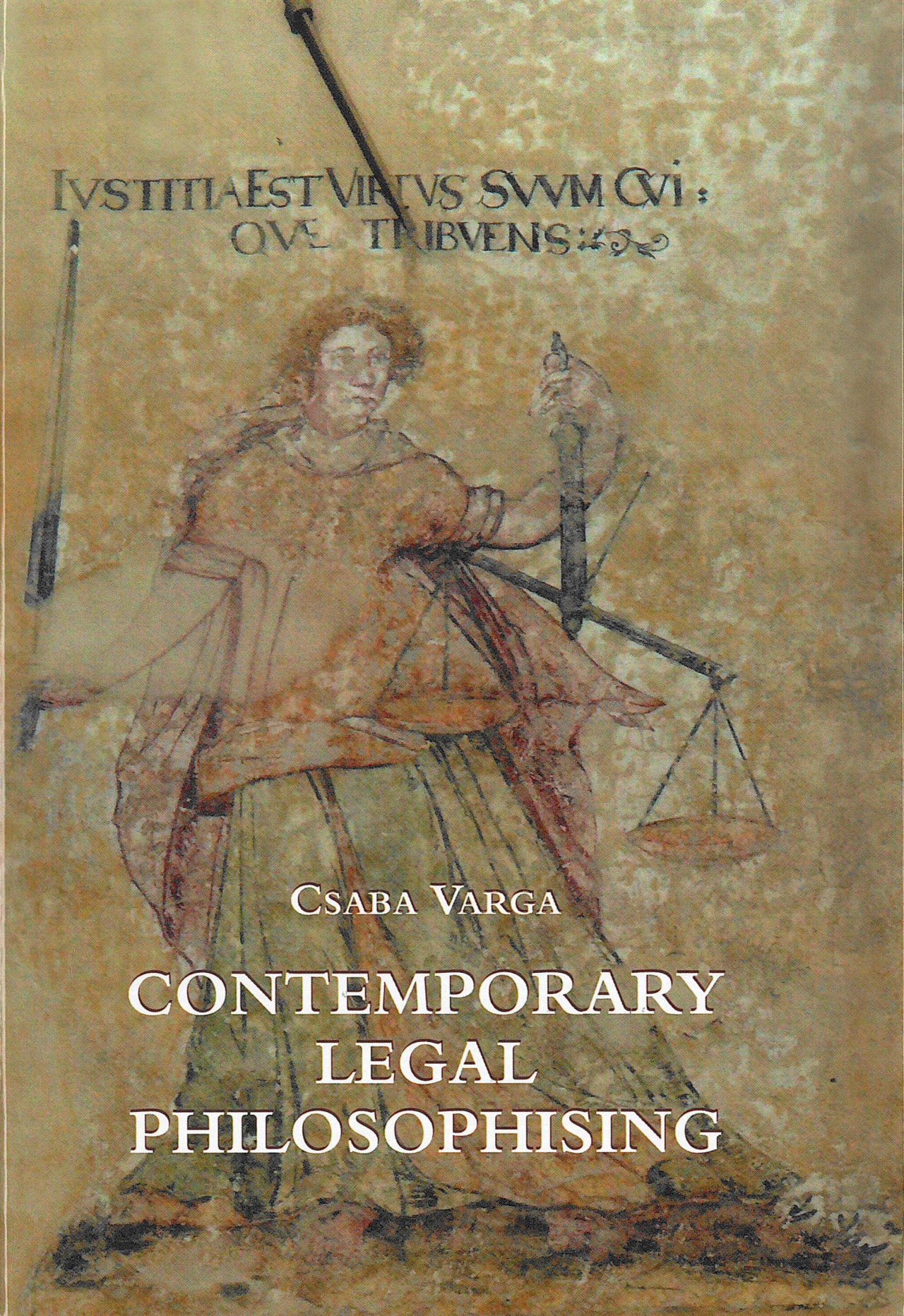

Csaba Varga

CONTEMPORARY LEGAL PHILOSOPHISING

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PHILOSOPHIAE IURIS
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CONTEMPORARY LEGAL PHILOSOPHISING

Schmitt, Kelsen, Lukács, Hart, & Law and Literature,
with Marxism's Dark Legacy in Central Europe
(On Teaching Legal Philosophy in Appendix)

CSABA VARGA

SZENT ISTVÁN TÁRSULAT
Az Apostoli Szentszék Könyvkiadója
Budapest, 2013

A kötet részben az OTKA K 62382. számú projektuma finanszírozásának köszönhetően készült

Cover:
Allegoric Justice (1625) on the Mural of St. James' Church
at Lőcse/Leutschau/Leutsovia [now Levoča, Slovakia]
(photo by the author in 2008)

Back cover:
Reichskammergericht Wetzlar
(Conspectus Audientiae Camerae imperialis)
[Audience at the Imperial Chamber Court] (Frankfurt am Main, 1750)
from the Städtische Sammlungen Wetzlar

ISBN 978 963 277 ??? ?
ISSN 1218-0610

Szent István Társulat
1053 Budapest, Veres Pálné utca 24.
www.szit.katolikus.hu
Responsible publisher: Dr. Huba Rózsa
Responsible manager: Olivér Farkas
Printed and bound by Prime Rate

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HISTORICAL BACKGROUND

PHILOSOPHY OF LAW IN CENTRAL AND EASTERN EUROPE

A Sketch of History*

Central and Eastern European philosophy of law started its independent life in the second half of the 19th century by gradually distinguishing itself from the trends prevailing in the region, mainly German and Austrian ones, but also from French and Italian influence. Its formation bore the imprints of natural law, dominant in Europe at the time. In Central Europe this was primarily transmitted through ANTON MARTINI's book on the principles of natural law.[1] IMMANUEL KANT's and GEORG WILHELM FRIEDRICH HEGEL's philosophies contributed to their influences. For his contemporaries, HEGEL was the main symbol of philosophical protest against officialdom. He opposed the German historical school's respect for the past, with GUSTAV HUGO's textbook on natural law in 1798 as its first expression.

Under the guise of natural law, conservative ecclesiastical actions competed with enlightening secularisation, feudal patriarchalism with contractual theories (designed for confirming or rejecting privileges), and refutation of the *ius resistendi* with approval of revolutionary republican ideas. Political use of a CHRISTian natural law competed with the fashionable science of the law of reason (called as *Vernunftrecht*), launched at Budapest.[2] By that time, national languages had already gained ground in legal philosophy,[3] replacing Latin and German.

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* In its first version, 'Central and Eastern European Philosophy of Law' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 98–100 [Garland Reference Library of the Humanities, 1743], enlarged for *Acta Juridica Hungarica* 41 (2000) 1–2, pp. 17–25.

[1] [Karl Anton von Martini] *Erklärung der Lehrsätze über das* Naturrecht des Freyherrn von Martini, hrsg. Scheidleinschen Vorlesungen, I–II (Wien: [auf Kosten des Hrsg.] 1787).

[2] Tivadar Pauler *Bevezetés az észjogtanba* [Introduction to the law of reason] (Pest: Emich Gusztáv 1854) iv + 143 pp. {& <http://books.google.com/books?id=q4ALAAAAYAAJ&printsec=frontcover&hl=hu#v=onepage&q=&f=false>}.

[3] E.g., in Hungary by János Sz. Szilágyi *Természeti törvénytudomány* (Jus naturae) [Science of the law of nature] (Szigethen: máramarosi Gotlieb Antal' betűivel 1813) 196 pp. [Tételő (practica) filosofia második része]. It is to be noted that contemporary magisterial works have also appeared in local translation soon. See, e.g., Jeremiás [Jeremy] Bentham *Ál-okoskodási módok törvényhozási kérdésekben* [Sham reasoning in issues of legislation] trans. János Gindery

In Central Europe, the last decades of the century signalled the formation of a positive social theory based on the ideal of science. An artificially built view of history, rooted in the early developments of historical jurisprudence, appeared in, e.g., ÁGOST PULSZKY's reconsideration of Sir HENRY MAINE's *The Ancient Law* in his Hungarian translation published in 1875,[4] or ŽIVOJIN M. PERIČ's evolutionism published in Serbia in 1908,[5] just as the simplistic materialist theory which reduced law to the act of comprehension (e.g., JULIUS PIKLER in Budapest in 1897).[6] Perhaps the most successful and lasting theory was the psychological theory of law proposed in 1900 by LEO N. PETRAZYCKI, a Polish professor in St. Petersburg at the time. Reasoning from the motives of human behaviour, this theory based its explanation on the individual legal consciousness as a phenomenological fact.[7]

The reactions were varied from flat refutation by arguments of natural law in 1897 by ALEXANDER ESTERHÁZY in Kaschau[8] to transformation by TOMÁŠ GARRIGUE MASARYK, professor at Prague in 1900. According to him, natural law has to be taken as an ethical maximum to be transformed into positive law as an ethical minimum.[9] FELIX SOMLÓ in Budapest realised in 1910 the need for reconciliation between positivism and moral considerations.[10] RUDOLF

(Pest: [Beimel Nyomda] 1842) 60 pp. {probably taken from *The Book of Fallacies* From unfinished papers of Jeremy Bentham, ed. by a Friend [probably Peregrine Bingham] (London: J. & H. L. Hunt 1824) xi + 411 pp.}.

[4] Ágost Pulszky Jegyzetek [Notes] in Maine *A jog őskora* [The ancient law] (Budapest: Magyar Tudományos Akadémia 1875) xxiv + 443 pp. on pp. 325–443.

[5] Looking at the evolutionist school in jurisprudence by Живојин М. Перић [Živojin M. Perić] *Један Поглед на еволуционнистичку правну школу* [Some observations on the evolutionist school of law] (Belgrade: Српска Краљевска Академија 1907).

[6] Gyula [Julius] Pikler *A jog keletkezéséről és fejlődéséről* [On the emergence and development of law] (Budapest: Politzer 1897) 276 pp. {& <http://mtdaportal.extra.hu/books/a_jog_keletkezeserol.pdf>}.

[7] Лев Иосифович Петражицкий *Введение в изучение права и нравственности* Эмоциональная психология & *Теория права и государства в связи с теорией нравственности*, cf. Leon N. Petrazycki *Law and Morality trans.* Hugh W. Babb (Cambridge, Mass.: Harvard University Press 1955) xlvi + 335 pp. [20th Century Legal Philosophy Series 7].

[8] Sándor Esterházy *A bölcseleti jogtudomány kézikönyve* [Textbook of philosophical jurisprudence] I–II (Kassa: Ifj. Nauer H. / Bernovits Gusztáv nyomása 1897) 468 + 165 pp.

[9] Tomáš Garrigue Masaryk *Právo historické a přirozené* [Historical and natural law] (V Praze: Čas 1900) 43 pp. [Knihovnička Času 9].

[10] Felix Somló 'Maßstäbe zur Bewertung des Rechts' *Archiv für Rechts- und Wirtschaftsphilosophie* III (1910), pp. 508–522 & 589–591. {Cf., for a reprint, Felix Somló *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Akadémiai Kiadó 1999) xx + 114 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris] on pp. 26–40.}

STAMMLER's theory of "rightful law" became the division line in 1902.[11] The recognition of its unsustainability provided inspiration for seeking refuge either in axiology or in logical formalism, as did V. A. SAVAL'SKY in Moscow in 1908,[12] JULIUS MOÓR and FELIX SOMLÓ in Hungary in 1911 and 1914, respectively,[13] as well as PAUL GEORGESCU in Romania in 1939.[14] For this reason, laying the philosophy of the science of positive law on the value-free foundations of jurisprudence became a need of primary importance again. This project followed the patterns of JOHN AUSTIN in London in 1861[15] and KARL BERGBOHM in Leipzig in 1892[16] as well as of SOMLÓ in Budapest in 1917.[17]

In Eastern Europe, in the region dominated by the Byzantine heritage, the orthodox variant of natural law represented the ideological framework. From the beginning of the 19th century, however, rival positions became more and more feverishly formulated within it. These reached from KANTianism[18] to HEGELianism.[19] They included Italian-inspired national self-as-

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[11] Rudolf Stammler *Die Lehre von dem richtigen Rechte* (Berlin: Guttentag 1902) viii + 647 pp.

[12] Василий Александрович Савальский *Основы философии права в научном идеализме* Марбургская школа философии: Коген Наторпб Штаммлер и др [Foundations of legal philosophy in the scientific idealism of the Marburg school of philosophy: Cohen, Natorp, Stammler and others] I (Москва/Moscow: Моск. ун-та 1908).

[13] By Julius Moór, *Stammler »Helyes jogról szóló tana«* [Stammler's doctrine on the rightous law] (Budapest: Pfeifer Ferdinánd 1911) 87 pp. [Magyar Jogászegyleti Értekezések, III (1911. november) 25] and 'A jog fogalma és az anarchizmus problémája Stammler jogphilosophiájában' [Concept of law and the problem of anarchism in Stammler's legal philosophy] *Athenaeum* XX (1911) 4, pp. 1–35; as well as Bódog [Felix] Somló *A helyes jog elméletéről* [On the theory of the rightous law] (Kolozsvár: Ajtai Albert nyomdája 1914) 10 pp. [Erdélyi Museum Egylet Jog- és Társadalomtudományi Szakosztályának kiadványai 1912–13/V].

[14] Paul Al. Georgescu *Conceptul şi ideea dreptului în doctrina lui R. Stammler* [Concepts and ideas of law in R. Stammler's doctrine] (Bucureşti: Tipogr. Române Unite [1939]) iv + 152 pp.

[15] John Austin *The Province of Jurisprudence Determined* (London: J. Murray 1832) xx + 391 + lxxvi pp.

[16] Karl Bergbohm *Jurisprudenz und Rechtsphilosophie* Kritische Abhandlung (Leipzig: Duncker & Humblot 1892) xvi + 566 pp.

[17] Felix Somló *Juristische Grundlehre* (Leipzig: Meiner 1917) ix + 556 pp.; 2nd ed. (Leipzig: Meiner 1927 [reprint by Aalen: Scientia Verlag 1973]) xv + 556 pp.

[18] Spanning from А. П. Кунитцин [A. P. Kunitzyn] *Право эстѣственное* [Natural law] (Санкт-Петербург/Sanktpeterburg 1818) to Богдан Александрович Кистяковский [Bogdan A. Kistyakovskiy] *Философия и социология права* [Philosophy and sociology of law] (Санкт- Петербург: Изд-во Рус. Христиан. гуманит. ин-та 1998) 798 pp. [Русская социология XX века]. Cf. Susan Heuman *Kistiakovsky* The Struggle for National and Constitutional Rights in the Last Years of Tsarism (Cambridge, Mass.: Harvard Ukrainian Research 1998) xiv + 218 pp. [Harvard Series in Ukrainian Studies].

[19] К. Н. Ниеволин [K. N. Niewolin] in the volume II [history of legal philosophy] of the encylopaedia of jurisprudence (Киев/Kiev 1839), according to whom law is "the expression of justice, actualising godly existence in the world of morality."

sertion[20] to positivism in Romania[21] and also in Russia.[22] The ascetic mysticism reminiscent of early CHRISTianity in VLADIMIR S. SOLOVYEV,[23] and LEO TOLSTOY's cry against violence in Russia, presented through IVAN A. IL'YN,[24] were developed. In Russia proper, philosophy of law became accepted only in the last few years of the century. The textbooks of NIKOLAY MIKHAILOVICH KORKUNOV and P. REDKIN in St. Petersburg on the history of legal philosophy,[25] as well as those of PAVEL IVANOVICH NOVGORODTZEV and

[20] By Simeon Bărnuţiu, *Dreptul natural privat* [Private natural law] (Iaşi 1868) and *Dreptul natural public* [Public natural law] (Iaşi 1870).

[21] Petre Th. Missir on legal philosophy and natural law (Iaşi 1904).

[22] Габриэ́ль Феликсович Шершеневич [Gabriel F. Shershenevitch] *Философия права* [Philosophy of law] (Москва: Бр. Башмаковы 1910–1911); cf. also Николай Иванович Палиенко [N. Palienko] *Нормативный характер права и его отличительные признаки* К вопросу о позитивизме в праве [The normative character of law and its special features: on the positivism in law] (Ярославь/Yaroslav: тип. Губ. правл. 1902).

[23] Владимир Сергеевич Соловьев [V. S. Solovyev] *Право и нравственность* Очерки из прикл. э́тики [Law and morality as a terrain of applied ethics] (Санкт-Петербург: Я. Канторович, ценз. 1897) 177 pp. [Юридическая библиотека 14)] & in his *Politics, Law, and Morality* Essays, ed. Vladimir Wozniuk (New Haven: Yale University Press 2000) xxix + 330 pp. [Russian Literature and Thought].

[24] By Иван Александрович Ильин [I. A. Il'yn], on Tolstoy as against communism (1910) as well as 'Понятие права и силы' [Notions of law and coercion] in *Вопросы философии и психологии* (1910) 21 [Кн. 101(2)] 138 pp.

[25] By Николай Михайлович Коркунов, *Лекции по общей теории права* [Lectures on the general theory of law] [(Санкт-Петербург: А. Ф. Цинзерлинг 1886 {1887}) 313 + ix pp.] 8th ed. (Санкт-Петербург: Izd. N. K. Martynova 1908) 354 pp. {General Theory of Law trans. W. G. Hastings (Boston: The Boston Book Company 1909) xiv + 524 pp., 2nd ed. (New York: Macmillan 1922 [reprint Holmes Beach, Florida: Gaunt 1998]) xxviii + 524 pp. [Modern Legal Philosophy Series IV] & *Cours de théorie générale du droit* trad. J. Tchernoff, 2ème éd. (Paris: M. Giard & Brière 1914) 563 pp. [Bibliothèque internationale de droit public]}, *Общественное* права [The social significance of law] (Санкт-Петербург: тип. Р. Голике 1892) 20 pp., *Указ и закон* [Decree and law] (Санкт-Персбург: тип. М. М. Стасюлевича 1894) viii + 408 pp. and *История философии права* [History of legal philosophy] [(Санкт-Петербург: тип. М. Меркушева 1896) iv + 267 pp.] 6th ed. (Санкт-Персбург: тип. М. М. Стасюлевича 1915) vi + 502 pp.; Петр Григорьевич Редкин *Из лекций по истории философии права в связи с историей философии вообще* [From the lectures on the history of legal philosophy, with a look at the history of philosophy in general] I–VII (Санкт-Петербург: тип. М. М. Стасюлевича 1889–1891).

EVGENIY N. TRUBETZKOY in Moscow on natural law,[26] exerted the main influence by their repeated editions.[27]

A regional turning point in how to think about legal philosophy was provoked by the discussions related to FRIEDRICH CARL VON SAVIGNY's work and the historical school of law. These included U. KOLLOTAY in Poland, a number of Serbs, NOVGORODTZEV in 1896,[28] as well as A. TAMOŠAITIS in 1929 in Lithuania.[29] As to the trends born in Russia, the discussion of V. S. SOLOVYEV's teaching on law and morality in 1897[30] and of PETRAZYCKI[31] (by VENELIN GANEV in Sofia in 1914,[32] JERZY LANDE in Krakow from 1916

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[26] Ву П. И. Новгородцев, *История новой философии права* Немецкие учения XIX века [History of the new legal philosophy: German teachings in the 19th century] (Москва 1898, 2nd ed. 1899), *Кант и Хегеъ в их ученiях о правe и государствe* Два типичных постоения в областы философии права [Teachings of Kant and Hegel on law and state: Two typical trends in legal philosophy] (Москва 1901) as well as *Учения новаго времены XVI–XVIII. в.* Лекции по истории философии права [Teachings of the new era in 16th to 18th centuries: Lectures on the history of legal philosophy] 1901), XVI–XIX. *â.* [16th to 19th centuries] (Москва: Книжиое дело 1904; Москва: И. Власов 1910, 2nd ed. 1912) and XVI–*XVIII. в. и* XIX. *в.* [16th to 18th and 19th centuries] 4th ed. (Москва: Высшая Школа 1918); by Е. Н. Трубецкой, *Истории философии права древней* [The history of legal philosophy: ancient] Киев/Kiev 1899), *новой* [new] (Киев 1898) and *новейшей* [modern] (Киев 1896).

[27] Formulated as a rivalry between slavophil and westernist approaches, Anatoliy Nikolaevich Savinov's issue on *The originality of Russian legal philosophy* of the end of the XIXth and the beginnings of the XXth centuries [Diss. in Russian (Rostov n/D 2000) 137 pp.] is raised continusously. Cf. also Andrzej Walicki *Legal Philosophies of Russian Liberalism* (University of Notre Dame Press 1992) 477 pp.

[28] П. И. Новгородцев *Историческая школа юристов* Её происхождения в судьба: Опыт характеристики основ школы Савинии в их соследовательном развитии [The historical school of jurists, their achievement and assessment: characteristic traits of Savigny's school in its subsequent development] (Москва: [n.p.] 1896) 226 pp.

[29] Antanas Tamošaitis *Istoriškoji teisės mokykla Vokietijoje* Istorizmo reakcija prieš racionalizmą XIX šimtmečio pradžioje [diss.] (Kaunas: "Spindulio"B-vės sp. 1929) 179 pp.

[30] П. И. Новгородцев [P. I. Novgorodtzev] *Идя́ права в философии В. С. Соовъ́ва* [The idea of law in V. S. Solovyev's philosophy] (Москва 1901) and А. Ш. Ященко [A. S. Yashtshenko] *Философия права Соовъ́ва* [Solovyev's legal philosophy] (Санкт-Петербург 1912).

[31] Н. Н. Трубецкой [N. N. Trubetzkoy] 'Философия права проф. Л. И. Петражицкшго' [Prof. L. I. Petrazycki's philosophy of law] *Вопросы философии и психологии* 1901/2, pp. 9–34 and М. А. Рейснер [M. A. Reisner] *Теория Л. И. Петражицкого, марксизм и социальная идеология* (Санкт-Петербург: тип. т-ва) »Обществ. польза« 1908) 240 pp. as well as Николай Иванович Палинко [N. Palienko] (Харков/Harkov: тип. и лит. М. Зильберберг 1908).

[32] Венелин Йорданов Ганев [Venelin Ganev] 'Imperativno-atributivnata teoriia na prof. Petrazhitzk' [Prof. Petrazycki's imperative-attributive theory] *Spisania na Yuridicheskoto druzhestvo* II (1904) 6 & 10. Cf. also his *Учебник по обща теория на правото* [Legal theory text-book] I–II (София/Sofia: Родина 1932–1938).

on and EUGENJUSZ BAUTRO in Warsaw in 1925[33]) became the crystallising point, determining the further development of legal-philosophical thought.

In addition to this Eastern European variety, the wave of scholars from the Balkans getting their doctorate degrees in law in Paris before World War I relied mainly on FRANÇOIS GÉNY's revolutionary work.[34] This oeuvre generated interwar schools in Romania and Serbia through MIRCEA DJUVARA in 1913[35] and JIVAN SPASSOYÉVITCH in 1911,[36] respectively.

The years preceding World War I signalled the launching of the so-called Vienna school in mastering and spreading philosophical positivism (issuing the journal *Zeitschrift für öffentliches Recht,* 1921–). HANS KELSEN's concept of the "pure theory of law" grew into an international trend followed by SZYMON RUNDSTEIN in Poland,[37]

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[33] Jerzy Lande on norm and phenomenon of law (Krakow 1925), *Dzieła Leona Petrażyckiego* 1: Wstęp do nauki prawa i moralności: podstawy psychologji emocjonalnej [Introduction to the sciences of law and morality: on emotional psychology] wyd. staraniem Komitetu Jubileuszowego & Jerzy Lande (Warszawa: F. Hoesick 1930) xii + 398 pp., Jerzy Lande *Historja filofozji prawa* (Kraków: Nakł. Towarzystwa Bibljoteki Słuchaczów Prawa UJ 1931) 81 pp. and, posthumously, Jerzy Lande *Studia z filozofii prawa* [Studies in legal philosophy] ed. Kazimierz Opałek, introd. Jerzy Wróblewski (Warszawa: Państ. Wydaw. Naukowe 1959) 1005 pp. By Eugenjusz Bautro, on feeling of law as the symtom and form of unconsciously abbreviated thought, *Prawne poczucie jako przejaw i forma podświadomego, skrótowego myślenia* 1: Historyczno-pragmatyczna (Warszawa: Kasa im. Mianowskiego, Instytut Popierania Nauki 1925) 435 pp. and 'Die Idee der Totalität in der Philosophie und Rechtstheorie' *Internationale Zeitschrift für Theorie des Rechts* 3 (1928–1929), pp. 156–194, complemented by his *Idea antytetyki prawniczej* (szkic programatyczny) (Lwów: nakładem autora 1932) 78 pp. and *De iurisprudentia symbolica* 1: Prolegomena do logistyki prawniczej (Lwów: nakładem autora 1934) 54 pp.

[34] François Gény *Méthode d'interprétation et sources en droit privé positif* I–II (Paris: Sirey 1899).

[35] Mircea Djuvara *Le fondement du phénomène juridique* Quelques réflexions sur les principes logiques de la connaissance juridique (Paris: L. Tenin 1913) 246 pp., summarised in is *Precis de filosofie juridică* (Tezele fundamentale ale unei filosofii juridice) I: Faptele şi dreptul: Natura cunoştinţei juridice „Universul" 1941) 101 pp.

[36] By Jivan Spassoyévitch, *L'analogie et l'interprétation* Contribution à l'étude des méthodes en droit privé (Paris 1911) as well as [Živan Spasojević] *Analogija i tumačenje* Prilog proučavanju metoda u privatnom pravu (Beograd: Pravni fakultet Univerziteta u Beogradu 1996) 134 pp. [Biblioteka Naučno nasleđe Pravnog fakulteta u Beogradu 5] and *Nacrt jedne opšte teorije prava* [Esquisse d'une théorie générale du droit] ed. Božidar Marković (Beograd: Srpska akademija nauka i umetnosti 1989) 141 pp. [Iz teorije prava: Srpska akademija nauka i umetnosti, Odeljenje društvenih nauka 8].

[37] Szymon Rundstein on legal interpretation and science of law, *Idea prawa narodów* (Warszawa: Księgarnia Ferdynanda Hoesicka 1917) 71 pp. and on the structure of law, *W poszukiwaniu prawa cywilnego* (Warszawa & Kraków: Księgarnia Powszechna 1939) 150 pp. [Biblioteka Umiejętnoœci Prawnych i Politycznych 14], in addition to his *Studya i szkice prawne* (Lwów: Polskie Towarzystwo Nakładowe 1904) 235 pp. & *Zasady teorji prawa* (Warszawa: Księgarnia F. Hoesicka 1924) 368 pp.

