressive* et *ontologie hylétique*, force serait de constater que chez Leibniz – il s'éloigne dans ses écrits de maturité que J.-L. Gardies date de 1672, de la théorie positiviste[6] – les normes sont des *entités idéales* ayant le contenu indépendant de la formulation linguistique. Chez Hobbes, en revanche la source unique du droit est la volonté humaine, donc sa conception est expressive. L'ontologie "autonome" de Leibniz parvient à traiter du droit sans devoir véritablement accepter le "hobbisme", ou les prémisses volontaristes qui impliquent nécessairement les questions de l'obligation à obéir ou commandement de souverain. L'anti-volontarisme est un caractère propre de l'ontologie leibnizienne, comme l'explique clairement Sève :

> "Leibniz fait du *bonum suum* le principe ou la cause de l'obligation; hors de tout lien à un supérieur. En d'autres termes il y a bien dans l'obligation leibnizienne, légalité, ou liaison par rapport à une règle mais cette dernière *n'est pas un commandement et la liaison n'est pas lien à une règle (impérative) mais selon une règle (indicative)*. Celle-ci exprime le lien objectif constitutif de l'obligation et qui relie une action désirée rationnellement, par elle-même ou par ses conséquences, et le mobile qui nous fait la poursuivre naturellement."[7]

Il *refuse de la verticalité externe ou interne d'obligation* en droit et par cela il effectue une "dissolution" ou "réduction" de concept d'obligation. Il y a des avantages de cette réduction. Il devient par cela possible de parler de la structure du droit sans faire allusion à la question normative de l'obligation. Sa théorie suppose une théorie "horizontale" de l'obligation. Ceci signifie que "l'obligation juridique" est une *iuris vinculum*, notamment donc un lien social-juridique.[8] Sans une telle conception hylétique des normes, Leibniz n'aurait pu prétendre élaborer une logique juridique en souhaitant transposer en droit le principe logique de non-contradiction. De nos jours les thèses

[6] J. L. Gardies "La rationalité du droit chez Leibniz" *APD* 23 (1978), 117s.
[7] Sève (n. 4), 101–2 (nous soulignons).
[8] Cp. ibid.

de Ross pourraient être rattachées à la première ontologie alors que celles de Kalinowski à la seconde.

En résumé, l'ontologie du droit de Leibniz est *complexe*, *hétéronome* et *hylétique*. Bien sur, cette présentation de la famille des ontologies est extrêmement simplificatrice. Elle permet toutefois d'introduire de manière certes rapide, la pensée de Leibniz que nous allons découvrir plus précisément dans les développements suivants reprenant les successivement les questions de l'ontologie juridique en général, la conception du droit naturel, et la nature des normes.[9]

2 *La complexité de "l'ontologie juridique" leibnizienne*

A titre préliminaire, il importe de rappeler quelle est la nature *systémique* de la pensée leibnizienne.[10] Ce constructeur de "système", n'a pourtant laissé qu'une pensée "systémique" reconstruite par les commentateurs.[11] Comme Blanché et Dabucs le soulignent

> "[L]a 'logique' de Leibniz est une reconstruction à partir d'éléments épars et guidée par quelques idées maîtresses."[12]

De là les difficultés pour des recherches dans des domaines bien déterminés comme le droit dans ses écrits. Sa pensée philosophique idéaliste dépasse la philosophie médiévale à certains égards vers la phénoménologie,[13] pourtant

[9] Dans notre essai nous allons citer les œuvres principales sous les formes suivantes : 1) Sources primaires : B = H. Busche (sous la dir.) G. W. Leibniz *Frühe Schriften zum Naturrecht* (Hamburg : Felix Meiner 2003); C = L. Couturat (sous la dir.) *Opuscules et fragments inédits de Leibniz. Extraits des manuscrits de la Bibliothèque royale de Hanovre* (Paris : Félix Alcan [1903] 1988); Grua = G. Grua (sous la dir.) *Textes inédits d'après les manuscrits de la Bibliothèque provinciale de Hanovre* (Paris : P.U.F. [1948] 1998); GP = C. I. Gerhardt (sous la dir.) *Die philosophische Schriften von G. W. Leibniz* (Hildesheim : Olms [1875–1890] 1960–1961) I–VII. ; Jnc = "De la justice et du nouveau code" *APD* 31 (1986), 359–67 ; NE = *Nouveaux essais sur l'entendement humain* (Paris : Flammarion 1990); SDr = R. Sève *Le droit de la raison* (Paris : Vrin 1994). 2) Sources secondaires "classiques" : CL = L. Couturat *La logique de Leibniz d'après des documents inédits* (Hildesheim : Olms [1901] 1969); Grua J = G. Grua *La justice humaine selon Leibniz* (Paris : P.U.F. 1956).

[10] Y. Belaval *La pensée de Leibniz* (Paris : Bordas 1952), 278. : "S'il est vrai qu'une vision du monde ne suffit pas, sans un Système, pour faire un philosophe; alors Leibniz est le philosophe par excellence : aucun n'est plus systématique ..."

[11] A cet égard v. A. Robinet "Situation architectonique de la logique dans l'œuvre de Leibniz" *Studia Leibniziana* (1986) 15 [Sonderheft], 14. et Rauzy (n. 4.), 51.

[12] R. Blanché – J. Dabucs *La logique et son histoire* (Paris : Armand Collin [1970] 1996), 191.

[13] Cp. P. Lalande "Ontologie" in *Vocabulaire technique de la philosophie* (Paris : Quadrige–P.U.F. [1926] 1992).

il est érigé en *philosophe de la continuité*[14] dans la mesure où son opposition à la démarche aristotelicienne–thomastique n'est pas fondamentale.[15] La science des êtres donc "l'ontologie" est pour Leibniz identique avec la logique.[16]

Son ontologie du droit repose sur une conception plus générale de la connaissance et de l'homme et est *dépendante* de ses considérations métaphysiques. A cet égard, la philosophie du droit leibnizienne appartient à *la philosophie du droit des philosophes*. Il met en œuvre les lois et la méthodologie de la philosophie générale dans le cadre d'un domaine spécial, en l'occurrence le droit. Sa démarche volontaire se distingue de certains de ses homologues (par exemple Spinoza) puisqu'elle n'est pas dénuée de tout lien avec la réalité du droit étant donné que Leibniz a été juriste praticien.

Son ontologie juridique est définie d'abord directement par la métaphysique, mais aussi indirectement, ainsi que par les autres disciplines intermédiaires : la théologie et l'éthique de l'a découlant son caractère complexe. Tout d'abord dans la *division interne* de la philosophie générale entre *la philosophie théorétique* et *pratique*, Leibniz range la science du droit dans la philosophie pratique. Cette science (*complexus doctrinarum universalium*) s'oriente vers les *rerum usus ad obtiendum bonum malumque evitendum*.[17] Or, la liaison entre la métaphysique et le droit est affirmée également par l'inclusion de la *théologie*, comme un *intermédiaire* entre la métaphysique et le droit. Par exemple l'hypothèse de "l'harmonie préétablie" du monde actuel crée par Dieu, permet de supposer qu'au delà de nos expériences (juridiques ou morales), on peut retrouver les vérités nécessaires ou universelles. Ainsi l'axiome de la bonté de Dieu, devient le fondement ultime établissant cette unification. Cette liaison est très explicite dans la *Nova Methodus* où Leibniz fait un parallèle entre la théologie et le droit, où il écrit que la "théologie est une certaine espèce de jurisprudence prise universellement"[18] qui traite du droit et des lois admises dans "la république ou dans le royaume de Dieu sur les hommes".[19] L'unité du droit et de la théologie implique l'idée d'un monde moral donné qui a une rationalité propre, et qui est indépendante de la volonté. Plus précisément le "monde moral" est un "sous-ensemble" à l'intérieur de la création ou de "cité de Dieu". Il est composé de l' "ensemble

[14] Blanché – Dabucs (n. 12), 191.

[15] D'où sa célèbre observation à l'égard de ses contemporains (GP VII, 481) : *Lockius aliique qui sperunt non intelligunt.*

[16] C, 512 ; GP, IV, 292 ; CL, 238. V. aussi H. Knecht *La logique chez Leibniz. Essai sur le rationalisme baroque* (Lausanne : L'age d'homme 1981), 113, n. 32.

[17] CL, 524–5.

[18] SDr, 191.

[19] Grua, 614.

des esprits tendant vers Dieu", c'est-à-dire des "êtres spirituels en tant que tels" et non des esprits en tant que sujets de droit et de devoir. Contrairement aux thèses des théories volontaristes, chez Leibniz Dieu est d'abord une "cause finale" du monde des esprits, et secondairement législateur ayant toute puissance. Autrement dit, Dieu est "architecte du monde", et non pas "Dieu-tyran", qui pourrait agir comme il veut.

De cet aspect théologique, découle une philosophie morale utilitariste. Ceci signifie que l'éthique est la deuxième *science intermédiaire* entre la métaphysique et le droit. La perfection des esprits ou le bonheur consiste subjectivement en la connaissance et l'admiration de Dieu et de ses œuvres, c'est de plus dans cette connaissance que réside la gloire de Dieu qui est le but de la création. Les esprits humains tendent vers le Dieu, en le regardant comme "suprême félicité". Le bonheur est une *inclinatio ad bonum*.[20] L'honneur, la gloire, la sensation de l'âme qui se réjouit de sa propre vertu sont ce que les philosophes appellent "l'honnêteté", qui pour Leibniz sont les biens de la pensée et de l'esprit. Il veut faire une démonstration universelle que tout ce qui est honnête est utile et tout ce qui est honteux est nuisible, en présupposant l'immortalité de l'âme. Dans cette perspective, la science du droit est "la science des actes justes c'est-à-dire utile au public"[21] ou la "science de la sagesse ou du bonheur, ou de la méthode de la vie"[22] appartenant donc au champ de la philosophie pratique et elle est en même temps une théorie de la justice englobant même la théologie naturelle.

Enfin, l'ontologie complexe de Leibniz provient de *la totalité du phénomène étudiée* et sa présentation, puisque pour ce philosophe jusnaturaliste, à côté du droit positif, il existe un droit idéal qu'est le droit naturel. Celle-ci est presque immédiatement donnée si l'on prend en considération la définition du droit, élaborée par les jurisconsultes : *jus est scientia boni et aequi*.[23] Dans son étude intitulée *De la justice et du nouveau code*, après avoir introduit les notions de "droit" et de "l'homme bon", Leibniz reproduit presque la même définition, en caractérisant la science du droit dont l'objet est le "droit" et "l'obligation".[24] Ici se pose tout de même la question de la *généralité* et de l'*universalité* qui caractérise la science, comme la science naturelle. Générale puisque la jurisprudence "est la science du droit, quelque cas ou fait étant

[20] GP, VI, I, 454–5.
[21] Grua J, 231.
[22] Ibid. 30–34.
[23] Grua, 608, 610.
[24] Jnc, 357.

proposé".[25] Cependant une telle exigence semble contraire au fait, que le droit romain pris comme base par Leibniz est au moins partiellement historique. Il faut donc faire une abstraction depuis les textes du droit romain et reconstituer *universellement* les préceptes d'un droit naturel.

L'ontologie complexe permet de comprendre les éléments du système juridique développés par Leibniz.

3 Construction d'une ontologie "autonome" du droit naturel

Leibniz, en réfléchissant sur le juste et l'injuste, projette d'écrire *un système de droit parfait codifié* dans lequel tous les problèmes de droit pourraient trouver solution. Son projet trouve une motivation dans la multiplicité des sources du droit coexistantes à son époque (le droit de l'Empire, les droits et les coutumes locaux, le droit canonique et le droit romain). Cette pluralité de source contribue à une grande confusion que déplore Leibniz, puisqu'elle conduit à l'incertitude du droit. C'est la raison pour laquelle il souhaite comme la plus part de ses contemporains, participer à la "remise en ordre du droit" par la codification. Cette exigence est caractéristique des juristes et des philosophes des Lumières.[26] Dans une lettre adressée à Jean Chapelain[27] Leibniz expose clairement son projet de remise en ordre du droit à partir du droit romain pour parvenir à formuler les préceptes d'un droit naturel apportant clarté et sécurité. Mais à partir de quelle matière faut-il "remettre en ordre le droit"? Dans une autre lettre, adressée à Hobbes, Leibniz affirme que "la moitié du droit romain est de pur droit naturel".[28] Il exprime toute son admiration comme suit :

> "la jurisprudence même est une science d'un très grand raisonnement, et dans les anciens je ne trouve rien qui approche davantage du style des Géomètres que celuy des Jurisconsultes, dont les fragments dans les pandectes".[29]

D'autres raisons plus pragmatiques sont exposées par Leibniz dans sa lettre à Chapelain, justifiant le recours au droit romain. Son projet doit se baser sur des lois, ce ne peut être les droits coutumiers différents d'une province à l'autre, mais le droit romain qui est aussi en vigueur dans tout le

[25] SDr, 189.
[26] Cp. les notes de Sève : ibid. 183s.
[27] B, 349–73.
[28] SDr, 67 ; GP, I, 42.
[29] CL, 227–8.

royaume. Ce dernier est par ailleurs accepté comme le *jus commune* en Europe, utilisés en cas de lacune de droit par les juges.

Il ne s'agit toutefois pas de reprendre tout le droit romain (tâche au demeurant impossible), mais uniquement les éléments qui correspondent au droit naturel. Car malgré toute son admiration, Leibniz n'hésite pas à critiquer certaines incohérences du droit romain, ses parties "vagues et obscures"[30], son caractère superflu. Paradoxalement ces caractères du droit romain permettent d'inventer – pourrait-on dire – le "meilleur droit possible". Du point de vue de l'ontologie juridique, cette démarche présente un avantage. *La tâche est simplement de chercher le meilleur droit possible ; de reformuler le droit idéal depuis le corpus du droit romain, qui est une donnée historique.* Il est incontestable que les règles du droit romain sont des productions humaines, mais elles ne constituent pas des commandements au même sens que les lois des souverains, pour Leibniz. Le droit romain lui-même devient une source de droit, et la question "d'où découle le droit romain ?" est dépourvue de sens. Et l'essence du droit, le droit naturel ce qui *legibus non indiget*[31] ou – en reprenant la formule classique du droit romain – *quod natura omnia animalia docuit.*[32] Entre l'ordre juridique et la structure ontologique de l'univers, le lien c'est la formule abstraite romaniste, le *vir bonus* (l'homme bon), qui se définit néanmoins d'une manière essentialiste, dans la mesure où elle renvoie aux hommes existant dans notre monde. Ce concept d'ailleurs imprégné de morale sert de base même à la science juridique : *jurisprudentia est scientia viri boni.*[33]

Certes, la tension entre le *caractère concret du droit romain* et *la nature abstraite du droit naturel* pose certains problèmes, comme cela peut être mis en évidence avec la célèbre division tripartite de Gaius. Dans ce cas précis, Leibniz est obligé d'admettre qu'au moins partiellement (par exemple concernant la question de l'esclavage), le droit romain et les commentaires y afférents, sont des *vérités de faits* ; y compris d'ailleurs la division tripartite de Gaius. Contrairement à Gaius, le juriste-philosophe allemande préconise de mettre au centre de cette division du droit, les actions et non des personnes et des choses, parce que, d'une part les actions proviennent aussi bien du droit des personnes que du droit des choses, et d'autre part, parce qu'il s'agit de divisions factuelles qui peuvent être subdivisées à l'infini. Or si l'on subdivise à l'infini, le résultat ne peut être que la confusion alors que

[30] Note de Sève ds. SDr, 183. V. aussi NE, IV, VII, §19.
[31] Grua, 597.
[32] Ibid. 615.
[33] Ibid. 606, 608.

le but à atteindre est la simplification du droit permettant ainsi de le rendre universalisable. Leibniz l'exprime clairement lorsqu'il écrit que "... l'affaire ne pourrait être ramenée à des choses universelles"[34], s'il en était autrement. L'action doit être ainsi déterminée par sa finalité propre. Et l'action humaine par essence est dirigé vers le bien. C'est la raison pour laquelle la science du droit est d'un autre côté une philosophie pratique, une "science de l'action en tant qu'elles sont dites justes ou injustes".[35] L'ordre juridique se composant de droits, la tâche de la science du droit consiste à *systématiser des règles* visant les actions humaines (justes ou injustes). La *dimension axiologique* de la science est d'ailleurs explicite: la justice de l'action est une qualité de la personne agissante, respectivement à son action et la qualité morale de l'action est son caractère juste.

Leibniz reprend la distinction classique entre le droit naturel et le droit humain, en donnant une priorité au premier:

> "suivant l'origine, le droit est naturel ou positif ... Il est conforme à la nature ou à la raison, non seulement humaine, mais divine, et connu comme vérité éternelle avec tant de facilité qu'on ne peut l'ignorer, tandis qu'il faut l'écriture pour connaître le droit positif ou humain. Ce dernier comprend le droit des gens ... et le droit civil".[36]

Le droit civil n'est que partiellement déduit du droit naturel, les vérités relatives au droit civil sont des *vérités contingentes*. Car ce droit civil englobant également les lois et les coutumes "tient sa force du souverain". Et c'est la raison pour laquelle Leibniz considère que le droit civil est "plutôt fait que droit, il faut le prouver non par la science de la nature, mais par l'histoire et l'observation"[37].

De là l'intérêt de la recherche des définitions des normes du droit naturel, pour *fonder la validité des lois positives*. La validité des règles positives est assurée par application des règles originelles issues du droit naturel et c'est un moyen pour rendre plus effectif le droit naturel. D'un autre côté considérant que la "synthèse" est le moyen adéquat pour arriver à de "belles vérités"[38], en passant du simple au composé, il admet comme fondement du

[34] GP, VI, 1, § 10. V. aussi P. Boucher "Introduction" dans G. W. Leibniz *De conditions (De conditionibus)* (Paris : Vrin 2002), note 4, 16.

[35] SDr, 192. En ce qui concerne la critique leibnizienne de la division tripartite de Gaius v. A.-J. Arnaud *Les origines doctrinales du code civil français* (Paris : LGDJ 1969), 131s. V. aussi Boucher (n. 34), 12s.

[36] Grua J, 231.

[37] Ibid. 232.

[38] NE, IV, II, §7.

droit la sécurité et la socialité en conciliant ainsi les thèses de Hobbes et de Grotius. *Cette idée soutenue par* la structure pyramidale du droit de Leibniz.

Ainsi *la structure interne du droit idéal* est hiérarchisée en *trois degrés*, qui correspondent à trois degrés de la justice, inspirés des maximes romaines: ne léser personne (*neminem ledere*), attribuer à chacun le sien (*suum cuique tribuere*) et vivre honnêtement (*honeste vivere*).

Le précepte du *droit strict* est *neminem laedere*, il renvoie au principe du droit de propriété. Il correspond au pouvoir le *homo economicus*. De ce précepte découle le critère de sécurité, dont le but est "dans la cité ne pas donner matière à une action en justice et en dehors de la cité à la guerre".[39] Ce précepte est appliqué dans le cadre de la justice commutative, qui traite tous les hommes de manière égale.

Tandis que le droit strict sert à éviter le malheur, *l'équité* qui constitue *le second degré* du droit, tend au bonheur des hommes. Le précepte qui guide le degré médian du droit est *suum cuique tribuere*. Il fait référence plutôt au droit public, puisque de là découle le principe de la socialité et de la paix procurée par l'Etat. Ce n'est plus l'utilité privée mais l'utilité de la république qui est visée, faisant donc intervenir l'homme social, et imposant une obligation positive de faire quelque chose. C'est donc un degré supérieur au droit strict rigoureux qui incite les individus à l'entraide et à la gratitude, individus qui augmenteront leur bonheur à travers celui d'autrui. Cette raison doit suffire puisque aucune action juridique n'est donnée aux bénéficiaires de cette obligation par le droit strict. Le précepte constitue la base de la justice distributive. L'homme social, en référence à Grotius, se mettra à la place de l'autre dans la distribution de ses propres biens et des biens publics et négativement il ne fera pas à autrui ce qu'il ne veut pas qu'on lui fasse. Au dessus de l'équité ou l'égalité se trouve la piété ou charité.

Le *dernier degré* qui correspond à *la charité* (ou à la piété) englobe et justifie les deux précédents. La notion de l'utilité en même temps s'élargit: de celle qui intéresse l'individu, on passe à celle qui touche à la république et enfin au genre humain dans son ensemble. Ce degré est encore plus parfait que le droit strict et l'équité, il les confirme et comme le dit Leibniz au début de la présentation dans la *Nova Methodus* "en cas d'opposition y déroge"[40]. Le précepte fondant la justice universelle est *honeste vivere*, c'est-à-dire vivre honnêtement, dans le respect de la volonté divine.[41] Cette obligation de faire quelque chose vise l'homme sage, et l'utilité en cause est celle du genre hu-

[39] SDr, 164.
[40] Ibid. 196.
[41] Grua, 616–7.

main. La justice universelle renvoie à celle qui s'exerce dans la république de Dieu. Il faut donc présupposer l'immortalité de l'âme. Et les règles comme ne pas "abuser de son corps ou de sa propriété" pour reprendre les exemples que donne Leibniz sont interdites par les lois éternelles du divin monarque, c'est-à-dire le droit naturel même en dehors des lois humaines. La malhonnêteté entraînerait, la non-obtention de ce que Dieu promet "parce qu'il est évident que Dieu a destiné des récompenses aux justes et des punitions aux injustes à partir de sa sagesse"[42], car rien n'est négligé dans la république de l'univers. L'intervention divine ainsi conduit à ce que ce qui est utile au genre humain, devienne utile à l'être au singulier. En somme:

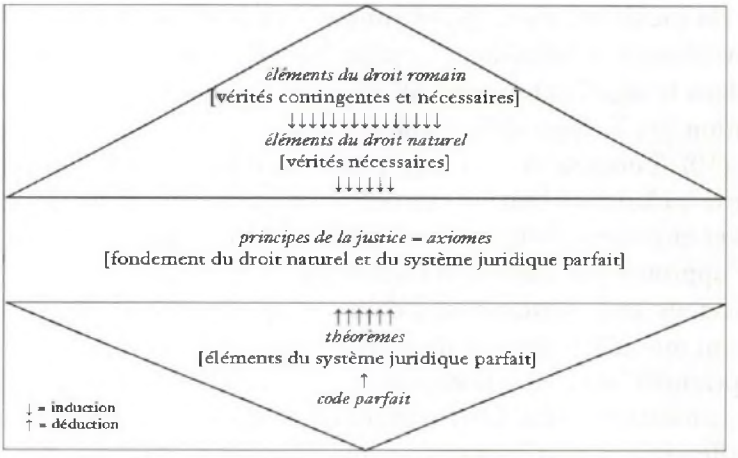
	droit strict	équité	charité
L' homme bon est	égoïste	sociale	savant.
La source philosophique est celui de	Hobbes	Grotius	la pensée chrétienne / rationalisme philosophique.
Le type de la justice est	commutative	distributive	universelle.
Le type du bien est	individuel	commun	général.

S'agissant d'une doctrine jusnaturaliste (rationaliste), le fondement du système juridique idéal est la justice. La justification est simple: le droit naturel est *dans* le droit, le droit en l'espèce est en partie le droit romain et c'est dans le droit naturel que se trouvent les préceptes de la justice. Selon la méthode axiomatique de Leibniz arriver au fondement du droit, signifie trouver *les éléments les plus primitifs possibles.*[43] Ce sont les éléments de la justice. Sa conception de la justice s'est développée progressivement. Ce développement est marqué par "l'élimination progressive des intérêts égoïstes et introduction des intérêts supramondains que résume de personnage 'l'homme bon'".[44] L'axiome de "l'homme bon" est introduit ici comme élément dans la définition repris du droit romain.[45] Il tente également de réconcilier plusieurs thèses philosophiques, et d'intégrer harmonieusement tous les éléments.[46] Par cette méthode "ésotérique", rapprochant encore la pensée scolastique et le courant utilitariste, Leibniz définit la justice comme les juristes romains en l'orientant vers l'intérêt public ou privé. Selon cette conception, le juste et

[42] SDr, 198.
[43] Sur les spécificités de l'école du jusnaturalisme-rationaliste, v. Villey (n. 2); Sève (n. 4).
[44] SDr, 124.
[45] Grua, 606.
[46] Ibid. 607.

l'injuste sont tout ce qui est utile ou dommageable au public premièrement et l'injuste ce qui est dommageable au public sans nécessité privé.[47] Or Leibniz reste fidèle à la pensée aristotélicienne-thomastique dans la mesure aussi où il définit la justice également comme vertu, notamment la "charité". Mais la "charité" est une notion chrétienne qui institue un équilibre dynamique entre la volonté et la raison.[48]

La méthodologie appliquée par Leibniz, peut être caractérisée par deux phases: *il applique* la métaphysique au champ du droit et *il reconstruit* le droit idéal ou naturel depuis des préceptes du droit romain. L'originalité du philosophe de Hanovre est la combinaison de deux méthodes, notamment, la déduction avec l'induction. Les deux méthodes sont "analytiques" au sens large, car il s'agit de créer une chaîne de définition, composer et décomposer les notions complexes, en partant de ou en remontant jusqu'aux notions "absolument" primitives et simples.[49] Ainsi schématiquement le tableau suivant peut être tracé:



Dans le cas du fondement du système, l'axiomatisation passe par un processus de composition et de décomposition. Toutefois la méthode axiomatique n'est pas assez formaliste: le lecteur ne trouve que de longues chaînes de définition présentées telles des équations mathématiques. La réduction (l'axiomatisation) escomptée par Leibniz n'est pas – et dans cette forme, ne

[47] Ibid. 596–7.

[48] Ibid. 604–5, 611–2, 614.

[49] Définir, dit Leibniz, est *explicare notionem, seu resolvere in plures notiones uniaequivalentes.* (C, 497.)

pourrait être – opératoire, à cause de leur formulation par *le langage naturel*. Les concepts fondamentaux formulés restent vagues et finalement, indéfinies comme l'attestent l'exemple de la définition de la justice ci-dessous.

Le procédé d'*axiomatisation de la justice* par Leibniz prend la forme suivante: "la justice est (1) la volonté constante (2) d'attribuer à chacun (3) le sien". Leibniz s'intéresse à l'élément (3) qui est défini comme (3a) "ce qui convient" et (3b) "qu'il appartient à chacun". Il donne la signification au (3b) plus tard, selon laquelle "ce qui appartient à quelqu'un soit ce qui est en son pouvoir" soit "ce qu'il peut traiter de toutes les manières, qui ne sont pas tirées d'un motif singulier", mais ce dernier élément sera abandonné dans la suite de définition. Il choisit la voie plus complète, qui est indiquée par (3a). Elle est "qui semble être (4) le meilleur au total"; le (4) est le "(4a) bien général" ou ce qui équivalent avec "(4b) la volonté divine", laquelle est "(5) la bienveillance générale" ou la "(6) charité". La définition de (5) est équivalente avec (1) + (4a-b). Mais pour arriver au (6), on devrait être guidé par la science (7), afin de savoir ce qui est le meilleur (8). La "sagesse" est "la science du meilleur", donc (9) identique avec le (7) et (8) ou du bonheur. On arrive donc à la définition [2], selon laquelle la justice est "la charité qui réside dans le sage" autrement dit, la proposition (6) est identique avec la proposition (9). Leibniz définit ailleurs "l'acte juste" en introduisant la notion de (10) "l'homme bon et sage", donc dans la personne qui possède (6) la "charité". L'homme bon est une personne qui est "dotée de justice" qui va approuver et évaluer l'acte en tant qu'acte juste, puisque l'acte juste est celui qui est "approuvé par l'arbitre d'un homme bon et sage."[50]

Le lecteur peut constater ainsi d'un côté que les trois définitions [1–3] se définissent mutuellement et d'un autre côté que leurs composantes, les concepts "primitifs" comme axiomes sont trop nombreux pour qu'ils puissent remplir la fonction de fondement ontologique du système juridique. Sous un angle différent, on peut relever avec intérêt que cette faute méthodologique sur le fondement n'empêche pas totalement l'élaboration d'un systême juridique idéal en tant que systême logique.

4 *L'ontologie des normes juridiques et le problème de la logique juridique*

L'ontologie "hylétique" du droit leibnizienne se fonde sur une distinction élémentaire mais tout à fait essentielle, entre le droit (*ius*) et la loi (*lex*).

Sa définition de la loi maintient *la subordination hiérarchique* entre le droit et la loi. *Lex est generale pronontiatium circa jus*: la loi n'est qu'un "énoncé

[50] Jnc, 357.

général" du droit. La loi est soit juste soit injuste, par contre, le droit est toujours juste. Le droit est identique avec la puissance morale ou avec "le pouvoir de l'homme bon".[51] Le corollaire du droit est l'obligation, définie comme nécessité morale.[52]

La distinction entre le droit et la loi est parallèle avec celle qui est faite par Leibniz entre la philosophie et l'histoire: l'une est en quelque sorte *éternelle*, l'autre est *factuelle*. Leibniz interprète donc les notions et règles du droit romain parfois comme des *vérités nécessaires* et donc éternelles et parfois comme des *vérités factuelles*. La norme juridique est une vérité et définir une vérité n'est rien d'autre que trouver l'essence. Dès lors Leibniz peut immédiatement considérer les règles du droit romain, lorsqu'elles expriment le droit naturel comme des vérités (et pas comme des actes de la volonté), équivalentes aux vérités mathématiques ou celles de la géométrie, susceptibles d'être vraies ou fausses.

Une doctrine des vérités et de la définition tient lieu de soubassement à sa conception du droit. En ce qui concerne la première, Leibniz considère non seulement les "vérités de raison" mais également les vérités de faits comme exprimant une essence, qui est indépendante de nos expériences. En ce qui concerne la deuxième, en s'écartant du nominalisme pur auquel il avait adhéré dans sa jeunesse, il souligne qu'il est possible de donner plusieurs définitions, tout en atténuant cette thèse en affirmant que les différentes formulations renvoient à la même essence de la chose donnée. Ayant rejeté le pur volontarisme de Hobbes, selon lequel une norme est un commandement ou un impératif, Leibniz adopte donc une *conception hylétique* de la norme, en la considérant comme une règle indicative.[53]

L'ontologie hylétique de la norme juridique entraîne deux conséquences: donner au concept d'obligation une position primordiale et rejeter presque totalement la notion de sanction, élément qui habituellement accompagne une disposition précisément juridique. Le concept de la norme découle du concept du droit de Leibniz et apparaît dans sa logique juridique. Il s'agit d'une théorie proche de celle d'Aristote, tout en s'en distinguant. Leibniz présuppose et présume qu'une action humaine est toujours désirée rationnellement et la règle est la mesure qui aide et guide pour accomplir une fin ou une satisfaction. Il doit être rappelé encore une fois que le droit – ensemble de

[51] C, 504.

[52] Jnc, 357; Grua, 615.

[53] Les termes "hylétique" et "expressif" sont introduits par Alchourron et Bulygin. P.e.: "The Expressive Conception of Norms" ds. R. Hilpinen (ed.) *New Studies in Deontic Logic* (Dordrecht: Reidel 1981), 95–121.

règles et de principes – est toujours juste (contrairement aux lois ou aux coutumes ou aux ordres du souverain) et tend vers le bien parce que dérivé du droit naturel.[54]

Ce concept de la norme juridique introduit la question de la possibilité de la logique juridique. Appartenant au courant rationaliste, Leibniz applique bien évidemment la logique au droit. Il va même plus loin, puisque selon lui la science du droit est la *logique appliquée* aux choses morales et il y a une logique juridique, de sorte que la jurisprudence est une véritable dialectique de droit. Leibniz appelle la science du droit partie "didactique" de la jurisprudence et il la définit comme désignant

> "du nom d'éléments à l'imitation des éléments d'Euclide ... [qui] se résolvent en deux parties: dans l'explication des termes ou les définitions, à laquelle correspond le titre de *verborum significatione*, et dans les propositions ou préceptes, auxquels correspond le titre de *regula juris*".[55]

La partie "didactique" se distingue de la partie "polémique" qui complète la première et traite du procès et donc de l'interprétation dans le cadre de l'application du droit.[56] Rappelons sans entrer dans le détail que Leibniz se méfie des avocats (qui profitent de l'incertitude du droit en cherchant à remporter leur cause par de nombreuses références à la doctrine) et des magistrats qui par l'interprétation déforment le droit. Son souhait est précisément de *réduire la marge de manœuvre* (pouvoir arbitraire) laissée aux interprètes du droit notamment aux juges, en ne laissant à l'interprétation qu'un rôle marginal.[57] Or, il convient de retenir que dans le système de Leibniz évidemment, le droit naturel domine les principes de décisions, non en s'imposant toujours mais en "jouant le rôle de droit commun, qui donne une réponse dans le cas douteux en droit civil ..."[58]

En ce sens l'introduction de la logique a *une fonction double*, théorique et pratique: d'une part elle vient de la structure du système des sciences, notamment de la formalisation de la science de base (la métaphysique ou l'ontologie), d'autre part elle garantit la certitude en droit dans les cas complexes et limite l'arbitraire des juges. Dans sa lettre à Chapelain[59], cette raison pratique est clairement exprimée comme d'ailleurs son désir d'appliquer

[54] Grua, 612.
[55] SDr, 189. Mais v. aussi ibid. 192.
[56] Ibid. 190.
[57] Cp. également C, 495, 497.
[58] Grua J, 234–5.
[59] B, 359.

son "art combinatoire" au droit, une tentative d'application de cet art ayant été en linguistique dans son projet sur un langage universel.

Leibniz est reconnu aujourd'hui comme *le précurseur des logiciens déontiques*.[60] Comme les passages ci-dessus en attestent, chez lui il existe une logique juridique au sens fort car il considère que les règles juridiques elles-mêmes sont susceptibles d'être vraies ou fausses. Il ne soutient pas simplement que la logique juridique soit possible en tant que discours séparé sur les règles juridiques, mais plutôt que les lois logiques opèrent dans le système juridique-lui même, autrement dit, que les lois logiques sont tout à fait valides dans le système juridique. Leibniz envisage d'écrire une table des droits, réduits aux éléments les plus simples et permettant à chacun de trouver rapidement les solutions adéquates aux *casus complexi* de droit. Il utilise les lois logiques en identifiant les opérateurs propres au système normatif. Selon un tableau comparatif, il s'agit donc de quatre modes, transposés de la logique classique dans le domaine du droit. Malgré les critiques bien fondées contre lui, il a quand même le grand mérite d'utiliser des demandes en justice du droit romain de sorte que derrière les solutions logiques se profilent des solutions juridiques concrètes.

Avant de regarder de plus près notre tableau comparatif pour illustrer les projet de Leibniz, il convient de rappeler qu'il réduit le droit au pouvoir et l'obligation à la nécessité entendus au sens large. Il s'agit non seulement des nécessités physiques ou *de facto* capacité de faire quelque chose, mais aussi les nécessités et possibilités morales, voire religieuses. Une place primordiale revient au concept de "juste" dans son système. Un acte est juste s'il est possible que l'homme bon le fasse. Par conséquent l'injuste devient tout ce qui est impossible que l'homme bon fasse. Plus précisément: *iustum vel licitum*, *illicitum*, *debitum*, *liberum est quod est viro bono et prudenti possible*, *impossible*, *necessarium*, *contingens*.[61] Le présupposé de Leibniz étant qu'une action tend toujours vers le bien, on ne s'étonnera pas de l'association du possible avec le juste et inversement de l'injuste avec l'impossibilité. Ainsi les actions possibles sont toujours justes et les actions impossibles sont toujours injustes. Il faut ajouter l'adaptation de la maxime romaine attribuée à Celsus *impossibilium nulla obligatio est*.[62]

[60] G. Kalinowski – J.-L. Gardies "Un logicien déontique avant la lettre: G. W. Leibniz" *ARSP* 60 (1974), 79–112.

[61] Grua, 615.

[62] D. 50, 17, 185.

Ces différentes combinaisons peuvent être retrouvées dans le tableau comparatif ci-dessous: [63]

modes déontiques	termes de Leibniz		modes aléthiques		modes épistémiques	modes existentiels	modes temporels
ne pas devoir de ne pas faire	juste *(iustum, licitum)*	permis de faire	possible	ce qui est vrai dans certains cas	plausible	existe x tel que	quelque fois
devoir de ne pas faire	injuste *(iniustum, illicitum)*	défendu de faire	impossible	ce qui n'est pas vrai dans aucun cas	falsifié	n'existe pas d'x tel que	jamais
devoir de faire	équitable *(aequum, debitum)*	obligatoire de faire	nécessaire	ce qui est vrai dans chaque cas	vérifié	n'existe pas d'x tel que non	toujours
ne pas devoir faire	non-dû *(indifferens, indebitum, omissibile)*	permis de ne pas faire	contingent	ce qui n'est pas vrai dans quelque cas	litigieux	existe un x tel que non	quelque fois non

Bien évidemment ce système ne marche que si le principe de clôture, "tout ce qui n'est pas interdit est permis" est introduit.[64] Alors que toutes les actions nécessaires [obligatoires/équitables] sont aussi possibles [permises/justes], il n'est pas vrai que toutes les actions possibles [permises/justes] sont aussi nécessaires [obligatoires/équitables]. Les actions qui ne sont pas nécessaires [obligatoires/équitables], mais possibles [permises/justes] sont contingentes [permises/indifférentes] et celles qui ne sont ni possibles [permises/justes], ni nécessaires [obligatoires/équitables] sont les actions impossibles [interdites/injustes].[65]

⋆

La recherche du "meilleur droit possible" fut effectuée, bien évidemment, *sub specie aeternitatis*, cependant ne constitua nullement un but en soi. Knecht accentue à bon droit que

[63] Grua, 605; B, 244; Kalinowski – Gardies (n. 60), 82s., 98s.

[64] Gardies (n. 1), 126–7.

[65] Les correspondances au-dessus sont à retenir de ce tableau établi à partir de SDr, 209s. Cp. aussi B, 254., 260.

> "la méthodologie universelle, but ultime des recherches logiques de Leibniz, ne vise ... pas tant à découvrir la vérité qu'à fonder les règles d'une vie heureuse, ou plutôt à vie heureuse grâce à la connaissance de la vérité."[66]

La tâche ultime est de livrer par une jurisprudence universelle ou par la codification, une "lutte contre la misère morale".[67] Les efforts intellectuels du philosophe de Hanovre, ont, il est vrai, porté leurs fruits. Nous oublions parfois que – á côté de la codification – la contribution leibnizienne a donné naissance plus tard à la *Begriffsjurispudenz* et eu un impact important dans la théorie du droit international public.[68]

Certes sa tentative vers l'axiomatisation pure, n'a pas connu le même succès á cause des limites qui se trouvent dans la méthode axiomatique. Ainsi l'axiomatisation implique une formulation rigoureuse des théorèmes, tels que des axiomes découverts par l'analyse inductive. Leibniz ne réussit pas à poursuivre cette méthodologie jusqu'au bout et ceci pour deux raisons. Tout d'abord sa table de droit contient non seulement les concepts fondamentaux, mais également leurs définitions. Ensuite c'est qu'en arrivant jusqu'aux axiomes ("au meilleur droit possible"), il faudrait supposer que les notions sont petit à petit réduites et plus en plus formalisées. L'idéal visé par Leibniz étant que les axiomes soient remplacés par les symboles mathématiques, ou le principe de la justice avec une équation mathématique. Cependant il échoue dans cette entreprise: les éléments de la définition de la justice deviennent de plus en plus complexes et ne sont pas formalisés. Il se peut que ces difficultés expliquent, en plus des explications plus conjecturelles que les différents projets qu'avait entrepris Leibniz comme l'écriture des *Eléments du droit naturel* ou la remise en ordre des lois romaines, ne furent jamais aboutis.[69]

[66] Knecht (n. 16), 308.
[67] Note de Sève dans SDr, 185.
[68] Souligné par Gardies (n. 1), 129.
[69] SDr, 184s.

Die Idee sozialer Gleichheit

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1 Zum Begriff der sozialen Gleichheit

Soziale Gleichheit ist eine der maßgeblichen Leitideen der Selbstorganisation moderner Gesellschaften und ein grundlegender Maßstab der Legitimität ihrer rechtlichen Ordnung. Die Idee der Gleichheit bekräftigt die jeder universellen Moral inhärente Annahme des gleichen Werts und der gleichen Würde aller Menschen. Um die Bedeutung und Funktion dieser Idee richtig zu verstehen, ist es erforderlich, den ihr zugrunde liegenden Begriff der Gleichheit genauer zu betrachten.

Der Begriff der Gleichheit wird auf zwei verschiedene Weisen verwendet: einerseits als *empirisches* Konzept, das zur Beschreibung und Erklärung realer sozialer Verhältnisse dient, und andererseits als *politisches* Konzept, das als Richtschnur der Gestaltung und Bewertung sozialer Ordnungen fungiert. Im Folgenden soll zunächst die logische Struktur beider Konzepte skizziert und dann das empirische Gleichheitskonzept näher erläutert werden. Der Rest des Artikels wird sich mit dem politischen Gleichheitskonzept beschäftigen.

1.1 Die logische Struktur des Gleichheitsbegriffs

In logischer Hinsicht stellen die Ausdrücke "Gleichheit" und "gleich" ebenso wie "Ungleichheit" und "ungleich" *Relationsbegriffe* dar, die dazu dienen, Menschen hinsichtlich bestimmter Eigenschaften oder Umstände zu vergleichen. So kann man sagen, dass Menschen hinsichtlich gewisser Eigenschaften oder Umstände entweder gleich oder ungleich sind, wobei die Ungleichheit qualitativer oder komparativer Natur sein kann; z.B.: "X hat die gleiche (eine andere) Hautfarbe wie (als) Y", "X leistet gleich viel (mehr / weniger) wie (als) Y", "X hat gleiche (mehr / weniger) Rechte wie (als) Y",

"X bekommt gleich viel (mehr / weniger) Lohn wie (als) Y". Das sind nichts weiter als einfache Aussagesätze, die über bestimmte reale Tatsachen berichten und für sich allein keinerlei normative Konsequenzen implizieren. Von Sätzen dieser Art macht das empirische Gleichheitskonzept Gebrauch.

Demgegenüber haben die Sätze, mit denen das *politische* Konzept sozialer Gleichheit operiert, eine komplexere Struktur: Sie enthalten neben wenigstens einem Aussagesatz der genannten Art einen *zweiten* Relationssatz *normativen* Charakters, der eine bestimmte Behandlung der betreffenden Personen verlangt, wie z.B. "X soll gleiche (mehr / weniger) Rechte haben wie (als) Y", "X soll gleich viel (mehr / weniger) Lohn bekommen wie (als) Y". Die beiden Relationen werden dabei zu einem *konditionalen Normsatz* des Inhalts verknüpft, dass die betreffenden Personen, je nachdem, ob sie sich hinsichtlich jener Eigenschaften gleichen oder unterscheiden, entweder gleich oder verschieden behandelt werden sollen.

So können mit Hilfe der genannten Beispielssätze die folgenden Normsätze gebildet werden: "Wenn X die gleiche (eine andere) Hautfarbe hat wie (als) Y, dann soll X gleiche (mehr / weniger) Rechte haben wie (als) Y", "Wenn X gleich viel (mehr / weniger) leistet wie (als) Y, dann soll X gleich viel (mehr / weniger) Lohn bekommen wie (als) Y". Natürlich können solche Sätze auch generelle Forderungen zum Ausdruck bringen, wie beispielsweise die Sätze: "Jede Person soll unabhängig von ihrer Hautfarbe gleiche Rechte besitzen", "Wer mehr leistet, soll auch mehr Lohn bekommen".

1.2 Das empirische Konzept sozialer Gleichheit/Ungleichheit

Zur Beschreibung realer sozialer Verhältnisse und der sie kennzeichnenden Ungleichheiten bedarf es eines empirischen Konzepts von sozialer Gleichheit bzw. Ungleichheit.[1] Obwohl dieses Konzept soziale Unterschiede als objektive Tatsachen der Realität zu erfassen sucht und deshalb *deskriptiven* Charakter hat, liegen ihm gewisse normative Annahmen zugrunde, welche die Wahl der Gesichtspunkte leiten, hinsichtlich welcher Menschen verglichen und als gleich oder ungleich eingestuft werden. Worum es dabei geht, das sind die sich aus der Verteilung bestimmter sozialer Vorteile oder Güter ergebenden *Lebenslagen* von Menschen.

Die üblichen Definitionen sozialer Ungleichheit nehmen deshalb stets auf solche Werte oder Güter Bezug. Dementsprechend kann man sagen, soziale Ungleichheit liege vor, "wenn Menschen aufgrund ihrer Stellung in

[1] S. Hradil *Soziale Ungleichheit in Deutschland* (Opladen: Leske & Budrich [8]2001), 27ff.

sozialen Beziehungsgefügen von den 'wertvollen Gütern' einer Gesellschaft regelmäßig mehr als andere erhalten".[2] Als solche Güter, die zugleich die wesentlichen Parameter sozialer Ungleichheit darstellen, gelten vor allem die folgenden: rechtlicher Status (allgemeine Rechte, Zugang zum Recht), politische Macht und sozialer Einfluss (formelle Machtbefugnisse, politische Teilhabe, Meinungsmacht, Prestige), soziale Chancen (Familienverhältnisse, Erziehung, Bildungswege, Berufsaussichten, Zugang zum Erwerbsleben) und wirtschaftliche Lage (Vermögen, Einkommen, Arbeitsverhältnisse, soziale Sicherheit).

Auf der Grundlage dieses Konzepts haben die Sozialwissenschaften ein reiches Arsenal von Kategorien und Methoden entwickelt, die es ermöglichen, die vielfältigen Erscheinungsformen sozialer Ungleichheit – wie Stände, Klassen, Schichten – zu klassifizieren, zu erforschen und zu erklären. Was gegenwärtige Gesellschaften angeht, so interessiert sich die Forschung vor allem für die relativ dauerhaften *Strukturen sozialer Schichtung*, die sich in den generationsübergreifenden Unterschieden der Bildungs- und Berufswege, der Arbeits- und Lebensbedingungen, des sozialen Einflusses und Ansehens sowie der Einkommens- und Vermögensverhältnisse der Menschen manifestieren.[3] Für die Messung von Ungleichheiten des Einkommens und Vermögens stehen mehrere quantitative Maße zur Verfügung, darunter der *Gini-Koeffizient*, der das Ausmaß dieser Ungleichheiten im Verhältnis zu einem Zustand der Gleichverteilung durch einen Wert von 0 bis 1 (keine bis extreme Ungleichheit) angibt.[4]

2 *Zur Geschichte der Idee sozialer Gleichheit*

Die folgenden Erörterungen fokussieren auf das *politische Konzept* sozialer Gleichheit. Was dieses Konzept zum Ausdruck bringt, das ist eine grundlegende Forderung an die politische Verfassung sozialer Ordnungen, die *Idee sozialer Gleichheit*, die zusammen mit den Ideen der Freiheit und der Solidarität den Kern der modernen Vorstellung sozialer Gerechtigkeit bildet.[5] Eine prägnante Formulierung dieser Idee gibt Artikel 1 der französischen Erklärung der Menschen- und Bürgerrechte von 1789: "Die Menschen werden

[2] Ibid. 30.

[3] Ibid. 147ff.

[4] A. Sen *Ökonomische Ungleichheit* [1973] (Frankfurt am Main–New York: Campus 1975), 36ff.

[5] P. Koller "Soziale Gerechtigkeit. Begriff und Begründung" *Erwägen Wissen Ethik* 14 (2003), 237–50.

frei und gleich an Rechten geboren und bleiben es. Die gesellschaftlichen Unterschiede können nur auf den gemeinsamen Nutzen gegründet sein."[6]

Allerdings bestehen darüber, was die Gleichheitsidee im Einzelnen besagt und verlangt, erhebliche Meinungsverschiedenheiten. Und es fehlt auch nicht an kritischen Stimmen, die diese Idee überhaupt in Zweifel ziehen. Im Folgenden soll zuerst die Geschichte der Gleichheitsidee in Kürze skizziert werden, um danach einen Blick auf die gegenwärtige Diskussion zu werfen.

2.1 Die historische Entwicklung der Gleichheitsidee

Die Wurzeln der Gleichheitsidee reichen bis in die Antike zurück, in der die grundsätzliche Gleichwertigkeit aller Menschen u.a. von den Sophisten vertreten wurde. Zu ihren Quellen gehört auch die christliche Vorstellung der Gleichheit aller Menschen vor Gott. Soziale Wirkungsmacht gewinnt die Gleichheitsidee jedoch erst in der Neuzeit, in der sie wachsende Verbreitung findet und sich schrittweise entfaltet.[7]

Den ersten Schritt bildet die Forderung nach *Gleichheit vor dem Gesetz*, die sich gegen die aus der mittelalterlichen Feudalgesellschaft tradierten Unterschiede der Rechtsstellung der Menschen nach ihrer Standeszugehörigkeit richtet. In dem Maße, in dem das städtische Bürgertum mit der Entwicklung von Gewerbe und Handel wirtschaftlich reüssiert, fordert es immer vehementer rechtliche Gleichheit und gleiche Freiheit ein.[8] Das geistige Fundament dafür liefern die Theorien des *rationalen Naturrechts* und des *klassischen Liberalismus*, vor allem jene von Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Adam Smith, David Hume und Immanuel Kant.[9] Die rationale Naturrechtslehre leitet aus der Annahme der natürlichen Freiheit und Gleichheit aller Menschen unveräußerliche Rechte ab, die jedem Menschen von Natur aus zukommen.[10] Und der klassische Liberalismus verspricht, die Freiheit aller Bürger werde von selber zu einem Zustand des all-

[6] W. Heidelmeyer (Hrsg.) *Die Menschenrechte* (Paderborn: Schöningh–UTB [3]1982), 60.

[7] O. Dann "Gleichheit" in O. Brunner – W. Conze – R. Koselleck (Hrsg.) *Geschichtliche Grundbegriffe* (Stuttgart: Klett 1975) Bd. 2, 997–1046; Idem *Gleichheit und Gleichberechtigung* (Berlin: Duncker & Humblot 1980).

[8] J. Schlumbohm *Freiheitsbegriff und Emanzipationsprozeß* (Göttingen: Vandenhoeck & Ruprecht 1973); Dann *Gleichheit und Gleichberechtigung* (Anm. 7), 85ff.

[9] I. Fetscher – H. Münkler (Hrsg.) *Pipers Handbuch der politischen Ideen* Bd. 3: *Neuzeit: Von den Konfessionskriegen bis zur Aufklärung* (München: Piper 1985), Kap. VII–XII, 275ff; W. Reinhard "Vom italienischen Humanismus bis zum Vorabend der Französischen Revolution" in H. Fenske – D. Mertens – W. Reinhard – K. Rosen *Geschichte der politischen Ideen* (Frankfurt am Main: Fischer Taschenbuch [1981] 1987), 241–376.

[10] Dann *Gleichheit und Gleichberechtigung* (Anm. 7), 93ff.

gemeinen Wohlergehens führen.[11] Davon beflügelt, formiert sich eine *bürgerliche Emanzipationsbewegung*, die in den bürgerlichen Revolutionen spektakulären Niederschlag findet. In vielen Ländern kommt es zur Kodifikation von Verfassungen, die Rechtsgleichheit und gewisse elementare Freiheiten garantieren, die staatliche Macht durch Gewaltenteilung und Gesetzesbindung zügeln und vielerorts dem besitzenden Bürgertum eine Beteiligung an der Gesetzgebung einräumen.[12]

Diese Errungenschaften stellen zwar das besitzende Bürgertum zufrieden, können aber dem Kleinbürgertum und der ständig wachsenden Arbeiterschaft nicht genügen, die von der politischen Mitsprache weiterhin ausgeschlossen und auch in der Ausübung der Freiheitsrechte eingeschränkt bleiben. So bildet sich während des 19. Jahrhunderts eine machtvolle *demokratische Bewegung*, die *Gleichheit der politischen Teilhabe* fordert.[13] Nach und nach setzt sie zuerst die Ausdehnung des Wahlrechts auf breitere Schichten und schließlich das allgemeine und gleiche Stimmrecht durch.

Gleichzeitig gewinnt im Gefolge der industriellen Revolution die kapitalistische Wirtschaft an Terrain, was die soziale Polarisierung weiter verstärkt. Die sich vertiefende Kluft zwischen dem wachsenden Reichtum der Besitzenden und dem krassen Elend der arbeitenden Massen provoziert die "*soziale Frage*", die das politische Geschehen in den entwickelten Gesellschaften bis weit in das 20. Jahrhundert hinein beherrscht.[14]

Mit der wachsenden Masse der Lohnarbeiter entsteht trotz massiver staatlicher Repression eine machtvolle *Arbeiterbewegung*, zu deren zentralen Forderungen unter anderen die folgenden gehören: die *Beseitigung der Klassenunterschiede*, d.h. Chancengleichheit, und eine *gleichmäßigere Verteilung des Reichtums*, also ökonomische Gerechtigkeit. Auch die Arbeiterbewegung kann sich auf eine Vielfalt von politischen Doktrinen stützen, unter denen zwei Richtungen besonderen Einfluss gewinnen[15]: einerseits die Konzeptionen eines *kommunistischen Sozialismus*, die – wie jene von Karl Marx und Friedrich Engels – einen totalen Umbau des kapitalistischen Systems propagieren und in der Regel eine anspruchsvolle Vorstellung von sozialer

[11] H. Fenske "Politisches Denken von der Französischen Revolution bis zur Gegenwart" in Fenske – Mertens – Reinhard – Rosen (Anm. 9), 379–567, 380ff.

[12] Dann "Gleichheit" (Anm. 7), 1024ff; D. Grimm *Die Zukunft der Verfassung* (Frankfurt am Main: Suhrkamp 1991), 31ff.

[13] Dann *Gleichheit und Gleichberechtigung* (Anm. 7), 192ff; Fenske (Anm. 11), 405ff.

[14] W. Abendroth *Sozialgeschichte der europäischen Arbeiterbewegung* (Frankfurt am Main: Suhrkamp [10]1975).

[15] W. Hofmann *Ideengeschichte der sozialen Bewegung* (Berlin–New York: de Gruyter [5]1974); Dann *Gleichheit und Gleichberechtigung* (Anm. 7), 219ff.

Gleichheit samt einer weitgehenden Angleichung der sozio-ökonomischen Aussichten der Menschen vertreten[16]; sowie andererseits die Doktrinen einer *liberalen Sozialdemokratie*, wie jene von Ferdinand Lassalle und Eduard Bernstein, die dafür plädieren, das kapitalistische Wirtschaftssystem durch staatliche Regulierung zu zähmen und die sich aus ihm ergebenden Ungleichheiten durch Maßnahmen der Umverteilung und durch die Bereitstellung öffentlicher Güter zu begrenzen.[17]

Die Positionen des klassischen Liberalismus, des radikalen Sozialismus und der liberalen Sozialdemokratie, zwischen denen es vielfältige Mischformen gibt, markieren bis weit in die zweite Hälfte des 20. Jahrhunderts hinein das Feld der politischen Debatte um soziale Gleichheit. Einen neuen Impuls setzt erst die Theorie der Gerechtigkeit von John Rawls (1975), welche die zentralen Anliegen des Liberalismus und der Sozialdemokratie miteinander verbindet, indem sie mit ihren zwei Gerechtigkeitsprinzipien eine differenzierte Konzeption sozialer Gleichheit vertritt: Während das erste Prinzip strikte Gleichheit der allgemeinen Rechte, der individuellen Freiheit und der politischen Teilhabe aller Bürger verlangt, lässt das zweite Prinzip soziale und ökonomische Ungleichheiten nur in dem Maße zu, in dem sie sowohl mit den Anforderungen einer effizienten Wirtschaftsordnung als auch mit jenen der Verteilungsgerechtigkeit kompatibel scheinen.[18]

2.2 Die gegenwärtige Krise der Gleichheitsidee

Der gegenwärtige politische Diskurs bietet, was die Frage sozialer Gleichheit betrifft, ein sonderbar fragmentiertes Bild: Ist in der öffentlichen Debatte von Gleichheit kaum noch die Rede, so findet in der akademischen Philosophie eine stark polarisierte Kontroverse über Gleichheit statt. Hier treten vor allem zwei Extrempositionen in Erscheinung.

Da gibt es auf der einen Seite eine Reihe von Theoretikern, die einen äußerst radikalen Egalitarismus vertreten, indem sie alle sozialen Ungleichheiten für ungerecht halten, die auf zufälligen, nämlich genetisch oder sozial bedingten Eigenschaften der Menschen beruhen, sich also nicht auf die selbstbestimmten Entscheidungen der Einzelnen zurückführen lassen.[19]

[16] I. Fetscher – H. Münkler (Hrsg.) *Pipers Handbuch der Politischen Ideen* Bd. 4: *Neuzeit: Von der französischen Revolution bis zum europäischen Nationalismus* (München: Piper 1986), Kap. VII–X, 369ff; Fenske (Anm. 11), 423ff.

[17] Fenske (Anm. 11), 447ff.

[18] J. Rawls *Eine Theorie der Gerechtigkeit* [1971] (Frankfurt am Main: Suhrkamp 1975), 74 ff.

[19] R. J. Arneson "Equality and Equal Opportunity for Welfare" [1989] in L. P. Pojman – R. Westmoreland (Hrsg.) *Equality. Selected Readings* (New York–Oxford: Oxford U. P. 1997),

Diese Auffassung, "luck egalitarianism" genannt, setzt voraus, dass die ererbten Eigenschaften von Menschen samt den mit ihnen verbundenen Vorteilen und Nachteilen nicht den Individuen gehören, sondern Gemeingut aller sind; und sie setzt ferner voraus, dass es möglich ist, den relativen Anteil, zu dem jede Person für ihre soziale Lage selber verantwortlich ist (also sie durch ihr selbstbestimmtes Handeln herbeigeführt hat), vom Anteil ihrer zufälligen Eigenschaften zu separieren, damit das Ausmaß der zulässigen Ungleichheiten bestimmt werden kann. Keine dieser Voraussetzungen ist haltbar: Ist die erste mit dem Recht jeder Person auf ihre natürlichen Gaben unvereinbar, so ist die zweite aus praktischen Gründen illusorisch.

Das andere Extrem bildet ein anschwellender Chor von Stimmen, welche die Gleichheitsidee überhaupt in Frage stellen, ja teilweise völlig verdammen.[20] Im Wesentlichen werden gegen sie zwei Einwände vorgebracht. Der erste, wenig originelle Einwand lautet, soziale Gleichheit sei mit der individuellen Freiheit unverträglich, weil sie nur um den Preis unakzeptabler Freiheitseinschränkungen realisierbar sei.[21] Dieser Einwand hat jedoch nicht viel Gewicht, wenn nicht zugleich gezeigt wird, dass die Einschränkungen der individuellen Freiheit, welche die Realisierung sozialer Gleichheit erfordern mag, unakzeptabel sind. Hier stößt der zweite, originellere Einwand nach. Er besagt, Gleichheit sei kein Wert an sich, sondern bestenfalls ein Mittel zur Erreichung anderer in sich wertvoller Zwecke, die ihren Wert aber nur aus der individuellen Autonomie bezögen, wie der Schutz der Menschenrechte oder die Sicherung der materiellen Existenzbedingungen jedes Menschen.[22] Dieser Einwand übersieht jedoch, dass es Kontexte sozialen Handelns gibt, in denen die Gleichbehandlung der Beteiligten für sich und nicht bloß als Mittel zu einem anderen Zweck geboten scheint: nämlich Formen sozialer Gemeinschaft, deren Mitglieder gemeinsame Ansprüche auf irgendwelche Vorteile haben und deshalb zu deren Gleichvertei-

229–42; R. Dworkin *Sovereign Virtue. The Theory and Practice of Equality* (Cambridge, Mass.–London: Harvard U. P. 2000), 65ff; K. Nielsen "Radical Welfare Egalitarianism" in Pojman – Westmoreland (supra), 204–17.

[20] A. Krebs (Hrsg.) *Gleichheit oder Gerechtigkeit. Texte der neueren Egalitarismuskritik* (Frankfurt am Main: Suhrkamp 2000); W. Kersting *Kritik der Gleichheit* (Weilerswist: Velbrück 2002) 23ff; J. Kekes *The Illusions of Egalitarianism* (Ithaca–London: Cornell U. P. 2003).

[21] F. A. Hayek *Die Verfassung der Freiheit* [1960] (Tübingen: Mohr 1971), 105ff; R. Nozick *Anarchy, State, and Utopia* (New York: Basic Books 1974), 160ff.

[22] H. Frankfurt "Equality as a Moral Ideal" [1987] in Pojman – Westmoreland (Anm. 19), 261–273; A. Krebs "Gleichheit oder Gerechtigkeit. Die Kritik des Egalitarismus" in H. Pauer-Studer – H. Nagl-Docekal (Hrsg.) *Freiheit, Gleichheit und Autonomie* (Wien: Oldenbourg 2003), 49–93.

lung verbunden sind, sofern nicht triftige Gründe für eine andere Verteilung sprechen.

Demgegenüber ist in der öffentlichen Diskussion der wohlhabenden Demokratien soziale Gleichheit – mit Ausnahme der Geschlechtergleichheit – derzeit kein zentrales Thema. Dieser Sachverhalt ist angesichts der realen Entwicklungen, die sich gegenwärtig vollziehen, doch überraschend. Denn nachdem es den demokratischen Gesellschaften mit Hilfe des Sozialstaats gelungen war, die sozialen Unterschiede merklich zu verringern, nehmen die ökonomischen Ungleichheiten seit einigen Jahrzehnten wieder allerorten zu. In Anbetracht dieser Tatsache spricht alles dafür, dass die Idee sozialer Gleichheit keineswegs obsolet geworden ist, sondern aktuell ist wie eh und je.[23]

3 Zur Systematik sozialer Gleichheit

Die rezente philosophische Debatte um Gleichheit drehte sich vor allem um die Frage "Equality of what?".[24] Diese Debatte hat zwar manche interessante Argumente zutage geördert, ist aber insgesamt fruchtlos verlaufen. Der Grund hierfür dürfte darin liegen, dass schon die Fragestellung irreführend ist, weil ihr drei falsche Annahmen zugrunde liegen: (1) dass es so etwas wie eine "*Einheitswährung*" der Gleichheit gibt, wie z.B. Wohlergehen, Ressourcen oder Chancen, um deren Gleichverteilung es letztlich bei allen Gleichheitsforderungen geht; (2) dass die Forderung sozialer Gleichheit *kontextunabhängig* zwischen allen Menschen gilt, also ohne Rücksicht darauf, in welcher sozialen Beziehung Personen zueinander stehen; und (3) dass soziale Gleichheit stets eine *Gleichverteilung* derjenigen Dinge verlangt, auf die sich ihre Forderungen beziehen.

Diese Annahmen reflektieren jedoch eine allzu simple Vorstellung sozialer Gleichheit, die der Korrektur bedarf. Zu diesem Zweck soll im Folgenden die Gleichheitsidee einer Rekonstruktion zugeführt werden, die der

[23] P. Koller "Was ist und was soll soziale Gleichheit?" in R. Schmücker – U. Steinvorth (Hrsg.) *Gerechtigkeit und Politik* (Berlin: Akademie 2002), 96f; Idem "Gleichheit und Pluralismus in politikphilosophischer Perspektive" in P. A. Berger – V. H. Schmidt (Hrsg.) *Welche Gleichheit, welche Ungleichheit?* (Wiesbaden: Verlag für Sozialwisenschaften 2004), 49–71, 54ff.

[24] R. Dworkin (Anm. 19), Kap. 1–4; G. A. Cohen "On the Currency of Egalitarian Justice" *Ethics* 99 (1989), 906–44; Idem "Equality of What? On Welfare, Goods, and Capabilities" in M. Nussbaum – A. Sen (Hrsg.) *The Quality of Life* (Oxford: Clarendon Press 1993), 9–29; A. Sen *Inequality Reexamined* (Oxford: Clarendon Press 1992).

Vielschichtigkeit, Kontextabhängigkeit und Flexibilität dieser Idee besser Rechnung trägt.

3.1 Die Architektur sozialer Gleichheit

Die politische Idee sozialer Gleichheit ist ein vielschichtiges und komplexes Konzept, das eine ganze Reihe von teils recht allgemeinen, teils spezielleren Forderungen in sich birgt.[25] Ihren Kern bilden zwei grundlegende und abstrakte Prinzipien, die heute weithin Anerkennung finden und Teil der öffentlichen Moral geworden sind. Um diesen Kern schließt sich zunächst eine erste Schicht von spezielleren Postulaten, die sich auf die rechtlich-politische Ordnung moderner Gesellschaften beziehen und im Großen und Ganzen ebenfalls unstrittig sind. Dazu kommt eine zweite Schicht von spezielleren Postulaten, die das sozio-ökonomische System betreffen und im Grundsätzlichen ebenfalls breite weithin Zustimmung finden, aber im Detail umstritten sind. Die folgende Liste fasst alle diese Postulate zusammen:

(A) gleiche Achtung (B) distributive Gleichheit	*normativer Kern:* *allgemeine Grundsätze*	öffentliche Moral
(1) rechtliche Gleichheit (2) gleiche Freiheit (3) gleiche politische Teilhabe	*1. Schicht:* *weithin akzeptierte politische Postulate*	rechtlich-politische Ordnung
(4) soziale Chancengleichheit (5) ökonomische Ausgewogenheit	*2. Schicht:* *umstrittene Postulate*	ökonomisches System

Das moralische Grundprinzip sozialer Gleichheit ist das *Gebot der gleichen Achtung*. Ausgehend von der Annahme, dass alle Menschen gleichen Wert besitzen, gebietet es, Andere *als Gleiche* zu behandeln. Das meint natürlich nicht, dass alle Menschen immer gleich behandelt werden müssen, sondern es verlangt, andere Menschen nicht bloß als Mittel für eigene Zwecke benützen, sondern sie nach allgemeinen Regeln zu behandeln, von denen angenommen wird, dass ihnen jede Person bei rechter Erwägung zustimmen kann.[26] Das Gebot gleicher Achtung erfordert somit nicht mehr als die Universalisierbarkeit der Normen zwischenmenschlichen Handelns. Dieses Erfordernis führt zwar für sich alleine nicht sehr weit, es gewinnt aber schnell an Kraft, wenn es auf konkretere Zusatzbedingungen trifft.

[25] Koller "Was ist und was soll soziale Gleichheit?" (Anm. 23), 95–115.
[26] H. Pauer-Studer *Autonom leben* (Frankfurt am Main: Suhrkamp 2000), 54ff.

Eben das ist bei Vorliegen einer Konstellation der Fall, in der bestimmte Güter und/oder Lasten mehreren Personen gemeinsam zukommen, z.B. weil die Güter von diesen Personen gemeinsam erzeugt oder die Lasten von ihnen gemeinsam verursacht wurden. In einer solchen Konstellation, die als ein *Gemeinschaftsverhältnis* angesprochen werden kann, erfließt aus dem Gebot der gleichen Achtung die Forderung, dass alle beteiligten Personen grundsätzlich gleich behandelt werden bzw. im gleichen Maße an den gemeinschaftlichen Gütern und Lasten teilhaben müssen, sofern es nicht triftige Gründe für eine Ungleichbehandlung jener Personen bzw. für eine Ungleichverteilung der in Betracht stehenden Güter und Lasten gibt. Das ist das Prinzip der *distributiven Gleichheit*, das Grundprinzip der distributiven Gerechtigkeit, das – anders als das Gebot gleicher Achtung – nicht für jedes zwischenmenschliche Handeln, sondern nur für das wechselseitige Verhalten von Menschen gilt, die eine Art von Gemeinschaft bilden, wie beispielsweise eine Familiengemeinschaft oder eine wirtschaftliche Erwerbsgemeinschaft. Die Mitglieder einer Gemeinschaft haben gegeneinander stärkere Ansprüche und Verbindlichkeiten als gegenüber anderen Menschen, weil sie, um dem Gebot der gleichen Achtung zu genügen, bei der Regelung ihrer gemeinsamen Angelegenheiten einander nicht nur als Gleiche achten, sondern auch gleich behandeln müssen.[27]

Das Prinzip distributiver Gleichheit ist zwar stärker als das Gebot der gleichen Achtung, aber gleichwohl eine ziemlich abstrakte und schwache Forderung, der zufolge Ungleichheiten zwischen den Mitgliedern einer Gemeinschaft, was deren Güter und Lasten angeht, einer allgemein akzeptablen Begründung bedürfen. Dies lässt offen, ob und inwieweit große, insbesondere moderne Gesellschaften als Gemeinschaften zu verstehen sind, auf die das Prinzip distributiver Gleichheit Anwendung findet. Das ist eine Frage der *Gesellschaftsauffassung*, über die es jedoch keine Einigkeit gibt.

Das Spektrum möglicher Auffassungen reicht hier von radikal individualistisch-libertären bis zu extrem kollektivistisch-kommunitären Konzeptionen. Nach der *individualistisch-libertären* Auffassung ist eine Gesellschaft nicht mehr als eine Ansammlung selbständiger Individuen, die sich nur im Interesse an einer für sie möglichst vorteilhaften Kooperation vereinigen und deshalb einander nicht mehr schulden als die Unterlassung gewaltsamer Übergriffe und die Einhaltung von Verträgen. Die *kollektivistisch-kommunitäre* Auffassung betrachtet die Gesellschaft dagegen als eine Gemeinschaft menschlicher Daseinsbewältigung, welche die Individuen von Geburt an

[27] J. Feinberg *Social Philosophy* (Englewood Cliffs, N.J.: Prentice Hall 1973), 99ff; J. Rees *Soziale Gleichheit* [1971] (Frankfurt–New York: Herder & Herder 1974), 107ff.

formt und erst zu dem macht, was sie sind, weshalb sie einerseits für ihr Wohlergehen Sorge tragen muss, andererseits aber auch von ihnen sehr viel mehr fordern darf. Die richtige Auffassung dürfte wohl irgendwo zwischen diesen Extremen liegen; denn eine Gesellschaft ist weder ein Marktplatz, auf dem sich selbständige Individuen zufällig treffen, um miteinander Geschäfte zu machen, noch eine Kommune, deren Mitglieder alles teilen müssen, weil sie alles gemeinsam besitzen.

Im Allgemeinen dürfte es weitgehende Übereinstimmung darüber geben, dass die grundlegenden sozialen Güter und Lasten, die in modernen Gesellschaften einer gerechten Verteilung gemäß der distributiven Gleichheit bedürfen, jedenfalls die folgenden einschließen: die *allgemeinen bürgerlichen Rechte*, die *individuellen Freiheiten*, die *politischen Teilhabemöglichkeiten*, die *sozialen Chancen* und die *ökonomischen Aussichten* der Mitglieder samt den damit verbundenen Pflichten.[28] Von diesen Voraussetzungen ausgehend ist es nun möglich, zu den spezielleren, politischen Postulaten sozialer Gleichheit überzugehen.

3.2 Die politischen Postulate sozialer Gleichheit

Das *Postulat der rechtlichen Gleichheit* verlangt, dass allen Mitgliedern gleiche allgemeine Rechte und Pflichten zukommen und dass diese Rechte und Pflichten auf *allgemeinen Gesetzen* beruhen müssen, die für alle gleichermassen gelten. Das schließt rechtliche Differenzierungen nicht aus, erfordert aber, dass solche Differenzierungen ihrerseits durch allgemeine Gesetze erfolgen, denen alle unterworfen sind.[29] Dieses Postulat folgt unmittelbar aus den Grundprinzipien sozialer Gleichheit, die ja die willkürliche, nicht auf Regeln beruhende Ungleichbehandlung von Menschen verbieten.

Das *Postulat der gleichen Freiheit* schreibt vor, dass jede mündige Person die gleiche Freiheit haben muss, ihr Leben nach eigenem Gutdünken zu gestalten, und zwar im weitestgehenden Umfang, in dem dies in einer wohlgeordneten Gesellschaft möglich ist.[30] Dass diese Forderung aus den Grundprinzipien folgt, ist leicht einzusehen, wenn man überlegt, wie sich eine Ungleichverteilung individueller Freiheiten gegenüber den Personen mit weniger Freiheiten mit guten Gründen rechtfertigen ließe. Denn es ist offensichtlich, dass solche Gründe nicht zu finden sind, von einigen wenigen Ausnahmen abgesehen, die entscheidungsunfähige oder gefährliche Menschen

[28] Koller (Anm. 5), 244ff.
[29] R. Alexy *Theorie der Grundrechte* (Baden-Baden: Nomos 1985), 357ff.
[30] Rawls (Anm. 18), 223ff.

betreffen. Auf der Basis des Postulats gleicher Freiheit ist es möglich, die Grundfreiheiten zu begründen, die gewissermaßen den Kernbereich gleicher Freiheit verkörpern.[31]

Das *Postulat der gleichen politischen Teilhabe* bekräftigt den Anspruch aller mündigen Bürger auf gleiche Teilhabe an der öffentlichen Meinungs- und Willensbildung über gemeinsame Angelegenheiten. Da es, von wenigen Ausnahmen abgesehen, offenbar keine triftigen Gründe für Ungleichheiten der politischen Mitsprache und Teilhabe gibt, muss jeder Bürger das gleiche Recht zur politischen Betätigung und Mitwirkung bei der Entscheidung über öffentliche Angelegenheiten besitzen. Diese Forderung fundiert das allgemeine und gleiche Stimmrecht aller Bürger.[32]

Während die bisher genannten Forderungen heute zumindest in entwickelten Gesellschaften weithin Anerkennung finden, sind die Erfordernisse der sozio-ökonomischen Gleichheit höchst umstritten. Dennoch wird man sagen können, dass zwei Postulate im Großen und Ganzen breite Zustimmung genießen: soziale Chancengleichheit und ökonomische Ausgewogenheit. Diese Postulate heben sich von den Forderungen rechtlich-politischer Gleichheit in einer wichtigen Hinsicht ab: Sie lassen Ungleichheiten in gewissen Grenzen zu, da es offenbar mehrere Gründe gibt, die sozio-ökonomische Ungleichheiten zu rechtfertigen vermögen.[33] So kann angenommen werden, dass solche Ungleichheiten zulässig oder sogar geboten sind, wenn sie (1) den ungleichen Beiträgen von Individuen zu Arten der sozialen Kooperation entsprechen, deren Ergebnisse allen zugute kommen; (2) sich von selber aus dem freizügigen Handeln der Individuen im Rahmen einer sozialen Ordnung ergeben, die insgesamt zum langfristigen Vorteil aller Beteiligten ist; oder (3) notwendig sind, um dringlichen Bedürfnissen einzelner Menschen Rechnung zu tragen. Allen diesen Gründen liegt der Gedanke zugrunde, dass soziale Ungleichheiten allgemein akzeptabel sind, wenn sie auf lange Sicht dem Vorteil aller Beteiligten liegen, einschließlich derer, die schlechter abschneiden.

Das *Postulat der sozialen Chancengleichheit* verlangt, dass die Mitglieder einer Gesellschaft gleiche Möglichkeiten haben, nach Maßgabe ihrer Fähigkeiten und Ambitionen in begehrte soziale Positionen (wie berufliche Stellungen, öffentliche Funktionen, Karrierewege) zu gelangen. Das setzt vor-

[31] P. Koller "Grundlinien einer Theorie gesellschaftlicher Freiheit" in J. Nida-Rümelin – W. Vossenkuhl (Hrsg.) *Ethische und politische Freiheit* (Berlin–New York: de Gruyter 1998), 476–508.

[32] Ch. R. Beitz *Political Equality* (Princeton, N.J.: Princeton U. P. 1989).

[33] W. Hinsch *Gerechtfertigte Ungleichheiten* (Berlin–New York: de Gruyter 2002), 169ff; S. Gosepath *Gleiche Gerechtigkeit* (Frankfurt am Main: Suhrkamp 2004), 348ff.

aus, dass Unterschiede der sozialen Positionen und der damit verbundenen Vorteile bis zu einem gewissen Grade zulässig sind. Unter dieser Voraussetzung ergibt sich das Postulat der Chancengleichheit ohne weiteres aus der distributiven Gleichheit zusammen mit der Tatsache, dass die individuellen Chancen, begehrte soziale Positionen zu erreichen, wesentlich von der gesellschaftlichen Ordnung abhängen und nicht bloß das Ergebnis individueller Bemühungen sind. Was Chancengleichheit im Einzelnen bedeutet, ist eine kontroverse Frage. Einigkeit besteht nur darüber, dass begehrte soziale Positionen von Rechts wegen allen offen stehen und dass öffentliche Ämter mit den jeweils bestgeeigneten Bewerbern besetzt werden müssen. Ob und inwieweit darüber hinaus auch eine gewisse Angleichung der anfänglichen Ausgangsbedingungen der nachkommenden Mitglieder durch eine Grundausstattung von materiellen Mitteln und Bildungsgütern geboten ist, bleibt eine umstrittene Frage, die hier auf sich beruhen muss.[34]

Das *Postulat der ökonomischen Ausgewogenheit* ist am schwersten zu fassen, weil darüber die Meinungen am weitesten auseinander gehen. Aber vielleicht lässt es sich auf die folgende Formel bringen, die mit den meisten Deutungen vereinbar sein dürfte: Ungleichheiten der ökonomischen Lage (des Vermögens, Einkommens und Zugangs zum Wirtschaftsleben) sind zulässig, wenn sie eine notwendige Voraussetzung oder unvermeidliche Nebenfolge einer effizienten Wirtschaftsordnung sind, die bei rechter Erwägung im längerfristigen Interesse aller Beteiligten liegt, sei es, weil jene Ungleichheiten als Leistungsanreize im Dienste einer wirtschaftlichen Kooperation erforderlich sind, deren Ergebnisse letztlich allen zugute kommen, oder weil sie unvermeidlich aus einem allgemein vorteilhaften ökonomischen Wettbewerb resultieren. Diese Formulierung lässt zwar offen, in welchem Maße wirtschaftliche Ungleichheiten gerechtfertigt sind, macht aber deutlich, dass solche Ungleichheiten auch gegenüber den schlechter gestellten Mitgliedern vertretbar sein müssen. Und das ist wohl nur dann der Fall, wenn plausibel gemacht werden kann, dass die sozialen Regelungen, mit denen jene Ungleichheiten verbunden sind, auf längere Sicht auch diesen Personen zum Vorteil gereichen.[35]

[34] P. Westen "The Concept of Equal Opportunity" [1985] in Pojman – Westmoreland (Anm. 19), 158–67; J. E. Roemer *Equality of Opportunity* (Cambridge, Mass.–London: Harvard U. P. 1998).

[35] Rawls (Anm. 18), 81ff.

Justice to Future Generations and the Problem of Uncertainty: Some Communitarian Approaches

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This essay is intended to examine the problem of uncertainty in the context of justice to future generations, and the ways how some communitarian thinkers try to overcome that problem. In order to do so, I first sketch the general theoretical setting of the discourse on future generations, and the questions where the problem of uncertainty emerges. Then I turn to some possible communitarian answers, namely, that of A. de-Shalit, and J. O'Neill. I am going to argue that the narrative-based approach of O'Neill opens a very promising perspective, especially if one manages to eliminate some inconsequencies that haunt his reasoning.

1

In the last decades, future generations appear more and more often in philosophical and political, as well as in legal thought. The increasing frequency of references to future generations might be understood in the light of the increasing awareness of the ecological crisis. Within that discourse, the notion of future generations serves as a source of arguments that is intended to help in providing support for the determination of individual duties and common measures which – at least sometimes – seem to be counter-intuitive and to bring sub-optimal results for presently existing individuals and their communities. Here, present duties are often formulated as obligations to future generations.

In his 1972 essay, M. P. Golding has put forward a plausible proposal for grounding present obligations to future generations.[1] According to his reasoning, one has to assume that present and future generations are members

[1] M. P. Golding "Obligations to Future Generations" *Monist* 56 (1972), 85–99.

of a moral community, i.e. that the present generation accepts the good of present generations as its own good. However, Golding claims, it is most probable that this cannot be the case. Too simply, the distance in time that separates us from future generations renders our suppositions in terms of their good uncertain: given that their life circumstances may differ considerably from ours, one cannot be sure whether our conceptions of the good life hold for them. The present generation ought not to take into account the supposed interests of future generations, since either it coincides with the interests of those presently living or their immediate posterity, or it would lead to the offering of these interests for the sake of some uncertain one. On the other hand, Golding emphasises that present actions do actually affect the future actualisation of our uncertainties: "[i]t actually appears that whether we have obligations to future generations in part depends on what we do for the present," he concludes.[2]

While those who are sceptical towards present obligations to future generations generally point out that we cannot determine the content of our duties (i.e. what exactly we have to do), Golding extends this uncertainty to the very existence of the inter-generational community. In his argument, "good" is understood not only as something that contributes to the material welfare, but also as those common understandings that determine a "moral community." And this is the point where communitarian theories become relevant.

2

It seems to be interesting to examine here two statements of Walzer first. The first one is the so-called "open-ended distributive principle," according to which

> [n]o social good x should be distributed to men and women who possess some other good y merely because they possess y and without regard to the meaning of x.[3]

The second one refers to the nature of membership, and says that "community is itself a good" conceivably the most important good "that gets distributed."[4] Now, if we understand the latter as meaning that membership in

[2] Ibid. 99.

[3] M. Walzer *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford: Blackwell 1983), 20, italics omitted.

[4] Ibid. 29.

the community is one of the social goods, then we can substitute "membership" for "good y," with the following result:

> [n]o social good x should be distributed to men and women who are members of the community of justice merely because they are members of the community of justice and without regard to the meaning of x.[5]

This principle obviously contradicts to Walzer's other statements, where he explicitly affirms that membership is a good prior to others. Thus, one has to acknowledge that Walzer attributes a special status to membership, and maintains its fundamental importance for the distribution of other goods (of which the environment may be one[6]). As he states elsewhere, "it is only as members somewhere that men and women can hope to share in all the other social goods."[7]

Walzer apparently does not consider the question of future generations. There is, however, a remark made by him that may be of importance in our further inquiries. As he speaks of political communities as "historically stable, ongoing associations,"[8] he does not deliberate the possibility of opposing different generations to each other. Comparing the situation of "strangers in political space (immigrants) and descendants in time (children)," both newcomers in the community, he remarks that the process of admission can be controlled in both cases. For children, however, what the political community can effectively (and acceptably) determine is "the size of the population only": "its growth, stability, or decline."[9] Thus, the above-mentioned principle of distribution could be reformulated for future generations as follows:

> The membership in the community of justice should not be distributed to future men and women who possess some other good y merely because they possess y.

And, we might add, it should not be denied from future persons merely because they lack y. One may conclude, then, that Walzer does not deal with the possibility of a moral distance between members of different generations, a question he examines at length in terms of strangers. In my opinion, this

[5] That point is made by A. Dobson *Justice and the Environment: Conceptions of Environmental Sustainability and Dimensions of Social Justice* (Oxford: Oxford U. P. 1998), 177f.

[6] Ibid. 141.

[7] Walzer (n. 3), 63.

[8] Ibid. 62.

[9] Ibid. 35.

is to be explained with some chain-like image of a "domestic" continuity, similar to that of Rawls or Passmore. But in this case, again, the problem of "skips" emerges, i.e. the possibility that later generations seem too far away from a present perspective: that problem does in fact arise in one of the theories examined in the following. As it was mentioned above, the only plausible way of arguing that justice is relevant in inter-generational relations from a communitarian perspective is by claiming that there exists a community of justice that comprises successive generations. The two theories that are examined in the following both describe such a community.

3

A. de-Shalit develops a theory of justice to future generations based on essentially Walzerian ideas.[10] In his work, he examines how future generations can actually make part of a community together with the present ones. He scrutinises the question of identity in the case of political communities, bearing in mind the caveats of Golding.[11] De-Shalit does not explicitly exclude the possibility of a chain-like continuity of a political community's identity. He nevertheless emphasises that changes in commonly accepted values can lead to a downright breach between two given generations that do not have immediate links with each other. He brings more historical examples in order to support that view. Thus, his conception of community is limited both in space and time: the present members of a given community have rather limited relations to other people that might be evaluated using justice as a criterion. In terms of future generations, it means that justice is applicable only as long as the sense of community exists in the members of the present generation. Shared understandings and common values fade away with time. As for the generations that follow after this temporal divide, the present generation only has the same obligations as towards their own contemporaries who are outside the community.[12]

This, however, contradicts to his affirmation that "although future generations are by definition people who will live after our deaths, our obligations to them are a matter of *justice*, rather than of charity or supereroga-

[10] A. de-Shalit *Why Posterity Matters: Environmental policies and future generations* (London – New York: Routledge 1995).

[11] Ibid. 19f.

[12] Cf. ibid. 17: "obligations to very remote future generations [...] do not derive from communitarian relationships."

tion."[13] As a normative theory, that does not say anything more than the motivational assumption as described by Rawls. Its content might be formulated like "our generation has to accomplish justice in its relationship to those generations that seem to be in the same community, but does not have any such obligation towards those that we do not expect to share our common understandings." Of course, de-Shalit seems to be right in arguing that a theory that demands too much from the present in terms of distribution of resources may face a total rejection.[14] Still, I think that, for the moment at least, we should put aside the question of plausibility, and take a look at his views on community, in order to see if they are acceptable from a purely theoretical point of view.

de-Shalit affirms that it is possible to conceive of a trans-generational community, even if one excludes common life in a physical sense. [15] There are two more criteria that can prove the existence of such a community: cultural interaction and moral similarity. These are strongly interconnected. Cultural interaction means an ongoing dialogue between the members of the community. Thus, it is necessary to create new common understandings and common conceptions of the good life, but also to challenge and discuss old ones. In this way, it contributes to the establishment and the continuous rethinking of moral similarity, which is defined as "common and more or less accepted" "attitudes, values, and norms."[16] On the one hand, cultural interaction needs a common background, which is, at least partially, provided by moral similarity. Now, it seems rather counter-intuitive to expand the notion of cultural interaction to a trans-generational context. On the other hand, it is clear that every generation reflects on, sometimes even answers to ideas that stem from their predecessors, yet inter-generational communication works in one direction only. De-Shalit solves this problem by emphasising the temporality of the dialogue, and says that "in fact this communication will continue with the response of yet further future generations to the future generations with whom we communicate."[17] Accordingly, moral similarity is in a state of endless development: attitudes, values and norms of previous generations are submitted to deliberation in every new

[13] Ibid. 11.

[14] Ibid. 14.

[15] Cf. D. C. Hubin "Justice and Future Generations" *Philosophy and Public Affairs* 6 (1976), 17, who rejects the possibility of speaking intelligibly of obligations to future generations for that reason.

[16] de-Shalit (n. 10), 28.

[17] Ibid. 44.

generation. And this is exactly, de-Shalit argues, why the sense of community "fades away":

> when it comes about that the values of the members of the community change drastically, many members will find themselves in a state of growing alienation from the community of their ancestors.[18]

Therefore he concludes that the present generation may reasonably assume that persons in some generation in the future will not consider themselves as members of our community. Hence, if it comes to a conflict between needs of the present generation, or of some in the proximity, and the needs of more distant generations, priority should be given to the former. It is also interesting to note how de-Shalit distinguishes between an internal and an external point of view. He makes it clear with the example of a member of the English nation. From the perspective of a historian (an outsider), the community in both the 17th century and now may be properly described as "English," while a member of today's English political community (an insider) will hardly share the values of the 17th-century English nation.[19] While I think that the applications of de-Shalit's theory are acceptable at least as parts of the principles of justice to future generations, his description of the community has, in my opinion, some shortcomings.

The first problem is a practical one, and is due to the lack of possibility of determining how fast common values are likely to fade away. As the present generation cannot know the exact nature of future debates, present persons cannot know where to place the divide according to which their obligations could be determined. Hence, what remains is a pure temporal scale, and that hardly means anything other than discounting the future: the utilitarian solution that de-Shalit (among others) explicitly rejects.[20]

But what seems much more puzzling to me is the inherent contradiction in de-Shalit's accounts of cultural interaction and moral similarity. On the one hand, these factors provide for the constitutive character of the community through the moral and political debate, while, on the long run, it is that debate that causes common understandings to disappear. But do they really disappear? It seems that de-Shalit is too mechanical in distinguishing between the insider's and the outsider's point of view, and claims that the question of shared values should be viewed from the former one. This is justified as far as it is the present members of the community whose decisions concerning future generations are in the focus of the theory. Yet it is

[18] Ibid. 47.
[19] Ibid.
[20] Cf. Dobson (n. 5), 106f.

important to note that, according to de-Shalit's view, the outsider does only consider the identity of the community, while insiders are concerned with the content of the community's tradition. De-Shalit seems to identify these two things, but I think the difference is of great importance here. The question of recognition or self-identification is a most relevant one in terms of defining the membership of a community. Accordingly, if one would ask the Englishman of the example whether he considers himself to be part of the community referred to as the English nation, his answer is likely to be an affirmative, as well as that of one of his 17th-century predecessors. And, in my opinion, the same is true if one would make the question refer to the membership of 17th-century and present-day persons, respectively.[21]

To put it otherwise: even if we tend to assume that at some moment our descendants are going to leave all of our values and norms, we still talk about them (with more or less confidence) as future members of our community. In fact, de-Shalit himself does apply a "mixed" perspective in that he speaks of the (future and objective) non-constitutiveness of a community on the basis of the alleged subjective views of the community's future members, and concludes to principles of justice that, again, should be adopted by the actual community. I think, however, that also his assumption of the fading away of the sense of community might face serious challenges based on the argument of recognition.

While de-Shalit seems to concentrate on the inherent uncertainty of the present generation's conceiving of their posterity, O'Neill examines how the present participates in the shaping of the past.

4

O'Neill builds his theory on the notion of the "transgenerational self," that also de-Shalit makes use of, but, unlike de-Shalit, he does not limit its application to a psychological assumption.[22]

Contrary to the widely accepted opinion on the lack of reciprocity between generations, O'Neill affirms that there are real harms and benefits

[21] The strength of identities is well illustrated by the fact that certain communities even project their identities back into the darkness of the past, as they search for their predecessors: the 19th-century collection – and creation – of folk tales and myths about the past of newly formed nations may be a good example. See also the argument of A. MacIntyre *After Virtue: A Study in Moral Theory* (Notre Dame, Ind.: University of Notre Dame Press 1984), 220f.

[22] O'Neill explicitly rejects subjectivism: J. O'Neill *Ecology, Policy, and Politics: Human Well-Being and the Natural World* (London – New York: Routledge 1993), 38.

posterity can do to us. He begins to develop his views with a criticism of modernity, in the spirit of Taylor and MacIntyre:

> [T]he assumption that future generations cannot benefit or harm us highlights a peculiarly modern attitude to our relation with the past and future which is at the centre of our environmental problems. [...] It is tied to the modern loss of any sense of a community with generations outside of our own times.[23]

O'Neill mentions the example of narratives to demonstrate how one's self transcends the limits of one's life and how future generations can play a role "in determining the success or failure of the work of previous generations."[24] As narratives about one's work may well exist and even change after one's death, we can hardly speak of separate generations without links to each other. Moreover, there is a wide group of human projects that can be successful only in the long term: here, it is necessary that more generations contribute to the same project, sometimes without enjoying any of its results. These insights were generally acknowledged by every culture, until the emergence of market-based societies. The idea of the market that emphasises mobility against ties of place, profession and so on, contradicts to identity across time, and that leads to a "temporal myopia of modern society."[25]

As for future generations, then, it is the responsibility of the present generation towards its past, future, but also to itself to attempt, as far as it is possible, to ensure that future generations do belong to a community with ourselves – that they are capable, for example, of appreciating works of science and art, the goods of the non-human environment, and the worth of the embodiments of human skills, and are capable of contributing to these goods.[26]

It is important to note that O'Neill's image of the community is a rather dynamic one, as it takes the history of a community into account. He emphasises the importance of arguments "both within generations and between them."[27] Thus, the most important obligation of the present generation is

[23] Ibid. 27f.

[24] Ibid. 32.

[25] Ibid. 42. See also J. O'Neill "Time, Narrative, and Environmental Politics" in R. S. Gottlieb (ed.) *The Ecological Community: Environmental Challenges for Philosophy, Politics, and Morality* (London – New York: Routledge 1997), 32f.

[26] O'Neill (n. 22), 34. In his 1997 paper, he replaces "community with ourselves" with "a community that has a narrative continuity with ourselves." O'Neill (n. 25), 32.

[27] O'Neill (n. 22), 36.

to provide for both the external and internal conditions of the ongoing discussion,[28] i.e. conditions of the (physical) existence of future persons, as well as the (cultural) conditions of their meaningful participation in the arguments. The theory of O'Neill is a very attractive one, as it helps to overcome some problems that are often criticised in communitarian theories. He rightly mentions debate (as opposed to a constant set of values) as one of the most important features of a community, without describing it as something that menaces the identity of the community, as does de-Shalit. Furthermore, his account of communities allows for conceiving of a global community that may be essential for dealing with global environmental problems properly.[29]

Nevertheless, some objections can be formulated as to his arguments. The first possible objection concerns the influence of future generations on the success or failure of one's work. This argument is put forward by O'Neill in the context of reciprocity, as opposed to the view that future generations cannot help or harm presently living persons. The good of a successful life (one that we can obtain only with the help of posterity) is then paired with the harms present persons can do to future generations. According to O'Neill, these are the following:

> (1) We can fail to produce works or perform actions which are achievements. Future generations may not be able to bring our deeds to a successful fruition. (2) We can fail to produce generations capable of appreciating what is an achievement or contributing to its success.[30]

Now, what I fail to see here is how these points provide for an intergenerational reciprocity on the one hand, and mutual obligations on the other hand, since the goods of the one party that depend on the contribution of the other, are of quite different nature. But let us take a closer look on them.

First, the possible failures of the present generation necessarily harm further generations but also the present generation, at least from the perspective of the present generation: indeed, it is a harm to future generations if they do not have anything to appreciate or contribute to, or if they are unable to

[28] Cf. MacIntyre (n. 21), 221f.

[29] O'Neill (n. 22), 42. Here, he quotes *The Capital* of K. Marx (Part 3, ch. 46): "[A] whole society, a nation, or even all simultaneously existing societies taken together, are not the owners of the globe. They are only its possessors, its usufructuaries, and, like *boni patres familias*, they must hand it down to succeeding generations in an improved condition." The idea is further developed by F. Ost *La nature hors la loi. L'écologie à l'épreuve du droit* (Paris: La découverte 1995) and A. Gosseries *Penser la justice entre générations. De l'affaire Perruche à la réforme des retraites* (Paris: Aubier 2004).

[30] O'Neill (n. 22), 34.

do so, and it is likewise a harm to us if they do not. But these harms exist, at least partly, only from our point of view, since if future generations cannot do something, they do not necessarily realise their lack of that capacity. To that, O'Neill would answer that it is a mistake to think that "what you don't know can't hurt you."[31] But that does not answer the objection that in a final analysis it is us who harms us if we fail to provide for the conditions of our (future) success. The next problem arises if we do our best for future generations, since (fortunately enough) this does not compel them to render our work a success. Of course, the fact that they exist and are able to appreciate or contribute to our ongoing projects is a success in itself (one that we accomplished ourselves!), but they will not have the slightest obligation not to let our stories continue or end as failures.

The second objection is closely related to the first one. With the help of his account of the trans-generational self, O'Neill seeks to prove the existence of a trans-generational community, that is aimed at certain trans-generational goods. He further concludes that each generation is responsible for contributing to maintaining the community and accomplishing its goods. As O'Neill himself states, however, there is a constant debate on many aspects of the community and its goods. There I see some tension between this latter, discursive approach and the rather objectivist views O'Neill develops elsewhere. He seems to be aware of the uncertainty of particular contributions to the common goals as he formulates his principle that "our primary responsibility is to *attempt*, as far as possible to ensure that future generations do belong to a community with ourselves."[32] This seems to be a pragmatical recognition of the fact that human action is always bound to a certain perspective: the most one can – and has to – do is to contribute to the debate (and its conditions) according to one's best knowledge. But here again, the question of success emerges. One can never be sure if his story is a success: but neither can be any of the future generations, at least not in a final, "objective" sense. Of course, there are some concrete achievements that can be understood as fulfilling one's "trans-generational intentions." Still, it is nothing else but possibility what remains for those initiating trans-generational projects. This is enough for keeping the concept of responsibility – even justice – to future generations (as part of our community), but it also shows that

[31] Ibid. 28.
[32] Ibid. 34, emphasis added.

uncertainty, and therefore precaution too, also has to obtain a central place in the discussion of the problem of future generations.

5

Now, it seems appropriate to overview the main "harms and benefits" the discussion of the problem of future generations can gain from these communitarian theories. To begin with their advantages, communitarian authors seem to spend proper attention to the counterfactual nature of contractarian theories, and try to overcome that by giving a more adequate description of real communities and the link between the individual and the community. Hence, in the case of future generations, the central issue is not how a person can be shown to be interested in the welfare of future generations, but whether future persons can be thought of as making part of a community together with presently living people. The answers of de-Shalit and O'Neill both start with the affirmation of a real (not imaginary) transgenerational community that provides the framework for an ongoing intra- and inter-generational discourse (debate) on the community's moral, political, and cultural understandings. Accordingly, they succeed in avoiding excessive conservatism in terms of common values, while saving their theories from complete uncertainty. Moreover, they show that the "object of justice", i.e., what is distributed among generations is not only "passive" goods, but also – and mainly – the possibility of active participation.

The particular shortcomings of both theories are indicated above. Here, I would like to mention only two things. First, for different reasons, both de-Shalit and O'Neill fail to provide an adequate basis for the present generation's commitment for the interests of future generations. While de-Shalit makes debate dissolve the sense of community on a larger time horizon, O'Neill attempts to give more objective grounds but he cannot reconcile that with a necessarily present-bound perspective. Second, neither of the authors extends the theory to a global community, which seems to be unavoidable for mastering global problems that are characteristic for today's environmental concerns. Here, however, there is a greater difference between the two. De-Shalit concentrates on a particular community, the political one, whereas his account of the dynamics of commonly accepted values, norms and attitudes precludes a real horizontal extension of the community. O'Neill, in turn, develops a theory which is a much more general one, thus it may be applied to any kind of community.

6

As I argued above, the discourse on the obligations to future generations has to adopt a "present point of view," i.e., it has to concentrate on the perspective of the presently existing persons, whose actions necessarily affect the life conditions, indeed the very existence, of all the future generations. As Golding rightly states, we have to deal with a very high degree of uncertainty here. We cannot know what the values of our posterity will be like. On the other hand, if our decisions affect future generations, they also affect their values.

In my opinion, the theory of de-Shalit seems to neglect these insights. First, he takes for certain a complete change in the set of values that constitute a moral community. Of course, de-Shalit would object that in terms of a given future generation, these changes are not necessary, only possible. The degree of possibility grows as we move forward in time. And it is because of this possibility that the members of the present generation have to consider their relation as a matter of justice only to their immediate posterity. However, if we cannot determine with complete certainty whether a given future generation is "off the limits," we cannot tell whether we have to use justice as a criterion in our relation to its members or not. Moreover, his view also implies that changes in values are irreversible: those once "argued out" cannot return anymore. I think there are many examples for the contrary. Second, he does not account for the present contributions to future changes: if the present generation acts contrary to its own values, these are likely to disappear over time.