LEONIDAS PITAMIC in Slovenia,[38] as well as VOJTECH TUKA in Slovakia.[39] Almost simultaneously, a school in Brünn was formed (with their journal *Internationale Zeitschrift für Theorie des Rechts / Revue internationale de la théorie du droit,* 1926–[40]). The Brünn school was begun by FRANTIŠEK WEYR, author of the "normative theory" based upon ARTHUR SCHOPENHAUER's early concept of sufficient reason,[41] JAROSLAV KALLAB (a student of WILHELM WINDELBAND's and HEINRICH RICKERT's axiology),[42] as well as JAROMÍR SEDLÁČEK[43] and KAREL ENGLIŠ.[44] After the First World War, phenomenology and the analytical interest in aprioristic-deductivist realism also demanded ground in the work of NIKOLAY N. ALEXEEV in Russia in 1918[45] and CZESŁAW ZNAMIEROWSKI in Poznan in 1921.[46]

[38] By Leonid Pitamic, 'Denkökonomische Voraussetzungen der Rechtswissenschaft' *Österreichische Zeitschrift für öffentliches Recht* 3 (1917–1918), pp. 339–367, 'Zur neuesten Rechtskraftlehre' *Zeitschrift für öffentliches Recht* 4 (1923–1924), pp. 160–164, *Drzava* [The State] (Ljubljana 1927 {reprint Ljubljana: Cankarjeva založba 1996}) 480 pp. & *A Treatise on the State* (Baltimore: J. H. Furst Co. 1933) x + 301 pp. and 'Zur Lehre von der richterlichen Funktion' in *Gesellschaft, Staat und Recht* Festschrift gewidmet Hans Kelsen zum 50. Geburtstage, hrsg. Alfred Verdross (Wien 1931), pp. 295–308. Cf. also his posthumous collection in *Na robovih čiste teorije prava / An den Grenzen der reinen Rechtslehre* hrsg. Marijan Pavčnik (Ljubljana: Slovenska akademija znanosti in umetnosti & Pravna fakulteta 2005) 350 pp. [Opera / Facultas Iuridica Labacensis & Academia Scientiarum et Artium Slovenica, Classis I, Historia et Sociologia 36].

[39] Vojtech Tuka *Die Rechtssysteme* Grundriß einer Rechtsphilosophie (Berlin & Wien: Limbach 1941) xv + 273 pp. [Archiv für Rechts- und Sozialphilosophie, Beiheft 37 / Slowakische Rechtsphilosophie 1].

[40] Cf. *Die Brünner rechtstheoretische Schule* hrsg. Vladimir Kubeš & Ota Weinberger (Wien: Manz 1980) 372 pp. [Schriftenreihe des Hans-Kelsen-Institutes 5].

[41] By František Weyr, 'La théorie normative' *Rocenka právnické fakulty Masarykovy university* IV (1925) 3, 'La notion de »Processus juridique« dans la théorie du droit' in *Studi filosofico-giuridici dedicati a Giorgio del Vecchio* (Modena 1931), 'Natur und Norm' *Revue internationale de la théorie du droit* VI (1931–32) 12 and 'Die Rechtswissenschaft als Wissenschaft vor Unterschieden' *Archiv für Rechts- und Sozialphilosophie* (1935). Cf. Renata Boháčková *Život a dílo prof. JUDr. Františka Weyra* (Brno: Masarykova univerzita 1993) 61 pp. [Právnické sešity 40].

[42] By Jaroslav Kallab, 'L'oggetto della scienza giuridica' *Rivista internazionale di filosofia del diritto* 2 (1922), pp. 14–22 and 'Le postulat de justice dans la théorie du droit' *Revue internationale de la théorie du droit* I (1926–1927), pp. 89–99.

[43] By Jaromír Sedláček, 'Interprétaton et application de la règle de droit' *Revue internationale de la théorie du droit* 7 (1932–1933), pp. 180–185 and 'Il concetto realistico ed il concetto normologico della norma giuridica' *Rivista internazionale di filosofia del diritto* 13 (1933), pp. 153–174.

[44] Karel Engliš *Apologia finalitatis / Rozprava o Tardym* (V Praze: Knihovna sborníku věd právních a státních 1946) 133 pp. [Knihovna sborníku věd právních a státních, B: Nová řada B, Obor státovědecký 24].

[45] By Н. Алексеев, on introduction to the study of law (1918) and on the creative judicial act as the primary source of the law (1934), as well as his *Основы философии права* [Foundations of legal philosophy] (1923 {reprint Санкт-Петербург: Лан 1999}).

[46] By Czesław Znamierowski, on subject and social fact (1921) and on psychological theory of law (1922).

Yet the interwar period was mainly shaped by generations which undertook the critical reconsideration of KELSEN's "pure theory of law". These included DJUVARA, as a neo-KANTian eclectic critical idealist in Bucharest,[47] GANEV, who analysed normative concepts as ideological tools for shaping the future in Sofia,[48] MOÓR, who tried to reconcile positivism and natural law in Budapest,[49] as well as DJORDJE TASIČ in Belgrade,[50] CEKO TORBOV, a student of LEONARD NELSON on KANTian natural law in Sofia,[51] EUGENIU SPERANTIA, an idealist at Cluj,[52] VLADIMÍR KUBEŠ, a disciple of NICOLAI

[47] By Mircea [Maurice] Djuvara, 'La théorie de la cause à la lumière de la théorie du Droit' *Revue internationale de la théorie du Droit* 6 (1932) 2–3, pp. 91–105, *Drept raional, izvoare şi drept pozitiv* (Bucureşti: Socec [1933?]) 140 pp. [Biblioteca universitara de drept], 'Relatività e diritto, à proposito del parallelisimo fra la struttura logica del mondo fisico e quella del mondo giuridico' *Rivista internazionale di Filosofia del Diritto* 15 (1935) 3, pp. 309–327, 'Considération sur la connaissance en général et sur la connaissance juridique en particulier' in *Annuaire de l'Institut* 2 (1935–1936), pp. 83–96, 'Dialectique et expérience juridique' *Zeitschrift für Theorie des Rechts* 12 (1938) 4, pp. 295–315; *Considérations sur la structure de la connaissance morale et juridique* (Bucuresti 1940); 'L'idée de convention et ses manifestations comme réalités juridiques' *Archives de Philosophie du Droit* (1940), pp. 110–158 and 'Über das Verhältnis des Rechtserkenntnis zur soziologischen Erkenntnis' *Zeitschrift für deutsche Kulturphilosophie* 9 (1942) 1, pp. 39–45. Cf. also Barbu B. Berceanu *Universul juristului Mircea Djuvara* (Bucureşti: Editura Academiei Române 1995) 248 pp.

[48] Венелин Йорданов Ганев [Venelin Ganev] *Курс по обща теория на правото* Увод – Методология на правото [Course on general legal theory: Legal methodology in introduction] (София: Право 1921) 92 pp., (Хр. Т. Бъчеваров 1932 & Нова литература 1933) 104 pp.

[49] By Julius Moór, 'Das Logische im Recht' *Internazionale Zeitschrift für Theorie des Rechts* II (1928) 3, pp. 157–203, 'Reine Rechtslehre, Naturrecht und Rechtspositivismus' in *Gesellschaft, Staat und Recht* [note 35], pp. 58–105, 'Creazione e applicazione del diritto' *Rivista internazionale di filosofia del diritto* XIV (1934) 6, pp. 653–680, 'Recht und Gewohnheitsrecht' *Zeitschrift für öffentliches Recht* XIV (1935) 5, pp. 545–567 and 'Der Wissenschafts-Character der Jurisprudenz' *Zeitschrift für öffentliches Recht* XX (1941) 1, pp. 20–37.

[50] Djordje Tasić 'Le réalisme et le normativisme dans la science juridique' *Revue internationale de la théorie du droit* I (1926–1927), pp. 165–182 and 2 (1927–1928), pp. 23–56.

[51] Ву Цеко Николчов Торбов [Ceko Torbov], *Философия на правото и юриспруденцията* [Philosophy of law and jurisprudence] (София: Херман Поле 1930) xvi + 120 pp., *Основният принцип на правото* Право и справедливост (Fundamental principles of law: Law and justice) (София: Полиграфия 1940) viii + 255 pp. as well as *Естествено право и философия на правото* [abstract: Zeko Torbov 'Naturrecht und Rechtsphilosophie', pp. 92–107) (София: Universitetska Pechatnitza 1947).

[52] Cf., by Eugeniu Sperantia, Curs de filosofia dreptului (Oradea: Tipografia Franklin 1932), 3rd ed. as *Introducere in filosofia dreptului* (Cluj: Tipografia Cartea Românească 1946) 484 pp. authoring also *Principii fundamentale de filosofie juridica* (Cluj: Institutul de Arte Grafice Ardealul 1936) 227 pp. Cf. also his *Une définition du droit* Analyse philosophique (Cluj: Cartea Românească 1939) 53 pp.

HARTMANN in Brünn,[53] and JÓZSEF SZABÓ, who attempted to rationalise the irrational at Szeged.[54] As a counter-effect to the rigour of the purist defence against methodological syncretism, a number of synthetic philosophies were also born, with TOMA ŽIVANOVIĆ in Serbia in 1927,[55] BARNA HORVÁTH's synoptic view in 1936[56] (followed by ISTVÁN BIBÓ at Szeged),[57] as well as ISTVÁN LOSONCZY's neuro-physiological realism at Pécs.[58]

This flourishing was brought to an abrupt end by the Soviet Union, as the real winner of World War II, imposing its own regime on the region. With the liquidation of P. I. STUCHKA, M. A. REISNER and E. B. PASHUKANIS, A. J. VYSHINSKY's "socialist normativism" (formulated definitively in 1939) could no longer provide significant developments for legal philosophical thought. Although the entire region was destined to share the same fate,[59] the tradition of analytical linguistico-logical theorising in Poland proved to be strong enough to survive with outstanding journals (*Archivum Juridicum Cracoviense,* 1966– and *Studies in the Theory and Philosophy of Law,* 1986–), and magisterial oeuvres (KAZIMIERZ OPAŁEK, JERZY WRÓBLEWS-

[53] From the syntheses of his late years, see Vladimír Kubeš *Grundfragen der Philosophie des Rechts* (Wien & New York: Springer-Verlag 1977) 87 pp. [Forschungen aus Staat und Recht 39], *Ontologie des Rechts* (Berlin: Duncker & Humblot 1986) 470 pp. [Schriften zur Rechtstheorie 118] as well as *Theorie der Gesetzgebung* Materiale und formale Bestimmungsgründe der Gesetzgebung in Geschichte und Gegenwart (Wien & New York: Springer-Verlag 1987) xii + 299 pp. [Forschungen aus Staat und Recht 76].

[54] József Szabó *A jogászi gondolkodás bölcselete* [Philosophy of juristic thinking] (Szeged: Szeged Városi Nyomda RT. 1941) 71 pp. [Acta Universitatis Szegediensis: Sectio Juridica-Politica XVI, 2].

[55] Toma Živanović [Thomas Givanovitch] *Système de la philosophie juridique synthétique* [Paris, 1917–1918] (Paris: Librairie Arthur Rousseau 1927 / Paris: Librairie Générale de Droit et de Jurisprudence 1970) 516 pp.

[56] By Barna Horváth, *Rechtssoziologie* Probleme der Gesellschaftslehre und der Geschichtslehre des Rechts (Berlin-Grunewald: Verlag für Staatswissenschaften und Geschichte 1934) xi + 331 pp. [ARSP Beiheft 28] and, as a selection, *Probleme der Rechtssoziologie* (Berlin: Duncker & Humblot 1971) 204 pp. [Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung 20].

[57] By István Bibó, 'Le dogme du »bellum justum« et la théorie de l'infallibilité juridique: Essai critique sur la théorie pure du droit' *Revue Internationale de la Théorie du Droit* X (1936) 1, pp. 14–27 and 'Rechtskraft, rechtliche Unfehlbarkeit, Souveränität' *Zeitschrift für öffentliches Recht* XVII (1937) 5, pp. 623–638.

[58] István Losonczy 'Über die Möglichkeit und den Wissenschaftscharakter der Rechtswissenschaft' *Zeitschrift für öffentliches Recht* XVII (1937) 2, pp. 145–194.

[59] Cf. *Marxian Legal Theory* ed. Csaba Varga (Aldershot, Singapore, Hong Kong, Sydney: Dartmouth & New York: New York University Press 1993) xxvii + 530 pp. [The International Library of Essays in Law and Legal Theory, Schools 9].

KI,[60] and ZYGMUNT ZIEMBIŃSKI) as well.[61] As for Hungary, less fortunate local traditions relied on neo-KANTianism, which was easily swept away by GEORGE LUKÁCS and his neophyte Muscovite comrades. Notwithstanding the devastating effects in the short run, the outcome grew into a scholarship with considerable historical and comparative interest, generating further reformist tendencies with the journal *Acta Juridica* (1959–), which soon became a number one jurisprudential messenger of the region. This development, launched by IMRE SZABÓ,[62] led into an open-minded philosophising on law in MARXism with social-theoretical and—thanks to LUKÁCS's late ontology of social being—even ontological pretensions, with GYULA EÖRSI[63] and VILMOS PESCHKA.[64] MARXist theories of law worthy of international attention were also formed in Serbia by RADOMIR D. LUKIĆ,[65] in Czechoslovakia by VIKTOR KNAPP, and in Romania (through the *Revue roumaine des Sciences juridiques* (1956–)[66] by ANITA M. NASCHITZ.[67]

Today's endeavours, with the reintroduction of classical and contemporary trends from Western Europe and the Americas, are mostly directed to-

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[60] By Jerzy Wróblewski, *Meaning and Truth in Judicial Decision* ed. Aulis Aarnio (Helsinki: A-TIETO Oy 1983) vi + 215 pp. and *The Judicial Application of Law* ed. Zenon Bankowski & Neil MacCormick (Dordrecht & Boston: Kluwer 1992) x + 357 pp. [Law and Philosophy Library 15].

[61] *Polish Contributions to the Theory and Philosophy of Law* ed. Zygmunt Ziembiński (Amsterdam: Rodopi 1987) 212 pp. [Poznan Studies in the Philosophy of Sciences and the Humanities 12].

[62] Imre Szabó *Les fondements de la théorie du droit* trad. Pál Sebestyén (Budapest: Akadémiai Kiadó 1973) 340 pp.

[63] Gyula Eörsi *Comparative Civil* (Private) Law Law Types and Law Groups, the Road of Legal Develoment, trans. Gábor Pulay et al. (Budapest: Akadémiai Kiadó 1979) 651 pp.

[64] Cf., by Csaba Varga, 'Vilmos Peschka (1929–2006)' *Archiv für Rechts- und Sozialphilosophie* 93 (2007) 2, pp. 253–255 and also the former's *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985) 193 pp. & <http://www.scribd.com/doc/46267684/varga-a-jog-helye-lukacs-gyorgy-vilagkepeben-1981>.

[65] Radomir D. Lukić *Théorie de l'État et du Droit* (Paris: Dalloz 1974) 600 pp. [Philosophie du droit 13].

[66] Especially Traian Ionascu & E. A. Barasch 'Les constantes du droit: Droit et logique' *Revue roumaine des sciences sociales* Série de Sciences juridiques 8 (1964) 2, pp. 132–143.

[67] Anita M. Naschitz & Inna Fodor *Rolul practicii judiciare în formarea şi perfecţionarea normelor dreptului socialist* [The role of judicial practice in the formation and perfection of the norms of socialist law] (Bucurêsti: Editura Academiei Republicii Populare Romîne 1961) 299 pp. and, from Anita M. Naschitz, 'Wert und Wertungsfragen im Recht' *Revue Roumaine des Sciences sociales* Série de Sciences juridiques 9 (1965) 1, pp. 3–23 as well as 'Le problème du droit naturel à la lumière de la philosophie marxiste du droit' *Revue Roumaine des Sciences sociales* Série de Sciences juridiques 10 (1966) 1, pp. 19–40.

ward filling the vacuum left behind by the forced interruption of development. Identifying and reassessing national traditions meet the needs of contemporary synthesis and the necessity to reintegrate such neglected fields as natural law and, with theoretical foundations, the doctrinal study of law [*Rechtsdogmatik*]. Sensibility toward philosophical issues and emphasis on historical and comparative approaches will surely survive the forced encounter with MARXism. Hopefully the demand for interdisciplinary explanation (that is, an ontological reconstruction integrating macro-sociology, autopoietical systems-theory and cultural anthropology) can also survive as one of the characteristic traits and strengths of the Central and Eastern European philosophy of law.

PHILOSOPHISING ON LAW IN THE TURMOIL OF COMMUNIST TAKEOVER IN HUNGARY

(Two Portraits, Interwar and Post-war: JULIUS MOÓR and ISTVÁN LOSONCZY)*

JULIUS MOÓR

The cataclysms and disasters of 20th century hardly spared anyone who had taken their professions seriously, thus dedicating themselves to the public and their nation as a whole. For anyone who opts for reason as an ultimate guide in the conflict between values and very material coercions is bound to be crushed by tyranny and wiped out by injustice.

The university years in Kolozsvár of JULIUS MOÓR,[1] originating from a LUTHERan archdeacon's family in Brassó, coincide with the period of the Great War. He gained lifetime experience as a volunteer artilleryman at the front. FELIX SOMLÓ, a pioneering mind both in legal philosophy and socio-

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* First published (as translated by István Losonczy, Jr) in *The 2005 ALPSA Annual Publication* of the Australian Legal Philosophy Students Association, ed. Max Leszkiewicz (Brisbane 2005), pp. 82–94. As to MOÓR, originally prepared as ceremonial *laudatio* to MOÓR's oeuvre acknowledged as "Hungarian Heritage" in 2001 {'Moór Gyula emberközpontú jogfilozófiája és jogi ethosza MAGYAR ÖRÖKSÉG' [The humanistic legal philosophising and ethos of Julius Moór is a Hungarian Heritage] in *Laudációk könyve II.* (2001–2005) szerk. Poprády Géza (Budapest: Magyar Örökség és Európa Egyesület 2009), pp. 276–279}; as to LOSONCZY, as commemoration in the Pécs University Memory Lectures series in spring 2002 and published as 'Losonczy István, a filozófus jogtudós' [The philosopher jurisprudent] *P[écsi]T[udomány]E[gyetem] Orvoskari Hírmondó* [Pécs] (2002. május), Melléklet, pp. 3–6 & <www.aok.pte.hu/hirmondo>, & *Jura* [Pécs] 8 (2002) 2, pp. 162–165.

[1] GYULA MOÓR, born on August 11, 1888 in Brassó, Transylvania, Hungary (now: Brašov, Romania), died on February 3, 1950 in Budapest. After studies in Kolozsvár (known historically also as Klausenburg, Transylvania, Hungary [now: Cluj, Romania]), he was discharged from active service in the army as a lieutenant, and following temporary teaching assignments at Eperjes, upper Hungary (now: Prešov, Slovakia) and Kolozsvár, he was appointed professor in Szeged in 1920.

logy in Hungary at the turn of the century[2] was his master and later his fatherly friend. It was just at the end of the war when SOMLÓ, once resoundingly celebrated by progressive liberal circles in this country, was to arrive at a dead end in his life and career. Once carrying him shoulder-high, his former comrades, by now intoxicated with ideas incited by, and patterned on, those of the Russian Revolution were busy agitating discharged soldiers only to hustle them into the Leftist "Aster Revolution" (getting under way on 31 October, 1918 with Count MIHÁLY KÁROLYI becoming prime minister) while SOMLÓ was having to witness the disintegration of his country and was also seriously concerned about the fate of his beloved Transylvania, already threatened by advancing Romanian troops. With his proud faith in the positivity of law, the controllability of events, the reconcilability of reason and social existence shattered, he turned to the ancient classics, seeking asylum in PLATONian ideas, St AUGUSTINE's suspirations and St THOMAS AQUINAS' hard realism. It was in Kolozsvár's legendary Házsongárd cemetery, the gem of that city, the pantheon of Transylvania and of the whole of Hungary, too that he committed suicide, bequeathing what remained of his assets to the League of Motherland Protection, an organization intransigently resisting the peace dictate of Trianon, which had truncated the country, allocating two-thirds of its territories to artificially created successor states. This is the spiritual heritage (over and above SOMLÓ's magnificent library) that was to launch dr Vitéz[3] JULIUS MOÓR on his career as a professor in Szeged, Hungary.

He started where SOMLÓ had left off. Shifting from what had been SOMLÓ's German and Anglo–American orientation (a combination regarded as unusual at the time), he followed the traditional German–French–Italian schools of thought, contacting as fastidiously as his master had earlier, the greatest in the field. He became both an adherent to, and a critic of, the Vienna school of legal positivism, a theory of law in Continental Europe holding sway ever since. Sharing the line of thought of its founder, HANS KELSEN, he accepted the separation of normative ought propositions from

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[2] Cf., as BÓDOG SOMLÓ's magisterial work, Felix Somló *Juristische Grundlehre* (Leipzig: Meiner 1917, [2]1927 [reprint Aalen: Scientia 1973]) x + 556 pp.; as posthumous philosophical re-foundation, Felix Somló *Gedanken zu einer Ersten Philosophie* hrsg. Julius Moór (Berlin & Leipzig: de Gruyter 1926) 107 pp.; and for papers collected, Felix Somló *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Akadémiai Kiadó 1999) xx + 114 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris].

[3] Member of the knightly order of war heroes, inaugurated by Admiral MIKLÓS HORTHY as regent of Hungary in 1920.

existential statements as a starting point in law. As a critic, however, he was no longer contented either with value relativism or with the reduction of values to mere formal abstractions (e.g., in conceiving of justness as nothing more than equal treatment). He started searching for fixed points of reference, which he came to find more and more (in terms of the entire legal setup) in natural law and (in respect of particular legal arrangements already in operation) in the need to develop and ceaselessly accommodate deliberately value-controlled legal policies.[4]

Soon he became a celebrated professor of the prestigious Pázmány Péter University of Budapest, the teacher of generations[5] and, on account of his books and papers,[6] one of the most responsible intellects in Hungary to shape sociological thinking. Most demanding as a teacher and, as an academic author, characterized by clarity and beauty of style, he was committed to ceaselessly building bridges between law and other fields of humanities. He treated with strong reservations the legal philosophies of, and jurisdictional developments in, both the red and the brown dishonourable neighbourhoods, i.e., those of Bolshevism and National Socialism. He wrote a stern critique of the legal philosophy (published in Berlin during the war) of BÉLA TUKA, one-time teacher at the Episcopalian high school of law in Pécs, Southern Hungary, who was to become a Slovakian nationalist only to be executed later as the interior minister of the nationalist puppet state, the Slovak Republic.[7]

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[4] By Julius Moór, *Stammler "Helyes jogról szóló tana"* [Stammler's "Theory of correct law"] (Budapest: Pfeifer 1911) 87 pp. [Magyar Jogászegyleti Értekezések III/25] and *Bevezetés a jogfilozófiába* [Introduction to legal philosophy] (Budapest: Pfeifer 1923) 356 pp. [Filozófiai kiskönyvtár III].

[5] He served as a dean several times; became a member of the Hungarian Academy of Sciences (a corresponding one in 1925 and an ordinary one in 1942), a deputy member of the Upper House of the Parliament of Hungary, representing his university (from 1937 on, elected for ten years in principle).

[6] By Julius Moór, *Zum ewigen Frieden* Grundriss einer Philosophie des Pazifismus und des Anarchismus (Leipzig 1930) 101 pp., *A jogi személyek elmélete* [Theory of legal persons] (Budapest: Magyar Tudományos Akadémia 1931) 379 pp. [A Jogtudományi Bizottság kiadványsorozata 2], *Szociológia és jogbölcselet* [Sociology and legal philosophy] (Budapest: Királyi Magyar Egyetemi Nyomda 1934) 59 pp. [Filozófiai értekezések 5], and *A szabad akarat problémája* [The problem of free will] (Budapest: Magyar Tudományos Akadémia 1943) 149 pp. [Értekezések VI/1].

[7] See Vojtech Tuka *Die Rechtssysteme* Grundriß einer Rechtsphilosophie (Berlin, etc.: Limbach 1941) 273 pp. [Archiv für Rechts- und Sozialphilosophie, Beiheft 37] & Julius Moór 'Tuka's Rechtsphilosophie' *Zeitschrift für öffentliches Recht* XXII (1943) 4–5, pp. 370–382, respectively.

All along, MOÓR corresponded with one of HITLER's first scholarly victims, the philosopher of law GUSTAV RADBRUCH, who, after having been removed from his post as rector of Heidelberg University, took spiritual refuge in the study of history and in that of the doctrinal history of German criminal law. Being unswervingly humanist and value-oriented, MOÓR lived to personally attest to the then already waning virtue of transforming his scholarly interests into genuine human understanding.

As a tragic reminder, MOÓR preserved the documents of the theoretical-legal efforts made during the Hungarian Republic of Councils, which was brought about by POWs-turned-LENINist revolutionaries. What is more, communists in illegality in between the two world wars regularly dropped their leaflets in the mailbox of his flat in Váci street. His authority, as buttressed by the unconditional trust of the Regent, Admiral HORTHY, and his Upper House membership afforded him the opportunity to intervene on behalf of a lesser- known Szeged colleague,[8] who was threatened deportation owing to his Jewish origin. (Ironically, less than half a decade on, the same colleague, who had become a neophyte communist and a satrap of STALINist legal ideas, took revenge on everything that might have borne a faint resemblance of the burgherly past which had elevated him.) MOÓR remained steadfastly committed to reason all through the bloodbath of the 2nd World War. It is of symbolic import that he became the first post-war rector of the Pázmány Péter University and, temporarily, also the president of the Hungarian Academy of Sciences. He was also shortlisted number one for the ambassadorial post in Moscow, which he declined, as he was convinced that upcoming fights should be fought at home in Hungary.

After the war, he started publishing with renewed vigour, criticising fascism and national socialism, touching upon the relationship between CHRISTianity and socialism and on democracy,[9] and went on working as long as he

[8] TIBOR VAS (1911–1983), a gifted author of *Die Bedeutung der transzendentalen Logik in der Rechtsphilosophie* (Szeged: Szeged Városi Nyomda 1935) 94 pp. {& *Senkenteki hotetsugaku* (Tokyo: Yufukanshobo 1941) 133 pp.), before he entered a typical STALINist career marshalled by the Communists' cause. Cf. *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas, hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) 246 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae], especially at pp. 137–139.