As for the views of O'Neill, the first consequence is that the present generation has to be aware of the fact that its narratives are told in the present: they necessarily implement a present point of view. Of course, posterity is included in these narratives: we have narratives about future generations. Moreover, our narratives (at least the one told by O'Neill) tell that future generations are going to have narratives about us. Second, the very existence of future generations, and also the contents of their narratives depend on what kind of narratives we have about them and about ourselves. Indeed, it is possible to conceive of a narrative of *après nous le déluge*, i.e. one that lacks (or ignores) posterity. Yet, fortunately enough, it is easy to see why such a narrative is at least unconvincing. Since the lives of different individuals do not begin and end at the same time, generations cannot be separated mechanically. Someone who, from my point of view, belongs to the present generation, may well be part of the posterity of someone else, who, in turn,

considered me as a member of his "present generation": I may have known a grandfather who could not live until his grandson was born, but I may know the grandson as well. While one cannot, by definition, experience his own posterity, one meets people who play the role of future generations in others' narratives. Conceived this way, the present generation's narrative about future generations is constituted by a network of personal narratives that are linked to, complement, and sometimes contradict each other. Therefore, every member of the present generation can shape the narratives future generations are going to have, and thus contribute to the narrative identity of a trans-generational moral community. Hence, a present-perspective communitarian approach should put the emphasis on present actions and duties, not to avoid but to face uncertainty.

Legal Culture, Transnational Legal Processes and Conformity

David Nelken (Macerata)

I am pleased to offer this contribution to a Festschrift for Csaba Varga, a distinguished scholar who has, amongst his other achievements, made important contributions to the fields of legal theory, sociology of law, and comparative law. As I share with him[1] a fascination for the study of legal cultures[2] I shall therefore take this topic as the subject of my paper. First of all I shall explain why some scholars are increasingly uneasy about talking about cultures (or legal cultures) as if they were independent entities. I shall then suggest why work on legal culture needs to take more account of the various transnational legal processes which are currently bringing cultures into contact. Finally I shall focus in more detail on one aspect of the interaction between legal cultures that may be described as the signalling of conformity.

1 Culture in Question

Anyone who wants to talk about legal cultures, whether national legal cultures or the time-honoured "families of law" studied by legal comparativists, has nowadays to face a number of objections. Talking of legal culture presupposes that we know what we mean by culture. But, though writing about culture has become increasingly central in many disciplines, anthropologists, who originally developed the term, have found its common meanings less and less illuminating for the purpose of their explanations. "Over the last two decades," writes Sally Merry, "anthropology has elaborated a conception of culture as unbounded, contested, and connected to relations of power. It does not consist only of íbeliefs and values but also practices, habits, and

[1] See e.g. Cs. Varga (ed.) *Comparative Legal Cultures* (Aldershot: Dartmouth 1992); V. Gessner – A. Hoeland – Cs. Varga (eds.) *European Legal Cultures* (Aldershot: Dartmouth 1996).

[2] See e.g. D. Nelken (ed.) *Comparing Legal Cultures* (Aldershot: Dartmouth 1996); D. Nelken – J. Feest (eds.) *Adapting Legal Cultures* (Oxford: Hart 2001).

commonsensical ways of doing things. The contemporary anthropological understanding of culture envisions a far more fluid, contested, and changing set of values and practices than that provided by the idea of culture as tradition. Culture is the product of historical influences rather than evolutionary change. Its boundaries are fluid, meanings are contested, and meaning is produced by institutional arrangements and political economy. Culture is marked by hybridity and creolization rather than uniformity or consistency. Local systems are analysed in the context of national and transnational processes and are understood as the result of particular historical trajectories. This is a more dynamic, agentic, and historicized way of understanding culture."[3]

Certainly, great care must be taken in employing any concept which makes reference to culture. We shall need to avoid reifying national or other stereotypes and recognise that much that goes under the name of culture is no more than "imagined communities" or "invented traditions". It is easy to fall into the opposed vices of "Occidentalism" or "Orientalism", making other cultures seem either necessarily similar or intrinsically "other".[4] If culture is always , to a large extent, a matter of struggle and disagreement, the purported uniformity, coherence or stability of given national or other cultures will often be no more than a rhetorical claim projected by outside observers or manipulated by elements within the culture concerned. Any assumption that long-standing historical patterns cannot be altered can be "dystopic" and block possible reforms[5]. Legal culture, like all culture, is a product of the contingencies of history and is thus always undergoing change.[6] For our purposes it can be salutary to recall the rapid transformations in attitudes towards "law and order" in the short period that elapsed from Weimar to Hitlerian Germany. But, on the other hand, we should note that Merry herself still uses the term. Even invented traditions may of course be real in their effects. And, whilst talk of "culture wars" is often exaggerated, it would be equally mistaken to assume that cultural differences do not exist of all kinds and at many levels, or deny that some of these may indeed clash.

Critics of "legal culture" argue that it inevitably carries the inconsis-

[3] S. Merry *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: Chicago U. P. 2005), 44.

[4] M. Cain "Orientalism, Occidentalism and the Sociology of Crime" *British J. of Criminology* 40 (2000), 239.

[5] M. Krygier "Is There Constitutionalism After Communism? Institutional Optimism, Cultural Pessimism, and the Rule of Law (1996–1997)" *Int'l J. Sociol.* 26 (2002) 4, 17.

[6] D. Nelken "Disclosing/Invoking Legal Culture" in *Social and Legal Studies* 4 (1995) special issue: D. Nelken (ed.) *Legal Culture, Diversity and Globalisation*, 435.

tent or misleading referents of the term "culture". The noted comparatist Patrick Glenn, for example, tells us that cultures should not be treated as "super organic", or "substantive, bounded entities", but rather seen as "shreds and patches remaking themselves".[7] To avoid such assumptions we may be tempted to use other terms than legal culture to do the same job. There is no shortage of such alternatives: these include living law, the law in action; epistemes, mentalities, and formants; legal traditions, legal ideology, legal fields, legal or regulatory styles, and even "path dependency". Those who prefer such other terms point to their virtues as compared to legal culture (but say less about their drawbacks!). Glenn, an advocate of the term legal tradition, argues that it is more natural to speak of non-traditional behaviour and innovation than to make the same point when using the term culture. Talking about traditions, he adds, suggests overlap rather than closure because within a given tradition there are always a range of creative possibilities. The very existence of a tradition is necessarily a result of persuasive argument and interpretation. For Glenn, because tradition is a matter of "information" it is hard to reify it as something "beyond us". He also suggests that all societies have a notion of tradition, but not all use the term culture. As against this, however, others might argue that tradition can also be a confusing term, and it has often been said to be one which tends too easily to distract attention from questions of power and interest. Conversely whilst legal actors do (perhaps must?) work with some unitary idea of culture as their normative presupposition, few sociologists of law actually give legal culture the meanings to which Glenn objects. At this time of export and import of legal institutions and ideas it would be implausible indeed to see cultures as closed and self-referential.

2 *From Legal Transplants to Transnational Legal Processes*

But even, or especially, if we continue to use the term legal culture we must try to get more of a handle on the ways in which legal cultures interact. A conventional starting point for examining the interaction of domestic and international norms is the idea of legal transplants.[8] But this metaphor has also been much criticized for the way it so often relies on or reproduces sim-

[7] H. P. Glenn, "Legal Cultures and Legal Traditions" in M. van Hoecke (ed.) *Epistemology and Methodology of Comparative Law* (Oxford: Hart 2004), 7.

[8] The general discussion which follows was first developed for the purpose of a Comment recently published in the Michigan Journal of International law. See D. Nelken "Signaling Conformity. Changing Norms in China and Japan" *Michigan J. Int'l L.* 27 (2006), 933.

plistic or misleading notions about the relationship between legal and social change. William Twining's recent, valuable critique of the legal transplant literature[9] attempts to correct a number of false assumptions the metaphor implies. In contrast to the simple transplant model, Twining argues, legal transfers do not have any one final reception date and can be long, drawn-out affairs. Sources of reception are often diverse; transfers can take place between many kinds of legal order at and across different geographic levels. Pathways can be complex, indirect, and mutual. Transplants often move from the imperial centre to the periphery – but it is not always so. Just as legal rules and concepts travel, Twining explains, various aspects of institutional practices migrate as well. The agents of change are not only governments but also include transnational networking by pressure groups, NGOs, and others. The role of local actors as mediators is crucial.[10] (n. 2), 241–56. In addition, it is important to avoid "exporter bias" in studying transplants and recognize that the introduction of innovations occurs on a continuum from informal diffusion to deliberate dissemination. Transplants change when they move; they rarely merely fill a vacuum or wholly replace the existing order. Relations between coexisting legal orders can take the form of complementarity, cooperativeness, cooptation, competition, subordination, symbiosis, convergence, repression, or imitation. It is wrong to think legal transplants are necessarily instrumental, technological, and modernizing; they can also be expressive or ideological. As far as the problem of whether transplants "take" or "work" successfully is concerned, Twining suggests the need for more detailed empirical studies. Apart from the difficulty of defining success,[11] claims regarding outcomes require the proper monitoring of transfers. Measures of success, Twining adds, can also then become important in their own right as a resource for arguing for or against social change.

According to Twining, the way to get beyond the transplant metaphor is through careful empirical investigations that use explanatory schemas drawing from the literature on the diffusion of technical or cultural innovations. Given the way the relationship between the global and the local is changing, however, there is a need for further rethinking of the theoretical frameworks that guide empirical research into the interconnection between inter-

[9] W. Twining "Diffusion of Law: A Global Perspective" *J. Legal Pluralism* 49 (2004), 1, and "Social Science and Diffusion of Law" *J. L. & Soc'y* 32 (2005), 203.

[10] See also Y. Dezalay – B. Garth *Dealing in Virtue* (Chicago: Chicago U. P. 1996) and "The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars" in Nelken – Feest

[11] D. Nelken "The Meaning of Success in Transnational Legal Transfers" *Windsor Y. B. Access Just.* 19 (2001), 349.

national laws and domestic norms.[12] In particular, in addition to studying single transplants, scholars must consider what some have called the making and acceptance of what have been called "global prescriptions."[13] Increasing interdependence means that the most pressing questions do not just concern the various ways in which transplants or even global prescriptions move from place to place but how "place" itself is constructed and deconstructed.[14] As Sally Merry has suggested,[15] a world characterized by "the space of flows" puts the very idea of "place" in doubt. [16] Writing about human rights, she points to three such flows: transnational consensus building, the way international discourse shapes transnational program transplants, and the localization of transnational knowledge by national and local actors who participate in transnational events and bring their experiences home. Given the importance of the mass media, scholars must also be alert to the possibility of "virtual" transplants. Individuals who watch U.S. imported films and television shows sometimes think they enjoy U.S. legal procedures even though those processes have not been introduced into their legal systems. Thus, German consumers of the *Perry Mason* television series sometimes assume their state has imported the accusatorial process, and Chinese villagers who have watched U.S. police films have been known to ask for their *Miranda* rights. In addition, those who keep closely in touch via the Internet with others who share their political, ethnic, cultural, and/or religious identities may sometimes feel it is they who are being transplanted.

Attempts to revise our ideas about transplants may also take inspiration from the interesting, recent line of work in international law that studies transnational legal processes. Harold Koh, one of the pioneers of this field

[12] For some authors the serious theoretical issues at stake here cannot be resolved merely by a shift of empirical focus. See, e.g. G.Teubner "Legal Irritants: Good faith in British Law or How Unifying Law ends up in New Divergences" *Modern L. R.* 61 (1998), 11 or P. Legrand "What Legal Transplants?" in Nelken – Feest (n. 2), 55.

[13] See Y. Dezalay – B. Garth (eds.) *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press 2002).

[14] Consider Saddam Hussein's claim that the Iraqi court trying him is an "American court" or the way the United States deliberately created the prison in Guantánamo as a non-space beyond all jurisdictions. More everyday examples concern the way states choose or feel obliged to sign conventions that allow courts based elsewhere considerable power over what happens in local jurisdictions. For an Italian example showing the interaction between the European Court of Human Rights at Strasbourg and the problem of delay in Italian courts, see D. Nelken "Using the Concept of Legal Culture" *Australian J. Legal Phil.* 29 (2004), 1.

[15] See Merry (n. 3).

[16] See A. Appudurai *Modernity at Large: Cultural Dimensions of Globalization* (Minnesota: University of Minnesota Press 1996), ch. 3.

of international law, is particularly interested in the way transnational norms modify behaviour – "the theory and practice of how public and private actors – nation-states, international organization, multinational enterprises, non-governmental organizations, and private individuals internalize rules of transnational law."[17] Likewise, Lawrence Friedman, for the purposes of sociology of law, describes transnational law as the "norms and institutions which span, are valid in, or apply to more than one country or jurisdiction." He distinguishes imposed norms, planned voluntary norms, and unplanned evolutionary norms.[18]

These writers agree that the increasing interchange of commerce, populations, and information makes it less and less appropriate to think of "domestic" norms as forming part of distinct national jurisdictions that then interact with transnational norms. Naturally, this process does not affect all fields to the same extent and varies by different areas of legal and social regulation. A contrast is often made between, on the one hand, those areas of law that are relatively internationalized, such as international business contracts, antitrust and competition policy, Internet and new technology, labour law, social law, and environment law, and, on the other, family law and property law. But experts in the latter fields also often find much evidence of international and cross-cultural influences[19].With the reduction in national sovereignty, legal fields are increasingly internationalized. Instead of governments, the talk now is increasingly of "governance" – power exercised at a series of other levels and by other institutions, in collaboration or otherwise with state bodies. The "denationalization" of rulemaking[20] means that transnational public and semi-public networks substitute, to an increasing extent, for national governments in building a "real new world order."[21] Rule-formulation and settlement increasingly takes place within new

[17] See e.g. H. H. Koh "Transnational Legal Process" *Neb. L. R.* 75 (1996) 181; "Why Do Nations Obey International Law?" *Yale L. J.* (1997) 106, 2599; "How is International Human Rights Law Enforced?" *Ind. J. L.* 74 (1999), 1397; "Internalization Through Socialization" *Duke L. J.* 54 (2005), 975.

[18] L. M. Friedman "Borders: On the Emerging Sociology of Transnational Law" *Stan. J. Int'l L.* 32 (1996), 65. For a good collection of studies, see M. Likosky (ed.) *Transnational Legal Processes: Globalisation and Power Disparities* (Cambridge: Cambridge U. P. 2002).

[19] See the chapters in E. Örücü – D. Nelken (eds.) *Comparative Law: A Hart Handbook* (Oxford: Hart 2007).

[20] S. Sassen "Opening Remarks: Producing the Transnational Inside the National" in Likosky (n. 18), 189, 195.

[21] A. M. Slaughter "The Real New World Order" *Foreign Aff.* [Sept.] (1997), at 183–97.

agencies of transnational governance, such as NAFTA, the OECD, and the WTO, but also in many lesser-known public–private forums.

The language of transplants is ill-suited to studying the new forms of norm-making, dispute-channelling and regulation which thrive in the neo-liberal trading environment, whether it be the growth of the *lex mercatoria*, the use of "soft law" or other non-binding agreements and persuasive practices by international regulators, or the private power of multinational companies. The use of *lex mercatoria*, for example, is said to "break the frame" of national jurisdiction. [22]It is one factor that leads to what De Sousa Santos has described as "interlegality," a term that describes "a highly dynamic process" where different legal spaces are "nonsychronic" and thus result in "uneven and unstable combinations of legal codes (codes in a semiotic sense)."[23] Lawyers and accountants also play an increasing role as entrepreneurs of new forms of dispute prevention and settlement,[24] mainly, if not entirely, so as to service the increasingly important international business community. In turn, the opportunities for such activity transform the legal profession(s).

We need, then, to study legal changes in the context of the larger spatial transformations in the social relations and transactions of which they are a part.[25] As Snyder[26] points out, this means examining transnational processes of coordination, contract, hierarchy, networks, *lex mercatoria*, and global legal pluralism as a means to identifying the key structures of sites of production and consumption and the relations between them. We are now living in what Manuel Castells has called the "network society,"[27] where power is diffused in global networks of wealth, power, information, and images that circulate and transmute in a system of variable geometry. For him, flows of capital, information, technology, organizational interaction, images, sounds, and symbols go from one disjointed position to another and gradually replace a space of locales. The new power lies in codes of information and in images of representation produced by people's minds and constructed in identities.

[22] G. Teubner "Breaking Frames: The Global Interplay of Legal and Social Systems" *Am. J. Comp. L.* 45 (1997), 149, reviewing M. van de Kerchove – F. Ost *Le Droit ou les Pasachotes du Jeu* (1992).

[23] B. de Sousa Santos *Towards a New Common Sense* (London: Routledge 1995), 473.

[24] Dezalay – Garth (n. 13).

[25] D. Nelken "Changing Legal Cultures" in Likosky (n. 18), 41.

[26] F. Snyder "Economic Globalization and the Law in the 21st Century" in A. Sarat (ed.) *Blackwell Companion to Law and Society* (Oxford: Blackwell 2004), 624.

[27] M. Castells *The Rise of the Network Society* (Oxford: Blackwell 1996); *The Information Society* (Oxford: Blackwell 1998).

Likewise, in his continuing effort to develop a satisfactory account of law and globalization, Wolf Heyderbrand writes of the "generalization of procedural informalism to transnational governance" and "the kinds of mechanisms and processes that link procedural informalism to the political economy of globalization," arguing that "a key homology may be found between network society and flexible law."[28] In this perspective, "the logic of negotiated process is that it is organizationally anchored in minimally structured informal social networks." Moreover, Heydebrand suggests, "networks typically facilitate the formation, communication, and easy transfer of process-based decisions among organizational positions and institutional levels insofar as official decision makers typically participate in both formal settings and informal networks at the same time."[29]

On the other hand, there are dangers, as always, in assuming too radical a break with the past. Care must be taken to distinguish the various phenomena that fall under the rubric of globalization.[30] We need to ask whether the term "globalization" really helps us capture all current processes of legal transfers. Is there really any connection between the worldwide spread of human rights, the development of *lex mercatoria*, the spread and increased role of constitutional courts, and, more generally, the alleged "globalization of judicial power"? What really interests us about such developments? Is it the way the world is becoming more alike? Or is the point the fact that these developments all testify to the declining power of the local state? In addition to seeking out homologies between changes in social relationships and changes in legal forms, we should keep in mind that law can also follow a relatively independent path or even serve to conceal dramatic social change. It is a tricky problem to decide when and why law incorporates wider national or local patterns of cultural dispute settlement and when, instead, it offers – and seeks to offer – an alternative to these arrangements. And this issue is particularly acute at a time of rapid social change and legal reform. So we should be careful not just to "read out" or predict from globalisation theory any universal pattern of interaction between international and domestic norms; the outcomes in each context will depend to a greater or lesser extent on negotiation and are open to contestation.

[28] W. Heydebrand "Globalization and the Rise of Procedural Informalism in Europe and America" in V. Gessner – D. Nelken (eds.) *European Ways of Law* (Oxford: Hart Books, forthcoming).

[29] Ibid.

[30] Nelken (n. 25).

We also should bear in mind (as Merry reminds us) that crucial decisions regarding legal change take place in *specific* places and are shaped by reformers' anticipations of the forces they expect to encounter. It will likely be within the United States that Microsoft decides whether it feels obliged to reveal its code to Europeans or Google concedes the need to adopt a considerable degree of self-censorship so as to continue trading in China. As this suggests, the nation-state continues to serve as an important reference point, and law within national boundaries should not be underestimated. States also differ in the ability or desire of their elites to shape or reshape international norms and in the willingness of their populations to imitate foreign methods. Policymakers in some states will now think twice for example about seeking to copy U.S. corporate law without also incorporating the Sarbanes-Oxley reforms.

3 *The Signalling of Conformity: An Agenda for Research*

To make further progress in describing and explaining interaction between legal cultures attention needs to be given to identifying the processes involved. What may be called the signalling of conformity[31] is one such process that seems to play an increasing role alongside, and often connected to, more familiar mechanisms of imposition, borrowing and imitation. Where should we expect to find this taking place? The signalling of conformity, we are likely to find, plays a role in all three of the "flows" that are identified by Merry – those oriented toward building consensus, copying programs, or localizing innovation. Such moves toward conformity may make less noise than dramatizations of political, religious, or cultural differences, but their significance should not be underestimated. Many countries in Latin America and Eastern Europe for example, do seem to making gestures towards doing what is required so as to take their place in the globalising economy. Inge Markovits, for example, suggests that states in Eastern Europe have abolished the death penalty (whatever their populations may actually think or

[31] For two good (but contrasting) studies of this phenomena see C. K. Whitehead "What's your sign? – International Norms, Signals and Compliance" *Michigan J. Int'l L.* 27 (2006), 695 and E. Feldman "The Culture of Legal Change: A Case-Study of Tobacco Control in Twenty-First Century Japan" *Michigan J. Int'l L.* 27 (2006), 743. I shall not make reference here, for reasons of space, to the extensive literature on social norms which seeks to explain why individuals (or groups) incur "costs" as a means of showing willingness to collaborate with others.

want) as a way of signalling their desire for acceptance into the European Union.[32]

On the other hand, for any specific issue, it is possible to point to countries and places that are not (yet) coming into line. Rather than seeing divergence simply as the absence of conformity, however, we should note that there may be various direct and indirect connections between these phenomena. Demonstrations of dissent are often justified by the experience of imposed similarities or the fear that foreign models will be imitated. Emphasizing points of disagreement is often a way of concealing more profound conformities. Or the use of similar technologies may become an instrument for creating difference.[33] Conformity to common standards may be promoted by and through law but the homogeneity of norms is not an inevitable consequence of processes that involve signalling conformity. Globalization involves processes of both homogenization and integration, and integration usually presupposes and accentuates difference.[34] Likewise, even common standards are often encouraged so as to allow more, not less, competition. Globalization can, and often does, have quite different or sometimes opposite consequences, even in the same state.[35] Similar laws, in different places, may produce or presuppose different social conditions. Because pressures for conformity are so bound up with processes of economic and political inclusion and exclusion, it can be especially important to distinguish between different types of common standards. Heinz Klug argues that "the deployment of global forms whether as norms or success or failure stories sets limits of available options on pain of global marginalization and isolation imposed by capital markets, governments or the human rights community."[36] But we

[32] I. Markovits "Exporting Law Reform – But Will it Travel?" *Cornell Int'l L. J.* (2004), at 98.

[33] The increasing use of the Internet by those with extreme views to consolidate differences, rather than overcome them, is the most obvious example. See A. Roversi *L'odio in Rete* (Bologna: Il Mulino 2006).

[34] D. Nelken "The Globalization of Crime and Criminal Justice: Prospects and Problems" in M. Freeman (ed.) *Law and Opinion at the End of the 20th Century* (Oxford: Oxford U. P. 1997), 251.

[35] In Thailand, for example, Fiona Haines points to the considerable influence of global standards on the regulation of worker safety, while David Engel describes the way globalization has led to a decline in resort to law for tort claims. See F. Haines *Globalization and Regulatory Character: Regulatory Reform after the Kader Toy Factory Fire* (Aldershot: Dartmouth 2005); D. Engel "Globalization and the Decline of Legal Consciousness: Torts, Ghosts, and Karma in Thailand" *L. & Soc. Inquiry* 30 (2005), 469.

[36] H. Klug "Hybrid(ity) Rules: Creating Local Law in a Globalized World" in Dezalay – Garth (n. 13), at 276.

could question whether the same factors in play in all these cases. As the Chinese experience shows, it is possible for a state to be highly integrated economically even while suffering considerable criticism for its human rights violations.

Another set of issues concerns how new conformist standards are spread – and resisted. Who are the actors involved? We might expect that NGO's and social movements would be among the most important players but often state actors will be involved (and they are frequently also the sponsors of the NGO's). We will obviously want to explore who gains and loses through such changes. So we will need to distinguish, for example, between local and cosmopolitan bureaucrats and between those legal actors with an interest in promoting change and those with an interest in resisting it. How far do the interests of the elites and the population at large coincide? Often well-meant attempts at change generate paradoxes such as trying to create "civil society" through reliance on initiatives that require the existence of a civil society itself to produce.

What does conformity require in any given case? Is it about reaching a certain standard or more about not being out of line? Will pressures to conform necessarily lead to improvements, or could they also mean a lowering of standards? Commentators often express worry about the need to prevent globalization from leading to a "race to the bottom." It may be helpful to distinguish three types of "races":[37] those that produce pressures to aim at higher standards, those that induce pressure to aim at the mean, and those that, unfortunately, lead to lowering levels of behaviour. Many observers would see the battle for human rights as an example of the first of these races. Efforts toward similarity in bank reserves or money laundering rules could be taken as examples of the second. In such cases, standardization is often more important than the particular standard chosen. Laws increasing job insecurity are an essential component of the third type of race, where the aim is to cut production costs.

Despite these differences, the same social or economic sectors may involve more than one of these races. In addition, it is rarely possible to allocate any given race to only one of these categories, and even when they do not overlap, each race may also "interfere" with others. The "standard" or average for one state or set of states is, of course, not the mean for others; for the latter states, the standard may represent a goal they hope to achieve. Moreover, what one state (or group of states) may present as a certain kind

[37] Talk of the "advanced" world or "progressive" states itself employs the metaphor of a race.

of race may seem different to another state. This is all the more likely where, as is often the case, it is in the objective economic interests of more advanced states to insist that their competitors observe similar worker or environmental standards.[38] On the other hand, a requirement to observe such standards – as a prerequisite for membership in a trading group, for example – may be the only way to achieve improvements in internal standards. According to the Western media, India is currently quite concerned about improving food standards; even if done mainly "for external consumption," with a view to attracting investment, this undertaking will have more general implications.

Who actually formulates and judges what conformity requires? Often this process will be directed by stronger states, which take their own standards as norms and act either directly or indirectly to impose them through their dominance of international organizations. The attempts of the WTO to impose the introduction of GMO seeds and produce provides a good example of this dynamic, with much of the struggle depending on who should be made to carry the burden of proof. But much conformity evolves without explicit coordination. Neo-Marxists such as Hardt and Negri now admit that even the strongest states are unable to control the flows of the international economy.[39] And system theorists such as Günther Teubner likewise argue that "global law will grow mainly from the social peripheries, not from the political centres of nation-states and international institutions."[40] On some readings of the literature, if a state defects from an agreement in one area (for example, environment) it does not necessarily jeopardize its reputation in other areas of international exchange (for example, trade and security). But there is certainly need for more empirical research on this question.[41] The WTO, for example, is a package deal, where it is not possible to defect from one part – but it may be possible to retaliate under different agreements.

It is always worth asking how a particular standard emerged, as well as how any index for measuring compliance with it was constructed and pop-

[38] In practice, even strong states may have to settle for very broadly defined standards, as in the recent moves in the ILO toward core labor standards.

[39] M. Goodale "Empires of Law: Discipline and Resistance Within the Transnational System" *Soc. & Legal Stud.* 14 (2005), 553.

[40] G. Teubner "Global Bukowina: Legal Pluralism in the World Society" in G. Teubner (ed.) *Global Law Without a State* (Aldershot: Dartmouth 1997), 3.

[41] Part of the problem is defining "area." It is hard not to believe the United States' notorious treatment of prisoners at Guantánamo and Abu Ghraib, as well as its reluctance to sign the International Criminal Court agreement, does not have implications for the credibility of its promotion of human rights in general.

ularised. How are such indexes used or misused, understood or misunderstood? What states are taken as models for comparison, and why, when, and how, is as important an issue here as it is with deliberate transplants. Takao Tanese, a leading Japanese sociologist of law, urges policymakers in China not to take an uncritical view of Western models. He warns against importing a false idea of rights as having exclusive boundaries, and writes of the need to preserve social norms outside of the law.[42] Arguably, some European states may provide better models than the USA of how to mix public and private provision and institutionalise concern for solidarity. Even Japan might in some respects be a better example for China to follow. But historically-based resentments would make it difficult for the Chinese to look to the Japanese experience. And Japan itself tends to look elsewhere. As Tanase admits, "the usual course for us in Japan is to condemn our own system after looking to Europe and United States and measuring the gaps between their systems and ours."[43]

A variety of public and private agencies and rating institutes seek to shape international standards and prevent international risks, whether the issue is dumping products under cost price, food safety, or shared computer and telecommunication codes. Such standards typically emerge in the process of seeking agreement rather than being pre-standing. Learning of the failures of conformity may also be important (though ignorance has its uses too); hence, the agencies that set and vet standards play a crucial role, although the growth of domestic civil society is another and often better route to increasing information. But the problem of who guards the guardians can never be fully resolved – witness accounting standards after Enron or the way the rating agency Standard and Poor failed to spot the Italian mega-company Parmalat's lack of credit-worthiness (a case of poor standards?). Standard-setting agencies can easily work at cross-purposes. Do those who compile IMF surveys know of the leeway Basel bank regulators are prepared to concede to those who are part of the club of those doing the regulating?[44]

A further point for consideration concerns outcomes. We may leave aside such large questions as the endpoint of globalization – the extent to which we are witnessing the growth of "global legal culture" or "modern legal culture."[45] It is also beyond our task here to decide whether the implicit tele-

[42] T. Tanase "Global markets and the Evolution of law in China and Japan" *Michigan J. Int'l L.* 27 (2006), 873.

[43] Ibid. 875.

[44] Whitehead (n. 31).

[45] L. Friedman "Is There a Modern Legal Culture?" *RJ* 7 (1994), 117.

ology of these trends is toward a global civil society or a global consumer society. (Where exactly lies the difference?) But we can still ask: What are the specific outcomes sought through the spreading and signalling of conformity – for example, when adopting common standards or introducing local versions of peculiar institutions and procedures of the United States? How should we measure compliance? And how easy is it to fake commitment?[46] While it is possible to disagree with those scholars who argue that we can never predict outcomes, we should also anticipate that many results will indeed be unexpected.[47] If reforms designed to introduce privatization or enlarge the role of the judiciary as compared to the legislature are successful, then one of their intended consequences is to make larger social outcomes less easy to predict.

It would be unrealistic to assume state behaviour could ever completely conform to international commitments, especially as global pressures are ongoing and changeable. The degree of conformity with external standards will depend on the interests and values at stake. What norms are considered acceptable, is often the crucial question.[48] The extent to which conformity is a state's chosen goal will also vary from period to period. Was Japan competitive in the 1980s despite or because of its emphasis on personal relationships in business? For some of the most acute observers of the Japanese scene, the current Japanese economic situation may still be unstable, insofar as Japan cannot yet capitalize (his words) on the new stress on individualism.[49] Even where the level of compliance is poor, however, what may be more important (as in domestic regimes) is the symbolic message – *whose* norms are being violated.[50]

Can outcomes be defined descriptively without reference to some evaluator's standard? We should not assume that compliance itself is always a value.

[46] A concern discussed extensively in the literature on norms is how to recognize those who use signaling to mimic the commitments of good future collaborators without actually committing to cooperation.

[47] This is implicit in Teubner's arguments concerning "legal irritation" (see n. 12). See also D. Nelken "Beyond the Metaphor of Legal Transplants? Some Consequences of Autopoiesis Theory for the Study of Cross Cultural Legal Adaptation" in J. Priban – D. Nelken (eds.) *The Consequences of Autopoiesis* (Aldershot: Dartmouth 2001) 265.

[48] Some politicians in Turkey, for example, which is presently being considered for membership in the European Union, would rather risk rejection than accept what they view as dishonor. Journalists Ibrahim Kabogklu and Baskin Oran are currently on trial for having brought Turkey into disrepute by providing information for an international report on human rights in Turkey.

[49] Tanase (n. 42).

[50] See J. Gusfield *Symbolic Crusade* (Urbana: University of Illinois Press [1963] 1986).

Whether greater conformity and standardization is good will obviously depend on the issue in question and the implications for the parties involved. In many situations, the interests of the state under pressure to conform will simply not be the same as for the states seeking the change. Across a whole range of "common" problems – such as environmental protection or forestry conservation[51] – the (continuing) failure to attain conformity or achieve coordination can produce a series of negative consequences. But continuing disagreement will likely remain as to who should pay the price for the general good. And the effort to impose standards can sometimes be counterproductive. In his analysis of efforts to limit forest destruction Dimitrov argues that his case study shows that "good" social norms can have negative effects on institutionalized policy; global environmental norms can facilitate the construction of hollow "decoy" institutions; and the connection between institutions and governance is highly problematic, as institutions are sometimes deliberately designed to prevent governance.

We certainly cannot take it for granted that ensuring international financial stability is an obvious value independent of the conduct of international companies. The Enron debacle showed that the U.S. financial services industry's methods of self-regulation were far from ideal. Now, predictably, many American observers are criticizing the Sarbanes-Oxley Act for imposing too large a burden of compliance, especially on smaller firms. But while, for most of these commentators, the problem is how to avoid another Enron-like collapse, others may be as worried by what similar multinational corporations can achieve when they *thrive*.[52] The new international economic order allows the acquisition and exploitation of resources such as water and energy supplies in poorer states – as part of what some have called "the second enclosure movement."[53] The same ambiguities afflict many of the other "standards" the institutions of international neo-liberalism encourage. Laws and agreements protect the greater distribution of goods and capital but seek to limit the greater circulation of peoples. The IMF and, to a lesser extent, the World Bank[54] are accused of placing some states in a double-bind: by insist-

[51] For a recent well-documented study, see R. S. Dimitrov "Hostage to Norms: States, Institutions and Global Forest Politics" *Global Envt'l. Pol.* 5 (2005), 1.

[52] See V. Prashad *Fat Cats and Running Dogs: The Enron Stage of Capitalism* (Monroe USA: Common Courage Press 2002).

[53] Ibid.

[54] L. Tshuma "The Political Economy of the World Bank" *Soc. & Legal Stud.* 8 (1998), 75; L. Tshuma "Hierarchies and Government Versus Networks and Governance: Competing Regulatory Paradigms in Global Economic Regulation" *Law, Soc. Just. & Global Dev.* [Dec.] 2000 [http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2000_1/tshuma/].

ing on unpopular policies of economic retrenchment, they oblige governments to act in authoritarian and undemocratic ways in order to promulgate such measures.

Normative issues emerge not only when considering the *ends* of signalling and spreading conformity but also when reflecting on the characteristic *means* used to recognise and encourage such conformity. Irrespective of the ultimate goal, objectionable means or methods of producing conformity produce collateral problems that must be borne in mind in assessing the success of achieving harmonization. In particular, there is the question of the appropriateness of what is called "soft law". Are the soft or flexible norms involved in the spreading and patrolling of conformity consistent with the rule of law? How should we evaluate their employment? Do they have a different status when used in domestic, as opposed to international, contexts? Can the "cost" of signalling commitment ever be too high or otherwise unfair? Can regulators be over-flexible? As with discussions of the choice between more formal or more substantive approaches to legal reasoning, the politically correct answer here, too, is likely to depend on the wider, changing circumstances of social and political struggle. There do seem to be large doses of opportunism in willingness to accept given instances of soft law. When Asian or other governments use informal means to block foreign competition, this represents a betrayal of law, but the same means are apparently acceptable when adopted as part of international "flexible regulation." Because the use of soft law seems to be a growing phenomenon, it may be too early to draw up a balance sheet but some better pointers are needed.

For Wolf Heydebrand, the move to soft law as part of legal development has worrying normative implications. Procedural informalism and soft law, as he sees it, the hallmarks and bearers of neo-liberalism, lack essential features such as obligation, uniformity, justiciability, sanctions, and/or enforcement. The growing asymmetry of power and resources in the current phase of globalization aggravates the imbalance between the rule of law and the political economy. It promotes the further decline of legalism (whether bureaucratic or adversarial). The rise of procedural informalism and the flexibility associated with the growing privatization, denationalization, and commercialization of law have, in his view, rendered the nineteenth and early twentieth century forms of adversarial legalism either obsolete or have given them an enforcement role in extreme and exceptional circumstances or as a matter of last resort. By contrast, soft law is often chosen, he argues, precisely because it is less visible, more equivocal, and essentially unaccountable in terms of conventional criteria of formal responsibility. On

the other hand, other scholars (and not necessarily only those with different political sympathies) are more willing to acknowledge the advantages of proceeding by means of soft law. Berman, for example, argues that such agreements characterize transnational networks of government bureaucrats, trade-promoting groups, human rights NGOs, and the like, who form *de facto* cosmopolitan communities – affiliations of people who see the welfare of their state as interlinked with the welfare of others and view evaluations of "utility" or "interest" as interdependent. In his view, this is an enlarged vision of a state's interests, organically evolved from agreements motivated by more short-term and immediate objectives.[55]

David Trubek and his co-authors have provided excellent, recent surveys of criticisms of soft law[56] that set out both the risks and possible advantages of this regulatory strategy. They note that soft law, in contrast with "hard law," lacks clarity and precision. It is also less able to forestall a "race to the bottom," is unaccountable, and can create expectations it cannot fulfil. At the same time, Trubek and his colleagues also insist on soft law's (corresponding?) advantages. It has simplicity and speed, involves participation, and permits an incrementalist approach. The employment of soft law allows tolerance and, as compared to hard law, requires less knowledge and is easier to change. Being less linked to sovereignty, it can more effectively cope with diversity. Because soft law agreements do not require legal ratification, it is easier to get even the least committed states to sign on. Trubeck and his co-authors also suggest that soft law has lower contracting costs.[57] Especially in the international sphere, they see it as a boon to sustainable development and the global environment. They conclude that "soft law may be better equipped to promote transformative processes of norm diffusion, persuasion, and learning that have a positive impact on policy outcomes by allowing a wider spectrum for deliberation in the governing process."[58]

Doubts remain, however, about exactly how such processes do or should work and how much acculturation is a condition precedent for the efficacy

[55] P. S. Berman "From International Law to Law and Globalization" *Columbia J. Transnat'l L.* 43 (2005), 485.

[56] D. M. Trubek – L. G. Trubek "Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination" *Eur. L. J.* 11 (2005), 343.

[57] This may be true for any single transaction, but the wider literature on social norms would imply that the costs must reflect the requirements for convincing potential partners of commitment to long-term collaboration.

[58] Trubek – Trubek (n. 56), at 13.

of soft law norms.[59] In addition, soft law is rarely the only instrument in use, and the fact that it is normally employed in tandem with hard law only takes the argument a step further. Whereas Trubek and his collaborators see this as a further strength (adding flexibility to flexibility) – which allows regulators to create what they term "hybrid instruments" – Heydebrand sees this as a recipe for yet further manipulation. For soft law to be acceptable, trust in regulators is essential – but not always warranted.[60] We therefore end with some rather large questions. Is the type of transnational law being constructed largely for economic relationships compatible with or opposed to the simultaneous export of rule of law and human rights? How far is the idea of rule of law itself out of date due to the role of transnational business and the phenomenon of social acceleration?[61] Only by considering these problems will we begin to understand what would be involved in trying to constitutionalize new forms of social and economic relationships constructed in part through processes of signalling conformity.[62]

[59] Following the work of Koh, Trubek and his co-authors argue that sustained interaction over time results in the "creation of inter-subjective knowledge and a 'norms cascade' where a critical mass of states subscribe to new norms and rules." Id. The obvious objection involves what happens when (as is typical) the parties involved in such processes have differential power to influence it.

[60] J. C. Coffee, Jr. "Understanding Enron: It's About the Gatekeepers, Stupid" *Colum. L. Sch. Working Paper* No. 207, (2002) [http://www.law.columbia.edu/law-economic studies].

[61] W. E. Scheuerman "Globalization and the Rule of Law" in D. Dyzenhaus (ed.) *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart 1999) 243; Idem *Liberal Democracy and the Social Acceleration of Time* (Baltimore: John Hopkins Press 2004).

[62] See Snyder (n. 26).

The Preamble of the Treaty that Institutes a Constitution for Europe: A Question of Virtual Reality

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1 Forewords

Social-cultural patterns have become relevant topics in legal science since their structural and functional implications have been recognized as constitutive "levels" or "dimension" of law-making's technicalities.[1] However, it is quite rare to find scholars that worked on this matter as a serious methodological issue worth of theoretical consideration. Even more rare, in turn, are those legal scholars whose theoretical consciousness and methodological disposition to study law-making according to the many lines of enquiry (logical, ontological, sociological, etc.) that such evidence imply, suggest them to develop a dialectical conception of law as a particular formation of the broader social dynamic. Yet, significant exceptions eventually occurred. In this respect, the scientific work of Csaba Varga constitutes one of the most outstanding case within contemporary European legal schools of thought.

As a matter of fact, leafing through the works of Csaba Varga, one cannot but notice how far the methodological requirements for a scientifically plausible and socially adequate study of law are entrenched with a theoretical definition of law as a complex unity of a multiplicity of other social complexes. Not surprisingly, therefore, the historically determined nature of any sort of social-cultural variable operates, in Varga's works, as a source of cognitive inspiration and empirical control to drive legal theory towards as a dialectical conception of the totality of human interactions within which law dialectically plays as a regulatory medium.[2]

[1] A. Podgorecki *A Sociological Theory of Law* (Milano: Giuffrè 1991)

[2] See, e.g.: Cs. Varga "On the Socially Determined Nature of Legal Reasoning" *Logique et Analyse* 61–62 (1973), 21; Idem "Towards a Sociological Concept of Law: An Analysis of

The aim of this study is to move along Varga's line of thought and focus on a topic that he repeatedly stressed when dealing with the role of law as a social-cultural medium: the existence of theoretical and empirical limits and potentials in law, whether it is conceived as a value bearer provided with an inner morality or as a mere technological instrument fit for political purposes: that is to say, the degree of interior/exterior moral integrity and instrumental rationality on the part of legislators as creators of social means and tasks, especially when cultural and political dilemmas involved in the role of law as a medium cannot be detached from a direct reference to past legal experiences and/or future-oriented projects.[3]

Due to space-time constraints, a single work of Csaba Varga will be considered here as a step-stone for discussion: the essay titled "The Preamble: A Question of Jurisprudence".[4] A substantial reason supports this choice: the opportunity to read, here and now, Varga's theorizing about preambles as introductory forms of legislative acts in relation to the symbolic meaning and material content of one of the most re-known preamble drafted in Europe in the last few years: that of the Treaty that institutes a Constitution for Europe.[5]

The leading hypothesis of the discussion is that structural and functional patterns of said preamble make apparent and epitomise (among other topics) a problematic issue that has been rather neglected by contemporary general theory of law, whether or not directly concerned with EU governance, i.e. that contemporary law-making, as historically determined social artefact, while oriented to perform workable social mediations, actually produces not so much a generalized social order but rather a particular type of virtual – functional/fictional – socio-legal reality, thus putting into question traditional assumptions about interpretation and justifiability of the constructionist nature of modern positive law as such.

Lukács' Ontology" *Int'l J. Sociol. L. 9* (1981), 159; Idem "Liberty, Equality and the Conceptual Minimum of Legal Mediation" in N. MacCormick – Z. Bankowski (eds.) *Enlightement, Rights and Revolution. Essays in Legal and Social Philosophy* (Aberdeen: Aberdeen U. P. 1989), 229–51.

[3] See, e.g. Cs. Varga "The Law and Its Limits" *AJH* (1992) 1–2, 49; Idem "Reflections on Law and Its Inner Morality" *Rivista internazionale di filosofia del diritto* 62 (1985) 4, 439.

[4] Cs. Varga "The Preamble: A Question of Jurisprudence" *AJH* 13 (1971) 1–2, 101

[5] *Trattato che adotta una Costituzione per l'Europa* (Gazzetta Ufficiale n. C del 16. 12. 2004) [=http://europa.eu.int/eur-lex/lex/it/treaties/dat/12004] (hereinafter TCE).

2 *Csaba Varga's Theorizing on Preambles*

In general terms, Csaba Varga's essay "The Preamble: a Question of Jurisprudence" offers a critical overview of major issues that dominant legal doctrine dealt with so far according to a typical positivistic approach. According to this doctrine, preambles are conceived either as a particular legal form or as a legal methods enabling legislators to express utterances and/or assess directives, considered socially and/or politically relevant, as preliminary valuation-information about the material and/or symbolic rationale of given legal acts. From a structural point of view preambles, by rule, *(a)* are somehow distinctively detached from the text of the corresponding legal provisions; *(b)* are drafted in a refined and solemn way that apparently differs from usual legal writing; *(c)* are carriers of heterogeneous references, judgements, values, etc., whose mixture supports each other's statements. In turn, from a functional point of view, preambles, by rule, afford *(a)* general motivations about the content or the policy-making of the concerned legal provisions; *(b)* normative orientations and guidelines for their programmatic implementation; *(c)* philosophical/political considerations to raise social support and ideological mobilisation. Altogether two types of preambles are distinguished as regards the formal-legal character and content: simple (i.e. provided with a "weak" legal value), and qualified (i.e. provided with a "marked" legal value).[6]

Varga's response to this sort of grids is rather pragmatic. Firstly he questions traditional nominal definitions – based on the dichotomy between form and content – about the structural *differentia specifica* of preambles *vis-à-vis* any other law-making technique. In his view, only a theoretical conception focusing on the totality of preambles' constitutive elements provides adequate insights, for it enables to enlighten also their overall structural features in relation to the specific provisions of the corresponding acts. In turn, also the nominal distinction between fact-value contents and functions of preambles is questioned. In this respect, Varga excludes that preambles are unnecessary or superfluous legal appendices, for, their heterogeneous and multidirectional characters notwithstanding, contents and functions are not optionally or casually sorted out and established. For example, the instrumental overlapping of politically oriented cultural references, value-judgements and norm-carrying tenets, etc. constitute altogether a specific informational vehicle about the normative meaning of the corresponding statutory regulations. Hence – even though means and goals as such are never mutually

[6] Varga (n. 4), 102.

equivalent and/or relationally interchangeable – the mixture of evaluation-information tools should not be conceived as a limit, but as a veritable potential, i.e. a sort of "surplus function", of the overall instrumental performance of preambles' contents.[7]

Yet, evaluation-information features – Varga notes – can be found in any legal text. What then about the specific normative essence of preambles' content? On this topic Varga rejects legal doctrines excluding the normative character of value-motivations and other preparatory materials providing introductory guidelines to legal acts. Consequently, he questions also the usefulness of the nominal distinction between "simple" and "qualified" preambles, by arguing that either the necessity or the opportunity to grant an explicit legal qualification to preambles on the part of the legislator is a pragmatic matter entrenched with both the legitimacy of the same legislator and/or the legal effectiveness of the legal system that defines the conditions of validity – the legal significance – of the drafting of given legal provisions. In fact - he argues – preambles are legally relevant, up to the point to be conceived as veritable sources of law, to the extent that they directly contribute to motivate the actual enforcement of the corresponding legal acts, or – if one prefers – to the extent that their socio-cultural, moral and political contents operate as a reference frame to enact normative performances, such as a new law-policy making. Therefore, what really matter for their qualification as proper legal tools is the type of coupling, occurring within each preamble, between its norm-contents and its binding evaluation-information performance.[8]

The above patterns concern preambles of constitutions also. The predominant moral and political significance of constitutions' preambles, however, suggest additional considerations. Evaluative statements – recording of socio-political tasks, declaration of general principles, reference of ideological nature, etc. – do not entail as such a formal obligation of normative character, for *(a)* values and norms are not mutually fungible in a logically equivalent manner and, as it has been noted already, *(b)* value-judgements (goals) and instrumental activity (means) hardly have in practice a direct correspondence. Consequently, to promote a "transition" or "translation" of value-judgements into norm-contents and enabling a direct causal intertwinement, an additional item is required: a process of creative cognition-evaluation. In fact, processes of creative cognition-evaluation typically operate as a dialectical medium in any social field, being genetically, epistemo-

[7] Ibid. 106.
[8] Ibid. 110.

logically and logically the way in which social-cultural experiences transubstantiate into value-judgements fit for prospective instrumental activity. In this respect, the field of law does nor make an exception.[9]

However, if it is true that the most part of creative stages of law-making are those necessarily preceding law-making proper, it is true also that not all the outcomes of such a creative activity of cognition-evaluation in the field of law exclusively aims at, or lead to, their normative enforcement. This is particularly apparent in constitutions' preambles. On the one hand, a great deal of preambles' value-judgements uniquely aim at proclaiming or assessing certain political-ideological options. On the other hand, the few norms that they may contain are, by rule, void of legal sanctions. Hence, it is quite usual that their normative content is not fully perceived as such, being rather interpreted as the result of a political "compromise" between competing legal and social issues. If so, not only either an orderly regulation of such variables or the actual enforcement of the corresponding statutory provisions becomes problematic, but the same socio-legal justifiability of all sort of preambles as a specific legal technique turns out quite questionable.

Given the above, is its by no means unusual that traditional legal doctrine conceives preambles as an exceptional expedient. Varga supports this general conclusion in principle. However he maintains that this exceptional character is historically conditioned in the final instance, and that the justifiability of the use of preambles depends on favourable circumstances, such as those raised, by rule, by socio-political claims for revolutionary law-making. Consequently, insofar as constitutions are exceptional legal and political acts by definition, the justifiability of their preambles depends also on the exceptional character of their historically determined functional performances as a communicative sources of social mobilisation. Accordingly, the contingent coupling between the claim for an innovative socio-legal policy and the structural-functional aptitude of preambles to accomplish these claims is the basic issue that – according to Varga – makes the question of preambles' concrete use a relevant matter for legal theory.[10]

3 *The Preamble of the Treaty that Institutes a Constitution for Europe*

Needless to say, the above summary of Csaba Varga's essay does not do justice to the theoretical-methodological subtlety of his analysis. However, even the scanty points made above, offer us the chance to have a better under-

[9] Ibid. 115
[10] Ibid. 121.

standing of the symbolic and material content of a recently made preamble whose cultural and political importance for contemporary socio-legal experience does not require to be stressed here: the Preamble of the "Treaty that institutes a Constitution for Europe', drafted and transmitted to the European Council by an *ad hoc* institutional body called "Convention on the future of Europe" in 2003 and undersigned at EU intergovernmental level in 2004.[11]

As we know, due to political and ideological contrasts within and outside the Convention, the drafting of this Preamble was suspended and postponed while the Treaty's contents were under discussion. In its (so far) final version it recalls social, cultural and normative sources of EU institutions, basic principles and rights common to EU Member-States, the universal value of basic roots of Europe's civilization legacy, and general hopes about EU future developments. As we know also, the Treaty as such – hereinafter called "EU Constitutional Treaty" – has been (so far) rejected by two EU Member-States by virtue of popular referendums, formally ratified by a number of national parliaments and still under examination in other EU countries. Not surprisingly, therefore, a great deal of current debates about it are devoted to one of the topics that Csaba Varga repeatedly stresses in his works, i.e. – as already mentioned in the headline – the problem of limits and potentials of law-making, either as a value bearer provided by an inner morality, or as a mere technological instrument fit for social-engineering political purposes. In the case in point, the problem stems from both the way in which the law-making process has been carried out according a particular idea of EU governance model and the way in which its actual content has been technically defined according to a "soft", i.e. *spurious* and *slanting*, innovative mix of legal devices.[12]

Contrary to traditionally dominant legal doctrine, any sort of EU legal act – whether of administrative, ordinary or otherwise nature – is necessarily provided with "qualified" preambles, stating compulsorily value-judgements and technical guidelines. This holds even more compelling for EU treaties.[13] In fact, these treaties are meant to produce also – as Varga would put it – a "surplus function", i.e. to act as veritable legal manifestos to assess EU gov-

[11] TCE, Preambolo.

[12] F. Bassanini – G. Tiberi (eds.) *Una Costituzione per l'Europa* (Bologna: Il Mulino 2003); A. Cantaro – C. Magnani "L'ambiguo Preambolo: atto formalmente internazionalistico, dichiarazione sostanzialmente costituzionale" *Quaderni di Rassegna di Diritto Pubblico Europeo* (2003) 1, 51.

[13] V. A. Vedaschi *Istituzioni europee e tecniche legislative* (Milano: Giuffrè 2001) 80.

ernance as a sort of self-fulfilled/self-fulfilling "prophecy". Quite paradoxically, however, contrary to EU treaties' preambles that historically paved the way of the process/project of European integration up to the Maastricht Treaty, in which not only EU values and goals were extensively and solemnly proclaimed, but prospective achievements were sketched in some detail also, the EU Constitutional Treaty's Preamble does not contain any significant additional or innovative hints, and even less clear statements about EU future directions. As this intentional deficiency already occurred in Nice and Amsterdam Treaties' Preambles, one might thus wonder: is this a sign of an intrinsic exhaustion of overall EU policy as has been carried out so far? Or is this an indicator of the difficulty to deal with the challenges that EU endures at present and will have to face from now on? In both cases, what sort of mediation has been performed, or is still expected, by such an extraordinary EU law-making?

While these questions are still open, one thing at least is clear from a socio-legal point of view: the political difficulty to manage the *differentia specifica* of the EU Constitutional Treaty and its Preamble *vis-à-vis* any other treaty or preamble in modern western legal history.

As we know, EU treaties are legal acts of international legal value. Their preambles therefore cannot but reflect such a technical-dogmatic feature. In turn, and by contrast, constitutions and their preambles are legal acts typical of State-nation domestic sovereignty, validly enforced within the borders of such sovereignty only. Being so, what sort of political "compromise" provides, and/or could grant in the future, legal validity and legitimacy to a EU Treaty and its Preamble of trans-national constitutional nature drafted *as if* EU law-making can work against or without a proper, legally credited, genetic, epistemological, logical and technical coherence? What sort of *effect utile* – i.e. concrete socio-legal significance – might have the cognitive-evaluative information function of a spurious, Janus-headed, legal acts of that sort?

The above and previous interrogatives should not be undervalued. Given the number of re-known jurists acting as members of the Convention that drafted the Treaty, it is out of question that they were consciously oriented to by-pass traditionally dominant legal doctrine and produce a legal text of revolutionary nature at both constitutional and international level. Yet, as the same Conventionals were surely aware that the expected potentialities of such a revolutionary law-making could have been jeopardized precisely by its own theoretical and methodological construction, it is out of question also that the presence of additional spurious "refinements" was not occasional

at all. To give an idea of the theoretical/methodological issues at stake, it suffices here to mention a few items.

To begin with, the anomalous *dual* legal character – international and constitutional – of the EU Constitutional Treaty and its Preamble had to be framed somehow. Hence, a functional-fictional legal device was established, i.e. the unity of the variety of European peoples and the unity of the variety of European Union Member-States, *as if* these complexes were altogether a unitary legal agency able to act as such as a supreme constituent power.[14]

As this technical solution – i.e. the recognition of two radically different bodies such as peoples and states as "mutually convergent" constituent tools of the Union - had to be somehow theoretically and methodologically handled also, a further legal *escamotage* was sorted out: a new sort of what legal doctrine defines "dual preamble". As a matter of fact, inserted into the text of EU Constitutional Treaty, one finds a section of another EU Treaty, i.e. the well-known Nice Treaty's "Charter of Human Rights and Fundamental Freedoms of the European Union". Such insertion has been officially made in order to provide full formal-legal validity to said Charter, but actually it has been suggested to provide the same EU Constitutional Treaty with a special moral appeal also.[15]

The need to provide the Treaty with a visible moral consistency stems from the fact that, according to traditionally dominant legal doctrine, constitutional law-making is made "in the name of the people" and/or legitimated by virtue of an explicit mention of people's "general will". In the case of the EU Constitutional Treaty, however, one does not find such references at all. Firstly, not "the people" but European citizens as such, i.e. mere individuals acting *uti singuli*, are mentioned. Then, it is stated verbatim that the "will" of European citizens merely "inspired" the process of constitutionalization of the Union. Last but not least, this will is jointly shared with the will of the EU Member States *as if* they were functional equivalents. So much so that, also due to current questionable legal definition of EU citizenship, *de jure* and *de facto* the Treaty could not but being the outcome of an EU intergovernmental agreement, to be subsequently ratified at national level, not the direct expression of a generalised popular commitment.[16]

Well: being aware of the above, the Nice Charter perfectly suited the needs of the Conventionals: thanks to the value of its own political-ideological contents: not only it could act as a ready-made "source of law" of

[14] TCE, Titolo I.
[15] TCE, Titolo II.
[16] TCE, Titolo I, Art. 1.

technical nature, but also as a symbolic tool able to raise a degree of social consensus towards a revolutionary *experimentum juris* lacking, as such, the force of either a logically coherent legal doctrine or a commonly shared legal tradition.

We will discuss these issues in more detail in the following paragraphs. For now, it is worth noting that, in so far as all has been said presupposes a sort of "converging commonality" between national and international democratic-styled political institutions, such *experimentum* overturns national sovereignty into a mere "functional borderline"; downgrades national governments into mere "procedural sites"; and forces bottom-up creative potentials of European social dynamics into a selective top-down "institutional design".

A deeper insight on the matter cannot therefore be avoided.

4 *The Nice Charter as preamble of the EU Constitutional Treaty's Preamble*

As has been said, the insertion of the "Charter of Human Rights and Fundamental Freedoms of the European Union" into the text of the EU Constitutional Treaty has been explicitly made by the Convention on the Future of Europe in order to technically grant it a binding formal-legal value. However, as the Nice Treaty has been proclaimed in 2001, i.e. less one year before the institution of said Convention, and due to the need to provide the EU Constitutional Treaty with the widest possible moral consistency, it is by no means casual that the Charter has been instrumentally used as a veritable introductory act of the EU Constitutional Treaty to perform the most extraordinary "surplus function" an introductory legal act could ever perform: the "transubstantiation" of already internationally established *fundamental* rights/principles into *foundational* constitutional values.

If this is the case – as it seems hardly deniable from both a conceptual and a pragmatic view-point[17] – it follows that a scientific study on the EU Constitutional Treaty's Preamble cannot but include a concern about limits and potentials of the same Charter as preamble of this Preamble. In this respect – following Varga's theorizing – either its communicative function or its normative structure have to be considered here.

[17] See, e.g.: L. S. Rossi "La carta dei diritti come strumento di costituzionalizzazione dell'Unione" *Quaderni Costituzionali* 3 (2002), 565; Cesare Pinelli – Fiorenza Barazzoni, "La Carta dei diritti, la cittadinanza e la vita democratica dell'Unione" in F. Bassanini – G. Tiberi (eds.) *Una Costituzione per l'Europa* (Bologna: Il Mulino 2003), 37–46.

As far as the Charter's communicative function is concerned, it is notorious that the most valued communicative strategy to support current and prospective EU governance system as a geo-political entity of constitutional nature runs around the assessment of an account of the origins and development of the same EU as a process and project fostered by (and leading to) a "common geo-political destiny" stemming from a "common European legal tradition": a socially shared legal tradition, based on a common cultural heritage and a common normative experience.

Surely a reference to a "settled" normative order and a "shared" political future rooted into easily recognizable civilisation patterns is undoubtedly a refined way to technically define (and make socially appealing) the mutual connectedness of "common" values and interests within the EU, the EU Member-States and the European society at large.

It is a fact, however, that in spite of the authoritative patterns of the above strategy, the actual existence and/or consistency of a common European legal tradition can hardly be scientifically demonstrated, due to either contradictory variety of legal experiences in European history or the novelty of current EU law-policy making.[18] By definition, a legal tradition – as any tradition – requires a congruous period of space-time consolidation, but this is just what a laboratory-like such as European unionism continuously put into question: unlike classic historical Charters such as Magna Charta or Universal Declaration of Human Rights, the EU Charter does not mark the emergence of a new model of socio-political co-existence, that is a new form of government. It merely outlines a grid of general legal standards useful to improve the governance (i.e. the techno-structural functioning) of current EU institutions. In turn, this is done in an extraordinarily innovative way.

As we know, the Charter's legal and political rationale runs around an absolutely new legal format: the *ontological equalisation* of a variety of human rights and fundamental freedoms, some of them created *ex novo* by the European Court of Justice and some receipted by this Court from national legal systems and then proclaimed as a part of the so called *acquis communautaire*. Such equalisation, in turn, is made possible by virtue of an equally extraordinary newly created legal principle: that of the *axiological indivisibility* of such a variety of rights and freedoms as basic legal pillars of the whole EU legal order. As a result, the Charter now contains – and states as indivisibly equal – rights and freedoms that were already established *yes-but* in different space-time conditions, by virtue of different legal techniques, within differ-

[18] V. Olgiati "L'Unione Europea verso una Costituzione virtuale?" in V. Cotesta (ed.) *Le identità mediterranee e la costituzione europea II* (Soveria Mannelli: Rubettino 2005), 75–103.

ent socio-legal systems, according to different interests and values, and last but not least by different social forces and institutions. Interestingly, the legal rationale sorted out to avoid any technical and ideological contradiction about such indivisible equalisation is based on a not less innovative criteria: the assessment of three *social* variables, i.e. *(a)* techno-scientific achievements, *(b)* economic activity and *(c)* individual/social creativity, as proper formal-official *legal* sources of legal cognition and interpretation for any sort of prospective EU decision-making.[19]

Unfortunately it is not possible to discuss the number of additional problems raising from these technical innovations. However, two issues at least deserve to be stressed here. Firstly, while, say, economic freedoms gain in the Charter an equal position *vis-à-vis* human rights, nothing compensates the fact that, since early 20th Century, human rights lost any universal and/or human character *stricto sensu* as soon as they were formally codified (for the space-time contingency of positive law makes them *(a)* changeable at whim or by force, *(b)* subjected to discretional interpretations, and *(c)* subdued to occasional power-games). At the time of the Weimar Constitution, the notion of "fundamental" rights was thus suggested not only to cover such a semantic and operational de-powerment, but also to assess a totally different institutional system. Actually, since then, the term "human/fundamental rights" does not epitomise the individual freedoms of the personhood, but rather a type of political-institutional ordering principle enforced by a given political system to sustain the legitimacy of vested constituencies in the first instance, not to guarantee individual subjects' basic needs as such.[20]

As if the above is not enough, the EU Charter's ontological equalisation and axiological indivisibility of, say, human solidarity and trade freedom, is far from being a "fair" legal provision. Firstly, the assessment of their compulsory mutual legal balancing could not but give rise to an unrestrained disciplinary competition among legal, psychological, economic, etc. schools of thought, as a consequence of equally unrestrained social conflicts about the legal recognition of general ideals and particular interests embodied and/or carried out by any social or institutional agent. Besides, the primacy accorded by the EU to the principle of national rights' "best guarantee" in the balancing procedure before the European Court of Justice, could not but lead to a substantial depowerment of the EU Member-States constitutional systems,

[19] V. Olgiati "Lex Mercatoria e Communitas Mercatorum nell'esperienza giuridica contemporanea" *Sociologia del diritto* (2005) 2–3, 351.

[20] G. Gozzi *Democrazia e diritti. Germania: dallo Stato di diritto alla democrazia costituzionale* (Bari: Laterza 1999).

lacking as it does an explicit prescriptive legal force. Last, but not least, how can one underestimate that what the Charter labels as "rights" are meant to be conceived and legally treated as mere value-judgements ? Being so, it is clear that what is really fundamental in the Charter is the legal-political possibility to favour nothing less than a systematic de-constitutionalisation of human rights (as national welfare-state provisions).[21]

As one can see, the fact that the EU equipped itself preliminarily with a Charter of fundamental rights and freedoms, and only afterwards with a Constitutional Treaty, and not the other way around, is anything but a marginal fact to improve the geo-political self-referential logic of EU governmentality.

5 *The ideological content of the EU Constitutional Treaty's Preamble*

What has been said *supra* makes clear how and why the Nice Charter, as a conspicuous section of the EU Constitutional Treaty, played *de facto* the role of introductory act of the same Treaty. If so, what sort of political "compromise" distinguishes the Treaty's Preamble as such.

As has been mentioned, the drafting of the Preamble was "suspended" during the drafting of the Treaty due to ideological and political contrasts within and outside the Convention. Controversies also raised about the Preamble's draft attached to the Treaty's project delivered to the European Council. Hence, to avoid further discussions, it has been convened at last to re-assess what, more or less, was already mentioned in previous EU Treaty's preambles, without any specific indications about future-oriented EU agenda.

Quite paradoxically, therefore, the potential communicative function that, by rule, preambles embody, in this case turned into a veritable limit. Of course, as far as the Preamble states that Europe is an already unified and pacified socio-political entity, it has ever since been a carrier of civilisation patterns, and that its inhabitants progressively developed universal values such as equality, freedom and respect of reason, one might say that this is fine enough. Yet, if one reads it through the lenses of an historically determined dialectical perspective, one immediately realizes that it is not quite so, for the actual result is just to repress in idealistic terms major political and cultural short-circuits of contemporary EU Member States' constitutional experiences since the rise of the same European project.

[21] A. Cantaro *Il secolo lungo. Lavoro e diritti sociali nella storia europea* (Roma: EDIESSE 2006).

No mention is made, for example, of the *Manifesto di Ventotene* written in the Ventotene prison in 1941 by one of the leading promoters of the European unionism, Altiero Spinelli.

In that Manifesto the ideal of a United Europe is conceived as the only way-out to overcame – verbatim – the "civilisation crisis" of continental European societies: i.e. the rupture of Western *Weltanschauung*, and the turn of one of its constitutive patterns towards extreme forms of authoritarianism and totalitarianism. In other words, the Preamble not only ignores what was – and still is – the core mission of the EU project, i.e. to overcome recurrent domestic and exterior conflicts, but also hides the fact that the Father-founders claimed for a veritable "civilisation transition" from what might be called modern Western legal barbarism, i.e. nothing less than a substantial "transition from within".[22]

Besides, no mention is made about other constitutional "transitions" such as those occurred to Greece, Portugal and Spain, on the one hand, and Eastern European Countries, on the other hand. Even less, a mention is made about EU countries "transitions" from colonialism, i.e. about the ways in which e.g. Belgium, England and France reacted against the claim for Western-styled national independence, civil rights and self-determination made by Asian and African colonized countries. Last, but not least, the Preamble simply "forgets" that for about forty years the self-same European unionism grow up in a state of limited sovereignty, for all its Member-States had to comply with the military and financial rule of the *Pax Americana*.

As one can see, the EU Constitutional Treaty's Preamble has been consciously constructed in idealistic terms, as it occurred in many other legal preambles, *yes-but* to opt for a veritable *legal amnesia* – just as a bi-millenary legal tradition still suggests [23] – in order to avoid a basic socio-legal issue: "to reckon with the past" on the part of the whole European power elite *vis-à-vis* either itself or the World-system.

In this respect the well-known ideological controversy about the recognition or not of the Christian–Jewish religious tradition as a cultural matrix of Europe, and the final solution to exclude any mention of it in the Preamble, could be easily taken on as a sort of litmus-paper: the exclusion of the Catholic Church from any direct official involvement into future EU governance affairs, *as if* the Church had not been one of the political promoters of the fall of the Berlin Wall and a substantial "constituent power" of the EU Eastward enlargement.

[22] A. Spinelli *Il Manifesto di Ventotene* [1944] (repr. Milano: Mondatori 2006).
[23] H. Quartisch *Giustizia Politica. Le amnistie nella storia* (Milano: Giuffrè 1995).

This evidence, in turn, makes apparent another issue, i.e. the absence of any concern about the "intelligence failure" of certain organizational-sets due to the "false promises" of (western-styled) Modernity. As these "promises" were and are at the core of the Enlightenment and Classic Political Economy narratives that, in their turn, are at the core of the Treaty's Preamble, the fact cannot be undervalued: it signals that, besides the above, the same Treaty ideologically represses also a scientifically plausible and socially adequate representation of what current and prospective European socio-legal dynamics is and could be like.[24]

6 *The constructivist legal revisionism of the EU Constitutional Treaty*

If the EU Constitutional Treaty's Preamble aims at repressing an historically determined cognition of current and prospective EU process and policy, the Treaty as a whole shows another general aim: to up an up-to-date EU governance system by "rescuing" and mixing up in a creative way a variety of ancient and new legal tools.

At a closer technical look the EU Constitutional Treaty epitomises the quintessence of the EU "soft" law-policy making as it has been performed so far: a spurious mix of voluntaristic-rationalistic legal constructivism and jusnaturalistic-decisionist neo-institutionalism, both of them developed according to two (theoretically divergent) age-old principles: *necessitas jus constituit* and *auctoritas, non veritas, facit legem*.

As a constructivist regulatory model, the Treaty is for sure a sort of creative/regressive re-issue (in late-modern key) of Rousseau's "social contract". Urged by a veritable *status necessitatis*, it is the result of a contractual agreement between EU Member-States acting as private agents, intentionally disposed to limit their own sovereignty so that it can be implemented (by virtue of the newly-created EU legal principles of "direct effect" and "supremacy") by EU agents (devoid of a substantial democratic legitimisation) *as if* it expresses of the general will (of European society) in the view of the pacific cooperation of each (State) and all (citizens), and therefore in the general interest of the overall Europe as formally constituted by the Union.

As on can see, in the articulation of its essential elements, the EU Constitutional Treaty does not appear to diverge greatly – *mutatis mutandis* - from that hypothesized by Rousseau to give credit to the shift from a "state of nature" to a "civil society". The only exception is that *(a)* the agents being not

[24] V. Olgiati "Arcana Imperii. I confini dello spazio europeo" in E. Dell'Agnese – E. Squarcina (eds.) *Confini e frontiere della nuova Europa* (Torino: UTET 2005), 63–79.

physical persons, but States and EU organs (thus substantiating Wolf's and Pufendorf's absolutist theorizing, according to which political institutions are social actors acting as individual subjects), *(b)* there is no original "state of nature" except that given by the political and legal systems of the current European *pouvoirs constituées*, just as *(c)* there is no civil and political society except through the re-enforcement of the existing (politically and legally constituted) European power elites. The novelty of the Treaty, therefore, is that it is the result of a self-interactive process, an act of self-observation and self-recognition of mere vested interests and values, brought about, and intentionally oriented to function in the absence of an explicit, visible and substantial, popular *pouvoir constituant*.

Being so, the rationale of the Treaty is therefore clear: to do (or not to do) things with words – as authors as varied as Hagestrom and Dworkin would say – by means of the everlasting constructivist *as if* legal technique typical of the *Arcana Imperii* legal tradition.[25]

In turn, as a neo-institutional regulatory model, the Treaty is an equally interesting case of creative/regressive re-issue (in late modern key) of a well-known constitutional trend now leading to the constitutional hypostatisation of the Judiciary as the "supreme power" of vested political constituencies. To have an idea of this trend (and consequently of current political activism of the Justice system) within the EU it is sufficient to consider that the EU Treaty's structural-functional patterns overlap upon a late-modern constitutional architecture that cannot but reflect the historically conditioned technical solutions sorted out to deal with the crisis of (western) European constitutionalism occurred after the failure of the Weimar Republic and the rise of the Nazi regime, i.e. the establishment of a social-democratic Constitution as supreme rule of political dynamics, so that to neutralize the limits of liberal parliamentary system (e.g. Italian model), and of a constitutionally framed commissarial-type political leadership, so that to neutralise the perversions of a totalitarian regime (e.g. French model). These two constitutional solutions have been "softly", i.e. spuriously, synthesized at EU level, as both the insertion of the Nice Charter and the re-institutionalisation of the EU Commissions within the EU Constitutional Treaty demonstrate. This sort of slanting legal syncretism, however, goes hand-in-hand with, and cannot work otherwise than by virtue of, the role of the European Court of Justice as supreme formal-official ruler of the overall EU governance.

[25] Vahininger *Die Philosophie des "Als Ob"* (Berlin 1911) (transl. F. Voltaggio *La filosofia del "cone se". Sistema delle finzioni scientifiche, etico-pratiche e religiose del genere umano* [Roma: Ubaldini 1967]).

As a matter of fact: *(a)* since ever the EJC devoted its autocratic law-making to enhance a sort of EU constitutionalisation by "inventing" new legal principles and assessing certain values *as if* they were part of a common EU tradition; *(b)* the constitutionalization of the ontological equalisation and axiological indivisibility of such legal stuff in the EU Treaty now provides the EJC with the last word about any decision about it; and *(c)* the same EJC is allegedly representing itself as an impersonal organ of the EU law – i.e. as EU law-speaker – while, in actual practice, it acts as a veritable commissarial agency involved in a value-judgements' balance of substantial political nature.

But why all the above has been done in such a twisty, manifest/latent, functional/fictional way ?

The most credited reason is that the EU constitutionalisation cannot, in one way or another, by pass *ex abrupto* the historic experience of the State/nation model: an inheritance, however, which the same EU clearly tends to rejects and go beyond.

Indeed, the problem of the theoretical and practical connection/detachment of the EU governance system *vis-à-vis* State-nation constitutional models is rather serious. This is because the EU is not and does not have State-form, being the result of international agreements. Consequently it does not have the possibility of setting up its own democratic-representative constitutional system rooted, as in the case of the State/nation, on the principle of legality and on the criterion of the fiduciary mandate, lacking as it does any exclusive sovereignty over its own people or its own territory. In other words, not only the process of EU constitutionalisation cannot give rise to a constitutional order similar to any modern State model, but in the event of such a process being completed by simply following, in one way or another, historic patterns or guidelines of the State-form, the EU would either infringe the historic tradition of western constitutionalism itself, or put openly into question the existing legal systems created and still enforced by the EU-Member States.[26]

Given the above, therefore, it is easy to understand why not only an extraordinary creative constructionist legal revisionism is at the theoretical/methodological core of the EU Constitutional Treaty, but also why the

[26] V. Olgiati "The Eastern EU Enlargement and the Janus-Headed Nature of the Constitutional Treaty" in W. Sadurski – A. Czarnota – M. Krygier (eds.) *Spreading Democracy and the Rule of Law? Implications of EU Enlargement for the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Springer: Dordrecht 2006), 27–49.

technical revival in EU law-making of what pre-modern *Ratio Status* legal doctrine called *simulacra dominationis ac libertatis* – i.e. legal tools creating a virtual reality – increasingly raises questions about the consistency and legitimacy of contemporary positive law as such.

Some Problems and Pitfalls in Researching Law in Foreign Jurisdictions

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1 Introduction

It is an honour to be asked to write in a volume dedicated to Csaba Varga, the legal theorist, sociologist, anthropologist and comparatist. As a comparatist, I have decided to look into the pitfalls of comparative legal research by starting with a quotation from one of his works: "If we consider the law in isolation, we find that we can understand and use it to only a rather limited degree".[1]

The law of a single country alone, says Gordley, cannot be an independent object of study. To understand law within that country, one must look beyond its boundaries, indeed, beyond one's own time, which means that a trans-temporal and trans-national approach is necessary even for domestic lawyers. [2]

It is also true that law cannot be meaningfully studied unless placed within context and culture. The role of culture as a distinctive part of a legal system cannot be ignored. Furthermore, there is no single legal culture in a legal system, let alone a single culture in a society: there are communities and sub-communities, as well as legal sub-communities. A comparative lawyer usually does not share the culture of the "other" into which she wishes to research and juxtapose to "another". Nor does she share all the cultural aspects of the "other" culture's legal sub-communities.

[1] V. Gessner – A. Hoeland – Cs. Varga (eds.) *European Legal Cultures* (Aldershot: Dartmouth 1996), xvii.

[2] J. Gordley "Comparative Legal Research: Its Function in the Development of Harmonised Law" *Am. J. Comp. L.* 43 (1995), 555.

Yet, cultural context calls to mind anthropology and sociology rather than law. Scholars undertaking research in these areas, are not interested in comparative law because their interest is not in creating uniform legal systems or in harmonising them; comparative law is.[3] Most anthropologists still rely on 19th century legal scholars because today law has become more technical with narrowly defined subject matter, more Eurocentric and less global by not using a world sample or examining all cultures and societies cross-culturally.

First, anthropologists used a wide and rather speculative social evolutionary perspective. Later, this was replaced by historical particularism. Later still, the concept of "controlled comparison" emerged.[4] In this approach there would be control for variables while holding a function such as dispute, constant – a positivist model. The 1970's saw social sciences looking at positivism critically, and the emphasis (the gaze as it is called) moved from the social to the cultural. Some anthropologists returned to particularism and relativism, moving away from comparison altogether. However, though the practices were particular and the starting perspective was comparative,[5] the method was not comparative. In comparative law, the field may be Eurocentric or ethnocentric but the method is comparative. The focus on sameness and difference is there in both disciplines, with alternating emphasis.[6]

Today, comparative lawyers are also interested in culture, and it is said that, "understanding a foreign legal system and a foreign (legal) culture is not possible without respecting it. Debates as to the rightfulness and efficiency of a particular legal system are certainly useful: they promote understanding and create awareness of the relative value of legal solutions."[7] However these debates should not have as a background purpose the promotion of one particular mode of legal thinking rather than another, even when strictly academic, differences between legal systems being expressions of self-identity, to be respected.

For comparative law, the way forward is not necessarily to be less Eurocentric but to articulate new questions that do not even occur to the globalisationists interested in creating hegemonies, in a positive way.[8] There must be more sensitivity to historical specificity in order to dissipate misconcep-

[3] L. Nader "Comments" *Am. J. Comp. L.* 46 (1998), 751.
[4] Ibid. 752.
[5] Ibid. 753.
[6] Ibid. 754.
[7] See S. van Erp "Law and Culture" *Electronic J. Comp. L.* 5.1 (2001).
[8] Nader (n. 3), 755.

tions. The instrumental uses that comparative law is put to must also be recognised.

The liberal conception of law is evolutionist, that is, there is a belief that there will always be a transition from the traditional to the modern; it is also ethnocentric since the shift from a traditional to a modern legal system is regarded as development. However, unless law is used instrumentally, the development of the law and the direction it will take cannot be pre-determined. The Western liberal conception of law interprets diverse cultures in terms of Western history and considers history as a series of identical stages repeated in all societies. Though it is often regarded as such, Western law should not be regarded as the prototype of a modern legal system if a comparatist wants to study legal systems or laws of "other" places.[9] Modernisation and Westernisation are two distinct processes.

The question arises: Is comparing more closely connected jurisdictions easier than comparing those that originate from divergent backgrounds? Is it not true that what seems similar may in fact pose more problems when closely examined, and the seemingly incomparable, less? In addition, jurisdictions, which were once closely related, may have grown apart as a result of historical accident or different economic infrastructures. Furthermore, derivatives may look similar on paper, but present differences due to the indigenous culture's tuning of the formal legal system.

From codifications in Europe to well into the second half of the 20th century, the "contrastive approach" was dominant among comparatists. Since the end of the Second World-War the "integrative approach" has returned with common core studies, and is now even stronger with the enlargement of Europe, culminating in *ius commune*, European integration and globalisation. However, because globalisation is in fact globalised localism, there is at the same time an interest in diversity, hence the contrastive approach. In fact, at the moment the integrative and the contrastive approaches run parallel.

For instance, Gordley states that "the laws of different legal systems may be much the same even if the decided cases and the authoritative statements made in statutes and treatises look different". He then goes on to say that, if after scrutiny, the laws are found to be the same, they should be analysed in the same way by both the comparative and domestic lawyer.[10] However, if the laws are genuinely different, the methods will begin to diverge, but

[9] See C. R. M. Dlamini "The Transition from the Traditional to the Modern System of Law" *CILSA* 31 (1988), 240–41 and 245.

[10] J. Gordley "Is Comparative Law a Distinct Discipline" *Am. J. Comp. L.* 46 (1998), 607–8.

even then the methods of the comparative lawyer and the domestic lawyer are interdependent. He then asks, "What is the way in which particular legal systems accommodate for the absence of particular doctrines and institutions found in others?"[11] Further Gordley claims that if the rules of one system were based on a value or principle utterly foreign to the other, the study of the foreign principle would not illuminate the principle of domestic law; and comparative law would become impossible, as we cannot compare things that are utterly different.[12] However, if we can describe our difference, it must be because of what we share.[13] In that case studying the difference will shed light on what we have in common. This may mean that comparison cannot be carried out between totally different systems. If this is the case, does it mean that comparative law can only work in regional studies? Even between derivatives which are the results of impositions, or imposed receptions, there may be fundamental differences. I believe that we can compare even dysfunctional systems, if the aim of comparative law is to find the differences, explain and interpret them, and increase knowledge.

Another question occupying comparatists today is: Should one emphasise similarities and transplantability rather than the differences and non-transferability? Should one have a "purpose" as a comparatist and should this be reflected in one's research?

2 *How Should Diverse Foreign Jurisdictions Be Studied?*

The first possible answer to this question is that foreign law can be taught and studied only in a descriptive manner: The question then becomes, "Is this to provide information or ideas?" Can law be studied in a vacuum? For example, Gerber points out that comparative law has four objectives: conflict law, unification of law, transnational contractual relations, and guiding domestic decision making. He then states that the common feature of these objectives is that they are norm-centred.[14] Comparative law methodology (function/context) reflects these goals. No attention is paid to the dynamics of the systems. The "function/context" approach does not look at the pro-

[11] Ibid. 611.
[12] Ibid. 615.
[13] Ibid.
[14] D. J. Gerber "System Dynamics: Toward a Language of Comparative Law?" *Am. J. Comp. L.* 46 (1998), 720.

cess, how legal actors think or how decisions are made. Standard methodology seeks to create knowledge about the particular without a common theoretical or conceptual structure. Here, there is also a convergence bias.

The second possible answer is that foreign law can be taught and studied only in context: The question then is, "Which context?" Social, cultural, religious, developmental, economic, geographic? What about background differences? This point becomes more important when comparing systems related legal culturally but not socio-culturally. What exactly are we supposed to be studying?[15] Gerber says that new objectives are developing but without the necessary methodological refinement. He points to three such: scientific, seeking new knowledge about legal systems; practice related, application of this knowledge; and transmission of information about legal systems.[16] These developments have been influenced by sociological jurisprudence and legal realism and involve the dynamics of the systems. Gerber suggests that within the context of decision and system, we look at texts, institutions, decision-making communities and patterns of thought.[17] The conditions under which these operate, such as history, social science and philosophy, are also important as outside forces.

Would a foreign jurisdiction be better understood if comparative material were presented through cases or could the recognition of the factual environment lead to misconceptions? Markesinis uses this method and says that a functional rather than a conceptual approach helps here.[18] Gordley, on the other hand, regards both the functional and the "problem" oriented approaches as better,[19] saying that even when the statutory language is different, jurists of different countries may in fact be confronting the same problem and seeking the same solution. Bussani talks of a factual approach and a "question and answer methodology" whereby information is requested on all the relevant elements that affect the legal solutions of a given case, including policy considerations, economic and social factors, social context and values, as well as the structure of the process.[20]

[15] Ibid. 728–9. Gerber suggests decision and system.

[16] Ibid. 724.

[17] Ibid. 730.

[18] B. S. Markesinis *Foreign Law and Comparative Methodology: A Subject and a Thesis* (Oxford: Hart Publishing 1997).

[19] Gordley, (n. 2), 562.

[20] M. Bussaoni "'Integrative'" Comparative Law Enterprises and the Inner Stratification of Legal Systems" *Eu. R. Priv. L.* (2000), 85–98.

What about policy considerations behind the judicial decisions? Markesinis claims that, rather than the conceptual approach, his search for reasons for a policy strengthened his functional approach.[21]

Does a comparatist need to spend long periods of time abroad, immersed in the other culture, talking to academics and practitioners and discovering the problems of the foreign "real" world? Be exposed to the foreign "real" world? Teach abroad? Invite foreign teachers to teach their foreign jurisdiction to local students? Yet, what about the "observer effect", which could be a "participant observer" effect or a "non-participant observer" effect? A researcher must discover his/her own prejudices.

What does it mean to say that "legislatures should give due consideration to foreign rules before adopting them"? To what aspect of the rules should consideration be given? How are transplanted norms to be compared? Is the method here different to comparing indigenous rules?

For the carrying out of comparative work Reitz for instance, offers the use of nine principles: draw explicit comparison; concentrate on similarities and differences but in assessing the significance of differences take into account functional equivalence; observe the distinctive characteristic of each individual legal system and the commonalities in dealing with the particular subject researched; push the analysis into broader levels of abstraction; give reasons and analyse the significance of similarities and differences; describe the normal conceptual world of the lawyers, look at all the sources and consider the gap between the law in the books and the law in action; acquire linguistic skills and anthropology skills if need be, in order to collect information, but if the two skills are lacking, a comparatist can also rely on secondary literature; organise with emphasis on explicit comparison; undertake research in the spirit of respect for "the other".[22] His principle one, considers the relation between comparative law and foreign law, two to five, the basic technique of comparing, six to eight, specific guidelines that lead to the ninth, that is the final good practice.

3 Samples of Problems

3.1. Who should point out any defects in the goods in a sales contract, the buyer or the seller? What differences should one expect where the practice is that a seller sells a box of tomatoes in a cellophane bag or where the buyer habitually handles the goods and picks his own fruit? The legal problem may

[21] Markesinis (n. 18), 5.

[22] J. C. Reitz "How to Do Comparative Law?" *Am. J. Comp. L.* 46 (1998), 617.

be the same and the rules in force may be the same in both cases, but there is a difference in the true meaning of liability here and not because liability has a different meaning in different countries.

3.2. Why does the Turkish judge hear both parties in a divorce case based on the ground of mutual consent separately, and does not recognise a foreign divorce decree, even though also based on the ground of mutual consent, where the foreign judge has not heard both parties separately?

3.3. Why should it be that in some countries only adults can be adopted? Why should these adopters have no children of their own?

3.4. What layers are involved in the legal system under scrutiny? What is the impact of one layer upon others? How should one decipher "interlegality" in multi-level legal systems, looking at local customary rules, religious rules, "national" rules, transnational business rules, EU rules (if a member state), rules of *ius humanitatis* (environmental pollution conventions etc.) and their interrelationship?

3.5. It is reported that in Italy, for example, EC law is hardly known, public administration is inefficient and corrupt, suing in court is time-consuming and the population is in general sceptical about state activities. In Denmark, people trust public administration, and complaints are peacefully and quickly resolved by an ombudsman. In Germany, administrative behaviour is strictly legalised and conflicts are frequently brought to court. In Belgium, all disputes between citizens and the state administration are brought to conciliation committees which decide with little reference to law and therefore also with little reference to EC law. In France, the Conseil d'Etat did not recognise the decisions of the ECJ until recently. Therefore a common or even a similar legal practice cannot be expected. These reports can easily be translated into socio-legal terms.[23] What is the question that a comparative lawyer should ask?

3.6. On the issue of bribery, where for example, in Turkish language and culture there is a difference between *bahşiş* and *rüşvet*[24] is there a dividing

[23] V. Gessner "Global Legal Interaction and Legal Cultures" *RJ* (1994).

[24] *Bahşiş* is a payment given as a "thank you" for a service legally owed to you but which could be delayed in implementation but for it, *rüşvet* is a payment to acquire an illegal interest.

line? Gessner says that German tax officers accept deductions for bribery in a tax return if the enterprise claims bribery to be a local custom, in spite of international conventions and codes of conduct against bribery.[25]

3.7. Now that its position is entrenched by the Constitution, how is the indigenous law in South Africa to be researched since it is not part of the literate tradition, being basically oral?[26] Narratives or stories about rules are as important as the rules themselves and give meaning to them. How does one listens to stories, especially if one is a judge? Van Niekerk writes about rethinking research methodology. The true values underlying the indigenous law must be discovered by listening. Can the comparative lawyer do this effectively?

Thus, we see that comparative law needs a more capacious analytical framework, and a language of comparison.[27] However, can this be applied neutrally to all foreign jurisdiction analysis? Can an analytical comparative language be created specifically to be applied to any system of law? A common analytical language or even a meta-language could help the community of comparatist scholars to communicate with each other more effectively and share information and analysis. But, can a common transnational legal science explain or resolve difference?

In the course of her work a comparatist will come across complex cases the understanding, interpretation and the re-presentation of which will rely on factors that are not at all obvious from the reading of the material alone. She will have to go away and re-think how she can develop insight and adopt a "deep level comparative law" approach.[28] She must be able to grasp the underlying assumptions, conceptions and values as well as the economic, social or cultural contexts surrounding the facts and the handling of the law. She must grapple with the cultural matrix into which law is embedded. She must develop an awareness and understanding of the multiple layers of systems and the significance of what is observed. Having comprehended, she must then re-present it for her audience with an explanation and provide an insightful comparison.

[25] Ibid. However this is not any more the case since the law has been amended.

[26] G. Van Neikerk "Indigenous law and narrative: rethinking methodology" *CILSA* 32 (1999), 208.

[27] Gerber, (n. 14).

[28] I borrow this phrase from Mark Van Hoecke. See M. Van Hoecke "Deep Level Comparative Law" in Idem (ed.) *Epistemology and Methodology of Comparative Law* (Oxford: Hart Publishing 2004) and M. van Hoecke – M. Warrington "Legal Cultures and Legal Paradigms: Towards a New Model for Comparative Law" *Int'l. & Comp. L. Q.* 47 (1998), 495.

4 *Researching the Law in the Specific Example of Turkey*

I will now give a few examples[29] from a legal system, which I call "hyphenated" and regard as the legal system of an "extra-ordinary" place.[30] This legal system is that of Turkey, which is apparently totally civilian, most of her laws being derivatives of Swiss, Italian, German and French laws. The State is secular, however, 98% of her people are Moslem and of complex ethnicity. It has been said that Turks have not only been European for 600 years, but that they are Asian, Caucasian and Middle Eastern and European all at the same time.[31] A candidate to the European Union since 1999, Turkey is an 83 years old Republic based on a particular vision. This vision, partly entrenched in the Turkish Constitution itself and now often called "westernisation and contemporanisation", embraces nationalism, secularism, republicanism, populism, statism and reformation – the six arrows of Kemalism, Kemal Atatürk being the founder of the Turkish Republic. This bundle is tied uncomfortably to the historical and political baggage carried by Turkey. Turkish courts first and foremost consider the legal framework and then, acting as the tuners of the law, the political and social realities in Turkey.

Before we consider the cases below, one thing must be kept in mind. All Turkish legislation in use in these cases is based on civilian legislation: the Civil Code on the Swiss, the Commercial Code on the German, the Penal Code on the Italian and the uncodified administrative law on the French. Therefore, a comparative lawyer may be inclined to make comparisons with the legal systems that provided the "source-laws" before looking beyond. However, would this strategy be as straightforward as it appears? The first challenge may be that of "true comprehension". The second challenge may be in deciding on which approach to take. The comparative lawyer's predisposition may be to regard "law as rules", "law as fact", "law as function", "law as interpretation" or "law as culture". Would any one of these approaches help her comprehension and any comparative study she wishes to pursue?

[29] These examples have also been discussed elsewhere. See E. Örücü *Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century* (Leiden: Martinus Nijhoff 2004).

[30] For a number of meanings attributed to "extra-ordinary", see E. Örücü "Comparatists and Extraordinary Places" Ch. 13 in P. Legrand – R. Munday (eds.) *Comparative Legal Studies: Traditions and Transitions* (Cambridge: Cambridge U. P. 2003) 467–89; for an analysis of Turkish experience also see E. Örücü "A Synthetic and Hyphenated Legal System: The Turkish Experience" *J. Comp. L.* 2 (2006), 27–47.

[31] See E. Örücü "Turkey Facing the European Union – Old and New Harmonies" *Eur. L. R.* 25 (2000), 57–71.

What kind of comparative lawyer do we need to understand, interpret and re-present the following complex cases?

4.1 Divorce for Irretrievable Breakdown and Mutual Consent

My first example, divorce for irretrievable breakdown and divorce by mutual consent, will be looked at in comparative perspective. The institution of divorce, under whatever name, and the grounds for divorce are to be found in most Western legal systems today. Therefore comparability issues may not arise. Yet how these grounds are understood is totally different in different legal systems. Comparative research into this legal institution shows us that similar institutions interpreted in different ways because of social differences can only make sense if compared in a deep local context. Let us look at Sweden and Denmark for example, where the fact that one spouse applies for divorce is sufficient proof of breakdown of marriage and no further judicial discretion is involved in granting divorce. In such societies the fundamental assumption is that if the marriage had not broken down a spouse would not have applied to court for divorce. The context behind this assumption must be analysed. In Scotland, the only ground for divorce is "irretrievable breakdown", but in order to prove that the marriage has irretrievably broken down, the traditional grounds of adultery, behaviour, one year's separation, that is non-cohabitation where both consent to divorce, or two years' separation where there is no mutual consent have to be shown to have caused this breakdown. This picture reflects a gradual development over the years from the time of the Reformation when divorce could be obtained only for adultery. Most divorces are obtained today by mutual consent after a period of non-cohabitation. This current position can be assessed as the product of continuing reform over the years and reflects the slowly changing social climate. A deeper understanding is again called for to appreciate the difference between Sweden, Denmark and Scotland.

Looking at Turkey, where Section 134 of the 1926 Civil Code, amended in 1988 to introduce divorce by mutual consent, and where divorce is obtainable for irretrievable breakdown,[32] we see certain conditions that must be fulfilled: the marriage must have lasted for at least a year, the judge personally must hear both parties, be convinced that they are expressing their wills freely, and endorse as acceptable the arrangements made by the parties for the financial consequences of the divorce and the children. The only objective fact is the duration of marriage. The rest is left to the discretion

[32] Since 2002, the new number of this Section is 166 in the new Civil Code.

of the judge. So, the most interesting aspect for a comparative lawyer is the comprehension of the interpretation of these conditions by Turkish judges.

When divorce by mutual consent was first introduced in Turkey, it was in an attempt to limit the discretion of the judge, in that the court no longer had to weigh the circumstances and decide whether life in common had become intolerable. Yet, the High Court of Appeal *(Yargıtay)* is extremely cautious and holds a narrow view in the application of Section 166 (the old 134). Thus, though the Court finds presumption of irretrievable breakdown when the spouses petition together or when one has accepted the lawsuit of the other, and though the judge has no discretion and need not gather evidence as to the breakdown, the Court believes that divorces apparently based upon mutual consent may not be so, and that women, who are often the weaker partners in Turkish marriages, may be forced by their husbands to accept divorce under threat of, for example, their children being taken away from them. Therefore, the *Yargıtay* judges try to ensure that the conditions of Section 166 are strictly met. There are important reasons for this. Most Turkish women from rural areas wear scarves, which obscure their faces and hide their identity. There has been anecdotal evidence that husbands, with all the documents for the family such as birth certificates and passports in their possession, have taken their mistresses to court to pose as their wives. The mistresses have declared that they consent to divorce, while the wives at home have no idea that there was even a divorce suit in progress in court! Thus the judge feels that he must hear the two parties "separately and independently" when he can ask the woman in question to uncover her hair, and then form his conviction on the issues of identity and free consent.

The Second Section of the High Court observed in one case that, "divorce by mutual consent is a new possibility. It is not part of established tradition and therefore great care must be taken to see that justice is done."[33] The Court went on to say that the judge must take an active part in this, since the "parties in their haste to end their relationship may be rash and one spouse may give up all her rights or be under pressure or be deceived."[34] According to this judgement, the judge is not bound by the facts as presented by the parties, but must directly investigate and determine the truth. This is the general trend in interpretation and indicates an attempt on the part of the courts to ensure that women are not adversely affected. So although the policy behind this ground for divorce is to make divorce easier to obtain and reduce the pre-eminence of fault, in operation all is not what it seems.

[33] 6979/8890; November 2, 1989.
[34] Ibid.

These conditions are regarded as so important that in divorces obtained abroad, the High Court does not recognise a foreign divorce decree if the foreign judge has not ensured the existence of these conditions and not adhered to the conditions the Turkish judge expects him to. This problem usually arises upon an appeal by the *Yargıtay* Public Prosecutor of the Republic to the High Court after a lower court has recognised such a foreign judgement. Judges in countries where many Turks live such as in the Netherlands, France, Germany or Switzerland, would refuse to include in their judgement a statement such as: "I have met both parties, seen them separately and am convinced that they are expressing their consent freely and approve of their financial and other arrangements", even if this requirement were brought to their attention by a comparative lawyer, since their own law has no such requirements. The Turkish Public Prosecutor is particularly sensitive in this area and raises such issues using his power of *ex officio* objection. One of the unfortunate results of this approach is that it leads to "limping marriages" – divorced abroad, married at home! Nevertheless, here we see the High Court acting as the protector of women and children. This also is an indication that the *Yargıtay* takes into consideration the realities of Turkish society rather than European comity or the religious feelings of Moslems who expect that divorce should be easy for men.

To a comparative lawyer it may seem as absurd that the Turkish judge cannot see that Dutch or German grounds of mutual consent and irretrievable breakdown are functionally equivalent to the Turkish grounds of mutual consent and irretrievable breakdown. For her, there would be no need even to seek for functional equivalence since all these systems rely on the same ground. Her main concern would be to secure a recognisable pattern and if she could not, she would conclude that only comparables should be compared and that Turkish law in action is "beyond compare"!

4.2 Adoption

To illustrate how the same name of an institution can indicate different content and different function, it might be worthwhile to observe another example where common semantic reference undermines the delicate balances struck for social reasons, and where concepts and conceptions may differ. Let us look at "adoption" as seen in Turkey and Scotland, two legal systems that do not belong together according to the traditionally accepted classification of legal families. In neither system is adoption a part of the indigenous law; it is a historical addendum through historical accident. The comparative

lawyer's findings would show that in Turkey between 1926, when this institution was first introduced through the Civil Code adapted from the Swiss Code, and 2002, when the Civil Code was amended, only persons over the age of 35 with no natural children of their own could adopt, that the age difference between the adopter and the adoptee should be at least 18 years, that if the adoptee was married, the consent of his/her spouse was also required, that the adoptee did not lose his/her relationship with his or her natural family and therefore could inherit from them as well as from the adopter who in turn could not inherit from the adoptee. Statistics would show the comparative lawyer that when adopting, adopters were usually around 50 years of age and the adoptees, 30.

The subject is regulated quite differently in Scotland. In the 1930's when adoption legislation was first introduced, adoption may have been seen as a remedy for childless couples, but also as a way of making provision for a child whose parents had died or as a means of legitimation. Through the adoption process, the legal relationship between that child and his/her birth parents is severed and a new relationship with the adoptive parents, now the substitute parents, is created. Whereas parental rights would have ceased after the child reaches 16, adoption would still be operative. Either a single person or a couple can adopt if they are over 21, unless one applicant is already the natural parent of the child. An adoption order can only be made for a child under 18; the child must be at least 19 weeks old and must have lived with the applicant adoptive parents for the preceding 13 weeks. A young married person cannot be adopted. Statistics show the comparative lawyer that most adoptions are by step-parents.

The explanation for the difference between the two systems lies in a number of tentative hypotheses: In Turkey the aim of adoption, as in Roman law and Swiss law at the time of the reception, was to provide care for the elderly and the continuation of family name and family business for those with no children. Adoption was not available in the interests of children and therefore, the adoption of adults was more appropriate for the stated aim. The age difference of 18 was to avoid sexual relationship between the two adults. Arising from the underlying aim of adoption as stated, only childless persons could adopt. The ban on adoption by those with children of their own was also to protect the inheritance rights of the blood relations.

The comparative law researcher must find and examine such explanations in order to understand why the legal systems have produced the institutions they have, although these explanations are not legal ones. The texts show the differences but do not offer explanations.

This area was thoroughly reconsidered in Turkey in the amended Civil Code of 2002. The adoption of minors has been introduced into Turkish law and couples with children can now adopt. The conditions for such adoptions are: the care for and education of the minor for one year and the interests of the minor, while not adversely effecting the rights of other children of the adopter. An unmarried person can now adopt if 30 years of age or over. With some exceptions, spouses can only adopt jointly. The conditions for spouses are, to have been married for at least five years, and to be at least 30 years of age. If married for two years or more, with the condition of being 30 years old or more, one spouse can adopt the child of the other. The adoptee must be 18 years younger than the adopter. Adoption can take place from six weeks after birth. A discerning minor must consent to the adoption and, in addition, the natural parents of the minor must give their consent.

These amendments to Turkish law can readily be understood and explained. Three explanations can be offered: They are made to bring Turkish family law into line with the laws of the Member States of the European Union in keeping with Turkey's desire to join the Union; and to give additional protection to children, Turkey having ratified the Convention on the Rights of the Child. Maybe the most important reason is the force of the facts of life, that is, the desire to legalise a widespread phenomenon: as in fact aunts and uncles usually treat the orphans of their siblings as their own children to give them economic security in keeping with traditional family solidarity, a highly valued commodity in Turkish society.

As stated, Turkish family law derives from the Swiss where the institution of adoption was also directly influenced by Roman Law. The Swiss law has been amended with the times. The fact that the Turkish law was not amended until 2002 however, suggests that the needs of Turkish society coincided with the needs of Roman society, and the modern approach, which regards the institution of adoption from the point of view of the "best interests of the child" was not regarded as a social value to be legislated on until 2002 when other forces came into play.

A comparative lawyer looking at adoption can only develop deep understanding and genuine interpretation by appreciating the moral, social and cultural contexts that shape the legal institutions. However, a traditional comparatist may come to the conclusion that Turkish law lagged behind until 2002 and that the situation before that date should not be compared with that in Scotland.

4.3 Marriage

The following example may be used to show how a legal system accommodates culture and religion, and how answers to social needs are found within the framework of the over-arching legal system of the nation State in a legally monolithic but culturally pluralistic society.

In Turkey, neither the legal framework nor the *Yargıtay* accepts that couples living out of wedlock can be regarded as having a relationship to be protected by law. A marriage must be concluded upon the oral response of the two parties in the presence of a marriage registrar whereupon a marriage certificate is given. A religious ceremony cannot take place without this certificate and such a ceremony has no legal consequence for the validity of the marriage. This well-established principle of the 1926 Civil Code was restated in the Civil Code of 2002 to emphasise the importance of the secular nature of marriage in Turkey. The vision on which the Republic was founded in 1924 regarded Islam as a hindrance to progress and the official framework reflects this vision. Therefore decisions of courts in this area are of the utmost importance for couples living together without an official secular marriage.

A decision of the Turkish Constitutional Court (*Anayasa Mahkemesi*), giving an authoritative answer to any question related to the acceptability of religious union as an alternative to civil marriage, must be mentioned here, to underline the secular nature of Turkish family law.[35] Section 237/4 of the Penal Code[36] criminalising religious unions entered into without prior civil marriage and imposing a prison sentence of from two to six months on both the man and the woman,[37] was challenged as violating several Articles of the Constitution: Article 2 (the principle of secularism), Article 10 (equality), Article 12 (the character and the scope of fundamental rights and freedoms) and Article 24 (freedom to conduct religious services and ceremonies). The Constitutional Court, referring to Article 13 of the Constitution on the limitation of rights and freedoms, stated that Section 237 had been inserted into the Penal Code in 1936 to give support to civil marriage, that without this Section, polygamous marriages would become possible and that, though such marriages have no legal consequence, they pose a threat to the concept of family, such unions being detrimental to the social order. The Court stated that if couples enter illegal unions, women cannot use rights

[35] 1999/27; 1999/42; 24.11.1999; *Resmi Gazete* (Official Gazette) No: 24743; May 2, 2002.

[36] Now section 230 of the 2005 Penal Code.

[37] Persons performing such religious ceremonies without seeing the official certificate of marriage are subject to the same sanction. (Now Section 230 of the new 2005 Penal Code).

arising from marriage, any children are illegitimate and lose their inheritance rights;[38] civil marriage must be strengthened to protect the family and the rights of women and children. The Court went on to say that there is no violation of the principle of equality here between couples living together with no marriage of any kind and couples in a religious union alone, since the first group do not wish their relationships to be regarded as marriage.

The Court saw the Civil Code as a fundamental building block in the bridge to a contemporary and secular legal system for the Turkish Republic, and said that civil marriage, being at the core of that block, is specifically protected. As a religious ceremony subsequent to the civil marriage is not banned, there is no violation of secularism or any fundamental right. The Court decided unanimously that Section 237/4 did not violate the Constitution, firmly underlining the secular nature of Turkish family law.

Yet the *Yargıtay* extended the right to compensation to the unmarried cohabiting woman *(nikahsız eş)*, where an insured man died in a work-related accident.[39] His surviving partner, referred to by the *Yargıtay* as the "cohabiting partner", was 18 and had a child. The insurance company refused to pay compensation. According to the *Yargıtay* she had more than a 35% chance of getting re-married, 35% being the judicially accepted percentage for an official widow. The Court was of the opinion that her age, social status, position and family ties meant that she was not in the same position as a married woman who could expect to live in the family home for an indefinite period and be supported throughout her life. The Court therefore decided that the compensation arising out of Section 43 of the Code of Obligations should be reduced in keeping with fairness and equity.

There was a telling dissenting opinion to this decision by a female judge, critical of the differentiation drawn between the two women. The dissenting judge stated that:

> [H]ere "cohabiting couple" *(nikahsız eş)* refers to a traditional Anatolian relationship where couples have the intention of living together as husband and wife, with close family ties and children. Therefore, the presence or absence of official wedlock should not be the criterion for treating the two women differently. The Social Security Council only gives a pension to the officially married wife, and this for life. This should be the only extra gain for the married woman. The Anatolian woman is already oppressed and faces the risk of remaining officially

[38] The differences between legitimate and illegitimate children has been removed (see new Civil Code Section 498).

[39] 97/3331; 97/4819; 8.7.1997 23 *Yargıtay Kararları Dergisi* 1997, 1785.

> unmarried owing to tradition, and therefore her position should not be even further weakened when facing the law. This situation would only lead to mistrust of justice. The present circumstance is the outcome of the social structure, and social order cannot be changed by making a weak person even weaker. She should be given equal compensation.[40]

A comparative lawyer looking at "cohabiting couples" and into the payment of compensation for death in work-related accidents may have problems in appreciating both the position of the Constitutional Court, the High Court and the dissenting opinion above, unless she can read the normative story in its deep cultural context.

4.4 Family Name

In Turkey, traditional values of family and lineage for men override claims to modernity. The principle of equality of the sexes, was specifically introduced into the Constitution in 2001 by a phrase in Article 41, in addition to the existing "equality before the law" principle in Article 10. Now, added to the phrase, "The family is the foundation of Turkish society", is the phrase "and is based on the equality between the spouses". However, Turkish public policy considerations prohibit a man from taking his wife's family name. Thus a husband is not allowed to use the right acknowledged to a wife of having her name added to that of her husband's (Section 153). This prohibition effects even Turkish husbands of foreign wives in cases where the spouses live abroad and the law of that country allows the spouses to choose which family name they wish to be known by. This principle was pronounced in a case concerning a Turkish man who married a Swiss woman in Switzerland and acquired her surname, a possibility under Swiss law where, as in Germany, spouses can choose either of the surnames. He requested his family name to be changed in his Turkish personal status register. The lower court was of the opinion that such a correction was admissible since it had a "foreign connecting factor". The High Court *(Yargıtay)* was quick to point out that the lower court's qualification was erroneous as there was no possibility in this case to resort to conflict of laws rules, and declared the Swiss rule to be totally against Turkish public policy.[41] It can be speculated that this creates another problem of equality of the sexes that could have been corrected in the amended version of Section 153, but was not considered, since the as-

[40] Ibid. at 1786.

[41] *Yargıtay*, 18. HD; 1997/288;1997/1496;25/2/1997; 23 *Yargıtay Kararları Dergisi*, 1997, 1118.

sumption in male dominated Turkish society must have been that few men would want to choose their wife's surname.

It is apparent that the comparative lawyer must consider many complex issues related to visions and traditions, traditions and transitions, interpretation, human rights and margins of appreciation, interaction of law and culture, modernity and traditionality and the relationship between transposed law and "source-law". Without these considerations, a comparison of Turkish law to, say, German law – or even the Swiss "source-law" – would be difficult.

4.5 Abandonment of an Illegitimate Child

Here is another case worthy of deeper analysis. Section 475 of the then Turkish Penal Code,[42] adapted from the Italian, created and punished the offence of the abandonment of children or persons incapable of taking care of themselves. However it accepted as a mitigating circumstance the abandonment of an illegitimate child less than five days old in order to protect the *namus* (honour and good name) – a most significant concept in Turkey – of the perpetrator, the wife, the mother, the daughter, the grand-daughter or the sister. The sentence to be administered could be reduced by up to one third. In the course of one case, there was a challenge of unconstitutionality to this Section, the claim being that the reasons for reduction of length of sentence violated feelings of justice and equity, threatened the life of an illegitimate child, and encouraged the commission of a crime with less stigma. To treat the abandonment and even abandonment to death of an illegitimate child could not be regarded as less onerous than of the abandonment of a legitimate child.

The Constitutional Court held that, in the case of a child born out of wedlock abandoned within five days of birth, the reason for the reduction in the sentence is the negative effect this birth has on the mother and the family and consequently the saving of the honour. The Court went on to say that in contemporary criminal law the personality of the perpetrator is considered to be of importance, not the act but the actor is given priority and that in reality, considering an act as an offence is related to the pressure of society, and that today a person's psychological state must be regarded as an important factor. The Court decided that Section 475 should be assessed in this light. According to the Court, the purpose here is not to create inequality between legitimate and illegitimate children but to create justice in sentenc-

[42] Now the new Penal Code of 2005 has abolished this offence altogether.

ing. The Court held that, although Section 138 of the Penal Code states that judges decide eventually according to their conscience, this is within the framework of legislation and the Constitution; Article 17 of the Constitution guarantees everyone the right to life, the protection and development of their personality and is not applicable to Section 475. Thus there was no unconstitutionality.[43]

There were two dissenting opinions, both of interest. One said that people live in society; its pressure is always felt; and crime is related to the effect of society on the individual and these effects are the societal causes of crime. It went on to say that the responsibility of the individual may be lessened by this and responsibility should be shared between the individual and society. It said that it is true that in Turkish society to "save honour and good name", accepted as a traditional and social value, is very important and it is this that had been taken into consideration in Section 475; the same mitigating circumstances were to be found in Section 592 of the 1930 Italian Penal Code, the "source-law"; however, that Section was abrogated in Italy in 1981. The dissenting opinion went on to say that the draft Turkish Code covered this matter in Section 146 but only as regards the mother, by allowing the reduction of the sentence by one sixth, and the reasoning of the draft stated that sanctity of life was one of the most important values of our times and that only the mother could be given such leniency considering the biological and psychological condition in which she finds herself in such cases. In addition, Section 453, which related to the murder of such a child and also allowed mitigating circumstances, was amended in 1991 and the reduction of sentence was now only applicable to the mother. Therefore, Section 475 should also be regarded in this light. This dissenting opinion supported the majority decision only so far as related to the mother but regarded the extension of this leniency to others as "unreasonable, unjust and incomprehensible" and suggested annulment of the Section for those other than the mother.

The second dissenting opinion approached the subject from the point of view of equality in the right to life between the legitimate and the illegitimate child. It said that Section 474 covered abandonment of a legitimate child and considered this as an aggravating circumstance, and that a legitimate and an illegitimate child should be protected equally by law. Otherwise this was a violation of Article 10 of the Constitution on equality. The opinion stated that whatever the reason, this difference meant that the right to life of an illegitimate child is less worthy of protection than that of a legitimate one, which understanding violated also Article 17 of the Constitution, since the

[43] 1997/60; 1998/53; 22.9.1998 (*Resmi Gazete*: 23770; 29/9/1999).

right to life is inviolable and no other value or tradition can justify its violation. The dissenting opinion went on to say that if Turkey wanted to reach the contemporary levels of civilization, as expressed both in the Preface and Article 174 of the Constitution, then there was no place for such a provision in Turkish law.

How is the comparative lawyer to explain why these received values were so inherent to the receiving system and so cut off from their roots over the past number of years that, though changes may have taken place in the "source-law", in the domestic law they were regarded as an integral part of indigenous societal values and local culture? What kind of a "fit" was there between the foreign institution and the local culture that the law could not be changed in Turkey, though the "source-law" changed? Could it be that the values of the Catholic Italy of that time "fitted" the religious and traditional attitudes of the Moslem society in Turkey? Can the comparative lawyer resolve this paradox by using the traditional tools? How is she to assess this transplant here and what can she as a comparative lawyer say on this issue? What could she say now that this Section is no more?

5 Concluding Remarks

When law is approached as the outcome of complex competitive relationships between different layers of law, or between different layers of systems, legal, sociological, cultural or religious, what do we see? Some examples of interlocking between the social and the legal culture in Turkey have been observed above. We know that legal evolution has come about through a succession of imports from abroad. We also know that the Turkish legislature is intent on keeping the legal and the social fabric under centralised control. So, do the various systems interlock successfully? It is said that "Law and other such systems exist in a world where they are each the background or environment of each other".[44] Is this so for Turkey, or have the law and other systems "become increasingly isolated from each other as they become more and more self-referential"?[45]

Although the Turkish legal system is self-referential in the sense that it is only concerned with the law as envisaged by the formal legal system and does not enrich itself beyond necessity by discourse with other systems in society, it is at the same time not self-referential, in the sense that it still consults the

[44] Z. Bankowski – E. Christodoulidis "The European Union as an Essentially Contested Project" *Eur. L. J.* 4 (1998), 341–8.

[45] Ibid.

"source-laws", thus taking advantage of and strengthening its "hyphenated" nature. This nature is also strengthened by the courts tuning the formal law in view of custom and culture.

What is a comparative lawyer to do facing such cases? Where are the functionally equivalent institutions to be found? What should her target audience be told and what would they appreciate?[46]

Here, in assessing such cases either as interpreter or even as raconteur, the comparative lawyer must re-think her conception of law in appraising the relationship between law, custom and culture. What should she consider? How can she truly understand the position of the courts handling the law and then re-present it? Without a deep understanding of contexts cumulatively, it would be difficult to deal with such cases or any of the questions posed in the earlier parts of this article, properly.

I hope that all the above illustrate Varga's words: "[...] the law, seen as it is practiced, can be construed only within the confines of the social challenge and the individual answer."[47]

[46] See N. Jamieson "Source and Target-Oriented Comparative Law" *Am. J. Comp. L.* 44 (1996), 121.

[47] Cs. Varga *Law and Philosophy: Selected Papers in Legal Theory* (Budapest: AKAPRINT 1994), 2.

The Rule of Law Argument
Its Elements and Some Open Questions and Cases

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"No, we cannot say: everything that is useful to the people is law,
but just the opposite must be said:
only what is law is useful to the people."
(Gustav Radbruch)

1 The Concept and Elements of a State Governed by the Rule of Law

A state governed by the rule of law[1] is a modern state[2] where the actions of state bodies are legally determined and where basic (human) rights are guaranteed. The administration and the independent judiciary, which issue individual and executive acts or carry out material acts (especially the administration), are subject to the constitution and statutes passed by the representative body (national assembly, parliament, etc.). It is organized as a democratic state based on the principle of the separation of powers. One of the fundamental principles of the European Union and of its member states is that they are states governed by the rule of law.

The design of the modern state governed by the rule of law is *a result of historical development*, with the most intensive contributions coming from English (later also North American) and European continental law.[3] The

[1] Professor Dr. Csaba Varga has made profound contributions to the study of the state governed by the rule of law. See e. g. his monograph: *Transition to Rule of Law. On the Democratic Transformation in Hungary* (Budapest: 1995).

[2] Cf. J. Brand – H. Hattenhauer (eds.) *Der Europäische Rechtsstaat. 200 Zeugnisse seiner Geschichte* (Heidelberg: 1994).

[3] About the origin and design of the state governed by the rule of law, see e.g. A. V. Dicey *Introduction to the Study of the Law of the Constitution* (London: 1927) 179ff; N. MacCormick "Der Rechtsstaat und die Rule of Law" *Juristenzeitung* 39 (1984) 2, 65–70, at 65ff; E. Šarčević *Begriff und Theorie des Rechtsstaats (in der deutschen Staats- und Rechtsphilosophie)*

original elements of the English *(common law)* rule of law are the *supremacy of the parliament* in relation to other state bodies (together with the principle of the necessity of the legal – not arbitrary! – actions of the organs of state power), *equality before the law*, and *the protection of basic rights* before courts.[4] Basic rights exist already before that power and thus, as the substantive principle, define the limit that the state power must not violate. This insight was also accepted by the continental (especially German) variant of the state governed by the rule of law, which originally put more emphasis on the legality itself of the state organisation (hence the expression *Rechtsstaat*) and the subordination of the administration to statutes passed by the representative body. It is generally accepted in modern theory that there are no essential differences between the European-continental *Rechtsstaat* and the Anglo-American rule of law.[5] Even more clearly: the rule of law is the result and the aim of both systems and they understand it very similarly as regards its contents, while they approach it in different ways depending on the differences between the two families of law.

In a state governed by the rule of law, *legality* is a quality that is specially emphasized. It holds true for such a state that the constitution, the statutes, and other formal legal sources treat legal subjects *equally* (the principle of equality before the law) and *foreseeably*. Violations of the law are also defined in advance (of special importance is the principle *Nullum crimen nulla poena sine lege certa*) and the procedure used by the responsible state body in order to establish whether a violation of law has taken place and which legal consequence should be pronounced (the principle of legal certainty!). In a state governed by the rule of law *the rights and duties of legal subjects* are defined by law, the most important among them are contained and promulgated as the *basic* rights in a legally formal manner by the constitution or some other constitutional documents. Another element of a state governed by the rule of law are the *legal remedies* used by legal subjects to exercise their rights and achieve the realization of duties.

The design of the state governed by the rule of law is very broad. Its main dimension is a *legal framework* as regards the contents and the procedure within which legal decision-making should take place and state bodies should decide. By way of example, let us look at the elements of the state

vom aufgeklärten Liberalismus bis zum Nationalsozialismus (Diss. Saarbrücken: 1991); E. Benda "Der soziale Rechtsstaat" in E. Benda – W. Maihofer – H.-J. Vogel (eds.) *Handbuch des Verfassungsrechts* (Berlin–New York: 1994), 719–97, at 720ff; Varga (n. 1), 159ff, and M. Troper *La théorie du droit, le droit, l'Etat* (Paris: 2001), 267ff.

[4] See Dicey (n. 3), xxxviiff, 179ff, 402ff.

[5] See MacCormick (n. 3), 65ff.

governed by the rule of law as enumerated by Herzog in Maunz Dürig's commentary. Herzog bases his explanations on the original *Maunz' division* defining the following elements as corresponding to the concept and tradition of the state governed by the rule of law: the division of powers; basic rights; the legality of the administration and judiciary also encompassing being bound to "law and justice" (cf. Art. 20/3 of the Basic Law for the Federal Republic of Germany); the restrictability of state activity, which must be measurable and foreseeable (sub-elements of this element are the principle of legal certainty; trust in the law within a limited scope; the prohibition of retroactivity; the principle of definiteness in legislation, and the prohibition of excessive state interventions together with their necessity and proportionality); legal protection together with the principles ensuring an independent and fair trial; *Nullum crimen nulla poena sine lege*; the existence of a formal constitution, which is "the crown of a state governed by the rule of law."[6]

2 *The (In)definiteness of Legal Regulation*

In the practice of the Constitutional Court of the Republic of Slovenia the standpoint can be found that legal rules must be defined

> "clearly and definitely, so that they can be applied without arbitrary conduct by the executive power, and that they define unambiguously and definitely enough the legal position of individuals to whom they refer (the principle of definiteness)."[7]

In another decision we can read that "the norms must be determined in a manner enabling their implementation, that the contents of a regulation may be established by interpretation, and that the action of state bodies be thus determined."[8]

Even more "radical" is the following standpoint:

> "One of the fundamental *rules of a state governed by the rule of law* is that *statutory rules must be clear, understandable, and unambiguous*. This especially applies to regulations directly regulating the rights and the legal position of a wide circle of the population. A regulation from which *an average citizen, unskilled in law, cannot reliably decipher his legal position*, but which could be also in the legislature's opinion correctly applied, though in contrast to its explicit text, only after an interpretation of the

[6] R. Herzog in Th. Maunz – G. Dürig (main eds.) *Grundgesetz. Kommentar* (München: 1994), 266–9.

[7] OdlUS [=Decisions of the Constitutional Court of the Republic of Slovenia] XI/1, 1.

[8] OdlUS VIII/1, 105.

> statutory provisions at the enforcement thereof, i.e. in the responsible legal bodies, causes legal uncertainty and a lack of trust in the law and violates *the principles of a state governed by the rule of law*."[9]

The standpoint that "statutory rules must be clear, understandable, and unambiguous" and designed so as to be understood by "an average citizen, unskilled in law" is rather naïve and does not correspond to reality. Legal norms however perfect and well expressed they may be are only a result of an understanding of the law. The rule of law argument *cannot require anything that is against the nature of law* and against the nature of legal understanding, but it can require that the legal message contain enough elements to make possible an understanding of the contents of the message and the normative realization of the message. The legal message is arbitrary if its contents do not direct the recipient and also restrict him. It would be unrealistic to expect the meaning of a legal text to be completely clear and unambiguous. It is more realistic to require the legislature to provide *such degree of certainty* that will enable rational and foreseeable legal argumentation at least at the level of legal understanding and decision-making. Laws that do not fulfil even these criteria do not correspond to the rule of law (the principle of trust in the law).

In a state governed by the rule of law, criminal offences, the rights and legal duties of legal subjects especially the limitations of rights and the regulation (in more detail) of duties, as well as the jurisdiction and proceedings used by state bodies to decide on rights and legal duties all have to be defined with relative certainty *(lex certa!)*. It is of special importance that the meaning of legal norms be based on criteria contained in legal texts (in the constitution and/or statutes), i.e. on criteria that can be activated by established methods of interpretation. If the legal text does not offer any support on how it is to be understood, one cannot speak about interpretation: in this case teleological interpretation cannot replace other arguments of interpretation and, on the basis of itself (as the goal), create a legal norm as a means to achieve a certain goal. In such a case one could, at best, speak about a legal gap that has to be recognized as such and filled by means provided for filling legal gaps.

Teleological interpretation cannot be a solitary method of interpretation, like a "shining goal" that can be manipulated just as one wants. It is in the legal nature of teleological interpretation that it must also be based on other

[9] OdlUS VII/1, 78 at 494 (Italics in all places added by the author).

elements incorporated into the legal system.[10] The more such elements that define its meaning exist and the more these elements supplement each other, or the less they exclude or even contradict each other, the more coherent the teleological interpretation. The interpreter's task is to work out these criteria, to combine and evaluate them and to justify the solution he judges to be most well-founded and most rational. These findings are especially binding for the interpretation of legal texts by the constitutional court.

It is natural and legally correct that the interpreter first seeks the criteria for the purpose of the legal norm in the legal text itself. Logical interpretation will tell him whether the criteria is consistent and help him to encompass, by persuasive arguments, also cases that are not directly regulated (e.g. by *argumentum a contrario*). Historical interpretation will remind him of the purpose attributed to the statute (the legal norm) by the legislature or of the purpose determined by the historical circumstances that gave rise to the law and in which the law was created. In a broader sense, the historical interpretation will also give rise to the dilemma whether the interpreter is bound by the "intention of the historical legislature", by the "intention of the current legislature" or by the purpose of the independent text at the time of interpretation (an objective-dynamic interpretation). Within this broad range of possibilities, which can also be divergent or even contradictory, a systematic interpretation will, last but not least, remind one of the meaning of legal principles, of the meaning of the legal norm in view of its position in the system, and of the "inner logic" binding the parts into a whole and thereby determining them with regard to their intended function.

It would be ideal if these and other interpretative arguments acted in a harmonizing manner and confirmed thereby that the legal text has a relatively clear and definite meaning. In legal practice, however, it often happens that the arguments do not work together and result in the discovery of two or even more meanings in the legal text. If a collision occurs between the interpretative elements, the teleological argument is of crucial importance. It is generally accepted in theory and legal practice that in such a case one has to choose, from among the several linguistically possible solutions, the one corresponding to the purpose of the legal norm in the most intensive

[10] See e.g. F. Müller – R. Christensen *Juristische Methodik* (Berlin: [9]2004), 349; O. Weinberger *Norm und Institution. Eine Einführung* (Wien: 1988), 186: "Die teleologische Argumentation für die Entscheidung zwischen Interpretationsalternativen darf nicht als schlüssige Begründung angesehen werden, sie kann jedoch dazu dienen, die Plausibilität einer vorgeschlagenen Interpretation zu erhöhen." [The teleological argument for a choice between alternative interpretations may not be considered as a conclusive reason, but it can serve to increase the plausibility of a proposed interpretation.]

manner. The condition for such is, however, that this is not a purpose based on the interpreter's assumptions or even his wishes, but that this purpose is already expressed in the legal text itself or can be gathered from it or from its value (teleological) context in a relatively (i.e. sufficiently) defined manner.[11]

3 The Significance of Basic (Human) Rights

3.1 The Expressiveness of the Constitution

The *starting criterion* of the rule of law argument are *basic (human) rights*. The expressiveness of modern constitutions is not so strong that basic (human) rights would be defined therein in much detail, but they are rather a matter of understanding and further normative concretization. What constitution-makers can do is to be aware of this problem and to incorporate the criteria for a suitable constitutional interpretation into the constitution itself. In the following section I would like to touch upon three general aspects that can contribute to the rule of law argument.

3.2 The Central Position of Human Dignity

Human dignity as the central criterion of interpretation is most clearly emphasized in the German constitution (Grundgesetz, Art. 1/1):

> "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. *(Die Würde des Menschen ist untastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.)*"

The first sentence is the basic one, the second one could be even broader and could emphasize that this is the duty of everyone. This is really what it is all about, and the whole spirit of the constitution (the Basic Law) in general, and of the first chapter on basic rights (Art. 1–19) in particular, is in accordance with this approach. Historical reasons required and still require that the one who is the most powerful and can repress basic rights in the most severe way should be mentioned first.

The ambivalence of the law and basic rights is just an additional reason for establishing human dignity as the central criterion with regard to content for the interpretation of the constitution and basic rights (cf. Treaty Establishing a Constitution for Europe, Art. II-61: "Human dignity is inviolable. It must be respected and protected.") *Human dignity* is the common value

[11] See and cf. M. Pavčnik *Juristisches Verstehen und Entscheiden* (Wien–New York: 1993), 71ff.

starting point on which the whole constitutional structure is based: it refers to the protection of the dignity of the living as well as of the dead, and it is also a topical value criterion with regard to our duties to future generations e.g. regarding the protection of a healthy living environment, the protection of the natural and cultural heritage, or the dilemmas concerning gene technology and technical influences upon human embryos. In countries with a totalitarian past the protection of human dignity is an especially sensitive issue in (criminal and other) proceedings before state bodies and during the enforcement of a custodial sentence.

3.3 Human Measure is the Measure of One's Fellow Man

Human dignity has a very broad meaning which has to be theoretically, and practically, operationalized and developed in concrete cases. The general starting point is that the *human measure is necessarily the measure of one's fellow man*: the other side of rights are duties that impose upon us the consideration of the rights of other persons to the same qualitative extent.

The human measure in law may take on very *different complexions*. I have in mind e.g. the questions of difference and distinction, which cannot be evaluated by the same general yardstick if we deal with privacy and autonomy, that show consideration for the equal rights of others. I am furthermore thinking of a collision of two or more basic rights, which are either proportional if we deal with rights of the same importance (e.g. the collision of two rights to the freedom of movement), or exclusive if some basic rights are weightier than others (e.g. the priority of the right to privacy over the right to the freedom of expression in publications). And, last but not least, I am thinking of the subtle questions of the social state, where the initial unequal starting points should be equalized by a rearrangement of the income created, yet this should be done in such a manner that it would not bring the creativity of the market economy to a standstill and that possible social goals as "higher goals" would not drown out basic rights and other historically established principles of a state governed by the rule of law.

The questions dealt with here also belong to the area of legal culture. In the legal world of continental Europe and of the West in general, the thinking is rather dualistic and bipolar: the right is set against the legal duty and the legal duty is set against the right. Behind this rather coarse vision of *a correlation between rights and legal duties* the measure of one's fellow man stands, which tells us that – at least in a certain sense – the entitlement of A is always connected to his legal obligation, whereas the legal obligation of B

is always connected to his legal entitlement. The holder of a right is really entitled to act freely within legally allowed limits, yet he is simultaneously obliged not to go beyond these limits. On the other hand, someone subject to a legal duty is obliged to act in a certain manner, yet he is simultaneously also legally entitled to demand of others that they not put obstacles in his way. What has been said wholly applies to unilateral as well as to bilateral obligatory legal relationships; the difference between both kinds of relationships is a quantitative one and does not refer to the legal quality of rights and legal duties, the quality being the same in either case.

A correlation is not characteristic only of the relationships between rights and legal duties. It applies to any *mutual dependence of conduct and behaviour between two or more legal subjects*. Correlation also exists between the holders of rights and the holders of duty entitlements (e.g. the relationships between parents and children) as well as between holders of legal obligations that are connected to one another with regard to their contents. Especially administrative and other public law is embodied by *duty correlation*. Thus, in public law relationships citizens are often holders of legal obligations (e.g. of tax obligations), which are in accordance with the "entitlements" of state bodies that citizens meet their obligations. The "entitlements" of state bodies are, with regard to their contents, legal obligations that state bodies cannot discard, because this would already represent a violation of the law.

3.4 What Is not Prohibited and Commanded, Is Permitted

Behind the areas of what is *permitted* (Germ. *erlaubt*), *commanded* (Germ. *geboten*), and *prohibited* (Germ. *verboten*), the relation between *the world of legally regulated behaviour* and *the world of legally free behaviour* stands. A legal consequence can only arise on condition that one moves in the world of legally regulated behaviour (also in the area of legally permitted behaviour, which is an object of legal protection just due to its legality). If there is no such support, one is in the world of free behaviour (e.g. in the world of intimate and friendly relations between people), which lies completely outside any legal enforcement and legal consequences. Of no lesser importance is the knowledge that the dividing line between the worlds of legally regulated and legally free behaviour is differently defined for individuals and their associations on the one hand, and for the state and its bodies on the other hand. The *individual* is legally free if he is not limited by legal prohibitions, legal commands, and the rights of others (the prohibition of the abuse of rights!) and if he has not legally committed himself. It stems from the nature of mod-

ern law and of the state governed by the rule of law, however, that it is just *the other way round concerning the state* and its bodies. They are only allowed to do what falls within their legally foreseen jurisdiction, everything else is forbidden to them. Another question is how strongly this jurisdiction can be defined and how elastic the language characterizing it is. Nevertheless, the difference is evident: it is assumed for the individual that he is legally free if he is not subordinated by law in the above-explained manner or if he himself does not take on legal obligations *(Pacta sunt servanda!)*, whereas with state bodies one must always find an appropriate legal criterion that entitles or obliges them to carry out a certain activity. This is, certainly, of special importance for the state governed by the rule of law.

4 *The Rule of Law Argument as a Legal Principle*

The rule of law argument is, by its nature, a *legal principle*, which differs from a legal norm. One can say for legal principles that they are value criteria directing the definition of legal norms as regards their contents, their understanding, and the manner of their enforcement. In positive-law theory and in legal practice, legal principles are often not sufficiently observed. For many the main legal guideline is still the legal norm (for some even just the "legal regulation", "legal provision", "constitutional provision", "article" of the constitution, etc.) and not also the legal principle, though both legal guidelines are closely connected to each other: norms without principles would lose their direction, principles without norms would lose their variety with regard to content (as well as their foreseeability and the firmness of their meaning), which would result in *unprincipled* and *arbitrary* legal adjudication. In short, the law is a system of legal principles and legal norms and within this whole there are differences that have to be considered.

It must not be said either of legal norms or of legal principles that the former are applied directly because they are ready for subsumption from the very beginning, whereas for the latter just the valuation or value consideration (assessment, nuancing, etc.) is of central importance. In *either case it is subsumed in the end* and legal consequences are deduced; with *legal norms* the interpretative path is, as a general rule, shorter and less complex, whereas with *legal principles* the interpretative procedure is, as a general rule, longer and more complicated. In either case the decision is only possible once the norm/principle has been chosen and when also its meaning as undemanding as it may be has been accepted.

A few examples will follow to illustrate how legal principles (also the rule

of law principle) are *used* in practice. The *legislature* (the lawgiver) has the most leeway; its duty is to remain within the limits of the legal principle, but at the same time it is the one to concretize the principle as regards its contents and to operationalize it. It (co)depends on the contents where the principle ends and where its limit is. Similar is the role of the *constitutional court* when it judges whether a statute or some other normative legal act is in accordance with a legal principle (e.g. the rule of law principle). When the constitutional court decides on a constitutional complaint, it judges whether a concrete decision is in accordance with a corresponding basic right. The duty of the constitutional court is to consider those constitutional principles (again e.g. the rule of law principle) that co-determine single basic rights regarding their contents, at the same time it must gauge the basic rights themselves which are under discussion. Many a basic right has largely the nature of a legal principle if it contains value standards (e.g. the principles of human dignity and of trust in law), which are characteristic of legal principles. Before *regular courts* (and other state bodies) it is, as a general rule, impossible for a decision to be directly based on fundamental legal principles (an exception are legal gaps). Regular courts use legal principles indirectly i.e. *via* legal norms on which they directly base their decisions. Here, the rule of law principle can have an important role; its influence is especially felt in pre-criminal and criminal proceedings, before administrative bodies, and before the administrative court (e.g. the question of using one's power of discretion).

5 *The Constitutionality of the Legal Game*

It is also a question of principle how *intensively* single elements of a state governed by the rule of law are already *designed in the constitution* and how far the understanding and a possible further improvement of the constitution may go. In principle, it can be said that the further improvement of the elements of the state governed by the rule of law should be in inverse proportion to the degree of their constitutional legal implicitness or explicitness. If some elements (e.g. the question of substantial justice) are only implicit, it is correct that the constitutional court is restrained and only supervises the constitutionality of the legal game.

Recently it has been the professor and German constitutional judge Hassemer who has very distinctly stressed the constitutionality of the legal game. Hassemer's standpoint is that also in democratic societies "the majorities have lost the self-evident dignity of being the source of the right law (Germ.

richtiges Recht)."[12] Also in a democracy the majority is limited in the sense that it must consider the substantial and procedural norms of the game that are constitutionally consolidated. Hassemer's emphasis is clear and meaningful: in the term constitutional democracy

> "the adjective 'constitutional' is not just an *epitheton ornans* or a mild change of the noun meaning of the word such as, for example, the adjective 'liberal' in the concept of the liberal state. The adjective 'constitutional' in the concept of the constitutional democracy represents a real intervention into the noun itself. It determines nothing more and nothing less than the limit of the democratic principle; it expresses that the judgement whether the majority decisions are right will in future be subject to a basic reservation, namely the reservation whether these decisions are in accordance with the constitution."[13]

Constitutional democracy is incorporated into the design of the state governed by the rule of law. A political and legal game which does not accept the rules of *constitutional democracy*, but which moves beyond them or arbitrarily subjects them to itself, returns to the condition of a totalitarian state. One should not forget that an important condition of constitutional democracy is also an open and objective argumentation which can listen to the other *(Audiatur et altera pars!)* and is at the same time tolerant of the views of the other (the principle of tolerance). A typical example of legal intolerance can be *a change in the level* of decision-making. In legal practice it can happen that what should be regulated at the level of legislation is taken to the constitutional level. Thus, also the decisions of the constitutional court and the norms of the valid constitution can be trumped, and a decision can be reached which more reminds one of a *constitutional divide et impera* than of a tolerant constitutional democracy. We are at a point that even the highly elaborate design of a state governed by the rule of law cannot avoid. Only those responsible for the political and legal game can avoid this point. It depends on them whether they remain within the limits of the rule of law or the legal form is for them just a facade to hide arbitrary political and legal decision-making.

[12] W. Hassemer "Ustavna demokracija" [Constitutional Democracy] *Pravnik* 58 (2003) 4–5, 207–226, at 217.

[13] Ibid. 214.

6 The (Non)political Nature of Legal Decision-Making

It would be unconvincing and unrealistic to say that making value decisions is apolitical and that it is just a technical legal question how to "merely" recreate a typical legal norm (e.g. a constitutional or a statutory norm) and "mechanically" transfer it into a concrete legal decision. If the activity of state bodies refers to matters connected to the existence, operation, and directing of the *polis*, it is evident that any decision-making taking up these matters is political. *Mutatis mutandis* this applies to any decision-making in smaller or broader communities such as states, and this decision-making is especially sensitive when the decision influences the quantity and the quality of the power of individuals and individual state bodies.

Open argumentation does not hide that legal decision-making is also political decision-making and/or that legal decision-making also has political dimensions.[14] If we are aware of this fact and admit it to ourselves, the main emphasis of the problem is on the arguments that are allowed and the limit that legal decision-making must not go beyond. The degree of political sensitiveness is much higher in the area of public law (e.g. constitutional, administrative, and criminal law) than in the area of civil law, concerning individual proceedings, however, it is by far the most intensive with some matters within the jurisdiction of constitutional justice.

The fact that legal decision-making is also political decision-making *does not mean that we are leaving the ground of law* and entering the world of politics, which is not restricted and directed by law. I am speaking about a world that is a wholly *legal world*, but which deals with questions that are (also) politically charged. It would be very bad for law if this charge were overlooked and one would want to give the impression of a pure application of the statute. Behind such veil there is an ideology that exploits the lawyer, whereas it shows him outwardly as a politically neutral decision-maker led by a statute with perfect content.

Making decisions about politically sensitive questions of law requires a careful survey of the meanings that can be attained with the help of interpretative arguments. By way of example, it can be said that among all the possible arguments, the following have special weight: the *argument of linguistic interpretation*, *which* reminds us that the meaning must be one of the linguistically possible meanings; the *argument of basic rights*, *which* prevents us from increasing legal duties and/or decreasing the scope of rights (at the

[14] See J. Bell *Policy Arguments in Judicial Decisions* (Oxford: 1985), 269, and W. Heyde "Rechtsprechung" in Benda – Maihofer – Vogel (n. 3), 1579–1636, at 1632.

same time knowing that they are limited by the same rights of others); the *argument of sense and purpose*, *which* urges us, however loose the legal text may be, to discover solutions that are immanent in the law; and the *rule of law argument*, which imposes on us that we remain within constitutional (legal) possibilities and that we make decisions in proceedings that are within the limits of the constitutional procedural game.

It is essential that already in the *determination of the competence* of individual state bodies it has to be considered who should be competent for what. Legislative questions that are of a political as well as of a legal nature are decided by the constitution-maker and the legislature, but not by courts (including the constitutional court), who are protectors of constitutionality and legality. Legislative questions are, at least directly, an object of judicial and constitutional court review in the negative sense; the responsibility of the courts is to remove regulations that are unconstitutional and/or unlawful. It is in the nature of law that the separation of competences is not watertight and that also matters with political dimensions fall within the jurisdiction of the courts. This cannot be avoided even in the most elaborate state governed by the rule of law. This circumstance is an additional reason for a prior determination of competencies and that the criterion for a possible current exclusion of matters cannot be the degree of their politicalness; the criterion for a possible current exclusion of matters can only be the degree of legal importance (especially in proceedings before the constitutional court).

7 Si in ius vocat, ito!

When one finds oneself surrounded by questions that are also politically important, one cannot avoid the political atmosphere in the society (which may also be strongly electrically charged and tense). In such circumstances the attitude and role of the legal profession is of special importance. A prototype of such attitude is the role of the judge in general and especially the principle of judicial self-restraint. The *judicial attitude* does not depend just on the judge's personality, but always also on the education of lawyers, on political conditions and the legal culture, and, to a large extent, on the legal institutions and principles that guarantee and strengthen judicial impartiality and independence (together with the permanence of judicial office as one of the most important legal guarantees).

Judicial self-restraint is synonymous with acting with moderation: the judge should be neither an activist intervening in the competencies of the other two branches of power nor a passivist diplomatically shirking from

showing with determination how far the other two branches of power may go. Either attitude becomes clearest with the constitutional court. If the constitutional court is activistic, it takes over the role of the positive legislature or declares its position on political questions that are outside its jurisdiction. If the constitutional court is too cautious, it takes refuge in milder decisions without directly saying where the legal mistake is.

Courts breathe with the time and place in which they act. The *Zeitgeist* marks them and co-determines the directions of the interpretation of statutes. The objective-dynamic interpretation which is accepted by the majority, is not conservative but is restrainedly open to changes in time and place. The *objective-dynamic interpretation* is not an interpretation in the service of daily politics, but an interpretation that admits in the long term that the understanding of old legal texts changes. The self-restraint requires the judge to not anticipate the time and to not bring novelties into the understanding of a statute that the text does not support with regard to the meaning.

It is evident from the above that the judiciary does not have only a constitutional and generally legal framework, but is always rooted in a certain social and legal culture. It is of decisive importance that the legal mechanism strengthens the checks and balances system, which is the central dimension of the separation of powers. The judiciary can have a very important role in social conflicts. It is crucial for the rule of law whether the central political subjects act within the limits of constitutional democracy and whether they are ready to subject themselves to the decisions of the highest courts (especially of the constitutional court, in the systems that know such a court). The co-dependence of the state governed by the rule of law, as a normative phenomenon, upon the society, the state and legal tradition, politics, the economy, and culture is strongly evident in the so-called transition countries (since the fall of Berlin wall).[15]

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[15] Cf. J. Přibáň – P. Roberts – J. Young (eds.) *Systems of Justice in Transition. Central European Experiences Since 1989* (Aldershot: 2003). Concerning Slovenia, see the contributions of M. Novak (ibid.) 94ff, and A. Igličar (ibid.) 180ff, and M. Pavčnik "The Transition from Socialist Law and Resurgence of Traditional Law" *AJH* 46 (2005) 1–2, 13–31.

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Droit et culture
Aux origines de la comparaison des cultures juridiques

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1

De plus en plus, certaines idées apparaissent en littérature contemporaine du droit comparé mettant en doute avec plus ou moins de critique les résultats acquis dans ce domaine, et parfois même des opinions destructrices qui anticipent un changement de paradigme.[1] Parmi les nouvelles approches – en raison de l'autorité scientifique de leurs représentants – les initiatives qui se reconnaissent sous le nom de "cultures juridiques comparées"[2] méritent une attention particulière. Ayant un caractère global, elles ne veuillent pas seulement élargir ou bien enrichir l'activité cultivée jusqu'à maintenant comme "droit comparé" (*comparative law*, *diritto comparato*, *derecho comparado* etc.) avec des nouveaux points de vues, buts et nouvelles méthodes pour la recherche scientifique, mais d'une part elles offrent aussi des considérations remarquables pour des sciences juridiques théoriques et historiques (comme l'histoire du droit, ou la sociologie juridique etc.) et d'autre part pour celle du droit positif.

On ne fait guère d'erreur en comptant monsieur le professeur Csaba Varga, notre dédicataire, parmi les chercheurs hongrois ayant une reconnaissance internationale, qui ont pris une part considérable à la représentation des nouvelles prétentions du mouvement comparatiste moderne, et notamment à la diffusion du concept et des idées des "cultures juridiques com-

[1] V. p. e. M. Reimann "The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century" *Am. J. Comp. L.* 50 (2002), 671–700.

[2] V. Cs. Varga (sous la dir.) *Összehasonlító jogi kultúrák [Cultures juridiques comparées]* (Budapest: 2000).

parées" en Hongrie.[3] *Vere dignum et iustum est, aequum et salutare* donc de saluer le 65ème anniversaire d'un chercheur dont je partage la discipline, particulièrement d'un expert d'autorité justement honoré, d'une problématique plus étroite, du côté des représentants du paradigme antérieur "traditionnel", à propos d'un changement – exigé par plusieurs – de paradigme dans le droit comparé. On lui souhaite beaucoup des succès dans ses prochains recherches et son travail d'enseignement.

Le terrain des "cultures juridiques comparées" est naturellement trop large et global pour qu'un si court article puisse faire sentir la richesse de ses idées, même *per tangentem*. Au lieu d'une analyse et une évaluation compréhensive, qu'il nous soit permis de poursuivre la suite des salutations solennelles avec cette contribution bien plus modeste, en entreprenant seulement d'évoquer quelques antécédents historiques des dernières prétentions liées au concept des "cultures juridiques comparées", pour ainsi contribuer à la découverte de ses racines historiques, et, par cela, á une meilleure compréhension de son présent.

Déjà du point de vue terminologique, le concept des "cultures juridiques comparés" peut être mise en doute. Que signifie dans ce contexte la notion de "culture"? Selon quel critère pourrait-on distinguer sa part caractérisée par l'adjectif "juridique"? Selon quelle hypothèse de départ et quels aspects peut-on examiner les cultures juridiques d'une façon comparative? Et, finalement, est-ce que les deux positions sont conciliables dans le cadre de ces recherches, l'une caractérisée par une approche philosophique des cultures, l'autre marquée jusqu'ici essentiellement par l'approche juspositiviste de la discipline juridique qui s'est rendue indépendante sous le nom "droit comparé" ou *comparative law*? Nos réflexions historiques contribueront à répondre à ces questions, à ce que représente ces nouveaux problèmes. Car il est justifié de poser la question de départ dans toutes les analyses synthétiques historiques, et notamment en ce qui concerne l'histoire du droit comparé. En fait, "[l]e puit du passé est très profond. Ne devrions-nous pas dire qu'il est sans fond?"[4] Et cette histoire, où commence-t-elle? Dans quelle partie de l'histoire est-il nécessaire de plonger pour découvrir les premières apparitions de la recherche comparative du droit? Et après tout, de quels critères a-t-on besoin pour tracer une démarcation dans la suite séculaire des tenta-

[3] Cs. Varga (sous la dir.) *Comparative Legal Cultures* (New York: 1992); V. Gessner – A. Hoeland – Cs. Varga (sous la dir.) *European Legal Cultures* (Dartmouth: 1996), Cs. Varga "Összehasonlító jogi kultúrák: szempontok a fogalmi körülhatároláshoz" *JK* 52 (1997) 1, 45–9.

[4] Th. Mann *József és testvérei I.* (Budapest: 1968), 9.

tives qui indiquent une application de la méthode comparative de recherche, cette "panacée" qui a beaucoup aidé de sciences à se renouveler effectivement, dans le domaine des phénomènes juridiques? Peut-on vraiment essayer sur cette base de différencier entre les phases anciennes de ce processus historique, manifestées d'abord seulement dans quelques initiatives chancelantes et isolées, puis dans l'oeuvre d'un groupe peu nombreux de chercheurs "classiques", considérés par certains comme "précurseurs"[5], et celles du droit comparé contemporain, "moderne", "scientifique" ou même "propre"?[6]

Il semble en effet clair – vu les résultats des études de l'Antiquité – que les différences entre les régimes politiques ou juridiques des peuples particuliers ou groupes ethniques ont réveillé l'intérêt de l'homme de la rue mais aussi des scientifiques, philosophes, écrivains et auteurs dramatiques déjà dans les temps anciens, tant au niveau de la curiosité qu'à celui d'une approche et analyse scientifiques. Comme l'indique aussi l'exemple les *poleis* grecques, que nous connaissons le mieux grâce à des sources conservées, pour satisfaire cette curiosité, et suivant les besoins pratiques d'imitation, d'emprunt ou de réception, on n'a pas fait seulement une comparaison des institutions ou bien même des structures politiques et juridiques, mais on a aussi tiré des conclusions valables, généralisées pour la totalité de la vie sociale.[7] De notre perspective, l'importance de ces initiatives est due à l'exiguïté du cadre de recherche comparée, car, quoique la validité de ces résultats scientifiques soit vraiment bornée par les limites du temps et de l'espace de la *polis* grecque, on pouvait étendre la recherche – grâce à ces limites – à presque toutes les composantes et caractéristiques de la vie sociale. La morphologie politique, formulée par rapport au monde de la *polis* grecque par Aristote il y a 2500 ans[8] est devenue au cours des siècles l'étalon universel même pour des futures

[5] Hug mentionne Montesquieu comme "le tout premier précurseur du droit comparé moderne" [*the foremost precursor of modern comparative law*]. V. W. Hug "The History of Comparative Law" *Harvard L. R.* 45 (1931/32), 1027–70 et K. Zweigert – H.-J. Puttfarken (sous la dir.) *Rechtsvergleichung* (Darmstadt: 1978), 121. Constantinesco indique les précurseurs anglais, français, néerlandais, allemands et italiens. V. L.-J. Constantinesco *Le droit comparé* (Paris: 1972), 54–65.

[6] V. H. C. Gutteridge *Comparative Law. An Introduction to the Comparative Method of Legal Study and Research* (Cambridge: [1949] [2]1971), 16; M. Rheinstein *Einführung in die Rechtsvergleichung* (München 1974), 37; K. Zweigert – H. Kötz *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* I (Tübingen: 1977), 49.

[7] F. Pollock "Le Droit comparé: Prolégomènes de son histoire" ds. *Congrès International de Droit Comparé (Tenu a Paris du 31 juillet au 4 aout 1900. Procès-Verbaux des Séances et Documents) I* (Paris: 1905) (par la suite: CIDC) 248–61.

[8] Aristote *Politiques* ch. II–IV.

recherches grâce à sa richesse comprenant tous les éléments relevant de la réalité de son époque.

Selon les sources contemporaines, tout cela avait pour conséquence d'intégrer les problèmes juridiques aux systèmes philosophiques conformément à l'approche complexe caractéristique à la pensée grecque – descriptive et évaluative à la fois. Comme la nouvelle science politique et juridique paraît revenir à ces traditions en plusieurs matières, peut-être peut-on tirer la conclusion et on l'a déjà essayé,[9] que les premières apparitions du droit comparé peuvent être découvertes même dans la culture grecque. Certes, le but de cet article n'est pas l'évocation détaillée des différentes opinions ou divergences qui sont apparues sur ce problème. Évidemment, si toutes les initiatives théoriques (scientifiques) et pratiques, qui cherchent et/ou utilisent l'expérience des systèmes juridiques étrangers sont incluses dans le concept du droit comparé, on peut retracer le chemin du droit comparé depuis les temps anciens, quand du rejet d'une telle approche, qu'on peut considérer comme débordante, s'ensuit une délimitation bien plus étroite de l'histoire du droit comparé.[10] Après la comparaison de ces deux opinions, c'est la dernière qui a été presque généralement acceptée dans la littérature, celle qui fait remonter l'histoire du droit comparé à l'apparition du droit comparé contemporain, ayant une exigence et un aspect scientifiques, donc pour la deuxième part de XIXème, éventuellement du premier congrès international du droit comparé (Paris, 1900), et les précédents historiques ne sont considérés qu'avec la mention d'"origines" ou "précurseurs". Il s'ensuit logiquement une position, selon laquelle on ne peut parler d'un paradigme exprimant l'opinion scientifique par rapport au droit comparé que depuis ce temps-là.[11]

2

La relation entre le droit et le concept de culture est un phénomène assez récent. Bien qu'il arrivait déjà à partir du XVème siècle dans les oeuvres de certains humanistes qu'on ait opposé la culture comme état érudit à la barbarie, au siècle des Lumières ce concept a recouvré une nouvelle signification plus atténuée. C'est-à-dire, qu'on a commencé à lui attribuer le sens d'un critère

[9] G. Hamza *Jogösszehasonlítás és az antik jogrendszerek [Droit comparé et les systèmes juridiques de l'Antiquité]* (Budapest: 1998), 11 sqq.

[10] Constantinesco (n. 5), 50.

[11] Z. Péteri "Paradigmaváltás a jogösszehasonlításban" ds. *Placet experiri. Ünnepi tanulmányok Bánrévy Gábor 75. Születésnapjára* (Budapest: 2004), 231 sq.

caractéristique de tous les groupements humains. D'une part l'ensemble des aptitudes intellectuelles qui distinguent l'homme des animaux, en le tirant de l'existence naturelle et animale, et d'autre part celle des instruments et expériences nécessaires pour déployer ces aptitudes. Au milieu du XIXème siècle le concept de culture s'est stabilisé couvrant la totalité des créations humaines sur lesquelles se fondent – dans des mesures différentes – toutes les définitions de la culture formulées depuis lors. Ainsi, contrairement à l'interprétation qui borne la signification de ce concept simplement à la civilisation,[12] la culture signifie tout ce que la société humaine a édifié avec son travail physique et intellectuel,[13] mais en plus de la civilisation et la culture d'une population, il signifie l'ensemble des valeurs qui se sont dégagées pendant l'histoire du développement matériel et intellectuel de l'humanité,[14] un facteur qui détermine la conscience et l'identité de l'individu et la communauté, ainsi que la manière de réaliser leur réalité matérielle et intellectuelle historiquement formées.[15] Suivant ce raisonnement on peut interpréter la culture comme l'ensemble des instruments qui aident l'homme à déployer ses multiples aptitudes intellectuelles et physiques, et qui l'aident à dominer la nature. En développant les coutumes et les institutions, la culture rend plus humaine la vie familiale et sociale, elle exprime, conserve et transmet les expériences acquises et les ambitions intellectuelles dans ses produits qui se sont réalisés dans le courant des siècles, pour qu'ils servent le bien et l'avancement des masses, même de toute l'humanité.[16] Comme la culture exprime le mieux l'attitude humaine qui sert l'intérêt de la communauté, le bien commun, elle est un principe humain, qui est, en dernière analyse, l'assurance de notre survie, car là où il ne se met pas en valeur ce sont souvent "les forces sous humaines" qui prennent le contrôle. Ainsi, la culture peut être regarder comme le facteur qui garantit et réalise l'unité et l'ordre de la société humaine, et en son cœur représente un principe d'orientation, fondement d'une vision du monde déterminée, une *Weltanschauung*.[17]

[12] "Kultúra: művelődés" voir F. Szakátsi Csorba *Idegen szavaink szófejtő magyarázatokkal* (Budapest: 1930), 118.

[13] Voir F. Bakos (sous la dir.) *Idegen szavak kéziszótára* (Budapest: 1960), 404.

[14] I. Tőtfalusi *Idegenszó-tár. Idegen szavak értelmező és etimológiai szótára* (Budapest: 2005), 532.

[15] Zs. Rostoványi "Az iszlám kiútkeresése a modernizációs krízisből" *Valóság* (1985) 11, 65 sq.

[16] Voir *Gaudium et spes* II. 53–62.

[17] P. Erdő "Az európai kultúra keresztény gyökerei és a katolikus egyetemek" *Vigilia* 70 (2005) 5, 386.

Les définitions citées indiquent déjà que l'explication de la culture comme une singularité de l'existence humaine, l'accentuation de sa nature commune (sociale), la reconnaissance du caractère global des créations intellectuelles et matérielles de l'humanité, sont plus ou moins universellement acceptées. Il reste encore à débrouiller certains problèmes, comme la signification de la complexité de la culture, la formation et le développement (avancement) des cultures, leur classification etc.

La relation du droit aux phénomènes culturels et son intégration dans le cadre global de la culture est devenue une question importante pour des écoles philosophiques formées au dernier quart du XIXème siècle. A cette époque le mécontentement contre le juspositivisme dominant et son approche unilatérale, analytique et dogmatique, et, parallèlement, la recherche de nouveaux chemins dans la science juridique étaient de plus en plus largement diffusés. La note fondamentale était donnée par les représentants de l'Ecole historique du droit, qui ouvrait le chemin à la nouvelle approche historique des phénomènes du droit non seulement en Allemagne, mais aussi dans d'autres pays européens, comme en Angleterre, avec la prétention de découvrir les rapports sociaux et historiques du droit. Un point de départ différent était choisi par les courants qui cherchaient des réponses aux problèmes des phénomènes naturels et sociaux et, parmi eux, ce du droit, tout d'abord dans le cadre des systèmes philosophiques idéalistes, avec une manière de pensée synthétisée, qui caractérise l'Antiquité. Un point de départ commun des doctrines d'inspiration néo-hégélienne est la prétention de découvrir l'essence, la racine, les causes et l'entraînement des phénomènes accessibles pour nos sens, donc empiriquement connaissables, et par cela de proposer pour les recherches des nouvelles possibilités, qui sont basées sur les résultats des sciences empiriques, mais qui les dépassent. Cet intérêt plus large, extrapolé de la sphère de la vie commune sociale, vise une meilleure compréhension des actes individuels et communs de l'homme, et par cela cherche les bases de l'existence humaine dans son entièreté. Car si l'on accorde une importance plus profonde – d'après l'idée hégélienne de développement – à l'histoire de l'humanité, il est difficile de contester que cette exigence est extensible à l'ensemble de l'humanité et particulièrement à l'essence, aux corrélations et changements du droit. La science positiviste dominante au XIXème siècle, dans sa forme étatico-juridique, l'approche analytico-dogmatique – à cause de son unilatéralité – ne pouvait que très peu aider, alors s'est imposée l'exigence bien justifiée de la part des nouvelles théories qui s'est traduite, une interprétation des phénomènes sociaux et notamment une interprétation du droit sur une base philosophique, essayant de

découvrir les racines et l'essence derrière la forme d'apparence des phénomènes. La doctrine néo-hégélienne a cherché et trouvé une certaine réponse à ce besoin essentiel et profondément ancré, qui était pour ces successeurs une vérité incontestable : la seule possibilité de franchir l'horizon étroit de la pensée juspositiviste, c'est une mentalité plus globale, une approche basée sur la philosophie.

La philosophie du droit inspirée par le néo-hégélisme a cru découvrir cette raison plus profonde – en partant de l'idée que l'activité sociale humaine est une activité créatrice de culture – dans la jonction du droit avec le concept de culture. Il est difficile de contester qu'une telle relation existe. Le droit est, sans doute, une partie même une condition *sine qua non* de la culture globalement comprise. Car il n'est possible de parler d'une culture humaine que si un certain ordre se fait valoir dans la cohabitation, dans le cadre de laquelle tout le monde a sa place avec tous les droits et obligations qui en découlent, un ordre, qui peut proprement pourvoir à la protection des biens et des valeurs communs, et ainsi l'établir de nouveaux. Naturellement, cela s'accompagne de l'acceptation de l'idée des changements essentiellement positifs dans toute la culture et le droit, ainsi que celle de la progression, et pour cela il faut considérer la collaboration dans la progression de la culture comme le plus important but du droit et de la science juridique.[18]

Dans la littérature du droit comparé, la première tentative considérable de la jonction du droit avec la culture universelle de l'humanité est faite par J. Kohler, appelé par ses contemporains comme "Hegel redivivus", dans un raisonnement basé sur la philosophie hégélienne et inspiré aussi de la perception des nécessités et exigences de la pratique. Comme le constate R. Pound, les néo-hégéliens sont justement considérés comme les héritiers des approches philosophiques et historiques du XIXème siècle en ce qui concerne la science juridique, parce qu'ils ont conservé et développé leur méthode de recherche, l'approche historique des phénomènes appartenant au monde du droit. Cette méthode est en effet, si on l'utilise correctement, capable d'établir l'harmonie entre les exigences du droit et celles de la pratique, puisque pour elle le droit n'est que l'ensemble des expériences de la juridiction, et elle fournit ainsi le seul critère valable pour juger ce qui est effectif dans la pratique.[19] Cette méthode se fonde sur des faits véritables en les rangeant par catégories pour en déduire des lois universelles, dont la

[18] J. Kohler *Lehrbuch der Rechtsphilosophie* (Berlin–Leipzig: 1909), 1.

[19] R. Pound "The Scope and Purpose of Sociological Jurisprudence" *Harvard L. R.* 25 (1911/12), 154.

recherche est parmi les prétentions essentielles de la scientificité "positive" au sens comtien.

L'utilisation de la méthode historique dans l'oeuvre de Kohler a produit des résultats d'importance universelle, c'est-à-dire qui ne se limitent pas à un seul domaine scientifique ou qui ne sont pas seulement utiles à la solution d'un certain problème juridique. Partant de la directive hégélienne, selon laquelle le droit est un phénomène culturel, une part de la culture universelle de l'humanité, Kohler a élaboré une explication et un système cohérent et philosophiquement inspiré des phénomènes du droit, qui se fondent sur l'utilisation ample des résultats des recherches comparatives contemporaines d'histoire, d'ethnologie et de droit. Pour lui, le droit est la partie et le produit de la culture, défini dans l'espace et dans le temps, où il s'est réalisé, alors il est obligé de s'adapter aux exigences et nécessités de la culture intellectuelle et matérielle de son époque. D'une part il s'ensuit que le droit comme phénomène culturel ne peut être compris que dans le contexte de toute la culture des peuples, dans laquelle les composantes intellectuelles – morales, religieuses, politiques etc. – ont un rôle en plus des composantes matérielles – économiques –, et d'autre part il fournit une réponse au problème du rôle du droit dans la totalité de la culture. Car le but de la progrès historique de l'humanité comme développement culturel *(Kulturentwicklung)* est le développement le plus complet possible des aptitudes humaines, et par cela d'assurer la maîtrise de l'homme sur la nature: l'objet et le tâche cardinal du droit est de participer à la réalisation de tout cela.[20]

Selon le raisonnement de Kohler, les changements du droit s'effectuent dans les changements de la culture universelle. Car la progrès comme *Kulturentwicklung* n'est rien d'autre que la lutte entre la raison humaine séparée de la nature et les objets (les données) naturels, qui se porte sur élévation des aptitudes, "du pouvoir" de l'homme au plus haut niveau possible.[21] Les produits de cette lutte sont les plus importantes valeurs de la culture: la cognition *(Erkenntnis)*, la création *(Schöpfung)* et la maîtrise effectuées par la technique *(Herrschaft durch Technik)*, dont le niveau acquis par un certain peuple est l'étalon le plus sûr de sa culture. La valeur d'une civilisation humaine, son niveau de développement dépend de la manière dont il peut servir et réaliser sa tâche essentielle, qu'est l'augmentation de la maîtrise de l'humanité sur la nature.

Selon Kohler, l'histoire de l'humanité est influencées par des lois universelles. Une de ces lois est l'exigence du droit ou bien la recherche du

[20] Kohler (n. 18), 2.
[21] Ibid. 17 sqq.

droit *(Drang nach Recht)*, dans la réalisation de laquelle il y a deux facteurs définitifs, dont le premier est l'orientation au but et le deuxième la liberté dans le choix des instruments nécessaires.[22] La relation de l'un à l'autre de ces deux facteurs donne la différence entre les systèmes juridiques. Bien que tout droit national doit être considéré comme une partie de la culture universelle de l'humanité et une contribution au développement de l'humanité, il y a une relation hiérarchique entre eux. Du fait que le développement signifie l'avancement du niveau le plus bas vers le niveau le plus haut, il s'ensuit logiquement que les cultures de certain peuples montrent non seulement les variations différentes de la même conception, mais aussi les différents degrés du processus de développement. La comparaison des systèmes juridiques ne peut être exécuté qu'en considérant que dans l'esprit universel de l'humanité apparaissent des façons uniques dans les cultures des différentes peuples.[23]

En revanche, Kohler – débordant la conception fondamentale de l'Ecole historique du droit, selon laquelle le droit, à l'instar de la langue, est le produit de l'esprit du peuple *(Volksgeist)* qui naît presque inconsciemment – a souligné le rôle de l'activité humaine délibérée dans la création et le développement du droit. Selon lui, l'humanité a créé le droit – à l'égal de toute la culture du passé – consciemment, même résolument, et le groupe des hommes, nommé peuple, cherche toujours à recréer et maintenir l'harmonie du droit avec la culture entière. Pour cette raison, le droit ne peut jamais rester immuable, mais il lui faut s'adapter sans cesse à la culture du peuple et apporter des réponses à des nouveaux défis. Ces défis viennent des "postulats juridiques" *(Rechtspostulate)* du peuple, c'est-à-dire, des conceptions concernant le juste et le bon, qui sont à réaliser à l'aide des institutions juridiques, et leur exigences à être réalisées.[24] En conséquence le devoir pour le juriste est de découvrir ces postulats, et formuler le droit en vigueur pour qu'il soit en harmonie avec les besoins et exigences du développement culturel universel. Alors, le droit a une double fonction dans le cadre de la culture: d'une parte maintenir et protéger ses valeurs existantes (fonction protectrice et organisatrice), d'autre part créer de nouvelles valeurs pour le nouveau développement et pour l'agrandissement de la maîtrise de l'homme (fonction créatrice).[25] "Le droit se construit à la base de la culture, mais comme tous les phénomènes culturels, il a une tête de Janus: il descend du passé et

[22] J. Kohler "Über die Methode der Rechtsvergleichung" *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 28 (1901), 273–84, ds. Zweigert – Puttfarken (n. 5), 19.

[23] Ibid. 18 sq.

[24] Kohler (n. 18), 2.

[25] W. Friedmann *Legal Theory* (London: [3]1953), 147.

il aide à préparer le terrain pour la future culture, c'est-à-dire, en partant de la rationalité d'une certaine époque, il sert l'avancement de la culture et par cela il travaille à la perte de la culture existante et à la création d'une nouvelle culture. Tout droit est un Oedipe, qui tue son propre père, et qui crée une nouvelle génération avec sa mère."[26]

En somme, on peut constater que tandis que les courants antérieurs de la science juridique ont examiné le rôle du droit dans l'histoire politique des peuples et son rapport au système politico-étatique du moment, la théorie de Kohler a cherché à éclairer la place et le rôle du droit dans un contexte plus large, c'est-à-dire, sa corrélation avec la société et sa culture, dans son historicité. Sur cette base, utilisant la méthode comparative, l'occasion s'est présentée de traiter l'histoire universelle du droit tout en présentant le développement historique du droit en corrélation avec l'histoire de la culture et en découvrant les interactions entre droit et culture. Il ne s'agit pas seulement du reflet du développement culturel de l'humanité dans le droit, mais aussi de l'influence du droit sur la culture d'un certain peuple : comment a-t-il encouragé ou bien empêché son développement. Une histoire du droit comme celle-là devient nécessairement l'histoire de la progrès de l'humanité, ce qui signifie une rupture avec la tradition classique platonicienne et ses représentants contemporains qui professe le changement circulaire des cultures.

La dernière question qui se pose est celle de la signification du concept de culture chez Kohler. Si l'on essaie d'interpréter sa définition quelque peu obscure, selon laquelle la culture c'est le développement des aptitudes humaines correspondent au destination de l'homme, peut-être n'a-t-on pas tout à fait tort en attirant l'attention sur deux composantes très importantes. La premier est la référence au caractère social de culture, qui la lie à la façon d'être ou aux acquis d'une société humaine (un peuple) – et non pas à celles de l'individu. Dans ce sens, la culture – opposée à la nature – signifie l'aptitude des sociétés humaines à l'utilisation des dispositions et des sources naturelles, ainsi que leur savoir, leurs instruments et leur arsenal de moyens techniques, qui les aident à réaliser la maîtrise de l'homme sur la nature. D'autre part, le concept de culture – sous la forme d'une référence au destin de l'homme – comporte un certain étalon de valeur, dans la mesure où il met des bornes – en faveur de toute la communauté humaine – à l'utilisation des instruments qui sont à la disposition de la communauté humaine, en évoquant certaines valeurs plus hautes, ou bien par leur observation, et par cela, elle "anoblit" l'accomplissement des instincts naturels de l'individu.[27]

[26] Cité par F. Finkey *A tételes jog alapelvei és vezéreszméi I* (Budapest: 1908), 270.
[27] Kohler (n. 22), 15.

3

L'autre doctrine à la mode au tournant du dernier siècle était le néo-kantisme, qui a fourni un fondement pour les problèmes taxonomiques et méthodologiques des sciences destinées à la recherche des relations entre le droit et la culture.[28] La philosophie juridique néo-kantienne a fondé la différenciation des recherches de nature et culture sur le fait que dans le premier sphère le but est de découvrir la corrélation des principes ordonnateurs de l'univers, alors que les objets du deuxième sont les réalités "individuelles", c'est-à-dire, les parts de la réalité qui se rapportent à l'existence humaine par leur individualité, et qui sont considérées "valables" par l'homme qui les choisit et sépare de la réalité environnante pour ses recherches.[29] Ce choix s'effectue toujours sur la base d'une approche évaluatrice, et c'est la relevance ou "valeur" de ces phénomènes pour l'homme qui les rend des objets de recherche. Le processus de leur cognition est ainsi inséparable de l'activité évaluatrice de l'homme, ou des valeurs acceptés par lui: voilà pourquoi la science destinée à leur recherche devient une science qui a pour objet des valeurs, qui est "rapportée aux valeurs" *(wertbezogene Wissenschaft)*.[30] Pour une science comme celle-là, tous les événements de la réalité ne sont pas "valables", mais seulement ce qui sont en rapport à une valeur choisie par le chercheur sélectionné parmi la foule des phénomènes et devenu objet d'examen. Bien entendu, le rôle distingué et séparé de ces événements n'existe jamais dans la réalité, mais seulement pour la recherche, et cela rend possible et justifie l'opposition des sciences de l'esprit *(Geisteswissenschaften)* qui explorent la part "historique" de l'univers (du cosmos) avec les sciences de la nature *(Naturwissenschaften)* qui examinent l'autre part, le cosmos "naturel".[31]

Puisque la relation des valeurs, qui caractérise le premier groupe de ces sciences, est inséparablement lié à l'activité de l'humanité, créatrice de culture, qui jalonne toute l'histoire, il est également justifié de leur donner le nom de "sciences culturelles" *(Kulturwissenschaften)*[32], pour représenter la différence entre cette part historico-humaine de l'univers comprise comme le monde de la culture historique, et le monde de la nature. Les lois et principes globaux, qui caractérisent tout l'univers, font valoir dans ce cosmos

[28] W. Windelband *Lehrbuch der Geschichte der Philosophie* (Tübingen: 1935), 444 sqq.

[29] V. M. Weber "'Objectivity' in Social Science and Social Policy" ds. Idem *The Methodology of Social Sciences* (New York: 1949), 50 sqq.

[30] V. G. Radbruch *Rechtsphilosophie. Studienausgabe* (Heidelberg: [2]2003), 8 sqq.

[31] V. W. Dilthey *Einleitung in die Geisteswissenschaften. Versuch einer Grundlegung für das Studium der Gesellschaft und der Geschichte I* (Leipzig–Berlin: 1922), 4 sqq.

[32] V. H. Rickert *Kulturwissenschaft und Naturwissenschaft* (Berlin: 1899).

"historique", une part de la réalité universelle, et ainsi la relation essentielle, celle qui subordonne l'individualité à la validité de la généralité est valable. Mais ici, l'objectif de la recherche n'est point l'élucidation de cette relation causale et par là hiérarchique, mais l'explication de l'existence historique et les processus qui s'effectuent dans cette existence, comme la réalisation des valeurs, qui sont – quoiqu'ils s'enracinent et s'imposent dans l'existence humaine – capables de s'élever au-dessus de son individualité avec une validité objective.[33]

L'approche des représentants néo-kantiens du droit comparé est également caractérisé par la reconnaissance du caractère complexe du droit. Selon Del Vecchio, le droit positif est "un fait naturel, c'est-à-dire un fait déterminé par certaines causes, qui est en relation avec tous les phénomènes de la réalité"[34]. Radbruch, en écrivant sur la méthode du droit comparé, définit le droit comme "pouvoir culturel" *(Kulturmacht)*, une composante de la culture, dont la comparaison semble justifiée à deux égards. Le premier critère est le "type de droit" *(Rechtstypus)*, un concept qui exprime les caractéristiques fondamentales de tous les systèmes juridiques qui tiennent à un certain "cercle culturel" *(Kulturkreis)*; l'autre est un "idéal de droit" *(Rechtsideal)*, comme une marque qui exprime l'ensemble des considérations évaluatrices formulées par l'individu à l'égard d'un certain cercle culturel ou bien du droit lié à un certain niveau de son développement. Le type et l'idéal de droit composent le double étalon qu'on doit utiliser au cours de l'examen comparatif des systèmes juridiques des différents peuples. D'un côté, il faut examiner comment ces systèmes juridiques se rattachent au type de droit caractéristique à une certaine étape du développement historique, et en particulier s'ils expriment un niveau de développement déjà dépassé ou qui n'est pas encore atteint; d'un autre côté, l'objectif est de voire si les systèmes juridiques individuels correspondent aux exigences exprimées dans l'idée de droit, et particulièrement s'ils avancent vers la réalisation de celle-ci, ou bien dans la direction opposée.[35]

Fondateur d'une école comparatiste, qui s'intéressait à l'enrichissement de la science du droit comparé par des considérations sociologiques, ainsi qu'à la prise en considération des rapports sociaux du droit, E. Rabel a défini l'objet principal de l'examen des problèmes du droit comme le droit du

[33] Windelband (n. 28), 240 sqq.

[34] G. Del Vecchio "Die Idee einer vergleichenden universalen Rechtswissenschaft" *ARWP* 7 (1913/14) 2–3, 8.

[35] G. Radbruch "Über die Methode der Rechtsvergleichung" *Monatschrift für Kriminalpsychologie und Strafrechtsreform* 2 (1905/6), 422–25, ds. Zweigert – Puttfarken (n. 5), 53.

monde entier dans ses formes anciennes et contemporaines. Il a ainsi étendu les recherches à l'espace, le climat et la race, la formation de l'histoire des différents peuples, ses événements formateurs et importants (guerres, révolutions, fondation d'Etat, occupation etc.), le rôle des aspects religieux et moraux, ainsi que de certaines qualités humaines dominantes (ambition, créativité etc.), les conditions de la production et distribution des biens, l'intérêt des différentes classes sociales, parties etc., les courants intellectuels principaux, les cadres et degrés de la continuation des traditions juridiques, et finalement – *last but not least* – les aspirations à réaliser un certain idéal étatico-juridique. La recherche de la signification de tous ces facteurs du côté du droit, ou l'évaluation du rôle de leur influence par rapport au développement du droit: c'est la tâche qui donne la raison d'être et justifie la nécessité du droit comparé, dont la réalisation réussie pourrait être non seulement l'alpha et l'oméga du droit comparé mais aussi le couronnement de toute la science juridique – y compris la philosophie du droit.[36]

4

Les questions relatives à la conception globale du droit se présentaient sous un nouveau jour pendant les débats du premier congrès international du droit comparé (Paris, août 1900). La discussion dans la première section du congrès sur les problèmes théoriques de la nouvelle science sous le nom "droit comparé", sur son sujet, sa méthode, son histoire et son enseignement universitaire – bien qu'elle était originellement destinée à promouvoir la synthèse et l'élucidation des résultats déjà acquis du droit comparé[37] –, s'étendait à l'interprétation de l'essence du droit et sa relation avec la culture. Le professeur parisien E. Lambert, qui a donné la première conférence caractérisant les deux modèles différents de la science du droit comparé, a clairement différencié entre l'activité du droit comparé poursuivant essentiellement des buts "scientifiques et spéculatifs", ayant un caractère ethnologique et historique, et le courant qui sert surtout des objectifs pratiques et qui a pour but l'harmonisation des systèmes juridiques des peuples civil-

[36] E. Rabel "Aufgabe und Notwendigkeit der Rechtsvergleichung" *Rheinische Zeitschrift für Zivil- und Prozessrecht* 13 (1924), 279–301, ds. Zweigert – Puttfarken (n. 5), 89.

[37] Voir le circulaire qui annonce l'organisation de congrès, signé par G. Picot, président du comité d'organisation (membre de l'Institut de France) et secrétaire général, F. Daguin (avocat), ds. CIDC 7 sq., et le rapport de R. Saleilles, professeur de l'université parisienne de la faculté du droit, "Sur l'utilité, le but et le programme du congrès", ibid. 9–17.

isés.[38] Pour les fidèles de la première interprétation, le but du droit comparé est d'explorer les lois naturelles qui déterminent les manifestations créatrices de droit de la vie sociale, et qui nous fournissent par là le clé pour la compréhension des relations intérieures et du sens des changements qui se produisent dans la vie juridique. Ainsi devient claires les formes les plus appropriées des institutions juridiques individuelles pour les étapes différentes du développement social, et pour leurs différents systèmes économiques. Il faut qu'une telle recherche ne se limite pas seulement aux systèmes juridiques en vigueur, mais qu'elle s'étende même aux systèmes dépassés, alors le "droit comparé" comme science indépendante est inséparable de l'histoire du droit et notamment de l'histoire de la législation des différentes peuples. Il n'est guère contestable que cette interprétation de la science du droit comparé évoquée premièrement par Lambert reflète essentiellement un sens synthétique du droit, qui représente le droit dans le cadre d'un contexte historico-social plus large, comme partie ou composante d'une culture. L'autre interprétation, en revanche, reste strictement dans le cadre du droit positif, et vise essentiellement à assister la législation des différents pays. Son but est tout d'abord pratique, dans la mesure où en comparant les résultats de l'activité législative des "pays civilisés" il essaye de développer un "droit commun législatif" qui pourrait aboutir à la disparition des différences entre les systèmes juridiques du monde et l'unification globale du droit, qui est le but principal du droit comparé.[39] Lambert lui-même a désigné cette deuxième version comme le chemin à suivre pour la nouvelle science du droit comparé et estimait que les résultats acquis de la première version – considérable par ailleurs – appartenaient plutôt au cadre de l'ethnologie, la science du droit ethnologique ou de l'histoire comparée.[40]

Dans son exposé envoyé au congrès, Kohler ne s'est pas refusé à lui-même à utiliser les résultats du droit comparé au bénéfice d'un but pratique, c'est-à-dire l'unification du droit, bien que – comme il l'a formulé nettement dans son ouvrage philosophique: "une simple adhérence à la pratique dégrade notre pensée juridique."[41] Étant donné qu'au cours de l'anoblissement

[38] E. Lambert "Conception générale et définition de la science du droit comparé, sa méthode, son histoire, le droit comparé et l'enseignement du droit", ibid. 31. sqq.

[39] 39/ Ibid. 39.

[40] Ibid. 33. Plus tard, dans sa monographie sur les problèmes du droit civil comparé, publiée après le congrès, Lambert a déclaré que les résultats scientifiques antérieurs parus sous le nom du droit comparé, considérés comme les acquis du premier courant, appartenaient à la sociologie descriptive ou bien à l'histoire comparative. Voir E. Lambert *La fonction du droit civil comparé I* (Paris: 1903), 913 sq.

[41] Kohler (n. 18), "Vorrede", III.

de notre culture on peut participer non seulement inconsciemment, mais aussi avec intelligence et par une activité bien réfléchie, à la coopération à la victoire du progrès. La tâche du juriste d'après lui n'est pas seulement la recherche du droit, mais ce dernier doit également viser l'intérêt du développement du droit en oeuvrant comme un politique juridique. La meilleure situation est celle du juriste comparatiste, qui, en examinant les droits étrangers, peut chercher et trouver les solutions et instruments les plus adéquats pour relever son propre système juridique et sa nation. Mais ce n'est pas une tâche facile. Il faut que la réception des expériences étrangères, la réception du droit étranger soit en accord avec la culture du peuple qui fait la réception, puisque la réception ne peut réussir que si le droit étranger est adaptable organiquement à la culture réceptionnaire. Il s'ensuit logiquement qu'un peuple peut réceptionner uniquement un droit étranger, qui est en accord avec ses propres conditions de vie et institutions.[42] La réception inconsidérée doit être empêchée par la réalisation du fait que tous les peuples doivent apporter leur contribution au développement de la culture universelle de l'humanité, et tous les peuples ont leur propres possibilités, ressources et instruments spécifiques pour cette tâche. Par conséquent tout peuple est capable de produire des choses nouvelles, spéciales même dans le monde du droit, et, comme membre de la communauté des nations, de contribuer à la fois à l'avancement de l'humanité entière en conservant et validant ses spécificités.[43]

L'enracinement du droit dans la culture des peuples différents était souligné aussi par d'autres participants du congrès. Par exemple E. Zitelmann, un professeur allemand, a considéré comme la plus grande valeur du droit comparé qu'il rend possible la conception du droit comme phénomène culturel, ou l'interprétation de la science dans cet esprit. Basé sur cette nouvelle vue du droit, le droit comparé peut nous aider à interpréter correctement la formation des conceptions juridiques primitives en particulier, mais il nous donne aussi le clé pour comprendre les anciens processus de l'histoire humaine qui sont regardés par la recherche moderne comme "préhistoriques", c'est-à-dire, presque insaisissables avec nos instruments. Or, seulement le droit comparé cultivé par un tel aspect global est capable d'explorer les rapports et l'influence réciproque entre le droit et les autres facteurs qui forment la culture dans l'histoire des différents peuples, donnant ainsi une explication valable aux similarités et différences des institutions juridiques des ces peuples, et, en même temps, de contribuer à la reconnaissance des lois

[42] Kohler (n. 22), 26 sqq.
[43] Ibid. 28.

universelles du développement du droit en regardant comme tendance permanente la spécificité du développement historique, que les communautés humaines vivant dans des circonstances (géographiques, climatiques etc.) totalement différent, et qui n'ont aucun relation entre elles, produisent souvent des idées et des institutions juridiques bien semblables.[44]

5

Par rapport à l'interprétation de la notion de culture juridique, Csaba Varga parle des "liens" et "liaison", qui agissent dans la genèse et fonctionnement du phénomène multifactoriel du droit. Parmi ces liens et liaisons, il mentionne le cadre conceptuelle, les motifs de pensée, le style d'argumentation et de raisonnement, les événements fondateurs, et les idéologies sous-jacentes comme les éléments de l'ordre juridique.[45] Si l'on accepte ce point de départ comme hypothèse de travail, il s'ensuit nécessairement qu'il faut que les cultures juridiques comparées soient examinées tout d'abord à partir des facteurs mentionnés, en tenant compte du fait souligné par Varga, qu'"aucune totalité relative (p. e. la culture juridique) ne peut être plus ou autre que ce qu'ont effectivement créé les facteurs (fonctionnant *hic et nunc*) qui participent réellement aux jeux (se jouant *hic et nunc*) de cette totalité, comme l'effet de leur fonctionnement".[46] Tout cela tend vers le développement de nouvelle possibilité du droit comparé qui peut devenir la voie de dépassement d'une situation incertaine qui peut corresponde éventuellement avec une potentielle changement de paradigme.

(Traduit par Erzsébet Könczöl-Kiss)

[44] E Zitelmann "Aufgaben und Bedeutung der Rechtsvergleichung" *Deutsche Juristen-Zeitung* 5 (1900), 329–32, ds. Zweigert – Puttfarken (n. 5), 13.

[45] Cs. Varga "Jogi kultúrák összehasonlító megvilágításban" ds. Varga (n. 2), XIII.

[46] Ibid. XV.

Einbeziehung der Herrschaftsdimension in die Luhmannsche Systemtheorie

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Während seiner langen wissenschaftlichen Tätigkeit hat Niklas Luhmann das Ausbauen einer umfassenden Theorie mit Hilfe verschiedener Theoriekonstruktionen und Lösungen versucht, aber in Bezug auf die wichtigsten Bauelemente dieser Theorie eine Stabilität festgestellt werden können. Bis 1970 haben solche Kategorien und theoretische Lösungen in seinem Denken sich schon ausgebildet, von denen seine umfassende Theorie und innerhalb dieser die Theorie der funktionalen Differenzierung bzw. der funktionalen Teilsysteme während seiner späteren theoretischen Entwicklung weitgehend bestimmt wurden. In den einführenden Bemerkungen möchte ich drei solchen theoretischen Lösungen von Luhmann skizzieren (1); in den nächsten Teil wird versucht, diese Lösungen von Luhmann weiterzudenken und zu korrigieren (2); und in dem letzten Teil werden solche Aspekten aufgezeigt, die in der Theorie der funktionalen Differenzierung ohne Thematisierung geblieben und deshalb zu einer eingeengten Gesellschaftsstruktur der Luhmannschen Theorie geführt haben. In diesem letzten Teil versuche ich, eine solche Theorie in die Erklärung der funktionalen Differenzierung einzubeziehen, von der die theoretische Einengung abgeschafft werden könnte.

1 Die theoretischen Lösungen der funktionalen Differenzierung bei Luhmann

Den Kern der Luhmannschen Gesellschaftstheorie bildet die funktionale Differenzierung und das Funktionieren der modernen Gesellschaft in abgesonderten Teilsysteme. Diese gesellschaftliche Evolution kann in erster Linie während der europäischen Geschichte beobachtet werden, wenn die

diffuse und mehrfunktionale Tätigkeiten der menschlichen Gemeinschaften durch mehrere Jahrhunderten von der Frühmittelalter immer mehr zu funktional abgekoppelten Teilsysteme umwandelten, und die Leistung der Hauptfunktionen der Gesellschaft von den ausdifferenzierten Teilsysteme monopolisiert wurden. Auf diese Weise konnte eine größere Komplexität erreicht werden und die Gesamtgesellschaft konnte eine größere Wirksamkeit im Vergleich zu der früheren diffusen Institutionen parallel mit mehreren Funktionstätigkeiten leisten. Im Vorgang der funktionalen Differenzierung können die folgenden Aspekte herausgehoben werden.

(1) Die einzelnen funktionalen Tätigkeiten konnten sich erst in dem Maße von den anderen funktionalen Handlungen absondern und diese von der Betreuung der bestimmten Funktion der Gesellschaft ausschließen, wie ein binärer Code entstehen konnte, welche das Monopol der Orientierung dieser Tätigkeiten erreichen konnte. Z.B. die Beobachtung der Realität und die Verarbeitung der so gewonnenen Informationen konnte der binäre Code wahr/falsch im Verlauf der Entwicklung der Wissenschaft monopolisieren und auf diese Weise konnte sich das gesellschaftliche Teilsystem der Wissenschaft etablieren; in Bezug auf die rechtlichen Konflikte der binäre Code rechtmäßig/unrechtmäßig, auf die wirtschaftlichen Tätigkeiten der Code von Haben/Nichthaben und noch später konnte der Code Regierung/Opposition für die politischen Tätigkeiten in dem demokratischen Pluralismus die Möglichkeiten der teilsystemartigen Ausdifferenzierung im Verlauf der europäischen Geschichte leisten.[1]

(2) Nach seiner Ausdifferenzierung kann von jedem Teilsystem die Handlungen innerhalb den anderen Teilsystemen nur als undifferenzierte Umwelt wahrgenommen werden und jeder Teilsystem kann die Informationen der Umwelt nur in dem durch seine binäre Code möglich gemachten Aspekt aufarbeiten. Für dieser Aufarbeitung gilt Luhmanns These, dass es in der funktional ausdifferenzierten Gesellschaft kein gesellschaftlichen Teilsystem gibt, das für die gesamtgesellschaftliche Führung und Koordinierung mehr geeignet wäre als die anderen und von dieser These folgt das Verschwinden der zentralen Gesellschaftssteuerung in der modernen Gesellschaft. Obwohl es Versuche geben kann, wenn ein Teilsystem sich selbst als Zentrum der Gesellschaftssteuerung ausgeben möchte, wie in Bezug auf das politische Teilsystem und den Staat auch heute noch manchmal beobachtet werden können, aber diese Versuche bringen mehr Nachteil als Vorteil und bringen immer

[1] Siehe N. Luhmann "Wirtschaft als soziales System" und "Selbststeuerung der Wissenschaft" in Idem *Soziologische Aufklärung* Bd. 1 (Opladen: Westdeutscher Verlag 1970), 204–30, 232–52 und "Die Zukunft der Demokratie" ibid. Bd. 4 (1987), 126–33.

mehr Disfunktionen zustande.[2] Funktionale Primat der einzelnen Teilsysteme kann nur provisorisch sein, wenn ein bestimmtes Teilsystem die ausdifferenzierten Charakterzüge stärker als die andere verwirklichen konnte: "Der funktionale Primat scheint jeweils dem Teilsystem zuzufallen, das sich mit jeweils höherer Eigenkomplexität ausdifferenzieren und strukturieren lässt".[3]

(3) Es ist hervorzuheben, dass Luhmann die funktionale Ausdifferenzierung so auffasst, dass alle Kommunikationen, von denen eine bestimmte binäre Code benutzt werden, ohne Differenzmachen zwischen den Laienkommunikationen und professionellen Kommunikationen demselben Teilsystem gehören. In Bezug auf das Rechtssystem schreibt er: "Das Rechtsystem einer Gesellschaft besteht aus allen sozialen Kommunikationen, die mit Bezugnahme auf das Recht formuliert werden. Zum Rechtssystem gehören nicht nur diejenigen Kommunikationen, die innerhalb rechtlich geregelter Verfahren ablaufen, sondern auch Kommunikationen des täglichen Lebens, oder Ansprüche mit Bezugnahme auf das Recht anmelden oder abwehren".[4]

Neben diese drei Charakterzüge könnte noch viele andere in der Theorie der funktionalen Differenzierung von Luhmann herausgehoben werden – nicht zu sprechen über die unzählbare Details in seiner umfassender Theorie –, aber jetzt möchte ich nur diese theoretischen Aspekte seiner Gedankenwelt problematisieren.[5]

2 *Korrigierungen der Theorie funktionaler Teilsysteme*

Die evolutionäre Ausdifferenzierung der funktionalen Teilsysteme bedeutet hauptsächlich, dass die multifunktionalen und an vielen heterogenen Wertgesichtspunkten sich orientierenden Kommunikationsbereiche (Handlungsbereiche, Tätigkeitsbereiche) sich immer mehr auf eine gesellschaftliche Funktion spezialisieren und es in ihren Kommunikationsselektionen anstelle der Orientierung an heterogenen Wertgesichtspunkten zur Orientierung am eigenen binären Code kommt. Als erster Schritt in Richtung auf das Grenzziehungsproblem der ausdifferenzierten Teilsysteme ist diese Formulierung

[2] Siehe N. Luhmann "Die Rückgabe des zwölften Kamels: Zum Sinn der Analyse des Rechts" *Zeitschrift für Rechtssoziologie* 21 (2000) 1, 189–215.

[3] Luhmann "Wirtschaft als soziales System" (Anm. 1), 226.

[4] N. Luhmann *Ausdifferenzierung des Rechts* (Frankfurt am Main: Suhrkamp 1981), 35.

[5] Ausführlicher siehe B. Pokol "Professionelle Institutionensysteme oder Teilsysteme der Gesellschaft? Reformulierungsvorschläge zu Niklas Luhmanns Systemtypologie" *Zeitschrift für Soziologie* (1990), 329–44; Idem *Komplexe Gesellschaft. Eine der möglichen Luhmannschen Soziologien* (Berlin: Logos ^{2}2001).

brauchbar, aber wenn man damit die empirische Realität beschreiben will, tauchen sofort zwei Probleme auf.

(1) Das erste Problem bezieht sich auf die orientierende Rolle des binären Codes in den Kommunikationsselektionen. Denn wenn man eine *dominierende* Rolle des Codes "wahr/falsch" bei der Wissenschaft oder "Recht/Unrecht" beim Rechtssystem annimmt, bleibt die Frage nach Effekten anderer Wertgesichtspunkte noch unbeantwortet. Sie sind sicher nicht vollständig aus den ausdifferenzierten Teilsystemen eliminiert, sondern höchstens in den Hintergrund getreten, aber in diesem Zustand wenn auch durch das Prisma des eigenen binären Codes des Teilsystems gebrochen bei den einzelnen Kommunikationsselektionen relevant. Dieser Schritt scheint für mich zwingend zu sein, und ihn zu vermeiden nutzte Luhmann in seinen späteren Werken die einzige Möglichkeit: nämlich die Verschiebung des Ausdifferenzierungsgedankens auf die momenthaft-operationelle Ebene,[6] obwohl er früher noch auf die These der institutionelle Ausdifferenzierung der Teilsysteme bestand hatte.[7] Auf diese Weise kommen Wissenschaft, Recht, Wirtschaft etc. zustande, wenn die momenthafte Kommunikation eben durch den entsprechenden binären Code bestimmt ist, aber sobald der jeweilige binäre Code den Platz für andere Codes – also für andere Teilsysteme freigibt – verschwindet diese Bestimmtheit wieder. (Z.B. gehören die finanziellen Kostenberechnungen des Forschungsleiters während der Forschungsarbeit in einer Universität nicht dem Wissenschaftssystem sondern der Wirtschaft.) Aber wenn man darauf besteht, dass sich die Ausdifferenzierung auf der Ebene der dauerhaften Strukturen aufzeigen lässt, und sogar nur diese dauerhaft zwingenden Strukturen wahrscheinlich machen, dass der jeweilige binäre Code beim Erkenntnisgewinn, dem Rechtsgeschehen etc. die Kommunikationsselektionen bestimmt, dann erscheint diese Lösung als korrekturbedürftig. Anstatt der momenthaft-operationelle Ausdifferenzierung muss die institutionelle Ausdifferenzierung beibehaltet werden.

Wenn man die Luhmannsche Theorie in diese Richtung präzisiert, erscheinen die einzelnen gesellschaftlichen Teilsysteme *als spezifisch arrangierte Wertungsgebiete*, in denen die Ausdifferenzierung nur das Zustandekommen der dominierenden Rolle eines binären Codes (oder anders ausgedrückt: eines universalen Wertduals) über die anderen Wertgesichtspunkte bedeutet. In allen Teilsystemen kommen alle binären Codes bei der Bestimmung der Kommunikationsselektionen zur Geltung, aber immer in anderem Arrange-

[6] Siehe z.B. N. Luhmann *Soziale Systeme. Grundriß einer allgemeinen Theorie* (Frankfurt am Main: Suhrkamp 1984), 51–70.

[7] Siehe z.B. Luhmann "Selbststeuerung der Wissenschaft" (Anm. 1), 232–52.

ment und dann durch einen anderen binären Code dominiert. Es lässt sich sogar sagen, dass das spezifische Arrangement der vielen Wertgesichtspunkte nicht nur durch die dominierende Rolle des jeweiligen binären Codes der einzelnen Teilsysteme charakterisiert sein kann, sondern auch aufzuzeigen ist, welche unterschiedliche Bestimmungskraft die anderen Codes in den einzelnen Teilsystemen haben. So bestimmt z.B. innerhalb des Rechtssystems der Code "wahr/falsch" stärker die meisten Kommunikationen (bei strafrechtlichem Verfahren die kriminalistischen Untersuchungen etc.) als im Kunstbereich. Allerdings müssten hier noch viele Forschungen gemacht werden, um ein genaueres Bild hinsichtlich des Arrangements der Werthierarchie in den einzelnen Teilsystemen zu bekommen. Man könnte sagen, dass diese Arbeit als Äquivalent für Forschungen angesehen werden kann, die in dem autopoietisch-momenthaften Differenzierungskonzept von Luhmann für das Auffinden der basalen Selbstreferenz der einzelnen Teilsysteme in seinen letzten Jahren geleistet wurden.

(2) Das zweite Problem lässt sich aufzeigen, wenn man die Unterschiede zwischen der Codebenutzung der *Laien* und der *professionellen* Wissenschaftler, Juristen, Künstler etc. thematisiert. Die Ausdifferenzierung der einzelnen gesellschaftlichen Teilsysteme bedeutet, dass bei den Kommunikationen (Handlungen, Tätigkeiten), die sich immer spezialisierter um die einzelnen gesellschaftlichen Grundfunktionen organisieren, die Selektionen durch einen universalen Wertdual bestimmt sind. Oder mit der schon angedeuteten Modifizierung: die Kommunikationsselektionen durch einen universalen Wertdual *dominierend* bestimmt sind, wobei die anderen Wertaspekte nunmehr durch das Prisma dieses Wertduals gebrochen, im Hintergrund eine Bestimmungskraft haben. Für beide Versionen taucht aber eine Frage in ähnlicher Weise auf: Wie wahrscheinlich ist es, dass beim Erkenntnisgewinn, dem Rechtsgeschehen etc. der eigene binäre Code und nicht die anderen die dominierende Rolle spielen werden? Und damit hängt die folgende Frage zusammen: nämlich, ob alle Kommunikationen, die sich momentan an den Codes "wahr/falsch" oder "Recht/Unrecht", "schön/hässlich" etc. orientieren, den passenden Teilsystemen zugerechnet werden sollten, oder ob dagegen die Ausdifferenzierung der Teilsysteme auf die professionelle Komponente eingeengt, die Kommunikationen der Laien also daraus ausgeschlossen werden sollten?

Die Antwort auf die erste Frage kann meiner Meinung nach mit dem Aufzeigen der zwingenden Strukturen und Mechanismen gegeben werden, die die Kommunikationsteilnehmer für den Erkenntnisgewinn, die rechtliche Konfliktlösung etc. in solcher Weise rekrutieren, sozialisieren, belohnen,

bewerten und sanktionieren, dass sie bei den relevanten Tätigkeiten in aller Regel durch den binären Code der Wissenschaft, des Rechtssystems etc. geleitet werden. Auch in einer Kneipe können also leidenschaftliche Diskussionen unter den Mitgliedern des Stammpublikums über Rechts- und Wissensfragen geführt werden, aber die Ausdifferenzierung der relevanten Teilsysteme bezieht sich nicht auf diese Kommunikationen. Sie finden ausserhalb der professionellen Institutionensysteme statt.

Mit diesem Problem hat Luhmann sich mehrmals konfrontiert und seine Lösung war die innere Differenzierung der Teilsysteme aufgrund der Leistungsrollen und Publikumsrollen.[8] Aber wenn man die zwingenden Strukturen der einzelnen Teilsysteme, die die dominierende Rolle des jeweiligen binären Codes sichern, stärker hervorhebt, taucht die Frage auf, warum man professionellen und laienhaften Kommunikationsteilnehmern in den einzelnen Teilsystemen zusammenfasst, wenn man dann die beiden sofort mit einer inneren Spaltung isolieren muss, weil dauerhafte Strukturen der Ausdifferenzierung nur für die professionellen Teilnehmer aufgezeigt werden können?