[9] By Gyula Moór, A *jogbölcselet problémái* [Problems of legal philosophy] (Budapest: Magyar Szemle Társaság 1945) 81 pp. [Magyar Szemle Kincsestára 80], *Jogfilozófia* [Legal philosophy] (Budapest: Magyar Élet 1936, 1947) 287 pp. [Jog- és államtudományi jegyzetek 3], as well as *Tegnap és holnap között* Tanulmányok [Between yesterday and tomorrow, Essays] (Budapest: Révai 1947) 172 pp.

had the faintest hope in the power of reason and the written word. It was in the Hungarian Independence Party that, for the first time ever, he took a directly political role. It was indicative of the fateful onus of the post-war times that this elevated representative of the Hungarian upper middle class did not refrain from applying himself even to petty tasks in the face of threatening communist advances. With the date of the Paris Peace Treaty approaching and the justification for the Soviet military occupation also coming to an end, the imminent threat of a communist takeover made him take a firm stand. And that he did with dignity befitting his stature in two grandiose addresses to parliament.[10] The communists, who kept heckling him all through, were keenly aware of the purport of his address. Their response was commensurate. At the age of nearly 59, he is full professor and head of department, but in consequence of the retort by the Szeged-rooted ethnographer-strayed-"fellow traveller"-turned-minister of education at the time, he was simply banned from entering university premises the following day. Was it the agents of the Soviet occupation force? Was it collaborators or hired thugs? Whoever it was, he had his flat burglarized and turned upside down.

Press campaigns, scandal-mongering, political demonstrations targeting him personally, and continuing parliamentary interpellations stigmatising him as a "traitorous, fascistic ideologue-in-chief" were to be his share, dealt out only to hide the naked truth that the communists were exactly like he had described them, and acted in a way that amply justified his fears for Hungary's future. As a matter of course, he was pensioned off "at his own request," quoth they, in the middle of the year he had turned 60. And all that was given the plain nod by the Faculty and University Boards. Not long ago the president of the Hungarian Academy of Sciences, he also had his membership quashed.

We are used to taking our lives seriously. He certainly did. There is no knowing whether he regarded it as deliverance, but his slowly manifesting throat complaints were eventually diagnosed as cancer of the larynx, which rapidly killed him.

His successors raged on in the terrain freed of him. No professionals socialized in the old era (i.e., the ones who could have restrained the primitive neophyte ruthlessness of the crudely adopted MARXist–LENINist–STALINist

[10] His MP-speeches before the new National Assembly on July 23 and October 8, 1947 were interpellated by EMÍLIA WEIL, representative of the Hungarian Communist Party on December 10, the response to which came from GYULA ORTUTAY, once ethnographer of a reforming spirit at Szeged and then Minister of Public Education and Religious Affairs, a Communist agent under a social democratic guise, on March 4, 1948.

theories of state and law) were to be left in position at any of the universities in this country. Within a few years' time, JULIUS MOÓR's legal philosophy, after having been labelled reactionary, was to be, so-to-say, "theoretically surpassed" in a Faculty Board session to the effect that his ideas, which had animated generations, were to survive only underground.[11]

As repositories of the new Muscovite rule, those who triumphed after his death (which was precipitated by the communist takeover) criticised him as an eclectic and an opportunist alike. As an eclectic, because he preferred the golden tree of life and also the faith in its mouldability into something more sensible and therefore more humane, to chiselled facades, angularity and the dead branches of ratiocination. And as an opportunist, simply because he was born to live and work there and then, i.e., in Hungary, between the two world wars and also under the shadow of the Third Reich and the Soviet-Russian Third Rome and, because his endeavours had been both officially and unofficially recognized in his time. They claimed to have surpassed him, but were unable to furnish better or theoretically sounder interpretations than he had been, for collaborationists, rallying after the invasion by the Red Army, were able to wangle but a materialistic, ideological wasteland in place of spirituality and the diversity of life worth living within its scope. It is still the vestiges of the so called socialist normativism that have been thriving on the ruins of Socialism in the entire region. Although the past never repeats itself directly, the history of ideas bears witness to the fact that methodological debates over some basic choices have got to be engaged in again and again. Conducted with devious bypasses and often hidden in postmodernist disguise, there are still disputes to be faced that look very much like the fundamental ones SOMLÓ and MOÓR had to undertake, e.g., on how to protect law from the ravages of dictatorship and from the staggering eventualities resulting from purely abstract ratiocination.

It was his friend and one-time fellow-professor SÁNDOR SÍK, famous poet and provost of the Piarist Order[12] who preserved his immensely valuable

[11] All his life his most unyielding critic was IMRE SZABÓ, cf. his *A burzsoá állam- és jogbölcselet Magyarországon* [Bourgeois theory of the state and law in Hungary] (Budapest: Akadémiai Kiadó 1955) 533 pp., 2nd updated ed. (1980) 471 pp. For the minutes of a Faculty Board meeting, see '»A Horthy-fasizmus állam- és jogbölcselete« Az ELTE ÁJK tanácsülésén 1955. január 29-én rendezett vita Szabó Imre készülõ könyvének IX. fejezetérõl' [»Philosophy of state and law during the Horthy-fascism«: Debate at the Faculty of Law of Eötvös Loránd University on January 29, 1955 on ch. 9 of IMRE SZABÓ's forthcoming book] ed. Csaba Varga in *Jogelméleti Szemle* 2004/3 <http://jesz.ajk.elte.hu/varga19.html>.

[12] SÁNDOR SÍK (1889–1963), professor of aesthetics.

library until he himself died. After a host of vicissitudes, but thanks to the generosity of his family, it was donated to the Library of Parliament to further enhance the best jurisprudential collection of this country.[13]

Now books are being written about MOÓR,[14] who, in turn, speaks to today's generations through the reprints of his books and articles.[15] As he himself was aware, theoretical propositions may get dated. We can, however, preserve the ethos of, and the commitment to, human values through our sincere quest for humane solutions. That is why this sadly maltreated teacher, thinker and social philosopher shall always remain with us in our present-day cares and concerns.

ISTVÁN LOSONCZY

ISTVÁN LOSONCZY[16] was born under a star lucky and unlucky at the same time.

Lucky was the star, for inspired by his alma mater, attracted by his teachers and spurred on by a good few of outstanding fellow students, he enjoyed the company of his peers and paragons at an all-round university, and was

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[13] In acknowledgement to the present author for the care of having saved the remnants of this collection of some five thousand titles, cf. Károly Jónás 'A Moór–Somló-hagyaték' in Károly Jónás & Katalin Veredy *Az Országgyűlési Könyvtár története* 1870–1995 (Budapest: [Magyar Országgyűlés] 1995), ch. 5.39, pp. 205–206 & <http://www.ogyk.hu/e-konyvt/pdf-konyv/konyv05.pdf>.

[14] As a present-day re-evaluation, see József Szabadfalvi *Moór Gyula* Egy XX. századi magyar jogfilozófus pályaképe [Julius Moór: The oeuvre of a 20th-century legal philosopher in Hungary] (Budapest: Osiris–Századvég 1994) 199 pp. {Summary, pp. 189–192; Zusammenfassung, pp. 193–197} [Jogtörténet]; *Moór Gyula* ed. József Szabadfalvi (Budapest: Új Mandátum 2001) 241 pp. [Magyar panteon 13]. Cf. also Csaba Varga 'Documents de Kelsen en Hongrie: Hans Kelsen et Julius Moór' *Droit et Société* (1987), No. 7, pp. 337–352 as well as József Szabadfalvi 'Wesen und Problematik der Rechtsphilosophie: Die Rechtsphilosophie von Gyula Moór' *Rechtstheorie* 30 (1999) 3, pp. 329–353.

[15] In addition to a number of reprints and re-editions from his oeuvre in Hungarian, cf. *Aus dem Nachlaß von Julius MOÓR Gyula hagyatékából* hrsg. Csaba Varga (Budapest: ELTE "Comparative Legal Cultures" Project 1995) xvi + 158 pp. [Philosophiae Iuris] and, as a late reprint of his papers in mostly German, some in Italian or French, Julius Moór *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) xxii + 485 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Bibliotheca Iuridica: Opera Classica 3].

[16] Cf., by the present author, the bio-bibliography of ISTVÁN LOSONCZY (1908–1980) in his *Abriß einer realistischen rechtsphilosophischen Systems* [1948] hrsg. Csaba Varga (Budapest: Szent István Társulat 2002) 144 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris], pp. 9–13.

happy to face the intellectual and moral challenges arising from the urge of getting well-versed in as diverse disciplines as literature, music, fine arts, sciences, theology, humanities, law, economics, minority research in a humbling, but at the same time inspiring spirit of continuous intellectual fermentation, rejuvenation and overachieving. He was born in a happy epoch.

Although in his formative years he may have witnessed his country's drifting into the Great War, the shame of its occupation and bolshevization, the perfidy disguised as ruthlessly spiteful pinko republicanism-turned-doctrinarism in the Baranya county triangle, his country's truncation followed by a difficult restart in the early, and the American-born Great Depression in the late, twenties. He also lived to see the rapturous times which followed in less than a decade after the post-war restart. Beholding the city of Pécs from the vantage point of our generation, we cannot help noticing the unprecedented intellectual effervescence and resurgence at the time. There is reason to believe that there was indeed faith and will at work there, intent on defying and turning round the country's bad fate. Tradition, morale and transcendence applied themselves in the spiritual and intellectual rebirth, going hand in hand with *avantgarde*, the creative query. Their sallying forth was tempered by negation with the fury of innovation being embarked upon. Searching for roots and the joy of rediscovering them in the columns of university journals and scholarly series were also to go hand in hand with the pleasure of keeping one's eyes peeled for the future and taking responsibility for it, too, accompanied by conscious preparations for the future and the desire to take a responsible role could manifest themselves. In brief, the man of intellect was welcomed in Pécs,[17] at its university, seminars, in the cool of its library rooms, its editorial offices, ateliers, and in its spacious churches and theatres.

In this alienated world of ours, a *curriculum vitae* cannot be but a dry set of data. As lone exhibitors capable of partial results only, we know, of course, that past and present are subsumed in all our deeds and inducements, which in turn, encompass all the efforts and clashes of our masters and peers, all the preserved memories of others' lives, desires, values, quests for meaning and means of self-expression. Happy is the man who has not been ruined but elevated by his epoch.

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[17] For a contrast, illustrating the pre-WW-I situation, see, by the present author, 'Somló Bódog esete a pécsi jogakadémiával' [The case of Felix Somló with the High School of Law in Pécs] *Jogtudományi Közlöny* XXXV (1980) 8, pp. 543–546.

Surely, it was thanks to his lucky star again that during the hard times of recovery from the economic crisis in Hungary, ISTVÁN LOSONCZY, despite the scarcity of university positions in the post-Depression era, was appointed assistant professor within less than one and a half years' time after his graduation. He then spent two semesters at the Vienna University and only following a stint at the ministry of education did he habilitate (thus opting for a law-school career) at the age of twenty-nine, only to be appointed (eight years after his graduation with Regent's Ring honours) at thirty-two, associate professor and head of the *Institutum philosophiae iuris* at the Royal Hungarian Elisabeth University of Pécs. From early on in his jurisprudential career he had had two irons in the fire (odd as it may have seemed only in this country, hardly unusual, however, in German-speaking countries or elsewhere), studying both what he was appointed to: philosophy of law and criminal law he had habilitated in, giving lectures in place of his distinguished but ailing master, ALBERT IRK, eminent in both fields.

When God closes one door, He opens another one. For ISTVÁN LOSONCZY's career as a philosophy of law scholar was to come to an abrupt halt a decade after he got his tenure, when Hungary was already drifting into the World War II with rampant abuse of power by a German-imposed puppet-government, following her occupation by her Teutonic ally. Vanquished again, then ransacked by the Red Army and having experienced a short-lived period of pseudo-democracy, this country was to be reduced to a state of Muscovite STALINism for decades to come. Ironically, and also as a stroke of good luck in the country's fate, the deterioration took years to materialise, during which time the foundationary components of LOSONCZY's oeuvre (which later research may still prove to be weightier than its latter parts) were being laid down.

His wide-ranging interest encompassed fields ranging from poetry to music, literary theories, medicine, contemporary philosophy, matters of life and death of his nation with his scholarly ties extending to Vienna and Rome, and his friendly ones reaching out to the capital and Szeged. It was the company he kept with men of letters like SÁNDOR WEÖRES,[18] musicians like the violinist VILMOS TÁTRAI,[19] theologians like the Graz, Rome and Fri-

[18] SÁNDOR WEÖRES (1913–1989), by now renowned as a classic of the remaking of modern Hungarian literature, see <http://en.wikipedia.org/wiki/Sándor_Weöres>. Cf., by the present author, 'Weöres Sándor ifjúkori versei és a széprõl írt okfejtése Losonczy István hagyatékában' [Juvenile poems of Sándor Weöres and his tractate on the nature of beauty in the legacy of István Losonczy] *Holmi* VII (August, 1995) 8, pp. 150–154.

[19] VILMOS TÁTRAI (1912–2002), founder of the Tátrai Quartet (1946).

bourg Dominican professor of natural law ALEXANDER HORVÁTH,[20] philosophers like TIBOR HANÁK who was to become one of the most outstanding figures of the Catholic anti-Communist emigration in Vienna,[21] life scientists from the medical faculty and his library-like study in his home that energized him. Professionally he is known to have kept in touch with Professor BARNA HORVÁTH[22] and the latter's disciples ISTVÁN BIBÓ and JÓZSEF SZABÓ[23] at Szeged University. In such an inspiring environment and at a time of a national revival, it is still his apparent solitude that strikes the eye. Or, alternatively, it may have been but his dogged perseverance in, and prospect of, finding a path of his own, or his compulsion to assert himself that made him appear that way. At any rate, the research theme of his choice was not to bring him any closer to the high-minded JULIUS MOÓR, the number one philosopher of law of the age, sitting on his university chair in Budapest, or to BARNA HORVÁTH, building his school of disciples involving BIBÓ, J. SZABÓ and TIBOR VAS[24] in Szeged. LOSONCZY certainly did not draw upon mainstream topics of jurisprudence either, when he discoursed upon the

[20] ALEXANDER HORVÁTH (1884–1956), author of *Eigentumsrecht nach dem hl. Thomas von Aquin* (Graz: Moser 1929) viii + 240 pp., arguing for the priority right of collectivity in use of property, among others.

[21] TIBOR HANÁK (1929–199?), author of *Lukács war anders* (Maisenheim am Glan: Hain 1973) 189 pp. [Monographien zur philosophischen Forschung 114], *Die Entwicklung der marxistischen Philosophie* (Darmstadt: Wissenschaftliche Buchgesellschaft 1976) xiii + 326 pp. [Die philosophische Bemühungen des 20. Jahrhunderts] and *Die marxistische Philosophie und Soziologie in Ungarn* (Stuttgart: Enke 1976) vii + 231 pp. [Enke Sozialwissenschaften].

[22] BARNA HORVÁTH (1896–1973), author of *Rechtssoziologie* Probleme der Gesellschaftlehre und der Geschichtslehre des Rechts (Berlin-Grunewald: Verlag für Staatswissenschaften und Geschichte GmbH 1934) xi + 331 pp. and *Probleme der Rechtssoziologie* (Berlin: Duncker & Humblot 1971) 204 pp. [Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung 20], as well as, in posthumous edition, of *The Bases of Law / A jog alapjai* [1948] ed. Csaba Varga (Budapest: Szent István Társulat 2006) liii + 94 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Jogfilozófiák] {bio-/biblio-graphy at pp. xvii–xxxviii}, with papers to be reprinted in Barna Horváth *Schriften zur Rechtsphilosophie* I: 1926–1948: Prozessuelle Rechtslehre; II: 1926–1948: Gerechtigkeitslehre; III: 1949–1971: Papers in Emigration, hrsg. Csaba Varga (Budapest: Szent István Társulat 2013) [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae] {in preparation}.

[23] JÓZSEF SZABÓ (1909–1992), imprisoned in 1948, forced to retire again in 1957. ISTVÁN BIBÓ (1911–1979), persecuted after both the Communist takeover in 1948 and the national revolution in 1956. Cf. *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas, hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) 246 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae] { bio-/biblio-graphies at pp. 11–22 and 81–89, respectively}.

[24] Cf. note 8.

ontological problem of the causality of non-action,[25] or when (inspired by neo-KANTianism) he considered the feasibility of functional concept-formation in jurisprudence.[26] However, the drift of his cogitation appears to indicate his attempt to find (despite its particularity) what is unprecedented and unique, and what is suitable not only for exercising his mental acuity but also for forging of what only seems to be ephemeral: an ARCHIMEDEan fulcrum to lift European scholarship out of its KANTian complacency. The ethos the two works have in common is based on his aspiration to root out false presumptions and fundamental theoretical assumptions left unchallenged. Asserting itself at this point was the same dry logic of iron ratiocination which had been hinted at with a modicum of aversion by IRK on the occasion of his disciple's habilitation,[27] and which was to appear in a manuscript summary of 1948 as one that takes cognisance of values but ousts any kind of reliance on attachment to transcendence or faith-based conviction from theorisation. It appears as though he had set about drawing up the outlines of a "realist" philosophy of law[28] as early as very first writings. Anyhow, he embarked upon his career in legal philosophy by raising an issue in the theory of science on a prestigious international forum,[29] and wound it up in an unfinished book-size series of lecture-outlines,[30] which, due to the irony of fate, were never to mature into a full-blown textbook.

A promising start with an eccentric detour, a career which, though rooted in the period between the two world wars, was to inevitably terminate in soberly and logically organised, unassuming and "realistic" orderliness.[31]

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[25] István Losonczy *A mulasztás* I: A mulasztási bűncselekmény okozatossága [Omission, vol. I: The causality of criminal offence committed by omission] (Pécs: Dunántúl Egyetemi Könyvkiadó 1937) 240 pp. [with no further volume ever published].

[26] István Losonczy *A funkcionális fogalomalkotás lehetõsége a jogtudományban* [The possibility of functional concept-formation in jurisprudence] (Budapest: Királyi Magyar Egyetemi Nyomda 1941) 141 pp.

[27] Quoted by László Vargha in *Fejezetek a pécsi egyetem történetébõl* [Chapters from the history of Pécs University] ed. Andor Csizmadia (Pécs 1980) 367 pp. on pp. 183–185.

[28] István Losonczy *Abriß eines realistischen rechtsphilosophischen Systems* [typescript] (1948), posthumously published, cf. note 16.

[29] István Losonczy 'Über die Möglichkeit und den Wissenschaftscharakter der Rechtswissenschaft' *Zeitschrift für öffentliches Recht* XVII (1937) 2, pp. 145–194, reprinted also as Appendix in *ibid.* [note 16].

[30] István Losonczy *Jogfilozófiai elõadások vázlata* [Outlines of lectures in legal philosophy] [lithoprint] (Pécs 1948) 57 + 43 + 81 +10 pp., reprinted under the same title, ed. Csaba Varga (Budapest: Szent István Társulat 2002) xvi + 282 pp. [Jogfilozófiák].

[31] Cf., for the conceptual explication of some of his key terms, Péter Cserne 'Az univerzalizmus partikularitása: Losonczy István »A mulasztási bűncselekmények jogellenességének prob-

Over and above the enigma of his solitude, there emerges the puzzle of what path or line of study he would have supposedly taken, judging by the thrust of his infrequent publications or by the considered but fragmentary analyses in his extant Manuscript Summary.

Remarkable is the reserve with which he related to his colleagues in the profession and even to his predecessors. It appears as though they had been non-existent for him, or as if he had set about planning his scholarly career with extraordinary calculation from the very outset, conceiving every day of it as pre-calculated elements of something enthralling to come, whose every element was to expediently fit in a distant perspective. While being cited by peers (like ISTVÁN BIBÓ, a few years his junior) of no lesser scholarly stature than he himself was, he failed to reciprocate, making it appear as though he had been trying to find his place in a German-speaking Central Europe without wasting his time on the endeavours of the ones in the peripherics. What did he feel? Did he feel belated or determined to do pioneering work? There is no knowing. Still, it seems to be a good bet that—aware of his belatedness—he felt the need to lay the theoretical foundations of his oeuvre. Anyway, the ivory tower he wound up in appears to have been of his own construction right from the outset.

His striving for perfection as inspired by, and in methodology borrowed from, natural sciences took its cue from the philosophy of his age. And the same is true of the eminent place he secured for the conceptual prerequisite of the notion of *henid*,[32] which by and large went hand in hand with *gestalt* psychology (gaining ground both in philosophy and methodology) and with his deduction of the various components of law and mechanism of its effectuation in correlation with specific ontological layers.[33] This ontological theorisation is so inexorably unambiguous that it strikes one as if it were but sheer banality. Yet, it is a revolt because, flying in the face of categorical reasoning, which is prone to logically and linguistically homogenise diverse

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lémája az univerzalizmus szemszögébõl« című művérõl' [The particularity of universalism: On the work of István Losonczy on »The problem of unlawfulness of criminal offence committed by omission from the aspect of universalism«] *Jura* [Pécs] 9 (2003) 1, pp. 50–58.

[32] According to his posthumous summary in reprint (note 30), "the *henid* content of consciousness—in our case: logical prerequisite—is present in our consciousness latently, yet not in a clear, explicit way, therefore not in the form of a logical judgement." (p. 60) For these are "[L]ogical *a priori* elements […] which mostly lack [explicit] logical form and are very often not even conscious, and are, thus—availing ourselves of OTTO WEININGER's expression—, intellectual phenomena of a »*henid*« state." (p. 247)

[33] Cf. with note 42.

concepts and thus misrepresent them, LOSONCZY set out to make theoretical "re-constructs" based on and starting from everyday facts of life. That is why (despite its unhistoricalness) the question remains: what direction would legal philosophical history have taken if LOSONCZY's realism had had the opportunity to mature into a monography and thus confront theories of, and provoke discussions with, the Budapest-based JULIUS MOÓR as assisted by KORNÉL SCHOLZ,[34] and those of the Szeged School shored up by the young and promising VERA BOLGÁR,[35] and those put forward by other authors (like ALEXANDER HORVÁTH or "synthetical" natural law expert JÓZSEF HEGEDŰS[36])?

Hardly had ISTVÁN LOSONCZY turned forty when he was compelled to make a change in direction in his professorial career. Soviet occupation, which was to ensnare this country into half a century of ill-fate, culminated in a communist takeover, physical and intellectual terror. The successors to the "LENIN-boys" of 1919 (militia notorious for committing atrocities) descending upon the University of Pécs went ahead with their cleansing (which hardly any scholar could have survived without being intimidated) with the gasping fervour befitting only mercenaries (ironically it has since assumed a kind of elegant, cosmopolitan veneer). We can only be pleased for LOSONCZY to have had the good luck in unlucky times to avoid being unseated by putting his better leg forward, unlike MOÓR, BIBÓ and SCHOLZ who were removed from their positions at short notice, or as B. HORVÁTH, HANÁK and BOLGÁR, who were forced to flee the country, or JÓZSEF SZABÓ, who was imprisoned, or, to mention just some of his colleagues at Pécs, constitutional law professor ISTVÁN CSEKEY and administrative law professor JÓZSEF BÖLÖNY, and associate professor of social care ISTVÁN WEIS and others, from among his closest colleagues who were all thrust into the worst existential insecurity of the declassed.[37]

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[34] KORNÉL SCHOLZ (1917–2002), forced to change his old LUTHERan Saxonian name to SOLT by the early '50s, was only permitted to publish at an advanced age. Cf. his *Jogi logika* A jog, a nyelv és a valóság [Legal logic: Law, language and reality] I–II (Budapest: Seneca 1996) 562 pp.

[35] Cf. Alfred F. Conard 'Vera Bolgar (1913–2003)' *The American Journal of Comparative Law* 52 (2004) 1, pp. 5–7 {& <http://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Documents/Vera_Bolgar/vera_bolgar_by_conard.pdf>}.

[36] JÓZSEF HEGEDŰS (1886–195?).

[37] Even by national standards, very few could escape through a radical change in their respective academic paths like this. To mention just one, professor MIHÁLY MÓRA of the metropolitan Pázmány Péter University became a procedural lawyer from a canonist.

So LOSONCZY shifted to criminal law. He took on the responsibility of teaching his subject and writing textbooks,[38] and also that of academically steering his department and his students. He was also lucky in that he succeeded in pursuing his long-time interest, doing research (staying within the realm of philosophy of criminal law) into the purely theoretical questions of the subjective side of, and the relationship to, the deed in criminal law.[39] Hence, he was to integrate only into the professional communities of criminal lawyers, thereby getting hold of considerable standing both for his university and himself. He also qualified for an Academic candidate's degree early on, and initiated interdisciplinary discussions in his Faculty and encouraged the student research circles' activity. All the same, he remains an outsider even in this community all through, in as much as he preserves his distance from criminal law proper, from the study of particular crimes, i.e., from their doctrinal analysis in positive law.

In my memory (further accentuated though by the specific emphases one tends to attribute to youthful impressions), he appears as the *burgher* (as one characterised by THOMAS MANN, among others), who was prepared to go to any length in his effort to preserve his privacy, including even the manifestations and objectifications of his values, thoughts and style—all that having been meant to demonstrate his autonomy vis à vis "them", i.e., the then communist Establishment, even if such deportment could not have served as a norm for others to follow. His self-sequestration, shutting out the outside world and his bottled-up-ness deprived him of the warmth of an empathetic community. Yet, he served as a living symbol of an abruptly terminated past which is still holding out for the future, braving a shallow and inferior present.

Free from the shackles of the recent past, today's scholars cannot but be sorry that, over and above his private resistance, he was prevented from also delivering content suitable for educating and edifying generations of stu-

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[38] By István Losonczy, *Magyar anyagi büntetőjog* [Hungarian criminal substantive law] (Pécs 1951) 268 + 9 pp. & *Szovjet büntetőjog és eljárás* [Soviet criminal law and procedure] (Pécs 1951) 148 pp., and their several versions amended yearly and then upgraded into co-authored textbooks later on.

[39] By István Losonczy, *A tettesség* [Perpetrators: principals and joint principals] (Budapest: Közgazdasági és Jogi Kiadó 1961) 203 pp. & *A tettesség és részesség a büntetõjog rendszerében* [Perpetrators and accessories in the system of criminal law] (Budapest: Közgazdasági és Jogi Kiadó 1966) 421 pp. as well as 'A korlátozott beszámítási képesség néhány kérdése…' [Questions related to the limited mental capacity…] in *Jubileumi tanulmányok* II (Pécs 1967), pp. 233–268.

dents. It is a pity that the erudition, intensity, analytical talent, conscientiousness and perseverance which the young professor engrossed in his work, evidenced, failed to bring about (during the three decades following the rift in his career and in addition to his nationally recognised professional qualities and some of his works) the grand oeuvre, which would have pre-required unconditional trust, a sense of commission on his behalf and also human warmth to back him up.

It is sad for us to realise yet again that, as the poet GYULA ILLYÉS says, in tyranny, there is no one who is not "a link in the chain",[40] in an upheaval likewise, it is not only that the vanquished get destroyed, but that even those who manage to stay afloat by holding on to something in the sea of troubles get inevitably crippled. The questions of what sanctuary one can retreat to, how much faith one has and what in (what tenacity of a LAZARUS of Bethany and will to live one can muster) are bound to be left unanswered, as they are part and parcel of our innermost self, undecipherable by any sophistry by the posterity, and rarely, if at all, the business of any outsider.

Whoever was his disciple felt honoured. Whoever had a word with him may have had a taste of his gravitas, congruity, insight, and tendency toward orderliness. What the Romans used to consider "*ars*" (i.e., craftsmanship and art in one) he conceived of as scholarly discipline, calling for calm, modesty, reflection, learning and application. He delivered the most and the best of what could have arisen from a professor's calling, doing all that at a time, under and despite circumstances in which his demeanour was construed as bearing all the hallmarks of a "discredited" past, branded as latently dissident, which consequently, was the least prized or conducive to, a successful career then.

He however, was to remain the symbol of staying on one's feet by all means, of endurance, of continuity between what used to be considered a discarded past and the present. He became the champion of the university which once had been his alma mater.

As a full professor of law, he decided at the age of thirty-six to take up medicine as a day student. His focus on determinism and indeterminism and criminal ethyology (themes he thrashed out philosophers, biologists, phy-

[40] Gyula Illyés *A Sentence About Tyranny* [1951] trans. George Szirtes in <http://www.hungarianquarterly.com/no139/p15.html>: "in tyranny's domain / you are the link in the chain, / you stink of him through and through, / the tyranny IS you."

siologists), his unrelenting interest in biology and medicine[41] and also his concern with criminal causality (re-asserted at an age of sixty) appear to be indicative of his endeavour to ontologically substantiate his "realism", within which (inspired even by childhood aspirations) he wished to specify (by separating the lifeless and the living and also further distinguishing within the latter the ontological layers verging on the specifically human[42]) the human being as one equally responsible to its own self, its community and God, and thereby discern its intrinsic intellectual and moral qualities.

If we take his "realism" as an attempt at superseding the traditional positions of idealism versus materialism in a new synthesis,[43] we can appreciate it not only as valid but—as to its purport—also unsurpassed up to the present day, since the way we pose our questions still appears to be suggestive of preconceptions in our one-time acceptable patterns of thought.[44] Worse still, our social setup, political philosophy and our juridical endeavours appear more often than not to be based on insufficient and ill-defined anthropological *sine qua non*s;[45] and considering the attempts at reconciling scientific and theological visions of man, we have to realise that not even the

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[41] István Losonczy 'A biológia és az orvostudomány fejlődésének hatása a büntetőjogra' [The influence of the developments in biology and medicine on criminal law] *Gazdaság- és Jogtudomány* VII (1973) 1–2, pp. 159–183.

[42] He discerns, in his posthumous works referred to in notes 16 and 30, (1) physical, (2) chemical, (3) biological, (4) psychical, (5) social, (6) cultural, and—as a theoretical possibility—(7) supernatural phenomena as conceptualisable layers of existence.

[43] Mihály Szotáczky in *Fejezetek a pécsi egyetem történetéből* [note 27], p. 115.

[44] Cf., e.g., by the present author, *The Paradigms of Legal Thinking* [1999] enlarged 2nd ed. (Budapest: Szent István Társulat 2012) 418 pp. [Philosophiae Iuris]
& <http://www.scribd.com/doc/85083788/VARGA-ParadigmsOfLegalThinking-2012>.

[45] Cf., e.g., regarding the atomising effect of individualism, Robert Nisbet *The Quest for Community* A Study in the Ethics of Order and Freedom (New York: Oxford University Press 1953) 303 pp. As a conceptual framework, see, by the present author, 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* Tanulmányok Várkonyi Nándor: Az ötödik ember című művéről [Mankind adrift: Notes on the work of Nándor Várkonyi »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom 2000), pp. 61–93 and 'Rule of Law – At the Crossroads of Challenges' *Iustum, Aequum, Salutare* [Budapest] I (2005) 1–2, pp. 73–88 {& <http://www.jak.ppke.hu/hir/ias/20051sz/20051.pdf> & in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 167–188 and also as 'Rule of Law: Challenges with Crossroads Offered' *Central European Political Science Review* 10 (2009) Spring, No. 35, pp. 42–68}.

most comprehensive and compelling achievements and authenticity of an oeuvre cannot guarantee a valid solution.[46]

Being aware that LOSONCZY's era was one for attempts at synthesising legal philosophies,[47] we will instantly recognise that his concern with abstraction as validated by scientific exactitude, was motivated by a striving for the soundest groundwork available which, at the same time, was to offer a glimmer of hope for the chance of a theoretical answer favourably disposed to truthfully humane values.

[46] Cf. the case of, e.g., PIERRE TEILHARD DE CHARDIN.

[47] Let us just refer to the synoptic approach by BARNA HORVÁTH or the psycho-analytical foundations in JÓZSEF SZABÓ's theory-building.

ON THE SURVIVAL OF ILMAR TAMMELO'S LETTER AND MANUSCRIPT ADDRESSED to Professor MOÓR*

The cataclysms and disasters of 20th century hardly spared anyone who had taken their professions seriously, thus dedicating themselves to the public and their nation as a whole. For anyone who opts for reason as an ultimate guide in the conflict between values and very material coercions is bound to be crushed by tyranny and wiped out by injustice.

The university years in Kolozsvár of JULIUS MOÓR,[1] originating from a LUTHERan archdeacon's family in Brassó, coincide with the period of the Great War. FELIX SOMLÓ, a pioneering mind both in legal philosophy and sociology in Hungary at the turn of the century[2] was his master and later his fatherly friend. He started where SOMLÓ had left off. Shifting from what had been SOMLÓ's German and Anglo–American orientation, he followed the traditional German–French–Italian schools of thought, contacting as fastidiously as his master had earlier, the greatest in the field. He became both an adherent to, and a critic of, the Vienna school of legal positivism, a theory of law in Continental Europe holding sway ever since. Soon he became a celebrated professor of the prestigious Pázmány Péter University of Budapest, the teacher of generations and, on account of his books and papers, one of the most responsible intellects in Hungary to shape sociological

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* First published in Péter Cserne's translation as 'Julius Moór und das »Überleben« von Tammelo's Manuskript – Eine zeitgeschichtliche Anmerkung' in *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. Raimund Jakob, Lothar Phillips, Erich Schweighofer & Csaba Varga (Münster, etc.: Lit Verlag 2009), pp. 303–306 [Austria: Forschung und Wissenschaft – Rechtswissenschaft 3].

[1] Born in 1888 in Brassó [Braschow], Transylvania, Hungary (now: Brašov, Romania), died in 1950 in Budapest. After studies in Kolozsvár [Klausenburg], Transylvania, Hungary [now: Cluj-Napoca, Romania]), following temporary teaching assignments at the Eperjes Law Academy, upper Hungary (now: Prešov, Slovakia) from 1914 and the University of Kolozsvár from 1918, he was appointed professor in Szeged in 1920 and then in Budapest in 1929.

[2] Cf. his *Juristische Grundlehre* (Leipzig: Meiner 1917, ²1927 [reprint Aalen: Scientia 1973]) x + 556 pp., the posthumous *Gedanken zu einer Ersten Philosophie* hrsg. Julius Moór (Berlin & Leipzig: de Gruyter 1926) 107 pp. and his *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Akadémiai Kiadó 1999) xx + 114 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris].

thinking.[3] Among others, MOÓR corresponded all along with one of HITLER's first scholarly victims, the philosopher of law GUSTAV RADBRUCH, who, after having been removed from his post as rector of Heidelberg University, took spiritual refuge in the study of the doctrinal history of German criminal law. MOÓR's authority, as buttressed by the unconditional trust of the Regent, Admiral HORTHY, and his Upper House membership afforded him also the opportunity to intervene on behalf of a colleague, who was threatened deportation owing to his Jewish origin. It is of symbolic import that he became the first post-war rector of the Pázmány Péter University and, temporarily, also the president of the Hungarian Academy of Sciences. He was also shortlisted number one for the ambassadorial post in Moscow, which he declined, as he was convinced that upcoming fights should be fought at home in Hungary.

After the war, he started publishing with renewed vigour.[4] It was in the Hungarian Independence Party that, for the first time ever, he took a directly political role. With the date of the Paris Peace Treaty approaching and the justification for the Soviet military occupation also coming to an end, the imminent threat of a communist takeover made him take a firm stand. And that he did with dignity befitting his stature in two grandiose addresses to parliament. The communists were keenly aware of the purport of his address. Their response was commensurate: he was simply banned from entering university premises the following day. Was it the agents of the Soviet occupation force? Was it collaborators or hired thugs? Whoever it was, he had his flat burglarized and turned upside down.

Press campaigns and political demonstrations targeting him personally and continuing parliamentary interpellations stigmatising him as a "traitorous, fascistic ideologue-in-chief" were to become his share, dealt out only

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[3] Cf. his *Zum ewigen Frieden* Grundriss einer Philosophie des Pazifismus und des Anarchismus (Leipzig 1930) 101 pp., *A jogi személyek elmélete* [Theory of legal persons] (Budapest: Magyar Tudományos Akadémia 1931) 379 pp., *Szociológia és jogbölcselet* [Sociology and legal philosophy] (Budapest: Királyi Magyar Egyetemi Nyomda 1934) 59 pp. and *A szabad akarat problémája* [The problem of free will] (Budapest: Magyar Tudományos Akadémia 1943) 149 pp.

[4] Cf. his *A jogbölcselet problémái* [Problems of legal philosophy] (Budapest: Magyar Szemle Társaság 1945) 81 pp. [Magyar Szemle Kincsestára], *Jogfilozófia* [Legal philosophy] (Budapest: Magyar Élet 1936; 1947) 287 pp. as well as *Tegnap és holnap között* Tanulmányok [Between yesterday and tomorrow: Essays] (Budapest: Révai 1947) 172 pp. Cf. also his *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) xxii + 485 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Bibliotheca Iuridica: Opera Classica 3] {& <http://philosophyoflaw.wordpress.com/>}.

to hide the naked truth that the communists were exactly like he had described them, and acted in a way that amply justified his fears for Hungary's future. As a matter of course, according to the official communication he was pensioned off "at his own request" in the middle of the year he had turned 60. And all that was given the plain nod by the Faculty and University Boards. Not long ago the president of the Hungarian Academy of Sciences, he also had his membership quashed.[5]

After his redeeming death in throat cancer, it was his friend and one-time fellow-professor SÁNDOR SÍK, famous poet, professor of aesthetics and provost of the Piarist Order, who preserved his immensely valuable library until he himself died and the Order forced to displace. After a host of vicissitudes, the remnants of this collection of some ten thousands volumes which eventually, as a result of persistent search for several years, I could locate and identify in a desolate state of a far-away small village's doorless parochial annex in 1977 were donated to the Library of Parliament to further enhance the best jurisprudential collection of this country.[6] Then I gave special care for manuscripts, correspondence and other archive materials which I could save from this mass already in process of organic dissolution.[7] Fortunately, TAMMELO's seminar paper [*Seminararbeit*] and letter had been amongst them, which later on I published, in company of all the rest.[8] Since then, the manuscript booklet of 79 typescript pages is

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[5] E.g. Csaba Varga 'Philosophysing on Law in the Turmoil of Communist Take-over in Hungary (Two Portraits, Interwar and Post-war)' in *The 2005 ALPSA Annual Publication* of the Australian Legal Philosophy Students Association, ed. Max Leszkiewicz (Brisbane 2005), especially on pp. 82–86, as well as József Szabadfalvi 'Wesen und Problematik der Rechtsphilosophie: Die Rechtsphilosophie von Gyula Moór' *Rechtstheorie* 30 (1999) 3, pp. 329–353 and András Jakab 'Neukantianismus in der ungarischen Rechtstheorie in der ersten Hälfte des XX. Jahrhunderts' *Archiv für Rechts- und Sozialphilosophie* 94 (2008) 2, particularly on pp. 266–268.

[6] Cf. Károly Jónás 'A Moór–Somló-hagyaték' [The bequest by Somló & Moór] in Károly Jónás & Katalin Veredy *Az Országgyűlési Könyvtár története* 1870–1995 [History of the Library of Parliament] (Budapest: [Magyar Országgyűlés] 1995) {& <http://www.ogyk.hu/e-konyvt/pdf-konyv/konyv05.pdf>}, ch. 5.39, pp. 205–206.

[7] For a recollection, see Csaba Varga 'Kelsen-dokumentumok Magyarországon' [Kelsen-documents in Hungary] in *Hans Kelsen jogtudománya* [Kelsen's science of law] szerk. Cs. Kiss Lajos (Budapest: Gondolat & MTA Jogtudományi Intézete & ELTE Állam- és Jogtudományi Kar 2007), pp. 58–85 [Bibliotheca iuridica: Acta congressum 16].

[8] Csaba Varga 'Documents de Kelsen en Hongrie: Hans Kelsen et Julius Moór' *Droit et Société* [Paris] (1987), No. 7 {& <http://www.reds.msh-paris.fr/publications/revue/pdf/ds07/007-03.pdf>}, pp. 337–352 and *Aus dem Nachlaß von Julius MOÓR Gyula hagyatékából* hrsg. Csaba Varga (Budapest: ELTE "Comparative Legal Cultures" Project

catalogued as item 484.366 in the Library,[9] and the letter awaits for me bequeathing it to the Manuscripts Department of the Library of the Hungarian Academy of Sciences.

1995) xv + 158 pp. [Philosophiae Iuris] {& <http://philosophyoflaw.wordpress.com/>}, with *fac simile* of documents including Ilmar Tammelo's exclusive surviving copy of his seminar paper in own translation on *Kritik zu Prof. Kliimann's normativistischer Unterscheidung des Privat- und des öffentlichen Rechts* [Dorpat 1942] (pp. 63–145) and the accompanying letter (pp. 45–46).

[9] Cf. <http://opac.ogyk.hu> and <http://gauda.ogyk.hu/F/YC915UPVFTC11REFP86SAPUYCB9XBMR8M3N1M16T2UUFTHNTUX-10036?func=item-global&doc_library=OGY01&doc_number=000196632&year=&volume=&sub_library=TGYKV>, respectively.

PROFESSIONAL DISTRESS AND SCARCITY
ALEXANDER HORVÁTH and the Legacy of Natural Law in Hungary*

Although not lacking forerunners, of course, and despite the fact that the idea of natural law was cultivated further on by others after his passing, ALEXANDER [SÁNDOR] HORVÁTH OP (1884–1956) has been up to now the only academic acclaimed for scholarly achievements in Hungary, whose systematic work within the natural law tradition led to results worthy of international appreciation. Devoted to theology and faithful to the style and axiomatic canon originated by Saint THOMAS AQUINAS, he was also a Dominican friar. Starting as an assistant professor of philosophy at Graz (Austria) and then at Turin (Italy), he was appointed a professor of fundamental theology at the Theological Faculty of Pázmány Péter University (1942–1948) while directing the Dominicans' High School in Budapest, in addition to his standing professorship in moral theology at the Papal *Collegium Angelicum* in Rome. He excelled in theological studies[1] and general philosophical thought[2] as well.

As part of the common intellectual life[3] represented by THOMism and Neo-Scholasticism[4] in his country, he raised interdisciplinary interest with dialogues and joint actions lasting through successive periods,[5] ending in a theology respected as a millennium-old integral part (if not the foundation)

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* Address at the commemoration at Vasvár on May 24, 2006, marking the 5th anniversary of the foundation of the Historical Collection of the Dominican Order and the 50th anniversary of the death of Alexander Horváth. Its first original publication is forthcoming as an introduction to Horváth Sándor *A természetjogról* [On natural law, a collection in *fac simile*] ed. Csaba Varga (Budapest: Szent István Társulat 2011) [Jogfilozófiák].

[1] E.g., David Berger 'Alexander M. Horvath: Thomist und Dominikaner' in *Biographisches-bibliographisches Kirchenlexikon* ed. T. Bautz, XIX (Hamm: Traugott Bautz 2001), pp. 713–716 {& <http://www.kirchenlexikon.de/h/horvath_a.shtml>}; *Magyar katolikus lexikon* [Hungarian Catholic lexicon] ed. István Diós, V (Budapest: Szent István Társulat 2000), pp. 59–60; David Berger *In der Schule des Heiligen Thomas von Aquin* Studien zur Geschichte des Thomismus (Bonn: Verlag nova & vetera 2005) 408 pp., especially at pp. 63–68.

[2] E.g., Tibor Hanák *Az elfelejtett reneszánsz* A magyar filozófiai gondolkodás századunk első felében [Forgotten renaissance: The Hungarian philosophical thought in the first half of our century] (Bern: Európai Protestáns Magyar Szabadegyetem 1981) 265 pp. at pp. 92–109.

[3] There is a fair entry in, e.g, *Magyar életrajzi lexikon* [Hungarian biographical lexicon] ed. Ágnes Kenyeres, I (Budapest: Akadémiai Kiadó 1967), p. 750, plentiful data in *Új magyar élet-*

of human knowledge. Thereby, he symbolised a living contrast to the "scientific atheism" characteristic both of the 133 days of the Hungarian Soviet Republic in 1919 and of the regime established by the Communist take-over in 1948, which reduced religious belief to a political stance either to be temporarily addicted as "opium of the masses"[6] or overcoming as a cultural lag. At the same time, he also symbolised a contrast with most of the past and present currents that could not offer a promising (by being reassuring and comprehensive) path out of the antagonism of the extreme poles they themselves generated.

As to his intellectual environment, we surmise one of the remarkable figures of Hungarian legal philosophising—ISTVÁN LOSONCZY, himself a quarter of a century younger than professor HORVÁTH—to have been (according to his children's recollections) a conscious atheist and yet to have been linked to ALEXANDER HORVÁTH by bonds of friendship, moreover, by a respect obliging him to feel the gratitude of a disciple.[7] In contrast, a fellow professor of almost the same age, the renowned star of the metropolitan Law Faculty (and its dean repeatedly between the two wars and its

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rajzi lexikon [New Hungarian biographical lexicon] ed. László Markó, III (Budapest: Magyar Könyvklub 2002), pp. 385–386, and a thorough analysis in the paper of Miklós Szalai 'Szent Tamás az Ugaron: Horváth Sándor arcképéhez' [St. Thomas on the fallow: to the portrait of Alexander Horváth] in <http://beszelo.c3.hu/03/0708/13szalai.htm> and, on behalf of our lawyerly profession, József Szabadfalvi *Cselekvőségi elmélettől az újrealizmusig* Fejezetek a magyar jogbölcseleti gondolkodás történetéből [From the theory of action to new realism: Chapters from the history of Hungarian legal philosophy] (Budapest: Gondolat & Debrecen: Debreceni Egyetem Állam- és Jogtudományi Kara 2004) 261 pp. [Gondolat – Debreceni Egyetem Állam- és Jogtudományi Karának kiadványai I], above all pp. 177–180.

[4] E.g., Pál Kecskés *A bölcselet története főbb vonásaiban* 2nd rev. ed. [The history of philosophy in main outlines] (Budapest: Szent István Társulat 1944) 712 pp. mentions him exclusively in the context of secondary literature on St. THOMAS, referring to new scholasticism.

[5] It is obviously a task for the future to evaluate the movement of "national intellectual defence" in search for a *Harmadik út* [Third road], rejecting the then widely-held exclusivity of the alternative of either liberalism or Bolshevism and National Socialism, in the spirit of which he initiated and co-edited the journal *Jelenkor* (1939–1944) with the historian GYULA SZEKFŰ and the jurist KÁLMÁN MOLNÁR.

[6] Cf. <http://en.wikipedia.org/wiki/Opium_of_the_people>.

[7] Cf., in the author's bibliographical overview, in István Losonczy *Jogfilozófiai előadások vázlata* [An outline of lectures in legal philosophy] [1948] ed. Csaba Varga (Budapest: Szent István Társulat 2002) xvi + 282 pp. [Jogfilozófiák], pp. xi & xiv and, as admitted by LOSONCZY (1908–1980) in a quotation from 1948, *ibid.*, p. 5.

first *rector magnificus* after the Second World War), JULIUS MOÓR, did not share HORVÁTH's ideas on natural law, albeit his own legal philosophy was imbued (eclectically, yet consistently) with *jus naturalism* throughout.[8] Was it perhaps so because Professor JULIUS MOÓR happened to be a committed CALVINist? Not quite likely. As a matter of common knowledge, he maintained a friendship with, e.g., the Piarist THOMist ANTAL SCHÜTZ, ending with his dedicating a critical overview to the latter's theological philosophy.[9] Or was it so because ALEXANDER HORVÁTH's oeuvre—despite being modern, of a broad outlook and also sensitive in responding to timely issues—proved in both its elaboration and message hermetically exclusive, using strictly dogmatic methods and resources from within theology, consequently by no means opening towards secular, lawyerly jurisprudence? Here we may think to be closer to an accurate response. For, in contrast to the striking openness (also seen in the processing of secular literature) of, e.g., bishop OTTOKÁR PROHÁSZKA (having started three decades before him) or professor TAMÁS NYÍRI (working three decades later than him), the endeavour of HORVÁTH remained within the systemic bonds of Saint THOMAS AQUINAS all along, merely reconsidering and actualising the latter's unchanged axiomatism (which led to his interpretation of property, which was heavily debated in its time, as being allegedly closer to the then-mainstream communitarian—National Socialist and Bolshevik—than the individualist—liberal capitalist—conception of it). At the same time, his attitude remained that of a preacher: always standing on a pulpit symbolically, heralding a message transcendent for us rather than trying to convince us.

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The Role of Eternal Ideas and Seeds of Ideas in the Thought of Saint Thomas—this is the title of his Philosophical and Theological Papers[10] outlining the

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[8] Cf. GYULA [JULIUS] MOÓR (1888–1950). Cf., also by the author, 'Philosophysing on Law in the Turmoil of Communist Take-over in Hungary (Two Portraits, Interwar and Post-war)' in *The 2005 ALPSA Annual Publication* of the Australian Legal Philosophy Students Association, ed. Max Leszkiewicz (Brisbane 2005), pp. 82–94.

[9] See, e.g., Gyula Moór 'Philosophia perennis: Schütz Antal bölcselete' [Philosophy of Antal Schütz] *Athenaeum* XXVII (1941) 2, pp. 136–164 {& off-print (Budapest: Kir. Magy. Egyetemi Nyomda) 31 pp.}.

[10] Alexander Horváth *Örök eszmék és eszmei magvak Szent Tamásnál* Bölcseleti és hittudományi tanulmányok [Die Rolle der ewigen Ideen und ideenhaften Keime nach dem hl. Thomas] (Budapest: Szent István Társulat 1944) 446 pp. For the outlines of the philosophical

horizon of his examinations and forming opinion about *particularitas*es and *ephemeralia*s of his age, which have grown to systemic dimensions. Yet, while the perspective of the eternal seems to be as given forever from the very beginning, in what we recently refer to as the Social Teaching of the Church, it is not immaterial whether we consider it as part of the Office of Instruction or as just the concretisation of the historical accumulation of human conviction and knowledge.

For, by now, humanity has almost completely used up the reserves of human life on Earth. The proudly declared victory of our civilisation is based on moral destruction accomplished. Our most effective schemes of social organisation have all resulted in the ultimate disintegration of the linkages of *societas*, that is, into liberal atomisation, through the perverted synthesis of the war of all against all: *bellum omnium contra omnes*.[11] Even our local efforts to achieve a political transition from Communism were eventually forced into the same Procrustean bed, assisted by actors allegedly committed to CHRISTian traditions and nothing else.

Or, globalism already forecasts—with the threatening perspective of the End of History[12] on the horizon—a future of re-totalisation, i.e., final unification with uniform homogenisation and one-way penetration completed.[13] Accordingly, we do live in a threatened age, with future endangered. Crying out is useless, direction is lost, and the negative impact is strengthened by the mainstream of value indifference ending in total relativism.

One of the most efficient factors forging a good or bad fate for ourselves—because, thanks to the idol of rationality, we live again in an ideocratic age—is exactly our law and the concept (taken in its present-day application as *de lege lata* and its future destiny to be shaped as *de lege ferenda*) we have formed about law. And our law and legal conception—alongside

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foundation of legal order in the works of Alexander Horváth O.P., see Géza Kuminetz *A jogrend filozófiai megalapozása Horváth Sándor O.P. műveiben* (Veszprém: Érseki Hittudományi Főiskola 2000) 121 pp.

[11] Cf. <http://en.wikipedia.org/wiki/Bellum_omnium_contra_omnes>.

[12] Cf. Francis Fukuyama *The End of History and the Last Man* (London: Penguin 1992) xxiii + 418 pp.

[13] As most clearly in Hungarian literature, see, by László Bogár—monographisingly—*Magyarország és a globalizáció* [Hungary and the globalisation] (Budapest: Osiris 2003) 446 pp. and—as to present-day application—'Orbán Viktor három választási lehetősége' [Three choices of Viktor Orbán] *Magyar Nemzet* [Hungarian Nation, a daily] LXIX (May 19, 2006) 135, p. 6.

the human rights ideology (Janus-faced as both healing and disintegrating),[14] constitutional adjudication (with the US Supreme Court practically overwriting the Constitution since the 1970s[15] and the Constitutional Court in Hungary derailing the very transition in its dramatic foundation period[16]), as well as legislation—work without any natural law consideration on their agenda, that is, in negation of the tradition of fundamental values, imbued with millennium-old developments of CHRISTianity and humanism.

Whether or not there is anything uneven and belated in Hungarian national development, her culture (testified by archaeology to be continuously CHRISTian for more than one millennium, that is, since before the state was founded and its population made baptised by the king Saint STEPHEN) will have acquired the entirety of the *corpus* of Saint THOMAS' work in Hungarian translation only now, in our day.[17] Not even the independent cultivation of natural law may have fully evolved in Hungary. ALEXANDER HORVÁTH was practically alone in doing so, although mainly for the sake of theology.

In sum, within the modern bourgeois development of mainstream legal positivism for a century and a half, there was a single *jus naturalist* oeuvre in

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[14] Cf., by the author, 'Rule of Law – At the Crossroads of Challenges' *Iustum, Aequum, Salutare* I (2005) 1–2, pp. 73–88 {& <http://www.jak.ppke.hu/hir/ias/20051sz/20051.pdf> as well as in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 167–188 and as 'Rule of Law: Challenges with Crossroads Offered' *Central European Political Science Review* 10 (2009) Spring, No. 35, pp. 42–68}.

[15] Cf., by the author, 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself: dilemmas of rationalism in our age] in *Sodródó emberiség* Tanulmányok Várkonyi Nándor: Az ötödik ember című művéről [in Mankind adrift: On Nándor Várkonyi's »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom Könyvműhely 2000), pp. 61–93.