Anstatt dem autopoietisch-momenthaften Differenzierungsgedanken ist die andere Möglichkeit zu der Lösung dieses Problems also die eingeengte Thematisierung der Teilsysteme, aber dann müssen einige Modifizierungen der Luhmannschen Systemtypologie eingerichtet werden. Die wichtigste unter diesen ist, dass die Systemebene "Gesellschaft" aufzulösen und neben der Kategorie der professionellen Institutionensysteme (als eingeengte Form der früheren Kategorie des gesellschaftlichen Teilsystems) die des Alltagslebens einzuführen ist. Die evolutionäre Ausdifferenzierung dieser Systeme kann dann nicht mehr als Ausdifferenzierung voneinander, sondern als *Hervorhebung dieser spezifisch-spezialisierten Kommunikationsbereiche aus der diffusen Alltagswelt thematisiert werden.*

2.1 Professionelle Institutionensysteme und Alltagsleben

Damit ist die erste Korrigierung von Luhmanns Theorie gemacht. *Die strukturelle Differenzierung der gesellschaftlichen Teilsysteme ist also auf die Ebene der professionellen Institutionensysteme einzuengen.* Nur so können Sozialstrukturen zustande kommen, die die einzelnen Differenzierungen zwangsläufig aufrechterhalten. Die Hauptaspekte der professionellen Institutionensyste-

[8] Siehe dazu die ausführlichen Analysen von R. Stichweh "Inklusion in Funktionssysteme der modernen Gesellschaft" in R. Mayntz (Hrsg.) *Differenzierung und Verselbständigung* (Frankfurt am Main–New York: Campus 1988), 261–95.

me sind die Rekrutierungsmechanismen der professionellen Teilnehmer, die Selektierungsmechanismen unter den Rekrutierten, die speziellen Sozialisierungsmechanismen der entsprechend dem zentralen Wertdual Ausgesonderten sowie die zur Bewertung, Belohnung und eventuellen Sanktionierung der vollberechtigten Teilnehmer entstandenen Mechanismen. Konnte unter diesen Aspekten eine gewisse Selektion nach dem universalen Wertdual eine dominierende Position erreichen, so kann über die bloße Organisationssystembildung hinaus auch über das Zustandekommen eines umfassenderen professionellen Institutionensystems gesprochen werden.

Auf der anderen Seite bedeutet nämlich die dauerhafte Geltendmachung der jeweiligen Wertduale (binäre Code) immer die Zurückdrängung von zahlreichen, davon abweichenden Bewertungsaspekten. Wenn es um die Beurteilung nach der wissenschaftlichen Wahrheit geht, darf man sich hinsichtlich der Behauptungen des anderen Partners nicht davon verleiten lassen, ob man ihn moralisch eventuell als einen Schuft oder umgekehrt: als einen Heiligen betrachtet. Bei der Auswahl der Kandidaten für eine akademische Position darf die uns sympathische oder eventuell verhasste politische Einstellung des Kandidaten keine Rolle spielen usw. Wie wir jedoch alle wissen, ist die Zurückdrängung dieser Gesichtspunkte äußerst schwierig. Es kann nur durch die Vielfalt von umfassenden unpersönlichen und zwingenden Strukturen gesichert werden, dass bei der auf die wissenschaftliche Wahrheit gerichteten Kommunikation in der Mehrzahl der Fälle diese fremden Aspekte verdrängt und die Diskussionen, Bewertungen und Belohnungen tatsächlich durch die in den wissenschaftlichen Gemeinschaften akzeptierten Regeln der Beurteilung von wahr/falsch geleitet werden. In dieser Hinsicht kommen wir also zu einer ausgesprochen entgegengesetzten Einsicht wie Luhmann, der die Grenzen der gesellschaftlichen Teilsysteme nicht auf die professionellen Institutionssysteme einengt, sondern auch die alltägliche Kommunikation miteinbezieht. Sich mit diesem Problem beim Rechtssystem konfrontierend schrieb er: "Nicht nur der organisatorisch-professionelle Komplex, sondern alle Kommunikationen, die auf den Rechtscode Bezug nehmen - gleichgültig, ob es sich um bindende Entscheidungen handelt, oder um "private" Rechtsbehauptungen, um kautelarische Vorsorge für Rechtspositionen oder um Versuche, sich angesichts eines drohenden Rechtsstreites zu verständigen, gehören zum Rechtssystem. Alle rechtlich codierten Kommunikationen ordnen sich eben durch die Zuordnung zu diesem Code dem Rechtssystem ein."[9]

Mit dieser theoretischen Entscheidung bringen wir jedoch einige Grund-

[9] N. Luhmann "Die Codierung des Rechtssystems" *Rechtstheorie* 17 (1986), 171–203, 178.

steine der Luhmannschen Kategorien ins Wanken. Infolge der Trennung des Alltagslebens und der professionellen Institutionssysteme brauchen die Systemebenen der Luhmannschen Grundtrias (der Interaktion, der Organisation und der Gesellschaft) eine gewisse Modifizierung. M.E. kann in der Welt der modernen komplexen Sozialität die grundlegende Differenzierung in der Dimension Diffusität/Spezialität gesehen werden: den diffus kompakten Kommunikationsstrukturen des Alltagslebens stehen die nach bestimmten Wertdualen spezialisierten professionellen Institutionensysteme gegenüber. In dieser Dimension ist die Differenzierung aber nicht so scharf wie zwischen den einzelnen professionellen Institutionensystemen; die Möglichkeit der Absonderung und die Verflechtung der Differenzierungen kommen durch eine Reihe von *vermittelnden Sphären* zustande. Als solche Sphären können einige Bereiche der aus der Diffusität des Alltagslebens teilweise herausragenden Massenmedien sowie die zwischen den professionellen Institutionensystemen und dem Alltagsdenken vermittelnde Publizistik betrachtet werden. Der Vermittlung der scharfen Absonderung dienen jedoch auch die unteren Ebenen der formalisierten Erziehung sowie die ideologische Sphäre oder die popularisierten Kunstwerke usw.

Mit Hilfe dieser Vermittler fließen die in den professionellen Institutionensystemen entwickelten spezifischen Argumentationstechniken, semantischen Distinktionen und Ausdrucksweisen durch einen Popularisierungsprozess in die Kommunikationsformen des Alltagslebens ein und lösen die dort bestehenden Diffusitäten und Kompaktheiten auf. Dadurch wird das Alltagsdenken selbst mit differenzierten Negationsmöglichkeiten, mit feinere Distinktionen ermöglichenden Kategorien bereichert. Neben den oben genannten vermittelnden Bereichen kann hier noch die Rolle der allgemeinen Intelligenzenkultur bei der Übertragung der eher spezifischen Kommunikationstechniken der professionellen Institutionensysteme auf das Alltagsleben hervorgehoben werden.

Die Abweichung von Luhmann berührt die Luhmannsche Grundtrias (Interaktion, Organisation, Gesellschaft) in der Systemebene der "Gesellschaft". Die professionellen Institutionensysteme sowie das Alltagsleben stellen eine *Differenzierung der Systemebene der "Gesellschaft"* dar und die von Luhmann hervorgehobenen Differenzierungen der gesellschaftlichen Subsysteme konnten nur entlang dieser Absonderung (und wie gesehen: entlang der Entstehung der vermittelnden Bereiche) erfolgen.

Mit der begrifflichen Differenzierung der "Gesellschaft" verändert sich auch die Rolle der Interaktionen und Organisationen. Im allgemeinen kann behauptet werden, dass die Kommunikationsstrukturen des Alltagslebens

stärker auf der Interaktion aufbauen bzw. andererseits sich sofort entsprechend der Determination auf gesellschaftlicher Ebene gestalten. Im Gegensatz dazu ist innerhalb der professionellen Institutionensysteme für die Bestimmung der Kommunikationen die organisatorische Systembildung wichtiger und hier wird die Selektion der Kommunikationsformen einerseits von den in der Gesamtheit des jeweiligen professionellen Institutionensystems aufgebauten Mechanismen der Rekrutierung, der Sozialisation, der Bewertung und der Belohnung, andererseits von dadurch gebildeten Organisationsmechanismen bestimmt. Die einzelnen Interaktionen in diesen Systemen können sich demzufolge spezifisch, entsprechend dem Wertdual des jeweiligen professionellen Institutionensystems abspielen. Mit der kategorialen Zweiteilung der Systemebene "Gesellschaft" könnte vielleicht die alte Diskussion über die Unterscheidung der *Organisationen* und *Gruppen* in eine neue Bahn gelenkt werden. Die diffuseren, gefühlsmäßigeren und interaktionsnäheren Gruppenbildungen sind ganz sicher charakteristischer im Alltagsleben als in den professionellen Institutionensysteme ausgeprägt, wo ihr Pendant von den formalen Organisationen mit ihren eher unpersönlichen Kommunikationsstrukturen gebildet wird.[10]

Die Zweiteilung der Systemebene von Gesellschaft öffnet den Weg für das Erkennen der unterschiedlichen Organisierungsbereichen zwischen dem Alltagsleben und den professionellen Institutionensystemen. Die letztere organisieren sich immer mehr in der ganzen Welt aber die Strukturen des Alltagslebens haben eine engere Organisierungsreichweite. In dem diffuskompakten Kommunikationen nehmen die Teilnehmer mit ihrer ganzen Persönlichkeit teil und auf diese Weise werden solche Solidaritäten bzw. moralische Bindungen aufgebaut, von denen fortwährend die gemeinschaftlichen Motivationen und Institutionen entstanden werden. Die nationalen Großgemeinschaften und die anderen kleineren Gemeinschaften und die dazu gehörenden Flanken, Hymnen, die Ritualen der historischen Erinnerungen etc. können in den Strukturen des Alltagslebens plaziert werden. Im Gegensatz dazu organisieren sich die professionellen Wissenschaft, der Kunstbereich, das Rechtssystem etc. in breiterer Regionen, sogar die Wissenschaft in der ganzen Welt. Aber in diesen professionellen Teilsystemen nehmen die Kommunikationsteilnehmer immer nur mit einer spezialisierten Rolle teil und ihre ganze Persönlichkeit bleibt in den Hintergrund geschoben.

[10] Für die Gruppe als vierter Systemtyp siehe F. Neidhard "Das innere System sozialer Gruppen" *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 31 (1979), 639–60; H. Tyrell "Zwischen Interaktion und Organisation: Gruppe als Systemtyp" *Kölner Zeitschrift für Soziologie und Sozialpsychologie* Sonderheft 25 (1983) 75–87, 362–90.

Mit der Korrigierung des Konzepts der Teilsystemdifferenzierung kann auch die Frage der Moral in der funktional differenzierten Gesellschaft abweichend von Luhmann beantwortet werden. Nach seiner Meinung: "Dabei geht es nicht um gute oder schlechte Leistungen in spezifischen Hinsichten, und etwa als Astronaut, Musiker, Forscher oder Fußballspieler, sondern um die ganze Person soweit sie als Teilnehhmer an Kommunikation geschätzt wird. Achtung und Mißachtung wird typisch nur unter besonderen Bedingungen zuerkannt. Moral ist die jeweils gebrauchsfähige Gesamtheit solcher Bedingungen. Sie wird keineswegs laufend eingesetzt, sondern hat etwas leicht Pathologisches an sich."[11] Oder wie er ein Jahr früher geschieben hatte: "Denn dann gibt es jene multifunktionale Einheiten nicht mehr, denen der Einzelne voll und ganz angehören, in denen er leben kann."[12] Ohne die Thematisierung der Alltagswelt kann die "ganze Person" der Astronauten, der Musiker, der Fussballspieler etc. in die Analyse der Gesellschaft wirklich nicht einbeziehen und deshalb kann Luhmann den Platz für das Funktionieren der Moral nicht sehen. Eine Folge davon ist die Einengung der Moral auf den negativen Aspekt und wenn es nur etwas Pathologisches gibt, taucht der Moralcode auf: "Empirisch gesehen ist moralische Kommunkation nahe am Streit und damit in der Nähe von Gewalt angesiedelt."[13] Mit dieser theoretischen Entscheidung eliminiert Luhmann solche positive Leistungen der Moral, von denen die gemeinschaftliche Kohäsion und Solidarität der Gesellschaft fortwährend reproduziert werden, aber ohne diese Leistungen kann das reibungslose Funktionieren der modernen Gesellschaft nicht erklären. Hier im Alltagsleben können also die Berührungen der Kommunikationsteilnehmer mit ihrer ganzen Persönlichkeit beobachtet werden und im Gegensatz zu Luhmann der Bereich der Moral plaziert werden.

Hinsichtlich der Modifizierungen der Luhmannschen Grundtrias kann zusammenfassend folgendes gesagt werden: Es wird zwar eine Aufteilung in die Systemebenen Interaktion, Organisation, Gesellschaft angenommen, ergänzend dazu jedoch bei der Systemebene der Gesellschaft eine Trennung zwischen dem Alltagsleben und den während der Modernisierung zustandegekommenen professionellen Institutionensystemen für erforderlich gehalten. In dieser Dimension erfolgt die Aufspaltung nicht entlang einer scharfen

[11] N. Luhmann *Paradigm lost. Über die ethische Reflexion der Moral* (Frankfurt am Main: Suhrkamp 1990), 25.

[12] N. Luhmann "Ethik als Reflexionstheorie der Moral" in Idem *Gesellschaftstruktur und Semantik* Bd. 3 (Frankfurt am Main: Suhrkamp 1989), 358–447, 370.

[13] Luhmann (Anm. 11), 26.

Grenze, sondern durch die parallele Entstehung der vermittelnd popularisierenden Bereiche.

Es lässt sich zu bemerken, dass infolge der Modifizierung hier gewissermaßen die von Jürgen Habermas eingeführte Trennung der Lebenswelt und der Systeme auftaucht, im Gegensatz zu Habermas wird jedoch nicht die "Kolonialisierung" der Lebenswelt durch die Systeme, sondern die harmonischere Vermittlung zwischen dem Alltagsleben und den das Alltagsleben überlagernden professionellen Institutionensystemen betont. Mit der folgenden Modifizierung der Luhmannschen Theorie wird noch ein weiterer Schritt in Richtung auf die Theorie von Habermas gemacht werden.

2.2 Herausheben zweier gesamtgesellschaftlichen Koordinierungssteilsysteme

Für Luhmann haben alle Teilsysteme der Gesellschaft gleiche Reichweite, sie sind gleichwichtig für die Gesamtgesellschaft. Diese These muss überprüft werden, denn die Beobachtung der gesellschaftliche Realität zeigt, dass es zwei Teilsysteme – die Marktwirtschaft und die Politik – solches gesamtgesellschaftliches Koordinierungspotential haben, die von den anderen Teilsystem nicht verwirklicht werden können. Für die Erklärung dieser Frage soll zuerst die Doppeldeutigkeit der Wirtschaft aufzeigen, um die Koordinierungsleistungen der Marktmechanismen besser herausheben zu können.

2.2.1 Doppelbedeutung der Wirtschaft

In den bisherigen Ausführungen wurde eine gewisse, dem Begriff der "Wirtschaft" immanente Zweideutigkeit ausgeklammert und parallel über wirtschaftliche Institutionensysteme bzw. ihren Wertdual rentabel/unrentabel genauso wie über Institutionensysteme der Wissenschaft oder der Kunst und ihre Wertduale gesprochen. Wird jedoch die Wirtschaft etwas näher betrachtet, leuchtet es sehr schnell ein, dass sie nicht ohne weiteres in die sonstigen Institutionensysteme eingefügt werden kann.

Bei der Beurteilung des Problems ist auf die Analysen von Karl Polanyi zurückzugreifen, der nach Carl Menger zwei selbständige Bedeutungen der Wirtschaft unterscheidet. Polanyi zeigt auf, dass innerhalb der durch den Begriff der "Wirtschaft" bezeichneten Zusammenhänge die *Produktion der materiellen Güter* – die in irgendeiner Form in allen Gesellschaften zu finden ist – und die Zusammenhänge der *formalen Wirtschaft* – welche nur in der

nach der Logik des Warenaustausches organisierten Produktion existieren – zu unterscheiden sind.[14]

Polanyi trennt diese beiden Bedeutungen der "Wirtschaft", um aufgrund seiner umfassenderen theoretischen Grundeinstellung aufzeigen zu können, welch eine vorübergehende und unbedeutende Zeitspanne die Existenz der durch die zweite Bedeutung angezeigten Zusammenhänge aus historischer Sicht darstelle. Die Zunahme der staatlichen Eingriffe der letzten Jahrzehnte in der Lebenszeit von Polanyi (*New Deal* usw.) deute überdies schon den Schwund der Mechanismen der formalen Wirtschaft an. Wir übernehmen die wichtige Erkenntnis von Polanyi hinsichtlich der Trennung dieser beiden Bedeutungen der Wirtschaft, führen jedoch seine Ausgangspunkte in eine völlig entgegengesetzte Richtung fort. Polanyi hat nämlich das Vordringen der Interventionen der modernen kapitalistischen Staaten in den 40er Jahren missverstanden und diese Tendenzen als das perspektivische Auflösen der Marktlogik interpretiert. Wenn auch die kapitalistischen staatlichen Eingriffe eine marktschrumpfende Wirkung hatten oder haben, zersplittert diese Intervention nicht die Orientierung des wirtschaftlichen Institutionensystems nach Rentabilität, sondern greift in die Marktprozesse mit monetären Mitteln ein und überträgt somit die Prioritäten der staatlichen Politik nur mittelbar auf die Bestimmung der sich nach dem Markt orientierenden Produktionseinheiten. Nach Erreichung eines gewissen Komplexitätsgrades wurde jedoch in den westlichen Gesellschaften in den letzten Jahrzehnten auch der staatliche Eingriff dieser Art eingeschränkt. Neben der Renaissance des Marktes bevorzugt auch das sozialpolitische Instrumentarium des Staates die nachträglich kompensierenden und korrigierenden Mittel statt der früheren direkten, die wirtschaftliche Rationalität kürzenden und aufhebenden sozialpolitischen Instrumentarien.

Die Rationalität des Marktes stirbt also – im Gegensatz zu den Annahmen von Polanyi – in den komplexen westlichen Gesellschaften nicht ab. Das für das Absterben des Marktes von Polanyi gebrachte andere Beispiel, die osteuropäischen Plandirektivensysteme haben auf der Ebene einer höheren Komplexität ebenfalls bewiesen, dass nach Erreichen eines gewissen Standes auch die Fortschreibung der Entwicklung der Produktion ohne spontane Selbstregelung des Marktes unmöglich ist.

Viel wichtiger ist jedoch, dass die Logik der formalen Wirtschaft nicht bloß im Bereich der Produktion weiterlebt, sondern auch die im vergangenen halben Jahrhundert ein Riesenausmaß erreichende akademisch wissen-

[14] K. Polanyi "The Economy as Instituted Process" in Idem *Primitive, Archaic and Modern Economies* (Boston: Beacon Press 1969) 139–75, 142–8.

schaftliche Sphäre oder die massenhaft zunehmende Sphäre der Kunst sowie viele andere Bereiche sich teilweise ebenfalls nach der Rationalität des Marktes organisieren. Diese Ausdehnung des Marktes macht heute noch augenfälliger, dass diejenigen Erscheinungen, die von Polanyi als die per *formaler Wirtschaften* erfolgende Verdoppelung der *materiellen Wirtschaft* beschrieben werden, sich in der Tat vielmehr von einander entfernen. Es liegt auf der Hand, dass es nicht um die beiden Seiten *derselben* Sache geht.

Der Produktionsbereich wurde riesengroß und komplex in den entwikkelten Gesellschaften und konnte einen gewissen Stand nur aufgrund der Rationalität des Marktes erreichen. Die sich entwickelnde Volkswirtschaftslehre hatte durch Erarbeitung der Produktionszusammenhänge und der lange Zeit nur darauf beschränkten Zusammenhänge der Marktrationalität die Aspekte der Produktion bzw. des Marktes viel zu sehr in einem gemeinsamen semantischen Bereich zusammengefasst. Polanyi entdeckte durch seine Unterscheidungen diese Erscheinung. In der Zwischenzeit breitete sich die Rationalität des Marktes auf zahlreiche Sphären aus und hier wird die interne Komplexität der einzelnen Sphären oft durch das Zusammenwirken der Marktstrukturen und der eigenen Bewertungsmechanismen des jeweiligen professionellen Institutionensystems gesichert. Die Differenzierung bei Polanyi kann also radikalisiert werden und es kann angenommen werden, dass ein eigener Bewertungsmechanismus auch im Bereich der materiellen Produktion neben dem seitens der Volkswirtschaftslehre in den vergangenen Jahrhunderten immer präziser erarbeiteten formalen wirtschaftlichen Institutionensystem und Marktrationalität funktioniert und die Bewertung der Marktrationalität nur mit diesem Mechanismus zusammen zur Organisierung der hochkomplexen materiellen Produktion fähig ist.

Es könnte vielleicht die Hypothese aufgestellt werden, dass dieser eigene Bewertungs und Belohnungsmechanismus der Produktion eher auf dem *Gebrauchswert* beruht und der Werbungsbereich, die Prestigunterschiede zwischen den Marken der Produkte, der Unternehmen usw. sowie ihre Neugestaltungssmechanismen die eigene Bewertung der materiellen Produktion darstellen. Im Gegensatz dazu werden die auf den *Tauschwert* aufbauenden Marktzusammenhänge in der Volkswirtschaftslehre stärker betont und die genannte eigene Bewertung des Produktionsbereiches wurde dieser formellen wirtschaftlichen Bewertung allzu stark unterworfen und nur eingeengt thematisiert.

Werden die Ausführungen von Polanyi so radikalisiert, dann kann nur das *Institutionensystem der materiellen Produktion in das Institutionensystem der Wirtschaft neben der Kunst, der Bildung etc. eingefügt werden*; die Zusammen-

hänge und das Institutionensystem der formalen Wirtschaft organisieren sich im Vergleich dazu auf einer umfassenderen Ebene. Es scheint mir, dass die funktionale Systemtheorie zwischen den zwei Bedeutungen der Wirtschaft eine unbewusste Verschiebung durchführt. Sie bezieht sich auf die Wirtschaft in materiellen Sinne, von deren subsystemischer Differenzierung von der Politik, der Wissenschaft, der Kunst spricht, aber wenn sie beginnt, nach den inneren Zusammenhängen der modernen Wirtschaft zu forschen, geht sie zur Analyse der formalen Wirtschaft, des Institutionssystems der Marktrationalität über.

Diese Erkenntnis wirkt sich auch auf die Ebene der angewandten Grunddistinktionen aus. Wie es sich erwiesen hat, wurde neben den Systemebenen der Interaktionen, der Organisationen und der Gesellschaft im Interesse des besseren Verstehens der Organisierung der Sozialität die Systemebene der Gesellschaft in die diffus kompakten Strukturen des Alltagslebens und in die sie überlagernden professionellen Institutionensysteme geteilt und zwischen diesen beiden Bereichen kann in einigen Fällen die Entstehung von vermittelnden popularisierenden Sphären beobachtet werden. Will man diese Struktur weiter verfeinern, so ist jetzt die Ebene der professionellen Institutionensysteme zu zerlegen und *die Wirtschaft im formalen Sinne als ein mehrere Institutionensysteme umfassendes System* zu konzeptualisieren, welches nicht von ihnen abgesondert existiert, sondern die internen Aspekte von zahlreichen Institutionensystemen in ein einziges System zusammenfasst und mit den eigenen Bewertungsmechanismen dieser Institutionensysteme zusammenwirkend die Stabilisierung dieser großen Komplexität ermöglicht. Um die gesamtgesellschaftlichen Koordinierungssystem der Marktmechanismen mit der einfachen (Produktions)Wirtschaft nicht zu verwechseln werden sie von nun an als Marktsystem benannt.

2.2.2 Marktsystem und Politik: Die alternativen Koordinierungsmechanismen der Gesamtgesellschaft

Nicht nur von den Marktmechanismen können die Handlungen aller Teilsysteme (parallel mit ihrer eigenen Bewertungsmechanismen aufgrund dem je bestimmten Code) organisiert werden sondern auch die Politik hat solches Potential. Genauer gesagt können die Prioritätensetzung der demokratischen Politik durch das Budget und die dazu ordneten und das fortwährend verwirklichenden Behörden als Alternative der Koordinierungsleistung der Marktmechanismen angesehen werden. Es kann Büchermarkt, Kunstmarkt, Universitätsmarkt, Zeitungsmarkt, Anwaltsmarkt, sogar die Markt der pri-

vatpolizeilichen Leistungen, der Privatgefängnisse, neuerlich die Markt der kriegerischer Leistungen durch Privatunternehmen usw. geben. Aber wenn es zu einer Wende kommt und der Vormarsch staatlicher Koordinierungsmechanismen beginnt, werden viele dieser Märkte abgeschafft und die Finanzierung bzw. die Bestimmungen der Rahmenbedingungen dieser Teilsysteme werden von zuständigen Behörden mit dem Finanzmittel des staatlichen Haushalts übergenommen. Wie der Unterschied zwischen den Vereinigten Staaten und die Ländern von Europa in dieser Hinsicht zeigt, können von beiden Koordinierungsmechanismen das Funktionieren der ausdifferenzierten Teilsysteme störungsfrei gesichert werden und die eigenen Bewertungsmechanismen der Wissenschaft, des Kunstsystems, des Rechts usw. können mit beiden gesamtgesellschaftlichen Koordinierungsmechanismen zusammenarbeiten. Der einzige Ausnahme ist die (Produktions)Wirtschaft, die – wie es auch das Fiasko der sowjetischen Planwirtschaft zeigte – nach einer bestimmten Komplexität ohne Marktmechanismen nicht extistieren kann. Aber das Ausdehnen der Reichweite dieser Mechanismen auf die anderen Teilsysteme oder die Zurückdrängung dieser Mechanismen ist immer die Folge gesamtgesellschaftlicher Entscheidungen.

Die Markt und die Politik können also nicht als die anderen Teilsysteme thematisiert werden und die Systemebene von "Gesellschaft" – neben die der Interaktion und der Organisation – soll innerlich weiter zerlegt werden. Es gibt einerseits eine Zweiteilung zwischen den Strukturen des Alltagsleben und den Strukturen der professionellen Institutionensysteme und andererseits treten unter den letzteren zwei koordinierenden Teilsystemen mit gesamtgesellschaftlichen Reichweite hervor, die alle anderen ausdifferenzierten Teilsysteme parallel mit ihren eigenen Bewertungsmechanismen bestimmen können.

Mit dieser zweiten Modifizierung der Luhmannschen Kategorien kamen wir ganz nahe dem Gesellschaftskonzept von Habermas' Theorie des kommunikativen Handelns[15] und die (modifizierte) Marktwirtschaft und die Politik auch bei uns als die zwei herausragenden Systeme erscheinen. Zwei wichtige Unterschiede gibt es noch im Vergleich zu Habermas. Einerseits sehen wir in der funktionalen Dimension der Gesellschaft keine Verzerrung mit der Entstehung der Systembildungen zustande zu kommen. Sogar denken wir mit Luhmann, dass die Gesellschaft nach dem Erreichen einer Komplexität ohne Systembildungen nicht lebensfähig ist. Andererseits bleiben hier die Wissenschaft, das Recht, der Religionsbereich, die Kunst,

[15] J. Habermas *Theorie des kommunikativen Handelns* Bd. 2 (Frankfurt am Main: Suhrkamp 1981), 229–93.

die Massenmedien usw. als Systeme (professionelle Institutionesnesysteme) thematisiert, obwohl die nähere Bestimmung dieser Systeme von der Luhmannschen Analyse abweicht.[16]

Der kritische Ton gegen die Luhmannschen Gesellschaftstheorie kann nicht in der funktionalen Dimension der Gesellschaft gegeben werden. In dieser Theorie gibt es keine Analyse der *Herrschaftsdimension* der Gesellschaft, keine Analyse der inneren Kohäsion bzw. äußere Feindlichkeiten der Menschengruppen und ihre Kämpfen für die Dominierung. Ohne die Analyse dieser Dimension kann auch die der funktionalen Dimension der Gesellschaft erst halbiert angesehen werden. Mit den obigen Korrigierungen habe ich größtenteils innerhalb der Luhmannschen funktionalen Systemtheorie der Gesellschaft geblieben aber mit der Einbeziehung der Herrschaftsdimension geht es nicht mehr um eine weitere Korrigierung sondern um eine echte Ergänzung.

3 Einbeziehung der Herrschaftsdimension der Gesellschaft in die Analyse

In den Schriften von Luhmann ist es ganz klar, dass er sich mit der inneren Kohäsion und der äußeren Feindlichkeiten der Menschengruppe bzw. mit den Kämpfen unter ihnen nicht beschäftigt. Für diesen Mangel gibt es keine explizite Erklärung in seinen Schriften und die Ursache dafür ist vielleicht ganz einfach darin zu sehen, dass die Konzipierung seiner Kategorien es nicht erlaubt. Ein konsequenter Denker kann erst sehen, was seine Kategorien für ihn erlauben und Luhmann war ganz sicher ein solcher Denker. Vereinzelte Bemerkungen dazu können nur in seiner kleineren Schriften und Interviews gefunden werden. Ausnahmsweise beschäftigt sich in seinem Lebenswerk eine kleine Studie mit dem Problem der sozialen Klassen aber sein letztes Urteil besteht darin, dass es in der funktional differenzierten Gesellschaft keine herrschende Klasse geben kann: "Man kann aber kaum von einer 'herrschenden' Klasse sprechen – schon deshalb nicht (und das mag man begrüßen oder bedauern), weil sie als Klasse nicht konfliktfähig ist. Außerdem fällt im Vergleich zu älteren Oberschichten die Möglichkeit, Erfolge durch Familienbildung zu konsolidieren und vererben, praktisch aus. Nur Individuen wird eine Klassenpersönlichkeit, eine Charaktermaske (Jean Paul) ausgeliehen, und auch dies zumeist nur für die Zeit zwischen ihrem 45. und ihrem 70. Lebensjahr."[17] Und eine ähnliche Behauptung später in einem Interview mit Luhmann: "Das zweite Phänomen ist, dass es in den

[16] Siehe ausführlicher: Pokol *Komplexe Gesellschaft* (Anm. 5).

[17] N. Luhmann *Zum Begriff der Sozialen Klasse* (Milano: Dott. A. Giuffrè Editore 1984), 72.

vorherrschenden Strukturen der Gesellschaft ohne Zweifel sozusagen 'Kontaktnetze' zwischen wissenschaftlichem Prestige, politischem Einfluss und dem Management großer organisierter Apparate gibt, also so etwas wie eine Elitenstruktur. Aber wenn man sich dieses Phänomen genauer anschaut, dann sieht man, dass es sich um Personen handelt, die eine bestimmte Prestigeposition in einem Alter zwischen 45 und 65 Jahren einnehmen, und die, da dies nur ein Viertel ihrer Lebensspanne betrifft, keine Chance haben, diese privilegierten Bedingungen an ihre Familienmitglieder weiterzugeben."[18]

Diese Behauptung von Luhmann bezieht sich ausdrücklich nur auf die Frage einer herrschenden Klasse, aber seine umfassendere Schriften zeigen, dass die Analyse (sogar die Erwähnung!) der großen Menschengruppen und die innere Kohäsion bzw. die Feindlichkeiten dieser Gruppen gegeneinander an seiner Gedankenwelt in vollem Umfang fehlen. Aber gegen ihn lässt sich zu sagen, dass wenn man die strukturellen Gliederung der Gesellschaft in Menschengruppen im Zentrum der Beobachtung nimmt und dazu für Literatur Ausschau hält, lässt sich sofort zu behaupten, dass es große Fülle von Analysen gibt, die solche Vorbedingungen und strukturellen Zwängen zeigen, von denen ungleichmäßige Qualität der Sozialisation bzw. Chancen der Karriere für die Mitglieder der nächsten Generationen in verschiedenen Gruppen verursacht werden und die so entstandenen verschiedenen psychischen Dispositionen in den großen Menschengruppen bauen unterschiedliche Einstellungen, Wertfühlungen, und politische Neigungen auf. Diese Unterschiede werden durch die Mitglieder der nächsten Generationen immer vererbt. Das ganze Lebenswerk von Pierre Bourdieu zeigt diese Zusammenhänge[19] und die ähnliche Sozialisation, ähnliche geistige Einstellungen generieren Solidarität und Kohäsion innerhalb der einzelnen Menschengruppen bzw. Feindlichkeiten außerhalb. Die durch die Solidarität zusammengeschlossenen Menschengruppen führen fortwährend latente Kämpfe für die Kontrolle der gesellschaftlichen Machtressourcen gegeneinander und für das Abdrängen anderer Gruppen von dieser Kontrolle. In diesen Kämpfen werden alle funktionale Leistungen der Teilsysteme *als Machtressourcen* einbezogen und wenn sich eine Menschengruppe über diese funktionalen Leistungen eine stärkere Kontrolle verschaffen kann, kann sie größeren Erfolg in den Kämpfen für die gesamtgesellschaftliche Dominierung erreichen. Z.B. kommen die Massenmedien in der funktionalen Dimension nur als

[18] N. Luhmann *Archimedes und wir* (Berlin: Merve Verlag 1987), 5–6.

[19] Siehe z.B. Pierre Bourdieu *Sozialer Sinn. Kritik der theoretischen Vernunft* (Frankfurt am Main: Suhrkamp 1987); Idem *Die feinen Unterschiede. Kritik der gesellschaftlichen Urteilskraft* (Frankfurt am Main: Suhrkamp 1989).

die Verbreiter der Informationen vor die Auge, aber in die Herrschaftsdimension gelten sie als die wichtigsten Machtquellen, und wenn eine Menschengruppe die Kontrolle der Massenmedien erreichen konnte, kann sie die politische Öffentlichkeit und die Ergebnisse der Wahlen in großem Masse kontrollieren und durch diese kann sie die Bestimmung des politischen Systems in die Hände bekommen. Und weil die politische Gesetzgebung in der Demokratie das Recht in großem Masse bestimmen kann, können die Menschengruppen mit der Kontrolle der Massenmedien auch den Rahmen anderer Teilsysteme durch das Recht beeinflussen.

Also, wenn die Herrschaftsdimension der Gesellschaft neben der funktionalen Dimension in die Analyse einbezogen wird, können auch die inneren Strukturen der Teilsysteme von anderer Sichtweise (und vielleicht realitätsnäher!) analysiert werden. Die Gliederung der Gesellschaft in Menschengruppen (mit inneren Kohäsion und äusseren Feindlichkeiten und permanenten Kämpfen untereinander) bedeutet eine andere Struktur für die Gesellschaft als die inneren Strukturen der Teilsysteme und strukturellen Knüpfungen untereinenander, und diese strukktuerellen Gliederung deckt sich nicht mit der Grenzen der Teilsysteme. Z.B. eine dominante Gruppe in einer Geselschaft kann grosse Teile der kulturellen Sektoren unter Kontrolle bringen und eine dutzende Representanten der durchpolitisierten Sozialwissenschaften kann durch die leitenden Personen dieser Gruppe fortwährend vor die Öffentlichkeit gestellt werden, um die Formierung der Öffentlichkeit sichern zu können. In einer anderen Gesellschaft findet diese Erscheinung nicht so stark statt, wie der Unterschied zwischen Deutschland und Frankreich in dieser Hinsicht zeigt.[20]

In der Herrschaftsdimension kommen die Leistungen der funktionalen Teilsysteme als gesellschaftliche Machtressourcen vor Auge und die Frage taucht auf, ob ein stabiler Rangunterschied unter den verschiedenen Leistungen in Bezug auf die Sicherung der gesamtgesellschaftlichen Dominierung gibt? Es scheint, dass das Marktsystem und die mit der Markt verbundenen Mechanismen des Geldes solche Machtquellen bedeuten, von denen alle andere funktionale Leistungen bestimmt werden können, aber umgekehrt geht es nicht. Das Geld ist ein solches Mittel, das in alle andere Teilsysteme konvertiert werden kann, aber umgekehrt ist es nur beschränkt möglich. Wenn man also die in Herrschaftsdimension erfolgreichen Gruppen identifizieren möchte, dann müssen die Gruppen der Kontrolle der Geldmechanismen im Zentrum der Analyse gestellt werden.

Die Herrschaft des Geldkapitals wurde von der marxistischen Theorie in

[20] Siehe R. Rieffel *Les intellectuels sous la Ve République* (Paris: Calmann-Lévy 1993).

der Analyse der Herrschaftsstrukturen traditionell betont (mindestens ihre von Rudolf Hilferding entwickelten Version) und auf diese Weise kann diese Theorie bei der Korrigierung der Einseitigkeit der Luhmannschen Theorie nicht ignoriert werden. Hier kann daran erinnert werden, dass in der doppelten Bedeutung der Wirtschaft bei Polanyi die substantielle Wirtschaft (die materielle Produktion) solche Strukturen darstellt, die bei Marx die gesamtgesellschaftliche Herrschaft fundamentiert. Dagegen hat Rudolf Hilferding am Anfang der 20. Jahrhunderts schon die Herrschaft der Gruppen des Finanzkapitals anstatt der Eigentümer der Produktionsmittel herausgehoben.[21] Aber wenn man von der doppelten Bedeutungen der Wirtschaft die formelle Wirtschaft oder anders genannt das Marktsystem im Zentrum der Beobachtung stellt, und das Marktsystem wird als ein gesamtgesellschaftliches Koordinierungssystem thematisiert, entfaltet sich die Einsicht von Hilferding in vollem Umfang. Denn können von den dominanten Gruppen des Finanzkapitals alle Teilsysteme und ihre Leistungen (=Machtquellen) unter Kontrolle gebracht werden, und wo ist man mit diesem gedanklichen Schritt schon von der Herrschaftsposition der Produktionsmitteleigentümer!

Also soll die neueren Versionen der marxistischen Theorie untersucht werden, um zusammengetragene Informationen über die Herrschaftstechniken- und Mechanismen der Gruppen des Finanzkapitals zu finden, war meine Idee in den letzteren Jahren während meiner Bestrebungen für die Eliminierung der Einseitigkeit der funktionalen Systemtheorie. Die Forschungen in dieser Richtung nicht eingehend dazulegen, muss herausgehoben werden, dass viele Theorien und Beschreibungen, die in den heutigen geistigen Leben als neo-marxistisch oder mindestens halb-marxistisch gelten, können zur Lokalisierung der Herrschaftsgruppen und ihre Herrschaftsmechanismen nicht genutzt werden. Denn treten anstatt der ausführlichen Schilderung der Herrschaftsmechanismen meistens die Darlegungen des Elends der unteren Gesellschaftsschichten und die Forderung der größere sozialpolitischen Empfindlichkeit in dem Zentrum der Beschreibung der Theoretiker von Marxschen Prägung. Oder wenn doch die Analyse de Verhältnisse unter den Herrschaftsgruppen beibehaltet wird, wird sie nur durch abstrakten Behauptungen gemacht und die Herrschaftstechniken der konkreten Menschengruppen, sogar die Lokalisierung dieser Menschengruppen als Träger der Herrschaft fallen de Analyse heraus. William Domhoff, der Nachfolger der Forschungen von Wright Mills über die Herrschaftseliten, der die konkreten Herrschaftsgruppen und die empirischen Informationen über die

[21] Siehe R. Hilferding *Das Finanzkapital. Eine Studie über die jüngste Entwicklung des Kapitalismus* (Wien: Verlag der Wiener Volksbuchhandlung 1923).

Herrschaftstechniken dieser Gruppen in dem Vereinigten Staaten auch noch heute dauernd analysiert, schreibt mit Bitterkeit über die Attacke, die gegen ihre Analysen errichtet wurde, als die "primitive Personalisierung" der Herrschaftstechniken.[22] Weitergehend tauchen die Weltsystemanalyse von Immanuel Wallerstein und von Verfassern seiner theoretischen Richtung auf. Sie haben die Herrschaftsdimension der Gesellschaften während der letzteren Jahrzehnten stark betont, aber der Schwerpunkt ihrer Analyse akzentuiert die Herrschaftsverhältnisse zwischen dem Zentrum und Peripherie und die Machtkämpfe unter der Herrschaftsgruppen der Länder des Zentrums und die Verschiebungen der Herrschaftspositionen unter ihnen fallen größtenteils aus.[23]

Es scheint, dass von den vielen theoretischen Richtungen von Marxschen Prägung die Analysen der neogramscianistischen geistigen Gruppe am geeignesten ist, um große Menge angehäufter Informationen über die Machtkämpfe der transatlantischen Herrschaftsgruppen und die Wandlungen ihrer Positionen finden zu können.[24] Besonders können die Schriften von Kees von der Pijl über die Geschichte der Formierung einer transatlantischen herrschenden Klasse und die Kämpfe der einzelnen inneren Gruppen des Geldkapitals zu diesem Zweck benutzt werden.[25]

Ein wichtiger Unterschied der neogramscianistischen theoretischen Richtung von der herkömmlichen marxistischen Theorie ist die Betonung der Dominierung über die geistigen Positionen neben der Herrschaftsposition des Kapitals in der Produktion und die Schilderung der Rolle der "orga-

[22] Siehe W. G. Domhoff *The Power Elite and the State. How Policy is Made in America* (New York: Aldine de Gruyter 1990), 23–4.

[23] Siehe für diese Kritik R. J. S. Ross "The Theory of Global Capitalism: State Theory and Variants of Capitalism on the World Scale" in D. A. Smith – J. Böröcz (eds.) *A New World Order? Global Tranformation in the Late Twentieth Century* (Westport, Conn.–London: Greenwood 1995), 19–36; und Ph. McMichael "The New Colonialism: Global Regulation and the Restucturing of the Interstate System" ibid.

[24] Siehe für diese Richtung A. Bieler – A. D. Morton (eds.) *Social Forces in the Making of the New Europe* (Hampshire: Palgrave 2001).

[25] K. van der Pijl *The Making an Atlantic Ruling Class* (London: Verso 1984); Idem *Transnational Classes and International Relations* (London, New York: Routledge 1998); Idem "What Happened to the European Option for Eastern Europe?" in Bieler – Morton (Anm. 24), 185–206. Diese Analysen weiterführend W. I. Robinson – J. Harris "Towards a Global Ruling Class? Globalization and Transnational Capitalist Class" *J. Science & Soc'y* 64 (2000) 1, 11–54; W. K. Caroll – Colin Carson "Forging a New Hegemony? The Role of Transnational Policy Groups in the Network and Discourses of Global Corporate Governance" *J. World-Systems Research* 9 (2003) 1, 67–102. Aber die monumentale Monographie von Caroll Quigley kann auch viele Informationen über diese Machtkämpfe geben: C. Quigley *Tragedy and Hope: A History of the World in Our Time* (New York: Macmillan 1966).

nischen Intelligenz" in dem Erwerb und der Beibehaltung der gesellschaftlichen Herrschaft.[26] Auf diese Weise können mit Hilfe dieser Theorie die Herrschaftverhältnisse der geistigen Sektoren der funktional differenzierten Gesellschaften und die Kämpfe der kapitalistischen Gruppe für die Herrschaft über die geistigen Teilsysteme besser verstanden werden. Diese Theorie hat gute Anschlussfähigkeit der von uns korrigierten Version der funktionalen Systemtheorie, weil sie im Zentrum der Analyse die Umwandlung des Keynesschen Kapitalismus zum monetären Kapitalismus stellt, und auf diese Weise kann diese Umwandlung systemtheroretisch als Verschiebung der gesamtgesellschaftlichen Koordinierung von durch demokratischen Staat verwirklichten Führung zur Integration des vollendeten Marktsystem dargestellt werden. Aufgrund den angehäuften Materialien der neogramscianistischen Richtung und weiterer Beschreibungen über die politischen Planungsorgane der Gruppen des globalen Kapitals, über die Netztwerke der halbwissenschaftlichen, halbpolitischen "think-tanks" (z.B. Mont Pelerin Society, Trilaterale Kommission etc.) können das Funktionieren der Wissenschaft und der Politik realitätsnäher als die einseitige funktionale Analyse dargestellt werden.[27] Aber ganz sicher konnte die funktionale Systemtheorie von Luhmann solche Einsichten in die sozialen Organisierung entdecken, die in den Theorien der Herrschaftsdimension der Gesellschaft nicht herausgehoben werden. Die Korrigierungen der Luhmannschen Theorie und die Einbeziehung der Analysen von Neo-Gramscianer und anderer Theoretiker der Herrschaftsdimension der Gesellschaft könnten sich nach einer längeren Forschungsarbeit in einer Theorie der doppelten Gesellschaftsstrukturen vollenden.

[26] Bieler – Morton (Anm. 24), 4–15.

[27] Siehe S. Gill *American Hegemony and the Trilateral Commission* (New York: Cambridge U. P. 1991).

From the Spirit of the Laws to the Politics of Identity A Critique of Ethno-Nationalist Fantasies and their Legalisations

Jiri Priban (Cardiff)

1 The Spirit of the Laws and Collective Identity

In his article "Institutions as Systems", Csaba Varga describes the legal system's normative capacity to preserve its identity and apparent harmony.[1] He thus highlights the system's capacity to internally establish its ontological and ideological unity. In this text, I shall analyse the concept of *the spirit of the laws* as a concept symbolising these transcendental origins and ontological unity of the systems of positive law and politics.

Although the concept is more typical of moral philosophical speculation and the metaphysics of social theory, it is also common in recent analytical jurisprudence and socio-legal theory. It is usually part of the ontological analysis of positive law which looks for common ground and general principles behind existing legal systems.[2] The spirit of a particular system of positive law is what makes the system a coherent, logical and unified part of social reality which is governed by general principles and rules.

Because of its status as the origin of the legal system, the spirit of the laws is perceived as a set of ultimate, supra-legal normative sources of positive laws. The spirit of the laws is taken as a symbol of the moral unity and

[1] Cs. Varga "Institutions as Systems" *AJH* 33 (1991) 3–4, 167, at 174.

[2] For a typical example of the 20th century legal realism and sociological jurisprudence, see especially R. Pound *The Spirit of the Common Law* (Boston: Beacon Press 1963); for recent jurisprudential uses of the concept of the spirit of the laws and legal system, see, for instance, A. W. Fraser *Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: University of Toronto Press 1990), B. G. Weiss *The Spirit of Islamic Law* (Athens: University of Georgia Press 1998), and G. S. Grossman (ed.) *The Spirit of American Law* (Boulder, Co.: Westview Press 2000).

collective identity of society which refers to the moral need for a reservoir of ideal patterns for positive law.[3] It operates as both an internal and external guardian of the laws' ideality and unity which makes it possible to morally evaluate the legal system in general.

In principle, the concept of the spirit of the laws has two possible meanings: *(a)* it signifies a general regime of legal interpretation which is intrinsic to the legal system; *(b)* it has "absolute meaning" in the sense that it claims to determine the ontological status of positive law. The first meaning indicates self-reference to the system of positive law and stabilises legal decisions and interpretation by referring to specific semantic limits of the positive laws. In this context, the concept of the spirit of the laws represents the systemic closure of the legal system. On the other hand, the second meaning implies external moral reflection on the legal system which standardises the collective identity and moral unity of a polity and makes them open to political manipulation and power struggles. The spirit of the laws refers to the transcendental "sources of law" and "origins of law." The central focus of jurisprudence then is to throw a "little light on the absolute origin of the law."[4]

The two meanings are structurally intertwined: moral ideals are internalised in legal arguments, and the intrinsic characteristics of law such as "predictability", "impartiality" and "calculability" achieve the status of moral ideals. Rules and principles facilitating the unity of the legal system and its operative closure are understood as the internal morality of law, applicable outside the legal domain and corresponding to human nature in general.[5] The specific morality of law, the primary function of which is to maintain the unity and operability of the system of positive law, may be generalised and applied to other social domains as the ethics of deference.[6] Obedience to laws, and the very fact that political societies are bound by the law's power, are considered a virtue which, for modern people, has the same moral importance as the civil ability to contest the right of law – the right of the legislator to make laws.[7]

[3] One of the most complex examples of this blend of moral philosophical speculation and social theoretical approaches to law is Otto von Gierke's *Natural Law and the Theory of Society: 1500 to 1800* (Cambridge: Cambridge U. P. 1958).

[4] H. S. Maine *Early Law and Custom* (New York: Holt & Comp 1883), 26.

[5] See especially L.L. Fuller, *Morality of Law* (New Haven: Yale U. P. [2]1969).

[6] P. Soper *The Ethics of Deference: Learning from Law's Morals* (Cambridge: Cambridge U. P. 2002).

[7] M. Serres *The Natural Contract* (Ann Arbor: University of Michigan Press 1995), 60.

Legality can become a moral symbol. Similarly, the moral distinctions of good and bad often find their ways into legislation and judicial decision-making. Unlike the self-referential interpretive use of the spirit of the laws, the external "absolute" reference to the spirit of the laws originally has moral meaning which is subsequently internalised by both the systems of law and politics. The spirit of the laws becomes a symbol of the timeless present of transcendental moral ideals. The collective identity of political society therefore can be constituted "out of time" and against the temporal walls of the past and future. It can recall the transcendental spirit of the laws as its "true" ideal origin and ultimate source of validity incorporated into the system of positive laws.

Collective identity is closely tied with evaluations of what is good and bad and often gets described as "essential", "fundamental", and "central". However, it should be emphasised that the validity of these seemingly absolute descriptions is restricted to moral communication. They are merely a *partial* reflection of the *totality* of society. Furthermore, the transcendental moral constitution of identity is internalised by the immanent normative structure of temporal moral evaluations which necessarily constitute the "us/them" difference. According to the anthropological truism borrowed from linguistics, identity is inseparable from alterity. The concept of "us" is governed by our relationship with the others – "them". Social communication between "us" and "them" determines our identity. The formation and identity of social groups, such as ethnic and political nations, is based on collective imagination, an emotional quest for belonging, and the active pursuit of *we*-images and *we*-feelings.[8]

Nations are collectively imagined as social entities and their members have to feel passionate about belonging to them. National identities are not essences and do not have primordial origin. They are constructed, have to start somewhere and are subject to change by human action and manipulation. The formation of this collective identity is radicalised in modern democratic states built on the notion of one nation and its general political will. Jean Jacques Rousseau's dilemma of how to make the people speak unanimously as a political nation and establish political procedures for the best possible representation of the people becomes a question of identity: who

[8] For the role of imagination in the nation formation, see B. Anderson *Imagined Communities* (London: Verso 1983); for emotional aspects of nationalist movements, see T. J. Scheff *Bloody Revenge: Emotions, Nationalism, War* (Boulder, Co.: Westview Press 1994); for nation-building and we-images, see R. Bendix *Nation-Building and Citizenship* (Garden City, New York: Doubleday 1969).

is the political Subject of the people imagined against the background of social heterogeneity, political plurality, and reality of multitude? What are the consequences of the view that being part of a political minority means misunderstanding the meaning of the general will of the people?[9]

Democratic political conflicts and power struggles, indeed, use the "us/-them" difference. The concept of identity is internalised by the political system. The legal system plays an important role in this politicalisation of identity when it makes the spirit of the laws subject to constitution-making, legislation and judicial decision-making. As regards the spirit of the laws, the system of positive law operates in two different ways and therefore has a double effect: it makes the transcendental moral ideals of the spirit part of its internal normative structure; however, this "legal codification of morality" happens only as a temporary and definite process of the immanent legal enactment.

The spirit of the laws incorporating the ideally constructed collective identity becomes the spirit of the positive laws, a definite political identity which is different from the identities of other political societies. In functionally differentiated modern societies, moral ideals and collective identities are communicated both inside and outside the political and legal systems. The complex process of moral idealisation, legalisation and politicalisation of the spirit of the laws and its role in the timeless symbolism of collective identity therefore needs to be introduced by the genealogical analysis of the spirit of the laws as a powerful and transformative concept of political and legal philosophy and social theory.

2 *The Spiritualisation of the Laws: A Historical Excursus*

The duality of spirit and letter is an archetype of philosophical and theological knowledge. The image of the force of written language taking over oral traditions, making them durable and published in texts plays an important role in modern culture's historical and transcendental self-reflection, as if the birth of thinking were marked by the degradation of orally transmitted and shared wisdom, the power of the letter consigning the origins of human knowledge to oblivion. According to this image, the role of spirituality is to oppose the overwhelming force of textuality and its formalistic reduction of thinking. The authentic spirit has to reassert itself against its textual form and thus be "redeemed through the very gesture of overcoming/renouncing

[9] J. J. Rousseau *The Social Contract and Other Later Political Writings* (Cambridge: Cambridge U. P. 1997), 124.

its particular historical shape."[10] The authority of a text depends on its spirit. At the same time, the spirit is threatened to be obliterated by its textual expression. In this intellectual tradition, the spirit eventually has to prevail over the formalistic universe of the letter.[11] It reconciles contradictions and unifies all moments in one supra-temporal totality. The unifying power of the spirit determines the true source of the letter of the laws and thus guarantees their authority.

For the ancient Greeks, philosophy means a return to the origins of being and the struggle against their oblivion by the mundane world.[12] Ancient calls for justice are calls for defining the nature of laws as their transcendental origins. The modern search for the spirit of the laws is echoed in Callicles' view that strong *physis* will eventually overcome weak *nomoi* including all conventional morality. Might is right, what is more powerful is ultimately better.[13] The Sophist criterion of success of the stronger and the rule of the strongest represents the first powerful concept of law originating in the nature (natural law) which is unrelated to the theological notion of justice and rightness of laws. Laws are not just conventions. Man as a supreme creator of laws has to follow the erupting law of nature in legislating the laws of a polity.[14] According to Sophist wisdom, nature's force is the origin of human laws.

This wisdom is contested by Plato who denounces the idea that a good lawgiver drafts laws for the purpose of war and success in it. Radically departing from the Sophist functionalist model of force as the first and ultimate origin of laws, Plato elaborates a different concept of nature and claims that the natural order in politics is the rule of laws freely accepted by all and not enforced by violence. According to him, the "unforced rule of law over willing subjects" should be called "nature's own ordinance".[15] The first job of philosophy is to define the conditions whereby citizens will freely accept and recognize laws. According to Plato, a perfect citizen in a naturally ordered politics is governed by the order of justice as the first political good. Justice

[10] S. Žižek *Did Somebody Say Totalitarianism? Five Interventions in the (Mis)use of a Notion* (London: Verso 2001), 154.

[11] W. Welsch *Vernunft: Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (Frankfurt: Suhrkamp 1996), 60.

[12] See E. Cassirer *The Philosophy of Symbolic Forms* (New Haven: Yale U. P. 1953) vol. I, 89–90.

[13] Plato "Gorgias" in E. Hamilton and H. Cairns (eds.) *The Collected Dialogues of Plato* (New Jersey: Princeton U. P. 1961) 229 at 266.

[14] Compare Plato "Laws" in Hamilton – Cairns (n. 13), 1225 at 1444–5.

[15] Ibid. 1285.

is reasonable; it is not the will of the powerful forcibly imposed on a polity in the natural struggle of stronger against weaker citizens.

Like the Sophist teachings, Plato's philosophical approach is teleological and functionalist.[16] However, the *telos* of the laws is not political success and the enforced growth of political power. Plato replaces the *telos* based on the force of nature with a transcendental model of justice as *arete*, the goodness of laws.

The ancient distinction between the power of man and the power of reason as the good has become the first ontological condition of modern thinking about laws and the spirit as their true origin and, therefore, ultimate source. Hegel highlights the complexity of the problem of the laws' origins and supra-legal foundations of their validity in the following words:

> "[I]f I inquire after their origin and confine them to the point whence they arose, then I have transcended them; for now it is I who am the universal, and *they* are the conditioned and limited. If they are supposed to be validated by *my* insight, then I have already denied their unshakeable, intrinsic being, and regard them as something which, for me, is perhaps true, but also is perhaps not true. Ethical disposition consists just in sticking steadfastly to what is right, and abstaining from all attempts to move or shake it, or derive it."[17]

From Hegel's perspective, obedience to divine laws has to be immanently questioned so that they may be constituted as the reason's commands. However, the immanent laws of a polity must be subjected to the same test; otherwise, their status is that of mere "tyrannical insolence."[18]

In modern moral, political and legal philosophy, the problem of origins of the laws consequently becomes inseparable from their temporality. Questioning the temporal nature of the laws means questioning their status as absolute commands. Hegel perceived the question of the law's origins and sources as part of the absolute spirit's dynamic which comes to its ultimate point in the reason's knowledge of the concrete world. The absolute spirit

[16] For further analysis of Plato's functionalism, see G. Santas *Goodness and Justice: Plato, Aristotle, and the Moderns* (Oxford: Blackwell Publishing 2002). This ancient functionalism is also typical, for instance, of Aristotle's *Politics* which opens by the following definition of the state: "[E]very state is a community of some kind, and every community is established with a view to some good; for everyone always acts in order to obtain that which they think good. [...]". See Aristotle *Politics* (Cambridge: Cambridge U. P. 1989), 1.

[17] G. W. F. Hegel *Phenomenology of Spirit* (Oxford: Clarendon Press 1977), 261–2.

[18] Ibid. 260.

guarantees that the immanent laws of a specific polity will eventually be synthesised with its ethical commands.[19]

Hegel's call for temporalisation of the laws has an ultimate goal of constituting the absolute spirit in thinking. Divine and human laws, which are originally undermined by the question of their origins, finally end up embraced and ultimately justified by the absolute spirit. Unlike the eternal natural laws, the spirit of the laws is reason itself in its concrete form and therefore inseparable from its temporality. According to this view, the spirit of the laws is *the totalising force unifying and embracing the laws' reality*. The absolute spirit is an ultimate concept embracing the contradictions, differences and conflicts of the concrete world. The spirit understands itself from itself (*sich in sich*) and therefore eliminates all logical contradictions emerging at the conceptual level and in speculative abstract thinking.

The absolute spirit is a theological concept which introduces unity where there are, in fact, only structural and conceptual differences and differentiations.[20] It operates as a symbol of unity which stands above the factual world of differences.[21] It has the total power to absorb everything and thus negate the concept of the "outside". Contained by the spirit, reality is all inside and does not have an environment. The spirit as unity accumulates all temporal moments because it does not forget and its memory is absolute. It disposes of the ideal concept of time. In the absolute spirit, there is no difference between past, present and future. The question of the origins and sources of laws is eliminated because time is programmed as the *progress* of the spirit towards itself in the concrete form of the laws of a political community – or State. The State is the absolute form and its evolution and laws are the merely realisations of the laws of historical progress.

The rationality of the absolute spirit is part of the factual world because the rational is identical with actual reality. The familiar statement that "[W]hat is rational is actual and what is actual is rational"[22] synthesises normativity and facticity, essence and existence. The absolute spirit is not revealed in some metaphysical form of natural law; it is immanent in the system of positive law. Explorations of the spirit of the laws therefore must proceed as explorations of the positive laws.

[19] G. W. F. Hegel *Lecture on the Philosophy of Religion* (Berkeley: University of California Press 1987) vol. II: Determinate Religion, 237.

[20] N. Luhmann *Die Gesellschaft der Gesellschaft* (Frankfurt: Suhrkamp 1998) vol. I, 364–5, 423.

[21] J. Hypollite *Genesis and Structure of Hegel's Phenomenology of Spirit* (Evanson: Northwestern U. P. 1974)

[22] G. W. F. Hegel *Hegel's Philosophy of Right* (Oxford: Oxford U. P. 1967), 10.

Hegel synthesises the immanent and transcendental perspectives in the concept of the ultimate law, manifested in the universal world spirit as the positive will.[23] The laws are expressions of the political will and, as such, differ from each other but there is a general criterion of law, which is the origin of all duties in man's thinking, answering the question of what the laws "ought to" be like.

3 *The Spirit of the Laws and the Concept of Culture*

According to Hegel, Charles Montesquieu was the first to recognise the true philosophical position when he demanded that legislation should be examined as a variable moment in the social totality.[24] By identifying reality with reason, the idea of law could be explored using positivistic methods and philosophical speculation at the same time. Hegel's notion of the spirit has three different levels: individual wisdom, the social structure and the world's transcendence.[25] The spirit therefore manifests itself in the collective life, social structures and history of a concrete nation. Different social groups may constitute different forms of the collective spirit which Hegel, drawing on Montesquieu's ideas regarding the spirit of political societies and their laws, described as *Volksgeist* (the spirit of the nation).[26]

However, Montesquieu would never draw such speculative conclusions from his study of the spirit of the laws. Montesquieu indeed assumes that there are natural laws of universally valid reason (having transcendental origins in God's will) which are intrinsic to human nature – "antecedent to society" – and which therefore should be followed by the laws of all nations.[27] In the second chapter of *The Spirit of the Laws*, Montesquieu specifies natural laws which transcend social conditions, such as the right to preserve one's life and live in peace, which have their origins in the existence of individual human beings and not in the existence of society.[28] The validity of these laws

[23] Ibid. 36.

[24] Ibid. 16.

[25] G. W. F. Hegel *Lectures on the Philosophy of World History: Introduction* (Cambridge: Cambridge U. P. 1977), 47–53.

[26] C. Mährlein *Volksgeist und Recht: Hegels Philosophie der Einheit und ihre Bedeutung in der Rechtswissenschaft (Epistemata)* (Würzburg: Königshausen & Neumann 2000)

[27] R. Aron *Main Currents in Sociological Thought* (Harmondsworth: Penguin Books 1965) vol. I: Montesquieu, Comte, Marx, Tocqueville, The Sociologists and the Revolution of 1848, 54.

[28] C. Montesquieu *The Spirit of the Laws* (Cambridge, Cambridge U. P. 1989), 6–7.

derives from the idea of God as a transcendental legislator. Nevertheless, it does not mean that the laws of all nations ought to be the same.

The laws of nature have to be distinguished from the diverse laws originating in social and political conditions which comprise political laws, civil laws, and all major social institutions. The first purpose of an examination of the spirit of the laws, therefore, is to describe the differences in the lives of political nations and the unique and untranslatable character of the laws of different nations. According to Montesquieu, the rule of human reason can manifest itself in the real world only as the rule of variety and differences. The main intellectual task is to disclose mutual relations and connection between all the external influences which determine the final form of the laws of each nation.[29] The spirit of the laws is the result of mutual social influences that may have only relative validity and are related to the life of specific nations and external conditions such as climate, geography, and space. As Raymond Aron remarks, the general spirit of the laws is a product of the "totality of physical, social, and moral causes [...] which enables us to understand what constitutes the originality and unity of a given collectivity."[30]

The concept of the spirit of the laws is analogical to the modern concept of *culture* because it signifies specific forms of the life of a nation, its moral bonds, natural environment, and persistence through history. The spirit is concrete and this is why different nations will always have different spirits of the laws. Instead of Hegel's universal world spirit unifying the laws of different political communities and their specific *Volksgeist* in the totality of reason, one witnesses an attempt to classify descriptions of the real state of the law of different nations. Montesquieu uses the spirit of the laws as "the unifying principle of the social entity"[31] which makes the entity of a specific nation different from other nations. This is what makes *The Spirit of the Laws* a proto-sociological treatise and its author one of the founding fathers of modern sociology.

The spirit of the laws synthesises descriptions of social diversity and factual differences in the life of different societies. Instead of a speculative attempt to express the total unity of the world, one can see a prototype of sociological nominalism in Montesquieu's thinking.[32] The general spirit of the laws signifies both the transcendental unity of a particular society and its

[29] Ibid. 9.

[30] See Aron (n. 27), 46.

[31] Ibid. 21.

[32] See, for instance, E. Durkheim, *Montesquieu and Rousseau: Forerunners of Sociology* (Chicago: University of Michigan Press 1960), 57.

specific life forms and differences when compared with other societies. The legislator should have corrective power over political society but the power must be exercised in accordance with the general spirit. If the legislator were to legislate against the spirit, he would be acting as a tyrant.[33] The general spirit accounts for the content of the laws commanded by the legislator.

According to Montesquieu, society exists only where there is government enacting a system of political laws. It is therefore the nature of the government that determines the spirit of the laws. Differences between specific legal systems are explicable as differences between the forms of government. At the same time, Montesquieu says: "[...] There is this difference between the nature of the government and its principle: its nature is that which makes it what it is, and its principle, that which makes it act. [...]"[34] The government may be examined as both a factual form of social life and as a normatively organised and regulated political institution. The spirit of the laws therefore is irreducible to the immanent reality of the socially constructed world which is determined by its environment, its geography, climate etc. It also refers to the transcendental normative principle of political institutionalisation which, albeit socially variable, is structurally common to all types of political societies. In other words, there are no laws without the spirit.

The republican government is then unique because, unlike monarchy or despotic regimes, it cannot rely only on political violence and the mere force of the laws. It demands additional virtue to guide citizens to obey the laws voluntarily. If this virtue is missing, "[...] [E]ach citizen is like a slave who has escaped from his master's house. What was a *maxim* is now called *severity*; what was a *rule* is now called *constraint*; what was *vigilance* is now called *fear*."[35] It turns out that the spiritual uniqueness in fact depends on the structural preconditions of the political regime.

According to Montesquieu's interpretation, the republican form of government is both more fragile and stronger than other forms of government, because of the bond of mutual trust between those who govern and those who are being governed and voluntarily subject to the political power. Respect for the laws and the polity is necessary for their continued existence which means that the spirit of the laws of republican government depends on the behaviour and normative judgements of its citizens. Respect for the laws is not a matter of rational judgement; it depends on a political sentiment

[33] Cf. N. Hampson *Will & Circumstance: Montesquieu, Rousseau, and the French Revolution* (London: Duckworth 1983), 21.

[34] See Montesquieu (n. 28), 21.

[35] Ibid. 23.

which is common to all and, in democratic regimes, takes the form of respect and love of equality.[36]

Citizens as social agents must vigorously defend and respect equality as a structural condition of democratic government so that its laws can be enforceable.[37] Montesquieu can thus be regarded the first modern theorist of the rule of law as a system which, apart from the institutional framework of separation of powers and the distinction between private and public spheres, depends on the virtues of public accountability and trust between the governed citizens and those who are to govern them by the power of the laws.[38]

Montesquieu conceptualises the spirit of the laws as a matter of social reality and does not translate the normative conditions of the existence of different forms of political government into the universal claims of the spirit of rational law-making. Montesquieu's strict separation of social reality and speculative claims successfully avoids the proto-romantic perspective of the "deification of the factual" which became so typical of Hegel's later philosophical legacy and romantic thinking.

4 *The Romantic Philosophy of* Volksgeist *and Historical Jurisprudence*

Romantic philosophy identified normative judgements with rules and regularities analysed and extracted from the factual nature of social reality. It was, indeed, inspired, by Montesquieu's historical methodology and sense of the importance of historical particulars.[39] It was F. C. von Möser who first used Montesquieu's concept of the general spirit of the laws in the context of historical nationalism and reformulated the synthetic concept as a unique genius of the German people.[40] The general spirit of the laws was gradually replaced by the national spirit. The concept of human nature antecedent to the social and historical condition of human existence was obliterated by this romantic historicism and its call for national patriotism and a feeling of unique togetherness. According to the romantic visions, the external reality of this world was shaping man and imposing commitments and obligations on him as a rational being.

The romantic ideology of the spirit of the nation – *Volksgeist* – emerged

[36] Ibid. 42–8.

[37] For this view, see especially J. Shklar *Montesquieu* (Oxford: Oxford U. P. 1987).

[38] M. Loughlin *Public Law and Political Theory* (Oxford: Clarendon Press 1992), 150.

[39] F. Meinecke *Historism: the Rise of a New Historical Outlook* (London: Routledge & Kegan Paul 1972).

[40] F. C. von Möser *Von dem Deutschen national-Geist* [1766].

as a synthesis of normative speculation and the factual exploration of the actual life and history of nations. As Ernest Gellner remarked in his analysis of romanticism and the basis of nationalism:

> [T]he new nationalisms enter into violent competition with each other, and the new standard and rallying cry is, above all, folk culture. This is the deep paradox of nationalism: it is a phenomenon of *Gesellschaft*, but it is obliged to use and invoke the imagery of *Gemeinschaft*. The moral sovereignty of ethnic culture is nationalism's central principle. It was the nationalists who really rammed home, persistently and to great effect, the vision of the closed community, final and sovereign.[41]

The romantic spirit was first persuasively presented by Herder in his "Yet Another Philosophy of History Concerning the Development of Mankind."[42] The positive laws were considered just another expression of the life and history of different nations and their spirits. The historical nature of the spirit means that it is expressed in folk tales, language, and the daily experiences of peoples. According to Herder, modernity threatens to destroy the specific spirits of different nations and it therefore is necessary to preserve these national distinctions and protect them against modern social pressures and the tendency towards uniformity in social life. The first job of philosophy is to focus on the people because it "is supposed to belong to the people."[43]

Despite the immense role of Herder's romantic philosophy, it was in fact Hegel who firmly established the concept of *Volksgeist* in moral and political philosophy and social sciences.[44] Using this concept, Hegel was inspired by both Montesquieu and Herder and referred to the mores, laws, and constitutions of a nation. The spirit of the nation is part of world history and one of the manifestations of the *Weltgeist* (World Spirit). According to Hegel, the

[41] E. Gellner *Language and Solitude: Wittgenstein, Malinowski and the Habsburg Dilemma* (Cambridge: Cambridge U. P. 1998), 29; for a complex view of nationalism and culture see E. Gellner *Nations and Nationalism* (Oxford: Blackwell 1983).

[42] J. G. von Herder "Yet Another Philosophy of History Concerning the Development of Mankind" in F. M. Barnard (trans. and ed.) *J. G. Herder on Social and Political Culture* (Cambridge: Cambridge U. P. 1969). Herder, who is generally considered a father of the *Volksgeist* romantic ideology, paradoxically did not introduce the term and used its various expressions like *Nationalgeist* (in reference to von Möser), *Genius des Volkes*, and *Geist des Volkes*.

[43] J. G. Herder "How Philosophy Can Become More Universal and Useful for the Benefit of the People" in M. N. Forster (trans and ed) *Philosophical Writings* (Cambridge: Cambridge U. P. 2002), 3 at 29.

[44] In this context, Hegel speaks about the Spirit self-alienated in the actual realm of culture; see Hegel (n. 17), 296–321.

spirit of the world manifests itself in the spirits of different nations which thus represent only a segment, albeit a meaningful one, of the total history of the world.

Leaving aside philosophical speculation, Hegel's concept of *Volksgeist* as the totality of the historical and cultural accomplishments of a nation fundamentally affected the history of social and legal sciences.[45] In his famous opposition to A. F. J. Thibaut's proposals to introduce a codified civil law for all German states during the Napoleonic wars in the beginning of the nineteenth century, F. C. von Savigny used the "deeply mystical idea"[46] of *Volksgeist*. Savigny argued that all legal codifications first of all have to reflect and recognise the genuine spirit, convictions, beliefs, and common consciousness of the nation (*Volksbewusstsein*).[47] The codified law should *express* the nation's distinctive ethos which could be traced back in its history, mythology, religion, customs, or folk tales. In comparison with the Enlightenment's legal rationalism, this was an entirely new scholarly enterprise according to which customs and popular faiths are the real powers behind the positive laws. The lawgiver's will ought to follow the spirit of the nation, expressing itself through the national culture. Law derives from the nation's specific character in the same manner as its language, mores, and folk tales. Legislation has to respect legal customs and traditions (*Gewohnheitsrecht*).

According to this view, one would expect the legislator to truly represent and reflect on the spirit of the nation and appropriate legislative activities to this ultimate origin of the laws. However, there is a general historical tendency for modern, rationally organised legal systems to become increasingly detached from custom and their roots in community life. Legal knowledge is organised and exercised by jurists instead of reflecting the popular wisdom of the nation. The spirit of the nation is hard to recognise in modern society: this is typical of the complex and differentiated legal system which demands expert legal knowledge and is detached from the "common consciousness" of the nation. Law therefore should be more historically reflective of the spirit of the nation.

The romantic ethos of historical jurisprudence represented by von Savigny, Puchta or, later, von Gierke and Maine, established historical methods

[45] Apart from the historical jurisprudence, it profoundly influenced comparative and social psychology of the 19th century in the form of *Völkerpsychologie*. See especially W. Wundt *Elements of Folk Psychology: Outlines of a Psychological History of the Development of Mankind* (London: Allen and Unwin 1916).

[46] R. Cotterrell *The Sociology of Law: an Introduction* (London: Butterworths [2]1992), 21.

[47] F. C. von Savigny *Of the Vocation of Our Age for Legislation and Legal Science* (New York: Arno Press 1975), 27–8.

as the most important tool of legal science. Contrary to Hegel's legal philosophy, the historical school shifted the theoretical focus from the state to the spontaneous evolution of customs and traditions of historical people. The content of existing law was to respect the characteristics and traditions of a particular community of people. Law, like language and other cultural systems, was considered to have grown organically through the history of a particular people, perceived as an *ethnos* – a community of shared language, traditions, customs, religion, territory, and race or ethnicity. Romantics like Savigny were convinced that "law is the totality of life" seen from a specific viewpoint.[48] According to the romantic ethos, the spirit of the ethnic nation must be verbally expressed in positive laws. The particular spirit of the *ethnos* is the spontaneous and quiet power operating behind the positive law in the course of the nation's history.

5 *The Politics of Identity and Culture: A Critique of Communitarian Ethno-Fantasies*

The romantic spiritualisation of the nation ends up in the modern politicalisation of cultural identities and culture in general. Culture represents the shared values and symbols of a people as a homogeneous entity distinct from all other peoples and their values and symbols. Modern nationalism politically sanctifies and identifies with a culture.[49] Unlike traditional people's worship of gods and deities, modern man worships culture in its totality. Politics is perceived as a form of a particular but omnipotent culture. Modern *ethno-nationalism* was born out of the romantic passion for the spirit of the nation – *Volksgeist*. The romantic study of collective life forms concluded that human beings as individuals were but creations of their nations, national cultures, and histories. Subverting Montesquieu's demand of respect and love of a polity by its citizens, adherents of the *Volksgeist* philosophy eventually demanded that one should "love thy nation as thyself".

The ideology of the spirit of the nation expressing itself through a culture gradually made the regulative idea of justice and the origins of law subject to the factual life of a specific nation and its history. The sovereignty of critical reason was replaced by the factual diversity of the life of modern nations and their different histories. The universality typical of rational Enlightenment philosophy gradually disappeared as the ultimate value and was replaced by

[48] N. S. Timasheff *An Introduction to the Sociology of Law* (Westport: Greenwood Press [1939] 1974), 343.

[49] E. Gellner *Culture, Identity, and Politics* (Cambridge: Cambridge U. P. 1987), 10.

romantic particularisms. The idea of universal reason and law was gradually challenged by singularity of culture and prejudice.[50] The national became identified with the universal, and the irrational collective spirit of the nation with the iron law of the spirit of history.

Jurisprudential use of the concept of *Volksgeist* is an example of the totalising expressive symbolism of law which is expected to recognise the nation's customs, adjudicate on them, and finally codify the national spirit in statute books and political constitutions. Law is supposed to mirror the spirit of the nation. The nation uses the legal system to codify its spirit. *The legalisation of ethnic collective identity* has an important political role because it turns the primarily cultural concept of identity into codified rules and policies.

The legal constitution of the nation is thus to represent the total political codification of the nation's ethnic identity. The law's power to express and codify the world of culture and its traditions result in the totalising attempt to legislate one generally binding collective identity for a political community. The domain of culture colonises the legal system with pre-political forms of expressive symbolism. The legal codification of the ethnic identity of the nation also legalises ethnic and cultural divisions and produces "unhelpful rigidities" in local, national and international politics.[51]

New forms of identity politics "increase centuries-old tensions between the universalistic principles ushered in by the American and French Revolutions and the particularities of nationality, ethnicity [...]".[52] The first principle of the democratic rule of law, that a *demos* constitutes itself by creating the constitutional powers of a democratic State, is being stripped of its universalistic ethos. Unlike the Enlightenment's political myth of the democratic political body, the romantic concept of the legal constitution is based on the recognition of the unique characteristics of a particular *ethnos* and its culture. Ethnic conflicts feeding on differences of language, race, history or religion are thus recognised and facilitated by the system of positive law and the political force behind it. As Michael Kenny admits in his defence of the politics of identity: "[R]omantic emphases upon the unique character of certain kinds of belonging ... are clearly visible in the politics of identity."[53]

[50] A. Finkielkraut *The Defeat of the Mind* (New York: Columbia U. P. 1995), 10.

[51] R. Dahrendorf "A Precarious Balance: Economic Opportunity, Civil Society, and Political Liberty" in A. Etzioni (ed.) *The Essential Communitarian Reader* (Oxford: Rowman & Littlefield Publishers 1998), 73 at 92.

[52] S. Benhabib *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton, N.J.: Princeton U. P. 2002), VII.

[53] M. Kenny *The Politics of Identity: Liberal Political Theory and the Dilemmas of Difference* (Cambridge: Polity Press 2004), 23.

A political society which constructs its identity by defending and proclaiming the past traditions and collective beliefs faces the danger of an authoritarian takeover, controlling first the state and then the whole of society. Conservative and progressive communitarian ethno-politics both demand "a complete harmony, within a given territory, between a form of social organization, cultural practices and a political power" and seek "to create a total society."[54] However, culture is in fact eliminated in the name of a political community which ultimately dictates who can or cannot be its member. The speculative question of cultural purity becomes politicalised either in conservative segregationist calls for "separate but equal", or radical misinterpretations of our multicultural reality which call for "equal but separate" politics of identity as difference. Normative conclusions supporting collective ethnic rights make constitutional democracy and human rights the tools of the ethical and political collective self-understanding. They effectively demand that the realm of law should codify the cohabitation of communities and become "an aggregate of community-oriented privileges."[55]

Ethnic communitarianism is an ideological reinterpretation of culture which primarily answers the call for collective recognition of different ethnicities pursuing political empowerment. Communitarian ethno-ideologies and policies promise a return to a politics of lived cultural experience and institutions based on shared traditions and beliefs. However, communitarian "retrospective utopias"[56] assume authoritarian power which could guarantee the political exclusion of "cultural foreigners." Communitarianism exploits cultures for political mobilisation and seeks to control a community through political manipulation of cultural symbols.

Similarly, Manuel Castells' vision of ethnic resistance identities, which oppose various forms of domination in the globalised network society and transform themselves to project identities, thus transforming the overall social structure and contributing to civil society, has a number of flaws. The new primacy of identity politics[57] draws on criticisms of the power shift in global society and the destructive effects of its economy and politics on the structures of civil society. According to Castells, the disintegration of civil society makes ethnicity the major source of communal resistance and an emancipating force for the discriminated against and the excluded. Ethnic

[54] A. Touraine *Can We Live Together?* (Cambridge: Polity Press 2000), 163.

[55] Z. Bauman *In Search of Politics* (Cambridge: Polity Press 1999), 199.

[56] See Touraine (n. 54), 34.

[57] M. Castells *The Information Age: Economy, Society and Culture* (Oxford: Blackwell 2004) vol. II: *The Power of Identity*, 12.

and cultural identities are perceived as forces revitalizing civil society virtues in the global age. Drawing on the power logic and the struggle for social justice, Castells believes that, despite risks of political violence, such identity politics on the part of dispossessed and marginalized communities would ultimately become emancipatory and result in the necessary political change of global society.

Ethnicity is romanticized as a force of political resistance against the disintegrative forces of global economics and international order. A hypermodern analysis of the information age paradoxically builds on the pre-modern ideal of a community uncorrupted by power and able to channel its potential for disintegrative political violence against the dark forces of modern economics, politics and powerful technologies. Castells' theory thus represents an eclectic mixture of conservative romanticism and a radical resistance agenda in which emancipation politics is exclusively based on the notion of communal identities without primarily civil self-reflection.

6 *Democratic Politics, Identity, and Cultural Heterogeneity*

According to persisting philosophical and political romantism, the nation's identity, constituted by its historically unique spirit, should stabilise the modern legal system. Identity is to operate as a totalising normative pattern for the laws and the source of their stability. At the same time, communitarian ideologies which have appeared in various politics of identity use the legal system as a tool of social stabilisation and political manipulation of specific identities. Identity is to be externally codified and solidified by the legal system.

The communitarian claim that human existence is constituted by culture[58] has serious political implications because there is no anthropologically and politically pure cultural domain. Collective identities are, rather, complex power relations constructed by those who control the collectivity and further strengthen their position by codifying the binding version of the collectivity's identity.[59] Identity politics is recognition politics which makes culture and history part of political hegemony.[60]

The constitutional identity distinction of *demos–ethnos* is a modern example of this political manipulation of identity. The civic/ethnic distinction of

[58] C. Taylor *Philosophical Papers* (Cambridge: Cambridge U. P. 1985), 230.

[59] J.-F. Bayart *L'illusion identitaire* (Paris: Fayard 1996).

[60] C. Taylor *Multiculturalism and the Politics of Recognition* (Princeton: Princeton U. P. 1992); see also C. Levi-Strauss *Race and History* (Paris: UNESCO 1952).

collective identity has a profound formative effect on national self-reflection and the political integration and disintegration of specific nations. The modern history of nationalism reveals the political risks of the legal and constitutional codification of pre-political ethnically-grounded identities of emerging democratic societies. Nationalisms have totalitarian potential[61] and the constitutional ethnic codification of the sovereign people or *ius sanguinis* may easily result in the degradation of general legislation and various forms of ethnic and national discrimination. The view of the nation as a mythical body of people of the same racial and historical origin is typical of fascist ideologies.[62] Although fascist totalitarianism could not be established without the monopoly of violence and bureaucratic administration typical of the modern state,[63] it also needed the organic and socially conservative legitimation by ethnicity.

Despite the political risks, it is impossible to isolate the pre-political context of collective identity entirely from legislation or constitution-making. It is therefore important to examine how pre-political ethnic identities are manipulated at the level of constitutional rights legislation, and in the process of constituting the sovereign nation by an act of legal constitution-making. As Jürgen Habermas remarks, the tension between pre-political cultural bonds and civil loyalty to the democratic state "can be resolved on the condition that the constitutional principles of human rights and democracy give priority to a cosmopolitan understanding of the nation as a nation of citizens over an ethnocentric interpretation of the nation as a prepolitical entity."[64] According to this view, the civil bonds facilitated by the liberal democratic rule of law are necessary to sustain a democratic polity and therefore have to be nurtured by the liberal democratic rule of law as protection against various forms of ethnic and cultural exclusion and chauvinism.

The first purpose of constitution-making and legislation, namely, the establishment of the liberal democratic rule of law enforcing generally applicable civil rights and liberties, has a strong symbolic effect on political society. It inspires a special form of political identification which stretches beyond the internal communication of law and politics and constitutes a specific system of attachment and solidarity. Apart from obedience to the laws, citizens

[61] C. Calhoun "Nationalism and Civil Society: Democracy, Diversity and Self-Determination" in C. Calhoun (ed.) *Social Theory and the Politics of Identity* (Oxford: Blackwell 1994), 304 at 326.

[62] W. Connor "A Nation is a Nation is a State, is an Ethnic Group, is a ..." *Ethnic and Racial Studies* 1 (1978), 379–88.

[63] H. Kohn *The Idea of Nationalism* (New York: Macmillan 1945), 20.

[64] J. Habermas "The European Nation State" *RJ* 9 (1996), 125 at 131.

are expected to emerge as a "*we*-entity" – a polity sharing the common system of political virtues and bonds usually and imprecisely described as *civic culture* or *political culture*.[65]

Instead of pre-political bonds and feeling of collective belonging, the concept of democratic political culture signifies the impact of politics on the system of culture and self-identification of individuals as citizens. Political culture arises from the laws and politics which makes citizens share a common political identity, mutual responsibility, and the duty of civil participation.[66] The general principle of constituting the civil political *demos* therefore takes precedence over all pre-political cultural and historical entitlements of the *ethnos* living in the constitutional democratic state, based on the rule of law. The general spirit of the laws is determined by the virtues of civility and democratic political culture. This culture depends on political trust and therefore invokes *constitutional patriotism* as a way for citizens to identify with their democratic polity.

Liberal thinkers, including a number of liberal communitarians, acknowledge that ethnocentrism has to be rejected and human rights affirmed. The political integrity of democratic societies needs a coherent conception of institutional morality which belongs to the larger whole of liberal community[67] and focuses on civil society.[68] According to these moderate communitarian voices, political community needs to be established on the basis of civil virtues in order to be inclusive and democratic.[69] The culture of liberty in a democratic community takes precedence over the ethnocentric cultures of various communities. The civil tradition of constitutional patriotism has priority over ethnic traditions. Constitutional patriotism contains and channels different ethnic and other collective pride, identities, and histories.

Indeed, the constitution, apart from supporting constitutional patriotism and civil democratic virtues, is obviously exposed to pre-political reflections on the people as *ethnos*. Furthermore, the civic concept of *demos* also can be imagined as a community integrating individual citizens into a whole of

[65] See, for instance G. A. Almond – S. Verba *The Civic Culture* (Princeton: Princeton U. P. 1963).

[66] J. Waldron "Cultural Identity and Civic Responsibility" in W. Kymlicka – W. Norman (eds.) *Citizenship in Diverse Societies* (Oxford: Oxford U. P. 2000), 155 at 155.

[67] P. Selznick *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley, California: University of California Press 1992), 323.

[68] J. B. Elshtain "In Common Together: Unity, Diversity and Civic Virtue" in M. Walzer (ed.) *Toward a Global Civil Society* (Oxford: Berghahn Books 1995), 77 at 80.

[69] H. Tam *Communitarianism: a New Agenda for Politics and Citizenship* (London: Macmillan 1998), 246–60.

values and traditions. Unlike the democratic culture of constitutional patriotism, these values and traditions are taken as part of a primordial essentialist culture and history. Ethnic and republican nationalisms can paradoxically have similar exclusionary effects. The idea of the civic nation as a political unity free of ethnic meaning can, like ethno-nationalist notions of political society, speak the mythical language of historical roots, genealogy of morals and values, and cultural commitments. Like ethno-nationalist fantasies of the people's historical destiny and uniqueness, the democratic republican concept of the nation can have cultural fundamentalist and communitarian foundations.

This transformation of the democratic nation to an organic community is described by Etienne Balibar as a paradox of "republican communitarianism" according to which

> "[R]epublican communitarianism" has made the cultural, scholastic, and administrative *non-recognition* of "particular identities" (be they linguistic, religious, national) within the nation into the mark of purity that allows one to recognize the character of one's own political universality. Thus, by a term-for-term reversal that does not fail to produce some strange mimetic phenomena, the struggle against communitarianisms of various degrees of reality, perceived as threats, is turned into the construction of an exclusive identity.[70]

Despite these risks of culturally grounded political and legal fantasies, the transformation of the people's constitutional self-identification to general *democratic procedures* leads to the cultural de-totalisation of modern societies. Creating a constitutional identity of the sovereign people as *demos* and its proceduralisation effectively dismantles totalitarian claims of culture that reduces the legal system to its expressive symbolic communication. The political system dismantles the totalising language of culture irrespective of whether it invokes republican or ethnically embedded forms of patriotism and political identity. Instead of enforcing the *demos – ethnos* distinctions and guarding its culture, the political system of modern complex democracies effectively operates as a generalised and socially inclusive system of power circulation expressed in the "government/opposition" code. Any preliminary cultural definition of who can qualify as government and opposition is eliminated by the general character of the political code.

Political and legal systems cannot enforce and codify the ultimate meaning of collective identity and thus eliminate its heterogeneity and instability.

[70] E. Balibar *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton: Princeton U. P. 2004), 64.

In the context of political philosophy, Seyla Benhabib also commented that conservative and progressive ethno-communitarians both

> share faulty epistemic premises: (1) that cultures are clearly delineable wholes; (2) that cultures are congruent with population groups and that a noncontroversial description of the culture of a human group is possible; and (3) that even if cultures and groups do not stand in one-to-one correspondence, even if there is more than one culture within a human group and more than one group that may possess the same cultural traits, this poses no important problems for politics or policy.[71]

The right to culture advocated by ethno-communitarians assumes that cultures are clearly detectable and legally definable essences which would predetermine political identities and rule out the competition between different cultural self-reflections. The right to culture would therefore necessarily result in the institutionalisation of cultural hegemony, marginalisation of some cultures, and even legal discrimination by one culture against another (for instance, territorially established traditional cultures against the immigrant ones).

The hegemonic concept of identity and identity politics would draw "the state into culture wars".[72] Ethnic identity politics feeds on epistemologically flawed cultural essentialism and normativism suppressing those elements within a culture which confront its existing dominant codes, traditions, and practices. Criticising the formalistic rule of law tradition, the holistic concept of political identity draws on the perception of political society as culturally united community.[73] Culture and its agents would consequently have to be purged of all foreign elements and cultural unity enforced against diversity, an impossible task in functionally differentiated democratic societies. Translated into human rights discourse, ethno-nationalist fantasies and claims of "the right to cultural membership" deny one of the basic rights – "to say no to culture and its identity offers" and to subvert the norms, patterns and ideals of one's culture.[74]

Culture is the permanent communication of the same with the other, and identity is its momentary and temporary outcome. It is only possible to communicate with other cultures if self-identity and knowledge of one's own

[71] See Benhabib (n. 49), 4.

[72] Ibid. 1.

[73] C. Taylor "Cross-Purposes: The Liberal Communitarian Debate" in N. L. Rosenblum (ed.) *Liberalism and the Moral Life* (Cambridge: Harvard U. P. 1989), 159–68.

[74] See Benhabib (n. 49), 66.

culture is being established against the diversity and differences of other cultures.[75] Nevertheless, as Vincent Descombes remarked "[D]ifference is necessary in order for identity to preserve itself [...]"[76] Unlike ethno-communitarian holistic claims of cultural homogeneity, modern culture is heterogeneous and constantly transforms when face to face with new experiences and their intellectual reflections.

Diversity is a basic element of the world and the world's unity is constructed against the preliminary background of cultural and temporal horizons.[77] Diverse cultural and social processes form collective identities. Identity can hardly be presented as unique and primordial in its nature. The provisional character of modern cultural self-identification rules out the ultimate political enforcement and totalising legal ordering typical of nationalism which "pretends that culture is *given* to the individual, nay that it possesses him, in a kind of ideological *coup de foudre*."[78]

Identity is primarily a cultural concept referring to individual and collective self-reflection and self-understanding that cannot be totalised by the legal, political and even moral communication. It is irreducible to the semantics of specific social systems of law and politics. Identity is a much more general and unstable concept than constitutionalism and the constitutional democratic state. Symbolically expressed identity gets evaluated by the moral system only after its differentiation to the transcendental ideals and immanent normative patterns. The moral system consequently cannot establish its ultimate meaning as a moral dogma of evaluative symbolism that could also be legally binding and politically enforceable.

Identity keeps its cultural meaning as a meaningful description of the original nature of individual and collective lives. Although identity is permanently contested and its provisional character used in political communication,[79] the cultural symbolism of identity exceeds the logic of political conflicts and their ideological background. No culture can consequently become a codifying pattern of the sovereign political Subject of the people in the form of either *demos*, or *ethnos*.

[75] P. Ricoeur "La civilisation universelle et les cultures nationales" *Esprit* (1961) [October].
[76] V. Descombes *Modern French Philosophy* (Cambridge: Cambridge U. P. 1980), 38.
[77] See Welsch (n. 11), 768, 913.
[78] See Gellner (n. 49), 16.
[79] See Kenny (n. 53), 101.

7 *Concluding Remarks: The "Noisy" Spirits of the Laws*

The difference between the spirit and the letter of the laws does not have the epistemological value of explaining the origins of law by external reference to transcendental reason, morality or cultural identity. It, rather, explains the functional differentiation of law, politics and morality. In this process, the spirit of the laws is communicated by different social systems and thus can be accessed only as different moral, legal, and political *spirits* of the laws. It is impossible to rely further on Gödel's proof and use the spirit of the laws as an external position from which one could satisfactorily prove or disprove legal propositions.[80] The concept refers to the law as a cultural artefact and uses different modes of social communication to promote its cultural value (morality), integrative force (politics), and specific virtues of normativity (law).

The spirit of the laws creates important "information noise" in the systems of morality, politics and law because its symbolic meaning has to be dealt with by different communication channels. The spirit of the laws makes the legal communication "noisy" by making a direct semantic link to the systems of morality and politics. It makes the political communication "noisy" by its symbolism which separates culture from the legal and political systems. Finally, it makes the moral communication "noisy" by oscillating between transcendental ideals of ethics and immanent moral norms.

The concept has been internalised by legal positivist hermeneutics and methodology in various forms of value-based interpretation, socio-legal methods, legal principles and human rights. Furthermore, it can be used in the Montesquieu-like tradition as a set of external determinants of the laws and the extra-legal origins of the legal system. It also can be perceived as transcendental source of positive law, a view typical of philosophical speculation. However, neither the immanent critique of positive law, nor its transcendental speculative analysis can establish the ontologically supreme spirit of the legal system that could inform the politics of identity and secure the ethnic and cultural bonds of political society.

[80] N. Luhmann "The Self-Reproduction of Law and Its Limits" in *Essays on Self-Reference* (New York: Columbia U. P. 1990), 227 at 238.

Theodicee: God Guilty as Charged?

Nikolas H. M. Roos (Maastricht)

1 A Confession by Way of an Introduction

Varga Csaba and I worked closely together during the first half of the nineties as co-ordinators of the first major legal TEMPUS-programme, "Bridges", granted by the EU on behalf of the Law Faculty of the Eötvös Loránd University in Budapest. He proved to be not just the excellent scholar I knew already from some of his many publications, but also a great organiser and manager of the programme. He extracted every possible kind of advantage out of it and especially so for metajuridical fields of study.

I owe Varga Csaba enormously for doing so much excellent work for the programme and being such a great host at all the many occasions when I visited Hungary during those times in which he took me all over his beloved country. We got along almost perfectly, notwithstanding his being a catholic and a political conservative and I being an atheist and a political liberal. But why even suspect our co-operation to be difficult because of this? Well, Csaba was very active politically also at that time, among others as an adviser on foreign affairs of the Hungarian prime minister József Antall. Csaba's objection against the radical liberals in his country was that they, very often renegade sons and daughters of important communists, were nevertheless as abstract-dogmatic in their way of – liberal – thinking as their fathers and mothers had been as believers in communism. Such an approach, Csaba was convinced, did not serve the Hungarian national interest, and certainly not at the time of transition from communism to a free country. I was a pure academic then, but with clearly liberal leanings. It so happens that just a few days before finishing this article I founded a new political party in my own country, The Netherlands. This "Party for Innovation and Modernity" is a thoroughly liberal one indeed.

I am not competent to question Csaba's judgement of Hungarian liberals at that time, but it may well have been right in the particular situation of Hungary. I am nevertheless inclined to think that there was a romantic tinge to Csaba's view of Hungarian national interest. Let me illustrate this by means of an account of the only disagreement Csaba and I once had. It was right at the beginning of our co-operation when we were both tired from a whole day of discussing the design of our programme. I had expressed my amazement about the fact that the largest Law Faculty of Hungary only had about one thousand students. My own faculty in the by then thanks to EU-treaty concluded there well-known, but nevertheless rather provincial town of Maastricht, had three thousand students, being just medium-sized in comparison to the other ten Dutch Law Faculties. Hungary, in contrast, had only four Law Faculties in total at that time. It was apparent that law, lawyers and legal scholarship had not been held in great esteem under Communism. Csaba told me that he was in favour of reintroducing Latin as a requirement for entrance into Law Schools. I pointed out that this requirement had been dropped in the Netherlands twenty-five years before already and that we would never have had so many lawyers (the number growing in proportion with national income), if we had maintained the Latin requirement. Would it not be counter-productive then, I asked, to impose such a requirement in Hungary considering its need for many more lawyers in the future? Csaba was unimpressed and argued that Roman law had still been valid by 1845 in Hungary. I rebutted by asking rhetorically in how many modern cases this historical fact might still be relevant. Csaba then rather passionately said "Yes, but this is Hungary!" Csaba's outburst made me realise that catching up with history after communism was not just an affair of planning the future according to EU-models.

In Hungarian history the Roman Catholic Church and Roman Law have played a very important role. Interestingly, however, Csaba's romanticism cannot have been inspired by his Roman Catholicism with its universalistic natural law tradition. Nor are liberalism and nationalism incompatible. In fact, they went hand in hand when the idea of the nation state became so important in the nineteenth century, whereas it was opposed rather by the Roman Catholic Church. Nationalism had been, in the liberal tradition, part and parcel of modernisation, a positive force, because it was not mixed with ethnic prejudice or aggressive intentions against other nations, as became the case more and more later in the century and especially so in countries that were late in realising national independence and unity. In contrast, the aim of liberal nationalism had been to overcome ethnic prejudice by creating

a state that citizens would be able to identify with whatever their ethnic or religious backgrounds might be.

Since rebuilding the Hungarian nation was so clearly connected to its adaptation to the EU with its commitment to human rights and a free internal European market, I wondered whether Csaba's dissatisfaction with these young liberals was not rather inspired by a sense of injustice. An understandable sense, because there they were, the former young communist elite back in the same position, but now supporting the very ideology which their parents had sworn to eradicate. Csaba, in contrast, being a son of an elite family of pre-communist times, literally had had to work his way upwards as a miner before eventually being allowed to enter Law School. Later he was to be tolerated as a non-communist in the relative free haven of the Hungarian Academy of Science, but never to be rewarded with a full professorship matching his standing as an internationally recognised important legal scholar.

Not having been involved in such historical injustice myself, I took a rather pragmatic attitude, believing that transition would be all the easier if the old elite were not hit too severely in their social-economic positions. If the new system offered them sufficient chances, they would have no interest to obstruct necessary changes and might even support them. I have the impression that this is what has actually taken place in most former communist countries. Csaba's fear vis-à-vis liberalism was therefore, in my opinion, exaggerated.

However, I would not like to go so far and state that a religious conservative has nothing to fear *vis-à-vis* liberalism. In fact, in my justification for creating a new liberal party I have argued that, from a truly liberal point of view, religion should play no role whatsoever in a secularised state, implying there is, at least as a matter of principle, no justification for religious political parties, public schools and public universities. I am sure that such a position is hard to swallow for Christians in a former communist country. However, liberals, unlike communists, will fully tolerate religious organisations as long as they respect civil liberties. I cannot deny being a dogmatic liberal indeed, since the kind of liberalism I defend is not just opposed to religion's role in public life. It can also not accept non-liberal political ideologies of a non religious kind. In fact, in my view all apparently non-religious political ideologies from fascism to communism, have all been inspired by explicit or hidden Christian-religious romantic reactions against Enlightenment. The argument for my position, that I cannot develop here further, is that the justification of public power can only be based on interests that are

truly universal. The fundamental general interest, both legitimating and restricting the state, is peaceful survival of the individual in society. What ever cannot be justified in these terms, cannot be justified as a public matter at all. Social-democratic desires for social-economic equality, for instance, cannot be justified on this basis as a public affair. An implication of this position is that democracy should not figure as an arena of confrontation between incompatible political ideologies, religiously or non-religiously based, as is the case now. Democratic discussion should not be about the goals of politics, but just about the adequacy of means in relation to goals which are fixed as a matter of principle. I imagine Csaba reading these lines will think: "I have always suspected there was a dogmatic hard-liner hidden in my liberal friend Nico." True enough, but I assure him that I do not plead for changing present day democracies by any other than peaceful, democratic means. The reason that I reject revolutionary means is that violence is incompatible with the very same general interest that I take as my starting point, the peaceful survival of the individual. I am realistic enough not to count on convincing great masses or even many intellectuals of my view. However, one can never tell, of course. Karl Marx also was not very optimistic about his views gaining much popularity and see what – alas – happened!

Having sketched my position as antagonistic to religion as a factor in public life, I would now like to attack (Christian) religion on its own ground. I will argue that religion will be either thoroughly irrational or, if rational, as I will argue it can be, superfluous because it will add nothing to the humanistic position that underlies the liberalism that I defend. Maybe this is out of place as a contribution to a *Festschrift* for a much valued catholic friend and professor at a Catholic University that he personally did so much to re-establish. However, since he is my friend, I must be sincere to him and speak out my mind, as he and I always used to do.

2 *Legal Theory and Religion*

The subject that I would like to deal with in this *Festschrift* in honour of Varga Csaba is, from a logical point of view, concerned with a fundamental question of both theology and legal theory. Both Carl Schmitt[1] and Hans Kelsen[2] were aware that some fundamental theological and legal concepts were structurally similar. Both theologians and lawyers have struggled in-

[1] C. Schmitt *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität* (Berlin: Duncker & Humblot 1993).

[2] H. Kelsen *Allgemeine Staatslehre* (Berlin: J. Springer 1925), Par. 16: "Staat und Gott".

deed with a problem that has legal features in theology and has theological features in legal theory.

Schmitt argued that the ultimate foundation of law, as expressed in the concept of sovereignty, has its equivalent in theology in the concept of a "miracle", something that comes into existence without being explainable in ordinary causal-temporal terms and being of a supernatural kind therefore. In (the) case of the establishment of a legal sovereign, something similar happens. The sovereign manifests himself by effectively being a sovereign, cause and effect of sovereignty becoming interchangeable as it were. The miracle is therefore the influx of normative power into facts that cannot logically be explained in legal terms.

Although Kelsen argued that the concept of sovereignty was superfluous, he in fact agreed with Schmitt that self-foundation of the law cannot be explained, because it is logically impossible. He admitted that his concept of a *Grundorm* was paradoxical. The *Grundorm* is supposed to be the normative foundation of law, whereas it cannot be a positive norm itself, as it would then already presuppose a *Grundorm*. The *Grundorm*-theory can be seen as an attempt to provide a legal-epistemological explanation for what Schmitt had qualified as a miracle. A paradoxical explanation can, however, hardly count as an explanation. Some have tried to nevertheless justify it, by suggesting that the paradox is similar to that discovered by Gödel in the case of the calculus of natural numbers.[3] This paradox has its origin in the fact that the axioms and theorems of this calculus can themselves be put into the framework of the calculus.

However, the analogy is a false one. Elsewhere I have shown that the *Grundorm*-paradox can be solved.[4] One can construct a constitution in such a way that some rules become self-referentially immune to change, even though this is not as easy as some quite important legal scholars have believed it is. The legal "calculus" can rule out its own application to its epistemology as it were. If I am right in this respect, a positivist model of law is possible indeed from a formal point of view. A not insignificant fact, one would think, considering that it has been the most important issue in twentieth century legal theory. However, although this proof, if valid, was important enough, it was not the most important point of my article.[5] That was that

[3] H. Thévenaz "La Théorème de Gödel et la norme fondamentale de Kelsen" 4 *DS* (1986) 435–46.

[4] See my article: "The Identity of legal Systems in the Light of some Paradoxes of Constitutional Law" in E. Attwool (ed.) *Shaping Revolutions* (Aberdeen: Aberdeen U. P. 1991) 56–68.

[5] I cannot say that the article was totally ignored, because it earned me an invitatiton to

a legal positivist model can quite well include, and, from a semantic point of view even requires, a background theory of principles of law, the structural violation of which is tantamount to a self-invalidation of a legal system. A certain *Vorverständnis* is required, without which the constitutional invariability structure becomes meaningless. It is this *Vorverständnis* through which formal and basic material principles of positive law become connected. The model I suggested is close to what Wilfried Waluchow,[6] meeting Dworkin's criticism of legal positivism, has called "inclusive legal positivism", except that I believe it to logically include a complete philosophy of law such that Dworkin is right in a way too.

One could argue that my semantic interpretation of the invariability structure as a formal condition of legal constitutionality is the equivalent of Schmitt's intuition that it is the emergency situation that determines sovereignty. It is in such a situation indeed that the potential for survival of the principles of a legal system is tested. I would like to submit, however, that according to Schmitt himself, there is no fundamental difference between the emergency situation and more daily legal decision-making in which the foundations of a legal system are at least tacitly involved. However, according to my solution of the paradox of sovereignty, no miracle or paradox is involved and reference to analogies between legal and theological concepts are also inappropriate therefore. This very inappropriateness raises the question, however, as to whether theological conceptualisation cannot also be improved so that theological paradoxes can be avoided. And if so, what does that imply theologically and to what extent can such rational reconstruction be supported by biblical ideas concerning the relationship between God and man?

3 Natural Religion

Natural religion represented an important theological approach in the age of Enlightenment. Natural religion was the attempt to develop a concept of God that would be without logical contradictions as well as compatible with the established results of modern empirical science. It marked the ultimate phase of the struggle that started with the confrontation of Christian belief with classical science.

Aquinas attempted a synthesis of science and religion by assuming that

write a contribution on paradoxes in A.-J. Arnaud (ed.) *Dictionnaire encyclopédique de théorie et de sociologie du droit* (Paris: LGDJ [2]1993) 422–4.

[6] W. J. Waluchow *Inclusive Legal Positivism* (Oxford: Clarendon Press 1994).

nature and reason are reflected in each other and that both will support the central assumptions of Christian belief. With Ockham, however, an important and, with hindsight, crucial step back was taken. According to Ockham there is not even a rational proof of the existence of only one God. He also found it blasphemous to assume that God(s) might not have created a world different from ours or might still do so. Epistemologically this implied that nature could no longer be conceived as reflecting the unity of God's reason as understandable for man. On the contrary, the very knowledge of man about nature is in principle restricted by human reason's severe limits in comparison to the infinite wisdom of God. Human knowledge is just an attempt to construct greater coherence in what we can perceive by our senses. The happy consequence of Ockham's approach was a nominalist understanding of science. Universals are simply tools for connecting individual sensory experiences, they do not mirror reality as it is for God who made it into what it is. Consequently, a scientific theory may contradict biblical accounts of nature, without being accused of contradicting religious truth. This split between religion and science grew ever wider over the centuries, until Charles Darwin's theory of evolution seemed to make it a forever irreparable one. That it might potentially do so, was already clearly seen by John Stuart Mill shortly after Darwin published his "On the Origin of Species".

In his latest essay on religion, "Theism",[7] Mill argued that the assumption of the existence of God was not unthinkable and even plausible. However, it could not be the perfect being as traditionally assumed. I will not reproduce Mill's argumentation here, which is simple and clear, but simply render his conclusion. Mill conceded the possibility of

> "a being of great but limited power, how or by what limited we cannot even conjecture; of great, and perhaps unlimited intelligence, but perhaps also more narrowly limited than his power; who desires and pays some regard to the happiness of his creatures, but who seems to have other motives of action which he cares more for, and who can hardly be supposed to have created the universe for that purpose alone."

However, this not so close and human God was just a possibility according to Mill. Mill also held it possible that human existence and development might be explained completely without any assumption of a teleological kind, depending on whether Darwin's theory, that suggested a purely causal explanation of man's existence, would become better confirmed. Since this has been very much the case now, Mill would have to conclude, if he still lived,

[7] J. S. Mill *Three Essays on Religion* (Amherst: Prometheus Books 1998) 112–28.

that the assumption of a providential God is in conflict with our empirical knowledge indeed. Is this conclusion inescapable?

4 Is God Dead after Darwin?

My defence of the possibility of God's existence does not consist of the well-known trick of including evolution as something that was part of God's act of creation and foreseen by him in its course. That is totally unconvincing as long as no plausible answer is given to the question why God had to use such an erratic and cumbersome way to have man created. However, there is certainly an interesting, but rarely asked question concerning natural evolution: how can Darwinists explain the development of Darwinist theory in terms of that very same theory?

The Darwinist theory may be described as nature observing itself through the means of human bodies as developed in the course of evolution. The theory of natural evolution may appear to be at least potentially self-invalidating to the extent that human knowledge of evolution empowers man to escape from its laws and use scientific knowledge according to criteria that are not reducible to man's selfish genes, but to e.g. altruist motives that go far beyond natural, family related altruism. Think, for instance, of promoting human rights and sending troops to put an end to local wars for no other reasons than human compassion. Such actions cannot be explained in terms of enhancing the chance of genetic reproduction of the helpers. One possibility would be prestige at home. However, failure of such expeditions may very well ruin one's reputation and position of power, as someone like Tony Blair, for instance, must realise by now. Extension of altruism beyond one's family-members to people one has no personal interest in common with, would seem to be totally irrational in terms of theory of evolution.

Evolutionists like Richard Dawkins[8] have suggested that evolutionary processes through intelligence is different from natural evolution only to the extent that bits of information or "memes" take the place of the human beings (and their selfish genes) whose brains process memes. Some memes are better survivors than others, they say, without really explaining why that would be so. Certainly, memes like peace, human rights and justice may be strong memes, because they appeal to pleasant feelings. However, historically seen, so were all sorts of memes that were associated with the superiority of one's own group, honour, struggle and aggression, whereas the latter are clearly more directly related to having reproductive success. Moreover,

[8] R. Dawkins *The Selfish Gene* (Oxford: Oxford U. P. 1989).

if society were institutionalised in a way that it is in the longer term interest of everybody's survival, that interest would certainly not be a genetic one. It would imply a consideration of the social-economically weaker classes that reduces the reproductive chances of higher classes. It would seem that the ideals of western societies at least tend towards escaping from the blind struggle for survival of selfish genes.

It is typical of the three great monotheist religions that the values they emphasise are universal peace and solidarity, although Judaism is certainly not free of ethnic prejudice, whereas both the Bible and the Koran are full of texts in which the unbelievers are threatened with God's wrath. Monotheistic religions may seem inherently aggressive because if God is all good, evil must be caused by non-believers that believers, if they wish to earn God's blessings, must try to punish and reform. It is doubtful therefore to assume that monotheist religions themselves were already an instantiation of memes taking over from the ultimate causes of human evolution.

Anyhow, if it is readily understandable that evolution produces increasing rationality up to the point of becoming intelligently self-reflective, such self-reflection would also seem to represent a dialectical transformation of natural evolution into an evolution of a spiritual kind. God is not dead after Darwin, but He as imagined traditionally, is ourselves in an alienated form. This may suggest that Marxism is not the dead horse one would hope it to be. However, de-alienating religion does not imply materialising man, quite the contrary, it implies spiritualising nature or at least human nature.

5 *Theological Paradoxes*

The three attributes of God's perfection, being all-good, omniscient and almighty, have set the stage for the question whether God can really have all these three properties at the same time. The problem is how God can have created man knowing that man is going to be evil. If almighty he must either have created evil himself and cannot be all-good, or, if someone else did it, he is not almighty, as he did not interfere at its creation or put an end to evil after it was created. Can this conclusion be avoided? Two possibilities appear. If God created evil himself or tolerates its existence, he may have done so because evil eventually serves a higher purpose. However, what is that higher goal and why, being almighty, would God not be able to realise that purpose without evil as a means? The second possibility is that he did not create evil himself, but that it is produced by man who renounces belief in God and the good goals set by God for man. This explanation cannot ex-

plain natural evil, evil that is not caused by man but by non-human nature. The Bible may suggest that God uses nature to punish man, but generally speaking there seems to be no correlation between lack of faith and liability to natural disasters or illness. However, even if we restrict ourselves to moral evil, the question remains why God is supposed to have created man in his image, but with a proneness to evil.

Theodicee, the question whether God can be just, is the essence of the paradoxes of monotheism. All other paradoxes can be reduced to it. The best known paradox concerning God's being almighty is also the most innocent one. If God were almighty, the argument goes, he would not be able to create a stone that he cannot lift himself. But if so, he cannot be almighty. This "paradox", however, is already based on a contradiction, because it assumes that a lack of power can also be a form of power. Nevertheless, this "paradox" may remind readers of a famous legal theoretical paradox, to wit the paradox of sovereignty: if a sovereign can make any law whatsoever, can he also make a law that limits his own sovereignty? This legal paradox, however, is not already based on a contradictory concept of sovereignty. It indicates rather that the concept of sovereignty as such is incoherent.

There are three more theological paradoxes that are not trivial and, moreover, closely related to theodicee. The social function of monotheism is the promise of eternal happiness for the good guys and girls and eternal damnation for the bad ones. God's being eternal and omniscient guarantees that there is no escape, not even after death, from punishment. However, eternity and omniscience are paradoxical concepts. Eternity presupposes an uncreated Creator. If God were eternal, he must have existed before he created anything temporal, temporal entities being those ones that are subject to change. However, there then must have been a moment before anything temporal was created and God himself must have gone from a moment in which he was uncreative to a moment in which he was creative. Creation, if we may believe the Bible, was quite an effort indeed, since God needed a rest at the seventh day. The only possible way out of this paradox is to assume that God is as eternal as his creation. It does not imply, of course, that man is eternal, nor does it imply that man's limited existence on earth is not a consequence of God's punishment for original sin. However, if at least man's existence is due to an act of creation by God, why has he created him as prone to evil?

Another theological paradox also leads back to theodicee. It pertains to the relationship between God's intelligence and his will, a problem that was central in both medieval and modern philosophy until the eighteenth cen-

tury (intellectualism versus voluntarism). If good and evil exist independently of God's will, he cannot be almighty. If, in contrast, he were almighty, he might exchange the present labels of good and evil. In that case, however, he cannot be good in an objective sense, since it is left to his liking how he determines the labels. The relation with theodicee is apparent: if God were almighty, he must have created good and evil himself.

Another paradox is that of determinism. It is concerned with the relation between human freedom and God's being almighty and omniscient. If God were omniscient he knows in advance who will sin and who will be saved eventually. It is this paradox that torments the Calvinist. If God knows already, it seems pointless to make any moral effort, since the result of it has been fixed already. If man were created free, it should be an open question even for God who will be saved and who won't. Another paradox is that omniscience makes intervention by God in his creation superfluous. If he nevertheless does so, it can be explained as an imperfection in God's creation. If he were really omniscient and almighty, he might have created the world more economically, dispensing with the need for his later intervention.

6 *Theology of Original Sin*

Is there a way out of these paradoxes? A way out will at least require that (a) the Creator is not almighty or has a good reason not to behave as such and (b) that evil must have a necessary function to eventually save man. I will attempt to find a way out for God via a reinterpretation of the biblical story of original sin. We have already assumed that God is not almighty. The almightiness ascribed to God in the Bible has probably not been meant in a literal sense, but in the same way that kings were called "almighty ", in a relative sense that is. God being omniscient, moreover, does not necessarily imply that God knows whatever is going to happen, but that he knows whatever has happened.

Another attribute of God, according to the Bible, is his love for his creation. Love for man, created in his own image, cannot materialise, however, if it is not accepted as such. Accepting love does not consist in enjoying an advantage of some kind. It is not a slavish kind of love, like the love of a dog for any master as long as he feeds him. The dependence of God's love on its acceptance by man, does not imply that he is imperfect, as long as man in general or, at least, one man loves God indeed. At the day of atonement, God will only save those who truly love him. However, he cannot know in advance who will do so or not. God being almighty can mean that he dictates

the rules of the game, but not its outcome. He is just the "God of creation" and his omniscience can mean no more than that nobody can escape from his judgement.

God is active at the beginning and at the end of the life of humanity. How about his influence in between, that the Bible clearly ascribes to him? Here he appears as "God of Wrath" or "God of Mercy". As God of Wrath he may be seen as punishing in advance of atonement day, trying to save souls who are willing to repent. "God of Wrath" is just a manifestation of the "God of Mercy", who can, if necessary, induce regrets by punishment. Regret, after all, is manifested by amendment and amendment is an act of love that God is after.

Even natural evil can, to some extent at least, be seen as a way to allow acts of human love. By trying to prevent or repair the damage caused by natural disaster, man demonstrates love of others and through it, love of God. However, as stated already, it does not explain differential exposure to natural disaster. It could not be otherwise, however, since if natural disaster were distributed only by way of punishment, it would suggest that God is after good behaviour under threat and not because of regret.

Original sin can also be understood within this framework, It can be admitted as intended by God indeed. It is not clear for Adam and Eve that he created them out of love. He created them in his image, but clearly not as intelligent and powerful as he is himself. The prohibition of eating from the tree of knowledge, which God pretended to have imposed to protect man, could therefore also be explained by Adam and Eve as a proof of God not truly loving them because he did not wish to share his knowledge and power, as the devil taking the disguise of a snake suggested to Eve. Nevertheless, Eve had no reason to test God's intentions, since she and Adam lived in paradise. She had no need of power and knowledge equal to God, because life was perfect in paradise. What more proof than living in paradise did she need of the fact that God loved her and Adam? The desire to share God's knowledge was a desire for power over God that is equal to the power of God over man (*Genesis* 3:4–5). It expresses distrust without any serious justification for it. The only knowledge that Adam and Eve gain from eating from the tree is knowledge about themselves, to wit, that they are sinners and that they have lost their innocence. The effect of original sin is, however, that Adam and Eve will henceforward be truly free in their decision to love God or not, and that is what God may have been aiming at to begin with when he created the tree of knowledge. Adam and Eve are punished for violating God's prohibition by being sent out of paradise, becoming mortal and having to work

in the sweat of their brows. Such punishment, however, can be explained as a test of their sincere willingness to do penance by loving God notwithstanding the hardships they are now going to be confronted with. The tree of knowledge drama was staged by God, but with a good purpose, to wit, making true love of God possible because he made it clear through it that he is as dependent on man for being loved as man is dependent on love of God for man.

That God was not concerned about Adam's and Eve's personal guilt, is apparent from the fact that he made human sinfulness hereditary. Obviously Cain and Abel were not responsible for the sins of their parents. However, proneness to sin, as Cain readily demonstrated, is a way of reminding man of original sin and his need for God's love and forgiveness. God appears as the "God of Mercy", for those who truly love him. His ultimate demonstration of this is his incarnation in Jesus and his (self)crucifixion taking over the guilt for human sinfulness. A radical interpretation of the crucifixion is seeing it as standing in a dialectical relationship to original sin. As Adam and Eve tried to become the equal of God when they ate from the tree of knowledge, God became the equal of man by incarnating himself in his son Jesus. It is only through the crucifixion that the scales truly come into balance, God doing penance for his manipulating man out of paradise. Only after the crucifixion can God and man love each other on a truly equal basis. However, an implication of such equality and expression of trust in religious man, is by implication that God also makes his powers available to man on his way to salvation. Exploring God's knowledge now becomes a blessing for religious man instead of a curse as in original sin. Since crucifixion religious man knows that he can work his way out of misery and suffering as God, who no longer hides from man, supports his efforts in doing so. At the same time, however, God takes a terrible risk, since he has no guarantee that his knowledge and power will not be abused and used to frustrate his quest for human love.

In our times man has not only eaten abundantly from God's tree of knowledge, but he is also busy studying the functioning of the tree of life. He is coming closer and closer to becoming God's equal in knowledge and power. It is no coincidence that notably the Roman Catholic Church reacts so hysterically to the increase in knowledge and power of modern science as transgression of what is supposedly reserved for God. The Church sees such knowledge and power as repeating original sin, how ever beneficial these explorations in God's domain may be for mankind.

A possible interpretation of our attempt to make sense out of Christian belief is that it is a modern form of Manichaeism or Gnosticism. They can be understood as attempts to save Christian religion from the paradox of theodicee: God has been imprisoned by Satan, a fallen archangel, making it impossible or very hard to get into contact with God. However, this raises the question why Satan, being an archangel, came to fall? Why did God not know about it and prevent it? It must be the case that it was God's own plan to ask Satan to take the form of a snake and seduce Eve to eat from the tree of knowledge (*Apocalypse* 20:2). Satan therefore was a victim of God's staging original sin as much as man is. Satan realises that God orders him to make man fall. It makes Satan lose his trust in God. He obeys God's order, but he does so having decided to become God's enemy, not understanding why God wishes all that evil. In fact, does God know the difference between good and evil at all? He is determined to persuade man to no longer believe in God, but to pursue his own goals and to rely solely on his own powers. However, without realising, Satan still acts as planned by God by challenging man, who has to choose between God and Satan, since different men have different goals and interests once they no longer identify with God's commands. Satan forces man to choose between his own selfish interests and God's command of brotherly love, thus allowing God to discriminate between true and untrue believers.

For the true believer evil as such thus becomes recognisable as egoism and also as an opportunity to testify of his belief. Satan tries to frustrate God's plan as the - in his perception - treacherous Saviour. Satan and Jesus fulfil complementary roles. Satan is instrumental in the creation of evil, Jesus is the one who - according to the Bible - after terrible struggles with Satan, demonstrates that Satan can be overcome. However, believing to be God's son, Jesus counts on God's interference when being crucified, proving his claim that he is his son. Jesus himself then seems to renounce belief when nothing happens: "O my God, why have you left me?" (*Marcus* 15:34). According to Gnostic views, Jesus himself became a victim of Satan at the moment of his crucifixion. It was Satan who had made him falsely believe he was to appear as the invulnerable son of God when exposed to crucifixion. And why should Jesus not think so after demonstrating Godlike powers performing such astonishing miracles that also became highly suspect on hindsight, assuming that Jesus was just an enlightened mortal. And Jesus had clearly not been able to definitely triumph over Satan. Even though Jesus had shown that man can overcome evil, his disciples were suggesting that the struggle against evil had now been decided definitely in favour of God

for mankind as a whole, as if that would not still require a major struggle within each individual just as Jesus had had to fight.

In agreement with our interpretation of Christian religion by way of rational reconstruction, the Gnostic view implies that God can only triumph if supported by man. In such a view Creation appears as God's self-creation as an ongoing process, the success of which is far from guaranteed. Connected to the criticism of Darwinism presented above, it figures as a process in which creation changes from a radically contingent process into a process of self-observation and self-control. In such an interpretation, however, God as existing separately from mankind becomes a superfluous hypothesis. A theological reflection on history, science and philosophy suggests that God, if existing, is trying to realise himself as an intelligent being in mankind. According to Hegel, however, this makes religion into an alienated form of self-observation of Spirit, whereas Marx would call such servile self-glorification "opium of the people", suggesting that it was imposed from above rather than something self-developed in the evolution of thinking in man. Whereas the Hegelian view is rationalistic, the Marxist view is too mechanistic to be credible. A from the point of view of natural religion more adequate view, it seems to me, had already been developed by the ancient Stoic philosophers, according to whom God and nature are identical, but man is that part of nature that is closest to God as the intelligent, self-reflecting cause of the universe. The importance of the Stoic philosophers as the forefathers of humanist modernity has, in my view, not been appreciated sufficiently.

7 *Guilty as Charged?*

The proposed theological interpretation solves the problem of Theodicee, because it explains why God had to create evil as a condition to allow man to develop into his equal. Here we encounter a remarkable analogy with the solution of the paradox of sovereignty. Sovereignty, I argued, can only be a limited one from a legal theoretical point of view. God, supposedly almighty, can only be conceived as possible if his power is limited and dependent on man's acceptance of God.

If so, the question can be raised whether it makes any sense to distinguish God from mankind at all. Why would we care about a God who has submitted us to such an ordeal out of desire for love? We may feel compassion with God, who wishes to be loved by man so much and blame his intolerable loneliness before creation for creating us. However, such compassion will not make our task to try and make mankind survive any easier.

Giving up religious belief in God as something existing independently of us will save us the struggle with aggressive theological dogmatism and it will help people to trust in themselves rather than in some nebulous force in the sky. Moreover, the removal of the concept of heaven as God's habitat can create a sense of metaphysical dignity of mankind as involved in a work of potentially cosmic-evolutionary importance, even though it may only be of a temporary nature. It is a work that, from a human perspective, is as important as the one ascribed to God in Genesis. In fact, there was no reason for him to rest after six days, as the result was still far from good from a human perspective.

So is God guilty as charged? In principle he is. Although he may have created even evil out of love of man, such love sprang from an egoistic motive, to wit, to be loved by man in return. Considering the terrible loneliness of his being perfect to himself, God's acquittal can be accepted at best as an act of mercy. Anyway, the accounts between God and man have been settled, when God became man. If God ever existed independently of mankind, there is no longer any need for him since he became man. To that extent Nietzsche was right to declare God dead after Darwin. But Darwin did not include human intelligence into evolution, whereas Nietzsche, being a late romantic at heart, needlessly required Superman to succeed both God and man, instead of more modestly following Spinoza's concept of nature as linking God and man as an at least partial identity.

The Church will certainly not be grateful for our saving God from the paradoxes connected to Theodicee since the very same exercise suggests that belief in God is superfluous, and can be exchanged for a more straightforward love of fellow men. I am pretty sure that religious people will find my analysis slightly or even extremely blasphemous. However, they can rest assured that non-believers can be as vexed as they are by the question why there is something rather than nothing and what the meaning of man is in all of this. Non-believers just do not pretend to have an answer to that question, although it seems to me that the Stoic view is the most adequate in terms of natural religion. To keep on speaking terms with believers, however, I would like to suggest that by giving up religious metaphysics, the metaphysical status of God becomes an empirically testable hypothesis. If unbelieving mankind through science and enlightenment will succeed in surviving and improving, then God and religion is superfluous indeed. However, if mankind does not improve to survive, a religious person might accuse us of having provoked the end of mankind through unbelief. Nevertheless, if religious belief were not to make any substantial moral difference from practical

humanism, as I think it does, would the end of mankind then not just be due to God's jealousy, assuming he exists? I would like to finish my venture into law and theology by submitting that such a childish view of God is not a very respectful one and not worthwhile keeping even if it were true.

Some Cautionary Observations with Regard to the Judicial Evaluation of "Scientific Evidence"

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Professor Csaba Varga has won international prestige in various areas related to the theory and philosophy of law. One of these areas concerns the role played by evidence in judicial proceedings[1]. For this reason, I would like to participate in this book, which pays tribute to the work of Professor Varga, with a modest contribution related to the theory of the establishment of facts in legal proceedings (focussing mainly on criminal trials).

1 Clarifications and Explanations

1.1 As is well known, the gathering, submission and consideration of evidence follows a series of different stages (determining which facts require proof, the relevance of evidence presented, the application of rules regarding the exclusion and evaluation of evidence).[2] The evaluation of evidence is, consequently, the last in this series of stages and it is this aspect that interests me especially. However, as the kinds of evidence to be evaluated are of a varied nature, I will limit myself exclusively to "scientific evidence". What then do we understand by the term "scientific evidence"?

This term requires some explanation. Scientific knowledge in general has expanded greatly in a wide variety of areas, an expansion that has also encompassed judicial proceedings. However, resorting to scientific notions

[1] As an example, see Cs. Varga *Theory of the Judicial Process: the Establishment of Facts* (Budapest: Akadémiai 1995)

[2] Cf. J. Wróblewski "La prueba jurídica: axiología, lógica y argumentación" in *Sentido y hecho en el derecho* (México: Fontamara 2001).

or models in the context of judicial argumentation can be considered from two distinct points of view.[3]

The first, very prevalent of late, refers to tendencies which are orientated towards the development of models of factual argumentation, based on schemas of a scientific character (e.g. the rules and theorems for calculating statistical probability). The second point of view refers to the direct use of methodologies and notions provided by science as a means for testing evidence which has an effect on the rulings made by a court (e.g. DNA testing, or that of a series of chemical, physical or biological analyses which are decisive in the case of determining the damage caused by medicines, or by exposure to toxic or carcinogenic substances). It is with regard to this second point of view that we can speak of "scientific evidence".

1.2 Why is it of interest to concern ourselves with the evaluation of "scientific evidence"? Because it is often the case that there is no proper awareness amongst judges of the problems that such evidence can present and this for at least two reasons.[4]

The first of these derives from procedural rules themselves which, in some countries (such as Spain), are centred, on one hand, on the way in which this form of evidence is produced and, on the other, on its evaluation by means of general formulae (such as *sana crítica* (healthy criticism), *libre convencimiento* (judicial discretion), *prudente arbitrio* (prudent judgement) etc.) to which the judicial system usually adds various general criteria (an expert's qualifications, clarity of exposition, absence of contradictions etc.) but which are not specific to scientific knowledge. And all this contributes to the idea, which is very widespread amongst judges that, by its own criteria, science determines which knowledge should be considered valid and accepted unquestionably.

The second reason relates to the process of submitting and considering evidence itself. Usually, the presentation of scientific knowledge in legal proceedings is made through the declarations of experts (whether nominated by the parties involved or by the judge); consequently, this leads to such declarations being valued by the judge in the light of traditional ways of thinking by which the testimony of witnesses, and also of the accused,[5] has been eval-

[3] Cf. P. Gianniti *La valutazione della prova penale* (Torino: Utet 2005), 11–2.

[4] Cf. J. Hernández García "Conocimiento científico y decisión judicial. ¿Cómo accede la ciencia al proceso y cómo puede valorarse por los jueces?" *Jueces para la Democracia* 54 (2005), 73–4.

[5] By way of a famous example, there is Judge decision, in the case *Wells v. Ortho Pharma-*

uated. The principle of "immediacy" is also invoked to limit any review of the evaluation of expert evidence as much in the second instance (if there is no re-examination of the evidence) as in the case of setting aside a verdict.[6]

This ignores the fact that an expert's personal credibility is not equivalent to his or her credibility in the scientific context (which is determined independently of the witness's personal qualities and is only based on whether his or her report conforms to the established body of knowledge accepted by the community of specialists). Consequently, what matters in the evaluation of expert evidence is not a person's facial expression or gestures but the certainty of his or her conclusions,[7] which cannot be based, as is the testimony, on the authenticity and deemed credibility of personal recollection, but rather on its possible confutation according to strictly scientific terms.[8]

The combination of these two factors explains the absence, under normal circumstances, of questions that should be asked, such as the following:[9] what kind of knowledge, presumably "scientific", is really endowed with scientific validity? How can reliability be attributed to the opinions expressed by experts in legal proceedings? What basic criteria must the judge adopt when the evaluation of evidence requires scientific knowledge? The key question is the second of these three since the first, that of the reliability, which is attributed to the testimony of experts, will depend on the type of scientific knowledge involved, whilst in the case of the third ques-

ceutical Corporation Mrvin Shoob's verdict (cited by S. Jasanoff *Science at the Bar: Law, Science, and Technology in America* [Boston: Twentieth Century Fund, Inc. 1995]) concerning a claim for more than five million dollars because a spermicide manufactured by the pharmaceutical company had caused serious malformations to the daughter of Mrs. Wells. The judge, who granted the compensation requested, valued positively the testimony of doctor Buehler (hired by Wells) because his presentation was both detailed and consistent throughout, and because his behaviour as a witness was excellent. On the other hand, he did not give credit to a prominent expert from the pharmaceutical corporation because there was a discrepancy between the apparent certainty shown when he was interrogated by the company's own lawyer and the more uncertain tone to his responses to the questions put the contrary party, and because he appeared inconsiderate towards the plaintiff's lawyers and expressed his conclusions in absolute terms.

[6] As is the doctrine in the Spanish Supreme Court, and whose main exponent and defender is the professor and magistrate of this same Court, E. Bacigalupo Zapater "Presumption of innocence 'in dubio pro reo' and resource of cassation" *Annual of Penal Right and Penal Sciences* 2 (1988), 374–6; also "La impugnación de los hechos probados en el recurso de casación penal. Reflexiones sobre un decenio de aplicación del art." *Estudios de Jurisprudencia* 1 (1992), 52–3.

[7] F. Zubiri de Salinas "¿Qué es la sana crítica? La valoración judicial del dictamen del experto" *Jueces para la Democracia* 50 (2004), 60.

[8] Gianniti (n. 3), 203.

[9] Hernández (n. 4), 73.

tion, the criteria which a judge must employ when evaluating evidence will be in accordance with the reliability that should rationally be credited to the testimony made by experts.

2 *The Involvement of Science in Legal Proceedings*

2.1 Science (or what in any given period has been taken to mean "science") has always played a part in legal proceedings. However, this presence has become more prevalent in recent times for at least two reasons.[10] On the one hand, many areas of knowledge that were, in the past, valued according to the light of common sense, have now entered the domain of scientific knowledge. On the other, the extent to which science and technology have permeated everyday life has given rise to problems directly linked to the application of science and, for this reason, which require procedures that must of necessity be scientific.

All of this makes the traditional distancing between "science" and "legal process" untenable, as well as the obsolete vision of science which was made possible by this distancing. Nevertheless, this vision has become so widespread amongst judges that it has resulted in a partial understanding which takes no account of new areas of knowledge, in addition to the so-called "hard sciences", which have now acquired scientific status. Furthermore, it is based on an idealized concept of science, which is seen as a symbol of certainty and absolute truth.

2.2 Taking advantage of this lack of understanding of scientific knowledge on the part of judges, and its consequent "mythification", scientific evidence has become (especially in the United States) a lucrative business for laboratories and experts, who use the press to advertise their services, which are offered in return for a considerable fee. In this way, a market for scientific evidence has been created in which it is not easy to distinguish evidence with real scientific validity from the junk science offered by charlatans and pseudo-experts.

For this very reason, within the field of jurisprudence in the United States (which in this respect serves as a model for Europe), a campaign has been initiated to introduce a measure of rationality amongst so much

[10] M. Taruffo "Conocimiento científico y estándares de prueba judicial" *Jueces para la Democracia* 52 (2005), 63–4.

confusion.[11] As a first step, an expert's professional qualifications are taken as a basic criterion (the higher the qualifications, the greater credibility attached to any testimony). However, this does not take into account the fact that an expert usually testifies in favour of whoever pays him or her. An approach of "general acceptance" has been taken as a second criterion, by which more credit is given to testimonies based on theories or methodologies which are more generally accepted by scientists in that speciality. This measure has been criticized for its conservative nature, given that it is possible to have theories and scientific techniques which lack general acceptance because they are new and original. At present, the prevailing approach is that inspired by the well-known Supreme Court ruling known as the "Daubert case" (*Daubert v. Merrel Dow Pharmaceuticals, Inc.*, a claim for the damages suffered by a child whose mother took a given pharmaceutical product during her pregnancy). This ruling established, first, two general premises: (a) that there are no certainties in science and that a scientist's work is to look for new, provisional theories to explain phenomena in the best way possible; (b) that scientific validity for a given purpose is not necessarily valid for any other purposes which might be related to the first. And, in continuation, the Court established the following requirements for the scientific validity of evidence: (a) the verifiability and the refutability of the theory on which any evidence is founded; (b) the determination of the percentage of error inherent in the technique used, (c) the existence of monitoring by other experts through peer review; (d) the existence of general agreement amongst scientists in the given specialist area as to the validity of the theory and/or technique employed.

The most significant aspect of the Daubert "doctrine" is, in my opinion, contained in premise (b) and in principles (a) and (b). For this reason, they deserve further comment.

According to the premise in question, scientific validity attributed in a given instance does not necessarily imply validity in other instances. For example, it is true that Newtonian mechanical physics has been seriously challenged by later theories (such as quantum mechanics and the theory of relativity), which serve to describe the behaviour of the physical world based on scales of magnitude and speed, for which Newton's mechanics do not serve. Nevertheless, Newton's laws still function exceptionally well today for the everyday world and they are extraordinarily useful for almost all engineering

[11] Cf. M. Taruffo "Le prove scientifiche nella recente esperienza statunitense" *Riv. Trim. D. & Proc. Civile* 1 (1996), 232–8.

tasks (from space-flight to the design of mechanical clocks), such that nobody today would think of using quantum mechanics to design a bridge.[12]

So, the suitability of a theory for a given purpose is subject to a condition: that the theory can be tested and passes tests of refutability. It is possible that the Supreme Court took into account certain court cases that resulted in conviction, but which had been based on barely established hypotheses, or on well-established hypotheses that had not subjected to tests of refutability.[13] Whatever the truth, the Daubert ruling reminds us, following Hempel, that the affirmations which go to make up a scientific explanation should be empirically verifiable, and in addition, following Popper, the criterion for the scientific status of a theory is its refutability, or confutability or verifiability.Another principle established by the Supreme Court is the need to determine the rate of error (known or potential) for the technique employed. No technique is perfect; for that reason the analysis of a technique should offer information about its rate of error. For example, medical practice demonstrates the need to declare the rate of error since the percentage of errors in medical diagnoses (drawing on the results of autopsies) varies between 36% and 60%.[14] A technique with an unknown rate of error must be a technique that has not been proven appropriately and, for that reason, any report based on such a technique should not be admitted. Without strict controls we cannot speak of "science", although a general tendency exists amongst experts to underestimate their own errors, in addition to not calculating any potential errors.

These requirements can be accepted or criticized for being generalised, but they alert judges to the necessity of validating the quality of scientific evidence used in legal proceedings because, as stated by Judge Weinstein and contained in the Daubert sentence, evidence presented by experts can be important but also misleading because of the difficulty in evaluating it. For this reason a judge must exercise much stricter control over experts than over normal witnesses.

3 The Credibility and Reliability of Experts

In contrast to the previous problem, which is in some ways external to the legal process (that of the scientific validity of the knowledge used by experts

[12] Cf. F. Stella *Giustizia e modernità. La protezione dell'innocente e la tutela delle vittime* (Milano: Giufrè 2002), 341–3.

[13] There is a brief reference to these sentences in ibid. 338.

[14] There are more examples in ibid. 343–6.

in their reports), we enter into another problematic area which is internal to the legal process (that of the credibility and reliability of experts). In fact, this second problem is connected with the first in that the reliability of an expert depends, ultimately, on the reliability of his or her report. However, it is worth considering the institutional function of experts briefly (whether they are acting on behalf of the parties involved or called for by the judge), because this aspect has some bearing on the topic that we are dealing with.

3.1 When experts are nominated by the parties involved, it is with the intention of availing themselves of a source of scientific knowledge that will prove helpful in securing the desired verdict. Given that it is the parties themselves who pay for such experts, they can expect that the testimony will tend to favour their own interests. It is no coincidence then that there exists (mainly in United States) a veritable market of experts who offer their professional services. Forming part of a market which is at the disposition of those who pay best implies a willingness on the part of experts to present information before the judge which is tailored to suit the needs of the client, rather than conforming to what should be the main function of an expert witness, namely to assist in the testing of evidence. Under these conditions, the technical and scientific notions used can lack objectivity. This situation is accentuated in cases where there is considerable complexity and when knowledge of an uncertain nature is called into play. On top of all this, it is not uncommon for experts themselves to lie about their own fitness to testify, or about their academic qualifications, or about any research they claim to have carried out, all of which impedes a judge in his or her evaluation of an expert's reliability.

Corrupt experts may not always be brazen in what they do and there are subtler ways in which to act with partiality, such as "stretching" the available data, excluding data contrary to the client's interests, mutilating scientific works which are cited, presenting as prevalent a current of thought which is in fact minority, concealing the rate of error of the hypothesis being defended, and so on.[15]

What has been said here with regard to experts can also be extended on occasions to police laboratories, a veritable factory of impressive falsehoods (such as those of Dr. Erdmann, a pathologist who for ten years carried out

[15] F. Centonze "Scienza 'spazzatura' e scienza 'corrotta' nelle attestazioni e valutazioni dei consulenti tecnici nel processo penale" *Riv. It. D. & Proc. Penale* 4 (2001), 1238.

false autopsies, always confirming the accusatory hypothesis, and contributing decisively to the passing of twenty death sentences).[16]

In pointing out the possible, or presumable, partiality of experts hired by the interested parties, it is not the intention, however, to encourage the evaluation of their reports in terms of the deponent's partiality/impartiality (as, unfortunately is usually the case) but to pay more critical attention to the content of the testimony.

3.2 The unease felt by judges as a result of their ignorance of scientific knowledge, and the increasing need to call upon experts, can lead them to take refuge in presumption: if the public prosecutor is impartial, any expert called upon to offer his or her or services on behalf of the prosecution will be impartial too, therefore it is necessary to accept what is said in his or her report. But this implies a bureaucratic conception of the judiciary.

There are several threads which intertwine in forming this bureaucratic conception.[17] Here we will consider just one of them, that which associates the function, as much of the judge as of the public prosecutor, with carrying out "reasons of State".[18] That is to say, both judge and prosecutor alike are characterized by the same word: "authority". Thus the judge can confer his trust in the expert nominated by the public prosecution for being an auxiliary to an official body frequently considered to be impartial, and even to have "judicial authority" (and in this sense, one is left with the impression that there is one single entity facing the accused, that of judicial authority). What is lost from sight here is that a lawsuit involves the active participation of all parties (one of whom is the public prosecutor); this helps to explain the quite frequent error of identifying the public prosecutor as a "public party' in the procedure, a *sui generis* party within the system of Justice (as if the counsel for the prosecution was an impartial investigator of evidence, as much in favour of the accused as against)[19] In this way, the public prosecutor enjoys a presumption of rightness (as would be appropriate to a judicial authority),

[16] P. C. Gianelli "The Abuse of Scientific Evidence in Criminal Cases: the Need for Independent Laboratories" *Virginia J. Social Policy & L.* 4 (1997), 439ff. For this reason, there should be a review of the tendency of many courts to place greater value on testimonies produced by official bodies because these do have no direct interest in adopting one position or another (M. López Muñiz *La prueba pericial. Guía Práctica y Jurisprudencia* (Madrid: Colex 1995), 271).

[17] M. Taruffo "Il modello burocratico di amministrazione della giustizia" *D&D* 4 (1993), 250ff.

[18] Stella (n. 12), 32–5.

[19] Centonze (n. 15), 1251–2.

and paradoxically, achieves the given status of a promoter of justice whereas in fact, he or she carries out a specifically one-sided function.

This apparently public and impartial character endows the function of the public prosecution with greater legal "status". Furthermore, through concomitance this status is extended to any expert acting on behalf of the public prosecution. In this way, experts giving testimony for the prosecution, despite being experts for one party only (that of the prosecution), also come to enjoy a kind of status equivalent to that of independent experts (those called by the judge). As a consequence, there exists the risk that judges will blindly accept expert testimony presented by the public prosecution, forgetting that some experts called for the prosecution cannot help adopting the accusatory psychology inevitably linked to the institutional role of the public prosecution.[20]

Neither should we discount the idea that corruption also affects experts acting for the public prosecution service: when the same technical advisers are appointed on a regular basis, there is always the risk that the prospect of a stable, economic relationship and repeated collaboration with the public prosecution service can corrupt an expert's seriousness and objectivity.[21]

3.3 Finally, there are the experts nominated by the judge. Here it is necessary to make a brief aside in order to comment on two different procedural practices (those of "common law" and "civil law"). In the continental European legal systems, it usually corresponds to the judge to determine the need for an expert to provide testimony related to technical or scientific notions that are important for making a ruling or judgement. And, whilst also present in "common law" (e.g. Rule 706 of the Federal Rules of Evidence of the United States) judges have the authority to name an "expert witness" *ex officio*. However it is a power that is rarely exercised.[22] Leaving aside this difference, we must wonder if a judge is right to trust, on principle, the prosecution experts' reports.

The reasons that should prompt a judge to be critical with the reports and testimonies made by experts for the prosecution service (which, in fact, they are also a part of), would seem to disappear when it is precisely the

[20] Ibid. 1253–4.

[21] By way of illustration, there is the case of a prosecution expert who produced 359 reports in 9 years, reports which were contradicted by a very wide range of scientific documentation. It is not known, therefore, whether this contradiction was malicious or due to utter incompetence (ibid. 1237–8).

[22] M. Taruffo "Considerazioni su scienza e processo civile" in G. Condé – G. Ponzanelli (eds.) *Scienza e diritto nel prisma del diritto comparato* (Torino: Giappichelli 2004), 486–9.

judge (who really is impartial) who nominates experts *ex officio*. If, in addition to this, we consider that it would be paradoxical for a judge to value, *ex post*, given technical-scientific knowledge that he or she did not possess *ex ante* (which is precisely the reason for appointing an expert),[23] we might wonder if it is legitimate for a judge to accept the conclusions of experts that he or she has named blindly (and even more so if the appointment is made at random).[24] The answer must be wholly in the negative, because if a judge automatically submits to an expert's authority, he or she ends up by renouncing one of the fundamental premises of making a judgement, which is that the power of decision corresponds exclusively to the judge.[25] But this response, even if correct, does not help us very much in dealing with the problem in question. For that reason, it is worth considering some general questions related to the ways in which a judge can make use of the experts that he or she nominates.[26]

4 *Problems Faced by the Judge*

4.1 First of all, there is the judge's decision with regard to the opportuneness of whether or not to nominate an expert (assuming that the judge has the authority to do so and that this is a discretionary power). As already indicated previously (cf. 2.1) judges are in general persuaded that they are in need of expert testimony when dealing with matters of "hard sciences" (such as chemistry, physics, genetics etc.). However, on occasions they are unaware of the extension of science into the realms of the "soft sciences" and so believe that it is not necessary to call for the report of a psychologist, of a sociologist, and so on. Thus everything depends on how a judge understands the line that separates science (which he or she is ignorant of) from common sense (with which he or she is familiar); and it may happen that a judge, unconscious of his or her cultural shortcomings, does not know that the analyses used in social or human sciences diverge from the criteria of common sense, and consequently decide to do without the services of an appropriate expert.

[23] A. V. Illescas Rus *La Prueba. Pericial en la Ley 1/2000, de Enjuiciamiento Civil* (Cizur Menor: Aranzadi 2002), 433.

[24] According to the rulings of the Spanish Supreme Court, greater credibility should be given to any expert drawn by lot, given that this procedure gives greater guarantees of the expert's independence (López Muñiz, n. 16, 281).

[25] Taruffo (n. 22), 494.

[26] After M. Taruffo "La prova scientifica nel processo civile" *Riv. Trim. D. & Proc. Civ.* 4 (2005), at 1106–9.

4.2 If a judge is conscious of not possessing the necessary knowledge, a second question arises, that of selecting experts. In this respect, there are usually scant procedural norms, only requiring, for example, that experts possess a "recognised qualification" and, perhaps, show "morally irreproachable" behaviour, or even that they swear under oath to carry out their duties well and in good faith, without seeking any other end than that of revealing and pronouncing the truth.[27] But these norms do not guarantee any specific level of competence on the part of the expert, such that it is possible an expert may lack the scientific expertise that resolving the matter in hand requires.

4.3 The third question refers to the correct employment of expertise. The success of this depends on two conditions. The first is that the judge presents the expert with the pertinent and precise questions required since there is no doubt that answers are conditioned by the questions that precede them. And secondly, that the expert's report is subject to cross-examination by the interested parties, allowing them (through their experts) to review and to criticize the *de officio* expert's labours and discuss the correctness of the findings presented.

4.4 The fourth question is connected with elucidating the grounds for the sentence. It is true that in situations where such an action is obligatory, the judicial system tends to facilitate the judges' work, freeing them of the need to justify the evaluation of a *de officio* expert's advice, unless the parties have presented precise and effective criticisms of essential aspects of an expert's report (of course, a judge would be forced to explain his or her evaluation if it differed from the *de officio* expert's conclusions). It is an extremely questionable judicial tendency if a judge is not required to justify why he or she considers imprecise and ineffective any arguments presented to the *de officio* expert by an expert for the interested parties.

[27] A brief qualification is required here: there are judicial systems in which the legislator does not place experts for the different parties under oath, whilst the ex officio expert is specifically required to follow this procedure. However, I do not believe that this changes the situation very greatly, firstly because the concept of sincerity is not a determining factor with regard to expressing a scientific opinion. Secondly, because the solidness of an expert's findings is determined by their ability to stand up to scrutiny under cross-examination and not by the personal standpoint of the individual who presented them (Centonze, n. 15, 1260–61).

5 Iudex peritus peritorum

The expression *iudex peritus peritorum* is very well-known (although the judge is not an expert and, therefore, much less an "expert of experts") and which for a long time has served to attribute judges with the capacity to make a definitive evaluation, based on his or her discretional and independent conviction, of the technical and scientific notions presented by the expert and of the conclusions reached on the basis of these notions. This is not acceptable because of the way in which the judge is granted absolute freedom to evaluate the scientific opinions expressed by experts, being able to disregard and make them subordinate to other evidence presented during the court case (e.g. as has happened recently in Spain, when greater value was given to the not very conclusive recollections of a rape victim, although the DNA analysis demonstrated that the traces of semen did not belong to the accused), or, what is even more absurd, affirming, when faced with the difficulty of establishing a causal nexus between the consumption of oil mixed with aniline and the appearance of a toxic syndrome, that proof in the court is different from natural science proof because the latter belongs to the world of spiritual sciences.

There is, however, a second possible reading of *iudex peritus peritorum* which is perfectly defensible and according to which the judge is set up as the "regulator" of an expert's report, with respect to the expert's professional competence but principally and fundamentally to the methods of investigation employed, as well as to the results of cross-analysis. This is the proposition I have tried to defend in this brief contribution.

Collective Rights of Minorities and their Quality as Constituent of the State

Mihály Samu (Budapest)

1

My starting point is that this problem is a question of detail within the framework of human rights, despite the circumstance that this is considered a peculiar and unacceptable approach by international political and juridical thinking. Western explanations identify human rights with individual rights, and consider this view an axiom. It was the consequence of this conviction that after the Second World War the systems of international protection of minorities was abolished and that the various international conventions only refer to the protection of the rights of some groups owing to their underprivileged or exposed situation. These same conventions, while prohibiting discrimination and persecution, oppose on principle the laying down of the collective rights of minority groups in the belief that these community problems get solved on the basis of the assertion of individual rights.

The historic facts do not confirm the above assumption or conclusion respectively, since the legal protection of certain groups, the ensuring of their collective interests, is not asserted in a spontaneous way relying on individual rights if no special institutional system exists for the solution of their particular problems.

It is in view of this that it can be stated that human rights are not identical with individual rights, since individual rights do not include the protection of communities. In view of this, my view conclusion is that collective rights form the other side of human rights, which contain entitlements of a different nature in view of the special situation of communities.

As evidence of this conclusion I stress the following facts and interconnections:

(1) It is beyond doubt that the fundamental substance of human rights is the protection of the life, dignity, freedom, equality and property of the individual; these refer decisively to the personal fate of the individual.

(2) Some civil rights figure as individual rights, but can be exercised through common activity and occur in connection with the interests of some community, the expression of their interests. It is obvious that the rights of assembly, the right of association, the right to strike, or the freedom of the press cannot be exercised individually.

(3) In addition to the human rights which can only be exercised in common, there are some which are linked decisively to the existence of the group, the community, the ensuring of their existence, the protection of their interests. Among these the entitlement the special protection of the existence of various ethnic groups, nationalities and traditional, religious, and social communities is the most characteristic. And the basic substance of this is the ensuring of the survival of some minority, of the consciousness of its identity, the tending of its culture. These are sui generis collective rights.

(4) The international protection of human rights fixed and contains primarily the ensuring of individual rights, but some refer to groups and communities; these include the international legal prohibition of discrimination, of apartheid, or of genocide and ethnocide, and the system of penal sanctions associated, with the internal legal regulation of these matters. Democratic legal regulation also protects communities when it interdicts and prosecutes by criminal law racial discrimination or the persecution of national-ethnic minorities, their enforced assimilation, and ethnical cleaning.

(5) It can also be established that internal and international legal regulation established the protection of various groups and communities from the negative aspect: by prohibitive rules and penal sanctions. This is why the question arises whether the protection of the collective rights does not demand positive regulation? Is mere prohibition, of a negative nature, sufficient? Is not the unfolding and regulation of positive substance of the collective rights necessary? In my view, one-sidedness is apparent here, since the fixing of rules of a positive substance in connection with the assertion of collective rights for various minority groups is lacking.

It is the general a conspicuous social fact that minorities need protection (since they are in an underprivileged situation), and to insure equality the establishment and operation of institutions as well as financial support by the sate or society are necessary; the protection and survival of a minority can be ensured by institutions, economic conditions and special legal guarantees. For instance, the right of the minority to use their mother tongue

cannot be settled by a declaration or legal rule, neither by the prohibition of the violation of the assertion of these rights, but (from the positive aspect) it demands special institutions and financial guarantees: a separate educational system for teaching in the mother tongue, a network of libraries, mass communication media, and possibilities to use the mother tongue in public life, in offices, or before the courts.

In this way, collective rights the protection of the existence and survival of different communities (including minorities), the ensuring of their autonomous existence, and the possibilities and entitlement connected to their functioning. As may be seen, it is not the individuals who enjoy rights in this respect, but the community (as social, ethnical or religious minority or nationality). And one aspect is the right of this community to survival, and the other important aspect is their entitlement to participate in public life. This is to be demonstrated in the following question.

2

(1) For the understanding, exploration and regulation of the substance of collective rights their relationship to public life and power be clarified, given that the state express – in most cases even in its name – the majority, rather than any minorities.

Some recent constitutions state that the given state does not belong only to the majority nation or nations, but also to the minority nationalities (e.g. the Czechoslovak Constitution of 1968). And the Hungarian Constitution of 1989 lays down that in the Republic of Hungarian the national and ethnic minorities share in the people's power: they are state-constituent communities. (Par. 68 of the Constitution.) And we can cite from this side the Spanish, Belgian and Canadian constitutional solutions, regulations and institutions.

What does it mean that within some states the national-ethnic minorities exist as state-constituent communities?

First, it must be emphasized that in dictatorships, owing to the concentration of power, – human rights (including individual and collective rights) do not assert themselves, and consequently this problem does not even arise; usually the minorities and nationalities oppressed.

Second, in democracies the ensuring of the collective rights of minorities does not occur as a spontaneous consequence, since on the one hand, in some democracies the minority question is not solved, and on the other, the tyranny of the majority exists on the basis of the majority principle (as referred to also by John Stuart Mill). It must however be mentioned that

democracy can be characterized on the one side by the majority principle and on the other side by respect for the minority, i.e. the ensuring of the rights of the minority.

Third, the political minority existing in democracies and the ethnic-national minority are not identical categories, since the political minority can become the majority, but in general the ethnic-national minority cannot be transformed into a majority, owing to its special social situation and position. It follows from this too that additional rights are necessary: for these minorities not only formal equality but special institutions and the possibility of self government must be ensured.

Fourth, in order to eliminate the underprivileged situation of the minorities, in order to ensure actual equality in public life, special legal guarantees, social institutions and minority organizations, and particular forms of activity are necessary.

(2) Contemporary historic evolution has involved various institutions and legal solutions for the protection of minorities; among these the most important is minority autonomy on the basis of self organization, i.e. self government, which is accompanied by a specific power position; representation in Parliament, in government, in the state apparatus and the local self government, participation through the right of intervention or veto.

In this context the question arises whether minority autonomy is identical with cultural autonomy? Is has become fixed as a prejudice that minorities are entitled to cultural autonomy. In my view, this explanation has already been surpassed by historic evolution, because cultural autonomy appears as a fundamental aspect in addition to the political, economic and social of minority autonomy. Legally this character finds expression also in the circumstance that minority agencies are legal personalities not only in civil law (in respect to their property matters), but also in public and administrative law, even international law. And politically this means that minorities can also participate in public life, may organize their own political institutions (party, social organizations, various associations), can fight for their interests, can take part in decision-making processes, in legislation, and in the solution of their own public affairs.

The lying down of the thesis of minorities as state-forming, communities does not mean that individual rights are disregarded, because the state where the rule of law exists provides special legal guarantees for the redress of individual injuries before the courts, and similarly minority communities can also speak up before official institutions and the courts against measures violating their interests.

In pluralistic democracy it is a fundamental requirement that in the course of the assertion of human rights individual and collective rights should be balanced, and that there should be an equilibrium among the different autonomies. In other words, a symbiosis of individual and collective rights appears.

3

In connection with the ideas formulated above I have to refer to some prejudices and objections.

(1) In connection with collective rights it is being raised that in the catalogue of human rights the ensuring of individual rights is basic, and in view of this the extension of individual rights in contrast to collective rights, is considered sufficient. In this connection let me mention as a special argument the right of the protection of the environment, which obviously affects individuals, but on the whole also the fate human communities, and thus appears as a protection of collective rights.

(2) It is raised versus collective rights that such had existed under feudalism and are similar rights to the feudal corporations. In opposition to this view let me first of all emphasize that under feudalism the rights of the corporations did not appear as human rights but as privileges, and on other, that in modern pluralism democracies the collective rights unfold in addition to individual rights as a consequence of the evolution of human rights.

And there is a further very essential difference: in modern societies (democracies) the community is not built on privileges and circumstances of birth, but on the free choice of the individual. The individual decides himself whether he joins the given community to which he belongs through his environment, language or decent, or opts for another. In consequence, this is a question on individual decision. But if by his or her decision the individual joins a community, then he can assert (demand and enjoy) in the collective group the specific rights which are due to him or her as member of the community.

(3) It is frequently raised in opposition to the qualification of the minorities as state-constituent communities that they lead to segregation and isolation. The representatives of this view also take exception to the circumstance that parties can be organized on the basis of national minorities and that they can advocate of self government.

This view is formulated on the part of those who justify the dictatorial concentration of power and defend the obsolete concept of the nation state:

on the one hand, they do not understand the characteristic of the organizations of pluralistic democratic power, and on the other, they support the protection of the interests of the majority, of the exclusive power of the national majority, or may reflect the ulterior homogenization and assimilation.

(4) It must finally be stressed that the assertion of human rights relies in every country and region on specific historic antecedents and circumstances. In the states of East Central Europe dictatorial and nationalistic policies were practised, in which ethnocracy, national intolerance, the denial or formal recognition of human (individual and collective) rights were accompanied by the infection of hatred and mistrust. It is mainly through overcoming mistrust that it is possible to explore these problems in an unbiased and systematic way and this is why I have not discussed questions of daily politics. It is possible to open up a new page in the course of building up democratic systems on the basis of tolerance empathy; it is on that the legislation and assertion of the system of the guarantees of collective rights can be built.

The Swedish Model – Three Aspects of Legal Methodology

Marie Sandström (Stockholm)

The legal tradition of the Nordic countries – Sweden, Finland, Norway, Denmark and Iceland – seems to perplex legal comparativists. On one hand, Scandinavian law differs widely from the *common-law* traditions of England and the United States. On the other hand, it does not seem to fit the *civil-law* mould either.[1] In a sense, Scandinavian law can be seen as an intermediary between the two dominant legal traditions in the Western world, and this unique position has prompted quite a few legal comparativists to pay special attention to the legal tradition of the Nordic countries.[2]

The unique character of Scandinavian law, however, does not primarily concern the substantive areas of the law. Swedish private law, for instance, consists of a rather curious blend of Roman, French and German law. This is hardly surprising from a historical perspective, since Nordic law in general has been influenced in turns by Roman, French and German law. The Nordic legal tradition was introduced to Roman law by way of Canon law during the Middle Ages and Roman legal concepts are still present in Swedish private law. The drafting of the *Code Napoleon* in the early 19th century provoked an intense, albeit short-lived, enthusiasm for French law in Sweden. Swedish lawyers, however, soon found another source of inspiration: From the 1830's and onwards, German law has exerted a marked influence upon the legislator and the courts alike. In any event, all advanced legal systems seem to converge at some point or another.

Instead, it is the way in which Nordic jurists argue a point of law that

[1] K. Zweigert – H. Kötz *An Introduction to Comparative Law* (Oxford: 1987) 290.

[2] S. Alekseev "On Some Tendencies in World Legal Development and the Russian Legal System" *R. Central & East Eur. L.* 4 (2001), 567, cf. Matteucci "The Scandinavian Legislative Cooperation as Model for European Cooperation" in *Liber Amicorum of Congratulations to Algot Bagge* (Stockholm: 1956), 136.

sets them apart from jurists in other parts of the world.[3] The legal method employed by Nordic jurists and, in particular, by Nordic judges, is a striking manifestation of the peculiar nature of the Scandinavian legal tradition. The aim of this contribution is thus to acquaint the reader specifically with the legal method employed by Swedish judges. This reasoning, however, is applicable to legal methodology in all the Nordic countries and hopefully will add another dimension to the ongoing comparison of legal cultures. In this outline of the development of the Swedish legal method, particular emphasis is given to the doctrine of legal sources. The reason for this is the presumption that the doctrine of legal sources serves as a pivot for the *civil-law* tradition in general. This doctrine provides the civil-law system with a line of demarcation between jurists and their surrounding world.

1 The Doctrine of Legal Sources

When settling a case, a Swedish judge is expected to enforce the law of the country, not his own convictions. In practise, this means that a jurist is to seek as much guidance as possible in the sources of law. Consequently, the doctrine of legal sources seems to separate legal arguments from purely moral judgements or political proposals. It could therefore be argued that the doctrine of legal sources, at the very least, must enable the jurist to find a legal, rather than a political or moral, solution to each and every case submitted to the courts. The doctrine of legal sources fulfils this purpose by enumerating the sources of law rather than the relevant legal arguments as such. Hence, a legal argument is considered binding if, and only if, it can be found in at least one source of law.

In most *civil-law* countries, the doctrine of legal sources also provides the jurist with a hierarchy of legal sources. Typically, the legal sources are mentioned in a specific order, which translates into a set of rules aimed at resolving any conflicts that may occur between the different sources of law. In this hierarchical order, statutes and codes would seem to occupy the unrivalled first place. The strong emphasis on codes and statutes in legal arguments has indeed been the main characteristic of the civil-law tradition since the Justinian codification. Preparatory works, precedents, custom and legal doctrine supply additional legal arguments where statutes are either ambiguous or incomplete. The Swedish doctrine of legal sources, however, does not entirely conform to this pattern.

[3] Zweigert – Kötz (n. 1), 293.

2 *The Lost Code*

Unlike most *civil-law* countries, Sweden and the other Nordic countries lack a comprehensive code. During the Enlightenment – the era of the great codifications – the issue was fiercely debated among Swedish jurists. At the time, the Swedish code of 1734 was considered unsystematic and old-fashioned. In fact, compared to the comprehensive codes of Austria, Prussia and France, the Swedish code was not a code at all, since it was no more than a collection of disparate statutes. The state of the Swedish code created a host of problems in the courts of the late 18th and early 19th centuries. Whenever the code was applied to specific cases, it became apparent that it contained numerable gaps and ambiguities. As a consequence, Swedish judges found it more or less impossible to maintain any reasonable degree of legal certainty and impartiality when applying the code of 1734 as to specific cases.

Inspired by the *Code Napoleon*, the Swedish Parliament decided to set up a commission with the express task of creating more coherence in the statutory law by introducing a new and improved code. Once the commission was assembled, the scope of its inquiry was severely limited by the mandate given it by Parliament. In fact, according to the mandate, the commission was only allowed to simplify and improve the old code. Despite this setback, the members of the commission proved both innovative and industrious. A draft version of a commercial code, heavily influenced by the *Code Civil*, was presented in 1815. In 1826, the commission produced a draft version of a complete private law code. The draft, despite the precarious position of the Swedish courts, was never adopted by the Swedish parliament. This was in part due to political opposition, since the code was closely associated with the liberal political movement of the time. More importantly, however, Swedish jurists seemed to distrust the sheer magnitude of the proposed code.

The Swedish law faculties were especially outspoken in their critique of the code. The very notion of a comprehensive code, according to the legal scholars of the time, was alien to Swedish legal culture. Dazzled by the technical brilliance of the French legislator, the commission had exceeded its powers and advocated what in essence amounted to a legal revolution. The Swedish courts tried a less confrontational approach. The drafts were referred to the Swedish Courts of Appeal and the Swedish High Court for consideration, but their opinions were either delayed or lost. When after more than a decade, the opinion of the Swedish High Court arrived at the Ministry of Justice, it contained little other than scathing criticism. As time dragged on, it slowly became obvious that the codification had floundered.

By the late 1830's, the code was already doomed. A Swedish commentator declared, with some bitterness, that "narrow-mindedness and misdirected considerations" had stood in the way of progress.[4] The jurists of the time, however, did not seem to share his opinion.

The antagonistic attitude of Swedish jurists towards the codification may seem enigmatic. Why would Swedish judges in particular oppose a measure that was specifically aimed at restoring popular confidence in the judiciary? The main purpose of the proposed code was to create a systematic foundation for the application of law in courts and administrative authorities. Legal application – according to the preamble to the code of judicial procedure – was to be uniform, speedy and foreseeable. It was not, however, the purpose of the codification that provoked opposition among the Swedish judiciary; the displeasure concerned the means rather than the aim of the codification.

3 The Code and the Law of Precedents

One of the main driving forces behind the codification projects of the Enlightenment was the dissatisfaction with courts of law. The logic behind the legal reasoning of the courts was to the layman, to say the least, obscure. Not even jurists could predict outcomes in many cases and seemingly identical cases were treated differently by the courts. This fundamental lack of legal certainty gave people the impression that the courts were operating along the same lines as a State lottery, and judges were made scapegoats. Court cases were, according to the advocates of codification, settled by the arbitrariness of the judges – their sympathies, antipathies and prejudices. The radical solution to this problem was to substitute the discretion of the judge with a foreseeable and uniform application of a code.

However, there is a price to be paid for this kind of legal certainty. By introducing an exhaustive book of statutes – a code – the legislator, in effect, transformed the previously independent judiciary to *la bouche qui prononce les paroles de la loi* (Montesquieu). The Swedish judges obviously considered this price to be exorbitant and were steadfast in their opposition to the introduction of a code in Sweden. The necessary legal reforms were instead carried out one by one and thus the opposition of the Swedish jurists gave rise to a plethora of different statutes that, in contrast to the codification project, did not threaten to diminish the importance of precedents in the doctrine of legal sources.

[4] E. Marks von Würtemberg "Blick på den svenska lagstiftningen alltifrån ardetonhundratalets början" in *Minnesskrift ägnad 1734 års lag* (Stockholm: 1934), 198.

This pattern of legal resistance against comprehensive codes has since recurred in the Nordic countries. In 1899, Danish legal scholars put forward a proposal for a Scandinavian civil code – the plan was described by the German comparativists Zweigert-Kötz as "bolder"– the "ambitious project was", however "shelved in favour of unifying specific areas of the law of property and obligations."[5] A code was proposed again in 1948 and subsequently rejected by Nordic jurists.

There seems to be a discernible pattern in the Nordic history of codification: Once a code has been drafted, it gives rise to a surge of activity within the ministries. The draft versions have invariably been rejected by Nordic jurists – and in particular by the judiciary – only to re-emerge in the form of specific statutes. The civil code proposal of 1899, for instance, resulted in the Nordic Sale of Goods Act (1905) and the Contract Act (1915). The partiality of Nordic jurists to *ad hoc*-legislation, according to Zweigert–Kötz, has contributed to the comparatively high importance attributed to precedents in the Nordic legal culture:

> With the enactments we have mentioned the Scandinavian countries have developed a substantially unified law of contract: where there are no applicable statutory provisions the device of *analogy* is widely used by courts and writers alike.[6]

It is obvious that the idea of comprehensive codes has not appealed to Nordic jurists – an attitude that, incidentally, has prevailed since the early 19th century[7] – and their resistance has up to the present been successful. The driving force behind the scepticism seems to be an explicit wish to retain a modicum of legal creativity in the application of law. The hostility of legal scholars seems more difficult to comprehend.

4 *Legal Science – The Jewel in the Crown?*

The opinions submitted by the law faculties concerning the proposed code of 1832 are representative of the attitude of Swedish legal scholars towards the notion of a comprehensive code. Both law faculties were outspoken in their critique, which concerned the very concept of a code as well as its material content. This might seem enigmatic, since one of the motives of the codification was to supply legal science with a more systematic foundation.

[5] Zweigert – Kötz (n. 1), 291.
[6] Ibid. 293.
[7] Ibid.

Legal scholars, however, knew exactly where their best interest lay. In the absence of large-scale, systematic and comprehensive codes, other sources of law – primarily precedents and legal doctrine – must be relied upon to supplement individual statutes. In this sense, the Swedish jurist would seem to reject the notion of the omnipotent legislator. By rejecting codification, the Swedish legal system has effectively limited the scope of legislation, without having to adhere to a formal division of power. The legislative bodies are told to focus on the realization of specific political aims by way of individual statutes and, at the same time, warned not to meddle with the making of precedents or legal systematization. Hence, more emphasis has been put on other aspects of the law-making process – for instance the judge-made law of precedents – than legislation in the Nordic legal tradition. In this respect, the Nordic legal method would seem to resemble the Anglo-American legal tradition.

The rejection of codification in the Nordic countries, however, should not be interpreted as a repudiation of the notion of coherency and completeness in a legal system. On the contrary, the absence of a code has forced Nordic jurists to take matters into their own hands. After the code was rejected, the task of creating a comprehensive system from the disparate statutes fell on the legal scholars and law faculties. By the 1830's, Swedish law faculties were completely dominated by the German Historical School. According to the Historical School, the main purpose of jurisprudence is to create a comprehensive system of rules defined as valid law or law in force. The building blocks of the legal system can only be found by legal scholars in other sources of law, namely precedents, custom and statutes. To this – the raw material of the legal dogmatic jurisprudence – the legal scholar adds his ability to create a comprehensive system out of individual rules. Once this task has been performed – though it is necessary to bear in mind that this is considered a continuing process – jurists practising law can make use of the legal system to achieve a high degree of precision and creativity in their arguments. The gap-filling technique frequently used by Nordic judges – analogies – presupposes the existence of a legal system, since similarities between cases only can be appraised by means of a systemic context. Thus the existence of a well-developed legal system is an absolute condition for the kind of legal certainty that was advocated in the early 19th century.

The absence of a comprehensive code, at least theoretically, allows for a wider scope of discretion by judges. Left unchecked, the creativity of judges can eventually threaten the desired uniformity and foreseeability of the application of law. It falls to legal science to counterbalance the discretion of

the judiciary; the creative element in the application of law must be harnessed by the legal method devised by jurisprudence. In this sense, precedents and legal doctrine appear as the Siamese twins of the doctrine of legal sources. As a consequence, the education of jurists, and in particular judges, must focus on jurisprudential rather than practical skills, since only scientifically trained judges can supply the legal system with the necessary precedents. With the support of these convictions, legal doctrine was elevated to a position in the doctrine of legal sources on par with statutes and precedents. It could be argued that legal science plays the role of the spider in the web; with the exception of legal doctrine, the sources of law contain no more than snippets of law, by which only a fraction of all disputes can be settled. The legal system, however, provides jurists with legal solutions to every conceivable problem.

5 *Division of Functions*

The Swedish doctrine of legal sources clearly defines – and thereby limits – the scope of each and every legal source. The political authority of legislative bodies is almost without limitation; according to the Swedish Constitution (the Instrument of Government, Chapter I, Section 1), the will of the people is, in effect, the only source of law in a political sense. The representatives of the Swedish people, the Parliament, make the political decisions upon which the legislation rests. In this sense, the Swedish parliament is the sole legislator. However, by rejecting the notion of comprehensive codes, the Swedish legal tradition acknowledges that political power does not necessarily equal legal skill or scientific prowess. In short, politicians should, according to Swedish legal tradition, stick to politics, while law as such should be left to the jurists.

The work of legal scholars – the "legal doctrine" – provides the courts and legislative bodies alike with a scientific, or in other words, a systemic conception of law. Hence the creativity of jurisprudence is restricted to that which can be scientifically proved; in effect, legal doctrine primarily contributes towards a more coherent body of rules, whereas other sources of law provide the building blocks. The actual rules must be found in other sources of law, mainly in statutory law. Legal scholars occupy themselves with the legal systematization that transforms a collection of disparate rules into a stable and coherent legal system.

Another peculiar trait of the Swedish society is the position of the Swedish courts within the fabric of the State: Like other Swedish authorities,

the Swedish courts of law are quintessentially independent of both Parliament and the Government. As a consequence, the courts decide cases under the "Rule of law". In practice, only judges can decide on the application of the law in a specific case (the Instrument of Government, Chapter I, Section 8). This holds true even in difficult or "hard" cases. Even if a court case involves interpretation or supplementation of statutes, it is up to Swedish judges at each level, from the courts of first instance to the Swedish High Court, to decide the case and formulate the opinion of the court. The autonomy of Swedish judges, however, does leave the system open to abuse, since the scope of judicial discretion would seem to come into conflict with the powers of the legislative bodies. According to the Swedish code of 1734, when confronted with a particularly difficult case, judges were to consult the legislative bodies for the correct interpretation of the law (a *référé législatif* or authentic interpretation). This turned out to be a top-heavy and, above all, time-consuming solution, and the right and duty of consultation were later abrogated. The law-making process was instead completely reformed.

6 *The Importance of Preparatory Works*

The main initiators of law reforms in Sweden are the Swedish Parliament, the Government and the different ministries. Each and every statute is prepared by a committee of jurists and other experts according to instructions from the Swedish Parliament or Government. Political directives are implemented at this stage and the intention of the legislator transformed into legal rules. The proposal is subsequently revised by the ministries and eventually sent to Parliament for approval. Each and every step of this process is documented in official reports, the legislative preparatory works *(travaux préparatoires)*, explaining the purpose of the statute – a valuable indication as to its interpretation – and advising on the application of the statute. Preparatory works are continually published and easily accessible to and widely used by all jurists.

The use of preparatory works is doubtless a striking and unusual feature of the Swedish legal method. The foundation of this aspect of the Swedish legal method was built during the latter half of the 18th and during the 19th centuries. The Freedom of the Press Act was passed in 1766, ensuring almost unlimited public access to official documents. In effect, this made the preparatory works accessible to all citizens. The need for political legitimacy prompted the draftsmen of the civil code of 1826 to make use of preparatory works to convince sceptical jurists of the advantages of the codification. In

the preparatory works, the draftsmen advertised the legal as well as the political conditions of the project. Had the draft been implemented, the preparatory works, without a doubt, would have been a valuable indication of the intention of the legislator. Since the 1830's, the preparatory works of most statutes passed by the Swedish Parliament have been published in legal journals. Swedish jurists soon got into the habit of consulting the preparatory works in difficult cases.

The expectation of the Historical School, that legal doctrine and legal training at the law faculties would provide the basis – and limit – of judicial creativity, may appear naive. After all, there is nothing to stop a judge from making use of the full scope of statutory interpretation and supplementation. The principle of the people's supremacy further complicates the matter, since it reduces judges to civil servants. The Swedish people have the supreme power over the political and moral content of the law. In my opinion, the emergence of a new source of law in the 19th century has eased the potential friction between the legislative bodies and the autonomous courts.

Preparatory works have always been considered a more or less controversial source of law among legal scholars, since they seem to diminish the importance of doctrinal opinions *(responsa)* in legal arguments. The potential friction between legal doctrine and preparatory works, however, was significantly reduced in the 1910's and 1920's by the writings of the Swedish philosopher Axel Hägerström. According to Hägerström, political arguments were to be kept apart from legal science. Legal scholars, Hägerström argued, must respect the epistemological boundaries that separate science from religion, morality and politics. In order to preserve their academic credibility, legal scholars must be aware of the chasm that divides knowledge from opinions. This same distinction, according to Hägerström, must also be maintained by the legislator. Whenever significant modifications to statutory law are considered, great importance should be attached to the opinions of legal scholars concerning the wording of the draft. The political supremacy of the legislator therefore can be said to mirror the academic supremacy of legal science. By and large, Hägerström's intervention settled the dispute between the legislative bodies and legal science. The peaceful coexistence between the sources of law – the most striking feature of the Nordic legal method – was finally established.

The development of a unique legal methodology in the Nordic countries can be divided into three separate, yet interlinked stages. During the first half of the 19th century, Nordic jurists dismissed the idea of a comprehensive codification and thus encouraged the legislator to settle for a gradual

reform of the law through means of *ad hoc*-legislation. The rejection of the notion of a code left the Swedish courts in dire need of legal coherence, albeit of a very different kind than the uniformity of codification. Swedish judges turned to the law faculties and, in particular, to the legal scholars inspired by the German Historical School for assistance. From 1835 and onwards, legal education went through rapid and radical changes to accommodate the needs of Swedish judges. A scientifically trained judiciary, according to prevailing attitudes, was the only long-term guarantee for legal certainty in the application of law. However, during the first decades of the 20th century, particular emphasis was given to the political, rather than the academic, nature of law. The social democratic-liberal legislator pitted itself against the conservative judiciary in a battle for supremacy. Predictably, the legislator prevailed and the use of preparatory works in Swedish courts marked the victory. The formative decades of Swedish – and Nordic – legal methodology thus were over.

7 *Conclusion*

By clearly defining the scope of each source of law, the Swedish doctrine of legal sources can dispense with a hierarchical structure. The legal sources are meant to co-operate rather than to compete. The absence of a comprehensive codification and the strong emphasis on legal doctrine and jurisprudence in Swedish courts of law, have led to a particularly diverse and pluralistic doctrine of legal sources, which has enabled Swedish jurists to retain a rather generous scope for legal creativity without necessarily blurring the distinction between law and politics.

Prima Philosophia Iuris
*A Sketch of Bódog Somló's Legal Philosophical Oeuvre**

József Szabadfalvi (Miskolc)

The turn of the previous century and the years afterwards have given rise to a major transformation in the history of European and Hungarian legal philosophical thinking. Traditional natural law and legal positivist approaches as well as historical views were completely forced in the background by the neo-Kantian legal philosophy introduced in the Continental Europe in the early 1900s. Jurisprudence was seeking new paths to law, emphasizing the aspects of theory, methodology and modern values studies. In Hungarian legal philosophy it was Bódog Somló,[1] a reputable jurist, whose oeuvre contributed

* Csaba Varga has played an important role in the revival of the oeuvre of Bódog Somló for the national and international scientific life since the late 1970s. He has written a paper on the Somló's career (see Cs. Varga "Somló Bódog esete a pécsi jogakadémiával" [Bódog Somló's encounter with Pécs Law Academy] *JK* 35 [1980] 8, 543–6) and he also published Somló's fragmented manuscript notes aiming to introduce the basically unknown layers of his oeuvre: "Somló Bódog jegyzetei Arisztotelész Állambölcseletéről" [Notes on Aristotle's philosophy of the state] (ed. Cs. Varga) *Magyar Filozófiai Szemle* 25 (1981) 6, 816–35; "Somló Bódog végső summázata: az ismeretlen Állambölcseleti jegyzetek" [Felix Somló's ultimate summary: the unknown Notes on the philosophy of the state] (introd. & ed. Cs. Varga) *Állam- és Jogtudomány* 28 (1985) 2, 359–73; "Somló Bódog jegyzetei Augustinus állambölcseletéről" [Notes on Augustine's philosophy of the state] (ed. Cs. Varga) *Állam- és Jogtudomány* 28 (1985) 4, 777–83. A volume containing Somló's works in foreign languages edited by Csaba Varga with his own foreword and another one concerned with the international reception of Somló's works as well as the edition of an overall evaluation of Somló written in 1952–53 deserve a special mention: F. Somló *Schriften zur Rechtsphilosophie*. Ausgewählt und eingeleitet von Csaba Varga (Budapest: Akadémiai 1999); K. Szegvári "Somló Bódog jogelméleti munkássága" [Bódog Somló's legal philosophical oeuvre] *Jogelméleti Szemle* 5 (2004) 4 [http://jesz.ajk.elte.hu/szegvari20.html].

[1] Bódog (Felix) Somló was born in Pozsony on 21 July 1871 and died in Kolozsvár on 28 September 1920. He graduated from Kolozsvár university in the academic year of 1895/96, served as a volunteer in the army and practised as a lawyer's asistant. In 1896/97 he spent

to abolishing the previous failure in progress and also to the establishment of the neo-Kantian philosophy of law in Hungary.[2] This paper has been written

one semester in Leipzig and one in Heidelberg, got his Ph.D. degree at the university of Kolozsvár in philosophy of law and political science in 1899 and 1902, respectively. After unsuccessful attempts at entering academic life (in Pécs and Pozsony universities), he was finally offered professorship at Nagyvárad Law Academy in 1903, from where he moved to the university of Kolozsvár in 1905. He was appointed full professor in 1909 and taught philosophy of law and partly also philosophy of criminal law and international law. For a year he served the Kolozsvár faculty of law as its elected dean in 1917. Then Budapest university invited him to take over the chair of general theory of law and legal encyclopaedia in 1918.

[2] See about Bódog Somló's oeuvre: F. Finkey *A tételes jog alapelvei és vezéreszméi [The principles and ideas of positive law]* (Budapest: Grill 1908), 413–19; Gy. Moór "Somló Bódog" *Társadalomtudomány* I (1921) 1, 17–40; J. Moór "Vorwort des Herausgebers" in F. Somló *Gedanken zu einer Ersten Philosophie* (Berlin–Leipzig: Walter de Gruyter & Co. 1926) 3–17; B. Horváth "Die ungarische Rechtsphilosophie" *ARWP* 24 (1930/31) 1, 59–73; I. Szabó *A burzsoá állam- és jogbölcselet Magyarországon [The bourgeois philosophy of law and state in Hungary]* (Budapest: Akadémiai 1955) 266–75, 360–84; L. Seres "Pozitivista társadalombölcselet Magyarországon" [Positivist social philosophy in Hungary] *Magyar Filozófiai Szemle* 16 (1970) 5, 936–54; Gy. Litván "Egy magyar tudós tragikus pályája a század elején" [A Hungarian scholar's tragical career at the beginning of the century] *Valóság* 16 (1973) 8, 32–42; P. Sándor *A magyar filozófia története [History of Hungarian philosophy]* (Budapest: Magvető 1973) 357–77; Gy. Litván "Somló Bódog munkássága" [Bódog Somló's oeuvre] *Szociológia* 5 (1977) 4, 503–7; E. Nagy "Erény és tudomány" [Virtue and scholarship] *Világosság* 22 (1981) 12, 764-772; Idem "Sein, Geltung in der Geschichte der ungarischen Rechtsphilosophie (1897–1935)" in Cs. Varga – O. Weinberger (Hrsg.) *Rechtsgeltung. Ergebnisse des ungarisch-österreichischen Symposiums des Internationalen Vereinigung für Rechts- und Sozialphilosophie 1985* ARSP-Beiheft 27 (1986), 59–66; Á. Kostyákné Vass – S. Pethő "Az evolucionista etikától a transzcendentális normativizmusig" [From evolutionist ethics to transcendental normativism] in E. Csikós – L. Lakatos – I. Veres (eds.) *A van és a kell világa. Fejezetek a magyar etika történetéből [The worlds of is and ought. Chapters from the history of Hungarian moral philosophy* (Miskolc 1990) 109–35; K. Szegő "Somló Bódog értékelmélete" [Felix Somló's theory of values] *Magyar Filozófiai Szemle* 37 (1994) 3–4, 343–64; Zs. Ződi "Erény és tudomány: Somló Bódog állam- és jogbölcseleti munkássága" [Virtue and scholarship: Felix Somló's oeuvre in philosophy of law and state] in S. Loss – J. Szabadfalvi – M. Szabó – I. H. Szilágyi – Zs. Ződi *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből [Portraits from the history of Hungarian legal philosophy]* (Miskolc: Bíbor 1995) 63–141; K. Gönczi "Somló Félix (1873–1920)" in M. Stolleis (Hrsg.) *Juristen. Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert* (München: Beck 1995) 575–6; L. Kupa "Somló Bódog" *Jura* 5 (1998) 1, 43–8; L. Perecz "A belátásos elmélettől a mezőelméletig: A magyar jogfilozófia fél évszázada: Pikler, Somló, Moór, Horváth" [From theory of discretion to theory of law field: Half century of Hungarian legal philosophy] *Századvég* 10 (1998) 78–83; J. Szabadfalvi "Bódog Somló" in F. Somló *Schriften zur Rechtsphilosophie* Ausgewählt und eingeleitet von Csaba Varga (Budapest: Akadémiai 1999) XI–XII; Idem "Some Reflections on the Anglo-Saxon Influence in the Hungarian Legal Philosophical Traditions" *AJH* 42 (2001) 1–2, 111–9; Idem "Transition and Tradition: Can Hungarian Traditions of Legal Philosophy contribute to Legal Transition?" *Rechtstheorie* 33 (1999) 2–4, 172–3; K. Falus *Fejezetek a magyar jogfilozófiai gondolkodás történetéből: Pulszky, Pikler és Somló jogpozitivizmusa [Chapters from the history of legal-philosophical thinking in Hungary: legal*

on the 90th anniversary of the publication of Somló's monograph, *Juristische Grundlehre*,[3] considered as his major work, through which he has become the leading representative of Hungarian legal philosophy for a long time.

Somló, the most reputable representative of Hungarian legal philosophy, started his career under the influence of the theories of naturalist positivism and evolutionism. From the first decade of the 20th century on, under the influence of Rudolf Stammler, Somló heralded, by accepting the neo-Kantian view, one of the most prosperous periods that had ever existed in Hungarian legal philosophy. While earlier he considered legal philosophy and legal sociology as identical, from that time on he distinguished, according to the neo-Kantian approach, these two areas of the investigation of law. The achievements of that period laid the foundation of Somló's academic reputation as a legal philosopher in Hungary as well as in the German-speaking countries. Hungarian jurisprudence can be proud of the fact that Somló, beside Rudolf Stammler, Gustav Radbruch, Hans Kelsen, and Alfred Verdross, is regarded as one of the most outstanding representatives of neo-Kantian philosophy of law in Europe.

In his early works published at the turn of the previous century, similarly to Ágost Pulszky and his professor, Gyula Pikler, both reputable representatives of Hungarian legal positivism, Spencer's evolutionism seems to have a determining influence. Spencer's doctrine no longer had the effect of revelation on the contemporary European social thought; nevertheless, it was still respected by the Hungarian progressive intelligentsia. Somló, after analyzing Spencer's doctrines, concluded that in an ideal future a perfect situation will emerge as a result of the progress of adaptation, which will then result in the creation of a "final and constant code of human acts". This code will include the major (liberal) fundamental rights, such as the rights to life, to good health, to free movement and property. The positive feature of Spencer's doctrine, in Somló's view, is that unlike the natural law approaches of the 18th–19th centuries, it considers human evolution and the

positivism of Pulszky, Pikler and Somló] (PhD thesis, Budapest 1999 [manuscript]); J. Szabadfalvi "Revaluation of Hungarian Legal Philosophical Tradition" *ARSP* 89 (2003) 2, 159–70; A. Funke *Allgemeine Rechtslehre als juristische Strukturtheoire. Entwicklung und gegenwärtige Bedeutung der Rechtstheorie um 1900* (Tübingen: Mohr Siebeck 2004); *Somló Bódog naplója [Diary]* archived in Országos Széchényi Könyvtár: Levelestár [Nathional Széchényi Library: Collected Manuscripts], Quart. Hung. 3038/1–4.

[3] F. Somló *Juristische Grundlehre* (Leipzig: Verlag von Felix Meiner 1917) x + 556 (²1927, repr. Aalen: Scientia 1973) xv + 556; *Jogbölcszészet* (Somló Bódog egyetemi ny. r. tanár *Jogi Alaptan* című műve nyomán) *[Philosophy of law. (*Based on the *Juristiche Grundlehre* of prof. B. Somló*)]* (Budapest: Grill 1920) 133, repr. *Jogbölcszészet: A Juristische Grundlehre kivonata [Philosophy of law: Extract of Juristische Grundlehre]* (Miskolc: Bíbor 1995) (hereinafter Jb).

relativity of man-made institutions. Nevertheless, he also expresses criticism by claiming that the ideal condition suggested by Spencer will never occur as it contradicts the law of evolution. This idea is supplemented in his work *Állami beavatkozás és individualizmus (State intervention and individualism)*, published in 1903, by stating that the direction of progress, similarly to the goal of human life, is determined by the aspiration to happiness, which in this way will create a constant and organic process. A strong role of the state, as a characteristic feature of the development of monopoly capitalism, enforced reconsideration of the functions and institutions of law, state and politics, and in this respect, reconsideration of Spencer's views opposed to the idea of state interference, however, promoting individual liberty. Somló takes the view that state intervention does not run against the natural law of adaptation. "Artificial intervention" in the system of nature (e.g. the work of legislation) must be considered as a result of natural progress, since "natural selection will necessarily occur despite any kind of state intervention."[4] He claims that although the scope of state regulation widens, individuals tend to submit to regulations in a spontaneous way, to law as well, which will induce weaker constraints. All these thoughts definitely reveal Somló's ability to provide a critical analysis of Spencer's theory, who he greatly admired after all, and to seek new paths in legal philosophy. Nevertheless, Somló's effort is considered as ambiguous, since the differing starting points could result in nothing else but an eclectic explanation.

The most important book of his period of positivism, titled *Jogbölcseleti előadásai (Lectures in legal philosophy)*,[5] was published at the University of Kolozsvár in 1906, which includes a number of concepts referring to his major work of neo-Kantianism.[6] He makes a distinction between jurisprudence as a pure and as an applied (normative) science. Among the objectives of jurisprudence regarded as pure science four major questions are mentioned: (1) creation of law and investigation of its underlying reasons; (2) research of the consequences of law; (3) investigation of the development of law; and

[4] B. Somló *Állami beavatkozás és individualizmus [State intervention and individualism]* (Budapest: Politzer 1903), 99.

[5] B. Somló *Jogbölcseleti előadásai [Lectures in legal philosophy]* 1. füzet (Kolozsvár: Sonnenfeld A. 1906) (hereinafter Je). In his first comprehensive book he describes the actual problems of legal philosophy through a sociological positivist approach. See Idem *Jogbölcselet [Philosophy of law]* (Pozsony–Budapest: Stampfel Károly 1901) (hereinafter J).

[6] A good example is the definition of the concept of law, which also occurs in his major work of neo-Kantian influence: Jb 35 "The law is defined as the norms created by the highest authority of any society."

finally, (4) study of the perspectives of law.[7] In a detailed description of these issues, he offers his reasons based on an approach later referred to by him as sociological positivism. However, jurisprudence considered as pure science can be considered, in the neo-Kantian sense, as investigation in order to define the pre-conditions for law. In the first part of the book we encounter further features referring to the neo-Kantian approach. Thus, while defining various concepts originating from Stammler, Somló performs a comparative analysis of law, morality, conventions, and religious norms.[8]

Stammler's influence becomes striking only through the analysis of the problem issues of jurisprudence. When Somló discusses jurisprudence as an applied (normative) science, he actually means the idea of "just law" *(richtiges Recht)* discussed earlier by Stammler, although at that time he considers Bentham's utilitarian formula as an objective means to prove the right objectives of law.[9] In his view, the utter goal of law is to promote public welfare.[10] However, Somló claims, following Stammler, that while law considers the "rightfulness of outer behaviour", morality is concerned with the "rightfulness of inner intentions".[11] Both the renowned jurist of Berlin and his colleague from Kolozsvár, who was scarcely known abroad, completely agree on the idea that the precondition to the justness of law is the justification of its necessity. Although Somló devotes only a few paragraphs to the problem of anarchy, his arguments clearly reflect the widely known thoughts of Stammler, according to which he justifies the necessity of enforced regulation represented by law by referring to the anti-social attitude of man's nature.[12]

In 1911, Somló, in his lecture on a congress on contemporary German legal philosophy, revealed full acceptance of Stammler's doctrine, through which he promoted the acceptance of the neo-Kantian paradigm in Hungary.[13] In his work on sociology and legal philosophy, which is particularly interesting as Somló's paper is followed by a paper on the same topic by

[7] Jb 8.

[8] Jb 35–9.

[9] See B. Somló "Massstäbe zur Bewertung des Rechts" *ARWP* 3 (1909–10), 514–6 (hereinafter MBR).

[10] See Jb 105–21.

[11] Jb 37.

[12] Jb 33, 126.

[13] B. Somló "Das Verhältnis von Soziologie und Rechtsphilosophie, insbesondere die Förderung der Rechtsphilosophie durch die Soziologie" Internationale Vereinigung für Rechts- und Wirtschaftsphilosophie, Second Congress, Darmstadt, 8 June 1911 *ARWP* 4 (1910/11) 4, 563–9 (hereinafter VSR).

Ferdinand Tönnies, Somló completely refuses the approach of sociological positivism, and he distinguishes two basic issues of legal philosophy. One of them is concentrated around the question "What is law?", thus he attempts to give a definition to the essence of law.[14] (He did not use the term of legal basic doctrine in this work.) The other complex issue is the area of the evaluation of law. As regards the value of law, legal philosophy is not expected to give directions, it can merely provide, based on Stammler, a general method for investigation. Two kinds of danger are emphasized in this respect. On the one hand, the trap caused by constantly valid issues included in the natural law approach should be avoided. On the other hand, law considered right in legal philosophical respect must be distinguished from "legal policy", which is concerned with the right legal content here and now.[15] In his study Somló accepts the classical neo-Kantian paradigm through stating that sociology is not able to promote either the conceptual definition of law or the determination of the criterion of just law, since causal connections are impossible to be interpreted in law.[16]

The actual neo-Kantian turn started with the creation of Somló's own view on the issue of just law.[17] He gave up his previous naturalist view and, under the influence of Stammler, he considered the research into just law as a methodological problem. All this was not without antecedents, since he stated in his lectures on legal philosophy several years earlier: "The true task of legal philosophy is to determine a formal method which will lead to the definition of a criterion by which the justness of law may be evaluated."[18] Although he refused Stammler's idea, he considered the introduction of the principle of just law in the philosophy of law to be his renowned colleague's merit. Stammler connected this theory with moral issues and proposed that

[14] VSR 565.

[15] Ibid. (This statement reappears in *Juristische Grundlehre* of 1917, supplemented with the idea that the policy of law frequently occurs "mixed" with statutory laws and in the course of their interpretation.)

[16] VSR 566–7.

[17] See B. Somló "Kauzális vagy normatív etika?" [Causal or normative ethics] in *Alexander Bernát emlékkönyv* (Budapest 1910), 125–30; Idem "Massstäbe zur Bewertung des Rechts" *ARWP* 3 (1909/10), 508–22, 589–91; Idem "A helyes jog" [Richtiges Recht] *Huszadik Század* 11 (1910), 390–95; Idem "Még egyszer a helyes jogról" [Once more on richtiges Recht] *Huszadik Század* 12 (1911), 71–3; Idem "Újból a helyes jogról és egy helytelen cikkről" [Again on richtiges Recht and on a wrong article] *Huszadik Század* 12 (1911), 334–46; Idem "Das Wertproblem" *Zeitschrift für Philosophie und philosophische Kritik* 145 (1912), 129–58 and 146 (1912) 64–100; Idem "A helyes jog elméletéről" [On the theory of richtiges Recht] *Erdélyi Múzeum-egyesület Jog- és Társadalomtudományi kiadványai* (1912/13) 5, 196–203.

[18] Jb 106.

the whole subject should be included in the principle of moral philosophy. Nevertheless, when Somló created his own view, he concluded a very similar explanation to Pikler's approach, particularly when considering the function of the "sense of justness."[19] His starting point is an empirical fact, according to which humans are able to distinguish just from unjust. Investigation into just law, in Somló's view, must derive from moral values: "As law consists of norms of acts, the criteria of the evaluation of law should always be the criteria of the evaluation of acts. The rightfulness of the norms of activity cannot mean anything else but prescribing the right acts. Just acts, consequently, are moral acts."[20] On the evaluation of law he asserts that morality is a fundamental fact of our mental life which cannot be deducted back to other facts. There is always an element of social evaluation included in moral acts involving the absolute value, which is nothing else but "the value of justness" being achieved in all respects without restrictions.[21] This concept leads to the core of knowledge theory. All this is supported by the arguments stating that evaluating and getting to know are exactly the same, as well as stating that the problem of absolute value and that of the theory of knowledge are concerned with the same problem. The basic problem has been, since Kant, the definition of limits man is not able to surpass. When examining the problem of value, man must refer back to these limits step by step, so as to conclude the fact that the value of truth is the final point one cannot go beyond.[22]

The right act, in his view, can never differ from what morals suggest: "There is no other morality but the positive one." – he claims.[23] Just law is the basic case of moral acts, which may have differing moral contents within various social groups, however, through having general validity, it may be the measure of the justness of law. While the relativity of morality can only be interpreted through a variety of moral approaches, in a normative sense, it is considered as of absolute validity. All this gives rise to "normative ethics."[24]

[19] This is well supported by Somló's concept of value: "Value is such a fundamental spiritual phenomenon, which serves as a norm for other matters." B. Somló *Az érték problémája [The problem of value]* (Budapest: Kilián Frigyes 1911), 28 (hereinafter ÉP).

[20] MBR 518.

[21] ÉP 10: "... truth is the final starting point of every kind of evaluation."

[22] ÉP 10–11.

[23] ÉP 11.

[24] When revising Somló's career, Gyula Moór recalls his attitude to the justness of law: "Under today's cultural conditions, he often said, the norm which allows us to evaluate the justness of morals, law and other social phenomena is the Christian morality." in Moór (n. 1), 32.

Neither Stammler nor Somló suggest that the examination of the justness of law involves the creation of an ideal system of law but it involves seeking a method which contributes to evaluating the variable content of law based on objective justness. Both of them considered just law as positive law, which is characterized by its justness but it is not a criterion for law. Thus, Somló was not able to achieve these objectives either. Instead of formal criteria he defined criteria of content considerations.

Somló started to write his basic study of law in 1912. During the completion of his manuscript, which took more than four years, only a study titled *A szokásjog (Customary law)*[25] and two reviews of Hans Kelsen's and Julius Binder's works were published.[26] These publications are considered as preparation for *Juristische Grundlehre*, moreover, several terms and references in these works reappear in his major study as well. Mainly the definition of the concept of law is to be referred to in this respect. According to his approach, the specificity of legal rules is that "they derive from a power which can enforce its own rules more efficiently than any other kind of power."[27] He examines certain elements and further sub-components of the definition of the term through his analytical approach. He claims that the legal character of a norm involves its achievement as well, but not without exceptions, nevertheless it is required in a general way. "This general rule of the achievement of the norms means that the norms should meet obedience."[28] Obedience refers to the attitude and behaviour of subordinates, and power refers to the enforcement of this behaviour as well as to the acceptance of its justness, or in other words, to the ability of applying physical or mental pressure. Somló also mentions the issue of moral justness, without which "the authority of law" would cease to exist. However, ethical approval is not included among the indispensable prerequisites of law. Moreover, he states that legal enactments can function even without this approval. In addition to his attempt to provide a conceptual analysis, Somló also reveals his empirical approach to the context of law and society.

He completely fulfilled his neo-Kantian turn with his monograph of 550 pages, *Juristische Grundlehre*, published in the German language in 1917, as a result of which Somló became an author widely referred to in the inter-

[25] B. Somló "A szokásjog" [Customary law] in *Emlékkönyv Farkas Lajos tanárságának negyvenötödik éve alkalmából* (Kolozsvár: Stein János Egyetemi Könyvkereskedése 1914), 339–69.

[26] F. Somló "Kelsen [Hans]: Grenzen zwischen juristischer und soziologischer Methode" *ARWP* 5 (1911/12), 644–5; Idem "Rechtsbegriff und Rechtsidee" *ARWP* 8 (1914/15), 525–8.

[27] Somló (n. 25), 342.

[28] Ibid.

national literature of legal philosophy for a long time, not only due to contemporary reflections to the publication.[29] Felix Kaufmann, the renowned jurist, referred to this work in one of his papers in 1924 as the standard basic study of modern philosophy of law.[30] This exceptionally important work of the Hungarian philosophy of law bears the influence of mainly the German but also the Anglo-Saxon theories of law. The influence of English-speaking countries was a rare phenomenon in this region of Europe at that time. Somló's monograph is considered, even by international standards, an outstanding work with respect to the conceptual analysis of legal dogmas.