[16] Cf., by the author, 'Creeping Renovation of Law through Constitutional Judiciary?' in his *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008), pp. 117–160 [PoLíSz Series 7] {& <http://drcsabavarga.wordpress.com/2010/10/25/varga-transition-to-rule-of-law-–-constitutionalism-and-transitional-justice-challenged-in-central-and-eastern-europe-2008/>} {& 'Transition Marshalled by Constitutional Court Dicta under the Cover of a Formal Rule of Law (A Case-study of Hungary)' *Central European Political Science Review* 9 (Summer 2008), No. 32, pp. 9–48}.

[17] Cf., as one relevant part of it, Aquinói Szent Tamás *A Summa Theologiae kérdései a jogról* [Saint Thomas Aquinas: The Questions of Summa Theologiae relating to law (I-II, qq. 90–108 & II-II, qq. 57–62)] trans. János Tudós Takács, ed. Csaba Varga (Budapest: Szent István Társulat 2011) ix + 269 pp. [Jogfilozófiák], thanks to the (recently died) translator's ambitious programme aiming at completeness.

Hungary, part of the international THOMism characterised by Dominican neo-scholasticism. Even HORVÁTH's basic work was published abroad, in a provincial centre of his order, in a small number of copies.[18] And he categorised his further works (summations, monographs and collections)—correctly, by the way—as "theology: theoretical moral philosophy".[19] And here lies the reason underlying why such fundamental *opus*es were not in fact welcomed by legal *facultas*es and *academia*s and why the latter was not ready to integrate the former into their timely work.

What may the future have in store for us? Here are some facts. Firstly, even American social science theorising on law does not exclude the conceivability of setting limits on legal action. Secondly, MARXism is increasingly considered in terms of one specific reaction to inhuman manifestations, with the view of either superseding them by way of revolution or neutralising them by setting up frameworks asserted like laws of nature. And thirdly, legal anthropology and sociology attempt to explore the internal limits of human intervention and the interrelations that prevail in the final account. In such circumstances, our legal voluntarism cannot gallop on unrestrained, and we are not free to become infatuated with (as driven away by) new utopianisms, which can release the brake of any experience by alternating ideologies, celebrated as mainstream, at the moment we like—as if they were cheap ornaments.

Otherwise speaking, points of orientation are needed, with patterns of reference as well as brakes within them. For—as we may know from the history of codification itself—even an over-rationalisation of law we are used to results in irrationality that may foster the collapse of the whole edifice in the long run. Likewise, the present-day American legal reality has provided us with the lesson[20] that rationality becomes, if left in its state of inertia, irrational through and through.

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[18] Alexander Horvath *Eigentumsrecht nach den heiligen Thomas von Aquin* (Graz: Moser 1929) viii + 240 pp.

[19] Horváth *Örök eszmék*… [note 10].

[20] Cf., by the author, 'Rule of Law? Mania of Law? On the Boundary between Rationality and Anarchy in America' in *Prudentia Iuris Gentium Potestate* Ünnepi tanulmányok Lamm Vanda tiszteletére, szerk. Nótári Tamás & Török Gábor (Budapest: MTA Jogtudományi Intézete 2010), pp. 492–504.

HUNGARIAN LEGAL PHILOSOPHY IN THE 20TH CENTURY

The first half of the 20th century in Hungary is marked by the prevalence of neo-KANTianism and its development into an almost exclusive jurisprudential orientation.[1] This came as a backlash against legal positivism, which stood as a stronghold in the background, exerting a dominant influence throughout the new era and replacing the earlier, 19th century breed of natural-law doctrines, mostly of Austrian origin.[2]

Hungary did experience a brief postwar recovery, but it was derailed and brutally cut short by the Communist dictatorship, which spread into the country by way of the Soviet expansion, and whose main conclusion lay in the accords of the Yalta Conference. The MARXism that came to be imposed by Moscow—a MARXism reduced to Soviet Russian use—could only be superseded by the fall of the regime. The new initiatives that have formed since then are attempts at synthesising some abiding theoretical experiences with the international mainstream.

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[1] Cf., e.g., by András Jakab, 'Neukantianismus in der ungarischen Rechtstheorie in der ersten Hälfte des XX. Jahrhunderts' *Archiv für Rechts- und Sozialphilosophie* 94 (2008) 2, pp. 264–272 and 'Kelsens Rezeption in Ungarn' in *Hans Kelsen anderswo / Hans Kelsen Abroad* Der Einfluss der Reinen Rechtslehre auf die Rechtstheorie in verschiedenen Ländern, III, hrsg./ed. Robert Walter, Clemens Jabloner & Klaus Zeleny (Wien: Manz 2010), pp. 41–71.

[2] Máté Paksy & Csaba Varga 'Ideas of Natural Law in Hungary: Past and Present' *Jura* [Pécs] 16 (2010) 2, pp. 155–164.

I. The Pre-war Period

1. Bódog (Felix) Somló (1871–1920)

Somló's oeuvre greatly influenced the development of neo-Kantian legal philosophy to become the dominant trend in Central Europe, thus also prevailing in Hungary, under the impetus of the modernisation of domestic legal theoretical thought.[3]

The first stage of his activity—which he summarised in a paper on the law's value standards[4]—is characterised by a reassertion of Herbert Spencer's doctrines, concomitantly with an espousal of Gyula [Julius] Pikler's sociological approach, naturalistic and utilitarian at the same time,[5] which was based on a strictly scientific, psychologically coloured outlook within the framework of a materialist philosophy of history. He could thus complete Ágost (Augustus) Pulszky's endeavour to lay the philosophical foundations of legal positivism in the country.[6] It is only later, in the second stage of development, that his work took a definite neo-Kantian turn. Initially, he had still seen legal philosophy and legal sociology as equal in standing, but neo-Kantian conceptualisation also made it necessary to separate them—regardless of whether they are interconnected fields.

He first criticised contemporary authors from a natural-science perspective inspired by positivism and evolutionism. He then reconsidered the increased role the state had to play when capitalism, having changed into a monopolistic scheme, demanded a reformulation of all the relevant functions and institutions of law.[7] When he set out to systematise these ideas

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[3] Cf. Felix Somló *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Akadémiai Kiadó 1999) xx + 114 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae]. With only a few exceptions, the bibliography in the following notes lists not the original works but their Western-language translations, and there may be years, even decades, separating the two.

[4] Felix Somló 'Maßstäbe zur Bewertung des Rechts' *Archiv für Rechts- und Wirtschaftsphilosophie* III (1909–1910), pp. 508–522.

[5] See, e.g., Gyula Pikler *A jog keletkezéséről és fejlődéséről* [On the emergence and development of law] (Budapest: Politzer 1897) 276 pp.

[6] See, especially, Augustus Pulszky *The Theory of Civil Law and Society* (London: T. Fisher Unwin 1888) 443 pp. {reprint (Westport, Conn.: Hyperion Press 1979)}.

[7] Bódog Somló *Állami beavatkozás és individualizmus* [State intervention and individualism] (Budapest: Politzer Zsigmond és fia 1903) x + 175 pp. [Társadalomtudományi könyvtár II].

and concerns in his masterly *Juristische Grundlehre*[8]—differentiating the pure sciences from the applied ones (the latter of which were to include the normative sciences as well)—he proceeded on two fronts, on the one hand (1) proposing a definition of law's preconditions (considering what the concept of law could be in a basic doctrine), while at the same time also (2) searching for rightful law [*richtiges Recht*] by developing a full legal axiology. It is this very search that necessitated the neo-KANTian turn, on the model defined by RUDOLF STAMMLER. Reasoning in line with JOHN AUSTIN's *Jurisprudence*,[9] and to a lesser extent with FRITZ BEROLZHEIMER's *Rechtsphilosophie*, SOMLÓ offered an analysis of the concept and conceptual components of law, without regard to content. The enthusiasm he raised in German-speaking countries urged him to lay the philosophical foundations for an axiology of his own. He did not live long enough to complete this endeavour, but his students did manage to edit and publish the book-length preparatory fragments he left behind.[10]

His *Juristische Grundlehre*—with its grounding of a general theory of law describing a conceptual structure that is continuously evolving in modern formal law—is now considered a classic, a masterpiece in the company of other pioneering works.[11]

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[8] Felix Somló *Juristische Grundlehre* (Leipzig: Verlag von Felix Meiner 1917 xv + 556 pp. [2nd ed 1927 {reprint Aalen: Scientia Verlag 1973}].

[9] Educated within a political émigré's family in England, PULSZKY made an early translation of Henry Maine's *Ancient Law* in 1875, "copiously annotated" with a series of references to Austin. As the common-law orientation continued until the Communist takeover in 1948, "the connection with English jurisprudence and political science was for many years somewhat closer in Hungary than in Germany" herself. Andreas B. Schwarz 'John Austin and the German Jurisprudence of his Time' *Politica* (1934) 2, pp. 178–199; cf. József Szabadfalvi 'Some Reflections on the Anglo-Saxon Influence in the Hungarian Legal Philosophical Traditions' *Acta Juridica Hungarica* XLII (2001) 1–2, pp. 111–119.

[10] Felix Somló *Prima philosophia* Gedanken zu einer erster Philosophie, hrsg. Julius Moór (Berlin & Leipzig: Walter de Gruyter 1926) 107 pp. Throughout his life, SOMLÓ played the fermentative role of a leftist progressist. An idealist who espoused the republicanism that was gaining momentum at war's end, he committed suicide when, owing in part to the idealism of his cohorts, his "beloved Kolozsvár" [now Cluj-Napoca] was lost to Romania. SOMLÓ's personal archives are now being reconsidered by Dr. FUNKE (of the University of Cologne) for a German publication.

[11] Andreas Funke *Allgemeine Rechtslehre als juristische Strukturtheorie* Entwicklung und gegenwärtige Bedeutung der Rechtstheorie um 1900 (Tübingen: Mohr Siebeck 2004) 338 pp. [Grundlagen der Rechtswissenschaft 1].

II. The Inter-war Period

2. Gyula (Julius) Moór (1888–1950)

Moór's oeuvre is best characterised as having a "comprehensive nature" with some features of eclecticism.[12]

Early on, after making Stammler's acquaintance at the University of Berlin, he began challenging Hans Kelsen with corrective remarks investing every part of his theory.[13] Seeking to develop a framework for a complex approach,[14] he acknowledged as independent, albeit interrelated, research topics (1) the concept of law (its definition within a foundational doctrine), (2) the kind of social causality the law may generate (an investigation in legal sociology), and (3) rightful law, or law according to justice (as the main concern of legal axiology), a trichotomy he would later expand by the addition of (4) the methodology for the study of statutory law.

Striving to elaborate a system of legal philosophy of his own inspired by the Baden School, and in particular by Wilhelm Windelband and Heinrich Rickert, Moór rebuilt a theoretical connection—rather than a merely declared antagonistic separation—between reality [*Sein*] and value [*Sollen*]. He accordingly classified law as belonging to the "reality of values". At the same time, in order to rejuvenate legal philosophy as a new cultural tendency based on a synthesis between neo-Kantianism and neo-Hegelianism, he had to turn to Nicolai Hartmann. In this final vision, even law builds as a kind of *Sein*. An aggregate of enacted abstract norms owing their content to human activity in its daily affairs, law builds through a process

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[12] József Szabadfalvi 'Wesen und Problematik der Rechtsphilosophie: Die Rechtsphilosophie von Gyula Moór' *Rechtstheorie* 30 (1999) 1, pp. 329–353.

[13] In fact, their close relationship of trust may help explain how Moór's offer to translate Kelsen encouraged Kelsen to commit himself, in 1927, to the first of his two intellectual *Selbstbiographien*. See *Aus dem Nachlaß von Julius MOÓR Gyula hagyatékából* hrsg. Csaba Varga (Budapest: ELTE Comparative Legal Cultures Project 1995) xv + 158 pp. [Philosophiae Iuris] {& <http://philosophyoflaw.wordpress.com/>} on pp. 15–23 and Matthias Jestaedt 'Einleitung' in *Hans Kelsen im Selbstzeugnis* Sondernpublikation anlässlich des 125 Geburtstages von Hans Kelsen am 11. Oktober 2006, hrsg. Matthias Jestaedt (Tübingen: Siebeck 2006) x + 126 pp. on pp. 8–10 & 21–29.

[14] Gyula Moór *Bevezetés a jogfilozófiába* [Introduction to legal philosophy] (Budapest: Pfeifer F. 1923) 356 pp. [Filozófiai könyvtár 3].

in the course of which intellectual representation will turn into some specific (legal) reality.[15]

The years of upheaval following World War II, combined with his personal persecution at the hands of the Communists about to seize power in the country, effectively prevented him from erecting something like a grand theory.[16] Despite all that, by comparing different theories relating to power and force, MOÓR was successful in transferring the idea of social reality into the realm of law, thereby opening new perspectives on the kind of sociality that lurks behind the law.

3. BARNA HORVÁTH (1896–1973)

HORVÁTH started out as MOÓR's assistant and went on to gain a professorship at Szeged, only to become MOÓR's rival, with a "synoptic theory" he advanced step by step.

Inspired by KELSEN, HORVÁTH took up as a precondition the separation between facts [*Sein*] and values [*Sollen*], a separation that neo-KANTian philosophy had deduced from KANT's epistemological distinction between transcendental, *a priori* knowledge (based on the form of all possible experience) and empirical, *a posteriori* knowledge (based on the content of experience). But in HORVÁTH's formulation, the separation deduced on this basis shows itself to be a logical contradiction. Accordingly, he concludes,

> "every judgment that can be directly or indirectly reduced to statements asserting that (1) a sheer fact is valid, (2) a sheer value is fact, or (3) an object of cognition is sheer fact and value at the same time is logically contradictory."[17]

HORVÁTH was in a unique position, having at first studied in Vienna—where he attended KELSEN's lectures and became acquainted with ALFRED

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[15] Gyula [Julius] Moór *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) xxii + 485 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Bibliotheca Iuridica: Opera Classica 3]

{& <http://philosophyoflaw.wordpress.com/>}.

[16] See Csaba Varga 'Philosophysing on Law in the Turmoil of Communist Take-Over in Hungary (Two Portraits, Interwar and Post-War)' in *The 2005 ALPSA Annual Publication* ed. Max Leszkiewicz (Brisbane: n.p. 2005), pp. 82–94 on 82–86.

[17] Barna Horváth *A jogelmélet vázlata* [Outlines of legal theory] (Szeged: Városi Nyomda és Könyvkiadó Rt. 1937) xxvi + 265 pp. at p. 94.

VERDROSS—and having then moved on to London, where he met HAROLD LASKI (who would channel his political views) and LEONARD T. HOBHOUSE (whose understanding of social development made quite an impression on him). With this background, he could be expected to counterpoise Germany's almost exclusive cultural influence in Hungary. And indeed the synoptic view he developed is an attempt at transcending the dualism between *Sein* and *Sollen* by effecting a synthesis that would dissolve the traditional antagonism between the Anglo-Saxon and German traditions. KELSEN's reductionism, which had launched the logic of norms as the sole method of legal cognition, was found by him to be too sterile; he thus looked for a compromise solution:

> "For a theory seeking to meet the proper requirement of methodological purity, while espousing the theoretical approach that views law as a conglomerate of norms and facts, there is but one conclusion to be drawn. That is, law is not an object of cognition but is rather the way in which, in accordance with a given scheme, norms and facts as exclusive objects of cognition can be seen in their endless mutual reference; and, accordingly, law is that which will be socially objectified out of such a perspective."[18]

And if law is not an object of cognition, the same goes for synopsis: it, too, cannot be an object-constitutive method of cognition. Rather, synopsis may be taken to be

> "merely a particular technique for combining natural- and norm-scientific methods; or the technique for combining these two methods by actually observing how they mutually refer to one another; or, again, the technique for functionally experiencing *Sein* and *Sollen*. Synopsis, in short, is the method of methods."[19]

The foregoing considerations, if applied to the judges, mean that their mode of thinking has a synoptic structure. Judges, in substantiating the claims made in their own judgments, proceed in two opposite directions, on the one hand filtering their knowledge of norms in light of the facts they select, and on the other filtering their knowledge of facts in light of the norms

[18] *Ibid.*, ch. 8.

[19] Barna Horváth *Rechtsoziologie* Probleme des Gesellschaftslehre und der Geschichtslehre des Rechts (Berlin-Grunewald: Verlag für Staatswissenschaften und Geschichte 1934) xi + 331 pp. at p. 63.

they select. This latter statement can be extended to all social and cultural domains shaped by human behaviour, because here, too, there is a mediator necessarily wedged between nature and values.

As HORVÁTH concluded at a time when he still had a voice in Hungary, the social reality of law can be traced to the regularity and order that can be observed in human conduct—a regularity that can also empirically be observed in society and measured as a mathematical average. And on a societal level, social order is reached as a complex of interlocked levels of institutions and processual schemes. Of all these levels, law is the most developed procedural structure.[20]

4. JÓZSEF SZABÓ (1909–1992)

As MOÓR's student at Szeged, SZABÓ later became acquainted with HORVÁTH. The latter's common-law approach drew the enthusiasm of his advanced disciples, so much so that they would eventually found their own Szeged School. SZABÓ was also awarded a grant to enrol in ALFRED VERDROSS's course in Vienna, and the two thus wound up forging a lifelong friendship.[21]

In a number of papers,[22] SZABÓ criticised the neo-KANTian approach by drawing for the most part on DAVID HUME and American legal realism. In

[20] Barna Horváth *The Bases of Law / A jog alapjai* [1948] ed. Csaba Varga (Budapest: Szent István Társulat 2006) liii + 94 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Jogfilozófiák].

[21] It was clear by this time, in 1949, that what had been a promising outlook for post-war Hungary had turned gloomy. Or at least this is how it must have appeared to HORVÁTH. As the most senior applicant for the chair in legal philosophy left vacant in Budapest as a result of MOÓR's expulsion, HORVÁTH expected to be appointed to that post but was instead rejected in favour of IMRE SZABÓ (discussed in Section 8), at that time a young and unnoticed Communist academic. HORVÁTH thus left the country and emigrated to the United States, where he became affiliated with the New School for Social Research in New York, but it was a rough start and a bitter end for him at this school, which at just about this time was placing less and less emphasis on its members' formal academic credentials. He had a family to support, and was thus persuaded to seek employment as an analyst at Voice of America, where he remained until his retirement in 1964. His repeated lecture tours in Europe did, however, result in a collection of selected writings, and these were later republished in his *Probleme der Rechtssoziologie* (Berlin: Duncker & Humblot 1971) 204 pp. [Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung 20].

[22] E.g., József Szabó 'Der Rechtsbegriff in einer neurealistischen Beleuchtung' *Österreichische Zeitschrift für öffentliches Recht* I (1948) 3, pp. 291–311.

a "neo-realistic" doctrine he formulated looking to common-law casualism, he drew a parallel between the British case-law approach and "traditional" models of judicial reasoning in Hungary, a country then known as a civil-law empire without a civil code.[23] Supported by JEROME FRANK, EDWARD ROBINSON, and THURMAN ARNOLD, he ascribed the belief in the certainty of law to the faulty logic erected by legal philosophers. His "fact-scepticism" and "rule-scepticism" was in this way sublimated into a theory based on the eventuality of the judicial event, whose contexture is dependent on "psychological circumstances" as well.[24]

In his unfinished oeuvre,[25] he offered pragmatic explanations of classic neo-KANTian paradigms, sometimes with a streak of eclecticism.

5. ISTVÁN BIBÓ (1911–1979)

BIBÓ studied under HORVÁTH at Szeged. After making visits to Vienna for lectures delivered by VERDROSS, ADOLF MERKL, and FELIX KAUFMANN—and travelling to Geneva to listen to KELSEN (in the company of PAUL GUGGENHEIM, MAURICE BOURQUIN, and GUGLIELMO FERRERO as staff) teach at the *Institut des Hautes Études Internationales*—he made a translation of KELSEN's *Reine Rechtslehre*, thus becoming one of the first scholars to ever translate the work *in extenso* (and with the author's approval).[26]

In a neo-KANTian perspective, he contrasted the functional links among liberty, constraint, and law with HENRY BERGSON's idea of spontaneity and NICOLAI HARTMANN's ontology and ethics. Superseding his teacher's synoptic view, he introduced the law of spontaneity as playing an important

[23] The Hungarian Civil Code was not promulgated until 1959, as Act IV of the National Assembly of Hungary.

[24] Cf. *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas, hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) 246 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae], particularly at pp. 81–133.

[25] JÓZSEF SZABÓ and his wife attempted to seek refuge by crossing the border, after his teacher succeeded in doing so, but they were caught and imprisoned for years. Then, his health failing, and struggling for his life, he managed to survive only thanks to commissions received for academic translations. The couple was then imprisoned a second time—for "counterrevolutionary acts" allegedly committed in 1956—and they continued in intellectual exile. A government interdiction meant that SZABÓ could only publish abroad, but this too was illegal at the time.

[26] It was only posthumously published as Hans Kelsen *Tiszta jogtan* [Reine Rechtslehre] trans. István Bibó [1937], ed. Csaba Varga (Budapest: Eötvös Loránd Tudományegyetem Bibó István Szakkollégium 1988 [reprint: Rejtjel Kiadó 2001]) XXII + 106 pp. [Jogfilozófiák].

role in law. According to him, a certain balance necessarily obtains between constraint and freedom in the practical workings of the law. By a seeming paradox, it is law that provides at once the most objective constraint and the most objective freedom, considering that any area freed from constraint is *ipso facto* the realm where freedom finds its most objective manifestation.[27] Therefore, law must perforce be Janus-faced. It is in this tension between these two forces that law's genuine power lies, and this is the specificity that distinguishes it from any other arrangement of social rules.[28]

6. Tibor Vas (1911–1983)

Vas—his eyesight gradually deteriorating in his youth—was a classmate of Bibó.

His award-winning paper on the significance of transcendental logic for legal philosophy—published in both German and Japanese[29]—defended Horváth's synoptic method and Georges Gurvitch's ideal-realistic one for recognising the duality inherent in law, thus having the intellectual potential to move beyond the logic that had been developed by classic transcendentalism. Then, in a short paper,[30] he presented Horváth's *Rechtssoziologie* (or sociology of law) as the conclusion to be drawn from the concession that Kelsen makes in his *Pure Theory* by conceiving law as a "twofold object", in which facts are reflected in values and *vice versa*. The upshot of this reasoning was that the logical approach cannot have a signi-

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[27] István Bibó 'Zwang, Recht, Freiheit' in his *Kényszer, jog, szabadság* [Coercion, law, liberty] (Szeged: Városi Nyomda és Könyvkiadó Rt. 1935) VIII + 151 pp. [Acta Litterarum ac Scientiarum Reg. Universitatis Hung. Francisco-Josephinae, Sectio Juridico-Politica, VIII], pp. 23–45.

[28] Cf. Varga *Die Schule von Szeged* (2006), pp. 11–77. During and after World War II, Bibó became involved in political debates as an author and in reforming government administration as a specialist and high-ranking official. His academic career was cut short by the Communist seizure of power in 1949, and he had to survive both intellectual exile and long imprisonment (as minister of state in Imre Nagy's revolutionary government of 1956). For the rest of his life, he mostly concerned himself with issues in the philosophy of history and with world-power dependencies in Central and Eastern Europe.

[29] Tibor Vas *Die Bedeutung der transzendentalen Logik in der Rechtsphilosophie* (Szeged 1935) 95 pp. [Acta Litterarum ac Scientiarium Reg. Universitatis Hung. Francisco-Josephinae: Sectio: Juridico-Politica, Tom. VI, Fasc. 1], trans. as *Senkenteki hotetsugaku* (Tokyo: Yufukanshobo 1941) 133 pp.

[30] Tibor Vas *A tiszta jogtan és szemléleti jogelmélet* [Pure theory of law and the synpotic approach] (Kecskemét: n.p. 1937) 16 pp. [Szellem és Élet könyvtára].

ficant role in law without taking sociological and evaluative aspects into account and working them into a single overall perspective.[31;32]

7. István Losonczy (1918–1980)

A recipient of the Governor's golden ring award as *doctor iuris sub auspiciis gubernatoris* at the University of Pécs, István Losonczy attended Verdross's class in Vienna and subsequently met Giorgio del Vecchio in Rome.

In line with his ambition to supersede legal positivism through a solid scientific realism, Losonczy sought to lay the study of law on new foundations by borrowing from the sciences[33] and adapting the methods and principles of science to law.[34] In an innovative manner, he based his "realistic" account on a two-pronged approach, differentiating the ontic layers of existence, on the one hand,[35] from the neurophysiological aspect, on the other, and developing in this latter respect an explanation he would later complement and detail by exemplifying the way neurophysiological stimuli are networked in humans. In this effort he relied on his own medical studies and worked in cooperation with leading local physiologists. To be sure,

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[31] Cf. Varga *Die Schule von Szeged* (2006), pp. 137–241. It is to be noted that Vas would probably not have survived the persecution years if Moór, a member of the Upper House, had not interceded in his behalf with the governor, Admiral Miklós Horthy, who officially exempted Vas from the race laws. With the Soviet occupation of the country, however, Vas abruptly converted to Stalinist orthodoxy and held key positions, never again committing to paper anything of lasting value.

[32] In addition, Vera Bolgár (1913–2003) also joined Horváth already in Budapest, where to he first moved after the war. For her publications, see
<http://www.law.umich.edu/library/guests/pubsfaculty/facultypages/Pages/bolgar_vera.aspx>.

[33] István Losonczy 'Über die Möglichkeit und den Wissenschaftscharakter der Rechtswissenschaft' *Zeitschrift für öffentliches Recht* XVII (1937) 2, pp. 145–194.

[34] István Losonczy *A funkcionális fogalomalkotás lehetősége a jogtudományban* [The feasibility of functional concept-formation in legal scholarship] (Budapest: Királyi Magyar Egyetemi Nyomda 1941) 141 pp.

[35] His developments in this first area were summarised in a paper commissioned by Verdross in late 1948 for *Österreichische Zeitschrift für öffentliches Recht*. The manuscript was sent without ever reaching its addressee, however, as the Iron Curtain had in the meantime come down. See the posthumous István Losonczy *Abriß eines realistischen rechtsphilosophischen Systems* [1948] hrsg. Csaba Varga (Budapest: Szent István Társulat 2002) 144 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae].

this promising start would soon be quashed,[36] but he did firmly believe in the project, persuaded that in this way the question of determinism and indeterminism in law and the enigma of causation in law (especially criminal law) could be set on a scientific foundation.[37]

III. The Post-war Period (Communism)

The Marxist dictatorship began with the Communist take-over in 1948. What it meant, among other consequences, was an ideological totalisation with a view to transplanting Stalinism. Which in turn meant that Stalinism had to be translated into a legal conception, a task entrusted to Andrey Vyshinsky, and which eventuated in a doctrine called socialist normativism. What came out of this was a narrow-minded, almost exegetic legal positivism (reminiscent of that which had developed in the first half of the 19th century), combined with a materialist and determinist view of social history as developed by Marx and Engels and "congenially redeveloped" by Lenin and Stalin. This end product did "primitivise" research and the pursuit of knowledge across the board, to be sure, but not so much as to make irrelevant or do away with the question (perceived as troubling) of what the future held for legal positivism and the sociological approach under the Communist regime. In other words, was classical legal positivism destined to perish, or could it develop into early post-positivism (giving way to the free-law movement, among other developments)? And did the sociological approach have any chances of surviving, or even thriving, despite the fact that it had been blamed from the outset as counterrevolutionary?

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[36] When the Communist take-over froze the air around him, he changed course and in 1950 took the chair of criminal law. Despite all his work, he was forced to retire at sixty-six. Cf. Varga 'Philosophysing on Law...' (2005), pp. 86–94.

[37] For a general overview of the period, see József Szabadfalvi 'Revaluation of Hungarian Legal Philosophical Tradition' *Archiv für Rechts- und Sozialphilosophie* 89 (2003) 2, pp. 159–170.

8. Imre Szabó (1912–1991)

Imre Szabó grew up in East Hungary, a part of the Kingdom of Hungary which was detached by the Trianon Peace Treaty from the rest of Hungary in 1920 to become part of the successor state Czechoslovakia, and then of the Soviet Ukraine in 1945. It was in this context that Imre Szabó, having graduated in 1937 from Charles University in Prague, would go on to write in his youth as a leftist Zionist, publishing in a comparatively open way, mostly in a Magyar journal based in the city of Kolozsvár (which at that point was already known as Cluj in Romania). His youth was in this sense twice a minority. In the postwar period, however, the Communist Szabó identified with the mission of consolidating as perfectly as he could Vyshinsky's doctrine of socialist legality. He brought jurisprudential thought into conformity with Soviet "socialist normativism", insisting in this way that no provision of the law can say anything other than what had already been textually embodied in the law itself.[38]

Later on, taking up the challenge of returning to the young Marx—a challenge that came to form part of the mainstream in Eastern and Western Europe alike at the time—he undertook an implicitly ontological reconstruction of Marx's early thought.[39] Before that, based upon partly the Marxian pattern and partly Pashukanis' quasi-ontological approach, he had set out to reconstruct legal relations as a reflection of social relationships,[40] without, however, being able to make a genuine breakthrough, either at home or abroad.[41]

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[38] By Imre Szabó, *Социалистическое право* [Sotzialistitsheskoe pravo / Socialist law] ed. V. A. Tumanov (Moscow: Progress 1964) 395 pp. and *Interpretarea normelor juridice* [Interpretation of legal norms] trans. Geoge Bianu (Bucureşti: Editura Ştiintifică 1964) 492 pp.

[39] Imre Szabó *Karl Marx und das Recht* Vorträge, red. Karl-Heinz Schöneburg & Ernst Weihrauch (Berlin: Akademie-Verlag 1981) 128 pp. [Staats- und rechtstheoretische Studien 10].

[40] Imre Szabó *Les fondements de la théorie du droit* trad. Pál Sebestyén (Budapest: Akadémiai Kiadó 1973) 340 pp. & trans. as *Основы теории права* [Osnovy teorii prava] (Moscow: Progress 1974) 268 pp.

[41] Even with all of his shortcomings, Szabó must be reckoned among the brightest legal minds of the orthodoxy of Socialism's Marxism. At one time the only jurist in the Soviet Academy of Sciences in Moscow, he was also internationally renowned as a legal comparatist. Relatively conservative as a thinker and open-minded in his institutional role in the Academy—where he also served as director—Szabó made possible the diversification which got underway with Kulcsár and Peschka and which continued with the next (or third) generation of legal philosophers and other specialists at the Institute for Legal Studies of the Hungarian Academy of Sciences. On the legal-philosophical achievements of his directorship, see, e.g., *Aktuelle Prob-*

9. Vilmos Peschka (1929–2006)

Peschka studied under Imre Szabó at the Eötvös Loránd University in Budapest and then continued at the Institute for Legal Studies of the Hungarian Academy of Sciences. He later joined the editorial board of the *Archiv für Rechts- und Sozialphilosophie* (a member since 1978) and co-founded the Hungarian National Section of the International Association for Philosophy of Law and Social Philosophy (IVR), serving as well as the section's first president.

Peschka devoted his entire scholarly life to a thorough study of the foundational issues—mostly philosophical and methodological—with which philosophising *in* and *on* law is concerned. Had he not been a Marxist, he would have been a conceptual analyst, for he took law to be a serious notional game standing for some abstraction in his epistemological realism. His sole interest lay in Marx, Engels, Hegel, Lukács, Weber, and Kelsen, within a conceptual world which he brought to near perfection, but this also meant that the categorial realm he designed was bound to remain a dry world, not inspirited by the greenness of life his beloved Goethe spoke of.

A conclusion which Peschka first reached with his doctoral dissertation,[42] and which he would go on to develop, was that legal relationships actualised in practice are prior to any formal enactment of law that may have preceded them; he thereby implicitly rejected Vyshinsky's stance. Five years into his development of these ideas, Peschka expounded his policy *desideratum* as concerns the question whether a supreme court's rulings should at the same time be deemed law-making acts, by virtue of their role in guiding the process of making the case law uniform. In keeping with the view upheld by political voluntarism—according to which with no limitations

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leme der marxistisch–leninistischen Staats- und Rechtstheorie Material der Konferenz der Staats- und Rechtstheoretiker der europäischen sozialistischen Länder, hrsg. Zoltán Péteri (Budapest: Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete 1968) 327 pp. and *Legal Theory – Comparative Law* Studies in Honour of Professor Imre Szabó, ed. Zoltán Péteri (Budapest: Akadémiai Kiadó 1984) viii + 463 pp. See also *Критика современной буржуазной теории права* [Kritika sovremennoy burzhuaznoy teorii prava / Criticism of contemporary bourgeois legal theory] trans. from the original Hungarian [1963] ed. V. A. Tumanov (Moscow: Progress 1969) 288 pp.

[42] Vilmos Peschka *A jogviszonyelmélet alapvető kérdései* [Basic issues of the theory of legal relationships] (Budapest: Közgazdasági és Jogi Kiadó 1960) 219 pp.

party dictates should prevail over reality—PESCHKA rejected that such rulings should be so considered.[43]

His critical overview of contemporary Western legal philosophy[44] became a classic of Socialist literature in Hungary. This was followed by an assessment of Weber's sociology of law,[45] after which point he concerned himself with various topics and then eventually steered toward ethics, with a study in which he reconsidered ARISTOTLE and KANT.[46]

Once GEORGE LUKÁCS had expounded his social ontology,[47] the stage had been set for turning "MARXist (and LENINist) theory of law" into a legal ontology. PESCHKA took up the challenge by setting out a conception of legal norms in terms of causality and teleology, taking law as a particular reflection of objective reality.[48] Proceeding from a re-reading of HARTMANN and KARL LARENZ, he went back to the idea of ontologising *in* law and *on* law by way of a synthetic reassessment of all teachings and ideas he had ever developed on law.[49] This line of thought was brought to a conclusion in a next and last turn,[50] where he reconsidered FRIEDRICH HAYEK's position and KELSEN's posthumous theory of legal norms in comparison with legal hermeneutics as developed by WOLFGANG FIKENTSCHER, HANS-GEORG GADAMER, and ARTHUR KAUFMANN.

PESCHKA never managed to supersede LENIN's perspective in treating law as a reflection of reality. His only concession was that such reflection would eventuate in some transformation. Unlike what LUKÁCS did, he could not symbolically return from LENIN to MARX. He did shift the emphasis from the law-giver's individual will to the legal-technical mechanics of the

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[43] Vilmos Peschka *Jogforrás és jogalkotás* [Source and making of the law] (Budapest: Akadémiai Kiadó 1965) 497 pp.

[44] Vilmos Peschka *Grundprobleme der modernen Rechtsphilosophie* (Budapest: Akadémiai Kiadó 1974) 235 pp., also as *Gendai hōtetsugaku no kihonmondai,* trans. Ameya Wafu (Tokyo: Hōritsu Bunkasha 1981).

[45] Vilmos Peschka *Max Weber jogszociológiája* [The sociology of law of Max Weber] (Budapest: Akadémiai Kiadó 1975) 134 pp.

[46] Vilmos Peschka *Az etika vonzásában* (Jogelméleti problémák az etika aspektusából) [Problems of legal theory from the aspect of ethics] (Budapest: Akadémiai Kiadó 1980) 196 pp. [Jogelméleti Értekezések].

[47] Georg Lukács *Zur Ontologie des gesellschaftlichen Seins* I–III (Neuwied: Luchterhand 1971–1973).

[48] Vilmos Peschka *Die Theorie der Rechtsnormen* (Budapest: Akadémiai Kiadó 1982) 266 pp.

[49] Vilmos Peschka *Die Eigenartige des Rechts* (Budapest: Akadémiai Kiadó 1989) 199 pp.

[50] Vilmos Peschka *»Appendix« a jog sajátosságához* [Return to the particularity of law] (Budapest: Közgazdasági és Jogi Könyvkiadó 1992) 170 pp. [Jog és jogtudomány 1].

transformation. But in the final analysis he could only see law emerging from social reality by "reflection", in a process thought to yield a "correspondence" between law and reality. Despite his shortcomings, he eventually shed his self-inflicted scholarly rigidity by also integrating case law and hermeneutic moments into his system, constructing them as part of the process of law itself, which by their predominance might become the final moment of the law's development.

As the Cold War wound down and the split emerged between Western MARXism and so-called Soviet MARXism, MARXism became both corrupt and politicised, and PESCHKA had fought both of such degenerations all along. He was the kind of MARXist you could easily approach in person: open-minded and always ready to engage professionally in discussion.

10. KÁLMÁN KULCSÁR (1928–2010)

A legal sociologist sensitive to theory from the outset, KULCSÁR addressed the law's internal system of fulfilment (or the formal rules under which it is to be applied and through which it develops), while at the same time also taking into account its factual actuality (its actual use). He thus found the law to be a two-pronged phenomenon, one that could be viewed in parallel from the point of view of virtual homogeneity (its coherence and uniformity as a system of norms) and that of sociological role-playing. He argued that this is not a contradiction waiting to be resolved but is rather an ontic difference set against a background where we find, on the one hand, a normative idea (or ideal) of order, and on the other hand, some factual situation.[51] He empirically also showed that the law's genuine effect is due for the most part, not to the mere fact of its having been enacted, but to its interaction within the overall social totality of which it is a part.[52]

Having concluded the pioneering sociological incursion by which he broke through STALINist dogmas, he undertook a comparative investigation into the factors at play in the attempts made across the world to achieve social modernisation through the law. He warned that no reform can be

[51] Kálmán Kulcsár *Основы социологии права* [Osnovy sotsiologii prava / Fundaments of legal sociology] red. V. S. Kazimirtshuk (Moscow: Progress 1981) 254 pp. [Politika i metodologiya nauki].

[52] Kálmán Kulcsár *Rechtssoziologische Abhandlungen* (Budapest: Akadémiai Kiadó 1980) 242 pp.

successful without fully setting the whole of society on a new and solid foundation. Stated otherwise, once law develops into a complex phenomenon, there is only less much that can be achieved by the mere means of formal enactment.[53;54]

IV. Contemporary Trends and Perspectives

In the contemporary period, the parallelism has continued between the philosophical investigation of law and its sociological investigation. But the next generation was also faced with the problem of accounting for the law's complexity, while also having to explain what exactly it is that changes, and in what way, when the law is observed to change or when such change is otherwise provoked.

11. Csaba Varga (b. 1941)

Csaba Varga started out with a historical comparative analysis investigating the functional needs served by the objectification the law undergoes as it is codified to make it more rational,[55] and he went on to develop an ontology of law on the model of Lukács' ontology of the social being.[56] These

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[53] Kálmán Kulcsár *Modernization and Law* (Budapest: Akadémiai Kiadó 1992) 282 pp.

[54] A role in removing the politically imposed ideological restrictions was played as well, from the 1960s on, by Mihály Samu (1929–) and Zoltán Péteri (1930–), among others. Samu came out with several monographs discussing the call for a socialist legal policy, a policy to be shaped by relying on both legal scholarship and statutory enactment (so as to mediate between the making and the application of law), the aim being to enable law's autonomy to strengthen social autonomy. Péteri, on the other hand, called for a socialist legal axiology (while also engaging in exercises in the methodology of comparative law). See *Ius unum, lex multiplex* Liber Amicorum: Studia Z. Péteri dedicata [Studies in comparative law, theory of state, and legal philosophy] ed. István H. Szilágyi & Máté Paksy (Budapest: Szent István Társulat 2005) 573 [+ 10] pp. [Jogfilozófiák / Bibliotheca Iuridica: Libri amicorum 13].

[55] Csaba Varga *Codification as a Socio-Historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp. {&, as to its 2nd {reprint} ed. with an Annex & Postscript (Budapest: Szent István Társulat 2011) viii + 431 pp., also
<http://drcsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>}.

[56] Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [21998]) 193 pp. {&, as to its 3rd [reprint] ed. with Postface (Budapest: Szent István Társulat 2012) 218 pp., <http://drcsabavarga.wordpress.com/2012/03/13/the-place-of-law-in-lukacs-world-concept-19852012/>}.

investigations became for him the basis on which to proceed in subjecting any epistemologising of the law—i.e., any attempt to identify the law's power to reflect reality—to an overall ontological assessment of the law's structural make-up and operation. The lawyer's ideology (usually treated as a false ideology, along the lines of FRIEDRICH ENGELS' *juristische Weltanschauung*) thus came be one of the law's ontic components. At the same time, he used his ontological reconstruction to respond to the "modernisation and law" enigma as well. Namely, if we accept that the law's complexity is owed in part to its ontology, then any built-in (ontological) element (impetus or stimulus) will inevitably march on as irreversible part of the law's overall process. This means that all-embracing reforms can be pursued, after all.

From the mid-1980s onward, he devoted himself to treating law as a language game in legal discourse, a game and discourse generating new conventionalisations in an endless sequence. Consequently, the law's identity is defined by the process that produces it rather than by the source of its validity. Or, stated otherwise, cognition and law alike—the former verifiable only by humans, the latter canonisable only by professionals—are autopoietic processes.[57] Instead of viewing law in the developmental trichotomy of objectification, reification, and alienation alone and without the moment of human involvement, VARGA now reveals law's genuine roots and the unavoidable responsibility we all share as to its future shape.[58]

His conclusion was anticipated by two thinkers under whom he studied and with whom he thereafter maintained a friendship: MICHEL VILLEY (with his concept of *dikaion*) and CHAÏM PERELMAN (with the praxis component of his notion of *auditoire universel*). It is a conclusion that VARGA has complemented with the THOMistic conception of the fullness of the human being, active in every situation. The basic claim that legal positivism makes as to what is law thus turns out to be no more than a *desideratum*; for there is a never-ending rivalry—between (1) the officials entrusted with *making*

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[57] Csaba Varga *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp. {&, as to its 2nd {reprint} ed. with Postfaces I and II (Budapest: Szent István Társulat 2011) viii + 308 pp.,
<http://drcsabavarga.wordpress.com/2012/03/13/varga-theory-of-the-judicial-process-the-establishment-of-facts-19952011/>}.

[58] Csaba Varga *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris] {&, as to its definitive version, *The Paradigms of Legal Thinking* enlarged 2nd ed. (Budapest: Szent István Társulat 2012) 418 pp. [Philosophiae Iuris], <http://www.scribd.com/doc/85083788/VARGA-ParadigmsOfLegalThinking-2012>}.

law, on the one hand, and (2) those entrusted with *applying* it, on the other—as to who will control the way the law is to be defined, and the process is further complicated in society (3) by the spontaneous emergence of popular practices bearing on the same issue.[59]

In this connection there also emerges the problem of the historicity of law, with the opposition between universalism and particularism.[60] Which is to say that such familiar constructs as "rule of law", or the German "*Rechtsstaatlichkeit*", far from belonging to the realm of the universal, are particular historical formations developed and applied in response to specific challenges under specific cultural conditions.[61] Which in turn means that any final ideal of law cannot resolve itself into anything more certain or universal than the outcome of a responsible and responsive mediation, where law can actually balance conflicting rules, principles, interests, and values—a process that for this reason carries weight and must be taken seriously.[62]

As to European law, he sees its actual working as exerting from the beginning a destructive impact upon the bounds once erected by the national laws' anchorage in the traditions of legal positivism. For and by its operation, the European law—whose efficacious operation is achieved by

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[59] Csaba Varga *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE Comparative Legal Cultures Project 1994) xi + 530 pp. [Philosophiae Iuris] {& <http://drcsabavarga.wordpress.com/2010/10/25/varga-law-and-philosophy-–-papers-in-legal-theory-1994/>}.

[60] Csaba Varga *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE Comparative Legal Cultures Project 1995) 190 pp. [Philosophiae Iuris] {& <http://drcsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/>}.

[61] By Csaba Varga, *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008) 292 pp. [PoLíSz Series 7] {& <http://drcsabavarga.wordpress.com/2010/10/25/varga-transition-to-rule-of-law-–-constitutionalism-and-transitional-justice-challenged-in-central-and-eastern-europe-2008/>} and *Válaszúton – húsz év múltán* Vitában jogunk alapjairól és céljairól [At a crossroads again, after twenty years passed: Debating the foundations and destinations of our law] (Pomáz: Kráter 2011) 256 pp. [PoLíSz Sorozat könyvei 8] {& <http://www.scribd.com/doc/85072170/varga-valaszuton-2011>}.

[62] Cf. *Theatrvm legale mvndi* Symbola Cs. Varga oblata, ed. Péter Cserne et al. (Budapest: Societas Sancta Stephani 2007) xvi + 674 pp. [Philosophiae Iuris / Bibliotheca Iuridica: Libri amicorum 24]

{& <http://www.slideshare.net/koppanyvarga/theatrvm-legale-mvndi-festschrift-in-honor-of-dr-csaba-varga-65-2007> & <http://www.slideshare.net/koppanyvarga/theatrvm-legale-mvndi-festschrift-in-honor-of-dr-csaba-varga-65-2007>}.

transposing the control on its central enactments to autonomous implementation and jurisdiction by member nations—dynamises large structures, through which it transforms into order that what is chaos itself. Its whole construct as a kind of artificial reality construction is frameworked by an artificially animated dynamism.[63]

12. ANDRÁS SAJÓ (b. 1949)

Essentially a sociologist, SAJÓ has conducted methodical studies revealing that the apparently descriptive function of legal scholarship is frequently outweighed by the normative and formative impact which the conceptualisation and classification of law (along with all the other efforts to reconstruct and restate the law) may exert on the practical making and application of law. For this reason theoretical reconstruction can frequently intersect with the construction of factual reality.[64]

In a series of books he then summarised his inquiries by drawing attention to the priority of social interaction in assessing the law's implementation or change. Otherwise stated, he put forward the view that the sociological complexity of law is such that there is only so much the law's stimuli can account for: their impact is at best subordinate and for the most part indirect.[65]

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[63] Csaba Varga *Jogrendszerek, jogi gondolkodásmódok az európai egységesülés perspektívájában* (Magyar körkép – európai uniós összefüggésben) [Legal systems, legal mentalities in the perspective of European unification: Hungarian overview – in a European Union context] (Budapest: Szent István Társulat 2009) 282 pp. [Az uniós tagság következményei a magyar jogrendszerre és a közigazgatásra] & [Jogfilozófiák]

{& <http://www.scribd.com/doc/85037925/varga-csaba-jogrendszerek-europai-egysegesulesben-2009>}.

[64] András Sajó *Kritikai értekezés a jogtudományról* [Legal science critically considered] (Budapest: Akadémiai Kiadó 1983) 215 pp. [Jogtudományi értekezések].

[65] By András Sajó, *Társadalmi szabályozottság és jogi szabályozás* [Legal regulation within the web of social regulation] (Budapest: Akadémiai Kiadó 1978) 151 pp. [Jogtudományi értekezések] and *Társadalmi-jogi változás* Jogszociológiai tanulmány [Socio-legal change: A study in legal sociology] (Budapest: Akadémiai Kiadó 1988) 288 pp.

13. Béla Pokol (b. 1950)

A disciple of Niklas Luhmann at Bielefeld, Pokol started out doing macro-sociological theory, with an abiding interest in the layering of law that takes place in consequence of its differentiation (the *Ausdifferenzierung des Rechts*), a differentiation that continues to operate at the lower levels of the law as well.[66] According to his descriptive picture of law as the enacted law officially put into practice, what gives any working legal system its coherence and identity is the classificatory web of concepts making up its particular *Rechtsdogmatik*, or legal dogmatics. This is the stablest element of law, underlying its coherence and identity alike, and it also serves as a suitable framework in channelling its future shape.[67]

In a series of inquiries into the origins and development of the doctrines expounding and reconstructing the various branches of law in Europe, he has come to the conclusion that *Rechtsdogmatik* exerts on the law a framework effect[68] as one of the quasi ontological components, in addition to the aspects and respective languages of the law as enacted, as officially enforced, as well as of law cultivated in *scientia iuris*.[69]

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[66] Béla Pokol *Komplexe Gesellschaft* Eine der möglichen Luhmannschen Soziologien (Bochum: N. Brockmeyer 1990) 271 pp. [Mobilität und Normenwandel 8] {2. erw. Ausg. (Berlin: Logos 2001) 219 pp.}, also as *Complex Society* One of the Possible Luhmannite Theories of Sociology (Budapest: Coordination Office for Higher Education 1991) 179 pp.

[67] Béla Pokol *The Concept of Law* The Multi-Layered Legal System (Budapest: Rejtjel 2001) 152 pp.

[68] By Béla Pokol, *Középkori és újkori jogtudomány* Az európai jogi gondolkodás fejlődése [The medieval and modern science of law, or the development of legal thought in Europe] (Budapest & Pécs: Dialóg Campus 2008) 224 pp. [Institutiones juris] and *Autentikus jogelmélet* [An authentic theory of law] (Budapest & Pécs: Dialóg Campus 2010) 207 pp. [Institutiones juris].

[69] Csaba Varga 'Law and its Doctrinal Study (On Legal Dogmatics)' *Acta Juridica Hungarica* 49 (2008) 3, pp. 253–274 &
<http://akademiai.om.hu/content/g352w44h21258427/fulltext.pdf>.

V. Our Understanding of the Law Today

There is much additional work that can be found in legal philosophy in Hungary today.[70]

If anything unifies this work—and the broader spectrum of current legal philosophy in Hungary[71]—it is the appreciation that law is a historical construct, shaped by anthropological conditions owed to an interplay of factors both social and cultural. What emerges in the outcome is a social totality and prevailing intellectuality within which to understand any given social actuality at any time. The dominant characteristic is the all-pervasive and mutual influence that can be observed among the various factors in question, without any fixed point or condition that can be pointed out as more foundational or as an absolute starting point. It is for this reason that if we are to arrive at a methodological scheme by which to survey and map out anew the vast territory across which the legal phenomenon extends,

[70] I should at least mention in this regard András Tamás (b. 1941), who in 1977 investigated the role of legal consciousness in the law's implementation, and who has recently also contributed to what is known as *legistica*, the study concerned with the proper methods of legal drafting {András Tamás *Legistica* A jogalkotástan vázlata [Legistics: Outlines of how to draft laws] (Budapest: Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar) 137 pp. {6th enlarged ed. (Budapest: Szent István Társulat 2009) 306 pp.}; Antal Visegrády (b. 1950), who in 1988 looked at the role that judicial practice has in the law's development, and who then focused on the question of the law's efficacy; Miklós Szabó (b. 1951), who has devoted himself to juridical methodology {Miklós Szabó *Ars iuris* A jogdogmatika alapjai [The foundations of legal dogmatics] (Miskolc: Bíbor 2005) 313 pp. [Prudentia Iuris 24]} and with the trivium of law's grammar, rhetoric, and logic {Miklós Szabó *Trivium* Grammatika, retorika, joglogika joghallgatók számára [Grammatics, rhetorics and legal logic in the study of law] (Miskolc: Bíbor 2001) 264 pp. [Prudentia Iuris 14]}; and József Szabadfalvi (b. 1961), who has traced out a history of ideas having legal theoretical relevance, his focus being for the most part on Hungary. There are also the theoretical investigations undertaken by Péter Szigeti (b. 1951), Péter Takács (b. 1955), and Lajos Cs. Kiss (b. 1955). Then, too, Péter Paczolay (b. 1956) has concerned himself with constitutional philosophy, István H. Szilágyi (b. 1963) has worked from an anthropological perspective, and the newer generations have dealt in analytical jurisprudence, natural law, classic rhetoric, and *Ideengeschichte* (the history of ideas).

[71] The two main book series are *Jogfilozófiák / Philosophiae Iuris*, edited by Csaba Varga in Budapest and started in 1988 (collecting thirty-two titles in Hungarian and nineteen in foreign languages), and *Prudentia Iuris*, edited by Miklós Szabó in Miskolc (with twenty-four titles since 1995).

so as to gain a deeper understanding of it, we will have enter into a historico-comparative investigation of legal cultures and of the manifold legal mind they shape.[72]

[72] Cf., among others, *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1] and *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I], especially Parts I–II and V.

AN IMPOSED LEGACY

LOOKING BACK*

1. On Ideologies and MARXism in General

Intellectuality, history of ideas, developments of trends: apparently these are compounds of (as worded units operating with) nothing but abstract notions, representing thoughts expressed in conceptual generality. It is only revealed later when whatever concrete issue is raised that apparently common terms for trends apparently shared in common may prove to be too ambiguous to allow general use and translation, for the respective meaning their actual usage assigns to them is thoroughly culture-dependent: among others, it also reflects historical experience rooted in various ideologies and echoed by a variety of emotional responses, all which are local and embedded in (as inseparably grown from) the underlying individual—*hic et nunc*—conditions. Such a realisation already forecasts a consequence in that human discourse—independently of whether or not it is homogenised, i.e., formalised according to some scientific methodology, for instance—withstands depersonalisation and the latter's usually implied aim that it can convey symbols of abstract meaning without reflecting anything more or else. For—in addition to having sense and denotation (that are to stand for GOTTLOB FREGE's *Sinn* & *Bedeutung*[1])—the words we use are simultaneously conveyors of experience and sensation, too, that is, and unavoidably, they embody humane response in reaction to challenges actually sensed.