In the introduction to his book he makes a distinction between jurisprudence concerned with the content of law and science of law concerned with the form of law. He aims to provide an analytical approach to the a priori principle of law, which all enactments are subject to, consequently, law is regarded as the "science of existence" *(Seinswissenschaft)*. This a priori science creates concepts without which law would not exist. As it is not a normative science *(nomographische Wissenschaft)* it declares valid truths on law as a kind of norm. While Stammler, the founder of this approach, aimed to define law through a priori, formal concepts, Somló, deriving from his previous interest in legal sociology, did not attempt to create the pure concept of law, typical of the neo-Kantian philosophy of law, mainly of its Marburg School. He does not consider law as a form of thought but the a priori principle of variable content. "The concept of law is empirical, but as it is not determined by the

[29] Within the contemporary national and international reflections the followings deserve a mention: J. Kohler "Felix Somló: Juristische Grundlehre" *ARWP* 11 (1917/18), 284–8; J. Bárd "Somló Bódog jogászati alapvetése" [Bódog Somló's legal foundation] *Huszadik Század* 19 (1918), 346–54; E. Bolgár "Felix Somló: Juristische Grundlehre" *Athenaeum* 4 (1918) 2, 116–22; L. Pitamic "Eine Juristische Grundlehre" *Österreichische Zeitschrift für öffentliches Recht* 3 (1918) 6, 734–57; W. Heinrich "Eine ungarische Rechtsphilosophie" *Juristische Blätter* 47 (1918), 73–6; [R.] Redslob "Felix Somló: Juristische Grundlehre" *Archiv des öffentlichen Rechtes* 37 (1918) 4, 485–8; R. Mallachow "Zur Metajurisprudenz und Rechtsphilosophie. Kritische Besprechungen über Somló, Nelson und Sturm" *Annalen der Philosophie* 1 (1919), 665–8; W. Sauer "Felix Somló: Juristische Grundlehre" *Zeitschrift für die gesamte Strafrechtswissenschaft* 40 (1919), 249–53; M. Salamon "Felix Somló: Juristische Grundlehre" *Kant-Studien* 25 (1920), 243–5; F. Weyr "Zur Frage einer juristischen Grundlehre" *Philosophie und Recht. Zeitschrift für Philosophie und Rechtswissenschaft, philosophische Parteienlehre, juristiche Erkenntnistheorie (Rechtsfindung) und Pädagogik* 1 (1920/22), 45–9, 112–8; K. Friedrichs "Felix Somló: Juristische Grundlehre" *Zeitschrift für Rechtsphilosophie in Lehre und Praxis* 3 (1921), 70–81; Armbruster "Felix Somló: Juristische Grundlehre" *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 21 (1925), 40–9.

[30] F. Kaufmann *Die Kriterien des Rechts. Eine Untersuchung über die Prinzipen der juristischen Methodenlehre* (Tübingen: Mohr 1924), 113–4.

content of law, it creates the relative a priori of jurisprudence."[31] Despite the fact that he claims that law should not consider the origin of legal basic concepts, he emphasizes, unlike Kelsen, that the basic concepts ultimately originate from experience. The disciplines of statute law need to elaborate all the elements included in the concept of law, since without them the content of statutes will be impossible to include in a system. The essence of law cannot be revealed from the content of statute law. He refers to the truths involved in law as fundamental doctrines of jurisprudence *(Grundlehren der Rechtswissenschaft)*, to the basic concepts as fundamental legal conceptions *(juristische Grundbegriffe)*, and to the system of doctrines as fundamental doctrine of law *(juristische Grundlehre)*.[32] Similarly to Kant, Somló makes a definite distinction between the fundamental concepts of law and those of statute law, distinguishing a priori from a posteriori. It is not by chance that his book could have been written under the title "Prolegomena for all future jurisprudence", which would allow one to recognize the Kantian principles, as he mentioned.[33]

In his introduction on the theory of science he describes three groups of interpretation. He makes a distinction between legal philosophy performed as similar to the fundamental doctrine of law, through referring to the views of Hans Kelsen and Adolf Merkl, and the value doctrine of law, that is jurisprudence interpreted as a doctrine of just law, represented by Julius Stahl, Gustav Radbruch and Emil Lask. These ideas are contrasted with his own theory including the fundamental and the value doctrines of law.[34]

Somló devotes a section to his own theory compared with the views of John Austin, the most reputable representative of the English analytical positivism, described in his *Lectures on Jurisprudence*.[35] Similarly to Austin, he also aims to determine concepts and basic principles which contribute to making distinctions between the different types of law. In his view, his own theory is more self-consistent, however, it is without doubt Austin's merit to have found this path. Both theories have a number of common features. Both jurists use the term of legislative power. Somló mentions that the term "sovereign" used by Austin is equal to his own "Rechtsmacht." Several other common terms occur, i.e. the habit of obedience, etc. Somló

[31] F. Somló *Juristische Grundlehre* (Leipzig: Felix Meiner 1917), 127 (hereinafter JGr).
[32] JGr 6–8.
[33] JGr 2.
[34] JGr 13–6.
[35] J. Austin *Lectures on Jurisprudence or the Philosophy of Positive of Law* (London: Murray 1863).

makes Austin's terms more precise or makes the distinctions more detailed, which enables him to create his own conceptual apparatus. Unlike Austin, he did not consider the concepts of sanctioning or generality as relevant. However, he regarded "will" to be of high importance, stating that law is an "empirical" norm, thus it is directed towards external human acts. Both of them held the view that law may exist only within national states, consequently they denied the existence of international law, not being supported by the actual power of enforcement, as proved by the experience of the First World War, according to Somló. He prefers the terms of international norms *(überstaatliche Norm)*[36] or rather interstate ones.[37] The strict positivism and self-consistency of Austin's view must have allowed Somló to incorporate it in his own conceptual system. His analytical search for conceptions was greatly promoted by his deep knowledge of the German jurisprudence *(Begriffjurisprudenz)* of the late 19th century represented by Karl Bergbohm, Rudolf Bierling, and Georg Jellinek.

After clarifying the starting point of the methods, he aimed to create a definition of the concept of law.[38] He was persuaded, through the history of legal philosophical thinking, that what was lacking in law was a detailed description of the concept of law considered as fundamental. In this way, his aim was not to create a new concept but to provide a thorough analysis and explanation of the existing definitions. His statement emphasizing that jurisprudence, while achieving its goal, must overcome the ambiguity of ordinary language usage, since it is the only way to provide a scientific definition.

Following the classical method, Somló attempts to define the "genus proximum" of law.[39] He claims that it cannot be anything else but the concept of "rule" and its types. When analysing law as a particular rule, he makes a comparison between absolute and empirical, specific and general norms, as well as sanctioned norms and ones without sanctions. Within this distinction he introduces law as an empirical-volitional normative rule. According to the practice followed by Stammler and later by neo-Kantian philosophy, the second element of the definition of law involves its distinction from other norms

[36] JGr 178.

[37] In 1917 Somló devoted a separate study – *A nemzetközi jog mibenléte [The nature of international law]* (Kolozsvár: Ajtai K. Albert Könyvnyomdája 1917) – to this topic in which he repeats, sometimes word by word, what he has written in JGr, 16: "Supposing there was a possibility for another term to become accepted instead of international law, we could simply speak about interstate rules leaving out legal as an attribute." See also Jb 50.

[38] JGr 52–178.

[39] JGr 55–65.

(morality, convention, religion, customs, traditions, and fashion), which allows definition of the "differentia specifica" of law.[40] With respect to this, he applies the term "nomology" *(Nomologie)*,[41] which may include the definition and analysis of the specific features of law. In Somló's view, the ultimate specificity of law is the "command of the highest authority of any society", which is able to enforce it more efficiently than any other authority.[42] This is a specific type of authority, and consequently legislative power must not be interpreted as physical power, legal power is not equal to the power in general, nonetheless law should be taken as power, neither the system of power with the system of exploitation.[43] A specific feature of the legal norm lies in its issuer, and this power is to be called legislative power *(Rechtsmacht)*.

Afterwards, the above-mentioned features of legislative authority are analysed in detail, which is followed by an attempt to define the notion of law: "Law is considered as the norms of a widely valid and constant supreme authority generally enforcing obedience." *(Recht bedeutet demnach die Normen einer gewöhnlich befolgten, umfassenden and bestandigen höchsten Macht.)*[44] This definition is independent from any actual legal content, as all kinds of law have this a priori condition, and as such it is a formal definition, which was more or less attempted by neo-Kantian philosophers. Nevertheless, Somló could clearly see the difficulty of concept formation. He stated that a detailed analysis of certain elements of the definition would not surpass the fact that a certain kind of malleability of the concept of law is included among the specific features of the formation of concepts.[45]

A particular feature of Somló's conception is that he asserts normative ideas, however, with a definitely sociological character. The law is a norm created by normative acts but at the same time it is the manifestation of an empirical legislative authority. In this respect, the concept of law is an empirical concept.[46] Somló, the legal philosopher of his late period, preserves certain elements of his previous sociological approach, thus his oeuvre creates an integral whole.

This paper is not concerned with the conceptual analysis of *Juristische Grundlehre*, which Somló provided under the title "the elements and conse-

[40] JGr 66–92.

[41] Somló uses the concept of "Nomologie" in a different sense than Thomas Holland or Jeremy Bentham, from whom he adopted this term. See JGr 66; Ződi (n. 2), 118.

[42] JGr 93; see also Jb 23.

[43] JGr 111.

[44] JGr 105; see also Jb 28.

[45] JGr 107; see also Jb 29.

[46] See also Jb 127.

quences of the concept of law" in more than 350 pages, in order to support his own theses created on the concept of law. He gives a thorough description on the different types of legal rules, the concept of society and state, the sources of law, the interpretation of law, the application of law, legal obligations, and on the recipients of legal rules, and within these, a number of other phenomena. He provides arguments on all the issues that are absolutely needed to understand his fundamental doctrine.

Somló was inspired, after an enthusiastic reception of his book, to elaborate his legal value doctrine even more thoroughly. He wrote a letter to György Lukács in the summer of 1916, in which he mentioned that he was planning to publish a second volume to *Juristische Grundlehre* entitled *Juristische Wertlehre*.[47] As a preparation to this work, he started to write his self-consistent philosophical theory *(Prima Philosophia or the Doctrine of Absoluteness as a Fundamental Science of Philosophy)*. After completing this work, he would have liked to create his legal value doctrine. However, his early death prevented him from achieving his goals. The fact that the major work of his oeuvre was not completed is a serious loss to Hungarian legal philosophy. His manuscript fragments were published with the help of Gyula Moór, his intellectual heir, under the title *Gedanken zu einer Ersten Philosophie* in 1926.[48]

In this posthumous work he was seeking the answer to the problem of "absolute", within which he reviewed the previous Kantian ideas profoundly influencing his earlier approach. The influence of Kant is substituted by that of Bolzano. The method of "prima philosophia" is based on logic and criticism, which leads Somló towards a transcendental philosophy, a synthesis of theoretical and practical mind creating the transcendental normative approach *(transzendentalen Normatismus)*. In his arguments he strictly distinguishes "Sein" and "Sollen", the affirmative and imperative sentences of absolute validity. Finally, he concludes that philosophy should be based on moral norms as the ultimate principle, instead of the value of truth. He considers moral norms as of definitely absolute validity. In this work he has almost achieved what he formulated in the early 1910s, asserting that similarly to logic, philosophy should be strict, but beyond that, an axiomatic science. At the same time, he was far removed from real life and the empirical world. He laid the foundation of a genuine theory in the Hungarian philosophical

[47] Somló's letter was written to György Lukács on 5 August 1916. The letter was published by Cs. Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai 1985), 31.

[48] F. Somló *Gedanken zu einer Ersten Philosophie* [Hrsg. Julius Moór] (Berlin–Leipzig: Walter de Gruyter & Co. 1926).

thinking. However, it was not considered of any value for jurisprudence in Hungary.

Somló is a most reputable representative of Hungarian jurisprudence. He was the first among the philosophers of law who could surpass the sociological and natural positivist approaches prevailing in the late 19th century and represented by Ágost Pulszky and Gyula Pikler. His scholarly work led the Hungarian philosophy of law to be acknowledged beyond its borders. Through his neo-Kantian oeuvre, in which he achieved a synthesis of "general theory of law" *(allgemeine Rechtslehre)*, formulated from Begriffsjurisprudenz of great importance from the 1870s in the German jurisprudence, and of the analytical positivist approach, which launched a modernisation of law in England from the mid-19th century, he became widely renowned in Europe. In the early 1910s he was considered, as his young colleague Barna Horváth defined, the "representative man" of Hungarian philosophy of law, whose theory was widely discussed in the foreign professional literature.[49] Among his contemporaries, Rudolf Stammler, Rudolf Merkl, Hans Kelsen, Joseph Kohler, Felix Kaufmann, and Alfred Verdross asserted their high appreciation to the Hungarian jurist, declaring genuine views.[50] Somló's reputation is proved by the fact that his fundamental book, *Juristische Grundlehre*, was republished ten years after its first issue in 1917, and again in 1973. In addition to the above-mentioned references of his contemporaries, Herbert Hart, Karl Larenz as well as Helmut Coing and Jerzy Wróblewski widely and frequently referred to him.

[49] B. Horváth "Az új magyar jogfilozófia" [New Hungarian legal philosophy] *Keresztény Politika* 2 (1923) 3, 153.

[50] Ződi (n. 2), n. 21 at 71 and n. 113 at 131.

Propositions in Law

Miklós Szabó (Miskolc)

In his "How to Derive 'Ought' from 'Is'"[1] J. R. Searle attacks "one of the oldest of metaphysical distinctions", i.e. that of between fact and value, with the help of the theory of speech acts. When arguing about his claim that "ought" is derivable from "is" purely via a chain of statements, Searle presents a series of transformations connecting an "is-statement" and an "ought-statement" at the ends of the series.[2] The "trick" is that the first statement is not a simple assertion, but a speech act, undertaking obligation by the speaker. Anyhow, the example shows that a chain of linguistic equivalents (though not logical entailments) may prove to be the contraries of each other. My point is that the same may be true regarding different chains of statements, namely chains of propositions within law.

1 Propositions

Let us start from the simple fact that the empire of law lies within the universe of language. Whatever happens within law, it takes some linguistic form or can be expressed – finally *is* expressed – in linguistic form. The unit of linguistic form is a *sentence*. Sentences are formulated in different languages (systems of linguistic codes), two types of which being important for our present purposes: *natural languages* and *artificial languages*. The basic form of artificial languages is *logic* (the application of which to quantities is

[1] J. R. Searle "How to Derive 'Ought' from 'Is'" [1964] in Idem *Speech Acts. An Essay in the Philosophy of Language* (Cambridge: Cambridge U. P. 1969), Ch. 8, 175–98.

[2] Ibid. 177: "1. Jones uttered the words 'I hereby promise to pay you, Smith, five dollars.'
2. Jones promised to pay Smith five dollars.
3. Jones placed himself under (undertook) an obligation to pay Smith five dollars.
4. Jones is under an obligation to pay Smith five dollars.
5. Jones ought to pay Smith five dollars."

mathematics). A sentence formulated within natural languages is a *grammatical sentence*, while a sentence formulated within logics is a *logical sentence*. A sentence is the unit of language, or – when linguistically expressed – that of speech. The basic form of a sentence, both within grammar and logics, is a *statement*, the minimal model of which is the set of a subject and a predicate.[3] Grammatical sentences have *meaning*, while logical sentences have *intension* i.e. some logically defined semantic content. A *proposition* is the content of a statement.[4]

At first glance a statement is a statement about reality, about the world – i.e. it states the existence of some fact. That is why a statement can be *true* or *false*. E.g. the statement "the Sun is shining" is true if and only if (in fact) THE SUN IS SHINING. However, *description* of reality is not the *only* role or function of linguistic expressions. A different function is *expressive* function, i.e. expression of the relation of self to world, expression of emotions, sympathies etc. (e.g. "I wish the Sun was shining"). The third function is *prescription*, conveyance of will *(voluntas)* concerning the (future) state of things, of the world (e.g. "Let the Sun shine!"). Finally *performing* an act by expressing words, i.e. action by speech is an important function of linguistic expressions – *speech acts* (e.g. "Let there be light!"). All these are separate roles or functions served by almost the same linguistic expressions.

At second glance all linguistic expressions are acts, *speech acts*, in the sense that we act in the world with their help. The poles of the scale of speech acts – following J. L. Austin's neologisms – are *constatives* and *performatives*.[5] Constatives are descriptive utterances – acts of truth-telling. Most of the time it is not obvious that constative utterances are acts-in-the-world, but sometimes it becomes clear, e.g. when a witness before the court claims he or she *does* tell the truth. On the other hand there are no verbs or utterances which are exclusively performative. The sentence "He should not smoke here" may declare the recognition of a non-smoking area, while "It is raining out there" may serve as a warning: "Take your umbrella with you!" It follows that sen-

[3] Formulated logically: statement p ("the Sun is shining") consists of subject a ("the Sun") and predicate F ("is shining") – $p \Leftrightarrow Fa$.

[4] For details see J. F. Rosenberg – Ch. Travis (eds.) *Readings in the Philosophy of Language* (Englewood Cliffs, New Jersey: Prentice–Mall 1971).

[5] J. L. Austin *How to Do Things with Words* (ed. J. O. Urmson) (Oxford: Oxford U. P. 1962), Lecture I. The taxonomy of speech acts consists of "verdictives," "exercitives," "commissives," "behabitives" and "expositives," or more or less the same categories of speech acts named by J. R. Searle: "representatives," "directives," "commissives," "expressives" and "declarations." See J. R. Searle "A Classification of Illocutionary Acts" *Language in Society* 8 (1979), 137–51.

tences (in grammar or in logic) themselves do not belong either to constatives or to performatives, rather, they belong *both* to constatives and performatives. Sentences are (the same) sentences – but they have two aspects: constative and performative ones at the same time. In other words: sentences have propositional and (to create another neologism) "actional" content.

The fact that constatives and performatives are but two sides of the same utterances makes it possible to move between statements and acts, between stating-the-world and acting-in-the-world. This is true even though stating and acting are different sorts of relations to world: statements are *about* the world, while acts are *against* the world. From this point of view propositions are linguistic expressions (utterances) stating that they describe a particular situation (the existence of it) and, at the same time, expressing the conviction that this situation occurs.[6] "Propositional content" means that each sentence has some descriptive relation to world; e.g. order "Shut the door!" contains the proposition "The door is open." (NB: "containment" is not "entailment:" the propositional content need not to be true for the order be valid.)

As it is well-known, linguistic expressions relate to ("hang on to") reality in two ways: via their "meaning" and their "reference."[7] However, meaning and reference connects words to the world in different ways. *Reference* "points" at a definite piece of reality; e.g. "London" points at a city, "Immanuel Kant" points at a person etc. It is the function of *proper nouns* to refer to a piece of reality.[8] On the other hand *meaning* can be attached to words or to sentences. As we have established, (elementary) sentences consist of two kinds of words: names and predicates. Names do have reference, but they do not have meaning. One can say "Paris" means "the city of light" but this is not the meaning of "Paris" – it is the meaning of the sentence "Paris is the city of light."[9] Words apart from names – i.e. *predicates* – and

[6] See A. Soeteman *Logic in Law* (Dordrecht–Boston–London: Kluwer 1989), 318.

[7] Originally introduced by Gottlob Frege in his "Über Sinn und Bedeutung" [1892] in Idem *Kleine Schriften* (ed. I. Angelelli) (Darmstadt: Wissenschaftliche Buchgesellschaft 1967). The relation is illustrated by "semantic triangle": a triangle with "sign," "reference" and "meaning" at its angles.

[8] "Proper nouns (from Latin *nomen proprium*, 'a name that belongs [to somebody or something]') are the prime examples of linguistic expressions with 'proper' reference: names name persons, institutions and in general, objects whose reference is clear." J. L. Mey *Pragmatics. An Introduction* (Oxford: Blackwell ^{2}2001), 53. Besides proper nouns *pronouns* (e.g. "he" or "the library we visited last Tuesday") and *descriptions* (e.g. "the victor of Jena" or "the loser of Waterloo" – Edmund Husserl's examples) may serve the function of reference.

[9] Of course, a "name" may function without reference and with meaning. E.g. "Zeus" refers to no real being, but, at the same time, it means "the King of Greek Gods". However,

sentences have meaning, while they do not have any reference. Meaning of predicates (e.g. "shines" or "is hungry") is some "thought content," while meaning of sentences (e.g. "the Sun is shining" or "Peter is hungry") is some "propositional content."

It follows that propositional content is not to be understood as "reference" in a logical or semantic sense.[10] Nor can it be justified by pointing at any piece of reality which is "referred to" by that proposition. The predicate, which connects proposition to a subject, is a generalisation – e.g. "shines" or "is hungry" may be attached to an indefinite number of subjects, referred to by proper nouns. Furthermore, as predicates have only meanings (instead of references), the thought content of predicates cannot be defined in the same way, i.e. as classes of individual beings (which can be pointed at, one after the other). The meaning is always open: the scope of it cannot be defined as the sum of its instantiations, as these instantiations are unlimited – it is their scope that is open.

2 *Equivalence of Propositions*

The concept of equivalence had been elaborated and defined by classical logic[11] as a metalogical sign: ⇔.[12] The sign cannot be classified as a *logical*

this "proper" name is not proper *(proprium)* in the sense that it *belonged* to (a *real*) "somebody" or "something."

[10] As I understand this mistake is made by Neil MacCormick when he says: "All in all, I conclude that the problem of matching major and minor premisses in a normative syllogism is the problem of securing *sameness of sense of the predicates* deployed in both. [...] That it is only in minor premisses that *predicates are used referentially*, with reference to particular features of particular concrete cases, while their use in major premisses is non-referential, poses no difficulty for this theory." (Emphasis added.) N. MacCormick *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford: Oxford U. P. 2005), 61. It must be stressed that, when using the terms properly, "sameness" means that reference of two names (e.g. "London" and "the capital of England") is the same; and predicates do not have references: particular cases are definitely not referents of general norms. On reference see R. E. Asher – J. M. Y. Simpson (eds.) *The Encyclopedia of Language and Linguistics* I–X. (Oxford etc.: Pergamon 1994), 3492–500.

[11] The followings within this section make a slightly revised version of one part of my "Practical equivalence" in S. Eng (ed.) *Proceedings of the 21st IVR World Congress.* Part 2 *Law and Practice* [*ARSP* Beiheft Nr. 97] 2005, 187–95.

[12] Ibid. 187: The word *aequivalentia* appeared as a neologism in Latin, from the words *aequum* (equal, identical) and *valentia* (physical, bodily strength or force) with the meaning of "equal (physical) powers", "equal force", "equal value". It is a relational concept stating equal or identical force or value of two (or more) things, phenomena, statements or expressions, and, as a consequence, their interchangeability. That, which is *aequi valens* is able to substitute for something else, being their force or value equal.

sign (constant), because it does not represent relation between linguistic expressions (sentences, predicates, subjects), but between logical schemata (formulae). *A*, *B*, *C*... logical schemata are logical expressions consisting only of non-logical components indicated with parameters (*p*, *q*, *r* for sentences, *F*, *G*, *H* for predicates, *a*, *b*, *c* for subjects) and logical components indicted with logical signs or constants (as negation, conjunction, disjunction etc.). Equivalence is to connect two schemata of this sort, expressing that they are equivalent, i.e. interchangeable, as they have identical *truth-values*. As a definition: equivalence is a two-argument metalogical predicate, which expresses necessarily identical truth-values of two logical schemata (formulae). It is a two-argument symbol, as it connects two schemata ("...⇔..." e.g.: $\sim\sim p \Leftrightarrow p$); it is a metalogical symbol, as it states certain logical relation between logical schemata ("$A \Leftrightarrow B$" e.g.: $p \supset q \Leftrightarrow \sim q \supset \sim p$); and it is a predicate, as it *states* this relation. The relation is stated as a logical law, the truth of which depends only on defined meaning of logical signs (e.g.: $p \& q \Leftrightarrow q \& p$).

Strictly speaking one can even conclude that the role of equivalence is restricted to the realm of classical logic. In other words: as opposed to logical constants (e.g. conjunctions), metalogical signs have no linguistic equivalents, because their meanings are specified by definitions for the purposes of logic (as "and" is defined by certain truth-function and represented by & in logic). We cannot agree with this strong claim: linguistic expressions are regularly used to express "interchangeability", "adequateness", "equivalence" of things or their descriptions, e.g.: "The enemy of my enemy is my friend" or "Silence implies consent" or "Not to forbid is to permit" etc.

It is easier to grasp the logical meaning of equivalence if we start from the other metalogical sign: *consequence relation* or *implication*. Its symbol is: ⇒; its schema is: $A \Rightarrow B$; its meaning is that the schema on the right side of the symbol logically (i.e. necessarily) follows from that on the left side. It is easy to recognise that this is the basic schema of logical inference. The schema of consequence relation is "$\mathbf{P} \Rightarrow C$"; where **P** is for the set of premises and *C* is for the conclusion. That is, a consequence relation is a two-argument metalogical predicate, which expresses that truth of premises implies (necessitates) the truth of conclusion; i.e. it is not possible to interpret the parameters of schemata in such a way, which results in truth of premises together with falsity of conclusion. Let us take as an example the law of Leibniz: $\{a=b; F(a)\} \Rightarrow F(b)$: if it is true that London is the capital of England and it is true that London lies on two sides of Thames, then it is necessarily true that the capital of England lies on two sides of Thames. Consequence relations have two extreme versions. The first is when the conclusion is necessarily

true together with *any* premise – these are *logical truths*; schematically: $\Rightarrow A$; e.g.: $\Rightarrow(a=a)$ or $\Rightarrow(p\supset p)$, like "A law is a law."[13] The other extreme version is when asymmetrical consequence relations (which are valid "from left to right" only) become symmetrical (valid in both directions). The latter is the case of *equivalence*: one logical schema logically follows from the other and vice versa; i.e. equivalence can be defined as mutual consequence relation.

There is a certain parallel between (metalogical) equivalence and consequence relation on the one hand and (logical) biconditional and conditional on the other. A *conditional* is a logical constant (symbol: $\supset$; reading: "if... then..."; i.e. the truth of consequent necessarily follows from truth of antecedent), which helps us to schematise conditional statements; e.g.: "If it is raining, then the field is wet": $p\supset q$. A conditional, of course, can form a part of a consequence relation (implication); e.g.: $p\supset q$; $p\Rightarrow q$: "If it is raining, then the field is wet"; (but) "It is raining"; (therefore) "The field is wet". A *biconditional* is a "mutual conditional", i.e. it is valid in both directions (symbol: $\equiv$; reading: "if... then, and only then..."); e.g.: "If he asks me, then, and only then I am ready to help him" (i.e.: if he asks me, it follows I help him and if I help him it follows he has asked me): $p\equiv q$. A biconditional also can be a part of a consequence relation (implication), as it is in the definition of biconditional: $p\equiv q\Leftrightarrow(p\supset q)\&(q\supset p)$. The parallelism lies in that the function of a logical conditional works the same way (derives consequent from the antecedent), as that of a metalogical consequent relation (derives conclusion from premises). The same parallelism can be observed between symmetrical biconditional and equivalence.

However, the word "equivalence" is often used to refer to biconditionals and, similarly, word "implication" is used to refer to conditionals. The reason for this may be that the *validity condition* of a conditional is that the consequent be the logical consequence of the antecedent; and the *validity condition* of a biconditional is that the two sides be logically equivalent. However, if a conditional is called implication, or a biconditional is called equivalence, a confusion of logical and metalogical levels occurs.[14] More properly

[13] This is to be understood within formal, extensional logic. However, linguistic expressions of the same form are not tautological, i.e. the same words have different meanings which are treatable within intensional logic.

[14] See e.g. I. M. Copi – C. Cohen *Introduction to Logic* (New York–London: Macmillan [5]1990). It follows that, though they use the same symbol: $\equiv$, they have to differentiate between *material equivalence* (i.e. biconditionals connecting contingent statements: $p\equiv q$) and *logical equivalence* (i.e. equivalence understood as logical law; e.g.: $p\equiv\sim\sim p$). Correspondence of truth-values in the former case is *contingent*, while in the case of the latter it is necessary, and these latter are only interchangeable (ibid. 288).

we can claim that a conditional is a *consequence* of an implication and similarly, a biconditional is a *consequence* of equivalence: $(A \Rightarrow B) \Rightarrow (A \supset B)$; and $(A \Leftrightarrow B) \Rightarrow (A \equiv B)$.

To sum it up, equivalence is a metalogical relation, which results in logically schematised expressions connected by it being freely interchangeable, because their truth values are the same. Classical logic is involved in criteria, methods and laws of valid inferences, i.e. how we can reach true statements from true (or held to be true) statements. In general, this is nothing else than to specify the criteria of interchangeability of true statements. Logic does not help us with coming to new discoveries, just with unfolding knowledge implicit in those statements. Natural language expressions are not needed to specify those criteria (in fact they are troublesome); just parameters and logical constants are needed.

Taking into consideration that logical equivalence is often referred to by the expression "logical synonym," it seems to be tempting to extend the concept of equivalence to linguistic expressions. The most evident example of making use of equivalence of linguistic expressions is *translation* of a text into another language. The aim of a translation is evidently that the translated text should correspond to the original, i.e. be equivalent with it. The question is whether this is possible or not. Obviously, "complete" equivalence is not possible in translations: vocabulary and syntax of natural languages are different. This is most evident in case of literary translation, whose representatives tend to conclude to the impossibility of "proper" translations. Naturally, we know that translations do exist, which are either "good" or "wrong", and in the simple case of the translation of an instruction or newspaper article we are ready to admit that a translation has the same (linguistic) value as the original: they are equivalent.

One more step is only needed to extend the concept of equivalence to *intralingual translations*. The term was introduced by Roman Jakobson to bring "rewording" under the concept of translation as interpretation of linguistic signs with different signs of the same language.[15] In the context of a situation "Yes!" and "I don't mind!" may be equivalent of each other in the sense that they are interchangeable as they have the same value when expressing "consent". We make use of such equivalents several times every day. It follows, equivalence as equation of values by translation of linguistic expressions performs a role not only within logic, but also within human practice in general. However, the use of equivalence within practical life is

[15] R. Jakobson "On Linguistic Aspects of Translation" in R. A. Brower (ed.) *On Translation* (New York: Oxford U. P. ^{2}1966).

not as strict or determined as within logic, because the use of linguistic expressions is not as formal as the use of logical expressions. Equivalence of elements of intralingual translations is a matter of judgement or a matter of functionality.

Our final question is whether *equivalence within law* (e.g. whether certain measure of penalty is "equivalent" with a certain length of imprisonment, or a certain measure of damages is "equivalent" with certain non-material harms) is a kind of *logical* equivalent or, rather, that of *practical* equivalent. The possibility of interpreting equivalents in law as logical equivalents depends on interpreting law as the realm of (deontic) logic. If relations within law are of logical nature, then equivalents within law are logical equivalents, too. But it does not seem to be the case. The "life of law" is not logic, indeed – which is good news.[16] Nothing new could be reached by operations within law, were legal inferences simply logical inferences. Within the "100 aker Wood" of Logic, when "tracking something" we can "nearly catch a Woozle"[17] – but finally, really, we cannot. We can only go around in circles, track ourselves and can discover nothing new. This is not satisfactory for law. Within the Wood of Law we *have* to get to somewhere from somewhere and, in the end of the day, catch a Wizzle or a Woozle. Now we turn to the question: how do we do that.

3 Transformation of Normative Statements

In the following we try to reconstruct two lines of transformations – or, rather, two circles of transformations. The starting point of these lines is a norm (a prohibition), by the linguistic transformation of which we can move from norms to statements and, the same way backwards, from statements to norms, getting back to the starting point. The first line of transformations we try to draw is that of *voluntas*. Under *voluntas* we mean the driving or creating force of norms. The *fiat* of norm-setting is the first, but not the last step. The first step is followed by further steps of transformations: transformation of norm-setting into norm-proposition and, backwards, transformation of norm-proposition into norm-reformulation. "Norm-reformulation" is the re-statement of the same norm with different words but the same content. Let us turn to the lineage of *voluntas* first.

(1) Do not kill! The example of the aboriginal prohibition or command

[16] O. W. Holmes *The Common Law* (Boston: 1881), 1: "The life of the law has not been logic; it has been experience."

[17] A. A. Milne *Winnie-the-Pooh* (London: Egmont Books 2002), 44.

can be found in the Ten Commandments; e.g.: "Thou shalt not kill!" Expressions like that represent the basic form of norms: pure and direct orders, prohibitions and permissions. In terms of speech acts they are prescriptive or normative acts; in terms of law they are norm-settings, i.e. linguistic expressions of will *(voluntas)*. Linguistically modernised versions of the same commandment – "You should not murder anyone!"; "Do not commit murder!" – are not linguistically neutral (and not necessarily equivalent) versions of the same command. Words representing slaying (killing, murder, manslaughter) serve as technical terms of legal language, too. However, the main difference between imperative sentences like the one above and norms of law is not terminological. Surprisingly enough, we cannot find norms formulated by linguistic patterns of the Ten Commandments even in the earliest and most archaic codes, like Hammurabi's Code of Laws.[18] Direct imperative sentences are not characteristic to legal texts: they do not order and do not forbid. They state normative consequences of operative facts.[19] If so, norm-setting in legal language needs different formulation.

(2) CCL 166.1: Whoever kills another person commits manslaughter and is to be punished by five to fifteen years of imprisonment.[20] This is one way of transforming the prohibition of killing into the language of law. The normative content or meaning (semantic content) of the latter can be held equivalent with the former ("you shall not kill"), apart form specifying of conditions and circumstances in cases of which an action can be qualified killing (murder or manslaughter). Transformation of direct imperatives is needed in order to interpolate them into the dogmatical (doctrinal) system and way of ruling of law. That is why this version is not simply norm-setting: it is norm-of-law-setting or *norm-formulation*.[21]

Transformation into (a more formalistic) legal language demands clarification of logical status of "deontic modalities", referred to by deontic operators obligatory *(O)*, forbidden *(F)*, permitted *(P)*.[22] Their status can be

[18] E.g. Section 231: "If it kill[s] a slave of the owner, then he shall pay slave for slave..." cca 1780 BC. (Transl. by L. W. King) The wording of the XII Tables of Rome is similar.

[19] That is why Soeteman uses term "normative statement" to refer to norm-setting. See Soeteman (n. 6), 31.

[20] Hungarian Code of Criminal Law, section 166, paragraph 1. Similar wordings can be found in several codes; e.g.: "Any person who unlawfully kills another is guilty of crime, which is called murder or manslaughter, according to the circumstances of the case." Queensland Criminal Code Act of 1899, section 300 ("Unlawful homicide").

[21] Von Wright's term. See G. H. von Wright *Norm and Action* (New York: The Humanities Press 1963), 93ff.

[22] Ibid. "Preface".

understood in different ways: 1. as *prefix* attached to descriptive statement *p*: "it is obligatory that *p*"; 2. as *predicate*, being one of constitutive parts of a proposition: "(for every one)... it is obligatory... (to give evidence)"; 3. as one of *logical constants* next to others like negation, conjunction, disjunction etc.: ~O(*p*) – "it is not true that it is obligatory (to vote)"; 4. as *modality* of utterances (either imperative mood in grammar, or illocutionary force in speech act theory,[23] or deontic modality in logic) with possible notation similar to interrogative logic (logic of questions) – ?*p*: "Is it true that (Peter is sleeping)?" or *a*?*F*: "Is Peter (sleeping)?" – like !*p*: "(do not kill)!" or *a*!*F*: "you shall not (park here)!";[24] finally 5. as meta-logical relation expressing certain relation (e.g. equivalence) between (logical) schemes of states of affairs on one side and legal consequences on the other: "(the fact that contract of sale of some real estate is not put in writing)... obligatorily evokes the consequence that... (the contract is invalid)".

(3) According to provision 166.1 of CCL: "Whoever kills another person commits manslaughter and is to be punished by five to fifteen years of imprisonment." The clearest way of referring to a norm is to create a "sentence-token" of it.[25] A sentence-token is a replica of the original; e.g. 15 pieces of "Non-smoking area" signs put out in a building. Sentence-tokens are somewhere between *normative statements* (i.e. norm-settings) and *statements on norms* (i.e. norm-propositions). The utterer of a sentence-token puts herself in the place of legislator and, as the "substitute" for the legislator, declares the norm again and again; but, at the same time, she refers to the norm, reporting its content by the most correct way: by repeating it word by word. Making use of Hume's metaphors, the first role is that of Censor, while the second is that of Interpreter. However, considering the function of the utterance, we are able to identify it as norm-proposition expressed in formal speech – i.e. *quotation*.[26] It *is* a proposition, as it can be true or false, being able to be justified empirically by pointing at the relevant part of the text of a code being legally valid in a definite system of law at a definite point of time.

(4) Provision 166.1 of CCL orders to be punished by five to fifteen years of

[23] Types of speech acts can be called "pragmatic modalities," as well.

[24] For similar notation see A. Ross *Directives and Norms* (New York–London: Routledge & Kegan Paul 1968), who understands norms as imperatives of the form *p*!, which is satisfied when statement *p* is true.

[25] On sentence-tokens see Y. Bar-Hillel "Indexical expressions" in Idem *Aspects of Language* (Jerusalem: Hebrew University 1970), 70ff.

[26] This step from norm-setting to norm-proposition is similar to that which was taken when – in the first hieroglyphs – the drawing of a fish or a tree was used as the *sign* of it, instead of the *picture* of it.

imprisonment anyone, who kills another person. This is a most common way of (professional) reference to a norm-formulation, to the provisions of a definite norm. The only difference compared to the original norm-setting is that its wording is put into indirect (reported) speech: re-forming of the norm in reported speech does not mean the re-wording of it in the sense of altering a word. In spite of this, the change of linguistic form (i.e. change from direct into indirect speech) *is* transformation of the original text – transformation from norm-setting into norm-proposition –, a transformation in terms of grammar, but without transformation in terms of propositional (semantic) content. This is the last point to which one can reach in transformation of a norm without any doubt concerning the sameness of the normative content or even the norm itself.[27]

(5) According to provision 166.1 of CCL you are to be punished if you kill anyone else. This kind of statement, too, is between norm-setting as replication of a normative statement and norm-proposition as a statement on a normative situation, but in a slightly different way. Utterances of this kind are *references* of a norm in reported speech to an individual being and, as such, the first step of norm-concretising or norm-individualisation (norm-concretising-norm-proposition/1).[28] Or else, we may hold that this step is not more than displacement of the variable of the scheme *(x)* by an individual term *(a)*; e.g.: $\forall x.(Fx \supset Gx)$; $Fa \supset Ga$. In this case we get some norm-concretising or norm-individualising norm-proposition, similar to Kelsen's individual norms. Alternatively, we may also conclude that this step is the conclusion of a hypothetical syllogism: $\forall x.Fx \supset Gx$; $Fa \Rightarrow Ga$. The practical validity of this logical relation is dubious, as a syllogism of this form in itself is unsatisfactory: not literally every one is to be punished who has killed, as there are lawful killings and other excuses. It follows that, if we insist on the model of syllogism, we have to open the set of premises so wide as to be able to individualise by selecting the premises.

(6) According to provision 166.1 of CCL you are to be punished if you poison somebody. This utterance serves as correlating a norm with one of its instantiations. It also counts as the second step of norm-concretising (norm-concretising-norm-proposition/2), namely the first step of concretising of predicate of the norm.[29] If Fx_1 is the first way of killing someone, Fx_2 is

[27] Even though, one could argue that convertibility does not work the same way in both directions: (2)–(3)–(4) does follow from (1), but not so in the reverse direction; I think they are, at least practically, interchangeable.

[28] On *Norm-Konkretisierung* see K. Engisch *Einführung in das juristische Denken* (Stuttgart–Berlin–Köln: Kolhammer ^{8}1983), 45ff.

[29] Not independently from considerations mentioned in n. 10, we cannot speak of "indi-

the second way etc., then $Fx \Leftrightarrow Fx_1 \vee Fx_2 \vee Fx_3 \vee \ldots \vee Fx_n$. As Fx_1 etc. is not an individual act (which would be to mix certain amount of cyanide of certain pureness with certain amount of certain liquid etc.: a conjunction of definitely individual circumstances), it cannot be interpreted by simple displacement – it needs semantic interpretation. Predicates can only be treated as variables in systems of second-order (intensional) logic.

(7) According to provision 166.1 of CCL you are to be punished if you poison your boss. This is the reference of a norm expressed in reported speech to an instantiation of instantiation. *Instantiation*$_1$ is "poisoning" as instantiation of "killing"; *instantiation*$_2$ is the "boss" as instantiation of "somebody" (to be poisoned). In terms of logic some system of third order logic could handle the three levels of variables mentioned above. Consequently this step is the third step on the road to norm-concretisation, which is the individualisation of individualisation of predicate (norm-concretising-norm-proposition/3).

(8) You are going to be punished if you kill/poison somebody/your boss. At this point we reach the apex of the chain of transformations of norm-setting. At this point the many-sided characteristics of normative statements catches our eye. First, we have to consider whether the difference (if there is any) between a statement *about* a norm and a statement *of* a norm is a sharp demarcation line.[30] Clearly, statement (8) is a report *about* a norm (which, otherwise, can be found at 166.1 of CCL, justifying the truth of the report) and, *at the same time*, a re-statement *of* the original norm (which we declare when we take the legislator's place or, more generally, when we stand up in the name of the community). Second, we have also to consider whether normative statements like ours are of *theoretical* or *practical* nature. We cannot say that statements about norms are theoretical (descriptive), while statements of norms are practical (prescriptive). It is rather their function that matters: whether they are to inform about the state of affairs, or they are to give reason to some decision or action. Third, we can speak of *direct* and *indirect* normative statements.[31] Direct normative statements are those, which contain normative operators (e.g. "ought to...," "is permitted to...") or normative predicates (e.g. "have a duty," "have a right to"), otherwise they are indirect (e.g. "In 1948 a new legal system was established in Israel").[32] So then: is statement (8) direct or indirect? I think: both.

vidualisation" of predicates, as only names (e.g. London, the Moon, Aristotle etc.) can be individual, predicates (is large, shines, claimed etc.) cannot.

[30] D. Bánki *Legal assertives* (manuscript) (Budapest: 2003), 158.

[31] See e.g. J. Raz *The Concept of a Legal System* (Oxford: Clarendon Press [2]1980), 49 *passim*.

[32] Ibid. 49.

Our statement is *practical reference* of a norm (expressed in reported speech) to a case – it is statement of *consequences* of the norm and not that of the norm itself. Transformation lies in substitution of normative consequence "is to be punished" with empirical consequence "is going to be punished." This step is called "prophesying" by American realists, as the consequence predicted can only be a probability-inference. The statement mirrors the outside point of view of the "bad man"[33] instead of the inner point of view of the judge, completing the application of a general norm to an individual case.

(9) Do not poison your boss, or else you are to be punished. From now on we start our way back from *Sein* to *Sollen*. Everything that appeared to be (normative) inference till now, turns into justification to an order of the type "Do this!" or "Don't do that!"; e.g. "(Hold it tight)... or else... (it is going to fall down)" or "(Don't touch the wire)... or else... (you are going to get an electric shock)". It does not matter if we refer to technical or to legal norms as justifications – the construction remains the same. It does not matter either if the justificatory norm is an order, a prohibition or a permission. In terms of speech-act theory each of them is a piece of advice: request of somebody to do something because of some reason. The first step of this section is confined to *setting an individual norm* backed by empirical (consequentialist) justification in the form of command, advice, request with regard to a single case.

(10) Do not poison your boss, because it is forbidden. As the next step backwards this warning differs just in one respect from the former: in the way of justification. The justification is not an empirical one (referring to some possible future factual consequence) but, instead, it is normative. It refers to an existing norm or, to be more precise, to the authoritative nature or source of that norm.[34] This kind of utterance is norm-setting again: setting of an individual norm backed by authoritative justification. However, as the authority is attached to someone else (namely to the legislator), reference to an indirect authority might be understood either as justification to some norm-setting or as reporting an existing norm with the pragmatic function of "warning" as speech-act.[35] Something similar is a warning addressed to our child: "Didn't you hear what Mum told you to do!?!"

[33] The phrase of O. W. Holmes "The Path of the Law" in G. C. Christie (ed.) *Jurisprudence. Text and Readings on the Philosophy of Law* (St. Paul, Minn.: West Publishing Co. 1973), 650.

[34] On authoritative reasons in general see e.g. J. Raz (ed.) *Authority* (Oxford: Basil Blackwell 1990).

[35] Replication of an utterance with the same wording is a "sentence-token"; replication of

(11) Do not kill, because it is forbidden. One more step backwards. The difference against the former utterance lies in its level of abstraction: a move from (more) individual to (more) abstract norm-formulation. The grammatical form of the utterance is still a declarative sentence, whose propositional content is "Killing is forbidden", but whose normative content (the norm, hidden in declaration) is "Do not kill!".

(12) Do not kill! Taking the last step we get back to the starting point. This means that, by performing a generalising norm-setting we occupy the position of the legislator. It is *us* who forbids killing – no matter, whether as legal or moral or sacral command. What we do now is more than the justification of a normative statement (proposition) and also more than the repetition of an authoritative reason. We set a norm, even if someone else (the legislator) has already set it.

4 *Transformation of Normative Propositions*

Now we can turn to the second line or circle of transformations – the transformation chain of "*ratio.*" "*Ratio*" is to mean the intellectual efforts of applier of law (i.e. the judge) to make the intention of legislator and demands of the case meet. The opposition of *voluntas* and *ratio* originates in the doctrine of distribution of powers: the demand of separation of legislation and execution. The *ratio* is the faculty of the judge who, being deprived of the possibility of norm-setting, is restricted to apply norms set by someone else to cases presented to her. The first step of norm-application is norm-setting, too, by the linguistic transformation – called interpretation – of which we can again move from norms to statements and, the same way backwards, from statements to norms, as far as we get back to the starting point. Let us turn to the lineage of *ratio* now.

(1) Do not kill! The starting point is the same elementary command again. We face the realm of norms in the form of normative barriers or forces, which we have to cope with. This "coping with" is applying norms to our own decisions and actions.

(2) CCL 166.1: Whoever kills another person commits manslaughter and is to be punished by five to fifteen years of imprisonment. The norm-formulation, as already introduced, is the transportation of an elementary norm (prohibition, command, permission) into the system of law. This transportation results in the transformation of a rather ambiguous norm-content into a (more) for-

the same utterance with the same content (though different wording) is a "sentence-type." See Bar-Hillel (n. 25).

malised and specified norm-text. At the same time the imperative sentence turns into declarative sentence, becoming able to carry propositional content and, consequently, to be judged as true or false.

(3) According to provision 166.1 of CCL: "Whoever kills another person commits manslaughter and is to be punished by five to fifteen years of imprisonment." Familiar again: this is the well-known norm-proposition referring to the norm in formal speech. The text is the same, just approached by drawing back one step. By repeating the text of the norm we create a meta-text, which is a norm-proposition. Its truth-condition is unambiguous: the literal correspondence of the two texts.

(4) Provision 166.1 of CCL orders anyone, who kills another person, to be punished by five to fifteen years of imprisonment. The last step of transformations within the validity conditions of semantic equivalence is the same: the norm-proposition formulated in indirect (reported) speech. Till this point there is no interpretation mixed into the original text of the norm; we restricted ourselves to repetition of the same norm with different grammatical constructions. This section of chain of transformations is the same as the first section of transformation of normative statements.

(5) Poisoning another person counts as manslaughter and is to be punished by five to fifteen years of imprisonment. From this point on the lineage of transformations of norms takes a different direction. This direction drives into the section of *implementation*, the classical legal tool of which is *interpretation*. Our statement is direct interpretative proposition as in order to state a plausible interpretation of the norm it transforms the norm-proposition in order to bring about specification (in reality: modification) of meaning. It can be modelled neither as demonstration nor as conclusion – as far as it is interpretation, it is creative or constructive interpretation. It means that we claim a *new statement*, against which the norm-proposition cannot be more than point of reference serving as justification or argumentation.

(6) Making someone drink 1 gramme cyanide added to a cup of coffee counts as manslaughter. Compared to the previous statement in which we could only find the predicate of the norm-proposition having been interpreted, taking the second step of implementation we face the concretisation of the norm. Concretisation is only possible in relation to a concrete case, the result of which is a *specified interpretative proposition*. While we can find examples of propositions type (5) in precedents of common law systems or supreme court decisions of civil law systems, examples of propositions type (6) could be found in individual judgements (or interpretative proposition aiming at certain judgement in a definite case).

(7) X *has made* Y *drink 1 gramme cyanide added to a cup of coffee, therefore she is guilty of manslaughter and is to be punished by five to fifteen years of imprisonment.* This kind of proposition is the third step driving to the implementation of the norm as interpreted and concretised, which also states the practical-legal consequences of the norm as Kelsenian "hypothetical judgement." This step is again capable of being modelled as logical inference, whose premises are statements (6) and (2). That is why we can call it *inferring proposition* – which is not *inferring norm-proposition*, but, instead, *inferring concretised interpretative norm-proposition.*

(8) X *is guilty of manslaughter and is hereby sentenced to ten years of imprisonment.* This statement is the first step of the third section of implementation, whereby we leave the realm of propositions again in order to enter the universe of decisions and actions. Applying judgements (in the sense of judgements or sentences of courts) are manifestations of *voluntas*, disguised as *ratio*, the decision (in our case: the declaration of a definite measure of punishment) itself is to be justified, too. Its justification is characteristically *normative justification*, presenting the decision as implementation of rules, principles and practices of imposition of punishment.

(9) X *is guilty of manslaughter and is hereby sentenced to ten years of imprisonment to be served in correctional facility without possibility of probation.* This is only to remind that judgements are not single decisions or inferences but a *series* of them. A judgement results from the implementation of the complexity of norms – it is an *applying concretised judgement.*

(10) X *was found guilty of manslaughter and sentenced to ten years of imprisonment.* It is the first step of the last section of linguistic transformations within the lineage of *ratio*. The transformation lies in empirical description of a judgement consisting in normative inference. The utterance is an unambiguous statement, a declarative proposition (like "It is raining out there"), whose truth-condition is the wording of an empirical judgement.

(11) I dissuade you from killing your boss or else you might be sentenced to ten years of imprisonment. This is a speech-act – a piece of advice which is to interfere in the decision of someone. The reason or justification of interference is the generalisation of a sentence (judgement) perceived and referable in case of necessity. Our advice is an *inferring, generalising, normative proposition* like "You had better carry an umbrella with you."

(12) Do not kill! Reaching the furthest point by transformations of propositions we arrive at the starting point: the original command. Having taken all steps of describing, inferring, generalising and reasoning propositions (serving as speech-acts) the result we earn is a normative statement, a norm-

setting universalisation. The circle closes – the same way as the circle of lineage of *voluntas*. Different sections of these circles are not opposites of each other, instead, they are conditions, consequences, prerequisites and justifications of each other.

Zum Verhältnis der Rechtstheorie und der Verfassungsgerichtsbarkeit in Ungarn

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Für eine rechtsphilosophische Konzeption, die das Recht als einen praktischen Vorgang auffaßt, ist die Untersuchung des Verhältnisses zwischen Rechtstheorie und Recht besonders wichtig. Die Gestaltung dieses Verhältnisses hängt vor allem von den folgenden drei Faktoren ab: der Zustand der Gesellschaft, die Traditionen und die organisatorischen Rahmenbedingungen der juristischen Praxis. Bei den letzteren ist es besonders bedeutend, ob es in der gegebenen Rechtsordnung eine Verfassungsgerichtsbarkeit gibt, und welche Formen sie hat. Im Falle der Judikatur der selbständigen Verfassungsgerichte ist die Feststellung von Ronald Dworkin vornehmlich zutreffend, daß die Rechtstheorie der allgemeine Teil der Rechtssprechung, das unsichtbare Vorwort jeder juristischen Entscheidung sei. Die hinter der Verfassungsgerichtsbarkeit vorfindbare und sich darin darstellende Rechtstheorie beeinflusst nicht nur die Entscheidungen der Verfassungsgericht selbst, sondern das Ganze der juristischen Praxis. Deshalb ist eine nicht zu unterschätzende Aufgabe der heutigen Rechtstheorie die rechtstheoretische (und nicht nur verfassungsrechtliche) Analyse der im Laufe der Verfassungsgerichtsbarkeit konzipierten Lehren und Doktrinen. Diese rechtstheoretischen Untersuchungen sind auch dann nützlich und lehrreich, wenn die Urteile selbst ihre verfassungsrechtliche Aktualität schon verloren haben. Das ist auch deshalb notwendig, weil man von den Verfassungsgerichten mit Recht erwarten kann, daß sie mindestens für eine relativ längere Zeit dengleichen dogmatischen Standpunkt, diegleiche herrschende Meinung vertreten. Meines Erachtens gehört auch diese relative Stabilität zur Rechtsstaatlichkeit. Zur Untersuchung dieser Stabilität ist die rechtstheoretische Analyse unentbehrlich. Ich möchte dazu mit der Untersuchung zweier

Doktrinen der ungarischen Verfassungsgericht, der Lehren von "lebendigem Recht" und von "verfassungsmäßiger Auslegung" beitragen.

Vor der Analyse der Urteile werde ich einige Eigenarten der ungarischen Verfassungsgerichtsbarkeit darstellen. Auch das ungarische Verfassungsgericht ist ein Produkt des Systemwechsels, es ist ein Verfassungsgericht aus der dritten Generation, und die Kompetenzen, die dem Verfassungsgericht zustehen, sind meistens an den verschiedenen Formen der Normenkontrolle ausgerichtet. Dem ungarischen Recht fehlt die echte Verfassungsbeschwerde, weil das Gesetz dieses Verfahren an strenge Bedingungen knüpft und nur ausnahmsweise zuläßt, gerichtliche Urteile zu überprüfen.

Georg Brunner charakterisiert diese Lage folgenderweise:

> "Die Ausgestaltung der Verfassungsbeschwerde stellt wohl die am meisten mißlungene Regelung des VerfGG dar. Sie kann von jedermann erhoben werden, der behauptet, durch die Anwendung einer verfassungswidrigen Rechtsnorm in seinen verfassungsmäßigen Grundrechten verletzt worden zu sein. Die Beschwerdeberechtigung ist offenbar nicht auf natürliche Personen beschränkt, sondern steht auch nichtrechtsfähigen Personenvereinigungen und juristischen Personen zu, sofern sie grundrechtsfähig sind. Weitere Zulässigkeitsvoraussetzungen neben der Beschwerdebefugnis sind die Erschöpfung des Rechtswegs und die Einhaltung der Beschwerdefrist von 60 Tagen seit Zustellung der rechtskräftigen (oder bestandskräftigen) Entscheidung. Die eigentliche Crux der Regelung besteht darin, daß Gegenstand der Anfechtung und verfassungsgerichtlichen Prüfung nicht die den unmittelbaren Grundrechtseingriff verkörpernde Einzelentscheidung, sondern die ihr zugrunde liegende Rechtsnorm ist. Es ist zu Recht darauf hingewiesen worden, daß die ungarische Verfassungsbeschwerde eigentlich gar keine echte Verfassungsbeschwerde, sondern eine Variante der nachträglichen Normenkontrolle sei, die eine Individualrechtsverletzung voraussetze."[1]

Aus dieser Lage folgt notwendigerweise das Problem, wie man die Verfassungsmäßigkeit der Rechtsanwendung und die einheitliche Auslegung der Verfassung in jedem Bereich der juristischen Praxis sichern kann. Das Verfassungsgericht versuchte dieses Problem zuerst mit Hilfe der Lehre von "lebendigem Recht" zu lösen, dann mit der Doktrin von verfassungsmäßiger Auslegung.

[1] G. Brunner "Vier Jahre ungarische Verfassungsgerichtsbarkeit" in G. Brunner – L. Sólyom *Verfassungsgerichtsbarkeit in Ungarn* (Baden-Baden: Nomos 1995), 35.

Der erste Hinweis auf das "lebendige Recht" kommt in der Entscheidung Nr. 15/1991 (IV.13.), in der sog. Personalnummer-Entscheidung vor, aber nur per tangentem:

> "Das ungarische Recht ermöglichte, daß sämtliche, sich aus der Natur der Personalnummer ergebenden, Gefahren eintreten, als es die Verwendung der Personalnummer nicht regelte und sie in einer rechtlichen Umgebung ohne Bedingungen einführte, in denen die grundlegenden Garantien des Datenschutzes unbekannt waren. (Im Bereich dieser Garantien wurde nur eine Teilfrage geregelt, nämlich das Einsichtsrecht des Betroffenen, welches jedoch – aus seinen Zusammenhängen herausgerissen – nie zu einem lebendigen Recht wurde.)"[2]

Die Doktrin oder Lehre vom lebendigen Recht wurde in der Entscheidung Nr. 57/1991. (XI.8.) ausgeführt. Die wichtigsten Feststellungen dieses Urteils sind folgende:

> "1. Das Verfassungsgericht mußte zunächst in der Frage Stellung nehmen, nach welchen Gesichtspunkten und Prinzipien es die Prüfung der Verfassungsmäßigkeit durchzuführen hat, wenn der Text einer Rechtsnorm mehrere mögliche Inhalte zuläßt.
>
> 1.1. Gemäß §1 Bstb. g des Gesetzes 1989:XXXII über das Verfassungsgericht (fortan: VerfGG) steht dem Verfassungsgericht eine Auslegungskompetenz lediglich in bezug auf die Bestimmungen der Verfassung zu. In Ermangelung einer eigenständigen Gesetzesauslegungskompetenz kann sich die Prüfung der Verfassungsmäßigkeit nicht auf die Feststellung des möglichen unterschiedlichen Sinnes und Inhaltes des Wortlauts einer Rechtsnorm an sich richten; vielmehr kann das Verfassungsgericht dies nur in Verbindung mit der Prüfung einer seiner Kompetenz zugewiesenen Frage vornehmen. Wenn die Gerichtspraxis und die allgemein angenommene Rechtsauslegung den Wortlaut einer Rechtsnorm – sofern unterschiedliche Inhalte möglich sind – einheitlich nur in einem bestimmten, festgesetzten Sinn anwenden, muß das Verfassungsgericht den Wortlaut der Rechtsnorm in diesem Sinn und mit diesem Inhalt unter dem Gesichtspunkt der Verfassungsmäßigkeit prüfen. Wenn nämlich ein solcher in der Praxis zur Geltung kommender Inhalt feststellbar ist, muß die Prüfung der Verfassungsmäßigkeit von der Tatsache ausgehen, daß Inhalt und Sinn einer Rechtsnorm diejenigen sind, welche ihnen die ständige und einheitliche Praxis der Rechtsanwendung zuschreibt.
>
> 1.2. Die Verfassungsmäßigkeit einer Rechtsnorm kann offensichtlich nur nach dem Sinn ihres Textes und dem Inhalt der Norm beurteilt

[2] Brunner – Sólyom (n. 1), 179.

werden. Das Verfassungsgericht vergleicht also auch bei der sogenannten abstrakten Normenkontrolle nicht bloß den 'Buchstaben' der Rechtsnorm, sondern auch ihren festgestellten Sinn und den Inhalt des Textes mit dem gleichfalls von ihm ausgelegten und festgestellten Verfassungsinhalt. Wenn eine zwei- oder mehrdeutige Rechtsnorm in der Rechtsanwendung nur einem Sinn entsprechend lebt und sich ausschließlich mit diesem Inhalt verwirklicht, muß das Verfassungsgericht die andere(n) Bedeutung(en) des Textes und den (die) anderen Inhalt(e) der Norm nicht in den Kreis seiner Prüfung einbeziehen, da in diesem Zusammenhang gar keine Verfassungsfrage auftaucht. Die Beurteilung der Verfassungsmäßigkeit des 'leblosen' Inhalts einer Rechtsnorm kann schon in Ermangelung eines darauf gerichteten Antrags (§20 VerfGG) nicht Gegenstand eines Verfahrens vor dem Verfassungsgericht sein.

Aus diesen Ausführungen folgt, daß das Verfassungsgericht nicht den Wortlaut der Norm allein, sondern vielmehr die zur Geltung gelangende und verwirklichte Norm, das heißt das 'lebendige Recht' mit dem Inhalt der Verfassungsbestimmungen und mit den Verfassungsprinzipien vergleichen muß.

1.3. Nach Auffassung des Verfassungsgerichts ist unter 'lebendigem Recht' die Rechtsnorm mit ihrem ausgelegten und angewandten Inhalt gemeinsam zu verstehen.

Im Sinne des VerfGG steht dem Verfassungsgericht keine Kompetenz in bezug auf die Prüfung der Verfassungsmäßigkeit der Rechtsprechung der Gerichte zu. Dies bedeutet einerseits, daß das VerfGG – im Fall, wenn die Rechtsnorm mehrdeutig ist und wenn sie in der Praxis auch nicht auf eine einzige Weise ausgelegt wird – keine Entscheidung über die Rechtsauslegung zwecks Ausgestaltung der einheitlichen Rechtsanwendung treffen kann, denn es würde dadurch dem Obersten Gericht seine Kompetenz entziehen. Andererseits bedeutet dies aber auch, daß in dem Fall, wenn bei mehreren möglichen Bedeutungen einer Rechtsnorm diese sich in der Praxis der Rechtsanwendung nur mit einem Inhalt verwirklicht, nur dieser Norminhalt für die Prüfung der Verfassungsmäßigkeit als Grundlage dienen kann. Im entgegengesetzten Fall würde nämlich das Verfassungsgericht während seines Verfahrens eine nicht in seine Kompetenz gehörende eigenständige Auslegung einer Rechtsnorm durchführen und seine Kompetenz gerade dadurch überschreiten, daß es dabei die Stichhaltigkeit der Auslegung der Rechtsnorm in der Gerichtspraxis anzweifelt. Und wenn diese Auslegung der Rechtsnormen – wie dies auch in bezug auf die durch die Anträge angefochtenen Rechtsnormen der Fall ist – auf der richtungsweisenden Entscheidung des Obersten Gerichts basiert, würde die Feststellung eines von der Auslegung des Obersten Gerichts

abweichenden Normeninhalts die Kompetenz des Obersten Gerichts verletzen.

Auch daraus folgt also, da die Rechtsprechung in Ermangelung einer diesbezüglichen Kompetenz nicht den Gegenstand eines Verfahrens vor dem Verfassungsgericht bilden kann, daß das Verfassungsgericht den Wortlaut der Normen inhaltlich in dem Sinne prüfen muß, den ihm die einheitliche Rechtsanwendungspraxis zuschreibt. Und wenn die Rechtsnorm in der ständigen und einheitlichen Praxis unter mehreren möglichen Bedeutungen - mit verfassungswidrigem Inhalt lebt und sich so verwirklicht, muß im Verfahren vor dem Verfassungsgericht die Verfassungswidrigkeit der Rechtsnorm festgestellt werden."[3]

Das Urteil ist mit 8:2 Stimmen ergangen, wobei die dissentierenden Verfassungsrichter Géza Kilényi und Péter Schmidt in ihren Sondervoten anmerkten, daß das Verfassungsgericht seine gesetzliche Kompetenzen überschritten habe. In seiner abweichenden Meinung, der Schmidt angeschlossen ist, hat Kilényi eine gründliche Kritik der Lehre vom lebendigen Recht geleistet. Seine Argumente lauten, wie folgt:

"Die Substanz der in Teil 'A' der Entscheidung beurteilten prinzipiellen Frage besteht darin: Was kann das Verfassungsgericht in einem Fall tun, wenn eine Rechtsnorm mehrere Auslegungen zuläßt und die Praxis der Rechtsanwendung unter diesen eine Auslegung befolgt, welche nach der Beurteilung des Verfassungsgerichts verfassungswidrig ist. Diese Frage beantwortet die Entscheidung – auf der Grundlage der in der Begründung ausgeführten Theorie des 'lebendigen Rechts' – im folgenden Sinne: In solchen Fällen sei der Spruchkörper nicht verpflichtet, aber auch nicht berechtigt zu prüfen, ob die gerügte Bestimmung eine oder mehrere verfassungsgemäße Auslegungen zuläßt oder nicht; vielmehr könne er, die Praxis der Rechtsanwendung auf die Rechtsnorm zurückprojizierend, nur eines tun: Er hebt die durch die Rechtsfindenden verfassungswidrig ausgelegte und angewandte Bestimmung auf. Diese Logik ist für mich unannehmbar. Die Gesetzgebung ist eine Sache, die Rechtsanwendung eine andere. Beide hängen selbstverständlich eng miteinander zusammen, jedoch nicht in dem Maße, daß dies dafür als Grundlage dienen könnte, die beiden Begriffe miteinander zu vermischen. Aus diesem Grunde ist die Normenkontrolle (die Überprüfung der Verfassungsmäßigkeit einer Rechtsnorm) von der Lenkung der Praxis der Rechtsanwendung zu unterscheiden. Das Verfassungsgericht hat – abgesehen von der Auslegung einzelner Bestimmungen der Verfassung mit Wirkung erga omnes – eine gesetzliche Ermächtigung nur in bezug auf die erstere, nicht aber auf die

[3] Ibid. 243–4.

> letztere. Die letztere gehört der Kompetenz anderer Organe an, und im ungarischen Rechtssystem haben sich für die Wahrnehmung dieser Aufgabe die entsprechenden rechtlichen Mittel entwickelt. [...]

Die in der Begründung der Entscheidung des Verfassungsgerichts dargelegte Theorie des 'lebendigen Rechts' kann ich aus den folgenden Gründen nicht annehmen:

> a) [...] In einem Rechtsstaat muß der Wille des Gesetzgebers respektiert und zur Geltung gebracht werden. Wenn sich also die Rechtsanwendung durch verfassungswidrige Auslegung einer Bestimmung dem Gesetz widersetzt, müssen die rechtsanwendenden Organe mit entsprechenden rechtlichen Mitteln zur verfassungsmäßigen Auslegung und Anwendung des Gesetzes (oder einer anderen Rechtsnorm) veranlaßt und nicht der Gesetzgeber wegen der verfassungswidrigen Rechtsauslegung seitens der rechtsanwendenden Organe dadurch 'bestraft' werden, daß das Verfassungsgericht die bei richtiger Auslegung nicht verfassungswidrige Bestimmung aufhebt.
>
> b) In bezug auf die Gesetze hat das Verfassungsgericht kein Recht auf Auslegung mit Wirkung erga omnes. [...] Dadurch, daß irgendeine Bestimmung mehrere Auslegungen zuläßt, wovon eine verfassungswidrig ist, wird eine in Frage stehende Bestimmung an sich noch nicht verfassungswidrig.
>
> c) Die Rechtsnorm ist der in entsprechender Form geäußerte und verkündete Wille der zur Gesetzgebung ermächtigten Organe, nicht aber der sich in der Praxis der Rechtsanwendung verwirklichende Wille der rechtsanwendenden Organe. Dementsprechend ist die Rechtsnorm – welche das Verfassungsgericht der nachträglichen Normenkontrolle unterwerfen kann – der in Magyar Közlöny verkündete Wortlaut und nicht dessen durch die Praxis der Rechtsanwendung korrigierte und dadurch entstellte Version. Eine Abweichung von dieser Auffassung der Rechtsnorm bedeutet nicht nur die Anerkennung der Daseinsberechtigung des gesetzesaufhebenden und gesetzesändernden Gewohnheitsrechts; vielmehr beraubt sie die Bürger und die juristischen Personen der Möglichkeit, das geltende Recht kennenzulernen. Die Verkündung der Rechtsnorm hat nämlich die Bedeutung einer Garantie, ist doch die rechtliche Konsequenz an sie geknüpft, daß sich niemand erfolgreich auf die Unkenntnis einer ordnungsgemäß verkündeten Rechtsnorm berufen kann. Ist aber der Inhalt der Rechtsnorm nicht derjenige, der verkündet worden ist, sondern der, welchen ihr die ständige und einheitliche Praxis der Rechtsanwendung zuschreibt, kann dies eine völlige Rechtsunsicherheit heraufbeschwören. [...] Auf diese Weise ist die in der Entscheidung dargelegte Theorie des 'leben-

> digen Rechts' unvereinbar mit dem Rechtssystem und mit der Rechtsstaatlichkeit unseres Landes. [...]
>
> d) [...] Aufgrund dessen nämlich, daß die Macht des Verfassungsgerichts beschränkt ist, kann es die Folgen von vielerlei Rechtsverletzungen nicht beheben. [...]
>
> e) Wenn sich das Verfassungsgericht die Theorie des 'lebendigen Rechts' zueigen macht, so hat dies zwangsläufig zur Folge, daß es praktisch nie aufgrund des verkündeten Wortlauts der Normen entscheiden kann; es muß vielmehr stets die Praxis der Rechtsanwendung prüfen, zumindest unter dem Gesichtspunkt: Ist sie 'ständig und einheitlich'? Dafür aber hat der Spruchkörper weder die Kompetenz, noch verfügt er über einen entsprechenden Fachapparat."[4]

Aus der abweichenden Meinung von Kilényi möchte ich nun nur zwei Momente herausheben. Erstens, daß er einen ausdrücklichen, markanten normativistischen Standpunkt vertritt, was die Lehre des lebendigen Rechts kontrastiert; zweitens, daß sein Standpunkt auf das früher aufgezeichnete Problem keine Lösung leisten kann.

Auf dem Grund der Lehre des lebendigen Rechts sind einige Entscheidungen des Verfassungsgerichts zustandegekommen, doch diese Lehre galt nur für kurze Zeit als lebendige Verfassungsgerichtspraxis. László Sólyom, der erste Präsident des Verfassungsgerichts schrieb später, daß das Verfassungsgericht nach dem Urteil, das dieses Rechtsinstitut eingeführt hatte, nur vier "wirkliche" Beschlüsse getroffen habe, die über die Verfassungsmäßigkeit des lebendigen Rechts entschieden haben. Es seien das den Gesetzlichkeitseinspruch aufhebende Urteil [Nr. 9/1992. (I. 30.) AB], das den Zeugen auf Blutentnahme verpflichtende Vorschriften aufhebende Urteil [Nr. 75/1995. (XII. 21.) AB] und noch zwei Entscheidungen [Nr. 826/B/1996. AB; Nr. 994/B/1996. AB]. Die Berufung auf das lebendige Recht war in anderen Urteilen nicht entscheidend, oder der Terminus wurde in einem anderen Sinn angewandt.[5] Meiner Meinung nach sind nur zwei "wirkliche" Urteil nach dieser Praxis zustande gekommen.

Sólyom hat recht darin, daß weder das Erwähnen noch die Berufung auf das lebendige Recht die Begründung des Urteils durch dieser Lehre bedeutet.

Diese Lehre hat auch weitere charakteristische Merkmale. In der Dimension der normativistischen und soziologischen Rechtsanschauungen drückt

[4] Ibid. 253–5.

[5] L. Sólyom *Az alkotmánybíráskodás kezdetei Magyarországon [Beginne der Verfassungsgerichtbarkeit in Ungarn]* (Budapest: Osiris 2001), 296.

ihr Rechtsbegriff (das Recht ist nicht identisch mit den Gesetzen im formellen Sinne) und ihre rechtspolitische Zielsetzung (die Versicherung der Verfassungsmäßigkeit der juristischen Praxis) eine soziologische Anschauung aus; in ihren Mitteln ist sie aber– wegen der Ermangelung einer echten Verfassungsbeschwerde – notwendigerweise "normativistisch": sie hebt das Gesetz auf. Die Lehre des lebendigen Rechts ist auch deswegen nicht identisch mit der bloßen Berufung auf das lebendige Recht, weil sie die Möglichkeit der verfassungsmäßigen Auslegung der umstrittenen Rechtsnorm notwendigerweise beinhaltet. Gibt es keine solche Möglichkeit, dann ist die Rechtsnorm an sich selbst verfassungswidrig und die Lehre des lebendigen Rechts wird unnötig, überflüssig; sind der Normtext und die Praxis der Rechtsanwendung gleichermaßen verfassungsmäßig, gibt es keine Verfassungsgerichtssache. So hat diese Lehre einen kritischen Charakter, sie kann nur solche Urteile begründen, die die Rechtsvorschriften aufheben oder verfassungswidrige Untätigkeit feststellen. Sie drückt die rechtspolitische Bestrebung aus, die einheitliche Auslegung der Verfassung und die Verfassungsmäßigkeit zu versichern, ohne die Kompetenz des Obersten Gerichts zu verletzen. Die Anerkennung der Lehre des lebendigen Rechts zieht zwei weitere logische Folgen nach sich: die eine ist die Anerkennung, mindestens Tolerierung der richterlichen Rechtsbildung; die andere ist die Unentbehrlichkeit bestimmter Festlegungen der Tatbestände, was mit der Ermangelung des kontradiktorischen Verfahrens in scharfen Widerspruch gerät. Die Lehre des lebendigen Rechts ist also nur selten anwendbar, und sie hat bedeutende Nachteile, außer dem Vorwurf der Kompetenzüberschreitung.

Aus den von Sólyom erwähnten "wirklichen" Urteilen sind meiner Meinung nach zwei [Nr.826/B/1996. AB, und Nr. 994/B/1996. AB] keine "wirkliche", weil das Verfassungsgericht in beiden Fälle die Verfassungsmäßigkeit der Rechtsanwendungspraxis festgestellt und die Verfassungsbeschwerde zurückgewiesen hat, obwohl die Anträge sich auf das lebendige Recht beriefen. Im Falle des Gesetzlichkeitseinspruchs waren die gesetzlichen Vorschriften auch an sich selbst verfassungswidrig, die Prüfung der Rechtsanwendungspraxis hat nur die Folgen dieser Verfassungswidrigkeit besser dargestellt. Die Lage war ähnlich im Falle der – von Sólyom als Grenzfall bezeichneten – Entscheidung über den immateriellen Schadensersatz. Im Falle des Blutentnahme-Urteils bestand keine Möglichkeit für die verfassungsmäßige Auslegung, weil die verfassungsmäßige Lösung – man sollte den Ausdruck "jede(r) Interessierte" im Sinne "jede(r) Teil im Prozess" interpretieren – mit Mitteln der Auslegung nicht erreichbar war.

Eine ausführlichere Prüfung zeigt also, daß es nur zwei spätere Urteile

gibt, die inhaltlich auf der Lehre des lebendigen Rechts beruhen. Es sind die Entscheidungen Nr. 4/1999. (III.31.) AB und 6/2001.(III.14.) AB. In diesen Fällen hat das Verfassungsgericht verfassungwidrige Untätigkeit festgestellt, was nur dann überzeugend ist, wenn man aufzeigt, daß "das lebendige Recht" verfassungswidrig sei.

Zwanzig Monate nach dem ersten einführenden Urteil hat das Verfassungsgericht eine mit der Lehre des lebendigen Rechts total entgegengesetzte Entscheidung getroffen. Das Urteil Nr. 38/1993. (VI.11.) – dessen Berichterstatter László Sólyom war – hat statt der Lehre von lebendigem Recht die Doktrin der verfassungsmäßigen Auslegung eingeführt. Das Verfassungsgericht hat ausgesagt: "das Verfassungsgericht kann als Ergebnis der Prüfung der Verfassungsmäßkeit der Rechtsnorm die verfassungsmäßigen Erfordernisse durch Entscheidung festsetzen, denen die möglichen Auslegungen der Norm entsprechen müssen."[6] Wir haben in diesem Beitrag keinen Ort, diese Entscheidung ausführlich zu analysieren und die beiden Doktrinen zu vergleichen. Ich möchte hier den Gegensatz der beiden einführenden Entscheidungen kurz darstellen. Obwohl die Anträge sich darauf berufen haben, daß der Justizminister das Gesetz bei der Ernennung der Gerichtspräsidenten verfassungswidrig interpretiert und angewendet hatte, hat das Verfassungsgericht das lebendige Recht diesmal nicht geprüft. Das Gericht hat die Aufhebung der einschlägigen Paragraphen – was aus der Lehre des lebendigen Rechts hätte folgen sollen – zurückgewiesen. Gleichzeitig hat das Verfassungsgericht folgendes ausgesagt: "Für die Ernennung der Richter und der Leiter der Gerichte gebietet die Verfassung, daß die Auswirkungen der politischen Natur des Amtes, das derjenige in einer anderen Staatsgewalt bekleidet, der die Ernennung vornimmt oder inhaltlich bestimmend vorschlägt entweder durch substantielle Mitwirkung der rechtsprechenden Gewalt oder durch ein anderes Gegengewicht außerhalb der rechtsprechenden Gewalt neutralisiert werden. Dieses Verfassungserfordernis gilt auch für den Fall, daß die Ämter der Richter oder der Leiter der Gerichte durch Wahl besetzt werden."[7] Daß dieses Verfassungserfordernis sich tatsächlich nicht verwirklicht hat, hat das Verfassungsgericht außer Acht gelassen.

Den Unterschied der beiden Entscheidungen zeigen gut die folgenden Teile aus den Begründungen.

> "Auch daraus folgt also, da die Rechtsprechung in Ermangelung einer diesbezüglichen Kompetenz nicht den Gegenstand eines Verfahrens vor dem Verfassungsgericht bilden kann, daß das Verfassungsgericht

[6] Brunner – Sólyom (n. 1), 475.
[7] Ibid.

> den Wortlaut der Normen inhaltlich in dem Sinne prüfen muß, den ihm die einheitliche Rechtsanwendungspraxis zuschreibt. Und wenn die Rechtsnorm in der ständigen und einheitlichen Praxis – unter mehreren möglichen Bedeutungen – mit verfassungswidrigem Inhalt lebt und sich so verwirklicht, muß im Verfahren vor dem Verfassungsgericht die Verfassungswidrigkeit der Rechtsnorm festgestellt werden."[8]

Etwas anders im anderen Urteil:

> "Wenn die geprüfte Rechtsnorm eine (oder mehrere) Auslegung(en) zuläßt, welche die verfassungsmäßigen Postulate erfüllt (erfüllen), muß das Verfassungsgericht die Verfassungswidrigkeit der Norm nicht unter allen Umständen feststellen. Die Norm muß nicht in allen Fällen bloß deswegen aufgehoben werden, weil auch eine den verfassungsmäßigen Erfordernissen nicht entsprechende Auslegung möglich ist oder vorkommt. Bei der Prüfung der Verfassungsmäßigkeit kann jedoch diejenige Auslegung der Rechtsnorm, welcher die Rechtspraxis einheitlich folgt, das heißt der sich im 'lebendigen Recht' äußernde Normeninhalt nicht außer acht gelassen werden. Wenn die Rechtsnorm auf diese Weise mit verfassungswidrigem Inhalt zur Geltung kommt, sind die Feststellung der Verfassungswidrigkeit und die Anwendung ihrer Rechtsfolgen unausweichlich. Doch muß das geltende Recht ansonsten, wo möglich, geschont werden."[9]

Zusammenfassend können wir feststellen, daß keine ständige und konsequente Verfassungsgerichtspraxis auf der Lehre des lebendigen Rechts aufgebaut wurde. Die Praxis des Verfassungsgericht ist in dieser Beziehung inkonsequent und situativ gewesen.

[8] Ibid. 243. [Nr. 57/1991. (XI.8.) AB]
[9] Ibid. 487.

Der Begriff des Gemeinwohls

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Bei unseren Betrachtungen bezüglich Staat und Recht gebrauchen wir zahlreiche Begriffe – häufig unreflektiert und aus Gewohnheit. Einer von ihnen, der für die Staats- und Rechtsphilosophie vielleicht der wichtigste ist, hängt mit dem Wohl der Gemeinschaft zusammen. Ziel der vorliegenden Zeilen ist es, die Sache, auf die dieser Begriff hinweist, zum Gegenstand von Reflexionen zu machen. Sie wollen Gesichtspunkte zur Abgrenzung des *Gemeinwohls*, des *Gemeininteresses* und des *Gemeinwillens* liefern und die Leser auf einige klassische Überlegungen aufmerksam machen. Es sollen nicht einzelne Theorien über das Gemeinwohl rekonstruiert werden, sondern eine mögliche Auslegung des Begriffs geliefert werden. Aus der Natur der Sache folgt aber, dass diese nur durch das "Zusammenlesen" der zerstreuten Bemerkungen derjenigen formuliert werden kann, in deren Kreis diese Idee viel lebendiger war als heute.

1 Die Idee des Gemeinwohls

Die Grundlage der Idee des Gemeinwohls ist der Gedanke, dass der Zusammenschluss und die Zusammenarbeit von Menschen notwendigerweise eine eigenartige Gruppe der Güter zustande bringt, die auch *die Ordnung ihrer Beziehungen* entscheidend *beeinflusst*. Es mag sein, dass die Vorstellung über diese Güter schon *vor* der Bildung der Gemeinschaft entsteht, wie dies auch Aristoteles dachte: "...jede Gemeinschaft [tritt uns] als eine menschliche Einrichtung [entgegen], die ein bestimmtes Gut verfolgt – denn um dessentwillen, was ihnen ein Gut zu sein scheint, tun alle alles...".[1] Es ist aber auch gut möglich, dass diese Güter *im Laufe* der spontanen Zusammenarbeit der Menschen entstehen, wie dies die modernen Denker – nach dem 17. Jh.

[1] *Pol.* 1252a

– vermuteten. Nach ihnen würde "eine unsichtbare Hand" die Bestrebungen dem Individualwohl gemäß harmonisch ordnen: Das Bewusstsein eines Gemeinwohls, behauptete zum Beispiel Hume, würde sich mit einem den auf das Gemeinwohl abgezielten Regeln entsprechenden Verhalten erst verknüpfen, nachdem bezüglich der Festlegung von Regeln "eine künstliche Vereinbarung" entstanden sei.[2] Wie auch immer dem sei, wenn diese Güter einmal entstanden sind, beeinflussen sie die grundlegendsten Fragen des Gemeinschaftslebens zwingend. Mit den Worten von Cicero: "Salus publica suprema lex esto".[3]

Eine jede Vereinigung kann ein gemeinsames Gut besitzen, das Gemeinwohl ist jedoch an die umfassendste politische Vereinigung der Menschen, an den Staat und das seine Ordnung gestaltende Recht gebunden. In dieser Beziehung kann es in zahlreichen Fragen von grundlegender Bedeutung sein. Den klassischen Denkern zufolge spielt es eine entscheidende Rolle zum Beispiel in der Staatsform: Die einzelnen "Verfassungen" unterscheiden sich in der Theorie von Aristoteles danach, ob die Machtinhaber das Gemeinwohl oder ihr eigenes Individualwohl durchsetzen wollen. Seine Wichtigkeit ist auch bei der Formulierung der Gesetze offensichtlich. Denn das Gesetz, so Thomas von Aquin, sei auf das Gemeinwohl ausgerichtet.[4]

Wie kann dieses gemeinsame Gut der in einer staatlichen Gemeinschaft vereinigten Menschen definiert werden? Welche sind die Güter, auf die der Begriff hinweist?

Der Begriff Gemeinwohl *(bonum commune)* weist im allgemeinsten Sinne auf Güter hin, die für die Individuen das dauerhafte gemeinsame Handeln *rechtfertigen*, und es *lohnend machen*, von ihren eigenen Bestrebungen nachzulassen und auch Opfer zu bringen. In diesem Sinne hängt das Gemeinwohl mit den Zielen der einzelnen Menschen bzw. mit der Art und Weise, wie sie erreicht werden, zusammen. Während die Menschen in erster Linie ihre eigenen Ziele verfolgen, sehen sie ein, dass sie nur durch Vereinigung und gemeinsames Handeln zu erreichen ist. Im Interesse dieses gemeinsamen Handelns müssen sie aber gewisse Bedingungen akzeptieren.

Das Gemeinwohl bedeutet deshalb vor allem die *Bedingungen*, die *ein gemeinsames Handeln mit den Anderen ermöglichen*. So eine Bedingung ist unter anderen der Frieden und die Ordnung der Gemeinschaft, wie auch ihr Schutz gegen interne Bestrebungen, sie zu stürzen, sowie gegen externe Angriffe. Es ist ja für alle gut, es ist also ein *gemeinsames* Gut, wenn man unter

[2] *Treat. Hm.* III.2.2.
[3] *Leg.* 3.3.8.
[4] *ST* I–II. qu. 90. a 2.

geordneten, berechenbaren und sicheren Verhältnissen nach dem eigenen Ziel streben kann. Bei Sicherstellung dieser Bedingungen spielen der Staat und das Recht eine besondere Rolle, sie werden aber bei weitem nicht vom Staat oder vom Recht geschaffen. Der Frieden und die dauerhafte Ordnung einer Gemeinschaft werden durch die Moral, die Gewohnheiten und die Familie geschaffen, also durch gesellschaftliche Institutionen, die mit der Politik nur indirekt verbunden sind; der Staat gibt dazu lediglich seine zwingende Macht. Bereits in diesem Sinne gilt also, dass der Staat – als *defensor pacis* – das Gemeinwohl nur *hütet* und nicht selbst schafft.

Der Begriff des Gemeinwohls bedeutet aber mehr als lediglich eine Ordnung; er weist auch auf gewisse charakteristische Züge der *erwünschten Ordnung* hin. In diesem Sinne bedeutet "Gemeinwohl" die beim gemeinschaftlichen Zusammenleben formulierten und zum Teil umgesetzten Werte, die schon auf eine bestimmte Art und Weise die Beziehungen unter den Menschen regeln. Diese Werte zielen nicht einfach auf die Schaffung der Ordnung ab, sondern sie weisen in die Richtung einer *eigenartigen Ordnung*. Die Ordnung setzt eine Regelung voraus, und diese verlangt die Ausgestaltung der Beziehungen zwischen den einzelnen Teilen des Ganzen und die *Ausrichtung* der Teile *auf ein gewisses Ziel*. Der Begriff des Gemeinwohls weist also zweitens auch darauf hin, dass die Mitglieder der Gemeinschaft *gewisse Werte* gemeinsam besitzen, die ihre Bestrebungen auf ein bestimmtes Ziel richten.

Die in diesem Begriff zusammengezogenen Werte haben zwei Hauptmerkmale. Einerseits weisen sie zwar auf die wichtigsten Merkmale der erwünschten Ordnung hin, aber sie stecken nur ihre *Konturen* ab. Sie sagen nicht, welchen konkreten Inhalt ein Gesetz haben oder wer im gegebenen Staat herrschen soll. Sie sind aber dazu geeignet, gewisse Einrichtungen von den umzusetzenden als falsche auszuschließen. Sie legen also häufig nur das fest, was mit dem Gemeinwohl *nicht vereinbar* ist. Wenn sie aber positive Normen enthalten, formulieren sie diese nur *annäherungsweise*. Diese annähernde Art ist kein Fehler, sondern sie folgt aus der Natur der Sache: Bei den staatswissenschaftlichen und moralischen Betrachtungen, bemerkte schon Aristoteles, dürfe man nur einen Grad von Bestimmtheit erwarten, den die Natur des gegebenen Stoffes zulässt.[5]

Andererseits kann man diesen Werten nur näher kommen, aber sie nie erreichen oder ausschöpfen. Deshalb werden sie im Zusammenhang mit dem gemeinsamen Handeln auch auf der Ebene der von allen mehr oder weniger geteilten *Ideale* formuliert. Der Inhalt solcher Ideale ändert sich zwar

[5] *EN* 1094b.

von Zeit zu Zeit, sie haben jedoch einige "zeitlose" Elemente. So ein alle Zeitalter umfassendes Ideal ist zum Beispiel die Rechtmäßigkeit der Staatsgewalt. Denn für alle ist es ein gemeinsames *Gut*, wenn in der staatlichen Gemeinschaft das Recht waltet, oder die Machtinhaber die Gebote des natürlichen Rechtes nicht verletzen. In Verbindung mit Staat und Recht werden diese Werte und Ideale am häufigsten im Begriff der Gerechtigkeit zusammengefasst. Obwohl die Grundsätze der Gerechtigkeit vielfältig bestimmt werden können, kann ihr umfassendstes Gebot – "gib einem jeden das Seine und taste das Seinige nicht an" – in erforderlicher Weise die Richtung und die Grenzen des Gemeinwohls abstecken. Deshalb betonte Thomas von Aquin, dass der Regulator des Entstehens des Gemeinwohls die universelle Gerechtigkeit sei,[6] die festlegt, was das Individuum der Gemeinschaft schuldet. Und als er diese Art der Gerechtigkeit in diesem Fall *iustitia legalis* nannte, wollte er vermutlich darauf hinweisen, dass die der Gemeinschaft gegenüber bestehenden Verpflichtungen auch in einer rechtlichen Form erscheinen.

Und zum Schluss entstehen in der Gemeinschaft im Laufe des gemeinsamen Handelns auch geistige, moralische und materielle Güter, die ebenfalls als Gemeinwohl (mit einem heutigen Ausdruck: Gemeinschaftsgüter) angesehen werden können. Solche sind zum Beispiel die Bildung, die Festigkeit der Moral oder der Reichtum der materiellen Güter der Gemeinschaft als Ganzes. Derartige Güter sind untrennbar: Sie sind deshalb und so lange Teile des Gemeinwohls, weil und bis sie allen zugänglich sind. Nachdem sie entstanden sind, können sie nur und ausschließlich in einer Ordnung weiter bestehen, die den besonderen Grundsätzen des gemeinsamen Handelns Rechnung tragen. Auch diese Güter werden nicht vom Staat geschaffen, aber ihre Aufrechterhaltung und die Sicherstellung ihrer Zugänglichkeit für alle kann als eine staatliche Aufgabe angesehen werden.

Solche Güter sind außerdem davon gekennzeichnet, dass sie bei "Benutzung" *nicht verbraucht warden*: unbegrenzt viele können daran auf eine unbegrenzt vielfältige Art Teil haben. Mit einem Beispiel aus dem 20. Jh. kann in diesem Sinne eine schöne und saubere Stadt als *gemeinsames* Gut aufgefasst werden, denn alle ihre Bewohner haben Freude daran, dass sie dort leben; auch eine Kathedrale mit einem gegen Himmel ragenden Turm, in dem der Gläubige Gott begegnet, der Ungläubige aber ein ästhetisches Erlebnis und Ruhe, vielleicht auch den seelischen Frieden darin findet; oder eine tolerante Gesellschaft, in der keiner vor Benachteiligung wegen seiner Anschauungen Angst zu haben braucht. Diese Güter werden durch Benutzung nicht ver-

[6] *ST* II–II. qu. 58.

braucht, sondern sie können lediglich durch ihre *Benutzung* und ihre für alle zugängliche *Benutzbarkeit* als gemeinsame Güter existieren.

2 *Gemeinwohl und Individualwohl*

In welchem Verhältnis stehen Gemeinwohl und Individualwohl zueinander? In dieser Hinsicht betonen die Klassiker der Philosophie, der Ethik, der Staatslehre und der Rechtsphilosophie zwei Gesichtspunkte. Einerseits dass das Gemeinwohl von den Gesichtspunkten des Individuums nicht getrennt werden kann, da sie eine *unabdingbare Voraussetzung des Erreichens von Individualwohl* ist. Ein Begriff des Gemeinwohls also, der dem Individualwohl gegenüber steht, ist unvorstellbar. Vielleicht in diesem Sinne sagt Cicero auf seine oberflächliche Weise, dass "der Nutzen jedes einzelnen und der ganzen Menschheit ein und dasselbe ist" [7] Dies bedeutet aber andererseits nicht, dass das Gemeinwohl *in jedem Einzelfall* das Erreichen des Individualwohls garantieren würde. Hier ist das allgemein anerkannte Prinzip verwurzelt, demnach bei einem Konflikt dem ersteren die Priorität eingeräumt werden müsse. Der Grund seiner Priorität ist jedoch nicht ein möglicher Konflikt, und seine Priorität ist nicht lediglich und nicht in erster Linie bei Konflikten offensichtlich. Seine Priorität beruht vielmehr darauf, dass das Gemeinwohl für alle gut ist, deshalb alle den Grund haben, es hochzuschätzen. Da es für alle mit Grund zu schätzen ist, ist es wichtiger als das Individualwohl, deshalb ist seine Förderung für das Individuum auch als Grundlage moralischer Verpflichtungen aufzufassen.

In der Frage aber, wie die Förderung des Gemeinwohls zu einer moralischen Verpflichtung werden kann, sind die alten und modernen Autoren grundsätzlich unterschiedlicher Auffassung. Die Modernen betonen, wenn alle uneingeschränkt nach dem Erreichen ihres eigenen Wohls streben könnten, dann gäbe es solche – ganz zu schweigen davon, dass in diesem Fall das Gemeinwohl gar nicht entstünde –, die ohne die Lasten seiner Schaffung zu tragen, die Vorteile des Gemeinwohls genießen wollten. Die Durchsetzung des Gemeinwohls verlangt demnach die gegenseitige Einschränkung der individuellen Verhaltensweisen, und zu den damit einhergehenden Regeln und zu den die Durchsetzung sichernden Institutionen und Sanktionen gesellen sich später moralische Emotionen. Die Ordnung der gegenseitigen Einschränkung der Verhaltensweisen wird auf diese Weise langsam zu einer moralischen Ordnung. Die Förderung des Gemeinwohls verlangt in diesem Fall von den einzelnen Menschen nicht viel; sie sollen "höchstens"

[7] *Off.* III. 6.

nicht töten, nicht lügen, nicht stehlen und ihre Schulden bezahlen. Bei dieser Annäherung verlangt das Gemeinwohl nicht unbedingt Heldentum oder Selbstaufopferung; auch solche können es fördern, die die grundlegendsten - häufig mit dem Ideal der Moral und der Gerechtigkeit gekoppelten - Regeln des gemeinsamen Handelns einfach einhalten. Unter anderem wies Kant auch auf diese Möglichkeit hin, als er sagte, dass das Problem der Gründung einer gerechten gesellschaftlichen Ordnung und eines Staates selbst für eine aus Teufeln bestehende Nation lösbar sei.

Die Alten meinten dagegen, dass das Gemeinwohl Teil eines allgemeineren Gutes *(bonum universale)* sei, dass schon an und für sich verdient, dafür Opfer zu bringen. Dieses allgemeine Gut sei die vollkommene und endgültige Form des gesellschaftlichen, also mit dem Zusammenschluss einhergehenden Gutes *(bonum in communi)*. Als solches sei es das in der Welt teilweise erscheinende, aber davon getrennte Gut *(bonum separatum)*, das die Summierung allen Gutes sei. Dieses Gut erhalte eine politische Bedeutung im Gemeinwohl *(bonum commune)*, und diese erscheine auch im juristischen Begriff *(res publica)* des Guten. Das allgemeine Gut sei, so Aristoteles, der letzte Grund aller Existenz und Tätigkeit, die in der Welt nur teilweise präsent aber vollkommen wahrhaft sei, *ipsum bonum subsistens*.[8] Offensichtlich folgte Thomas von Aquin in diesem Punkt dem Aristoteles. Ihrer Auffassung nach könne die Verwirklichung des Guten durch menschliche Handlungen nur Ergebnis absichtlicher Bestrebungen – die Erfüllung vorgegebener Pflichten – sein. Deshalb sei also derjenige, der auf diese Weise nach dem Guten strebt, in irgend einem Maße ein Heiliger, ein Held, aber mindestens vortrefflich. Seine Vortrefflichkeit beruhe nicht lediglich auf seinen Fähigkeiten, sondern darauf, dass er ein klares Bild von seinen Pflichten besitze und bereit sei, Opfer für andere zu bringen.

In welchem Maße aber hat er das zu tun? Anders formuliert: Haben seine Pflichten gegenüber der Gemeinschaft irgendwelche absteckbaren Grenzen? Die Auffassung der Alten bzw. der Modernen weichen von einander auch in diesem Punkt ab. Die Alten – so Aristoteles und Thomas von Aquin – hatten keine Angst auszusprechen, dass es eine Pflicht des Individuums sei, das Gemeinwohl sogar durch Aufopfern seines eigenen Wohls zu fördern. "Die Mitglieder einer Gemeinschaft haben offensichtlich ein Verhältnis zur Gemeinschaft, wie die Teile zum Ganzen. Der Teil aber, wie er beschaffen ist, gehört zum Ganzen, so hat der Teil all seine Güter auf das Wohl des Ganzen auszurichten". [9] Das Individuum hat sich, wenn auch *nicht unbedingt*,

[8] *Met.* 1075a.
[9] *ST* II–II. qu. 58. a 5.

aber *ohne Einschränkungen* der Gemeinschaft unterzuordnen, deren Teil es ist und die es anerkennt. Also der Gemeinschaft, deren Staatsform rechtmässig ist und deren Gesetze das Gemeinwohl fördern. Laut Thomas von Aquin habe das Individuum für so eine Gemeinschaft sogar sein Leben und seine Güter aufzuopfern. Darauf weist sein Gedanke hin, dass die allgemeine Gerechtigkeit kein Maß und kein Regelungsprinzip habe, im Gegensatz zur teilenden Gerechtigkeit, die auf Grund der Verhältnismäßigkeit misset, oder im Gegensatz zur gegenseitigen Gerechtigkeit, in deren Bereich die Gleichheit und die Würde der einzelnen Menschen das Maß seien.

Die Auffassung über das Gemeinwohl in der modernen Staatslehre unterscheidet sich auch an diesem Punkt wiederum von der Vorstellung der Alten. Auch die modernen Theorien ordnen das Individualwohl dem Gemeinwohl unter; bezüglich der Bedingungen der Unterordnung formulieren sie jedoch strenger und knüpfen diese an die Welt des Individuums. Bedingungen setzte aber auch schon Thomas von Aquin, denn er erkannte an, dass der Untertanengehorsam Grenzen hat: den ungerechten Gesetzen habe man laut Gewissen nicht zu gehorchen, behauptete er. Von der allgemeinen Regel machte er aber eine Ausnahme: die ungerechten Gesetze "verpflichten vor dem Gewissen nicht, ausgenommen vielleicht den Fall, wenn es ein destruktives Beispiel *(scandalum)* oder die Auflösung der bürgerlichen Ordnung *(turbationem)* zu vermeiden gilt". Um diese zu vermeiden "hat der Mensch vom Recht herzugeben".[10] Die Modernen wollen demgegenüber vom Recht nichts hergeben. Locke war zum Beispiel der Meinung, dass das Individualwohl Elemente hat, die unter keinen Umständen dem Gemeinwohl zum Opfer fallen dürfen. Diese Elemente werden auch heute im Ideal der subjektiven Rechte zusammengefasst und als institutionelle Grenzen der Staatsgewalt definiert. "Bezüglich ihrer letzten Grenzen ist die Macht der Gesetzgeber in der Gesellschaft auf das Gemeinwohl eingeschränkt", behauptete Locke.[11]

Die Definition der subjektiven Rechte (Menschenrechte) als unumgängliche Voraussetzungen des Gemeinwohls wies darauf hin, dass am Anfang der Neuzeit ein äußerst sonderbarer Gedanke entstand und allgemeine Akzeptanz fand. Nämlich dass es Situationen geben kann, in denen das Individuum gegen seine eigene Gemeinschaft und ihre in rechtmäßiger Form existierende Staatsordnung zu schützen ist. Dieser Gedanke beruhte auf zwei Axiomen. Einerseits darauf, dass die Ordnung der Gemeinschaft – ihre Staatseinrichtung und ihr Recht – frei *gestaltet* werden kann, andererseits darauf,

[10] *ST* I–II. 96. qu. 6.
[11] *Sc. Treat.* 135.

dass *sich* derjenige, der das Gemeinwohl definiert, *irren*, sogar seine Situation *missbrauchen* kann: Im Namen des Gemeinwohls, oder unter Berufung darauf will er vielleicht sein eigenes Individualwohl fördern.