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* A paper the original of which—as to its first paragraph—was prepared for an interview with a Brazilian student during my congress participation on GEORGE LUKÁCS in Marília in 2009, in order to help understanding the possible difference of underlying conditions, and remained unpublished, and—as to its next paragraphs—was drafted around 1999 to serve as an introduction to my *Útkeresés* Kísérletek – kéziratban [Search for a path: essays – in manuscript] (Budapest: Szent István Társulat 2001) 167 pp. [Jogfilozófiák], and was subsequently published as 'Visszatekintés' in Varga Csaba *Jogfilozófia az ezredfordulón* Minták, kényszerek – múltban, jelenben (Budapest: Szent István Társulat 2004), pp. 303–312 [Jogfilozófiák].

1 Cf., e.g., <http://plato.stanford.edu/entries/frege/>.

Consequently, underlying conditions do predefine what the individual interlocutor means indeed by what, when, in oral or written communication, historically diverse situations are compared or interpenetrating in common descriptions. One example for such a need of further specification is served by MARXism as a direction of philosophising in the major middle half of 20th century. For, as it is well known, the political, social and intellectual contexture within which it could offer patterns showed strikingly controversial variations in contrastable historical settings, from a militant critical perspective as a freely selectable option in the Atlantic West, to a state ideology imposed upon hundred millions of inhabitants in the East of Europe with no mercy or exception when using dictatorial means for implementing it in both the public and the intimate spheres of everyday lives, not to mention the intermediaries here. Therefore, in order to understand what is meant by what, a mentally reconstructive excursion is needed to live again in memory the relevant pasts, by recalling what we may come to know about those parallel histories.

As the case of Central & Eastern Europe in general and of Hungary in particular is concerned, developments following the armistice in the Second World War, determinative of the destiny of the countries involved, can offer suitable key for understanding what eventually stood for what in their ensuing—and rather difficult—life.

Hungary had been occupied by the Red Army. Soviet military administration assisted to forming a collaborationist government and intervened when general election could result in any issue of dislike to them. Soviet imperialism triumphed in 1948 when a thoroughly satellite Muscovite regime was instated, based on imitation, moreover, reproduction without adaptation of Soviet institutions. Thereby an Asian moloch, belated in most civilisational terms, became imposed upon the geographic centre of Europe, left to its destiny by three of the victorious Big Four. It is STALIN's totalitarian dictatorship they introduced: omnipotent party structure with all-covering institution-building to exert direct control; repressive state machinery freed from its own law in practical action; implantation of a terroristic set-up with property confiscated and rights withdrawn; total subjection to ideologically conceived, artificially generated and state-imposed obligations to interfere with—in order to penetrate, dominate, and also transform alongside communist doctrines—family life, leisure time, self-education, and the traditional channels of emotional attachments as well. Even such trivial private circles of liberty that remained untouched and which those politically manifestly indifferent could enjoy in the Third Reich as relatively safe holes

of unintervened and unperturbed refuge,[2] became removed by the Bolsheviks.[3]

The catch-word to ideologise the invasion was Communism. For reaching the target, a new religion was instituted with the claim of its ability to offer a scientific guidance in how to approach it, and this was MARXism. Even the smallest piece of Sovietisation was a direct transfer from Moscow, trusted first to special agents of the army and, at a later period, independently whether or not uniformed, to the Soviet complex of diplomacy and political policing. Their horde was undercivilised; they could exclusively address and activate those with the lowest self-esteem in the country. In fact, two layers had greeted the invaders as liberators during the closing phase of the war: a *quantité négligeable* of those already converted (some dozen members of illegal communist cells and the left wing of social democrats), on the one hand, and those who thanked to them not only for being freed from ghettoisation but also for not taken again into annihilating custody as an average well-to-do entity, on the other.

Accordingly, in Hungary as well Communism and MARXism symbolised the hated destiny forced upon a whole nation all through. They were launched through military occupation in a form degenerated into sheer imperialism with ruthless politico-economic subjection. From an internal perspective, therefore, participation could only stand for treason through collaboration. No one doubted that direction came from Moscow and was to serve the Soviet empiredom in its implementation of a new/old mystic object called "the Third Rome".

That particular MARXism which rank-and-file Soviet ideological agents were to export was crudely primitive: unelaborated and unsophisticated but closed down in its own simple-minded doctrinarism. It was like the best weapons of a mass army of Soviet style: simplified to the maximum but easily usable. It was elaborated to serve as subservient *ancilla* in STALIN's hand,

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[2] See, e.g., the almost guaranteed personal life, promising the very chance of survival of the National Socialist regime, of either KONRAD ADENAUER (ex-president of the Prussian State Council and ex-mayor of Cologne), withdrawn to his estate, in <http://en.wikipedia.org/wiki/Konrad_Adenauer>, or of GUSTAV RADBRUCH (ex-minister of justice and ex-professor of Heidelberg), withdrawing into lonely historical research of the German criminal doctrine, in <http://en.wikipedia.org/wiki/Gustav_Radbruch> & <http://www.uni-kiel.de/ps/cgi-bin/fo-bio.php?nid=radbruch&lang=e>.

[3] For the gradual closing down of all chances even for an exasperatedly fugitive character, see, e.g., the story of *Doctor Zhivago* (a fiction by Boris Pasternak [1957] adapted to film by David Lean [1965]). Cf. <http://en.wikipedia.org/wiki/Doctor_Zhivago>.

and there by also of his vision on world politics and personal cult. All current changes with political turns and adaptations notwithstanding, it made the appearance of a *sacro-saint* state religion, cultivated through constant adoration, which was rigidified in at least two directions. Petrified in/by its own dogmas, its message could only be (a) revelated (b) by those entrusted with proper competence for doing so, in the course of which (c) in addition to some old comrades and top functionaries respected with sacred reverence, the Number One in party function had a privileged position. At the same time, its teaching was held (expected and tolerated) to offer one (right) answer exclusively. This was the absolute embodiment of truth, and there could be no concurrence or alternative to it. Once it was formulated, debates on the issue (even by those officially holding the truth) had to be stopped.

Being an exclusive ideology cultivated as the last word science can at all avail, Hungary—with the vast Central & Eastern European region, including the Soviet Union itself, that is, hundreds of millions of peoples—was expected just to share it. All layers of society—from scientists and social theoreticians via professions (from lawyers and economists to teachers) up to skilled and unskilled workers and peasants converted into workers of agriculture (targets of indoctrination through regular weekly sessions, where the slightest doubt expressed or criticism launched could be retaliated by any punitive measure, including criminal persecution as well)—were expected to act in its name by ritually reuttering its canons. The field of scholarship was no exception, either.[4] Everyone was presumed to be a MARXist, unless a negative allegation expressly denied it with an act amounting to excommunication in practice. That is, formal declaration of allegiance was seldom needed; it was enough just to talk in its terms as a natural course of things. But denial, hardly counterarguable, meant exclusion and deprivation. Thereby nominalism—the art of naming—took the fore. Actions and ideas, whatever they were, were (as had to be) all channelled under the safe canopy of the self-justifying word 'MARXism'.

No wonder if rush race started for winning this match, to arrive in by representing super loyalty in the unceasing competition of loyalties. This is why self-qualifying as 'MARXist' was redundant from the beginning; it could

[4] Theology alone was a refuge field, taught at ecclesiastic fora exclusively, but, accordingly, it was separated from the *academia* and *universitas*es as the exclusive officially recognised and state-subsidised fora to cultivate scholarship. Accordingly, the two domains were expected never to meet.

only be an added sign of a neophyte's arrivism. On the scholarly side, a huge society of "professional MARXists" developed from teachers of "Scientific Socialism" via philosophers and journalists to bureaucrats headed by the Ideological Department of the Central Committee (on behalf of the communist party) and the Department of MARXism-LENINism of the Ministry of Education (on behalf of the state administration), with rivalry for who were "better MARXist", in which some could excel all along.[5] In popular perception, their fearfully negative prestige, due to blindly merciless doctrinarism, could hardly differ from those directly serving the political police: as executors, with varying but often interpenetrating means, all they were betraying the national cause for an alien arrangement imposed by the Soviet Union.[6]

For the rest in professions, including legal philosophy cultivated at the fora of *academia* and *universitas*, a prime care had to be devoted avoiding at any price that one should be labelled 'anti-MARXist', that is, avoiding any self-confession to have been patterned by whatever idea rejecting MARXism. Again, in public speech 'MARXism' meant nothing but a common coverage not to be denied, negated or contradicted, that is, the intellectual minimum of political loyalty to the actually existing regime of political dictatorship.

2. Life of an Intellectual in Communism

It is not necessarily simple to look back on the past from today. And at a distance of just a few years, it seems incredible, bizarre, and also tiringly banal

[5] Cf., e.g., by Michael Löwy, *Pour une sociologie des intellectuels révolutionnaires* L'évolution politique de Lukacs, 1909–1929 (Paris: Presses Universitaires de France 1976) 319 pp. [Sociologie d'aujourd'hui] {*Georg Lukacs* From Romanticism to Bolshevism, trans. Patrick Camiller (London: NLB 1979) 219 pp.} as well as *Rédemption et utopie* Le judaïsme libertaire en Europe centrale: Une étude d'affinité élective (Paris: Presses Universitaires de France 1988) 258 pp. [Sociologie d'aujourd'hui] {*Redemption and Utopia* Libertarian Judaism in Central Europe: A Study in Elective Affinity, trans. Hope Heaney (London: Athlone Press 1992) 276 pp. & *Redenção e utopia* O judaísmo libertário na Europa central: Um estudo de afinidade eletiva, trad. Paulo Neves (Sao Paulo, SP: Companhia das Letras 1989) 205 pp.}.

[6] Paradoxically enough, the situation hardly differs now. Those past competitors for communist papacy had, pushed by the logic of rivalry, marched first into some schism or alternate ism within alleged MARXism, then into a kind of transcendence bordering either some critical theory or post-modernism—preserving, however, their undubitable capacity to tell the final truth, even if variable as wind changes. In any case, replacing Bolshevik-cum-MAOist orthodoxy, now they are preaching mostly libertinist doctrinarism.

to recall the circumstances surrounding the everydays of social-scientific research shortly after the revolution of 1956 and the subsequent bloody retaliation.

At that time, it was hardly possible to recognise any alternatives at all. Survival was the first and foremost task. Then one was faced with the lack of any sensible objective that could also be assumed as a profession to make some difference in practice, too. Being allowed to publish one's own thoughts was in fact a real privilege or something reserved only for the insiders protected by the Communist authorities. Every single day had its own battle to fight, and its own pitfall as well. As a precondition, the personality involved had to develop a dual identity to comply with his/her own conscience when, after all, he/she had to survive against a merciless tyranny, threatening to crush prospects in case of the slightest political inconvenience. Scarcely anybody dared speak about his/her inner convictions openly, except for with a spouse or perhaps a close friend. At the same time, there was hardly any hope to achieve socially sensible results in public without becoming integrated into some official institution. Consequently, everything (otherwise insignificant matters as well) had its price. Even momentary moods might have gained tremendous purport in such an atmosphere. Anything had to be appreciated as a stand taken. And, vice versa, depending on the changing but cumulatively kept record on you, anything and its opposite could turn out to be problematic.

Life itself turned upside down. It became a muddle with additional meanings attached to each and every moment, transforming the whole to an extremely complex riddle with a very vague chance of any autonomous determination. Everyday life was fragmented into a mere sequence of decisions, at the same time vitally important on the borderline zones of moral survival, for even seemingly weightless responses could gain additional dimensions by ethical doubts and choices, definitive of the meaning of the very existence of a person, whether or not honestly assumable.

As to my formative years, the era was a hard lesson anyway. One could have a family background due to which an entire family was from the beginning politically stigmatised and discredited as a class-enemy, with social connections suspicious for the secret police, with adherence to CHRISTian values antithetic to the new regime, and with styles not to be assumed in public. All these together might have added up to an overwhelming burden that—depending on personal disposition, psychic resources and inherited behavioural patterns—inspired some to self-torturing, self-reproaching and eventually self-destroying submissiveness, and others, just to the contrary,

to a desire to test their irreducible personalities by outstanding performances, with more and even more strenuous work. All in all, all this inspired me to endure failures, humiliations and the early realisation of being pushed into the background, and also to try at least to suppress nearly unbearably miserable recurrent feelings with a less timely, almost transcendent perspective in sight. At every moment, it inspired the subject to re-evaluate, almost in a compulsive way, one's actions and life till then, to cherish the ethos of responsibility to be assumed collectively and to weigh and ponder every step morally, even as to the smallest issues of professional activity.

An additional significance was, thus, attributed to each and every component of ordinary life. Therefore, that which was realised as an end-product in character, personality and life-style, was no mere chance at all. Every little action had to be given deliberate consideration, while roles had to be carefully passed through an ethical filter. At times, deep seriousness was behind even seemingly careless laughter. Existence itself was not dreary, but it could at any moment easily take a tragic turn.

It seems to be impossible now to imagine, looking back on the era when my socialisation as a young academic researcher started, how it was possible at all to ponder upon theoretical dilemmas in the extremely restricted intellectual space available. Any plausible explanation can perhaps be furnished by scientific methodology. For—perhaps as a characteristic of abstract conceptualisation, provided that it is sophisticated, thorough and consequent enough—even the slightest analytical proposal for differentiation may modify (by switching off) the course of thinking in ways that turn out later on to be fatal. But we may know from others' narratives that even those ordered by fate to be blind or deaf or mute are not necessarily deprived of the ability to experience (as always, relative) totality. Perhaps nature's compensation is at work there, too, when a politically extorted insensitivity, as brutally imposed upon, is counterbalanced by, for instance, additional sensitivity developing spontaneously as to related topics or aspects of the same scholarly field. Let me assert here as a summary of the experience of the past few decades in Socialist Hungary[7] that the intellect is able to work, if it wants to. As we all know, it is not easy to dance hamstringed, with hands and feet tied up. But it should be noted at the same time that drifting about,

[7] As yet, there is no reliable description in details, translated into English, of what Communism meant for an intellectual to survive in moral integrity. Even in Hungarian, mostly literary non-fictions do the job, sometimes with scholars remembering.

pulled hither and thither helplessly by various currents, as if pulled on strings, is not really what you would call a dance, either.

3. On Marxism and its Socialist Cultivation in particular

The ideal of MARXism was a scientific image of society, built on the recognition and formulation of certain laws. Based on archetypes of the early 19th century, it conceived of the world as a unity both philosophically and in theoretical describability. It considered positive description as a task and also adjusted its language to it. It adapted a unified ontology and epistemology to this expectation. The only thing MARXism recognised as existing was what it called reality. It thought context, rule, logic and dialectics—that is, connections—to be drawn from this reality, and cognition, in its turn, to be reality reflected in consciousness. Consequently, it also considered human recognition of any context, rule, logic and dialectic—as far as cognition proves to be correct—to be a reflection (i.e., mirroring) of the external world in consciousness. Substance and phenomenon as much as general and particular and individual, as well as type—all these were regarded as features of reality revealed by theoretical reflection at a level superior to everyday perception. Language and concepts were also treated as fragments of reality reflected. Or, everything we have, either in our hands or in our thoughts, is, therefore, a mere reflection of "the" objective reality, existing prior to and independent of consciousness. This is the same as saying that in conceptual construction, one postulates an entity in relation to which one's self may play a merely receptive role at the most.

Accordingly, the MARXist theory of law has never been anything more than one of the applications of such an early 19th-century ideal of natural science to a field taken as a mere continuation in extension. It is indicative of such reflex-like methodological roots that even on the rare occasions of its theoretical cultivation, MARXism in law hardly ever transcended the level of obligatory clichés of party-line brochure-writing. Consequently, even at its most sophisticated levels, MARXism remained all along reduced to a chain of applications in that it never conceived of law as a separate entity, but as depending on something external to it, that is, as the mere product (or expression) of something having priority over it.[8]

[8] Cf., by the author, 'Autonomy and Instrumentality of Law in a Superstructural Perspective' [1986] *Acta Juridica Hungarica* 40 (1999) 3–4, pp. 213–235 {&

The history of MARXist legal theorising has been characterised by the dilemma of a theoretical duality. Notably, it either sought—mostly following KARL MARX on an ontological plane[9]—a specific, instrumental (i.e., transformed at the most) reflection of social relationships in jural relations (as testified by early Soviet legal theory, first of all EVGENY B. PASHUKANIS[10], and later by the theoretical scheme elaborated by IMRE SZABÓ[11]), or it wanted to trace—inspired, most of all, by VLADIMIR ILYICH LENIN, on an epistemological plane[12]—a specific, instrumental (i.e., transformed at the most) reflection of reality in the linguistic forms of legal objectivation, in order to apply, as a criterion, the very cognition of reality to its judgement upon law (as in the theory of VILMOS PESCHKA,[13] following GEORGE LUKÁCS' literary theory of realism,[14] reducing aesthetic qualities to patterns of cognition.)

Scientific construction, internal logic and strict coherence, as well as the explanatory force that may manifest itself in responses given to questions that may be raised at all within a theoretical framework, well, all this and other scientific qualities might have characterised such approaches, which themselves were in fact developed in hidden polemics with each other. In sum, there was continuous debate. Moreover, under the official aegis of the indubitable dominance of MARXism, some internal diversity of approaches and views could also evolve.

<http://springer.om.hu/content/x713702123847t53/fulltext.pdf>} and 'The Legacy of Marxism in Law' *Central European Political Science Review* 44 (Summer 2011), No. 44, pp. 78–96.

[9] Cf. Karl Marx *A Contribution to the Critique of Political Economy* trans. S. W. Ryazanskaya (Moscow: Progress / London: Lawrence&Wishart / New York: International Publishers 1970) 263 pp. and Karl Marx & Friedrich Engels *The German Ideology* (New York: International Publishers 1947) xviii + 214 pp.

[10] Evgeny Bronislavovich Pashukanis *Law and Marxism* A General Theory [Общая теория права и марксизм (Москва: Издательство Коммунистическая Академия 1928)], trans. Barbara Einhorn (London: Ink Links 1978) 195 pp.

[11] Imre Szabó *Les fondements de la théorie du droit* (Budapest: Akadémiai Kiadó 1973) 340 pp. / *Основы теории права* (Москва: Прогресс 1974) 268 pp.

[12] By Vladimir Ilyich Lenin, *Philosophical Notebooks* [Филосовские тетради (Политиздат 1947)] (Moscow: Progress Publishers 1972) [Collected Works 38] and *Materialism and Empirio-criticism* Critical Comments on a Reactionary Philosophy, trans. A. Fineberg (Moscow: Foreign Languages Publishing House 1947) 391 pp.

[13] Vilmos Peschka *Die Theorie der Rechtsnormen* (Budapest: Akadémiai Kiadó 1982) 266 pp.

[14] By Georg[e] Lukács, *Wider den missverstandenen Realismus* [Against realism misunderstood] (Hamburg: Classen 1958) 153 pp. and *Essays on Realism* trans. David Fernbach (Cambridge, Mass.: MIT Press 1980) 250 pp.

Only thoughts claiming to belong to (or to be drawn from or inspired by) MARXism (and certainly not disqualified or labelled as its criticism, negation, or transcendence) were allowed to appear at the official fora of scholarship, i.e., at the *Academia*, the *Universitas*, or in the practically exclusively state-owned and party-controlled publishing industry, that is, virtually everywhere—except the rather limited terrain of thought reserved to churches, strictly isolated and never presented in the official guise of scholarship. At the same time, almost any view had a chance to attempt to get into the officially acknowledged mainstream, only provided that it was developed and substantiated according to the officially accepted methodology (i.e., palliated with proper socialising empathy, adapted carefully and with appropriate talent). For, it has to be added that the practice in Hungary proved to be rather tolerant despite the party decision formally taken in the early '60s, which ruled out any attempt to pluralise MARXism, that is, to claim the truths of two or more diverging theses on the same subject (to be acknowledged as correct and, therefore, to be tolerated within MARXism) —apart from the party's constraint to react over-sensitively to any gesture bordering on provocation (mostly practised in fact by disappointed neophytes, labelling themselves as neo-leftists, anarchists, TROTSKYists and MAOists, or simply as authentic MARXists). Or, otherwise expressed, everyone had a chance to try to form an individual opinion at his/her discretion, according to his/her tastes, convictions, intuitions and recognitions. And what made a hard job out of all this was the need actually to find a way to form this hectic complex into systemic ideas acceptable as components of MARXism, taken as an exclusively scientific world-view and conceptual framework.

As every approach and intuition had to be filtered through MARXism's homogenising medium [*Gleichschaltung*], anyone who dared to think quite in terms of his/her profession was left entirely alone because, apart from MARX' and ENGELS' own presuppositions and LENIN's conservative simplifications from a century before, he/she was hopelessly deprived of any insight and understanding developed as scholarly foundations by the relevant disciplines, as he/she was isolated from contemporary western scholarship, both in the physical and ideological senses of the word. Philosophy of science, ethics or legal theory—scholars in Socialism encountered nothing but gaps and traps everywhere, as they were compelled to face the bone-dry official version of MARXism in an artificial island in which even its Western European and American variations counted as 'revisionism', and its Yugoslav variant, due to its theoretically humanistic drive, as expressly 'hostile',

on the one hand.[15] On the other, representing 'evil' itself, there were the "bourgeois" or "imperialist" doctrines, cast by the professional witch-hunters into scientific annihilation in an "ideological" combat.[16] Any attempt to draw inspiration or—oh, what audacity—to learn from this enemy's territory involved the threat of making oneself excommunicated, not to mention further risks. Because remaining within the bounds of one's own field of expertise could at least involve an ability to assess other opinions and to form an independent judgement on the given subject(s). However, also relying on science-philosophical and methodological foundations taken from this other territory did entail the danger of falling into an abyss, being left without any fixed point where even minor decisions such as the choice between "us" and "them" might gain additional significance, elevated to so-to-speak life-or-death issues within the profession.

For the sake of a balanced view, I have to add that all this counted as almost an idyllic status, envied by almost all in the world of the "actually existing socialism", who were outsiders to Poland, Hungary, and prior-to-1968 Czechoslovakia. In the Soviet Union, for example, there was simply no 'hostile' literature within average reach. Scholars could not even take cognisance of such, which also eliminated the need to bother with its criticism—except to some usual clichés, standing for insensitive political repudiation. The German Democratic Republic chose a solution best suited to the idea of 'scientific socialism': it assigned the theoretical investigation into socialist law to experts of socialist construction (who were expected to rely upon pure and uncorrupted—i.e., 'socialist'—literary sources exclusively), while the job of generating annihilating criticism of 'imperialist' doctrines (including both the rationalism of MAX WEBER and the normativism of HANS KELSEN) was assured to especially selected comrades who were commissioned to do it as

[15] It is worth noting that *Marxian Legal Theory* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1993) xxvii + 530 pp. [The International Library of Essays in Law & Legal Theory, Schools 9] was also pioneering in its collecting together specimens of so-called Western and Socialist Marxisms.

[16] The epoch is characterised by the fact, too, that *Modern polgári jogelméleti tanulmányok* [Modern western studies in legal theory] ed. Csaba Varga (Budapest: Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete 1977) 145 pp. and *Jog és filozófia* Antológia a század elsõ felének polgári jogelméleti irodalma köréből [Law and philosophy: Anthology of western legal theory from the first half of twentieth century] ed. Csaba Varga (Budapest: Akadémiai Kiadó 1981) 383 pp. were the first items in the entire Soviet orbit to translate and/or publish (instead of "ideologically annihilate") products of "bourgeois/imperialist" legal doctrines.

a special—and exclusive—privilege and duty. Hence, only those few charged with this responsibility were granted access to the literature of 'imperialism' in the closed stacks of some academic research libraries not available to the public. In other countries like Bulgaria or Romania, the situation brought about by overall poverty was relatively simple to handle, with scarcely anything to denounce, as libraries practically had no Western acquisitions. A radical innovation was decided by post-1968 Czechoslovakia: dreading any kind of revisionist disruption, the new leaders there restricted their interest in acquiring literature to that of their Soviet and East German comrades. Openness showed itself only in Yugoslavia and Poland, but as compared to Hungary, the end-result was not necessarily better. In Yugoslavia (similarly to pre-1968 Czechoslovakia by the way), prestigious attempts at humanising MARXism and its socialism were launched, yet social sciences remained so mercilessly doctrinarian that scholars could arrive at a neology from an outdated orthodoxy within a dogmatic MARXism, at the most. Perhaps Polish scholarship alone offered an apparently attractive perspective. Legal academics cultivated almost everything that was known from the West. It turned out only later that all this could only be the result of serious compromises and did have its price to be paid as well. For, while MARXism was the exclusive platform to approach and treat and cover and master all domains in Hungary, academic researchers were at least released from any requirement to become party rank-and-file in person. In Poland by contrast, all professors had to prove their loyalty to the party in order to be admitted at all to join the choir. At the same time, the relevance of MARXism to social scientific thought was also specific in Poland. They themselves also developed a MARXist-LENINist theory of the state and law, but restricted its competence to the field of building socialism, where either ideological issues or problems of law bordering on politics were at stake. In other domains, any scholarly activity could go on almost freely. As a result of the unimaginable corruption of MARXist-LENINist doctrine, a multitude of neophyte schools could, thus, spring up in Poland, where analysis was pursued as in Oxford, logic as in Paris or Brussels. Meanwhile, questions touching upon their national survival fell into total oblivion and their national traditions in the humanities remained traceable, if at all, mostly in their inclination to formalise and quantify issues.[17]

[17] Cf., for the respective surveys by the author, 'Legal Philosophy of the Marxism of Socialism: Hungarian Overview in an International Perspective' in his *Contemporary Legal Philosophising* Schmitt, Kelsen, Hart, & Law and Literature, with Marxism's Dark Legacy in Central Europe (On Teaching Legal Philosophy in Appendix) (Budapest: Szent István Társu-

Returning to the dilemmas of my search, I might well have stayed on this (continuously crumbling) side of "our" wing, had I not been overly drawn by the spaciousness of the opposite side. I was not only attracted by the latter's internal diversity and intellectual vivacity, but also most of all by the fact that actually I could not find any reference point on "our" side to my constantly recurrent questions. And without the outlines of a conceivable answer, not even a question can be formulated in an intelligible way. Instead of reference points, all I found was confusion, while the direction I began to discover in the early '60s (with the help of texts inaccessible to the public, made available only in numbered copies, a few of which I happened to obtain thanks to a sudden and potentially risky yet successful hitch-hike from Pécs to the heights of the Department of MARXism-LENINism of the Ministry of Education in Budapest) moved a long distance from the doctrine taught to us as exclusively true, once developed under the aegis of MARXism back in the late 19th century.