3 Gemeinwohl, Gemeininteresse, Gemeinwille

In der Theorie der Alten erschien diese Gefahr – in dieser Form – nicht. Sie akzeptierten, dass der Machtinhaber sich eventuell irrt oder eigene Ziele verfolgt, aber es fiel ihnen gar nicht ein, dass dieser Fall in irgendeiner Form mit dem Begriff des Gemeinwohls in Zusammenhang stehen kann. Gerade im Gegenteil, solche Sachen betrachteten sie als gegen das Gemeinwohl gerichtet. Das konnten sie tun, weil sie den Begriff des Gemeinwohls weder mit dem Willen noch mit den Interessen verbanden. Sie hielten die Ordnung, die staatliche Einrichtung und das Recht der Gemeinschaft nicht für frei gestaltbar. Für sie hing das Gemeinwohl eher mit der Ordnung eines höheren Geistes zusammen.

Obwohl Aristoteles zwischen dem Gemeininteresse *(koinon sympheron)* und dem Gemeinwohl *(koinon agathon)* nicht immer einen Unterschied machte, wusste er offensichtlich, dass das "Gut" ein Begriff höherer Ordnung ist als das "Interesse". Cicero sagte, dass das *Naturgesetz* "der Hüter und Beschützer des Gemeinwohls der Menschheit ist", das bekannterweise an eine höhere – an keine Person gebundene – sinnvolle Ordnung gebunden sei. Thomas behauptete entschlossen, dass das Gemeinwohl mit dem Ideal der durch die Gesetze geregelten vernünftigen Ordnung im Zusammenhang stehe: das Gesetz – unterstrich er – "ist die *Verfügung der Vernunft* im Interesse des Gemeinwohls, die von dem festgelegt wird, der sich für die Gemeinschaft sorgt, und die verkündet wird".[12] Die vernünftige Ordnung der menschlichen Gemeinschaft ist bei ihm nur teilweise ein menschliches Werk; in der Wirklichkeit ist sie Teil einer umfassenden Weltordnung, die von einem höheren Geist – dem persönlichen Gott – geschaffen wurde und regiert wird. Ebenso: Laut Thomas widerspiegele das Natur-, und dementsprechend auch das menschliche Gesetz – im Gegensatz zu den Lehren von Duns Scotus – die göttliche *Vernunft* und nicht den göttlichen *Willen*.

In der neuzeitlichen Denkweise wurde das Gemeinwohl teils vom Gemeinwillen, teils vom Gemeininteresse abhängig. Die entscheidende Wende bedeuteten die Theorien von Rousseau und Bentham.

Laut Rousseau müssten an der Schaffung der Gesetze – damit sie für alle gleich gelten – *alle* teilnehmen. Das Mitglied der Gemeinschaft habe aber

[12] *ST* I–II. qu. 90. a 4.

nicht nur wie auch immer über das Gesetz abzustimmen, sondern gemäß einem gewissen Prinzip: er habe darauf zu achten, dass das geschaffene Gesetz seine *wahren Interessen* fördert, also seinen *wahren Willen* widerspiegelt. Seines Erachtens sorge dafür der Wille der Gemeinschaft, d.h. der allgemeine Wille *(volonté générale)*. Der Mensch – warf Rousseau die meist umstrittene Frage des modernen politischen Denkens auf – "strebt zwar immer nach seinem eigenen Wohl, aber er sieht nicht immer, was es ist". D.h. er kennt sein wahres Interesse wegen seines Unwissens oder seiner Befangenheit sich selbst gegenüber nicht. Noch dazu, fügte er hinzu, könnten sich die Mitglieder der Gemeinschaft nicht nur individuell, sondern auch in ihrer Gesamtheit irren. Der gemeinsame Wille sei deshalb die Sicherheit dafür, dass das Gesetz sinnvoll wird und der Freiheit dient. Er stelle also sicher, dass sich die Gemeinschaft beim Ausdruck der individuellen und gemeinschaftlichen Interessen in Form von Gesetzen nicht irrt, und dass der zum Ausdruck gebrachte allgemeine Wille vom Gemeininteresse nicht abweicht. Angesichts dieser zwei Umstände meinte er, dass das Individuum auf Grund des allgemeinen Willens auch gezwungen werden könne: "Wer nicht bereit ist, dem allgemeinen Willen Folge zu leisten, der wird von der ganzen Formation zum Gehorsam gezwungen". D.h. er wird gezwungen, frei zu sein. Grundlage dieses fürchterlichen Gedankens ist, dass der allgemeine Wille nicht der Mehrheitswille ist, aber auch nicht einfach der Wille aller, sondern der ständige, das Gemeininteresse ausdrückende und die Freiheit umsetzende Wille aller Mitglieder des Staates. Gewissermaßen und unter gewissen Bedingungen ist er der Wille des Volkes. Das "Volk" aber, wie allgemein bekannt, ehrt nicht immer die grundlegendsten Rechte der das Volk bildenden Individuen. Die vom Ideal der individuellen Rechte ausgehende Theorie ging auf diese Weise in ihr Gegenteil über, und das Ideal des Gemeinwohls konnte sich seitdem nicht von der tödlichen Umarmung des Gemeinwillens befreien.

Der Utilitarismus führte auf einem scheinbar friedlicheren Wege zu demselben Ergebnis. Nach diesem Prinzip müsse alles nach dem Nutzen der Gemeinschaft – oder wie Bentham (mit der von Helvetius geliehenen Wendung) formulierte: "das möglichst größte Glück der möglichst größten Anzahl" – beurteilt werden. Der wichtigste Maßstab der Staatsformen, der Gesetze und der einzelnen staatlichen Maßnahmen sei die Frage, in welchem Maße sie die Interessen der Gemeinschaft fördern. Wenn sie der Gemeinschaft mehr nützen, dann sind sie als gut anzusehen. Den Anhänger dieser Denkweise interessiert aber nicht, *wie* das gemeinsame Gut unter den einzelnen Mitgliedern der Gemeinschaft *aufgeteilt wird*. Deshalb verliert er im Hinblick auf das Interesse der Gesamtheit sehr leicht aus dem Auge, dass

deren Wohl vielleicht nur durch Verletzung oder Aufopferung der Rechte einzelner gefördert werden konnte. So wird die in den Rechten erscheinende Form des Individualwohls auf dem Altar des Gemeininteresses aufopferbar. Wenn es die Interessen der Gemeinschaft verlangen, ist der Anhänger des Utilitarismus bereit, die Einschränkung sogar der grundlegendsten Individualrechte zu akzeptieren. Deshalb kann wirklich erklärt werden, dass die Vertreter dieser Denkweise "die Rechte nicht ernst nehmen", weil sie sich nur um das Ganze kümmern.

Die auf dem Gemeinwillen und dem Gemeininteresse basierte Anschauung wurde in den vergangenen zweihundert Jahren zur Grundlage zahlreicher Denkströmungen und fast vorherrschend. Die unterschiedlichsten – gemäßigten und radikalen, rechten und linken, menschlichen und unmenschlichen – Theorien verkündeten laut, dass das Wohl der Gemeinschaft sei, was die Gemeinschaft wolle, oder was im Interesse der Gesamtheit stehe. Natürlich änderte sich das gesellschaftliche und geistige Umfeld der Auslegung des Gemeinwohls: Es entstanden die modernen Massengesellschaften, die mit einander konkurrierenden "herrschenden Ideale" verbreiteten sich, und es entstanden die Wohlfahrtsgesellschaften. Das Gemeinwohl verflocht sich immer mehr mit dem Ideal des diese Gesellschaften führenden und für ihren minimalen Wohlstand sorgenden Staates. Der Gedanke, dass der Staat das Gemeinwohl nicht nur behüten oder fördern müsse, sondern er habe es *als einen Willen zu formulieren* und *als gemeinsames Interesse durchzusetzen*, wurde fast allgemein.

So geriet auch der Gedanke in Vergessenheit, dass das Gemeinwohl nicht etwas sei, was im gegebenen Moment irgendjemand mit einem Machtwort formulieren und anderen auf *normative* Art mitteilen könnte.

Über das Gemeinwohl können wir höchstens einen vernünftigen Diskurs führen und dabei erläutern, worin es *in einer gewissen Situation* nach unserer Meinung besteht. Dabei verweisen wir auf die Voraussetzungen des gesellschaftlichen Friedens unter den gegebenen Bedingungen, auf die Konturen einer rechtmäßigen und gerechten Ordnung unter den gegebenen Bedingungen, oder auf die richtigste Art und Weise der Erhaltung der gemeinsamen Güter unter den gegebenen Bedingungen. Wir stellen den praktizierenden Staatsmännern keine Bedingungen, wir wollen ihnen keine Befehle, nicht einmal praktische Ratschläge erteilen. Wir sind bestrebt, in diesen drei wichtigen Fragen die von der höheren Ordnung der Vernunft eingegebenen, aber vielleicht nur annäherbaren und endgültig niemals erreichbaren, richtigen Lösungen zu finden. Deshalb steht es so, dass während dieses Diskurses

keiner in einer Position ist, in der er eine ausschließliche Geltung seines Standpunktes beanspruchen könnte.

Laut den Alten ist der Begriff des Gesetzes auf das Gemeinwohl "ausgerichtet", und der Machtinhaber habe das Gemeinwohl zu "fördern". Die Alten haben es sehr wohl gewusst, und es lohnt sich, dies auch heute noch vor Augen zu halten: Nicht der Gesetzgeber sagt es, worin dieses Gut besteht, denn das ist auch für ihn gegeben. Die Staatsgewalt ist weder Besitzer, noch Festleger oder Garantie des Gemeinwohls, sondern sein *Behüter* und den Möglichkeiten gemäß sein *Förderer*. Die Grundlage der Macht der Herrscher ist in dieser Hinsicht höchstens nur, dass sie mehr Möglichkeiten haben, es zu fördern.

Ius *and* Dominium *in Thomas Aquinas*

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This paper does not seek to give a thorough analysis or even a general overview of Saint Thomas' legal philosophy. Its modest goal is only to examine Aquinas' usage of two fundamental notions, *ius* and *dominium*. These Latin words are the most often translated as "right" and "property," which is not wrong but still it is a simplification, seeing that in medieval use of language both terms had manifold meanings. In the first part of the paper I will try to show how this variety of meanings appears in Saint Thomas. In the second part I will scrutinize the interrelations between the two notions.[1]

1 Notions

1.1 The Notion of Ius

We can find three different meanings of the term *ius* in Aquinas' legal philosophy. *Ius* can mean (1) *iustum*, i.e. right action, (2) by metonymy a rule and measure of human acts *(lex)* and (3) occasionally subjective right.

(1) Like other medieval Aristotelians, the *doctor angelicus* understands *ius* fundamentally and primarily as the *iustum*, as the *obiectum iustitiae*, the object of the virtue of justice. Consequently he discusses the Questions *De iure* (On Right) and *De iustitia* (On Justice) side by side in the *Secunda Secundae* of the *Summa theologiae* (qq. 57–58).

In his discussion of *ius* he follows accurately Aristotle's analysis of *dikaion*. In Book V of the *Nicomachean Ethics*, Aristotle describes *dikaion* as the just

[1] It was a great pleasure for me to participate in the Saint Thomas Education Project together with Csaba Varga and Máté Paksy in 2005. This study is also the result of this fruitful cooperation.

thing in a given situation.[2] Aquinas, likewise, conceives *ius* as a right action (a duty) that justice requires of the agent under given circumstances.[3] Though both of them make frequent use of the term "just thing," they make it very clear that the object of justice is not a thing but an action. For there are no *res iustae* without – at least implicit – reference to human acts. That is why the word *opus* appears in Aquinas' famous definition of *ius*: "ius sive iustum est aliquod opus adaequatum alteri secundum aliquem aeqalitatis modum" (the right or the just is an *opus* that is adjusted to another person according to some kind of equality).[4] The term *opus* is best translated here – in accordance with the meaning of the verb *operari* (to work, to be occupied with something) – as "action."[5]

This definition shows, on the other hand, that justice – in contrast with other virtues – is directed *ad alterum* (towards another person), and that the mean at which it aims is not constituted in relation to the subject of the action, but is objectively determined by the requirement of equality in human transactions. Aquinas' example of right action is the payment of the wage due for a service rendered.[6]

(2) Secondly, it is by no means exceptional that Aquinas uses *ius* to replace *lex* understood as a *rationis ordinatio*, a rational rule of human actions. His general definition of *lex* is to be found in the treatise on law of the *Prima Secundae* (qq. 90–108), in the Question *De essentia legis* (On the Essence of Law). According to this definition, *lex* is (1) an ordinance of reason (2) for the common good, (3) made by him who has care of the community, and (4) promulgated.[7]

[2] *EN* 1129a.

[3] *ST* II-II q. 57 a. 1.

[4] *ST* II-II q. 57 a. 2 co.

[5] G. Kalinowski "Le fondement objectif du droit d'après la 'Somme théologique' de saint Thomas d'Aquin" *APD* 18 (1973), 59–75, at 64, n. 1.

[6] *ST* II–II q. 57 a. 1 co.: "iustitiae proprium est inter alias virtutes ut ordinet hominem in his quae sunt ad alterum. Importat enim aequalitatem quandam, ut ipsum nomen demonstrat, dicuntur enim vulgariter ea quae adaequantur iustari. Aequalitas autem ad alterum est. Aliae autem virtutes perficiunt hominem solum in his quae ei conveniunt secundum seipsum. Sic igitur illud quod est rectum in operibus aliarum virtutum, ad quod tendit intentio virtutis quasi in proprium obiectum, non accipitur nisi per comparationem ad agentem. Rectum vero quod est in opere iustitiae, etiam praeter comparationem ad agentem, constituitur per comparationem ad alium, illud enim in opere nostro dicitur esse iustum quod respondet secundum aliquam aequalitatem alteri, puta recompensatio mercedis debitae pro servitio impenso."

[7] *ST* I–II q. 90 a. 4 co.: "Et sic ex quatuor praedictis potest colligi definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communi-

The problem of the relation between *ius* and *lex* (right and law) is one of the most debated questions among commentators of Aquinas' legal philosophy. Here I only mention the debate between Michel Villey and John Finnis. In Villey's view, it is not by chance that Aquinas treats *lex* and *ius* in two completely distinct parts of the *Summa theologiae*. This reflects that for Aquinas, as for Aristotle and in classical Roman law, there is an *opposition capitale* (a fundamental opposition) between *ius* and *lex*. According to Villey, Aquinas, as the last great representative of the pure classical tradition of natural law, avoids the interpretation of *ius* as prescriptive law. He asserts that whenever Aquinas writes *ius* instead of *lex*, he does so only because he respects the authorities (Gratian and Isidore of Seville) he cites.[8]

Finnis criticizes with good reason this "exaggerated distinction between *ius* and *lex*".[9] To be sure, in his treatment of *ius* Aquinas once explicitly distinguishes *ius* and *lex*, saying that "law is not the same as right". But in the same sentence he adds that law is "an expression of right" *(aliqualis ratio iuris)*.[10] And in the very next article he seems to equate *ius divinum* with *lex divina*; he speaks of the promulgation of *ius divinum*, which can make sense only in the case of divine law.[11] Finally, in other parts of the *Summa* – first of all in the treatise on law – as well as in his other works he uses *ius* and *lex* quite often interchangeably (not only *ius divinum* and *lex divina* but also *ius naturale* and *lex naturalis*, *ius positivum* and *lex positiva*, and so on) to mean "law".[12] Finnis,

tatis habet, promulgata." This is a perfect exemplification of the essentialist type of definition, composed of *genus* and *species*. Saint Thomas first defines law as such, the universal idea of law as *genus*, i.e. its nature, its essence, then in the subsequent questions (*ST* I–II qq. 91 and 93–108) he describes its different *species*: eternal law, natural law, divine law, and so on.

[8] M. Villey "Sur les essais d'application de la logique déontique au droit" *APD* 17 (1972), 407–12, at 408; Idem "Si la théorie générale du droit, pour saint Thomas, est une théorie de la loi" *APD* 17 (1972), 427–31, at 427ff. See also Villey's *La formation de la pensée juridique moderne* (Paris: Montchrétien [4]1968) and "Abrégé du droit naturel classique" *APD* 6 (1961), 27–72. For a much more moderate version of this view, see E. T. Gelinas "*Ius* and *Lex* in Thomas Aquinas" *Am. J. Jurispr.* 15 (1970), 154–70.

[9] J. Finnis *Natural Law and Natural Rights* (Oxford: Clarendon Press 1980), 228. Finnis categorically states, "Un ouvrage récent sur Bentham" *APD* 17 (1972), 423–7, at 424, that "chez saint Thomas il n'y a pas d''oppostition capitale... entre droit et loi'".

[10] *ST* II–II q. 57 a. 1 ad 2: "lex non est ipsum ius, proprie loquendo, sed aliqualis ratio iuris."

[11] *ST* II–II q. 57 a. 2 ad 3.

[12] See e.g. q. 94 a. 4, q. 94 a. 5 and q. 95 a. 4 of the treatise on law. The perhaps most striking passage, which the most clearly shows the parallel use of *ius* and *lex*, can be found in q. 95 a. 4 (objection 1 and response): "Videtur quod inconvenienter Isidorus divisionem *legum humanarum* ponat, sive *iuris humani*. Sub hoc enim *iure* comprehendit *ius gentium*, quod ideo sic nominatur, ut ipse dicit, quia eo omnes fere gentes utuntur. Sed sicut ipse dicit, *ius naturale*

on the other hand, makes the not less contestable claim that in Aquinas right is derived from law.[13]

The perhaps most adequate and convincing solution to this *crux interpretum* has been provided, in my opinion, by Georges Kalinowski. He argues that in Saint Thomas there is a *lien organique* (an intimate link) between *ius* and *lex*, and thus his treatise on right and justice and his treatise on law – like two panels of a diptych – cannot be separated from each other.[14] According to Kalinowski, Aquinas' metonymical use of the term *ius* is legitimated by the fact that the concepts of *ius* and *lex* are connected to each other in a relation of mutual causation: the *ius naturale* (natural right) forms the basis of the *lex naturalis* (natural law) on the one hand, and the *lex positiva* (positive law), be it divine or human, lays the foundation of the *ius positivum* (positive right) on the other.[15] Divine law, having a double – partly natural, partly positive – character, can perfectly illustrate this complex cause-effect relationship:

est quod est commune omnium nationum. Ergo *ius gentium* non continetur sub *iure positivo humano*, sed magis sub *iure naturali*. ... Sunt autem multa de ratione *legis humanae*, secundum quorum quodlibet *lex humana* proprie et per se dividi potest. Est enim primo de ratione *legis humanae* quod sit derivata a *lege naturae*, ut ex dictis patet. Et secundum hoc dividitur *ius positivum* in *ius gentium* et *ius civile*, secundum duos modos quibus aliquid derivatur a *lege naturae*, ut supra dictum est. Nam ad *ius gentium* pertinent ea quae derivantur ex *lege naturae* sicut conclusiones ex principiis, ut iustae emptiones, venditiones, et alia huiusmodi, sine quibus homines ad invicem convivere non possent; quod est de *lege naturae*, quia homo est naturaliter animal sociale, ut probatur in I Polit. Quae vero derivantur a *lege naturae* per modum particularis determinationis, pertinent ad *ius civile*, secundum quod quaelibet civitas aliquid sibi accommodum determinat" (emphasis added). In the *Commentary on the Sentences*, *In IV Sent.* d. 33 q. 1 a. 1 co., Aquinas even speaks of *lex naturalis vel ius naturale*. See also *In III Sent.* d. 37 q. 1 a. 3.

[13] Finnis "Un ouvrage récent sur Bentham" (n. 9), 424–5. A similar point of view was presented by P. Van Overbeke in his article "Saint Thomas et le droit. Commentaire de II^a–II, q. 57" *Rev. thom.* 55 (1955), 519–64.

[14] G. Kalinowski "Sur l'emploi métonymique du terme 'ius' par Thomas d'Aquin et sur la muabilité du droit naturel selon Aristote" *APD* 18 (1973), 331–9, at 335f. For a similar view, see O. Lottin *Le droit naturel chez saint Thomas d'Aquin et ses prédécesseurs* (Bruges: Beyaert 1931); M. B. Crowe "St. Thomas and Ulpian's Natural Law" in A. A. Maurer (ed.) *St. Thomas Aquinas, 1274–1974: Commemorative Studies* (Toronto: Pontifical Institute of Medieval Studies 1974) vol. I, 261–82; W. E. May "The Meaning and Nature of the Natural Law in Thomas Aquinas" *Am. J. Jurispr.* 22 (1977), 168–89.

[15] Kalinowski (n. 5), 70–1: "nous avons affaire à une relation de cause à effet: soit l'action juste en elle-même (intrinsèquement juste) est la cause de l'évidence avec laquelle s'impose la loi qui la prescrit, soit la loi est la cause du caractère conféré par elle à l'action donnée et qui en fait une action juste. Et c'est en raison de cette relation que '*ius*', nom propre de l'action juste, peut devenir un nom métonymique de la loi (*lex*)." It should be mentioned that in the treatise on right, *ST* II–II q. 57 a. 1 ad 1, Aquinas explicitly calls attention to the metaphorical and metonymical use of language, saying that "it is usual for words to be distorted from their

> "The divine law is that which is promulgated by God. Such things are partly those that are naturally just, yet their justice is hidden to man, and partly are made just by God's decree. Hence also divine law may be divided in respect of these two things, even as human law is. For the divine law commands certain things because they are good, and forbids others, because they are evil, while others are good because they are prescribed, and others evil because they are forbidden."[16]

(3) Thirdly, Thomas sometimes uses *ius* – besides the above two objective meanings – in the subjective sense as well. For example, discussing restitution he mentions property right *(ius dominii)*,[17] and treating theft he speaks of right of possessing *(ius possidendi)*.[18] In a third passage he states that "it belongs to the order of justice that a man should obey his superior in those matters to which the rights of his authority *(ius praelationis)* extend."[19]

This usage is, however, sporadic and marginal, and it is only the common juristic terminology of his age that Aquinas unreflectively follows here, far from thinking of developing a theory of natural rights.[20] As Annabel S.

original signification so as to mean something else". Elsewhere in the *Summa*, *ST* I q. 79 a. 13 co., we can also read that "it is customary for causes and effects to be called after one another".

[16] *ST* II–II q. 57 a. 2 ad 3: "ius divinum dicitur quod divinitus promulgatur. Et hoc quidem partim est de his quae sunt naturaliter iusta, sed tamen eorum iustitia homines latet, partim autem est de his quae fiunt iusta institutione divina. Unde etiam ius divinum per haec duo distingui potest, sicut et ius humanum. Sunt enim in lege divina quaedam praecepta quia bona, et prohibita quia mala, quaedam vero bona quia praecepta, et mala quia prohibita."

[17] *ST* II–II q. 62 a. 1 ad 2: "Ad secundum dicendum quod nomen restitutionis, inquantum importat iterationem quandam, supponit rei identitatem. Et ideo secundum primam impositionem nominis, restitutio videtur locum habere praecipue in rebus exterioribus, quae manentes eaedem et secundum substantiam et secundum *ius dominii*, ab uno possunt ad alium devenire" (emphasis added).

[18] *ST* II–II q. 66 a. 5 ad 2.: "in parabola Evangelii dicitur, Matth. XIII, de inventore thesauri absconditi in agro, quod emit agrum, quasi ut haberet *ius possidendi* totum thesaurum" (emphasis added).

[19] *ST* II–II q. 69 a. 1 co.: "Pertinet autem ad debitum iustitiae quod aliquis obediat suo superiori in his ad quae *ius praelationis* se extendit" (emphasis added). For further examples, see J.-M. Aubert *Le droit romain dans l'oeuvre de saint Thomas* (Paris: Vrin 1955), 91, n. 2.

[20] B. Tierney *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625* (Atlanta: Scholars Press 1997), 23. Saint Thomas was well acquainted with law, and by the time he wrote his works, the subjective meaning of *ius* had widely spread both in canon and urban law. For the emergence of subjective rights in the Middle Ages see e.g. B. Tierney "Origins of Natural Rights Language: Texts and Contexts, 1150–1250" *Hist. Pol. Thought* 10 (1989), 615–46; R. Tuck *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge U. P. 1979); H. J. Berman *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard U. P. 1983).

Brett points out, "the scattered usage of the subjective construction of *ius* with the gerund does not affect the theoretical elucidation of *ius* as objective, which is indeed the sense that *ius* normally bears in Aquinas' text; nor does it necessarily imply a concept of subjective right as liberty."[21]

1.2 The Notion of Dominium

In Aquinas's thought the term *dominium* may refer to (1) the authority of human reason over man's other capacities or (2) the possession of material things or (3) the dominion over human beings.

(1) The first sense of *dominium* is connected with human rationality. It expresses that man, as a rational being, has control over his will, desires, and so on. As Aquinas puts it, "in man reason has the position of a master and not of a subject."[22] Reason by nature dominates man's other capacities.

(2) The second sense of *dominium* extends this primary meaning by way of analogy to animals and material goods. Owing to his particular place in the order of creation *(imago Dei)* and his rational nature, man has a *dominium naturale* over animals and things – to the same extent as human reason controls man's other capacities. "It is by his reason that man is competent to have mastership... Man in a certain sense contains all things; and so according as he is master of what is within himself, in the same way he can have mastership over other things."[23] Already in the state of innocence, man had natural dominion over the use (but not the nature) of material goods to his benefit, which did not fundamentally change even after the original sin.[24]

(3) Finally, Aquinas' understanding of *dominium* covers the relations of dominion or rule between man and man, too;[25] nevertheless he keeps this type

[21] A. S. Brett *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge U. P. 1997), 91, n. 12.

[22] *ST* I q. 96 a. 2 co.: "Ratio autem in homine habet locum dominantis, et non subiecti dominio."

[23] *ST* I q. 96 a. 2 arg. 2: "cum dominium competat homini secundum rationem"; *ST* I q. 96 a. 2 co.: "in homine quodammodo sunt omnia, et ideo secundum modum quo dominatur his quae in seipso sunt, secundum hunc modum competit ei dominari aliis."

[24] *ST* II-II q. 66 a. 1; *ST* I q. 96 aa. 1–2. Cf. M.-F. Renoux-Zagamé *Origines théologiques du concept moderne de propriété* (Genève–Paris: Droz 1987), 72–8; J. Coleman "Property and Poverty" in J. H. Burns (ed.) *The Cambridge History of Medieval Political Thought* (Cambridge: Cambridge U. P. 1988), 607–48, at 621ff.

[25] *ST* I q. 96 a. 4.

of *dominium* over rational beings consistently distinct from the *dominium* over things and animals.

2 *Conceptual Relations*

2.1 Ius *and* Dominium *as the Rule of Reason*

(1) For Aquinas, as we have seen, the first and primary meaning of *ius* is the *iustum* (right action), the object of the virtue of justice. In the Question *De iustitia* he gives a definition of justice that associates justice with volition: "constant and perpetual will to render to each one his due."[26] He notes immediately that he is only adopting the famous definition of Ulpian *(constans et perpetua voluntas ius suum cuique tribuendi)*,[27] "the lawyers' definition," as he calls it.[28]

In the fourth article of the question, after repeating that justice is in the will as its subject, Aquinas underlines that "the will is borne towards its object consequently on the apprehension of reason".[29] Thus he is consistent in maintaining that reason dominates will, which is subordinated to the dictates of reason.[30] On the other hand, the characterization of the will as "perpetual" and "constant" in the definition of justice, requiring the firmness of the will, shows that the right action or just is not a matter of personal choice. It is an obligation or duty that justice requires of a subject with regard to another person in a given situation.[31]

(2) The rationalism of Saint Thomas' moral philosophy manifests itself much more clearly in his discussion of the second sense of *ius*, equivalent to

[26] *ST* II–II q. 58 a. 1 arg. 1.

[27] *Dig.* 1.1.10.

[28] As Aristotle, *NE* 1129a, defines justice not with will but as a habit, later in the same article, *ST* II–II q. 58 a. 1 co., Saint Thomas has to correct this definition, adding that "if anyone would reduce it to the proper form of a definition, he might say that 'justice is a habit whereby a man renders to each one his due by a constant and perpetual will': and this is about the same definition as that given by the Philosopher." It is a well-known fact among commentators of Aquinas' legal philosophy that the *doctor angelicus* has a great respect for certain authorities and he shows an especial preference for Ulpian. As we will see later, this is not the only time when this preference gives him trouble.

[29] *ST* II–II q. 58 a. 4 ad 2: "voluntas fertur in suum obiectum consequenter ad apprehensionem rationis."

[30] *ST* II–II q. 58 a. 4 ad 3: "omnis appetitus obedit rationi. Sub appetitivo autem comprehenditur voluntas."

[31] Brett (n. 21), 91–2.

lex. Rationality, as we have seen, is the first of the four elements of his general definition of *lex* given in the Question *On the Essence of Law*. In the very beginning of the *quaestio*, in the first article Aquinas asks whether *lex* pertains to reason. He answers the question, as might have been expected, in the affirmative, arguing that since law is a rule and measure of actions, it follows that law pertains to reason because "reason, which is the first principle of human acts, is the rule and measure of human acts."[32] Thus "law is in the reason alone".[33] *Lex* as such consists of propositions or precepts articulated by the *ratio practica* (practical reason).[34]

The reference to reason appears repeatedly in the subsequent discussions of the "various kinds" of *lex*, too. First of all, the source of the *lex aeterna* (eternal law) is the divine reason or wisdom.[35] And *lex naturalis* (natural law) is nothing else than the "participation of the eternal law in the rational creature".[36] All created realities partake somewhat in the eternal law. But while nonrational entities participate only passively, through their inclinations towards their proper acts and ends, intelligent, rational creatures, such as men, participate actively in the eternal law. They share intelligently and rationally in it. Thus natural law, as law, exists only in the rational creature. The participation of the eternal law in rational creatures is properly termed law. Irrational creatures, on the other hand, do not share in the eternal law in an intelligent and rational manner, and hence law cannot be predicated of them except *per similitudinem* (by similitude).[37] Finally, as for *lex humana* (human law), every human statute has to be to derived form natural law, which is "the first rule of reason".[38]

[32] *ST* I–II q. 90 a. 1 co.: "Regula autem et mensura humanorum actuum est ratio, quae est primum principium actuum humanorum."

[33] *ST* I–II q. 90 a. 1 ad 1: "lex est in ratione sola".

[34] *ST* I-II q. 90 a. 1 ad 2: "propositiones universales rationis practicae ordinatae ad actiones, habent rationem legis."

[35] *ST* I–II q. 91 a. 1; *ST* I–II q. 93.

[36] *ST* I–II q. 91 a. 2 co.: "participatio legis aeternae in rationali creatura lex naturalis dicitur."

[37] *ST* I–II q. 91 a. 2 ad 3: "etiam animalia irrationalia participant rationem aeternam suo modo, sicut et rationalis creatura. Sed quia rationalis creatura participat eam intellectualiter et rationaliter, ideo participatio legis aeternae in creatura rationali proprie lex vocatur, nam lex est aliquid rationis, ut supra dictum est. In creatura autem irrationali non participatur rationaliter, unde non potest dici lex nisi per similitudinem."

[38] *ST* I–II q. 95 a. 2 co.: "In rebus autem humanis dicitur esse aliquid iustum ex eo quod est rectum secundum regulam rationis. Rationis autem prima regula est lex naturae, ut ex supradictis patet. Unde omnis lex humanitus posita intantum habet de ratione legis, inquantum a lege naturae derivatur."

If *lex* is so closely related to *ratio*, why does Saint Thomas accommodate, instead of rejecting – as his mentor, Albert the Great explicitly did – Ulpian's definition of the natural law as *quod natura omnia animalia docuit* (what nature has taught all animals)?[39] In the Question *De lege naturali*, to take an example, he classifies the precepts of natural law according to the different levels of natural tendency found in man: the inclinations of man considered (1) as a substance, (2) as an animal and (3) as a rational being. About the animal tendencies he says that "there is in man an inclination to things that pertain to him... according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, 'which nature has taught to all animals,' such as sexual intercourse, education of offspring and so forth."[40]

In the treatise on right, discussing the difference between *ius naturale* and *ius gentium*, he even states that "it belongs not only to man but also to other animals to apprehend a thing absolutely: wherefore the right which we call natural, is common to us and other animals... But the right of nations falls short of natural right in this sense, as the jurist says because 'the latter is common to all animals, while the former is common to men only.'"[41]

At first sight, Ulpian's formulary, supposing a nature common to man and animals, seems to pose a great danger to the essential rationality of natural law.[42] Does its adoption by Aquinas mean that there exists a subrational

[39] *Dig.* 1.1.1.3.

[40] *ST* I–II q. 94 a. 2 co.: "inest homini inclinatio ad aliqua..., secundum naturam in qua communicat cum ceteris animalibus. Et secundum hoc, dicuntur ea esse de lege naturali quae natura omnia animalia docuit, ut est coniunctio maris et feminae, et educatio liberorum, et similia."

[41] *ST* II–II q. 57 a. 3 co.: "Absolute autem apprehendere aliquid non solum convenit homini, sed etiam aliis animalibus. Et ideo ius quod dicitur naturale secundum primum modum, commune est nobis et aliis animalibus. A iure autem naturali sic dicto recedit ius gentium, ut iurisconsultus dicit, quia illud omnibus animalibus, hoc solum hominibus inter se commune est." For other appearances of Ulpian's conception of natural law in Aquinas, see e.g. *ST* I–II q. 95 a. 4 ad 1; *In IV Sent.* d. 33 q. 1 a. 1 ad 4; *In V Eth.* l. 12 n. 4.

[42] Odon Lottin (n. 14), 66 explains the accommodation of Ulpian's definition with Aquinas' "sympathies secrètes pour les formules du droit romain." Michael Bertram Crowe (n. 14), 282 finds this "secret sympathy" incongruent with Saint Thomas' general view and hence "slightly puzzling." William E. May (n. 14), 184 argues, on the contrary, that Aquinas has good reason to make room for Ulpian's definition; namely he wants to emphasize that a human being is first and foremost an animal (though by reason of his intelligence a very special kind of animal). Therefore "the tendencies that men possess in virtue of their animality are basic human tendencies, fundamental '*inclinationes naturales*,' and the goods correlative to those tendencies, goods such as the procreation and care of children, are basic human goods meriting the respest of human intelligence."

level of natural law in man, or that natural law can be found in irrational creatures, too? Certainly not. For Saint Thomas, animals have natural inclinations only, not natural law, and in rational beings the set of inclinations common to man and other creatures cannot be called a law essentially but only "by participation, as it were."[43] As regards the relation of natural tendencies and rationality, Odon Lottin's remark is very apropos:

> "Saint Thomas n'entend toutefois aucunement par là retirer à la raison la maîtrise sur toutes les tendances de l 'homme et il accepte tout ce qu'Albert le Grand avait dit à ce sujet; mais tandis que celui-ci en concluait qu'il fallait écarter la définition du droit romain comme étrangère au concept de raison, saint Thomas au contraire lui accorde l'hospitalité, en l'interprétant dans le sens d'une morale rationnelle: l'objet du droit naturel est ce que la 'raison naturelle' édicte au sujet des tendances communes à l'homme et à l'animal".[44]

Accordingly, Aquinas' accommodation of Ulpian' definition of natural law should be interpreted to mean, together with his statement that "all the inclinations of any parts whatsoever of human nature, e.g. of the concupiscible and irascible parts, *in so far as they are ruled by reason*, belong to the natural law,"[45] that what nature has taught all animals is part of the natural law only in so far as such inclinations are dominated and controlled by human rationality.[46]

2.2 Ius *and* Dominium *as Property*

(1) One of the peculiarities of *natural dominium* is that it does not specify the mode of possession, be it private or in common. So the question remains open: which one constitutes the just form of property? In the third article of the Question *De iure*, Aquinas describes private property as a just institution. But it is not *absolute* (absolutely speaking), by the very nature of the relationship that it is just – as male is related to female for the purpose of procreation or parent to child for the purpose of education. It is natural and just only with a qualification: in consideration of what results from it. "For if a particular piece of land be considered absolutely, it contains no reason why

[43] *ST* I–II q. 90 a. 1 ad 1: "quaelibet inclinatio proveniens ex aliqua lege, potest dici lex, non essentialiter, sed quasi participative."

[44] Lottin (n. 14), 62.

[45] *ST* I–II q. 94 a. 2 ad 2: "omnes inclinationes quarumcumque partium humanae naturae, puta concupiscibilis et irascibilis, *secundum quod regulantur ratione*, pertinent ad legem naturalem" (emphasis added).

[46] Gelinas (n. 8), 164.

it should belong to one man more than to another, but if it be considered in respect of its adaptability to cultivation, and the unmolested use of the land, it has a certain commensuration to be the property of one and not of another man."[47] Consequently the possession of property is not related to natural right but belongs to the *ius gentium*.

On the basis of this passage alone it would be quite difficult to determine the status of property in Aquinas, especially as he is noticeably oscillating between two competing conceptions of *ius gentium*. Sometimes he locates it, like Saint Isidore, in positive human law;[48] on other occasions – including the present article – he understands it as a special type of *ius naturale*, quoting Gaius' dictum that "whatever natural reason decrees among all men, is observed by all equally, and is called *ius gentium*."[49]

(2) If we want to know more about the status of (private and common) property in Saint Thomas, we have to examine its relation to natural law. First of all, Aquinas rejects the quite common medieval view that natural law requires – at least in the state of innocence – the community of goods. He refutes this view on the basis of a subtle distinction, arguing that something can be said to belong to the natural law in two ways: (1) because nature inclines thereto; (2) because nature did not introduce the contrary. In the latter sense it might be said, for example, that for man to be naked is of the natural law, because nature did not gave him clothes. Now common property is of the natural law only in this second sense, referring to the primitive condition of mankind (which is obviously not the proper meaning of the term).[50]

[47] *ST* II–II q. 57 a. 3 co.: "ius sive iustum naturale est quod ex sui natura est adaequatum vel commensuratum alteri. Hoc autem potest contingere dupliciter. Uno modo, secundum absolutam sui considerationem, sicut masculus ex sui ratione habet commensurationem ad feminam ut ex ea generet, et parens ad filium ut eum nutriat. Alio modo aliquid est naturaliter alteri commensuratum non secundum absolutam sui rationem, sed secundum aliquid quod ex ipso consequitur, puta proprietas possessionum. Si enim consideretur iste ager absolute, non habet unde magis sit huius quam illius, sed si consideretur quantum ad opportunitatem colendi et ad pacificum usum agri, secundum hoc habet quandam commensurationem ad hoc quod sit unius et non alterius."

[48] *ST* I–II q. 95 a. 4; *In I Pol.* l. 4 n. 1.

[49] *ST* II–II q. 57 a. 3.: "quod naturalis ratio inter omnes homines constituit, id apud omnes gentes custoditur, vocaturque ius gentium" (*Dig.* I.1.9). See also *In V Eth.* l. 12 n. 4. For a good brief overview of Saint Thomas' different texts on *ius gentium*, see Van Overbeke (n. 13), 557–63.

[50] *ST* I–II q. 94 a. 5 ad 3: "aliquid dicitur esse de iure naturali dupliciter. Uno modo, quia ad hoc natura inclinat, sicut non esse iniuriam alteri faciendam. Alio modo, quia natura non in-

For Saint Thomas, private property is not prescribed by natural law either. Regarding its relation to natural law, its status is quite similar to that of common property – nature is neither for nor against it. In general, natural law professes a "benevolent neutrality" on the question of the mode of possession of material things.[51] In replying to an objection in Question 66 of the *Secunda Secundae*, Aquinas gives an excellent brief summary of his teaching on the relation of natural law and property:

> "Community of goods is ascribed to the natural law, not that the natural law dictates that all things should be possessed in common and that nothing should be possessed as one's own: but because the division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law... Hence the ownership of possessions is not contrary to the natural law, but an addition thereto devised by human reason."[52]

Private property is thus merely a positive, temporal institution, an invention of human intelligence. It is neither prescribed nor forbidden by natural law but is a human addition to natural law principles, a mode of possession that has only conventional justification, on the basis of the *ius gentium* (assimilated here to positive law). Reason introduced private property for the benefit of human life, after having considered its comparative advantages and disadvantages. Aquinas mentions three rational, pragmatic arguments – very similar to those deployed by Aristotle in the *Politics*[53] – in favour of private property. (1) Everybody is more careful with a thing which is for himself alone than with that which is common to many or to all. (2) Human affairs are more orderly and efficiently organised when everyone has his own responsibility for his own things, whereas there would be a chaos if everyone cared for everything. (3) Men live together more peaceably if each

duxit contrarium, sicut possemus dicere quod hominem esse nudum est de iure naturali, quia natura non dedit ei vestitum, sed ars adinvenit. Et hoc modo communis omnium possessio, et omnium una libertas, dicitur esse de iure naturali."

[51] Lottin (n. 14), 89.

[52] *ST* II–II q. 66 a. 2 ad 1: "communitas rerum attribuitur iuri naturali, non quia ius naturale dictet omnia esse possidenda communiter et nihil esse quasi proprium possidendum, sed quia secundum ius naturale non est distinctio possessionum, sed magis secundum humanum condictum, quod pertinet ad ius positivum... Unde proprietas possessionum non est contra ius naturale; sed iuri naturali superadditur per adinventionem rationis humanae."

[53] *Pol.* 1261b and 1263b.

has what suits his own taste; quarrels would erupt more frequently, if men were to hold things in common without distinction.[54] This rational deliberation forms, together with common human consensus, the basis of private property.[55]

[54] *ST* II–II q. 66 a. 2 co.

[55] Cf. A. H. Chroust – R. J. Affeldt "The Problem of Private Property according to St. Thomas Aquinas" *Marquette L. R.* 34 (1950/51), 151–82; Coleman (n. 24), 621–5.

Immutabilité et changement dans le politique et le droit

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Apparence de stabilité

Les choses du politique et du droit sont le reflet de la culture. Elles se soustraient en apparence à une nature soumise aux contingences et aux fluctuations. Elles sont établies sur des structures ou des institutions qui les portent. Mais elles risquent d'ignorer parfois l'immutabilité qu'elles promettent, et qu'elles empruntent indirectement à la stabilité de l'être. Et elles suscitent par là le plus grand trouble. L'on ne saurait en effet nier les mouvements contradictoires qui les traversent ou les évolutions qui les caractérisent, et qui les font basculer d'un état dans un autre. Elles s'exposent sans cesse à une précarité qui déçoit les exigences de l'esprit. Elles passent et meurent. Le changement est leur loi.

Voilà qui explique souvent une démarche de retrait ou de distance. Elle part du constat que le monde de l'homme qui s'accomplit dans le politique et le droit n'échappe pas au monde tout court, et qu'il est entraîné dans le même tourbillon ondoyant, (...) "coulant et roulant sans cesse", comme disait Montaigne, où "tout vient en être et n'est pas encore du tout, ou commence à mourir avant qu'il soit né"[1] Plongé dans de constantes vicissitudes, sources de plus de "variations" que de points fixes, l'on retrouve ainsi à propos du politique et du droit le langage interrogatif et critique qu'emploie Bossuet visant l'éclatement et la disparité "des Eglises" *(Histoire des variations...)*.

Comment alors ne pas conclure, sinon à un scepticisme, du moins à un relativisme, obturant tout approfondissement spéculatif ? Et comment ne pas exalter, aux lieu et place de l'élément qui se rebelle à une première perception, la seule opportunité de l'action, gouvernée par son efficacité ou son

[1] Montaigne *Essais* (Paris : éd. M. Rat 1963) L. II, ch. XII.

succès ? Suivant cette logique, comment ne pas vanter un *autre* politique et un *autre* droit, délibérément calculés en fonction de simples intérêts partiels et momentanés, catégoriels et immédiats ? Comment ne pas rejeter, corrélativement, l'idée de les subordonner à ce qui pourrait renvoyer à l'universalité, et donc à l'identité supérieure d'une justification, reposant objectivement sur soi, et ne dépendant d'aucun usage individuel ? Comment ne pas inciter à un politique et à un droit qui renverseraient désormais la hiérarchie que commande le sens vain d'une immutabilité quelconque, et qui s'engageraient résolument en faveur d'un changement s'auto-fondant, et destiné à satisfaire les besoins avoués de la force matérielle ? Comment ne pas aller par conséquent jusqu'à ce que le politique ou l'Etat, impunément asservi à de tels besoins, instrumente le droit et en nie la substance propre ?

Préférer le changement

La préférence très tôt affichée pour un changement correspond de cette manière à une sorte de tendance à éviter une réflexion élémentaire et la compréhension de qui peut unir les termes en conflit. Et si l'on en introduit de "nouveaux" qui prétendent s'affirmer en incompatibilité avec eux, l'on sera toujours reconduit au problème de ne pouvoir davantage surmonter la contradiction que l'on voulait repousser.

Changer peut donc traduire le refus facile de chercher en profondeur une signification commune aux divers traits d'une meme situation. C'est une attitude simplificatrice et superficielle somme toute bien connue et dont traite déjà la psychologie de l'enfance. Il suffit de prendre le prétexte commode d'un changement donné dans l'apparence située hors de soi, ou de faire comme si aucune nécessité d'une immutabilité de sens, et de savoir, et d'être, ne surgissait à l'intérieur meme de sa propre conscience, une conscience peu tentée de dépasser le prétendu changement en cours.

C'est l'occasion pour chacun de faire disparaître un passé ou une histoire pouvant réveiller un juste sentiment de culpabilité dans l'incapacité à assumer le respect du réel. Ce sera la même opportunité, pour le politique, de faire oublier certains échecs ou certaines contradictions, en flattant l'instinct le plus spontané qui est de suivre la nietzschéenne "innocence du devenir", dans l'acception du *Gai savoir*, c'est-à-dire d'épouser cette fluidité de l'action qui n'a plus à se justifier devant quelque instance donnée ou future de l'être ou de la valeur, et qui sécrète d'elle-même son destin, entretenant une responsabilité purement "objective" : on est responsable de s'accorder ou non aux conditions de réussite de l'action, dans l'instant meme, sans avoir à se

demander si cette action est susceptible de démentir une action antérieure, ou d'etre démentie par l'action qui la suivra ...

Mais nul doute qu'il y ait dans cette tendance à l'irréfléchi du changement autre chose que la pure exaltation d'un nominalisme relativiste ou d'un pragmatisme nihiliste.[2] il y a incontestablement ici l'appel de forces métaphysiques plus étendues, héritées du vieil héraclitéisme et particulièrement sublimées dans les philosophies germaniques du devenir et de l'histoire, s'opposant invariablement à la religion, dite "méditerranéenne", d'une substantialité immuable (v. Fichte, Herder, ou, bien plus tard, Dilthey – attentif toutefois aux "noyaux réfractaires", aux "structures permanentes" sous le flux changeant de l'histoire...[3]). Et, certes, en tous registres de civilisation, l'historicisme prend cette meme direction, depuis Ibn Khaldoûn ou Vico, visant au discrédit de la substance frappée d'immobilité,[4] mais ce n'est que porté par l'idéalisme allemand et ressourcé à ses mythes persistants, qu'il s'engage dans une remise en cause aussi radicale des notions d'immutabilité issues de la culture gréco-latine et orientale.

D'ailleurs, les réminiscences de la plus archaïque mentalité germanique des temps primitifs hantent encore la conscience de contemporains, renouant avec ses plus caractéristiques démons : qu'il s'agisse, au plan politique, de recourir à une démocratie conçue comme une sorte de rudimentaire "tirage au sort" par les voix dominantes d'une assemblée de circonstance (le mythe même qui parcourt les légendes du Nord[5]) ; qu'il s'agisse, surtout, de substituer un règlement belliqueux instantané et improvisé à un arrangement processuel ou judiciaire plus lent, quand la force remplace plus volontiers un droit qui rationnellement effraye (v. une certaine diplomatie de la guerre

[2] V. la thèse de J. Granier sur *Le problème de la vérité chez Nietzsche* et ses conséquences sur l'interprétation de ce que l'on pourrait appeler "le nihilisme structuraliste" des années 60 à 70, tel que l'a souvent justement dénoncé Henri Lefèbvre.

[3] Cf. M. Dupuy *La philosophie allemande* (Paris : P.U.F.–Q.S. 1971).

[4] Cf. K. Izuka *La découverte des philosophies françaises de l'histoire* (Tokyo : Miraisha 1996), et notre rec. *APD* (1997) 522–3 ; et cf. principalement : Ch. Renouvier *Introduction à une philosophie analytique de l'histoire* (Paris : Ladrange 1864) I-IV (et de montrer très kantiennement que, "séparée du bien (moral) qu'elle ne réalise point, (l'histoire) conduit ses spectateurs et ses théoriciens au relâchement et à la corruption de la conscience" ... Ad. R. Aron *Introduction à la philosophie de l'histoire* (Paris : Gallimard 1938) (thèse principale d'Aron, à laquelle s'ajoutait la thèse complémentaire *La philosophie critique de l'histoire* [1937]), où l'auteur prolonge au fond sans grand changement substantiel la vieille démarche de Renouvier en concluant que seule l'Idée (kantienne) de la Raison permet d'interpréter l'histoire de manière unifiée et objective, et en tout cas univoque, et en repoussant le pluralisme relativiste des interprétations (de type néo-nietzchéen), tel que le réintroduit l'empirisme analytique implicite d'un Ricœur dans la son approche herméneutique encore aujourd'hui en vogue.

[5] Cf. G. Dumézil *Mythe et épopée* (Paris : Quarto–Gallimard 1995) I–II.

tentée parfois au Conseil de sécurité des Nations-Unies suivant les mêmes gestes de langage au cryptage mythico-symbolique) ; qu'il s'agisse, enfin, en bonne continuité, de désigner un coupable en le soustrayant à l'Etat de droit (concept reconnu embarrassant et qualifié d'idéologique), et en le déclarant "hors la loi", hors de la protection de tout droit : en le renvoyant donc aux traques de justices privées peu scrupuleuses ; qu'il s'agisse même plus prosaïquement d'opter, dans la technique juridique civiliste de la taxinomie des biens et de l'avoir patrimonial, pour les meubles plus que pour les immeubles.[6]

A chaque fois, la préférence pour la mobilité est le signe d'élection d'une métaphysique du devenir par l'action, *et non par l'être* ; du devenir par la volonté, *et non par l'esprit* ; et elle obéit à une forme d'irrationalité. La puissance intellective et abstractive, élevée cependant très haut, conduit à la *surdétermination* de la volonté, ou de son pouvoir plus obscurément sensible et organique. Et ce n'est nullement un hasard si, dans le langage de l'idéalisme allemand, le mot meme de volonté *(Wille, Willens)* remplace le mot raison *(Vernunft)*, et si la volonté est le seul mode d'universalisation accessible. Elle est l'immuable au-dessus de toutes les forces du changement.

L'on peut vérifier alors la disparition classique du politique ordonné au droit. Confondu avec un pouvoir, il absorbe le droit et "fait" ce droit. C'est le préjugé ou le contre-sens d'un Etat qui "créerait" le droit, tel qu'il demeure chez Kelsen lui-même, comme auparavant chez Jellinek[7] ; le système kelsénien se révèle dévoué au système d'autorité établi, aux antipodes de l'Etat de droit, qui signifie depuis les Grecs que le droit est la "cause" de l'Etat –

[6] Cf. déjà les remarquables *Etudes germaniques* oubliées aujourd'hui de F. Ozanam *Etudes germaniques* I : Les Germains avant le christianisme (Paris : Lecoffre [6]1894). Sur la philosophie sous-jacente à la distinction "immeubles/meubles", v. notre *La possession des biens* (Paris : Economica 1981) et notre note "Biens", ds. *Encyclopédie philosophique universelle. Les notions* (P.U.F. : Paris 1990) I, 232s. On peut aussi opposer en suivant propriété et échange, droit réel et droit personnel, crédit fournisseur et crédit financier, (et exploiter l'analyse de Jhering, *Esprit du droit romain*, montrant comment la créance sort initialement du droit de propriété sur la *domus* familiale, comp. ds. notre *Possession des biens* [supra]). Au plan esthético-littéraire, on rappellera que la puissante œuvre romanesque de Pär Lagerkvist (prix Nobel en 1951) vante la régénération permanente par le conflit et la guerre, comme si le mal, envoyé par un Dieu de colère, (anal. : films de K. Dreier) devait permettre d'expier le mal jusqu'à la délivrance définitive reposant sur la Grâce d'une totale et très luthérienne "justice imputée". Ce qui rejoint le nihilisme de K. Barth ou de P. Tillich, voire de J. Ellul (initialement), déclarant impuissants le politique et le droit renvoyant au *sola fide*.

[7] Cf. notre note "Georg Jellinek" ds. *Encyclopédie philosophique universelle* (P.U.F. : Paris 1992) II, 2525–6.

concept de *dikéo-polis* – et que Duguit paraît avoir le mieux compris parmi ses contemporains.[8]

Quant au droit en lui-même, il évolue en simple procédure, ne laissant subsister derrière sa récupération par le politique et derrière l'effacement de ses définitions normatives, que des instruments contractuels ou féodaux (au sens propre de *fœdus* : le contrat) ; le consentement volontaire en est l'unique maître, comme il l'est du politique, abandonné à une ontologie du changement.

La tentation dogmatique

Cependant, une autre tentation peut se manifester, dans l'agacement et l'exaspération qu'excite le soupçon même d'un changement. Fuir le changement pour l'immuable peut procéder ainsi d'une attitude tout aussi sommaire qui consiste à opter pour l'un des deux éléments que l'on oppose, sans voir le "troisième terme", le "sous-jacent", l'*upokeimenon*, ou, en pratiquant une métaphysique à l'envers : en le déplaçant et en lui assignant un lieu qui n'est pas le sien, en dehors du sens même de l'être.

Souvent l'assimilation abusive de l'être à l'essence, sa stérilisation ou son étiolement dans un formalisme abstrait, entraînent en effet des doctrines étatistes, substantifiant la personne morale de l'Etat, comme des théories du droit naturel, centrées sur une nature de l'homme, ignorant sa personnalité existentielle. Emancipée d'une réflexion fondamentale, la pensée a viré au dogmatisme.

Et l'on sait, dans le portrait du despote ou du tyran, que la forme délivre du doute, et que, la plupart du temps, les partisans d'une fixité à outrance ou d'un embaumement des institutions, qui ont été les premiers, en héros libérateurs, à invoquer le changement au nom d'un passé honni ou d'un "jamais plus", sont les memes qui s'empressent de prononcer de solennels "à jamais". Le changeant est l'alibi de l'immuable, l'un assure la prospérité de l'autre. Qu'aucune vérité ne puisse précéder l'action aboutit donc à idolâtrer le résultat que l'action a atteint et à l'ériger en vérité indubitable.

Ce risque de rupture et de division est déjà répertorié dans l'histoire philosophique ou théologique elle-même. Il est d'ailleurs caractéristique de tous les efforts de détachement trop radicaux de l'esprit par rapport au réel conçu comme existence, efforts qui mènent au refus du discours des symboles per-

[8] Cf. notre art. "La théorie de l'Etat et réalisme sociologique dans la pensée de Duguit et de Hauriou" ds. S. Goyard-Fabre (sous la dir.) *L'Etat au XXe s.* (Paris : Vrin 2004), 19s.

mettant de raccorder un monde à un autre, et au complexe de fuite idéaliste, subjectiviste et solipsiste.

Il y va même parfois de la récusation d'un lien possible de la nature et de la personne, comme si l'une n'était pas l'expression de l'autre. Volonté néo-platonicienne de désincarnation du sensible, et courants actuels de résurgence des gnoses fondées sur l'unique élément psychique ou intellectuel.[9]

Rejet commun

Mais, ne nous y trompons pas.

Certes, substantiellement, "ce qui est", ou l'existence (l'*esse*), en son immutabilité d'être, pourra signifier le changement, le devenir ou le mouvement de la vie, qui sont le devenir ou le changement de soi-même, c'est-à-dire d'un "même" s'auto-réalisant ou s'accomplissant, la *Wirklichkeit* hégélienne ou l'*appagamento* rosminien.

Mais, quand on se précipite sur le changement, au plan culturel et politique, ou bien quand on se laisse fasciner par l'immuable, *il y a généralement comme une envie de briser cet ordre d'un sous-jacent ontologique, et par là axiologique*. Un ordre qui ne se manifeste finalement jamais mieux que dans l'obstination à écarter ou à pourchasser la recherche du sens de ce qui est dit changer ou demeurer immuable dans l'aire des simples apparences.

S'attacher dans cette perspective au changement ou à l'immutabilité confirmera au fond une sorte de tourment identitaire et de réflexe à se fuir soi-même, et à refouler l'idée d'avoir à se justifier devant l'évidence d'un réel antérieur ou présent ou en voie de se révéler dans le futur. C'est se placer hors de soi, mais non pour apprivoiser une réalité et en saisir la signification, mais pour s'immerger plutôt dans ce qu'on veut prendre pour la réalité, et par là s'aliéner à un jeu de rôle ou devenir un autre que soi. La discontinuité extérieure suppose de ne promouvoir que le changeant dans l'exclusion de l'immuable, ou un état immuable dans l'exclusion du changement, dans le rejet du passé ou de l'avenir.

C'est, en politique, l'idée absurde d'un commencement pur suivi d'une révolution, comme si tout commencement n'impliquait pas une révolution originelle, comme si toute immobilisation d'un stade jugé positif ne recélait pas un changement en négatif, – le héros naissant du bandit primitif, comme Romulus, ex-voleur et ex-assassin.

[9] Comp. sur la théologie catholique issue en particulier de Urs v. Balthazar, les observations critiques dans une perspective ignacienne de P. Valadier *La condition chrétienne de l'homme* (Paris : Seuil 2003).

A la vérité, cette discontinuité extérieure est d'abord à l'image d'une inquiétante discontinuité intérieure où la personnalité se dissout dans des séquences successivement hétérogènes entre elles et où la conscience nie hypocritement ce que la vision d'un passé lui impose et ce que l'ouverture à l'avenir sollicite d'elle : la perception d'un ensemble plus grand que les représentations segmentaires qu'elle se forme complaisamment.

Pourtant, donc, cette conscience "sait". Mais a-t-elle le droit de vouloir oublier, comme Er le Pamphilien du mythe platonicien ? Peut-elle oser substituer à l'être, ou au "plus grand", le "plus petit" d'un changement ou d'un immuable, d'une séquence partielle sur le substrat de l'être ? Les discours démagogiques viennent sans cesse d'une inclination à ce qui peut limiter la mémoire, ou le savoir d'un tout. Or, réfléchir, c'est précisément sortir de la caverne où s'endorment le sensible et le rationnel qui le met en ordre ; c'est, par l'esprit, remonter au fondement ou plutôt à la justification de tout ordre.

L'action la plus évidente de l'esprit est d'assurer ainsi une prise sur l'invisible d'un arrière-monde, et elle explique que nous soyons portés, à force d'activité cogitative, voire d'imprégnation culturelle intense, à ne regarder les choses que comme des souvenirs ou des tracés de mémoire. C'est favoriser l'accès à la perception d'un *nouveau* qui n'est rétrospectivement que l'*ancien*, ou finalement le substantiel devenu conscient d'un avatar qui le singularise. Ce qui est encore très platonicien, et fait écho à de célèbres fragments de Wordsworth ;[10] ce qui rejoint autant la métaphysique brahmanique du "non manifesté", que la poétique juive de "l'inachevé" (E. Jabès) ou la mystique chiite de l'immam caché (v. H. Corbin), et conduit à admettre que chaque regard sur un élément engage, derrière la partie que l'on voit, le tout que l'on se borne à pressentir.

Deux changements

Il est donc deux types de références au changement.

La première référence est formulable *en positif*, pourrait-on dire, si elle accepte d'accueillir la réflexion critique et l'analyse, permettant de découvrir ou de dégager *une immutabilité première* et la nature même du changement qui s'y inscrit en second ; c'est le sens de cette substance de l'être que désigne, dans le *Mahâbhârata*, Khrisna à Arjuna sur son char de guerre, en lui rappelant qu'il est à la fois "l'apparition et la disparition", ... et que la défaite

[10] Cf. F. W. H. Myers *La personnalité humaine* (tr. S. Jankélévitch) (Paris : Alcan 1905), 82 (et citant judicieusement le poète anglais donc l'inspiration se retrouve chez Ruskin et donc chez Proust...).

et la victoire sont les illusions de l'action politique politicienne qui nourrit tous les conflits armés.[11]

La seconde référence est proprement *négative* ; elle renvoit à un changement qui n'est que combat horizontal des termes où chacun entend éliminer l'autre ; elle laisse supposer que *tout changement étant au contraire premier*, aucune immutabilité ne peut s'y adosser sans être affectée à son tour de la même relativité et de la même contingence.

S'il y a donc *un changement qui tire son sens d'un donné ou d'une chose, d'un transcendant*, d'un invariable, qu'il ne "fait" pas, mais qui s'impose à lui, et dont il témoigne implicitement, et dont il accomplit le mouvement, et qui, de toutes façons, le justifie, il y a par contre *un changement qui se veut issu totalement de lui-même*, et qui prétend n'avoir de référence qu'à lui.

Parallèlement, il y a une immutabilité qui écarte d'emblée et tout aussi globalement un changement, et qui correspond à la pétrification ou absolutisation d'un moment du changement lui-même ; elle s'installe ainsi dans le même monde que celui du pur changement et en adopte la logique appauvrissante d'un contenu plus profond de la réalité.

D'où la métaphysique qu'impliquera cette dualité d'approches.

Sans être en tout cas éclairé sur son sens, le langage du changement ou de l'immutabilité, surtout au *plan politique*, sombre dans l'idéologie en acceptant des présupposés indémontrés.

Et quand il aborde la *question juridique*, ce même langage alimente tous les positivismes : d'un côté, le positivisme de la volonté légale, honorée dans ses caprices et ses revirements intempestifs ; d'un autre côté, le positivisme de la nature rationnelle vantée pour sa généralité abstraite.

Il est, en effet, deux positivismes, l'un de la volonté, l'autre de la nature ; l'un politico-légal, l'autre théorico-scolastique. Et ils s'abreuvent tous deux à la même source : à la source de ce qui s'établit, à la source de l'action (de la volonté ou de la raison), prévalant sur *ce qui est* ; ou bien à la source du "posé" (gr. *tithémi* ; lat. *ponere* ; skr. *dhaman*), prévalant sur le simple donné.[12]

Le droit naturel n'a rien à envier ainsi au droit positif ; il est posé en une nature qui est construite sur l'être, mais *qui n'est pas l'être* ; il suscite une littérature le plus souvent descriptivo-dogmatique analogue à la littérature juridique ; il fuit l'approche aporétique, problématique et dialectisante, qui

[11] Nous rapprochons des formules empruntées à des passages dispersés : cf. les larges extraits du *Mahâbhârata* commentés par M. Biardeau (déjà traductrice elle-même partielle de l'édition Garnier-Flammarion) (Paris : Seuil 2002).

[12] Cf. notre *Métaphysique et éthique au fondement du droit* (Bordeaux : Bière 1995), chap. 13.

affronterait le vrai changement au cœur de l'être, sans avoir la peur du mouvement de vie qui lui est immanent.

Première démarche de tout savoir

Mais entreprenons une analyse plus systématique.

"Politique et droit" : deux objets d'étude sont donc au préalable distingués, recouvrant le politique, ou l'Etat, et le droit; et le deuxième objet se dédouble lui-même : il permet de dissocier la règle juridique et la loi qui la reçoit et qui l'adapte.

Dans le prolongement, "immutabilité et changement", s'appliquant à ces objets, au politique et au juridique, renvoient à deux notions qui s'imposent à l'origine, et qui traduisent la différence fondamentale et traditionnelle entre l'être et l'apparence, entre la substance et l'accident, entre le "non manifesté" et le "manifesté", entre le principe et la modalité, entre le "tout" et la "partie", entre la structure eidétique et la "facticité", entre la nécessité et la contingence ...

Ces notions sont à considérer à partir du point de vue où elles sont adoptées en référence, avant d'en scruter la nature dans leur visée progressivement axée sur le politique et sur le juridique.

I

Une première interprétation, à caractère scientifique et métaphysique, marque bien *le point de vue de départ* à retenir. Elle oblige à admettre la distinction qu'énoncent de telles notions, puisque tout objet de science relève du substantiel ou de l'ontologique, ce que connote d'emblée l'immutabilité. Le changement y est donc étranger. Enseignement classique de la Grèce et de l'Inde anciennes, ou du Moyen Age européen, véhiculant d'ailleurs les trois monothéismes (Averroès, Maïmonide et saint Thomas).

Le classement qui s'opère ainsi est tributaire du lien direct qui s'établit ici entre l'objet, scientifiquement ou gnoséologiquement examiné, et *l'universel* ou *le général*. Le sens de ce vocabulaire devient cependant plus précis quand on passe du "tout" à la "partie", impliquant une nette séparation entre le *sous-jacent* indivisible dans son unité et le phénoménal fragmentable à l'infini. Enfin, les degrés du savoir se hiérarchisent en accord avec ce schéma. "Il n'est de science que de l'universel", déclare le Stagirite. Le "tout", dans sa suffisance ou son inconditionnalité, désigne ce que contemple *immédiatement* l'intelligence métaphysique, et la "partie" indique ce que se représente

médiatement, à travers des entités génériques et abstraites, une raison simplement théorique.

Dans cette première optique, l'on peut caractériser assez clairement le politique et le droit.

Implication et solidarité des objets d'analyse

Le politique embrasse le domaine des "faits" de pouvoir ou de contrainte publique inévitablement changeants, et dont la consistance échappe à celle d'une nature ou d'une essence ; ce qui n'empeche pas de tenter de dégager des tendances à l'immutabilité sous forme de lois synchroniques ou diachroniques, de structure ou d'évolution ; et meme d'ouvrir à une critique aporétique et problématisante de portée plus philosophique.

Le politique est l'objet d'une histoire et d'une sociologie. Comme toute science de la diversité et du devenir, il relève platoniciennement du physique et du sensible *(Cébès)*.[13] Il se ramène à des *faits*, tantôt *empiriques*, quand ils en appellent à l'observation et au test d'hypothèses préconstituées ; tantôt *rationnels*, quand ils visent précisément à discerner ce en quoi se retrouve la raison humaine, des vérités de raison, au sens vichien du *verum et factum convertuntur* (repris par Habermas) : autrement dit, des lectures ou interprétations qui assurent la transition entre la *constatation* de faits empiriques et l'*explication* constitutive des faits rationnels eux-mêmes.

Dans les deux cas, il est vrai, dès la formation même du "fait", et sans attendre la formulation d'une sorte de loi exprimant des tendances ou des constances, une immutabilité émerge qui est propre à tout savoir procuré à la raison, laquelle ne comprend que des ressemblances et des différences à partir de ressemblances préalables (l'"autre" se "différenciant" du "même" dans cette acception de la raison théorique, et n'étant pas "l'autre" de l'esprit, l'autre absolu ou substantiel du *Sophiste*).

De plus, sous l'angle de leurs principes onto-axiologiques latents ou de leurs présupposés justificateurs, ces interprétations peuvent déboucher, plus philosophiquement, sur une dialectisation posant le problème *du rapport de tout fait et même de toute interprétation théorique "de raison" à l'être et à la valeur qui les transcendent*.

Par là, il est impossible de prendre pour objet le politique, sans y voir "l'objet de cet objet" qui est le droit ; impossible de percevoir donc l'Etat sans le droit, l'effet sans sa cause ou (étymologiquement) sa "chose".

[13] Cf. ainsi J. Moreau *La construction de l'idéalisme platonicien* (Paris : Boivin 1939, repr. G. Olms 1986) n. 298 (et sur le politique, cf. n. 192s).

De même, il est impossible de regarder l'objet-droit sans remonter à *l'objet interne à cet objet qui est le juste*, apparaissant donc à la fois comme l'objet supreme de l'objet politique, la référence à dévoiler, après une première analyse socio-historique, et engageant en somme une analyse de l'idée, après celle des concepts.

Quant au juridique, il est suspendu à une tradition de dissociation entre "justification" et "fondement", entre ius et lex, entre "lecture" *(legere)* rationnelle et "lien" *(ligare)* voulu, entre *topos*, *criterion*, *kanon* ou *regulæ* et *dispositiones*, entre *rules* ou *law* (au sens large) et *statutes*, entre *Grundsätze* ou *Rechtsregeln* et *Normen* (non certes au sens particulier de Kelsen, mais dans un sens au présupposé légaliste simplement identique au sien).[14]

Une dualité intime apparaît au sein même du droit *entre règle et loi* : entre un élément interne, à valeur cognitive, affecté d'une indubitable immutabilité, et un élément externe, à signification plus volontaire, et soumis au changement. Cette dualité s'accompagne historiquement de méthodes d'analyse différentes, dialectique ou inductive, et analytique ou déductive, historiquement illustrées par les Glossateurs, au moment de la séparation classique entre *mos italicus* et *mos gallicus* (v. les études de Landsberg ou de Wieacker) ; d'où le développement de diverses écoles du XVIIe aux temps modernes, de Grenade (Suarez) à Marburg (Stammler), de Louvain (Dabin) à Fukuoka-Kyushu (Mizunami).

L'essai de Flavio Lopez de Onate sur la "certitude en droit" (Rome, 1920) avait réveillé une vieille question déjà formulée par Savigny dans son *Vom Beruf unserer Zeit*.[15] Pour apaiser une légitime attente de sécurité, faut-il fixer le droit réputé trop fluctuant en une loi ? Le réflexe de légiférer n'est-il pas une faiblesse qui dénonce l'incapacité à saisir la seule certitude qui compte, celle des principes ? Attitude dont, au pays du précédent judiciaire et du *stare decisis*, le mouvement de l'*Analytical School* a offert à son tour une transposition chez Austin et Holmes comme, plus tard, chez Hall.

Mais quand cette question s'est présentée, l'assimilation de la règle à la loi avait accompli des ravages, et il s'agissait de freiner au mieux le processus emballé de la machine législative, meme dans des régions du monde où elle demeure marginale (v. Llewelyn). Toujours est-il qu'elle a permis de réentreprendre une analyse plus nuancée de la loi, en en décomposant la teneur,

[14] Cf. sur l'ensemble de ces points et sur tout ce qui suit Trigeaud (n. 12). Et cf. J. Carbonnier "Sur le caractère primitif de la règle de droit" ds. *Mélanges en l'honneur du prof. Paul Roubier* (Paris : Dalloz–Sirey 1961), 109s.

[15] Cf. nos *Essais de philosophie du droit* (Gênes : Biblio. Filosofia Oggi 1987), chap. 4.

en divisant entre forme et contenu,[16] en ne laissant pas d'ailleurs le soin de cette division aux kelséniens, engagés dans la théorie normative de la "pure" validité ou *Geltung*.

Et l'on a pu retrouver au fond la veine d'une doctrine qui s'était diffusée au début dans toute l'Europe et qui fut enrichie à la fois au XVIIe s. par l'Ecole du droit naturel hollandais et rhénan (Grotius/Pufendorf) et par la Seconde scolastique espagnole (Suarez/Vittoria), en écho à l'aristotélisme médiéval et à son hylémorphisme. Il s'agit de la doctrine qui professe la distinction entre la "matière", changeante et évolutive, objet des exceptions, dérogations, dispenses et exemptions en tous genres, et la "forme", immuable et anhistorique, siège des "qualifications" fondamentales qui président au travail de schématisation abstraite du juriste (v. Fr. Gény, L. Husson, H. Batiffol, H.-A. Schwarz-Liebermann) et l'immunisent contre les troubles issus de la "prose du monde", d'un concret versatile.

Il peut être par là démontré que la force du droit, la stabilité qu'il assure, la confiance ou la sécurité qu'il inspire, tiennent à cet effort d'une logique originale qui assume *les définitions* d'abord (comp. P. Stein), mais aussi bien *la dimension axiologique* qu'elles impliquent et qui empêche de réduire le droit à une activité passivement descriptive, et qui le révèle comme activité positivement évaluative et culturellement créatrice.

En qualifiant, l'on ajoute des valeurs à un donné naturel jugé apte à les recevoir et à s'élever avec elles à une réalité nouvelle, même si ces valeurs expriment plus en profondeur des tendances axiologiques que le donné naturel recélait déjà mais qui s'y trouvaient enfermées. Tout se passe comme dans la connaissance qui traduit un "naître avec" l'objet intentionnellement saisi dans le mouvement spontané de la conscience juridique, marquant la rencontre du connaissant et du connu dans un être de valeur intermédiaire, au confluent du sujet et de l'objet. C'est donc sans paradoxe que le droit apparemment fixé sur des procédures immuables enclenche un vrai changement, permettant au substrat le plus ontologique et axiologique du réel de s'épanouir grâce à lui.

L'évolution du droit vers les codifications de l'Europe continentale accuse ainsi la dissociation durable entre moyen et fin, entre instrument et fonction. Cette évolution montre que tout moyen ou tout instrument peut toujours etre utilisé pour remplir une même visée législative. Autrement dit, le progrès des moyens n'assure pas celui des fins.[17]

[16] Cf. H. Batiffol *Problèmes de base de philosophie du droit* (Paris : L. G. D. J. 1979) *passim*.

[17] Cf. Cs. Varga "Law as History" ds. *Law and Philosophy. Selected Papers in Legal Theory* (Budapest : 1994), 480 ; H. Batiffol "Droit et loi dans l'Europe continentale" ds. J.-M. Trigeaud

Confusions des pouvoirs et discours décadentiste

Mais l'on est entré dans l'ère de graves confusions.

Le politique veut l'emporter sur le droit et *a fortiori* sur le juste. De même, le phénoménal veut l'emporter sur le métaphysique ou sur le spirituel (distinct de formes dites "religieuses"). Le visible cherche à dominer sur l'invisible, la raison sur la pensée intellectuelle et réflexive, la logique sur les symboles qui rattachent un monde à l'autre.

De même, aussi, la confusion mènera par exemple à donner la priorité à la magistrature sur la faculté de droit, ou à la police sur la magistrature (selon le schéma matérialisant d'une "policiarisation" générale des esprits). Et, de même, encore, la force militaire qu'il n'est pas de l'essence du droit international de posséder par lui-même, en tant que droit, pourra le précéder en le violant, ce qui le condamnera il est vrai à se déterminer.

Si, brechtiennement, le droit peut toujours en arriver à être l'instrument d'une oppression de groupe pour celui qui s'en empare, est-ce le droit qui est ainsi traité, ou n'est-ce pas plutôt l'appareil de droit, c'est-à-dire sa forme ou son enveloppe ? Qu'en est-il, du reste, de la persistance de situations du type envisagé ? ne sont-elles pas promises à un revirement ou à "l'éternel retour" d'un droit substantiel qui a malgré tout vocation à enregistrer d'inévitables rééquilibrages compensatoires ?

Un tel confusionnisme n'en est pas moins assorti d'un *discours décadentiste* qui l'affermit.

Il s'indignera de l'effondrement d'un élément en l'assimilant à un autre, qui n'en est qu'une manifestation postérieure, seconde et partielle. Il déplorera ainsi la perte de l'être, mais qu'il a identifié à l'essence ou à la nature ; ou le déclin du droit de la personne, mais qu'il a aligné (sans guère de définition) sur un vague droit naturel.

Son leitmotiv génériciste, répandu dans les médias, sera de dénoncer "l'individualisme", dans lequel il verra une sorte d'explosion romantico-anarchique de libertés regimbant contre l'ordre d'un "Même" (le sien...). Et il l'abhorrera très significativement dans les courants esthétiques et littéraires, "impressionnistes", "surréalistes" ou "existentialistes", vouant aux marges suspectes le Bâteau-Lavoir, la rue Fontaine ou Saint-Germain-des-Près ...

Contre le changement, pour un fixisme néo-conservateur, l'on ravivera les vieux débats des périodes "fondatrices". On invoquera Edmund Burke contre Thomas Paine au sujet des droits de l'homme, ou Maistre s'en pre-

(sous la dir.) *Philosophie juridique européenne. Les institutions* (Rome–L'Aquila : Japadre 1988), 20s.

nant lui aussi à la Révolution sous le même aspect. Ou bien l'on adhèrera sans autre examen à un discours contemporain, plus journalistique il est vrai que scientifique,[18] qui cherche à s'appuyer sur l'historicisme d'Arendt ou d'Aron (pour éviter sans doute de citer la source d'une vulgate heideggérienne moins avouable) ; et l'on pratiquera l'amalgame de la notion de substance avec une de ses formes de substitution culturelle ou avec une de ses expressions historiquement donnée et vite galvaudée et dépassée, sans percevoir la vie et le progrès de la substance elle-même.

Cependant, ce meme discours s'affirmait autrefois très anti-métaphysicien. Or, aujourd'hui, il tend à être plus prudent, tout en devenant plus concret et plus franchement indécent dans son mépris humain du "social" ou de "l'existence", ou, pour tout dire : du plus faible ou du plus petit.[19] C'est qu'il redoute que l'évolution du droit puisse amener à reconnaître de "nouveaux" droits, alors que chaque jour il réclamerait plutôt l'abrogation des anciens.

Ce discours ose donc aller jusqu'à décrier les "droits de l'homme", et à vouloir en faire un objet subalterne ou latéral des études de droit, renvoyé à une zone idéologique de mauvaise fréquentation ...Dans cet esprit, il laisse supposer que le droit international public serait paralysé, comme si le droit tirait son critère de son fonctionnement, et comme si l'on pouvait nier aussi effrontément la réalité contraire de son application généralisée, bien que lente à se produire. Quelles sont exactement d'ailleurs les prétendues victoires de prétendus plus puissants que sa puissance morale ? Ne sont-ils pas juridiquement neutralisés et mis hors d'état de nuire du point de vue même d'avoirs divers qui leur échappent désormais *sub specie contractu*, en termes de puits de pétrole et de champs de coton ?

Le discours décadentiste incriminé assimile en conclusion progrès à décadence. Nihiliste à sa façon, il gomme tout repère qui dépasserait les consciences individuelles. Et il pourrait bien meme s'apparenter à un discours raciste, dès qu'il généricise sur un groupe humain, sur la relation intersubjective, en s'acharnant à méconnaître *la transcendance même de la personne singulière* : plus que jamais, il confond alors vérité de genre, "sans fond", et vérité d'existence, fait quantifiable et expérience unique de la valeur incarnée.

[18] Comme il est caractéristique chez certains publicistes et journalistes : v. de l'un d'eux une significative conf. sur le "le conservatisme dans les sociétés contemporaines" à l'Univ. McGill le 26 mai 2006.

[19] Cf. notre *L'homme coupable* (Bordeaux : Bière 1999), chap. 3.

Langage symbolique et rétablissement de l'unité perdue

Mais c'est le langage symbolique qui peut aider au rétablissement de l'ordre des termes confondus et à l'ouverture des uns sur les autres.

Introduire des symboles comme unissant le visible à l'invisible, c'est permettre au changeant de se référer à l'immuable, et au contingent de se fonder sur le nécessaire.

Il est toujours possible d'aller au delà des divisions et des limites précédemment indiquées.

Une réflexion critique peut s'exercer sur l'aspect phénoménal du politique en le reliant au droit et en y retrouvant la dimension onto-axiologique dont il paraissait s'être affranchi. Dans cette perspective, l'on rejoint l'inspiration de Montesquieu, de Maine ou de Tarde, ou le comparatisme historique des civilisations et l'analyse des mythes. En témoignent l'étude du rapport de causalité et de solidarité entre l'Etat et le droit, et l'examen de ses expressions cycliquement renouvelées, mais somme toute répétitives, et donc constantes (Eliade, Guénon).

C'est aussi l'exemple des confrontations entre la "cité d'avant" ou "d'en haut" et la "cité d'après" ou "d'en bas", entre la cité idéale ou utopique et la cité réelle ou empirique, entre la cité possible et la cité actuelle...[20] Confrontations instructives sur le sens de la *participation*, très platonicienne-ment comprise ici (v. le *Parménide*) comme jouant entre l'intelligible et le sensible.

Et, au fond, *la participation préfigure bien le symbole*. Elle en désigne la version logique et discursive, et non mythique et esthétique ; elle signifie qu'une cité ne peut se passer de l'autre, et que le rattachement de l'une à l'autre, de la plus immédiate à la plus éloignée, permet de répondre aux requêtes élémentaires de la raison : la raison demande à comprendre le politique comme le droit *par la justice*, c'est-à-dire ce qui a une prédisposition à l'instabilité *par ce qui est permanent*.

Enfin, deux types complémentaires ont souvent été mis évidence dans l'approche des structures elles-mêmes de la propriété et du contrat qui commandent à la fois au politique et aux principes du droit centré sur la définition des biens et des procédés assurant leurs échanges et leurs circulations.

Deux types qui coïncident avec deux tendances projetées à l'aube des sociétés entre le sédentaire et l'itinérant, entre Abel et Caïn. C'est la dis-

[20] Cf. le chap. 16 : "Rome et Jérusalem : le mythe des deux cités" ds. notre *Persona* (Gênes : Nv. Bibl. F. O. 1990).

tinction mythique qu'exploite *L'Esprit des lois* et qui alimente l'histoire des peuples (Ortega y Gasset, Spengler, Toynbee, Jean Pucelle[21]).

C'est, économiquement, le vieux clivage entre l'économie de la rente en circuit fermé, centrée sur la "terre", et l'économie monétaire de l'investissement (v. Schumpeter ou J. Marchal).

C'est, socialement, et sans forcément de connotation idéologico-politique (malgré l'utilisation marxiste qu'en fait, pour les Pyrénées, Henri Lefèbvre, dans de pertinentes analyses), l'opposition entre l'agriculteur et le commerçant, avec ses références régionales (Basco-pyrénéens et Béarnais, v., au XIXe, sur la "famille paysanne", Fr. Le Play).

C'est, plus largement et philosophiquement, le problème du *rapport entre pensée contemplative et action* ou entre *theoria* et *praxis* (réminiscence augustinienne de l'antinomie entre la *vita beata* et la *vita activa*, – entre la pensée par définition "oisive", rappelle Benveniste, dans son *Vocabulaire* . . ., et le *nec otium* des "affaires"). Platon critiquait ainsi le commerce qui avilirait l'âme, et la marine, adaptée au commerce, qui la corromprait, en excitant le gout de l'échange et donc du déplacement, et par là du changement; d'où l'idée que la capitale de la "cité juste" ne devrait pas être un port, lieu de tentations. Mais il est des manières d'exalter, en termes héroïques et épiques, des activités qui peuvent se réconcilier : de même que Virgile, Francis Jammes ou Giono célèbrent des "géorgiques" de la terre, les rythmes de la stabilité, de même Homère, les sagas scandinaves, Hemingway, ou même Segalen, montrent que la navigation découvre l'analogie, et donc la similitude fortifiante pour l'esprit dans le fait même de changer . . .; et tous les éléments liquides, fluides ou évanescents contribuent à fixer l'esprit en déployant un onirisme canalisateur (Bachelard).

Si l'exhortation au changement signifie une attirance pour la modernité technicienne, l'on ne saurait s'étonner de certains propos emphatiques à cet égard (A. Siegfried), et l'on ne saurait davantage être surpris que le droit soit dès lors conçu comme l'instrument de promotion de fins au contenu vide, parce que sans cesse rempli par des intérêts matériels de circonstance. Dans ses cours de droit civil sur *Les obligations*, le juriste René Demogue ironisait sur le déclin des civilisations "aristocratiques" et sur l'heureuse montée des "bourgeoises", sur la fin de la contemplation et l'essor du commerce.

[21] Les auteurs cités sont trop connus pour qu'on en rappelle les oeuvres (ainsi Toynbee, *La tradition et le changement*, etc.). Moins connu est revanche le philosophe original spécialiste de la pensée idéaliste anglaise (Berkeley) et juriste de formation, J. Pucelle, interprète de Spengler et de Toynbee, que nous avons souvent donné en références dans nos études sur les thèmes de rencontre des civilisations et des cultures depuis surtout 1995.

Ce sont de telles conceptions qui, éludant tout droit substantiel, ont conduit à une autre apologie dédoublée : l'apologie, d'abord, de l'Etat autonomisé, dans un splendide isolement au regard d'un droit vassalisé et fonctionnalisé ; l'apologie, ensuite, du même Etat occupant un rôle de pur arbitre, et opérant par voie dorénavant *contractuelle* : se livrant au compromis malsain d'intérêts que l'on suppose n'être que ceux de l'échange, et visant très logiquement à impliquer dans ses desseins la culture en son ensemble, c'est-à-dire à fabriquer de toutes pièces, puis à accentuer, la guerre dite "des cultures" – quand il est déclaré par ses représentants eux-mêmes en quelque pays, qu'une mosquée est un lieu de prière et d'inaction, et qu'il eût mieux valu qu'elle fut l'équivalent d'un *Wall Street* ! ...Malheureusement, aucune civilisation ne s'est jamais fondée "par" et "sur" le commerce, qui est d'importance certes, mais qui est *second* ; il n'existe aucun mot, remarquent Benveniste comme Dumézil, pour désigner le commerce dans le vocabulaire originaire des activités fondatrices de la cité ; toute civilisation s'affirme *en premier* à travers des biens et à travers leurs mécanismes de protection juridiques et sacrés.

La démarche qui vise à scruter en premier l'élément abstrait, c'est-à-dire *l'immuable*, démarche inéluctable, et que la pratique politique ou juridique requiert, confirme cette interprétation.

II

Recherche des invariants et ontologie latente

Mais ce n'est qu'en réfléchissant *sur la nature même de l'immuable et du changeant* que l'on est en mesure d'en comprendre la vraie portée quant au politique et quant au droit.

La recherche de l'immuable permet aussitôt d'identifier une exigence philosophique remontant à un "fondamental", à un transcendantal, à un "invariant" :[22] à un invariant du politique, conçu d'emblée comme *politique ou*

[22] Cf. notamment sur le principe d'éthicité : M. Reale "Prefacio" au *Novo Codigo Civil Brasileiro* (São Paulo : Ed. Rev. dos Tribunais 2003, texte reproduit sur *Thèmes* [2003] [www.philosophiedudroit.org]). Le code civil brésilien, ex. "code Bévilaqa" depuis son remaniement il y a plus d'un siècle, est devenu, depuis la disparition de Miguel Reale en avril 2006 : le "code Reale"...C'est en tout cas cette inévitable recherche des invariants, jusqu'à l'idée même que *le droit soit l'invariant du politique*, qui nous a permis de parler du droit "ou de l'éternel retour" (titre de notre art. aux *Mélanges en hommage au prof. Fr. Terré* [Dalloz–P.U.F. 1999], repr. ds. Trigeaud [n. 19], chap. 7) (arg. de départ du "devenir le Même ou devenir un Autre"..., 135 s.).

Etat "de droit", ce transcendantal étant "le droit" ; et à un invariant du droit lui-même, le transcendantal qui lui est inhérent étant le "juste", – ce qui, une fois encore, renoue avec la plus vieille terminologie.

Une telle postulation d'analyse, qui peut paraître inhabituelle, s'émancipe des interprétations structurales et institutionnelles stimulées par les sciences humaines et par un analytisme hostile à un mode de pensée métaphysique.

Mais l'évolution du droit prend par là son sens.

Elle éclaire le passage d'un droit tourné vers la *nature des choses* patrimoniale à un droit tourné vers la *nature de l'homme* et assurant enfin l'émergence de la *personne*.

Renversement de fondement, et extension inattendue du droit, qui ont pu être réprouvés par les philosophes du droit aristotéliciens et romanistes (v. Fassò, ou Villey[23]), mais qui signifient la conscience progressive (Brunschvicg, ou, mieux : Bergson) d'une justification en sommeil depuis les origines.

Nous inspirant d'ailleurs du Bergson des *Deux sources*, et transposant analogiquement le schéma qu'il applique à l'obligation morale, nous avons montré que l'évolution qui a consisté à substituer le nouveau fondement de la "nature de l'homme" au fondement traditionnel (aristotélicien et romaniste, vanté et "exclusivisé" par un Michel Villey) tiré de la "nature des choses", marque l'élargissement d'un droit patrimonial à un droit extra-patrimonial, empiétant sur le politique ou l'antique morale sociale (ou "justice générale"). Et nous avons relevé là un authentique "progrès de la conscience" juridique : il révèle que cette conscience ne parvient que progressivement au savoir de ce qu'elle savait au fond déjà (et n'exprimait qu'esthétiquement ou par voie mythico-symbolique), et *que ce qui doit passer ontologiquement et axiologiquement en premier n'est donc pas forcément ce qui se présente historiquement au début, mais se manifeste ainsi à la fin.*[24]

Au fond, l'on n'évite pas le problème de l'être à l'arrière-plan, surtout quand on déclare le congédier. Et l'on oscillera entre un certain héraclitéisme

[23] Cf. en ce sens notre critique tout implicite des positions de M. Villey dans le T. 1 de notre *Humanisme de la liberté* (Bordeaux : Bière, 1985) *in initio* et surtout dès le début de notre "Préface" à l'ouvrage de L. Bagolini *Justice et société* (tr. E. Rocher) (Bordeaux : Bière 1995).

[24] Cf. notre *Introduction à la philosophie du droit* (Bordeaux : Bière [2]1993) *in fine* et Trigeaud (n. 19), dernier chap. ("Nouvelle introduction"), ainsi que Idem *Justice et Hégémonie* (Bordeaux : Bière 2006), 322s. Cf. notre *Droits premiers* (Bordeaux : Bière 2001), sur la différence entre mythique et logique, ce qui vient en premier dans les arts ("arts premiers") n'arrive en premier qu'à la fin dans la culture abstraite : autrement dit, les "droits premiers" ne sont "premiers" que pour ne se manifester qu'à la fin.

et un certain parménidianisme. Tout dépend des modes en cours. L'apologie d'un changement semble retrouver le premier, quand l'attachement à l'immutabilité traduit le second. Mais les dénaturations sont promptes, qui déforment les deux courants présocratiques : qui oublient que le changement possède sa propre substantialité, et vise, chez le métaphysicien, un sens non pas de la phénoménalité comme changement, mais un sens de la sous-jacence comme vie ; et qui méconnaissent que la fixité imputée aux Eléates n'est pas celle d'enseignements dogmatiques liés à des représentations de raison, mais celle de perceptions plus profondes de l'intimité de l'être – là même où les jusnaturalistes se présentent avec ambiguïté en philosophes du droit, s'ils feignent erronément que la nature théorique soit l'etre métaphysique, la raison l'esprit, et la *ratio* l'*intellectus*.

La métaphysique implicite qui se joue ici prouve en tout cas que deux conceptions ontologiques s'y affrontent, l'une laissant supposer que l'être n'est pas avant d'être, et que le changement opère le passage entre le *non être* et l'être, comme le jour sort de la nuit qui est le *non jour* ; l'autre approche, qui admet que l'être est sans cesse, mais "en puissance" avant d'être "en acte", et que la nuit n'est qu'un jour potentiel qui "s'actuera" au petit matin. Si bien que toute chose est à la fois elle-même et son contraire, participant de *ce qu'elle est* et de *ce qu'elle n'est pas* ; ce que Montaigne dit au fond déjà (et après Sénèque) de la vie et de la mort : qu'elles sont un "mélange", les deux en même temps (la vie cette "mort qui vient", comme l'écrit à son tour Borgès, ou la mort, cette "vie vécue"...).

Du changement dans l'etre au rétributivisme

Par la dialectique aristotélicienne de la puissance et de l'acte, on peut expliquer alors ce phénomène du changement qui fait advenir le meme sous un état différent.[25] Elle permet de dépasser l'héraclitéisme n'affirmant que l'être du changement, de son résultat, et le parménidianisme soutenant la seule réalité de ce qui est avant de "changer", tout changement s'effondrant dans le *non être* (symbole de l'injustice).

Mais le lien entre la puissance et l'acte fait apparaître que la puissance, à la différence d'une virtualité idéaliste sur fond de représentation mentale, *est déjà un acte*, en possède la structure intrinsèque et l'énergie première, et désigne, à l'arrière-plan de cette distinction elle-même, le "troisième élément"

[25] Sur l'interprétation thomiste de cette dialectique à propos du changement, et sur l'idée par exemple que la neige est de l'eau en puissance, etc., cf. E. Peillaube *Initiation à la philosophie de s. Thomas* (Paris : Rivière 1926), 55s.

qu'est le sous-jacent, le substrat, le *suppositum*, la "subsistence" ou le "sujet" successivement potentiel et actuel, nuit et jour : il est *l'être même*, au cœur de cette définition ; et il annonce l'idée fondamentale d'après laquelle tout changement peut être connaturel, consubstantiel à l'être lui-même, incorporé ou inviscéré en lui, avant de prendre le sens second qui indique l'évolution d'un état à un autre ; il est ainsi plus "mystère" que "problème", destiné à une "scolastique grammaticale", et plus "présence" que "donné".[26]

C'est avec cette conception qu'ont finalement renoué les philosophies de l'existence, de l'*Erlebnis* ou des frémissements du vivant ;[27] c'est elle qui inspire le sens du mouvement et de la vie dans la matière, à l'époque où l'on commence à en comprendre "l'indétermination" (période impressionniste, picturalement ou musicalement, et marquée par Bergson et Proust). C'est cette même conception qui retrouve une sorte de mystique de l'énergie cinétique inhérente aux corps que l'on connaissait déjà en germe chez les alchimistes. Le changement pénètre la matière dans son existentialité, il la rend comparable à l'électricité, – au moment quasiment de la découverte de l'électricité, Hello voyait dans celle-ci la matière "comme si elle essayait d'avoir une extase".[28]

L'idéalisme qui avait influencé les droits naturels et les étatismes empesés dans leur gangue rationnelle, érigeant les concepts immuables de "sujet de droit" et de "souveraineté" abstraite, en ressort ébranlé : il ne parvient plus

[26] Cf. sur ces "philosophies de la vie", le chap. 7 de Trigeaud (n. 15) ; et cf. la thèse de prochaine soutenance : *La critique de l'objectivisme dans les philosophies du droit du XXe*, d'Ay. d'Alton, Univ. Bordeaux Montesquieu (2006) ; v. aussi, dans le prolongement de *Persona* Trigeaud (n. 20) et de Trigeaud (n. 12), sur "l'incarnation de l'homme", les derniers essais du regretté Michel Henry (ce que vulgarisera par la suite encore le critique littéraire R. Girard).

[27] Vocabulaire marcellien, renvoyant à une approche démontrant la radicale impossibilité de rendre l'être "objectivable" et donc de l'immobiliser dans une pensée de type taxinomique (implicitement aristotélicienne ou kantienne) (cf. G. Marcel *Le Mystère de l'etre* [Paris : Aubier 1963] T. II : Leçons d'Aberdeen des années, 49–50) ; cette authenticité de la démarche marcellienne qui permet de laisser sa place à la théorie rationnelle, et par là au droit et au politique, restitue à la métaphysique de la vie sa vraie fonction directive de toute réflexion sur la relativité du politique et du droit par rapport à un sens du juste situé dans l'être et dans son expérience vécue comme présence, à travers les présences précisément humaines, et non dans les purs phénomènes ou dans l'expérience factuelle ; de cette expérience originale participent politique (formellement) et droit (substantiellement).

[28] Dit Stanislas Fumet à propos d'E. Hello *Le drame de la lumière* (Fribourg : Egloff 1945), 107 ; ou encore Teilhard. On ne peut manquer d'évoquer, en parallèle, les études si originales et suggestives de rapprochement de la physique quantique, de la cybernétique et du droit des biens d'Aurel David, au CNRS (P.U.F. et Gallimard ; et série de conférences à l'Institut européen de Bolzano-Bozen, dans les années 1970/1980, actes de l'Institut).

à retrouver le sens de l'etre et de la justice, s'il ne se réconcilie pas avec la dimension d'un réel initialement censuré.

De même, ce sont deux interprétations de la valeur qui se dégagent. Car si le devoir-être s'inscrit dans l'etre, on peut comprendre que l'évolution apparemment changeante de l'etre prépare l'accomplissement incessant et renouvelé de la valeur qui procède par "compensations" ou "rétributions" successives.

C'est ainsi que pour les Grecs, et d'abord dans le monde présocratique (Jaeger, Wolf), l'ontologie est *ontodikè*, justice presque providentielle : un bien compense ou rétribue toujours un mal. Et le discours décadentiste a d'autant moins de place en une telle perspective, propre à la civilisation hellénique (ou, pourrait-on même ajouter, propre à tout type "traditionnel" de société, formé au sens et au respect du métaphysique, – v. Benveniste, Dumézil et Guénon), qu'une accentuation du mal entraîne, non un "retour" ou une régression mythique, mais une "katabase", un dépassement par intégration : dépassement qui reconstitue l'équivalent de l'unité primitive perdue en la rendant meilleure, fortifiée par le mal subi.

Tout désordre ou tout déséquilibre, qui est fondamentalement injustice, s'auto-détruit.[29] Toute guerre, malheureusement ou heureusement, poussée comme l'orage à son terme, suscite la régénération d'une éclaircie et d'une paix. *L'Apocalypse* correspond ainsi à la "parousie", à une sorte de *changement par conversion* et accomplissement (comme la *métanoia*, qui est changement intérieur ou modification de l'âme) ; elle n'implique pas un *changement par abolition* et un "néantissement" ; et elle signifie le triomphe de la cité "d'en haut", de la "Jérusalem céleste",[30] c'est-à-dire le resplendissement de l'esprit irénique sur un état débarrassé de sa violence.

Il ne saurait donc y avoir de "pessimisme" dans l'être.

Teilhard de Chardin choquait les esprits, lorsque, sous les bombardements japonais à Pékin, il osait dire (comme à Verdun, déjà, où, soldat, il avançait sa thèse de biologie sur "la boue des tranchées"...) : "demain sera meilleur".[31] Mais cette confiance dans l'être sait bien que le langage de l'être l'emporte toujours sur le langage de néant qui paraît le défier ; elle sait qu'il connote vie et changement profond, sous le changement de mort superficiel

[29] Cf. toute notre "Introduction" ds. Trigeaud (n. 24), v. *in initio*, et, de même, ds. Trigeaud (n. 19), l'idée très grecque que l'on passe du l'injustice et non de la justice au droit, et donc à une "compensation", chap. 5, 95s. ("de l'être nié à l'être rétabli").

[30] Cf. notre "Rome et Jérusalem : le mythe des deux cités" ds. Trigeaud (n. 20) ; et cf. R. Guénon *Autorité spirituelle et pouvoir temporel* (Paris : Vega 1984), 114.

[31] Propos rapportés, perplexe, par D. Wang *A Pékin avec Teilhard de Chardin 1939-1946* (Paris : R. Laffont 1981).

qui semble le recouvrir, comme les feuilles de saison entretiennent l'humus de la terre. Cette confiance permet de chasser les discours régressifs ou nostalgiques qui dissimulent à peine, comme les réactionnarismes du XIXe s., une option parménidienne ou éléate figeant l'ontologie en théorie abstraite ; d'où la curieuse complicité qui s'est opérée entre franc-maçonneries et traditionalismes, *via* le modèle maistrien, ou néo-thomismes, *via* les "illuminés" de Bavière, ou, bien plus tard, l'école jusnaturaliste italo-autrichienne jusqu'à Taparelli, Cathrein, Rommen, etc.

C'est la même option qui conduit, en tout bonne conscience et légèreté doctrinale, à couper les droits positifs et naturels d'un *substrat existentiel et vivant*.

Les révolutionnarismes sont certes des héraclitéismes qui s'ignorent ; mais les réactionnarismes sont en revanche des parménidianismes cachés. Or, la vérité philosophique n'est ni d'un côté ni de l'autre : elle se situe dans le dépassement synthétique des deux positions à la fois.

Conséquences juridico-étatiques

De même que le positivisme s'empare de la "loi" pour l'assimiler à une "règle" (comme si l'impératif pouvait s'accorder à l'indicatif), de même il existe un *positivisme du droit naturel* (sur lequel nous avons souvent disserté...) : c'est le positivisme qui accapare *la nature* pour l'identifier à *l'être*, sans voir que, si *la loi* n'a de sens qu'expressive de *la règle*, *la nature* n'a de sens *(général)* qu'expressive de *l'être (universel)*.

Cette dernière attitude aboutit à confisquer le changement ou à l'exclure, en niant qu'il puisse être concevable de l'intégrer : en refusant d'essayer d'ouvrir la nature à la vie de l'être qui la précède, et la loi à la vie de la règle qui la domine, et en s'opposant à ce que la nature et la loi prennent donc des modalités historiques qui les délivrent de raideurs centrées sur l'inessentiel de simples médiations, puisque le seul point immuable demeure ancré dans la structure de l'être ou de la règle.

Ainsi, l'évolution ne saurait être qu'on donne au mot "responsabilité" un sens qui en est absent (affaire Perruche, en France), quand c'est pour retomber dans l'indifférence de jadis à l'aide à l'enfance handicapée. Mais allons des cas d'espèce aux phénomènes qui caractérisent le plus fréquemment l'observation proposée du droit dans le champ de l'immuable et du changeant.

Ce sera l'exemple majeur du contrat et de la violation de l'obligation conclue, ou de l'infidélité du débiteur qui s'est engagé. Or, toute l'analyse juridique tendra à dégager, derrière un changement éventuel, et facteur d'in-

certitude, une "chose" ou une "cause" identifiable, comme "condition" d'etre sous-jacente (anal. *Voraussetzung* du droit allemand), capable de servir de transcendantal (ou stoiciennement d'*hegemonikon*) au contrat. La référence de la loi à cette règle implicite permettra de trancher entr'autres par là le problème de l'imprévision.[32]

D'où l'opportunité d'introduire le temps et son existentialité dans la genèse de la loi et, à l'origine même, au cœur de la formulation de la règle de droit, grâce à la conscience du passé (de ses survivances), du présent et de l'avenir (fait de significations anticipées). C'est ce que signifie, chez Miguel Reale, la "tridimensionnalité" qui constitue "l'expérience juridique" : elle unit "faits", "valeurs" et "normes" ; et elle revêt son sens dans le temps, non un temps physique, homogène et mesurable, mais un temps social et existentiel, un temps culturel, un temps comparable à la "durée" bergsonienne, progressive et qualitative. Le droit consiste ainsi à "objectiver" sans cesse des "moments de vie", et à en convertir les exigences dans sa "structure intersubjective" visant à "attribuer des prérogatives réciproques à chacun."[33]

Quant au changement au plan politique, ses manifestations attestent de l'irréductibilité du lien *entre politique et droit*, et entre *droit et justice* : entre le changement qui se situe dans le prolongement de l'être, et le changement qui déclare se substituer à lui ; entre le changement de type réformiste (tocquevillien) ou révolutionnaire (v. Gusdorf[34]), et le changement de "progrès",

[32] Cf. Trigeaud (n. 15), chap. 10 et 11 ; Trigeaud (n. 12), chap. 19 ; "Convention" ds. (n. 6), 478–83. D'Adolph Reinach (éd. fr. Vrin 2005), à Erich Fechner ou même à Helmut Coing, la phénoménologie néo-idéaliste du droit s'est attachée à discerner, de manière analogue, des conditions logiques *a priori* au fondement de l'expérience contractuelle.

[33] M. Reale *O direito como experiencia* (São Paulo : Saraiva [2]1999), 220s. (et cf. l'éd. fr., tr. G. Dell'Anna, d'*Expérience et culture* [Bordeaux : Bière 1990]) ; G. Husserl *Recht und Welt* (Frankfurt : Klostermann 1955) ; L. Bagolini (n. 23) ; P. Roubier *Le droit transitoire* (Paris : Dalloz–Sirey 1960). – De façon générale, sur le temps, comp. Trigeaud (n. 15), chap. 10 et 11.

[34] Sur l'idée de "révolution" en général, v. G. Gusdorf *La Révolution Galiléenne* (Paris : Payot 1969) *in initio* ; nos *Eléments de philosophie politique* (Bordeaux : Bière [2]1993) chap. 11, 12 et 13 et notre *Justice et tolérance* (Bordeaux : Bière 1997), chap. 7 (sur l'idée bernanosienne de "continuité" de la révolution spirituelle du temps des cathédrales au tout début de la Révolution française ; sur la comparaison entre révolution théologique (le luthéranisme) et révolution politique "à la française" impliquant un déicisme ; et sur la tendance "traditionaliste"...). Sur le sens scientifique du mot "révolution", reprendre cependant les approches de K. Popper et auparavant celles, plus classiques encore, de G. Bachelard *Le Nouvel Esprit scientifique* (Paris : P.U.F.–Alcan 1934). Cf. en même temps sur le concept de "révolution régressive", du biologique au politique : I. de Boissoudy *Le phénomène révolution* (Paris : P.U.F.–Alcan 1940), 77s.

tel que le conçoit Rosmini (distinction chère à cet auteur entre "progrès" et "réaction", le démarquant en particulier de Bonald et de Maistre[35]).

Mais c'est surtout en affrontant, aujourd'hui, le thème devenu familier de la rencontre des cultures ou des mondes dits "civilisés", que l'on voit s'afficher, journalistiquement vulgarisées, diverses tendances néo-conservatrices (MacIntyre, R. P. George), parfois poussées à l'hystérie de la conservation des profits acquis du capital, voire à un appel à la guerre teinté de haine raciale (Fukuyama, Huntington, Novak)[36].

Ce qui préoccupe alors n'est pas seulement *l'exclusion* caractéristique de la phobie assez primaire et simpliste d'un hypothétique changement, un changement qui ne ferait que traduire au fond l'ouverture au respect, non de *ce qui se fait* par l'opinion, mais de *ce qui est* déjà, c'est-à-dire d'une certaine dimension de l'être masquée par l'essentialisme artificiel d'un moment.

Ce qui préoccupe tient davantage à *l'inclusion* forcée, à l'idée de vouloir à tout prix ramener le monde à un sujet objectif de rattachement, à une sorte d'emblème identitaire immuable, qui alimente en réalité toutes les discriminations pratiquées, fulminant des mises à l'écart pour les uns, des jugements d'infidélité et de trahison pour les autres.[37]

C'est se soumettre, non à l'esprit humain universellement tendu vers l'exigence de vérité, mais à un groupe ou à une catégorie virtuelle, à une généralité sociologiquement circonscrite, dont les alibis sont aussi multiples que le sont les pays, les régions, les partis, les écoles, les clubs, les loges, les églises et confessions : c'est-à-dire que l'est un besoin irrépressiblement "communautariste" ou sectataire. La référence établie, faite de principes préconstitués (et qui véhicule bien des mots sans définition bien claire et dont il est donc possible d'abuser en fonction de leur polysémie : *v.g.* liberté politique, démocratie, république, tolérance, représentation, citoyenneté, altérité, ...), cette référence servira d'étalon à un jugement définitif qui n'est

[35] Cf. sur ce thème célèbre et original dans la pensée rosminienne de la tradition, de la réaction et du progrès, du "progrès formel" et du "progrès réel", etc., cf. M. A. Raschini *Rosmini et l'idée de progrès* (tr. E. Rocher) (Bordeaux : Bière 1995) ; et cf. Rosmini *Philosophie politique* (tr. J. Plaisance) (Bordeaux : Bière 1999).

[36] Sur l'affaire d'Irak et l'influence d'une certaine idéologie de la justice et du droit inféodée au "capitalisme social" de type rawlsien et son utilisation répandue par M. Novak et le mouvement de la "Lettre d'Amérique" stigmatisé avec véhémence par les principaux représentants du catholicisme américain, v. Trigeaud (n. 34), 287s.

[37] Cf. Introduction sur la discrimination Trigeaud (n. 34). L'atmosphère politique a toujours été viciée par cette transposition sophistique d'une exigence morale détournée de "fidélité" dans le réseau des liens de pouvoir ; le mieux serait sans doute d'en saisir l'illustration littéraire à partir de son archétype d'intrigues romaines : le *Jules César* de Shakespeare ou *La Guerre civile* de Montherlant.

trop souvent que la projection et la construction auto-justificative du milieu d'attente dont il émane.

Mais nul doute qu'alors la référence de ce *pancontractualisme politique*[38] au "groupe" derrière l'homme pensant, au collectif d'une entité derrière l'individu, à la relation d'interdépendance derrière la personne reliée au principe de son existence et du don libre de soi, nul doute que cette référence fausse le sens du contrat comme moyen du politique, de même qu'elle a faussé le sens du contrat comme moyen du droit.

Les contrats ne valent que par le respect de l'identité des personnes et des biens, ou, plus généralement, des "termes" qu'ils unissent, et à condition de s'adresser à tous comme membres potentiels du rapport qu'ils instituent. A moins de vouloir déclencher par eux-mêmes le seul mouvement qu'ils reconnaissent, à moins de récuser que le mouvement ou la vie changeante puisse se situer *en premier* dans les termes qu'ils appellent à se solidariser entre eux.

L'immuable du contrat n'est en ce sens qu'un relais ; il n'est cause à ce titre d'aucun changement dont il déciderait substantiellement lui-même. Ce changement le précède comme inscrit dans l'être profond et, sans paradoxe, immuable en sa forme, de chaque terme qu'il a vocation à relier.

[38] Cf. notre critique du contractualisme ici dénoncé, ibid. chap. 7.

The Developmental Tendencies of the National Legal Systems in the European Union

Antal Visegrády (Pécs)

1 As it is well-known, the European Union launched the most comprehensive legal harmonisation programme of all times. It concerns not only the 25 member states but – as a point of orientation – the countries of EFTA as well. The goal of the Union is not some kind of a "unified law" but the coordination of the legal regulations of the member states, the elimination of excessive deviations with preserving the national legal systems to a certain extent.[1]

Collective law can be mostly described as a law body that is hierarchical and autonomic at the same time. Not the law of a super state, not of a *quasi*-state and not of a federal state. It is an independent supranational law system that on one side separates but on the other is in tight relation with international law and the law systems of the member states also.

Here we have to touch upon the aspects of so-called monism and pluralism. According to the former – that is based upon the doctrines of Kelsen, Ross and Raz – collective law and the law of the member states integrate into one system with the basic norm of collective law at the top. However the pluralist point of view regards each member state's legal system independent from that of the other member states and they have a basic norm that invests with validity the national norms as well as the collective constitutional norms and the other norms deriving from them.

[1] Cf. e.g. A. Evans *A Textbook on European Law* (Oxford: 1998), 465–6; M. I. Cabero *Fundamentos de Derecho Communitario Europeo* (Madrid: 1989), 177–80; L. Cartou *L'Union européenne* (Paris: 1994), 155–8; C. Gulmann – K. H. Sorensen *EF-ret* (Kobenhavn: 1988), 287–97; F. Lourin *Manuale di diritto della Communité Europee* (Torino: 1992), 172–90; L. Kecskés *EU-jog és jogharmonizáció [EU Law and Legal Harmonisation]* (Budapest: HVG Orac 2003), 416–30

The perception of national and collective norms as a unified system is a concomitant of both concepts that is however is not the same as the declarations of the European Court[2] and some scholars[3].

2 The polemy about the application of the so called convergence criteria on the fields of European law should also be presented here. Those who believe in the convergence between the legal cultures of the EU refer to the common historical past, value systems and customs.[4] As Zoltán Péteri points it out:

> "it is not only about that the institutional solutions of two families show in many aspects the unmistakable signs of their approach towards the other but rather about the conquest of a thought that could be called all-European, which means the restoration of the formerly monarch-type, unified approach, its return to the legal concept that is worded in the form of '*ius unum, lex multiplex*' in the legal world, and with this – by using the expression of René David – it means the realisation of the concept of '*droit occidental*'. Namely because if we consider the content elements of law as determinating instead of the 'technical' side, if we regard law not only as the totality of norms but as the self-realisation of a civilisation and as the concept about the organisation of human relations and the expression of the related justice-concept, then there

[2] In the *Van Gend en Loos case t*he European Court returned a verdict of a telling affect in which it stated that the Community establishes a "new legal order", in which it assigns rights to the individuals also. Theodor Shilling called this concept the "theory of *big bang*" on page 558 of his article "Zu den Grenzen des Vorrangs des Gemeinschaftsrechts" *Der Staat* 33 (1994).

[3] Cf. e.g. N. MacCormick "Liberalism, Nationalism and the Post-Sovereign State" *Political Studies* 44 (1996); C. N. Kakouris "La relation de l'ordre juridique communautaire avec les ordres juridique des Etats-membres. Quelques réflexions parfois peu conformistes" in F. Capotori et al. (sous la dir.) *Du droit international au droit de la intégration Liber Amicorum Pierre Pescatore* (Baden-Baden: Nomos 1987), 319, 325; T. Schilling "On the Value of a Pluralistic Concept of Legal Orders for the Understanding of the Relation Between the Legal Orders of the European Union and its Member States" *ARSP* 83 (1997) 4, 568–91; C. Richmond "Preserving the Identity Crisis: Autonomy, System and Sovereignty in European Law" in N. MacCormick (ed.) *Constructing Legal Systems* "European Union" in Legal Theory (Dordrecht, Boston, London: Kluwer 1997), 47–90; I. Weyland "The Application of Kelsen's Theory of the Legal System to European Community Law: The Supremacy Puzzle resolved" *Law and Philosophy* 21 (2002) 1, 1–37.

[4] E.g. W. Van Gerven "Brinding the Gap between Community and National Laws: Towards a Principle of Homogeneity in the Field of Legal Remedies" *CMLR* 32 (1995), 679–702; C. Joerges Christian "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective" *Eur. L. J.* 3 (1997) 4, 378–406; P. De Cruz *Comparative Law in a Changing World* (London: Cavendish 1995), 99.

> is a quite close relation between the Roman-German and *Common Law* systems. These systems are connected by a common cultural and civilisation heritage [...]"[5]

So it is not by accident that the two legal families exist excellently together in South Africa, Sri Lanka, Scotland, Quebec, Louisiana, the Philippines, Japan, Mauritius, Cameroon, St. Lucia and on the Seychelles islands.

In spite of this there some who are of the opinion that *common law* and the continental legal culture are so far away from each other that approach between them is impossible. So for example Pierre Legrand does not only regard the legal system as a starting point but he also includes cultural elements in his examinations. He thinks that just the rules and notions uncover only few things about the legal system and that by these it cannot be decided neither whether the legal systems make advances towards each other. He judges these as changes only on the surface. He instances Montesquieu who already worded at his time the way that the comparative jurist should purse, according to which: "I am not interested in the mass of laws but in the spirit behind them".

There are differences deeply inherent in legal culture, through this in national culture that query the possibility of convergence. Legrand[6] illustrates the cultural meaning that lies behind the rules with an example when he examines how the courts in the two different law families label the cases: while the British with the name of the parties, then the French with the name of the court and the date of the judgement. In his opinion this reflects the aspect that at the British the court is just a mediator between the parties while at the French the stress is on the power position of the state. A rule that yet reflects a culture.

Explicating the example mentioned above he determines 6 points in which the two big law families differ. The first is the nature of legal reasoning that is analogical in the case of *common law* (for new problems they search the answers by analogy), while for the continental law family the institutional reasoning is typical (the case has to be inserted into an already built system). The second is the importance of systematisation. *Common law* has never been systematised neither has an effort ever been made towards it, while legal regulation is the keystone of continental law. The third is the nature of the rules.

[5] Z. Péteri "A jogalkalmazók felelősségéről" [Comparative aspects in the administration of the law] in Gábor Bánrévy et al. (eds.) *Iustum, Aequum, Salutare. Liber Amicorum János Zlinszky* (Budapest: Szent István Társulat 1998), 240–1.

[6] P. Legrand "European Legal Systems are not Converging" *Int'l & Comp. L. Q.* 45 (1996), 52–81

At the British the rules can change through the judicial law application, while at the continental law family this cannot happen. While at the previous the rules really gain their significance through the case, at the latter their mere existence is enough for their application. The forth is the role of facts, which is very important in the case of *common law* (the main question of the court: *Quid facti?*), while in continental law it loses its importance as it is installed into the already existing system (the main question is: *Quid iuris?*). The fifth is the meaning of entitlements, which at the British means the right to bring a lawsuit (the facts have to support the lawsuit), while in the Roman-German law family the lawsuit is just a modal rule, the stress is on the rights. Finally the sixth visualises the past that – as *common law* has been existing for ever – gives the text's authority for the British, while in continental law every rule and law institution came into existence in a given era by the will of a given person or a given body and became compulsory for the people by this order.

According to these we can see a converse standpoint that states that the European legal systems do not converge to each other. This standpoint does not think it realisable that a British jurist could really appreciate the notion of "system" or "rule", neither that a German, a Spanish or a Dutch jurist could appreciate the facts or the past as all of them observe the others through his own glasses.

According to the third approach[7] the above mentioned concepts interpret legal culture formally. Contrarily a social approach is needed which concentrates rather on identity. For example civil law is often the symbol of national legal identity and the expresser of national legal culture. Accordingly it can be experienced that the member states are averse from the harmonisation of civil law. However the EU requires it firmly.

Without so much as getting involved in this debate, we only deal with some questions in brief.

The first of them can be worded as in what ratio the EU utilises the legal institutions of the national legal systems. Well, for example the infiltration of human rights into community law is greatly due to the German Constitutional Court. As the community law consists largely of administrative-like legal material, this way many of its important principles have been taken over from the French and German legal systems with well developed administrative law. However lately the European Court took some principles – mainly procedural ones – from the British law from the range of *natural justice*. This

[7] Cf. S. Paasilehto "Legal Cultural Obstacles to the Harmonisation of European Private Law" in V. Heiskanen – K. Kulovesi (eds.) *Function and Future of European Law* (Helsinki: 1999), 101–4.

way did become a part of community law for example the principles of the "right to hearing", the "obligation of justification" and the "right to appropriate procedure". Though community law dips from the economic law of the member states also.[8]

The institutions and legal theories of the national legal systems of the member states make their influences felt in the creation of community orders and guidelines, but in an "un-nationalised" form.

At the same time a tendency of opposite direction can also be observed. Namely because the law of the EC also has an effect on the national legal systems of the member states. This prevails in two ways. On the one part by the recognition and national reception of community law creation and of the direct effect of the law sources coming into existence as a result of the previous, while on the other hand by the increasing direct application of the community made law material by the courts of the member states.[9]

Secondly we have to speak about the European Court. Namely because this is the forum that functions as a kind of a "forge" of the British and continental legal cultures. Law comparison is one of the constant "tools" of the European Court.

It is not an exaggeration to say that the legal practice of the court of Luxembourg ha a very high level of culture, higher than that of the community laws prepared in Brussels. The two large materials form of course one system: it is fortunate and of modernisation effect how the itemised community law material prepared by codification work unifies with the Anglo-Saxon inspirited case-law, law-expansion of the European Court. Even this way we cannot talk about a kind of European legal precedent system as the European Court is not bound to its sentences (similarly to the higher courts of the member states). [10]

At the same time the national courts can lean on certain decisions of the European Court in connection with a community order and can follow it as an authentic interpretation, but can also turn to the Court in the hope that it diverges from its former standpoint.

During the juridical period the judges often remount to the legal systems of the member states. The Court is aware of that it cannot break away from

[8] J. Steiner *EGK-jog [EC Law]* (Szekszárd: Babits 1990), 61–2; De Cruz (n. 4), 159–63.

[9] Cf. Kecskés (n. 1), 257–8

[10] Cf. eg. N. Brown – I. Kennedy *The Court of Justice of the EC* (London: Sweet & Maxwell 1994), 418; M. Kiiheri *Comparative Legal Reasoning and European Law* (Dordrecht – Boston – London: Kluwer 2001); L. Kecskés – Z. Lomnici – M. Maczonkai *Az Európai Közösségek Bírósága [The Court of Justice of the EC]* (Budapest: HVG Orac 2001).

the national laws and from the included legal principles. Leaning on the national laws is the most obvious at administrative law.[11]

The next problem that we would like to expose is in relation with *common law*. Specifically we think of the more and more obvious tendency that in the pursuit of jurisdiction of the British authorities – though the intention to the synthesis of Anglo-Saxon and continental legal culture is noticeable – approach rather the American model, where the decisions are rather based on law principles than on rules.[12]

Finally we face an inevitable question: was the Hungarian legal culture mature for joining the EU 1st May 2004 and can the previous give something to the latter? The dimensions of course limit the possibility of giving a detailed answer, so we can bring up just a few thoughts.

We have to start from the point that in our law evolution of a thousand years, apart from the national efforts, certain harmonisation factors have also always been present.[13] The movers of this latter process were the efforts for an economic and social structure similar to that of Western Europe and for closing up the European level. So from this point of view the law harmonisation dimension of joining the EU was not the first challenge in our history.

Following the change of regime there have been some positive tendencies in the formation of the Hungarian legal culture that already point towards euro-conformity. Thus for example the fact that the change of regime was legal and the consistent practice of the Constitutional Court have had an advantageous effect on our legal culture.[14] Law harmonisation fulfils an important role from the aspect of strengthening our regulative legal culture.

We only refer to that from 1990 until the joining we harmonised the major part of the laws of the Union given in the White Book[15]; this obligation is valid continuously with our Union membership. The further language and European law training of the judges and civil servants has been carried out

[11] V. Everling "Möglichkeiten und Rechtsangleichung in der Europäischen Gemeinschaft" in *Festschrift für Reiner Schmidt* (Karlsruhe: 1976), 165–85.

[12] See for example J. E. Levitsky "The Europeanisation of the British Legal Style" *Am. J. Comp. L.* (1994) 2, 380.

[13] See F. Mádl "Ius Commune Europae" *JK* (1990) 3.

[14] See K. Kulcsár *Jogszociológia [Sociology of Law]* (Budapest: Kulturtrade 1997), 147–8. Otherwise law-consciousness examinations made recently verified this also. See A. Visegrády *Jogi kultúra – jogelmélet – joggyakorlat [Legal Culture – Legal Theory – Legal Practice]* (Budapest: Aula 2003) pt. I.

[15] Cf. L. Kecskés – T. Soós "A csatlakozási tárgyalások által meghatározott jogharmonizációról, különös tekintettel a 2000–2001, évi fejleményekre" [On the Legal Harmonisation Determined by the Accession Negotiations, with Special Regard to the Events of 2000–2001] *Európai Jog* (2002) 1.

but the final solution is of course to be awaited from the mass employment of the new generation getting out of the universities.

On the other hand I would like to stress that our European integration does not preclude the preservation of the individuality of our legal culture. For the aim of the integration is double. On the one hand it has to ensure the reach of certain common effects; on the other hand it has to implement security items into the processes in order to insure that similar resources have similar results:

> "In law this means that we can – and in the given case we have to – unify just those elements of the legal culture, which are of device-like importance with *sine qua non* role from the aspect of the aims that are to be realised in any case."[16]

So when we are working on making our legal culture "euro-conform", we shouldn't forget to cultivate our already existing culture! I think it is not an exaggeration to say that the Hungarian legal culture can also contribute to the improvement of the law order of the European Union, if the Hungarian law-policy could take the initiative of the taking over and usage of certain legal solutions in order to perfect those legal institutions that are not yet worked out in the European legal material. One of these could be our law on ethnic minorities.[17]

3 – The law of the EU is not the "European legal culture", [18] but the product of the European legal culture. The new "European legal culture" is just being formed of which signs are for example the multiplication of technical laws and at the same time the strengthening of the unity of the legal system and of its vertical plurality.[19] The future European common law means more than the consonance of the different legal fields and rules. The "euro-centricity" of European law does not mean that it would build only on the law order of the Western-European countries. For it has taken legal solutions also from the USA, Australia and New Zealand. One question

[16] Cs. Varga "Európai integráció és a nemzeti jogi kultúrák egyedisége" [European Integration and the Uniqueness of National Legal Cultures] *JK* (1992) 10, 446.

[17] The opinion of Mihály Samu is very similar. See his "Az európai jog és az európai jogpolitika szükségessége" [The Necessity of European Law and European Legal Policy] *MJ* (1997) 7.

[18] Cf. V. Gessner "Wandel europäischer Rechtskulturen" in Bernard Schäfer (Hrsg.) *Lebenverhältnisse und soziale Konflikte im neuen Europa* (Frankfurt: 1993), 5–18.

[19] See Kulcsár (n. 14), 139.

of the future is how this complex but homogeneous law order would receive the legal traditions of the Eastern European countries?[20]

So community law appears increasingly among the items of the national legal systems of the member states. According to Wiesner 70–80% of the law creation competency controlling the economy of the member states of the community had already been at he Community in 1992. According to a statement believed to be said by Deloss it is to be expected that in our days 80% of the law material connected to economy of the member states is going to be based on community law.[21]

The pledge of the future of the *acquis communautaire* is in what measure do its rules become effective? The measure of this is a very complex exercise, which – among others – includes the examination of the followings: (1) the reflection of the policy of the Community in the law creation of the community institutions; (2) the application of the community law in the member states; (3) the engraftment of the community guidelines into the national laws; (4) the emergence of the secondary community law creation and of the national "naturalisation" in administration; (5) the emergence of community law in the activity of economic or other organisations and private individuals; (6) the summons in relation to community law at the international courts; (7) and lastly the enforcement of community law by the national courts.[22] So it can be seen that the effectiveness of European law gets decided in the national law orders.

For this a generation of jurists is needed, which can handle foreign laws as if they were local variants of the common European laws studied by them. The importance of the common European method should be that local, national law should be interpreted in a comparative approach with the sense that not the local approach is the only possible solution, other solutions also exist. This can lead to a precedent European doctrine and at the same time it would promote a more sophisticated, creative and effective juridical practice. This requires that the judges should cooperate side by side with other legal systems by the development and preservation of their own laws during law

[20] N. Burrows "European Community: The Mega Mix" in E. Örücü et al. (eds.) *Studies in Legal Systems* Mixed and Mixing (The Hague, London, Boston: 1996), 312.

[21] Cf. Kecskés (n. 1), 258.

[22] Cf. F. Snyder "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" *Modern L. R.* 56 (1993) [January], 25–7. For the notion, influential factors and measurement of effectiveness see A. Visegrády *A jog hatékonysága [The Efficacy of Law]* (Budapest: Unió 1997).

application. The opportunity is given in the forming European contractual law.[23]

For the perspective of the convergence of the legal systems, we join the followers of the convergence between the continental and Anglo-Saxon models. Both systems changes as beside the written law the judicial law also becomes important, while compared to the *case law statutory law* strengthens.

It cannot be doubtful that, as in the past, even in the future the European states will follow similar legal principles: the branches of the tree – of which the roots were formed by the Roman law, and the trunk by *ius commune* – that have grown in many different directions will again be bound together and grown in one direction by the slowly forming, cohesive will of the European people.[24]

[23] Cf. A. Herpai "Magánjogi magánharmonizációs vállalkozások és a közös jogi kultúra jövője Európában" [Private Law Harmonisation Enterprises and the Future of the Common Legal Culture in Europe] *MJ* (2004) 2, 184.

[24] E. I. H. Schrage "Utrumque Ius. Über das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit in Vergangenheit und Zukunft" *RIDA* 39 (1992), 407.

Tendencies in the Contemporary Theory of Law in Serbia

Gordana Vukadinović – Ágnes Kartag-Ódri (Novi Sad)

Up to the beginning of the 21st century, there emerged a vast number of distinctive views on legal theory – i.e. jurisprudence, including European and Anglo–American legal thought. Probably the largest in number among them are those that in defining the notion of legal theory take their start by defining the very notion of law, namely by attempting to answer the question: what is law? This question raises another issue among legal theoreticians as much as among logicians: what is truth?[1] There has been no definite or defining answer given to the question of what law is. Contemporary legal study has so far given valuable clarifications of the topic, as well as a wide variety of explanations of the fundamental notion of law and secondary legal terms. Moreover, it has given various sorts of classifications of legal theory, within which the notion of law as well. Thus, one sort of classification is dominated by the scope or 'spatial zone' legal theories cover (e.g. European, North American etc.); the second classification is governed by temporal and historical criteria (Ancient, Middle-Age, New-Age and contemporary legal theories); the third type of classification is dominated by so-called essential features of legal theories (positivism, jusnaturalism, normativism); the fourth classification, beside the basic legal attributes, may consider secondary features of legal theories (e.g. linguistic, ideological, political etc.).

On the general theoretical level, according to relevant insights, it can be argued that today, beside 'classic schools', like natural law, positivism, and the sociological approach, approximately a dozen perspectives of research mark the definition of the notion of law, i.e. the 'map' of contemporary legal theory: analytic legal theory, institutional legal positivism, critical rationalism, theory of system, legal logics, dialectical argumentation, topical ju-

[1] "Rechtstheorie" in J. Ritter – K. Gründer (eds.) *Historiches Wörterbuch der Philosophie* (Basel: 1992), 346ff.

risprudence, theory of jurist discourse, the Critical Legal Studies movement, the school of law and economy and narrative theory of law, etc.[2]

In contemporary Serbian legal theory, there is no agreement on the answer to the question of what law is. Such situation is completely explicable. One of the explanations lies in the fact that following World War II, for almost half a century, law was entirely understood as the will of the ruling class, and the state was seen as an organization with a monopoly on physical coercion, quoting Marx and Marxism. Today, it has been replaced by a wide variety of notions of the term. Additionally, the dominating view is that the value of justice, freedom etc. is a compulsory criterion of legal norms, i.e. the notion of law incorporates values as well.

In attempting to encompass the most eminent and most influential contributions to contemporary Serbian legal theory and philosophy of law, "hardly anywhere, including in its past periods, could one find a comparable example: that a unique spiritual endeavour lasted for almost seven decades whose 'bearer' was the Nestor of Serbian legal thought and legalism in general, professor Božidar S. Marković (1903–2002)."[3] The uniqueness of his contribution is not only reflected in its dimension of time, its incomparable longevity, but most of all in its compactness, consistency, and congruity.

If one would aim to summarize to key results that Marković attained on the course of his study, they would be the following. Marković sets off from the dualism of natural and positive law.[4] In the primeval natural state, justice comprised of biological justice governed by cruel rules of struggle for life. In our times, that biological justice has been changed, humanized, refined, and enriched with metaphysical, ethical, rational and other human values and standards. The ultimate criterion and goal of justness is maintaining and perfecting human life in compliance with the survival and development of the social community. This ultimate criterion is essentially relative and subject to change. Justice means equal treatment of equals, and unequal treatment of unequals – in proportion with their inequality. Assessment on that is done by the society. Justice is the task and purpose of positive law,

[2] G. Vukadinović – R. Stepanov *Teorija prava [Theory of Law]*, vol. 1 (Petrovaradin: 2001) 22ff.

[3] D. Basta "Pohvala jednoj doslednosti" [Appraisal of Consistency]. *Anali Pravnog fakulteta u Beogradu* (1992) 1–2, 19.

[4] In contemporary philosophy of law, a certain jusnaturalism has arisen globally; not in the political meaning of human rights, but more in a legal sense of faith in one function and the natural functioning of law and jurists. (R. Sève "Avant-Propos" *APD* 33 [1988], 21). The relation of justice and law, and the role of justice in law and by law are analyzed by Ch. Perelman, M. Villey, J. Rawls, R. Nozik, F. A. Hayek, G. Höffe etc.

to harmonize with the social concept of fairness, eliminating principally the negative consequences of stativity and generality of the rules of positive law. The unbalance between justness and positive law is further eliminated by interpretation, analogy, expanding judicial power, and legal standards. Within positive law, Marković differentiates between three types of norms regarding their maker: sociological, stateistic, and mixed.[5]

The continuity expressed in the duality of positive and objective law is found, in a certain sense, in the work of professor Radomir Lukić (1914–1999), one of the key figures of political and legal thought in Serbia.[6] In his doctoral thesis, *La force obligatoire de la norme juridique et le probléme d'un droit objectif* (Paris 1939), and some fifty years later in his book *The System of Legal Philosophy* (1993) he discussed the central legal-philosophical problem, the problem of law as a value. As Lukić himself said, the book presented the ultimate solutions to certain issues, particularly the issue of objective right, which he had questioned and partly solved in his doctoral thesis. According to Lukić, the objective causal legitimacies change into a legal norm. Objective law is not created by anyone, for it is not necessary, "it is given objectively, it exists in the essence of the world itself as soon as the world was created, in the relationship between the means by which the aim of the world is achieved and the realization of that aim." And the aim of the world is "the existence and survival of the largest number of beings as perfect as possible, above all people in their fullest possible dignity."[7] Considering that objective right is a continual process, a developing category, it is subject to changes. However, for the law to exist in another place, observing law from a materialist point of view, Lukić argues that the existence of law proposes that society is divided into antagonistic classes. This antagonism cannot be solved without the monopoly on physical coercion that the state disposes of. If social development leads to the disappearance of classes and class conflicts, then, concludes Lukić, in an egalitarian society both the law and the state must disappear. Thus, Lukić remained consistent to his own concept of

[5] B. Marković "Poruka učesnicima savetovanja" [Communique to the participants of the conference] *Pravni život* (1995) 1–2, 16–20.

[6] Radomir Lukić's opus is a comprehensive scientific work consisting of 11 volumes (vol. 1: *The Obligatory Power of Legal Norm and The Problem of Objective Law*; vol. 2: *Theory of State and Law. Theory of State [I]*; vol. 3: *Theory of State and Law. Theory of State [II]*; vol. 4: *The System of Legal Philosophy*; vol. 5: *Methodology of Law*; vol. 6: *Essential Sociology*; vol. 7: *Sociology of Morality*; vol. 8: *Formalism in Sociology*; vol. 9: *History of Political and Legal Theories*, vol. 10: *Political Theory of State*; vol. 11: *Political Parties*).

[7] R. Lukić *Sistem filozofije prava [The System of Legal Philosophy]* (Belgrade: 1993), 404.

objective law, and law as a means of solving the fundamental clashes by way of state monopoly on physical coercion.

In the past two decades, a rising number of eminent authors in Serbia have also emphasized the importance of the renaissance of natural law.

A moderate variety of jusnaturalism is represented by professor Kosta Čavoški.[8] In his Introduction to Law *(Uvod u pravo)*, he discusses various definitions of law in a clear and versatile way, with distinctive clarity. Within those analyses, his concepts of natural law have an important place. The fundamental conclusion he reaches is that his different concepts of law oscillate between power and justice, external efficiency and moral correctness.[9] Life itself does not always follow the logic of balance between power and justice. The solution lies in the acceptance of a scrutinized viewpoint expressed in the following maxim: law originates from justice as its mother; therefore, justice came into being before the law. Hence, "positive law only draws nearer, to a smaller or greater degree, (if not draw away from) its ideal pattern of the idea of justice. And the transcendental element, which is carried by the notion of justice, forms the last validity measure of positive law, and an ideal that it has to achieve."[10]

An integral and original concept of natural law can be found in the work of professor Slobodan Perović,[11] the founder and main representative of the Kopaonik School of Natural Law.[12] The nature of the Kopaonik School is best shown by the Hexagon of natural law, which is not a closed system of classification of natural law, as there is no such unique system.[13]

[8] K. Čavoški is the author of several monographic works, for instance: *Filozofija otvorenog društva [The Philosophy of Open Society]*; *O neprijatelju [On Enemy]*; *Ustav kao jemstvo slobode [The Constitution as a Guarantee of Freedom]*; *Pravo kao umeće slobode [Law as a Skill of Freedom]* etc. He also translated J. Locke's *Two Treatises of Government*, and Kelsen's *Concept of Justice* etc.

[9] K. Čavoški *Uvod u pravo [Introduction to Law]* (Belgrade: 1994), vol. 1, 89ff.

[10] Ibid. 98.

[11] S. Perović *Pravnofilozofske rasprave [Treatises of Legal Philosophy]* (Belgrade: 1995).

[12] The year 2007 is the 20th anniversary of the Kopaonik School. Namely, the Kopaonik School of Civil Law developed into the School of Natural Law. In the times of isolation from general culture of law, as professor Marković put it when appraising the contribution and importance of the Kopaonik School, "it is not only a scientific but also a cultural accomplishment that has few equals in the world." (B. S. Marković „Poruka učesnicima savetovanja" [Communique to the participants of the conference] *Pravni život* [1995], vol. 1–2, 19). In addition, his works published in the volumes of the periodical *Pravni život [Legal Life]* hold immense scientific value in criticism of state and law, especially in difficult times characterized as totalitarian, dictatorial and authoritarian.

[13] S. Perović *Prirodno pravo i sud [Natural Law and Court]* (Belgrade: 1996).

Nevertheless, it is comprehensive, well composed and logical, where all the disciplines can find their particularities as well as their universalities.

Thus, Perović not only laid the foundations of the work of the Kopaonik School but also tracked a new course to legal thought. From the kaleidoscope of legal issues, we shall consider the source and content of natural law, as well as the relation between natural and positive law.

Regarding the source and content of natural law, the prime focus is on features that occur in all areas of work of the Kopaonik School. Hence, positive law being partial, national, heteronomous, and changeable, natural law is universal, global, autonomous, constant, and just by itself. Positive law always disposes of state power, while natural law possesses this sanction in case the two laws do not correspond.

Concerning its grounds, the source of natural law is best expressed in the Hexagon of natural law. The source of natural law is in the mind and senses. In order to make law more just, Perović argues that there should be more of the mind rather than of the senses. As for the content of natural laws, by the very act and fact of birth people gain the right to life, which is the first natural law in the Hexagon. Since man lives in a community driven by his own social instinct, he has the right to live in a rational freedom, i.e. the kind of freedom limited by the freedom of others, and this is the right to freedom in a rational (intellectual) sense. Other natural rights emerge from these two fundamental natural laws: property rights, the right to economic activities, the right to cultural heritage, natural right to justice, and the sixth is the right to a rule of law.

The significance of the Kopaonik School of Natural Law and the endeavour of its initiator, professor S. Petrović, far exceed the boundaries of law. Thousands of pages of the periodical *Pravni život* (Legal Life) bring not only the complete criticism but also a vision of a possible modern European legal system and state in Serbia.

Value as an attribute to the notion of law is also found in the works of authors who do not support the concept of natural law. Interest in law, justice and state is again becoming increasingly important and necessary; consequently in the second edition of *Filozofija prava* (Philosophy of Law, 1996), member of the Serbian Academy of Science, Ljubomir Tadić introduced a new chapter dedicated to these questions in order to, as he himself put it, "discuss them once again in a more systematic and comprehensive fashion", by adding "a special reference to the theoretical endeavours that were made by Ch. Perelman and J. Rawls on the problematic of justice."[14] Summariz-

[14] Lj. Tadić *Filozofija prava [Philosophy of Law]* (Belgrade: 1996), 5.

ing the views concerning the relations between law, justice and the state, "we are facing two diametrically opposite discourses in the political (and legal) philosophy and jurisprudence: one, which despite all the modalities, holds that justice (alongside with law) is a possible political category, and the other that sees the realization of justice within uniting the freed 'political sphere'."[15] Today, the same way as in the times when the book was written, but with even more arguments, "a state uses its monopolist position as a world superpower to test modern weapons, without any authorization on grounds of international law, against another country that is nominally sovereign. This again points to the fact that in international relations, where there is no balance of power, equality among countries is a mere illusion, not to mention fair relations. There is still the 'right of the stronger one' like in the natural state. Using brutal power is cynically justified by defending human rights and democracy. Hence, 'new trials of justice' in contemporary science appear to be a mere declamation, like 'empty words' in the Platonic sense."[16]

Studying the ideas and views of leading scholars, and analyzing the answers to the many questions of jurisprudence and philosophy of law, professor Danilo Basta[17] points out the following: "Freedom as the basis of man's legal existence is not an abstract and unbound freedom that easily and rapidly transforms into its own opposite, into that 'fury of disappearance' which destroys not only law but also life itself. On the contrary, it is the kind of freedom that draws its own boundaries thus making itself possible and affirming itself."[18] The boundary of freedom always goes together with it. Law "cannot have other reasons or purposes of existence but to be a means of freedom understood in this sense."[19] In other words, law is a guarantee of freedom. That is why Basta's view of natural law is fully comprehensible. "Whenever the nature of law and legal thought is defined, there is always a barrier against a fatal equating a legal norm and law. Law lives in the house of nature, not in the arbitrariness of state power."[20]

[15] Ibid. 230ff.

[16] Ibid. 231–2.

[17] D. Basta *Fihte i francuska revolucija [Fichte And The French Revolution]* (Belgrade: 1981); *Pravo pod okriljem istorije [Law Under The Auspices of History]* (Belgrade: 1988). Serbian theoretic and philosophic legal thought has been enriched by numerous translations of D. Basta. He translated almost all the major works by Hans Kelsen, and Arthur Kaufmann's *Law And Understanding of Law*.

[18] D. Basta *Pravo i sloboda [Law And Freedom]* (Sr. Karlovci – Novi Sad: 1994), 124–5.

[19] Ibid. 8.

[20] Ibid. 124–5.

A similar standpoint was taken by Stevan Vračar (1925–2007), professor of legal theory and philosophy at the Faculty of Law in Belgrade, who argued that law is a multidimensional social product. "It emerges on an adequate economic substratum, alongside with the state it is connected with, and enters the political structure of the given society. But law and the state are directly determined by a specific process – the process of political constitution of the society. Law represents a relatively differentiated sphere of social life of people as polyvalent beings, apt to express different forms of sociability, participation in a variety of processes and relations. This legal sphere arises by connecting and, so to say, amalgamating numerous diverse elements, but a certain number of such elements is inevitably involved in the legal sphere. Among them is social consciousness crystallized in the form of legal norms. [...] This objectivization equally concerns other elements of law as well, not only conscience, and legal norms. Owing to this, people, members of the global society, attain features of legal subjects; certain acts they perform on the course of their social life get the role of legal acts; certain relations established between them get the function of legal relations. Even certain facts get the features of legal facts. Moreover, all the mentioned elements are 'equal' and equally significant for the law itself, which they comprise and whose structure they are built in."[21] Thus, it can be concluded that Vračar, most of all Serbian authors, broadens the scope and content of the notion of law.

The development of contemporary legal theory in Serbia is marked by an increasing number of authors belonging to the group that could be characterized as integralist, in the sense that law is one form of social order, or a dynamic unity of a certain kind of conflicting social relations: goals by which such relations are justified, and norms that primarily order such relations, i.e. alongside legal norms and social relations they also introduce values into the concept of law.[22]

Like the authors of this paper, professor at Belgrade Faculty of Law, Radmila Vasić defines the concept of law in a synthetic way.[23] "Law can be defined as a system of norms coercively protected by the state/society. Those norms define conflicting social relations with the purpose of realization of

[21] S. Vračar *Strukturalnost filozofije prava [The Structurality of Legal Philosophy]* (Novi Sad: 1995), 112ff; *Preispitivanje pravne metodologije [Revising Legal Methodology]* (Novi Sad: 1994).

[22] G. Vukadinović *Teorija države i prava [Theory Of State And Law]*, vol. 2, (Petrovaradin: 2006).

[23] Ibid. 43–4.

social values that enable cohabitation of people in peace and dignity."[24] Professor Dragan Mitrović defines law in a similar way. "Law represents a set of norms sanctioned by the state with the purpose of fulfilling its function, i.e. the function of social and legal order, determined by the predominant society and legal interests and values."[25]

Among the authors who take values as elements is professor Miroslav Živković, who argues that law consists of three levels: the idea of justice, the level of elastic law that represents the legal-technical elaboration of the idea of justice with the purpose of directing strict rules, and the level of relatively strict rules (laws and other norms).[26] Thus, law is the place where three spheres are interwoven: politics, law, and morality.[27]

Although the problem of grasping law still stays open and topical, it seems that the group of scholars who put forward the idea of multidimensionality is becoming larger. Hence, professor Miodrag Žižić argues in his textbook that it is apparent that essentially law has a normative dimension and a dimension of social value.[28]

There are certain other general characteristics of contemporary legal theory in Serbia that should be referred to. Regarding the topic, there are papers that, apart from the concept of law, deal with current issues of contemporary philosophy and theory of law. Such are: monographic interpretations of Perelman's Rhetoric and Topics by Jasminka Hasanbegović,[29] *Teorija haosa* (The Theory of Chaos) by Dragan Mitrović,[30] *Pravna država* (Rule of Law) by professor Gordana Vukadinović, and *Kulturna prava* (Cultural Rights) by professor Ágnes Kartag-Ódri.[31]

[24] R. Vasić – K. Čavoški *Uvod u pravo [Introduction To Law]* (Belgrade: 1996), 19.

[25] Cf. D. Mitrović *Pravna teorija [Theory of Law]* (Belgrade: 2007), 192.

[26] M. Živković *Uvod u teoriju države i prava [Introduction to The Theory of State and Law]* (Belgrade: 2002), 126.

[27] Ibid. 131.

[28] M. Žižić *Uvod u pravo [Introduction to Law]* (Priština: 1997), 151.

[29] J. Hasanbegović *Perelmanova logika kao nova retorika [Perelman's Logics as a New Rhetoric]* (Belgrade: 1988); *Topika i pravo [Topics And Law]* (Podgorica: 1996).

[30] D. Mitrović published *Teorija haosa* [The Theory of Chaos] for the first time in 1993. In his second book (which is a result of his cooperation with Ljubiša V. Stanojević) a relation is established between the theory of chaos and legal theory (*Teorije haosa i pravne teorije [Theories of Chaos and Legal Theories]*; and *Modelovanje i računska simulacija u pravu [Modelling and Computer Simulation in law]*, 1996), followed by the third book which gives a synthetic overview of the connection between chaos and law from a holistic point of view (*Put prava. Holistička paradigma sveta i prava u svetlu teorije haosa i pravne teorije [The Ways of Law. A Holistic Paradigm of the World and Law in View of the Theory of Chaos and Legal Theory]*).

[31] V. Dimitrijević – Á. Kartag-Ódri *Kulturna prava [Cultural Rights]* (Belgrade: 1999).

Further, it should also be pointed out that Serbian legal theory keeps abreast of and analyzes the current developments of legal thought in the world.[32] Hence, professor Todor Podgorac, following an extensive research on the work of the Polish legal thinker Leon Petrazycki, has given a significant comprehensive view of Polish theory and sociology of law. Interests for Hungarian legal theory can be found in the work of prof. Á. Kartag-Ódri, who analyzed the process of overcoming normativism in Hungarian legal theory.[33]

The extensiveness and variety of topics that prof. Podgorac covered is best presented in his work *Ogledi o pravu* (Essays on Law). According to him, "law sanctioned by the state, i.e. law supported by the state as a guarantee of its practice, is only a fragment of law, a microscopic particle, as L. Petrazycki phrased it. Beside the state, there are also other authorities that function as guarantees to the practice of law; apart from official there is unofficial law; apart from positive there is objective law, which stems from the real social and human relations, a law that is objectively imposed (in the history of legal thought often referred to as natural, intuitive, just etc.). Therefore, the horizons of law are much broader than the horizons of positive law...". "The so-called classic point of view (law as an expression of the will of the ruling class, which stems from class conflicts) must eventually give way to a broader concept, in which law connects with all kinds of society, not only class society (*Ubi societas, ibi ius*), and with every individual citizen (*Ubi homo, ibi ius*), and which emerges from the need for the solidarity of people. There is no individual, regardless of his education, who (unless he is depraved) does not also think of other people's rights and duties – he simply lives with it. Officially set down in writing, law is practised through acts of real people – common citizens, representatives, clerks, judges... Law is a means of protection of the freedom of man and his individuality, which guarantees civilized and cultured proceedings before the court..."[34]

In Serbia, as well as in contemporary legal theory worldwide, one of the paradigms of postmodern legal study comprises of the complexity, in this

[32] G. Vukadinović „Savremena francuska teorija prava" [Contemporary French Legal Theory] *Arhiv za pravne i društvene nauke* (1991) 1; Á. Kartag-Ódri – G. Vukadinović: *American Jurisprudence of the 20th Century* (Novi Sad: 2007).

[33] Á. Kartag-Ódri "Normativizam i njegovo prevazilaženje u savremenoj mađarskoj teoriji prava" [Normativism and the Process of its Overcoming in Contemporary Hungarian Legal Theory] *Arhiv za pravne i društvene nauke* (1983) 3. Also, her MA thesis *Shvatanje pojma prava u delima Imre Saboa [The Concept of Law in the Works of Imre Szabó]* (1983).

[34] T. Podgorac *Ogledi o pravu, filozofija prava, teorija prava i sociologija prava [Essays on Law, Philosophy of Law, Theory of Law, and Sociology of Law]* (Kragujevac: 1998), 5–6.

case the complexity of law, expressed in legal pluralism.[35] One can differentiate between local, state, and international legal levels. Legal pluralism is observed from the standpoint of coexistence in the same political body of different legal regulations presupposed and combined in the spirit and activities of every subject.[36] In Serbian legal theory Budimir Košutić, since his doctoral thesis (*Sudska presuda kao izvor prava* – Court Decision as a Source of Law, 1973) has been engaged in one of the most controversial issues, the problem of the relation between state and law expressed through the concept of legal pluralism, i.e. autonomous law.[37] The state is not the only maker and guarantor of law, since so are other powerful, autonomous groups, interest groups in economic, political and cultural life. In the present world, there are very dynamic groups, most of all corporations and other economic organizations, trade unions, autonomous territorial entities, associations, communities, even not organized collectivities. The citizen does not appear only as a subject who practices norms, but also takes part directly or indirectly in the making of legal rules, thus limiting both the political rule of the state and the power of autonomous social groups. These differing forms of legal pluralism appear not only on national but also on international level.

Legal theoretical thought in Serbia enters the 21st century with fresh ideas, new authors and initiatives best seen in the thematic reviews and approaches to certain issues of theory and philosophy of law.

One can conclude with great certainty that in defining the notion of law there has been a considerable step forward, hence the great variety of definitions of law in modern times. What is seen as a positive breakthrough is the fact that almost all the authors connect law with values and morality. However, following the break-up of Yugoslavia, up to the present moment, Serbia has been aspiring towards a rapid progress leading into a modern European legal system. In these processes, legal theory has a great significance, especially in defining the concept of law, which is crucial for the creation of a well-set legal system, and for the effectuation and functioning of a legal sate. Admittedly, the task is still to be performed.

[35] P. Maisani – F. Wieuer "Réflexion autour de la conception postmoderne du droit" *Droit et Société* 27 (1994), 343–63; K.-H. Ladeur *Postmoderne Rechtsteorie* (Berlin: 1992).

[36] F. Chazel – J. Commaille *Normes juridiques et regulation sociale* (Paris: 1991).

[37] B. Košutić – D. Mitrović *Autonomno pravo [Autonomous Law]* (1996). Moreover, B. Košutić and D. Mitrović carried out certain modifications in the texbook by R. Lukić *Uvod u pravo [Introduction to Law]*, and prepared the new, thirteenth, enlarged edition (R. Lukić – B. Košutić – D. Mitrović *Uvod u pravo [Introduction to Law]* [Belgrade: 1999]).

Römisches Recht – Beispielsammlung für Rechtsphilosophie und Staatskunde

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Recht und Philosophie sind eng verbunden. Nach Ulpian sind die Rechtsgelehrten *veram, non simulatam philosophiam affectantes* – sie suchen, wünschen, forschen die ware, und nicht die falsche Weisheit[1] Gegenstand der Betrachtungen und der Studien der Philosophie ist das Wesen, das Sein. Was man wahrnimmt, will begriffen, verstanden werden, wird, als Einheit und Vielfalt, betrachtet, systematisiert. Gesetze des statischen und des dynamischen Sein werden kundgetan. Die Philosophie forscht und erforscht das Wesentliche, die Zusammenhänge, Zweck, Grund und Ziel.

Die Rechtsphilosophie, Teil der Philosophie, tut dies alles mit dem Wesen des Rechts. Recht als Erscheinung, Recht als Ding wird analysiert, synthetisiert, Zusammenhänge, Prozesse der Entwicklung, des Wandels, deren Gesetze entdeckt und erprobt. Um dies zu tun, braucht die Rechtsphilosophie Fakten: Materie. Das sind einzelne Rechtsregeln, existierende, funktionierende Rechtssysteme, Rechtsregeln, Rechtsentscheidungen. Das Recht ist Abstraktion, es kann nur in Einzelerscheinungen erfasst werden. Sowohl als abgesonderte Kategorie, wie auch im Zusammenhang mit anderen Entitäten muß diese Betrachtung, Bearbeitung geschehen, um am Ende zur Wahrheit über das Recht zu gelangen.

Das römische Recht existiert. Es war, es ist, es überdauerte und entfaltete sich während einer überaus langen historischen Periode. Es bietet Rechtstatsachen für die Rechtsphilosophie. Nicht immer schön prepariert und serviert: die Erschließung dieser Rechtstatsachen ist eine Wissenschaft für sich. Quellenkunde, Quellenauslegung, Deutung gehören dazu. Doch reich ist das Angebot. Die Kleinsiedlung entwickelt sich zur Weltmacht, Stadtstaat zum Reich, sakrale bzw. Gewohnheitsgebundenheiten zu einem Welthandel

[1] Dig. 1.1.1.1.

und Weltfrieden sowie persönliche Freiheit bestimmenden Ordnung, eine ungebrochene Entwicklung von 1200 bzw. 2000 Jahren! Andererseits haben die am Ende oder am Wendepunkt dieser staatlichen Entwicklung gesammelten, formierten und aufgeschriebenen Rechtsregeln durch die innere Kraft, durch die Macht der existenten Ordnung weitere 1500 bis 700 Jahre lang die globale Rechtsentwicklung bestimmt, beeinflusst. Diese Rechtstatsachen, vielfach erforscht, keineswegs erschöpft, bestimmen weitgehend noch heute und auch für Morgen das Rechtswesen. Man kann sich mit dieser wunderbaren Materie nicht beschäftigen, ohne die wesentlichen Zusammenhänge, Gegebenheiten von Staat und Recht vor Augen zu halten. Man kann auch die Rechtsphilosophie nicht pflegen, ohne diese Rechtstatsachenfülle immer wieder nachzuschlagen, zu Rate zu ziehen, zu bewerten.

Meine eigenen Forschungen im Gebiet des römischen Rechts wandten sich den Anfängen, der ersten Phase der Entstehung von der Urbs, deren Rechtsordnung und dem Inhalt und der Form der ersten Rechtsregeln zu. Ich wollte das wahre Bild des archaischen Roms klarstellen, oder klarer stellen. Wie entstand der Stadtstaat?[2] Wie erschien zuerst eine Rechtsordnung? Woher stammten deren Inhaltselemente? Was ist die ware Bedeutung etlicher archaischen Rechtstermine? Alles spannende Fragen. Die Urgeschichte Roms ist sagenhaft, die frühe Rechtsgeschichte dagegen bietet eine Menge stichhaltiger Fakten, die auch in die Geschichte Roms Licht zu bringen können. Dazu jedoch muß die Methode des Verfahrens eine gemeinsame für Rechtswissenschaft und Geschichte sein, und das bietet nur die Philosophie. Sie ist dazu fähig, die beiden Disziplinen auf einen gemeinsamen Nenner zu bringen.

Das Definieren der Begriffe Staat und Recht geht nicht ohne ontologische Fragen zu beantworten. Um ein Staat als solches zu identifizieren, sowohl in einer geschichtlichen Periode, wie auch in der Gegenwart, muß man wissen, was man sucht. Das selbe gilt für Rechtsbegriffe und Rechtstatsachen. Als Vorbedingung meiner Forschungstätigkeit über Staat und Recht des archaischen Roms, habe ich einen philosophisch geformten Begriff für Beides benötigt. Als ich am Anfang meines diesbezüglichen Buches über die Methodik meiner Forschung berichtete, habe ich diese Begriffe für mich festgestellt, undzwar folgend: Der Staat ist eine künstlich geschaffene Organisation der Gesellschaft, bestimmt um für die Verteidigung nach außen und die Ordnung im Inneren zu sorgen, mit Macht ausgestattet, wobei die Organe, die Funktionierung, die Befugnisse durch festgesetzte Gesellschaftsnormen festgestellt werden. Diese Normen, gleichzeitig auch Verhaltens-

[2] Stadtwerdung oder Stadtgründung, war die Diskussion in der Archäologie.

normen für die Mitglieder der normierten Gesellschaftsgruppe, stellen die Grenzen der Macht der Organisation fest, sie sichern die von dem Staat anerkannten und garantierten Interessen der einzelnen Mitglieder dieser Gesellschaft, und bilden das Rechtssystem des gegebenen Staates.[3]

Ich mußte also im archaischen Rom eine, von der Gesellschaft schon klar separierte machtausübende und Recht setzende bzw sprechende Organisation suchen und deren Gegebenheiten erforschen.

Daß solch'eine Organisation entstanden ist und existiert, kann nur nach Ablauf einer gewissen Zeitspanne, rückwärts blickend, festgestellt werden. In diesem Sinne stimmt der berühmte Satz des großen Mommsen: "Rom wurde nich an einem Tag gegründet." Das heißt aber nicht, vornherein in Abrede zu stellen, daß die Gründung einer selbständigen Gesellschaftsgruppe durch eine einzige politische Entscheidung geschehen konnte, wie das für das Altertum oft überliefert ist und auch für moderne Zeiten nicht ohne Beispiel steht. Solch'eine Entscheidung wird von Livius zur Gründung der urbs behauptet[4]. Eindeutig sieht er in der gesellschaftlichen Festsetzung der staatlichen und kultischen Organe, in der Bestimmung der anerkannten religiösen und weltlichen Normen, die bildende Kraft, den bildenden Akt, die aus der Masse eine politische Einheit, ein populus geformt hatte. Der Gründungsakt, zeitlich auffallend genau und mehrfach überliefert, steht nicht unbedingt im Gegensatz zu der Feststellung, daß diese Gründung dadurch zum Rom der Geschichte wurde, daß sie stabil bestand und durch Jahrhunderte entwickelt, geformt, gestaltet wurde.

Günstige Gegebenheiten sorgten für die Standhaftigkeit der neuen Gesellschaftsgruppe: Normen zum Schutz des Gemeinwesens und auch der Privatinteressen durch die Macht wurden abgefasst, die Machtbefugnisse im Gemeininteresse ausgebildet und bewahrt, Grenzen des Öffentlichen und des Privatrechtes untereinander sowohl trennend wie auch im Einklang stehend gesetzt. Die Stabilität als Bedürfnis einer Rechtsordnung ward anerkannt, doch auch die Möglichkeit dasselbe zu den Bedürfnissen der gesellschatlichen Entwicklung anzupassen, treffend gelöst: die legislatio und die iurisdictio parallel bestanden unseres Wissens in keinem anderen antiken System. Durch diese Faktoren gewann die organisierte Gruppe gewisse rechtsstaatliche Elemente,[5] wurden die politischen Strukturen legitim. Noch heu-

[3] J. Zlinszky "Staat und Recht im archaischen Rom" *Helikon* 28 (1988), 169–82, die ungarische Monographie über dasselbe *Állam és jog az ősi Rómában [Staat und Recht im archaischen Rom]* (Budapest: Akadémiai 1996).

[4] Livius 1.8.1.

[5] J. Zlinszky "Rechtstaat – Rom" in M. J. Schermaier – Z. Végh (Hrsg.) *Ars boni et aequi.*

te können wir an diesem Beispiel Legalität und Legitimität untereinander differenzieren.

Bei der Untersuchung der frühen Rechtsnormen des archaischen Roms kann man interessante Fakten feststellen. Man kann die Entstehung einer Rechtsnorm der Form nach – durch staatliche Setzung, – und andererseits den Inhalt dieser Normen, das, was die Gesellschaft als bindend anerkannte, weil es die obligatorische Macht derselben Vorschriften als Gegebenheit betrachtete, von einander absondern, auseinanderhalten. Dieser Inhalt stammt zu Beginn zum bedeutenden Teil aus vorrömischer Überlieferung, aus Gewohnheiten der Stammesgesellschaft, aus welcher die ersten Siedler sich loslösten, um sich der neuen Siedlungsgruppe anzuschließen. Andere sind sakrale Normen, in dieser vorrömischen Gesellschaft schon geachtet. Zu diesen sozusagen überlieferten Verhaltensregeln gesellen sich dann die neuen Anordnungen der neuen Macht, für die besonderen Verhältnisse des neuen Zusammenlebens erlassen. Die alte Gewohnheiten widerspiegelnden Normen finden wir bei solchen Gegenständen, wo die Öffentlichkeit keine Kontroverse aufzeigte, wo ein Konsens anzunehmen war. Sakrale Normen dagegen werden zu Rechtsnormen in den Fällen, wo tiefe, antagonistische Meinungsverschiedenheiten zum Zweck des inneren Friedens zu überbrücken waren. Die neuen Normen werden von den neuen Problemen der Urbs generiert. Teilweise bedienen sie sich den Zwangsmaßnahmen der ersten zwei Gruppen: so z.B. die Vorladung der Kontrolle der Öffentlichkeit, oder die Beschädigung der Saat (oder später die Läsion der Volkstribunen) sakraler Sanktionen. Diese "Stratigraphie" der frühen Normen[6] hilft uns festzustellen, daß nicht der staatliche Zwang, sondern die allgemeine Anerkennung in gegebener Gesellschaft die Normen zum Kulturgut werden lässt, – bloße Machtzwang genügt nicht zur Annahme des Rechts.

Bei heterogenen Gesellschaften ist es schwieriger zu bestimmen, was als bindende Norm angenommen wird. Zur Erhaltung des inneren Friedens müssen verschiedene Gewohnheiten untereinander angepasst werden. Ez steht im Interesse der staatlichen Macht, Reibungen zwischen ethnischen Gruppen zu meiden, um daß die Gesellschaft nicht gespalten und durch innere Fehden aufgerieben werde. Die berühmte Satzung des Königs Stephan (I.) des Heiligen über die Einwanderer, die verschiedene *Consuetudines et Documenta* mit sich bringend die Macht des Königreichs heben

Festschrift für Wolfgang Waldstein zum 65. Geburtstag (Stuttgart: Steiner 1993), 471–80.

[6] J. Zlinszky "Frührömische Normenschichten in den Regeln der XII Tafeln" in *Akten des Deutschen Rechtshistorikertages* 1988, ferner Idem *Állam és jog az ősi Rómában* (Anm. 3), 110f., *Római büntetőjog [Römisches Strafrecht]* (Budapest: Nemzeti Tankönyvkiadó 1991), 20.

und bereichern, gilt dann, wenn diese Verschiedenheiten friedlich in Einklang zu bringen sind.[7] Um diesen inneren Frieden zu sichern, erhielten die imperium-tragenden Personen, erst der König, dann die Hauptmagistrate, die Jurisdiktions-Befugnis: sie konnten bei Meinungsverschiedenheiten für alle bindend feststellen, welche Norm in Rom als Rechtsnorm, als geltendes Recht anzunehmen sei.[8] Auch in modernen Zeiten brauchen wir effektive politische Lösungen, um ethnische Unterschiede in Frieden lösen zu können: man denke nur an Israel, oder unser einheimisches Problem mit der Integrierung der Zigeuner. Nicht jede Zuwanderung ist bereichernd, es können daraus auch Schaden entstehen, das wird immer klarer bewiesen.

Der innere Frieden, die innere zuverlässliche Ordnung sind eminente Interessen der Gesellschaft. Die Rechtsordnung bemüht sich, die verschiedenen Lebens- und Wirtschaftssphären gegeneinander so abzugrenzen, daß Reibungen erst gar nicht entstehen, und wo doch, versucht die Rechtsordnung die Lösung der Reibungen auf friedlichem, normiertem und durch die Macht geschütztem Wege zu lösen. Die Öffentlichkeit soll dabei Kontrolle ausüben, doch muß die Entscheidung der Streitfragen, undzwar endgültig, mit Machtspruch geschehen. Das ist eine eminente Aufgabe der organisierten, staatlichen Gewalt. Einen Beispiel zur Möglichkeit der Lösung dieser Probleme bietet Rom in der Entstehung und Entfaltung des Imperiums.[9]

Imperium bedeutet eine einheitliche, Persongebundene, doch derselben nicht wesentlich zukommende und auch unter mehreren Imperiumträgern teilbare, von der Gemeinde übertragene Vollmacht. Einheitlich wie auch die Staatsmacht, auch wenn zwischen Personen oder durch Gewaltenteilung geteilt. Zweckmäßig beinhaltet das Imperium alle die Befugnisse, die zur Funktionierung der Wirtschaft und zur Sicherung des Friedens der Bürger nötig sind. Die Funktionen werden sich mit der Zeit zu Gewaltenzweigen umbilden. So die anfangs wichtigste Funktion der Verteidigung nach Außen. Die früheste Organisation der römischen Stadtbewohner war die eines Militärlagers, einer Legion.[10] Die Quirites waren Soldaten, eine Organisation bewaffneter Männer. Die Familien, die *gentes*, die *curiae*, die drei *tribus* waren Träger militärischer Pflichten und Befugnisse. Schon das früheste öffentliche Recht betont diese ihre Rolle. Der Träger des *imperium militare* ist eine von allen erwählte, mit Macht ausgestattete Vertrauensperson. Unbegränzte

[7] "Sti Stephani Regis Admonitiones sive Libellus de institutione morum" §6 in *Corpus Iuris Hungarici* Bd. 1000–1526 (Budapest: Franklin Társulat 1899).

[8] Zlinszky *Állam és jog az ősi Rómában* (Anm. 3), 187f.

[9] J. Zlinszky *Ius publicum* (Budapest: Osiris–Századvég 1994), 61.

[10] Ibid. 27.

Macht wird ihr zugesprochen, da nur mit solchen Befugnissen die Erhaltung der Gemeinde gegen mächtige Feinde möglich sei. Darum ist er Herr über Leben und Tod der Quirites, schuldet für sein Walten, für Erfolg nachgehend Rechenschaft, haftet mit seiner vollen Person, Hab und Gut und Kopf.

Das *imperium coercitionis* sichert die innere Ordnung: anfangs auch eine Vollmacht, wird sie mit der Zeit auf das Nötige begrenzt: aus den *fasces* wird in der Stadt der Beil verschwinden. Die *castigatio* kann gegen römische Bürger nicht angewandt werden, über Kopf und Habe des Mitbürgers steht die letzte Entscheidung den Comitien, der Bürgerversammlung zu, der Magistrat hat nur das Recht den Antrag auf diese Strafe zu stellen.

Dazu hat der hohe Magistrat das Recht, Senat oder Volksversammlung zusammenzurufen, ihnen Anträge zu stellen. Die und nur die vom Magistrat gestellten Anträge werden behandelt, im Senat eingehend, von der Volksversammlung nur auf einfaches Ja oder Nein, *uti rogas – antiquo*. Auch den Nachfolger kann und hat der hohe Magistrat vorzuschlagen, oder er kann bei Gefahr den *dictator* ernennen. Falls in der geschichtlichen gegebenen Lage dies unmöglich wird, sorgt das ius publicum für eine Sonderlösung als Ersatz, durch das *interregnum* des Senates.

Die vierte, echt und speziell römische Befugnis des Magistrats war die iurisdictio, durch eigene Worte Rechtsregeln für geltend, Versprechungen für bindend, Machtbefugnisse vom Staat anerkannt zu erklären. Ursprünglich wurden bei diesen Akten die drei heiligen Wörter, von kultischer Bedeutung, *do, dico, addico,* benützt, die mit dieser rechtschaffenden Bedeutung nur im Amt, nur an bestimmten Tagen und an bestimmten Orten zu gebrauchen waren. Die Römer hatten darauf Wert gelegt, die amtlichen Handlungen auch durch Äußerlichkeiten unverwechselbar als solche kundzutun. Durch "do" wird Macht übertragen: dem Richter, dem Vormund, usw.; durch "dico" Inhalt des Rechtes kundgetan, mit "addico" die Macht über eine strittige Sache, schuldige Person oder ein sonst privates Besitztum jemandem zugesagt. Diese Befugniss der Jurisdiction hat die Welt mit dem ersten "ius gentium", dem praetorischen Rechtssystem, so mit der Gestaltung des privaten Prozesses wie auch des Amtsverfahrens bereichert. Alles das zwecks des inneren Friedens und der Rechtssicherheit, also *ad statum rei Romanae spectans*, dabei jedoch auch für *utilitatem singulorum* sorgend.

Eine andere Teilung der Staatsmacht besteht in Rom zwischen den Machttragenden Körperschaften und den Magistraten, wobei gewisse Entscheidungen nur von allen Machtfaktoren zusammen geschehen können. Neben der Entscheidungsbefugnis der Magistrate im Einzelfall steht die Beratungs- und Meinungsäußerungskompetenz des Senates, und in den Hauptfragen

– sowie in Einzelfällen, wie auch bei Machterteilung oder Gesetzesannahme – hat das entscheidende Wort die organisierte und unter sakraler Überwachung tagende Gesamtheit der Quirites, die *comitia*. Jede Befugnis zur Errichtung öffentlicher Tätigkeiten stammt von einem dieser ersten Gewaltausübenden. Sie können Hilfspersonen benützen, Ausschüsse zu Untersuchungen bilden, Sondermagistrate einsetzen, öffentliche Pflichterfüllung überprüfen, über Staatsvermögen entscheiden, all das unter gegenseitiger Kontrolle.

Die bewusste Einheit des imperium und andererseits die Vielfalt der Staatsgeschäfte, der öffentlichen Angelegenheiten führte zur Entwicklung mehrerer Vertrauensposten und mehrerer Spezalbefugnisse. Das wurde einmal durch die Kollegialität erreicht: die beiden Konsule hatten durch die Praetur die Möglichkeit, die Zahl der *collegae minores* zu heben und diesen Sondergebiete der Verwaltung zuzuordnen. Ferner trennte man die Kompetenzkreise in praxi: Heeresleitung, Stadtleitung, Iurisdictionsgewalt über Römer und über Fremde. Auch die territoriale Machtabgrenzung hat mit der Errichtung der ersten Provinzen begonnen. Alles dieses brachte die Erweiterung der Intercessionsmöglichkeit, der gegenseitigen Kontrolle mit sich. Ohne das Prinzip der einheitlichen Staatsgewalt fallen zu lassen, hatten diese Neuerungen die Effektivität der Staatsorgane erhöht.

Eine weitere, wenn auch quellenmäßig schwieriger nachweisbare Verschiebung der Machtbefugnisse geschah in Zeiten der Republik zwischen den anfangs fast allmächtigen Priesterkollegien und den Magistraten, zu Gunsten der Letzteren. Das der *rex* wenigstens ebenso sakrale Befugnisse hatte, wie auch das imperium ausübte, zeigt nach seiner Entmachtung die Erhaltung des *rex sacrorum*. Zu beachten ist die Rolle der *pontifices* in der Bewahrung der Formel und in der Auslegung des Rechtes. Auch die späten sacralen Bestimmungen bei Verfassungsänderungen, der Schutz der Tribunen, die Ausübung gewisser sacral bestimmter Arten der Todesstrafe, (gegen die Vestalin, gegen Vatermörder, die Abstürzung vom Felsen). Langsam verschwinden zwar, mit entschwindender Religiosität, die sakralen Elemente des Staatsrechts, aber latent sind sie im Senat noch bis zur Kaiserzeit präsent und gehen dann in den Kaiserkult über.

Umso interessanter finde ich diese Beweglichkeit der Entwicklung des Rechtssystemes in beiden Gebieten, publicum und privatum, da nach römischer Auffassung *ius* sicher stabil, statisch geartet war. Ergänzungen, Änderungen ließ man nur zögernd, ungern zu. Recht soll Sicherheit repräsentieren, berechenbar sein. Anstatt neue Texte zu schaffen, die vielleicht präziser gewesen wären, hatte man eher Worte umdeutet. *Glans pro fructu, arbor pro*

vitibus, tignum pro lapidibus, trinoctium sind dafür einige wenige Beispiele. Bei den Privatabkommen gilt lange *dictum promissum*, wonach man nur für klare Versprechen hafte: die andere Partei soll aufpassen, *vigilanter* verfahren (das römische Civil – nicht Privat, sondern echt römische – Recht schützt nur diejenigen, die hellwach sind!).

Mit der Regelung und dem Schutz des Zusammenlebens, der gemeinsamen Interessen, also mit dem ius publicum beginnt das römische Recht. Für die Privatsphäre gielt nicht die magistratuale, sondern die *patria potestas*. Wie im Staat der Imperator, so ist in der Familie der römische Bürger als Vater Herr über Leben und Tod. Die *potestas* gilt innerhalb der Grenzen des *heredium*, sowohl über Blutsverwandte, wie auch über sich frei Anschließende *(clientes)* oder über mit List oder Gewalt Eingedrungene Personen. Falls ein solcher Eindringling getötet wurde, *"iure caesus esto"*.[11] Als dann soziale Unterschiede die eigene Vollziehung der Privatrechte nicht mehr immer genügend sicherten, hat der Staat seine Hilfe dem ansuchenden Privatmann angeboten, im Rahmen des Zivilprozesses, strikt die Privatautonomie beachtend.

Der Bürger kann sich gegenüber einem andern Bürger nur selbst binden: diese Bindungen gelten unter ihnen und sollen dem *fides* gemäß eingehalten werden. Die Bindung kann aber auch sakrale Formen annehmen und in diesem Fall verstoßt das Nicht-Einhaltern des Versprechens gegen die Götter, dadurch gegen die Interessen der Gemeinde. So wird die formale Bindung unter Bürgern Gesetz: *lex privata*, und deren Einhaltung auch Sache des Gemeinwohles.

Ius publicum und ius privatum sind von Beginn an zwei getrennte Gebiete. Weite Teile der Privatsphäre fallen nicht unter die Regelung des ius: der Staat mischt sich in Privatangelegenheite nur zögernd und ungern ein.

Prinzip des ius publicum: *salus rei publicae suprema lex*. Keine Regel wird angenommen, keine Einzelhandlung der Magistrate gutgeheißen, die nicht dieser höchsten Forderung entspricht. Alle Privatinteressen, sogar der Schutz des Lebens treten vor dem Gemeinwohl zurück. Prinzip des ius privatum: *honeste vivere, neminem laedere, suum cuique tribuere*. Diese Forderungen stehen im Einklang mit den mores maiorum, welche zu folgen der Bürger verpflichtet ist, wobei er in dieser Hinsicht unter der ethischen Kontrolle des Staates (des censors) steht.

Öffentliche Pflicht der *fides*, private Pflicht der *mores* laufen am Ende auf nicht juristisch faßbare Kategorien hinaus. Ständiges und bestimmendes Element des römischen Rechts war das ethische Element: der freie Konsens

[11] XII Tab. II.12.

mit den Forderungen des Zusammenlebens, die freie Annahme der Pflichten, die Solidarität der Bürgergemeinde unter einander. Mit der Entwicklung des Systems tritt diese moralische Seite der Normen immer ausgeprägter in den Vordergrund.

Das könnte dazu führen, den Rechtshistoriker zum Schluß zu leiten, daß das rüde und strenge Gebäude des Rechts sich mit der Zeit verfeinert, ethisch sensibel wird. Doch soll sich der Rechtstheoretiker von so einem voreiligen Schluß hüten! Es gilt Jherings Mahnung: Rechtsregeln sind Aufzeichnungen in letzter Minute über schwindendes ethisches Gefühl der Gemeinde! Eher eine Minderung, nicht ein Wachstum des Morals läßt sich durch diese Entwicklung geschichtlich feststellen! Und das ist auch eine Regel, die bis heute immer wieder erkannt werden kann! Von Tierschutzpflicht bis zur Ahndung der Brutalität in der Familie oder Vorschrift der Erhaltungspflichte Eltern oder Kindern gegenüber weisen nicht auf wachsendes Moral der Gesellschaft hin, sondern zeugen für deren Verfall.

*

Bruchstücke sind da aufgezeigt von den Treffpunkten der Rechtsphilosophie und des römischen Rechts. Sie sollen zu Ehren des mit dieser Festschrift bedachten Kollegen und Freundes aufgezeichnet sein. Sie beweisen, daß wir auf verschiedenen Schienen, doch immer parallel demselben Ziele zustreben. Wir wollen das Recht erforschen, lehren, kundgeben. Damit wollen wir der Gesellschaft, der Ordnung, dem Frieden und der Wahrheit dienen. Ich freue mich an der Ehrung teilnehmen zu können! Mit Dank tue ich das, dem Kollegen gegenüber, der mir bei dem Aufbau des Rechtsstudiums an der Katholischen Universität ein treuer und stabiler Gefährte war. Soll ihm seine wissenschaftliche und seine Lehrtätigkeit noch viel Freude und Erfolg bringen, mit neuen und tieferen Einblicken in die Welt der *philosophia perennis*!

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Abbreviations: Bevezetés = Introduction; bőv. = enlarged; Előszó = Preface; előzetes = advanced; jav. = corrected; jelentősen átdolg. = thoroughly rev.; kiad. = edition; különszám = special issue; különszámi függelék = Appendix to; társszerk. = co-ed. with; Utószó = Postface; újrany. = reprint; in notes: dc = dust cover; Hb = hard bound; Pb = paperback. In case of reviews in Hungarian, authors' names start with first names. Signs "<", "=" and ">", relating to the next title, signal whether it is enlarged, equal, or abbreviated, as compared to the former title.

[13] [*The main systems of legal education today*] {B/5 Pb 1–4} {legal education; theoretical & historical subjects in law curricula} An overview of the ways law is taught by university faculties in the contemporary world. Surveyed are: institutional network & profile, admission, forms of education, subjects in theoretico-historical foundations & positive law, alternativity & optionality of, as well as specialisation in & grades of the studies, forms & the discipline of participation, and examination. Introduction [ch. I] is followed by country reports [ch. II] from the socialist orbit (Soviet Union, Bulgaria, Czechoslovakia, Yugoslavia, Poland, German Democratic Republic, Romania, with notices on Albania, Korea, Mongolia, Vietnam, China & Cuba) [§1], the Civil Law (Austria, Belgium, Finland, France, Germany, Italy, Sweden, Mexico, with notices on Argentina & Venezuela) [§2A], the Common Law (Great Britain with England & Scotland, USA, Canada with Quebec, & South Africa) [§2B], as well as from the Afro–Asian countries (Egypt, Philippines, India, Israel, Japan, Lebanon, Saud-Arabia, with notices on Ghana, Liberia, Kenya, Nigeria, Rhodesia, Sierra Leone, Sudan, Tanzania, Uganda & the Malgash Republic) [§2C]. The bibliography [ch. III] is followed by concluding remarks on the issues surveyed [ch. IV].

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[15] [*Codif*] {B/5 Hb 13–24, ISBN 963-15-6012-7} {codification: universal history & theory, definitions, types & functions; rationalisation of law} Introduction; HISTORICAL MANIFESTATIONS OF THE IDEA OF CODIFICATION Early forms (Antiquity), Early forms (the Middle Ages), Trends in the Enlightened Absolutism, Classical type (Continental codes in the service of bourgeois transformation), Attempts (Common Law), Striving for (Afro–Asian countries), New ambitions (Socialist law); TYPES & DEVELOPMENT OF CODIFICATION Possibility of a general concept of codification, Rationalization as the motive force of codification, as well as Types of codification in codification development, Codification in present-day development (Concluding remarks); w/ Index, as well as Indexes of normative materials & of names.

[16] [*Kodif2*] {B/5 Hb 9–18, ISBN 963-05-7886-7} w/ Utószó = 2002/a 379–403

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[23] {*Ténym2*} {B/5 Pb 7–17, ISBN 963-05-7826-3} & {B/5 Hb 7–17, ISBN 963 05 7974 X} w/ Utószó =2000/c 177–196

[24] {*LéPh*} {B/5 Hb/dc 1–4, ISBN 963-462-848-6 / ISSN 1218-0610} {law & philosophy: law as practice, technique, logic, experience, history: concepts, institutions, validity, morality, culture, preamble, presumption, fiction, judicial process, legal reasoning; ontology, macrosociology, anthropology of law; Leibniz, Kelsen, Lukács} Photomechanical reprint of papers from 1970 to 1992 mostly in English, some in German or French: Foreword =1994/c 1–4; LAW AS PRACTICE 'La formation des concepts en sciences juridiques' [1970/b] 7–33, 'Geltung des Rechts – Wirksamkeit des Rechts' [1978/b] 35–42, 'Macrosociological Theories of Law' [1983/a] 43–76, 'Law & its Inner Morality' [1984/b] 77–89, 'The Law & its Limits' [1985/b] 91–96; LAW AS TECHNIQUE 'Domaine »externe« & domaine »interne« en droit' [1983/b] 99–117, 'Die ministerielle Begründung' [1977/b] 119–139, 'The Preamble' [1970/a] 141–167, 'Presumption & Fiction' [1988/b] 169–185, 'Legal Technique' [1988/a] 187–198; LAW AS LOGIC 'Moderne Staatlichkeit und modernes formales Recht' [1982/b] 201–207, 'Heterogeneity & Validity of Law' [1986/d] 209–218, 'Leibniz & die Frage der rechtlichen Systembildung' [1973/d] 219–232, 'Law & its Approach as a System' [1975/a] 233–255, 'Logic of Law & Judicial Activity' [1982/a] 258–288, 'Kelsen's Pure Theory of Law' =1988/c 289–293, 'The Nature of the Judicial Application of Norms' =1992/b 295–314; LAW AS EXPERIENCE 'The Socially Determined Nature of Legal Reasoning' [1971/b] 317–374, 'The Ontological Foundation of Law' [1983/c] 375–390, 'Is Law a System of Enactments?' [1984/a] 391–398, 'The Uniqueness of National Legal Cultures' [1992/c] 399–411, 'Institutions as Systems' [1991/b] 413–424; LAW AS HISTORY 'From Legal Customs to Legal Folkways' [1981/c] 427–436, 'Anthropological Jurisprudence?' [1985/a] 437–457, 'Law as a Social Issue' [1985/c] 459–475, 'Law as History?' [1986/a] 477–484, 'Rechtskultur – Denkkultur' [1988/d] 485–489; w/ Curriculum Vitae & Bibliography, as well as Index & Indexes of normative materials & of names.

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[28] [*JogiElm*] [Legal theories, legal cultures: Surveys & overviews in legal theory & comparative law] {A/5 Hb xv–xix, ISBN 963-462-878-8 / ISSN 0865-0349} {legal theory & comparative law} Előszó =1994/d xv–xix; JOGFILOZÓFIA A jog elméletei {egyebek közt 'A jogi gondolat' [1967/b] 5–9, 'A finn jogelmélet újjászületése' [1980/a] 26–38}, Természetjog, jog és erkölcs, Jogi formalizmus, joglogika {egyebek közt 'Lengyel tanulmányok a joglogika köréből' [1971/d] 82–87, 'A joglogikai vizsgálódás lehetőségei az újabb megközelítések tükrében' [1971/e] 90–106, 'Kodifikáció – joghézag – analógia' [1969/e] 107–113}, Jog és társadalom {egyebek közt 'Henri Lévy-Bruhl és a jogszociológia' [1966/a] 148–155, 'A jog és a társadalom néhány kérdése – skandináv megvilágításban' [1972/a] 158–167, 'A jogpolitika tudományos rangja felé' [1978/g] 168–171}; A JOG ÖSSZEHASONLÍTÓ ELEMEI {egyebek közt 'Összehasonlító jog és társadalomelmélet' [1966/b] 181–185, 'Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező' [1980/b] 191–203, 'Tehetetlenség és kölcsönzés mint egyetemes jogfejlesztő tényező' [1970/g] 203–208, 'A »Jogforrás és jogalkotás« problematikájához' [1970/c] 215–222, 'A modern formális jog és kultúrája: kihívások, buktatók' [1988/d] 222–225, 'Átalakulóban a jog?' [1980/d] 226–236, 'A jog és korlátai' [1985/b] 236–250, 'A kódex és eszméjének formálódása Nyugat-Európában' [1970/d] 254–261, 'A törvényhozó közbenső döntése és a joghézagproblematika megoldása a francia jogfejlődés tükrében' [1971/c] 262–265}; JOGI KULTÚRÁK, JOGCSALÁDOK Északi jog, Dél-amerikai jog, Skót jog, Szocialista jog {egyebek közt 'A jogmeghatározás kérdése a '60-as évek szocialista elméleti irodalmában' [1979/c] 347–359}, Angol–amerikai jog (Angol jog, Az Egyesült Államok joga, Indiai jog), Egyéb jogok (Izraeli jog, Távolkeleti jog {egyebek közt 'Bevezetés a japán jogba' [1968/b] 450–456}, Afrikai jog); Tárgy-, Jogforrás-, Névmutató.

[29] [*Transit*] {B/5 Hb/dc 7–9, ISBN 963-463-011-1 / ISSN 1218-0610} {Transition, rule of law, civil disobedience, statutory limitations} 'Preface' [1995/d] 7–9; 'On Vitality in the Region' [1995/b] 10–18; NO-LAW 'On Stalinism' [1995/c] 21–22, 'Past & Present' [1985/c] 23–27, 'Attempts at Reform from Within (La séparation des pouvoirs)' [1984/c] 28–37, 'What is Needed to have Law?' [1989/a] 38–61, 'Marxism in Service' [1993/a] 62–68; TRANSITION 'The *sui generis* Nature of the Challenge' [1993/b] 71–77, 'Trumbling Steps of the New Constitutional State' [1992/e] 78–89; SKIRMISHES AND THE GAME'S RULE 'Crime, not Civil Disobedience' [1990/b] 93–96, 'Fragility of the Constitutional Establishment' [1990/c] 97–102, 'Troubles Surrounding the Functions of Law' [1991/g] 103–106, 'Indivisibility of the Law & Rule of Law' [1991/h] 107–110, 'Civil Disobedience (Pattern with no Standard?)' [1991/c] 111–118; COMING TO TERMS WITH THE PAST 'On Setting Standards' [1990/a] 121–128, 'Do we have the Right to Judge the Past?' [1991/e] 129–135, 'The Dilemma of Enforcing the Law' [1992/a] 136–143, 'Failure on Account of Constitutional Considerations?' [1994/a] 144–155; RULE OF LAW 'Varieties of Law & Rule of Law' [1993/c] 159–173; w/ Bibliography, Indexes of names & of normative materials, Index.

[30] [*Jogáll*] {*Our transition to rule of law*: Paradoxes, dilemmas, unresolved questions} {B/5 Hb, ISBN 963 03 4566 8 / ISSN 1417-7285} {transition, rule of law, civil disobedience, statutory limitations, borrowing legal patterns} ELŐZMÉNYEK 'Múlt és jelen' [1985/c] 9–16, 'Az államhatalmak szétválasztása' [1984/c] 17–23, 'Mi kell a joghoz?' [1989/a] 25–49; ÁTMENET 'A kihívás egyedisége' [1993/b] 53–58, 'Egy kezdő jogállam botladozásai' [1992/e] 59–69; JÁTÉKSZABÁLYOK, VITÁK 'A taxisblokád megítéléséről' [1990/b] 73–76, 'Törékeny jogállamiságunk' [1990/c] 77–82, 'Szerepzavar a jog funkciói körül' [1991/g] 83–86, 'Jog és jogállamiság oszthatatlansága' [1991/h] 87–91, 'Polgári engedetlenség: minta mérték nélkül?' [1991/c] 93–100; SZEMBENÉZÉS A MÚLTTAL 'A mértékállítás szüksége' [1990/a] 103–110, 'Szabad-e ítélnünk a múltról?' [1991/e] 111–119, 'A jogérvényesítés dilemmája' [1992/a] 121–127, 'Igazságtétel jogállamban: alkotmányos kudarcra ítélten?' [1994/a] 129–136; JOGÁLLAMISÁG 'A jogállamiság és joga' [1993/c] 139–154, 'Alkotmánybíráskodás mint »láthatatlan alkotmány« írása' [1998/d] 155–159; MINTAKÖVETÉS 'Újsütetű jogállamiság: a kölcsönmináták bája és esendősége' [1998/e] 163–165, 'Jogi kultúrák – összehasonlító megközelítésben' [1997/a] 167–175, 'A jogváltás paradoxonai' [1996/b] 177–186, 'Jogtudományunk

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[33] {*Lect*} {B/5 Hb, ISBN 963 05 7662 7 / ISSN 1218-0610} {methodology of thinking in law: legal development, systemic ideal, conceptualisation, fact, notion, meaning, technique} Preliminary considerations; METHODOLOGICAL DIRECTIONS IN THINKING Exemple of legal development (Greek, Roman, Enlightened absolutism, French *Code civil*), Example of geometry (Euclidean, Bolyai/Lobachevsky, Einstein's revolution), Example of thinking (Autonomy: New Testament, Cicero, Augustine, Talmud, Orthodox Christianity. Modern "irrationalism", Beyond conceptual strait-jackets, Patterns of thought, patterns of law; Heteronomy: Thomas Aquinas, Grotius, Leibniz; Dilemma of the evolution of thinking); SCIENCE-THEORETICAL QUESTIONS RAISED BY THE PHILOSOPHY OF HISTORY ; PARADIGMS OF THINKING The paradigm of paradigms (Conventionality, Cultural dependence, Nature of paradigms); Basic notions (Need for a change of paradigms, False alternative of objectivism & subjectivism, Facts, Notions); DILEMMAS OF MEANING Theories (Lexicality, Contextuality, Hermeneutics, Open texture, Deconstructionism); Social construction of meaning (Speech-acts, Social institutionalisation); Autopoiesis & systemic response; PARADIGMS OF LEGAL THINKING Nature of law (Law as process, Multifactorality, Law as building from acts); Nature of legal thinking; Concluding thoughts. APPENDIX 'Law & its Approach as a System' [1975/a] 221–230, 'Is Law a System of Enactments?' [1984/a] 231–237, 'Institutions as Systems' [1991/b] 238–251, 'Legal Technique' [1988/a] 252–266; w/ Subject index & Indexes of normative material & of names.

[34] {*Parad2*} {B/5 Hb, ISBN 963 361 558 8} FÜGGELÉK 'A racionális jogszemlélet eredendő ambivalenciája' [2000/a] 316–329, 'A jog és rendszerszerű megközelítésének történetisége' [1975/a] 331–342, 'Leibniz és a jogi rendszerképzés kérdése' [1973/d] 343–358, 'A relevancia kiválasztó szerepe' [1989/d] 359–362, 'Az intézmény mint rendszer' [1991/b] 363–386, 'A jog belső szerkezete' [2002/b] 387–397, 'Ismereteink korlátozottsága és nyelvünk határozatlansága' [1989/d] 398–407, 'Vajon tételezések rendszeréből áll-e a jog?' [1984/a] 408–417, 'Autopoiesis és a jog bírói újratermelése' [1987/a] 418–430, 'Jogtechnika és jogdogmatika' [2002/c] 431–449, 'Paradigmaváltás a jogi gondolkodásban' [2003/b] 450–466, 'Célok és eszközök a jogban' [2003/c] 467–479.

[35] {*JogTárselm.*} {*Towards a social science theory of law*} {B/5 Pb ix–xi, ISBN 963 03 9286 0; 963 361 300 0; 963 361 371 X / ISSN 0865-0349} {social science theory of law: Marxism, legal formalism, making & applying the law, rationality & morality in law, system & policy

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[36] {*JmFoly*} [*Law as process*] {12,7x19,7cm Pb 11–13, ISBN 963 379 729 2; 963 361 321 8 / ISSN 1219–1485} {law as process: Marxism, formalism, ontology, validity, history, anthropology, technique, judicial process, Kelsen, limits} Előszó =1999/m 11–13; ELMÉLETI HAGYATÉK 'Jogfilozófia Közép- és Kelet-Európában' [1999/d] 15–20, 'A marxizmus jogelméletéről' [1993/a] 21–41; MODERN FORMÁLIS JOG 'A modern formális jog és kultúrája: kihívások, buktatók' [1988/d] 43–49, 'Kelsen tiszta jogtana – tegnap, ma és holnap' [1988/c] 50–59; JOGI LÉT, JOGI ÉRVÉNYESSÉG 'Jogontológia' [1999/h] 61–66, 'A jog és érvényessége: Ontológiai megfontolások' [1986/d] 67–85, 'Érvényesség' [1999/i] 86–90, 'Visszaható hatályú szabályozás' [1999/f] 91–95; JOG, TÖRTÉNELEM 'Jog és történelem: A jog historikus megközelítéséről' [1999/g] 97–102, 'A jog mint történelem' [1986/a] 103–119; ANTROPOLÓGIAI ALAPOK 'Népi jogszokástól a jogi népszokásig' [1981/c] 121–138, 'Antropológiai jogelmélet? Leopold Pospíšil és a jogfejlődés összehasonlító tanulmányozása' [1985/a] 139–208; JOGTECHNIKÁK 'Kodifikáció' [1999/e] 209–213, 'A jogi technika' [1988/a] 214–233, 'Vélelem és fikció mint a jogtechnika eszközei' [1988/b] 234–270; A JOGALKALMAZÁS KÉRDŐJELEI 'Kelsen jogalkalmazástana: Fejlődés, többértelműségek, megoldatlanságok' [1986/c] 271–304, 'Miből is tevődik össze a bírói eljárás?' [1994/b] 305–322, 'A jogi normaalkalmazás természete: Tudomány- és nyelvfilozófiai megfontolások' [1992/b] 323–359; KITEKINTÉS 'A jog és korlátai: Antony Allott a hatékony jogi cselekvés korlátairól' [1985/b] 361–394, 'Európai integráció és a nemzeti jogi kultúrák egyedisége' [1992/c] 395–409; Tárgy-, Jogforrás-, Névmutató.

[37] {*JmLog*} [*Law as logic, system and technique*] {B/5 Ph 7–11, ISBN 963 9296 20 1 / ISSN 0865-0349} {law as logic, system, technique; juridicial reasoning, *exposé des motifs ministériel*, preamble} A logikaként, rendszerként és technikaként felfogott jog belső ellentmondása [2000/e] 7–11; A JOG MINT LOGIKA 'A jogi okfejtés társadalmi meghatározottságáról' [1971/b] 15–53, 'A joglogikai vizsgálódás lehetőségei' [1971/e] 54–57; A JOG MINT RENDSZER 'A kódex mint rendszer: A kódex rendszerjellege és axiomatikus felfogásának lehetetlensége' [1973/b] 61–93, 'A jog és rendszerszemléletű megközelítése' [1975/a] 94–105; A JOG MINT TECHNIKA 'A törvényhozás és felelős tudatossága: A miniszteri indokolás rendszerének elvi kérdései' [1977/b] 109–141, 'A preambulumok problémája és a jogalkotási gyakorlat' [1970/a] 142–206; Tárgy-, Jogforrás-, Névmutató.

[38] {*Útker*} [*Searching for a path* Unpublished essays] {B/5 Ph 1–3, ISBN 963-361-232-2 / ISSN 00865-0349} {ontology & epistemology of law; positivism vs. sociology in law; legal logic; definition of law; concepts in law; nature of judicial process; legal reasoning; comparative law; historical alternatives in legal development; legal tradition; Marxism; Australian legal theory} A collection of the author's papers from between 1964 and 1994, bound to remain unpublished mostly for timely political restrictions: Előszó 1–3; 'A magatartási szabály és az objektív igazság kérdése' [Rule of behaviour & the question of objective truth, 1964] 4–18, 'A jog meghatározásának néhány kérdése az ausztrál jogelméletben' [Some questions of the definition of law in the light of the Australian legal theory, 1964] 19–48, 'A jog meghatározásának néhány problémája a szocialista jogelméletben' [Some problems of defining law in the socialist legal theory, 1966 w/Discussion] 49–59 + 59–64, '»Jogforrás és jogalkotás«' [»Sources of law & law-making«: debate on VILMOS PESCHKA's thesis at the Hungarian Academy of Sciences, 1968] 65–72, 'A jogi fogalomképzés pozitivisztikus és szociologisztikus aspektusának néhány kérdése' [Some questions relating to the positivistic & sociologistic aspects of conceptualisation in law, 1968 w/Discussion] 73–86 + 86–88, 'A jogi okfejtés társadalmi alapjai' [The social bases of legal reasoning, 1971] 89–93, 'A jog alapvető kettősségéről' [On the basic duality of law, 1972?] 94–96, 'Összehasonlító módszer és jogelmélet' [Comparative method & legal theory, 1973?] 97–101, 'A rendszerek logikájához (*A Házakadás* második, paradox jelentésrétege' [To the logic of systems (as manifested by the 2nd, paradoxic layer of meaning of the film *Snow-storm*), 1974] 102–103, 'A jog' [Law, 1983?] 104–109, 'Politikum és jog ütközése? (A törvényelőkészítés kérdőjelei) [A clash of politics with law? question-marks relating to preparatory works to legislation, 1984] 110–117, 'A modern formális jog – önnön csapdájában' [Modern formal law – in self-captivity, 1984] 118–123, 'Fogalomalkotás és reflexivitás' [Reflexivity of conceptual building, 1985?] 124–126, 'A jog és történelmi alternatívái' [The law's historical alternatives, 1986?] 127–131, 'A Theory of the Judicial Process' [1987] 132–137, 'Az ellentmondás természete' [The nature of contradictions, 1989] 138–139, 'Marxizmus és hiteles tudás' [Marxism & authentic knowledge, 1989] 140–143, 'A hagyomány talajáról' [From the soil of tradition, 1991] 144–148, 'Bírálati vélemény SOLT KORNÉL *A jog, a valóság és a nyelv* (1992) című dolgozatáról' [Criticism of KORNÉL SOLT's *Law, Reality & Language* (1992), 1994] 149–157; Tárgy-, Jogforrás-, Névmutató.

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