4. Legal Philosophising

4.1. Approaches to Law

Law? It was obvious to me that I had to look for it and catch it as text, in a conceptualised form. However, for me it was interpretable intelligibly not as pure product or passive mirror of cognition, but as an active response in reaction to practical matters, that is, as the ingenious instrument of human action, which is produced out of theoretical knowledge and practical experience by us, fellow humans. For precisely this reason, the very question what we are to make out of it either in books or in action depends largely on traditions and practical accessibility of patternable instruments made elsewhere and/or at other times by others, as well as on axiological and practical considerations of purposefulness. As a result, I assumed the mainstream socialist approach to be unverifiable and tiresomely barren, which, once the law encountered a linguistically expressed (therefore, in principle, also contextually treatable) texture, assessed it—as a mere reflection of "the objective reality existing independently of human consciousness"—exclusively

lat 2012) {forthcoming} and 'Development of Theoretical Legal Thought in Hungary at the Turn of the Millennium' in *The Transformation of the Hungarian Legal Order 1985–2005* Transition to the Rule of Law and Accession to the European Union, ed. Péter Takács, András Jakab & Allan F. Tatham (Alphen aan den Rijn: Kluwer Law International 2007), pp. 615–638.

according to criteria of cognition, conceiving it necessarily either as a true or false model of reality, irrespective of whether a descriptive statement, a prescriptive will or an ascriptive attribution of some consequences was at stake (i.e., a statement on the surrounding world, the expression of some will aimed at some action or the institutional implementation of qualifications arising from a normative arrangement, or, beyond these all, perhaps an expression of emotions, a conventional action performed in and by language, introducing or operating a practical institution by "doing with words", or perhaps nothing more than artistic representation of relevant states of mind).

Consequently, what is addressed thereby is the autonomy of law and the question of whether or not issues of law can be treated as our own within the social contextures conditioning them. As I have presumed, in addition to cognitively reconstructing reflection, linguistic expressions may also serve as instruments of practical intentions. By leaving behind the forced paths of formal semantics and logics, I thought we might arrive at the realisation, while examining the law's meaning and logical context, that the textual embodiment of law is just a medium of mediation which carries different potentials depending on age, culture, and condition. Moreover, law as a text can also help creative decisions to be taken, channelling processes of reasoning, argumentation and justification to given paths with frameworks and references adapted to conceptually given tracks. Otherwise speaking, I have presumed that, on the one hand, logic is different (by being at the same time less and more) than a clearly coercive definition (with specific gaps, transformations, jumps and uncertainties in the legal process, exactly revealed by logical reconstruction). On the other hand, the use of diverse techniques in law may promise different, or outright opposing or mutually excluding, results depending eventually on (perhaps) banal choices that in the last analysis are not predefined by any (legal) text.

Likewise, there is also a duality in answering the dilemma whether or not the concept of a thing can only be defined in one correct way (as an exclusively verifiable conceptual reflection of "the objective reality existing independently of human consciousness") or, rather, is the concept (with its definition) instrumentalised, that is, adjusted to merely practical human interests and artificial contexts. Accordingly, we cannot speak of a concept or subject taken *per se* on its own, but—for example, in case of law—exclusively of phenomena of one kind or another in some sense or another. Therefore, the concept itself will be selected and defined depending on what I really wish to investigate in or out of it. Of course, it should be made clear what

I have shed light on when I picked it out from a set of phenomena involving an infinite variety of aspects and allowing various approaches, and how this is related to other similarly feasible interpretations. Well, such an understanding was from the outset rejected in the then dominant monist worldview (naively realist in searching for mirroring subject-materialities directly in our consciousness), as if it were to stand for pluralism. For the underlying official presumption assumed the subjects and their cognisance to be uniform, unless diversified by the eventuality of human error or ideological ("subversive") misinterpretation. No need to say that my theoretical attempt was by no means pluralistic. My purpose was simply to have analysis, by distinguishing and separately formulating aspects, sides and viewpoints that could be related to the subject, within a given set of phenomena, by presenting their mutual connections on the basis of their underlying complexity.

The principle of historicity in MARXism[18] did not necessarily mean for me either that all we know and the way we know it today should be separated from the phenomena and states that had existed yesterday. For historicity means historical explanation and understanding, nothing more. Irrespective of the survival of names, things may change in character over time. Properly speaking, it is not the thing itself or its concept that develop in time. For what existed yesterday was yesterday and is far from being identical with what prevails today. Moreover, not even events shall be recalled in a way such that something has continued but rather in a way that we have looked for and finally found answers to challenges arising in the course of our practical activity—regardless of whether a brand new solution was initiated or we were inspired by former procedures applied elsewhere, and also regardless of whether we gave our discovery a new name or preferred to adopt (by adapting) earlier names for it.

Monopoly capitalisation must have been a landmark back in its time, as was described by LENIN as well, and we had the opportunity to experience the corruptive blessings of the regime of so-called actually existing socialism in Hungary. Yet, I did not think that any of the two should serve as a key to deciphering the secrets of law. Codification, legal reasoning, lawyerly logic, legal ideal—I could hardly have come any further on the way of searching

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[18] By the author, 'History (Historicity) of Law' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 371–373 [Garland Reference Library of the Humanities, 1743]

{& <http://www.bookrags.com/tandf/history-30-tf/>}.

for a common core had I not formulated at least to myself that, notwithstanding its features of barbarism, all in all, Soviet law was in fact more close to French and German arrangements than the Western European legal set-up to the Atlantic one. I did not find the classifications offered by the terms "law type" and "legal family" adequate to my purposes and was therefore striving to test the terms of "modern statehood" and "modern formal law", by arriving, as one of the grounds of a possible typification, at the notion of legal culture. All this was regarded as outrageous back then, because it presented socialist law in association (and on an equal footing) with so-called bourgeois law. However, for me it meant the only feasible way to examine law in its technicality, knowing that law is reducible to techniques as operated by human motivations.[19]

The following quandary has remained a riddle to me all along. If we transcend the law's self-definition by considering its internal system as filled with and conditioned upon its own socio-historical background, how can we restrict our investigations to some selected (e.g., French or Soviet) embodiment of the law, while speaking of law and theorising on it in general? In other words: does it conform to the principle of historicity if our analysis accepts certain forms as universally given, without having examined their development in a comparative historical perspective? For that which may seem generally widespread (as the mainstream universalised) today in philosophical reconstruction shall obviously be regarded as the outcome of a particular development historically, and be examined together with other particularities (even if these others have remained mere potentialities). This is why I tried, as the *sine qua non* precondition of any scholarly treatment of legal phenomena and especially of legal forms, to found theory-building on comparative historical surveys of challenges and responses, instead of setting up and constructing theories on sheer conceptual analysis.[20] No wonder

[19] Cf. the author's publications spanning from his 'Moderne Staatlichkeit und modernes formales Rechts' *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 1–2, pp. 235–241 via Comparative Legal Cultures ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1] up to his *Comparative Legal Cultures* On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism (Budapest: Szent István Társulat 2012) 251 pp. [Philosophiae Iuris] & <http://drcsabavarga.wordpress.com/2012/03/12/varga-comparative-legal-cultures-2012/> & also <http://www.scribd.com/doc/59602888/1/COMPARATIVE-LEGAL-CULTURES>.

[20] Cf., e.g., by the author, 'Varieties of Law and the Rule of Law' *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1, pp. 61–72 {reprinted as 'The Basic Settings of Modern Formal

then that once I began my monography on *Codification as a Socio-historical Phenomenon*[21] by tracing its relatable functions and manifestations back to the universal comparative history of human institutions, so as to arrive finally at a general theory of codification. In addition, I tried to outline the variety of legal techniques (including presumption and fiction, subsidiaries to *legis latio* in the form of preambles, motives given by the minister having presented the bill, as well as the *travaux préparatoires*[22]) through different ages and cultures in their distinct unity, in order to be able to identify their properties in the end.

It is tradition that forms a community above and despite everything. It is tradition that links generations and cultures together. And tradition is an all but passive medium: it may embody both grass-roots initiatives and framework innovations. The fact that I could arrive at such a conclusion with MARXism in the background is a proof again of the success of (some sort of) tradition.

4.2. Arriving at a Legal Ontology

By the end of the Communism imposed upon Hungary, I could eventually return to the ideal of the starting period of my youth, when I had been given the chance of becoming the young friend of two groundbreakers of the

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Law' in *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), pp. 89–103 [Tem- pus Textbook Series on European Law and European Legal Cultures 1], introducing to Part II on »The European Legal Mind«} and 'Differing Mentalities of Civil Law and Common Law? The Issue of Logic in Law' *Acta Juridica Hungarica* 48 (2007) 4, pp. 401–410 {& <http://akademiai.om.hu/content/b0m8x67227572219/fulltext.pdf> & <http://law.sfu-kras.ru/viewdownload/30/105-differing-mentalitiesofcivillawandcommonlaw.html> & <http://law.sfu-kras.ru/viewcategory/30.html>}.

[21] By the author, *Codification as a Socio-historical Phenomenon* [1991] 2nd {reprint} ed. with an Annex & Postscript (Budapest: Szent István Társulat 2011) viii + 431 pp. & <http://drcsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>.

[22] By Csaba Varga & József Szájer, 'Legal Technique' in *Rechtskultur – Denkkultur* Ergebnisse des ungarisch–österreichischen Symposiums der Internationale Vereinigung für Rechts- und Sozialphilosophie 1987, hrsg. Erhard Mock & Csaba Varga (Stuttgart: Franz Steiner Verlag Wiesbaden 1989), pp. 136–147 [Archiv für Rechts- und Sozialphilosophie, Beiheft 35] and 'Presumption and Fiction: Means of Legal Technique' *Archiv für Rechts- und Sozialphilosophie* LXXIV (1988) 2, pp. 168–184; as well as, by the author, 'The Preamble: A Question of Jurisprudence' *Acta Juridica Academiae Scientiarum Hungaricae* XIII (1971) 1–2, pp. 101–128 and 'Die ministerielle Begründung in rechtsphilosophischer Sicht' *Rechtstheorie* 12 (1981) 1, pp. 95–115.

time, MICHEL VILLEY of Paris and CHAÏM PERELMAN in Brussels:[23] thinking in the context of law, language, logic, and rhetoric, approaching the legal subject within human understanding, incessantly re- and trans-conventionalised through varying sets of mutual effects. This is to say that such an understanding is going to be taken as a common core: the one to the "artificial human construction"[24] of which formalisms are used to refer; addressed to which we communicate; relating the network connections of which we may (by the force of logic, if adequately prepared beforehand) draw consequences; and the deepest human fallibility of which we strive incessantly to overcome, by the means of sheer over-ideologisation.

From problematising on that law is objectified, on the one hand, while its ontological existence (i.e., prevalence) is assessed by facts of its actual reference and the latter's impact on the course of events, I could already conclude to the law's simultaneous openness and closedness in autopoiesis,[25] in terms of which law is a patterned standard in need of ulterior justification, on the one hand, albeit its vocation is practical problem-solving in response to daily needs, on the other. Accordingly, both its process and logic are doubled indeed, for its problem-solving will be tested by, and also end in, subsequent justification, nearing to have the rigour of a genuine formal demonstration.

All this has shown that law is to be seen also as a linguistic game, composed of the layers of the respective (but distinct) languages of enacted law, enforced law, legal science, and doctrine of law, as a series in cumulation.[26] And its social ontological perspective has proved that all the law's phenomenal forms—including the ones hitherto treated as part of epistemology—

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[23] Detached from LENIN's so-called reflection theory, cf., by the author, 'A magatartási szabály és az objektív igazság kérdése' [Rule of behaviour and the issue of objective truth, 1964] in Varga Csaba *Útkeresés* Kísérletek – kéziratban [Searching for a path: Unpublished essays] (Budapest: Szent István Társulat 2001), pp. 4–18 [Jogfilozófiák].

[24] 'künstliche menschliche Konstruktionen' as termed by Georg Klaus in his *Einführung in die formale Logik* (Berlin[East]: VEB Deutscher Verlag der Wissenschaften 1959), p. 72.

[25] See, by the author, *Theory of the Judicial Process* The Establishment of Facts, 2nd {reprint} ed. with Postfaces I and II (Budapest: Szent István Társulat 2011) viii + 308 pp. & <http://drcsabavarga.wordpress.com/2012/03/13/varga-theory-of-the-judicial-process-the-establishment-of-facts-19952011/> and *The Paradigms of Legal Thinking* [1999] enlarged 2nd ed. (Budapest: Szent István Társulat 2012) 418 pp. [Philosophiae Iuris] & <http://www.scribd.com/doc/85083788/VARGA-ParadigmsOfLegalThinking-2012>.

[26] Cf., by the author, 'Law and its Doctrinal Study (On Legal Dogmatics)' *Acta Juridica Hungarica* 49 (2008) 3, pp. 253–274 {& <http://akademiai.om.hu/content/352w44h21258427/fulltext.pdf>}.

are rooted in the very ontic of the unbrokenly trustable continuity of human praxis. Or, FRIEDRICH ENGELS' *juristische Weltanschauung* (that is, the lawyerly outlook as professional deontology) is also one of the law's ontic components. And this explains why and how the relative difference amongst those judicial minds characteristic of Civil Law, Common Law (and so on) arrangements—together with the canons according to which justification is made (and will be subsequently made accepted) in the given arrangement—is of ontic importance. Moreover, it is such an ontological turn,[27] within which the foundation of Continental legal set-up upon enactment can be understood as the end result at any time of unceasing rivalry for primacy and control of those three layers that work self-imposingly in law: of what has been e n a c t e d , and/or authoritatively e n f o r c e d , and/or e x e r c i s e d in social spontaneity, in their respective quality acknowledged as the law.[28] Accordingly, the essence of law—and of all forms of sociality—lies in (as being founded by) the trustable continuity of the social praxis of humans, through their unending reconventionalisation. Components, configurations, impacts are in a flux in the latter's practice. However—and this is why it is autopoietic—such a trustable continuity will never miss the point to embody what it has ever been.

Law is composed of the dynamism of acts, progressing in competitive processes. This is why law is process-like from the beginning, even if veiled by ideological or deontological simplifications closing the door upon any discussion. Thereby whatever linkage of law to objective (quasi physical) properties will necessarily loose importance. For independently of what the law is, it is operated by humans. Therefore, on the final analysis formalisms of law cannot be more than a reified idol with human participation and unavoidable individual responsibility for the law's actual working in the background. By referring to it, it is us, humans, that activate law, trans-conventionalising it through the series of their re-conventionalisation. This is why its parts are mostly aspects that can only be differentiated for the sake of, and through, conceptual analysis, that is, in a hypothesised and fully artificial way.

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[27] Cf., by the author, *The Place of Law in Lukács' World Concept* [1985] [3rd [reprint] ed. with Postface (Budapest: Szent István Társulat 2012) 218 pp.
& <http://drcsabavarga.wordpress.com/2012/03/13/the-place-of-law-in-lukacs-world-concept-19852012/>.

[28] By the author, 'Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures' [1985] in *Law in East and West* On the Occasion of the 30th Anniversary of the Institute of Comparative Law, Waseda University, ed. Institute of Comparative Law, Waseda University (Tokyo: Waseda University Press 1988), pp. 265–285.

5. Conclusion

The relationship between a political regime and the state of the Humanities as an aggregate of various kinds of self-reflection in it may turn to be rather complex indeed. The ways in which ideas are generated are both conditioned by the former and self-conditioning. The variety of feasible responses to *hic et nunc* challenges is almost limitless, so there is high place for personal features, partly in function of purely intellectual capacity and partly drawing from moral virtues, to prevail while working out those paths and frameworks, as well as channels and methodologies, in and within the womb of which such responses are formulated. Moreover, limiting conditions (if there are any at play there and then, unavoidably) offer a chance for a live experience of life situations which are seldom experienced in actual human practice, and also of testing human stands, quite as if a testile strength test were to take in some laboratory. Accordingly, individual achievements are comparable among others with and without special regard to the underlying political regime—even if, *en masse*, an unfavourable environment may forecast mediocre output as an average.

LEGAL PHILOSOPHY OF THE MARXISM OF SOCIALISM
Hungarian Overview in an International Perspective*

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* In its first version, in *Jogelméleti Szemle* 2003/4 in <http://jesz.ajk.elte.hu/varga16.html>, abridged as 'Marxizmus és jogelmélet' [Marxism and legal theory] in *Világosság* XLV (2004) 4, pp. 89–116 & <http://www.vilagossag.hu/pdf/20041124144450.pdf>.

I.
Development and Balance of Marxist Philosophising on Law in Hungary

1. Preliminaries (until 1948)

In the terms of the legal ideology of the Communist dictatorship, gradually establishing itself in Hungary according to Soviet patterns with STALINian-cum-VYSHINSKYan inspirations after WWII, the legal philosophy as cultivated in the interwar period and renewed in the post-war period could only qualify as a remnant of the despised "bourgeois" continuity, part of a past to be done away with anyway. In a position of degradation from the outset, it soon became subject to the political attacks waged against everything coming from the national heritage, despite the fact that this legal philosophy had indeed represented an imposing culture and professional highlight, nurtured by highly valued scholars in both the interwar and the post-war short-lived coalition periods. In view of its representative output and dynamic post-war re-start, one may remember quite a few remarkable accomplishments indeed. For instance, JULIUS MOÓR—democrat and legal philosopher, the first post-war metropolitan rector—set an exemplary pattern for facing the past, formulating ethical and spiritual lessons for a new start in a sublime and inspiring way.[1] With constant efforts at reaching a synthesis, BARNA HORVÁTH just paved a new path, opening up further theoretical prospects.[2] JÓZSEF SZABÓ of Szeged, having launched his career by laying the foundations of jurisprudence in the methodology of sciences, faced a multitude of new tasks, such as an understanding and at least psychological explanation of Anglo–American lawyerly mentality and a description of the ultimate motives

[1] Cf. his CV & Bibliography by the present author, introducing Julius Moór *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) xxii + 485 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Bibliotheca Iuridica: Opera Classica 3] {& <http://philosophyoflaw.wordpress.com/>}, pp. ix–xxii.

[2] Back in 1948, he was even planning an international symposium within the metropolitan Pázmány Péter University. Cf., as the posthumous publication of the draft intended to underlie the discussions (and having survived in ISTVÁN BIBÓ's legacy at the Library of the Hungarian Academy of Sciences, MS Department), *The Bases of Law / A jog alapjai* [1948] ed. Csaba Varga, with a concluding paper by István H. Szilágyi (Budapest: Szent István Társulat 2006) liii + 94 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Jogfilozófiák].

of state jurisdiction and public administration. And, last but not least, István Losonczy of Pécs produced a summary of his so-called realistic legal philosophy (it having by then been developed into a systematic doctrine).[3] Well, all this ensured the promise of a smooth continuation.

Of course, we can regard it open to question whether or not this legal philosophy (especially of Moór and J. Szabó) could have advanced from the kind of reliable, intelligent and self-critical reflexive thought that was fellow-traveller to Western European and Atlantic models, to an independent trend, ensuring an internationally pro-active presence. Well, all our respect and esteem notwithstanding, my personal answer could at most be a rather hesitating 'yes'. And we may also add that in the case of some of the period's most self-aware reformers (especially Horváth and Losonczy), the chance of a positive answer is not more secure either, as they failed, despite the considerable volume of their academic output, to surpass the stage of outlining claims, packed with sketches and improvisations, but without arriving at explications extended into full theories as tested through their application to partial problems, within the working period spanning from their professorial appointment to the Communist takeover (i.e., a quarter of a century in the case of Horváth and one decade in the case of Losonczy). Yet it can be regarded as a fact that even their disciples (on behalf of Horváth, pioneering in school-founding at Szeged, István Bibó, József Szabó and Tibor Vas,[4] as well as Vera Bolgár who, having just launched her career, followed her master by soon emigrating, and on behalf of Moór, all along a lonely thinker who had not established a school of thought, Kornél Scholz) chose challenging paths, each of his or her own; meaning, all in all, that jurisprudence in Hungary covered practically the entire range of theoretical approaches then cultivated in Europe. Thus the uni-directionality

[3] Cf., as a posthumous edition of István Losonczy's writings at the time, his *Jogfilozófiai előadások vázlata* [Lectures on legal philosophy in outline] [1948] ed. Csaba Varga (Budapest: Szent István Társulat 2002) xvi + 282 pp. [Jogfilozófiák] and *Abriß eines realistischen rechtsphilosophischen Systems* hrsg. Csaba Varga (Budapest: Szent István Társulat 2002) 144 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris]. For a contrasted narrative of two personal dramas, cf., by the author, 'Philosophysing on Law in the Turmoil of Communist Take-over in Hungary (Two Portraits, Interwar and Post-war)' in *The 2005 ALPSA Annual Publication* of the Australian Legal Philosophy Students Association, ed. Max Leszkiewicz (Brisbane 2005), pp. 82–86 on Moór & 86–94 on Losonczy, respectively.

[4] Cf. *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas, hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) 246 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris].

of the 1920s (MOÓR), followed by the antagonism of the emerging companion (HORVÁTH) as rival to the former, in fact ended by being replaced by a series of mutual stimulations and inspirations, matured in group discussions.

2. STALINism (from the Soviet Occupation on)

a) Liquidation of the »Residues«

Shortly after the Communist takeover, a frontal attack started against everything with a flavour of the past, i.e., deterrence from following tradition through discrediting past thoughts and hindering their survival; in short, prevention of the national heritage from exerting any influence at all. This act of political and ideological liquidation was accomplished within one or two years. It was executed, e.g., through political measures like the mercilessly fanatic pseudo-journalism of GEORGE LUKÁCS calling for purges or through the Communist-Party-initiated thought-police[5] instituted as the Committee for Science Policy destined to replace the Academy of Sciences, staffed by young professionals, mostly holocaust-survivors, headed by ERZSÉBET FAZEKAS (a Muscovite historian, practically unknown until then), wife of ERNŐ GERŐ, who all along rivalled RÁKOSI for number one leadership. Such a purge became manifest through dismissing the old staff, deteriorating their existential conditions, blocking their academic chances and dissociating them from prevalent professional networks[6] (e.g., through a series of partisan debates generated by new-comer Communists such as, in law, IMRE SZABÓ, JÁNOS BEÉR, GYULA EÖRSI and MÁRTON SARLÓS[7]).[8]

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[5] Involving mathematicians GYÖRGY ALEXITS and ISTVÁN FENYŐ as well as historians like PÉTER HANÁK, LÁSZLÓ ZSIGMOND and JENŐ SZŰCS, dreaded by right by all at the time.

[6] In my natal Pécs, cleansing was managed by the dean ISTVÁN KOCSIS, ex-president of the county People's Court, and by FERENC PECZE, the local faculty head in matters of education.

[7] In Pécs, e.g., particularly PÁL HALÁSZ, LAJOS SZAMEL, and OTTÓ BIHARI.

[8] See, e.g., Tibor Vas 'A burzsoá jogfogalom meghatározásának marxista bírálata' [Marxist criticism of the bourgeois concept of law] *Jogtudományi Közlöny* V (1950), pp. 3–6 and Tamás Földesi 'Hogyan használjuk fel ma Marx és Engels bírálatait a burzsoá jog- és államelméletekről?' [How to use the criticism offered by Marx and Engels in the struggle against the bourgeois theories of law and state?] *Jogtudományi Közlöny* IX (1954), pp. 169–177. As the best species of intimidation, calling every one's bluff, cf. also '»A Horthy-fasizmus állam- és jogbölcselete«: Az ELTE ÁJK tanácsülésén 1955. január 29-én rendezett vita Szabó Imre készülő könyvének IX. fejezetéről' [Legal philosophy & theory of state of the Horthy-fascism: Eötvös Loránd University Faculty Board debate on ch. 9 of Imre Szabó's book under preparation] ed. Csaba Varga *Jogelméleti Szemle* 2004/3 in <http://jesz.ajk.elte.hu/varga19.html>.

In sum, the "new" was in fact built in utter irrelevance of and disrespect for the "old" in an inherently destructive manner, by fulfilling a political commission via administratively marshalled means—as is usual in a dictatorship.[9]

*b) Soviet-type Uniformisation [*Gleichschaltung*]*

In the absence of any genuine domestic preliminaries[10] or self-generated scholarly results—which proves most obviously that the MARXism of Socialism came into being as solely motivated by direct politico-ideological considerations and was bound to remain all along alien to any mature sense of scholarship—, the construction of MARXist theory in Hungary took a start through translation of pitiably crude and theoretically poor brochure-style militant pieces from the Soviet literature,[11] which had in its time had the Bolshevik mission to replace the certainly not overly-sophisticated but didactical instruction manuals of Tsarist Russia. By supporting the Communists' putschist political hegemony, a Hungarian post-epigonism of the Soviet STALIN-epigonism became the yardstick of party-political trustwort-

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[9] For its literary outcome, see, first of all by Imre Szabó, 'I. V. Sztálin tanítása a nyelvtudományról és a jogi felépítmény kérdése' [The teaching of I. V. Stalin on linguistics and the issue of legal superstructure] *Az MTA Társadalmi–Történeti Tudományok Osztályának Közleményei* II (1951), pp. 91–104 & *Jogtudományi Közlöny* VI (1951), pp. 155–160, 'I. V. Sztálin tanítása és a jogelmélet kérdései' [The teaching of I. V. Stalin and the issues of legal philosophy] *Az MTA Társadalmi–Történeti Tudományok Osztályának Közleményei* II (1950), pp. 113–122 & *Jogtudományi Közlöny* VI (1951), pp. 723–727, 'Vita haladó jogi hagyományaink kérdéséről' [Debate on our progressive legal traditions] *Jogtudományi Közlöny* VI (1951), pp. 653–662, 'A szocialista törvényességről' [On Socialist legality] *Társadalmi Szemle* VIII (1953), pp. 796–810, 'Állam- és jogtudományunk elméleti alapjainak néhány fő vonása' [Main characteristics of the theoretical foundations of our science on state and law] in *Az Eötvös Loránd Tudományegyetem Évkönyve* 1955, ed. Lajos Tamás (Budapest: Tankönyvkiadó 1956), pp. 37–43.

[10] With a sole and rather miserable exception. Cf., for its overview, by the author, 'Die Entwicklung des rechtstheoretischen Denkens in der Ungarischen Räterepublik' in *Der Kampf der politisch–rechtlichen Auffassungen in der Geschichte und Gegenwart* Materialen des multilateralen Symposiums vom 16. bis 18. September 1986 (Berlin [Hauptstadt der DDR]: Institut für die Theorie des Staates und des Rechts 1988), pp. 122–136 [Konferenz-Materialen 8].

[11] Published in translation and/or reviewed by Soviet or domestic authors in *Szovjetjogi cikkgyűjtemény* [Collection of articles from the Soviet law] I–IV (1951–1954).

[12] As a typical example, cf., by Tibor Vas, 'Az állam- és jogtudományok néhány kérdése az SzKP XX. Kongresszusa után' [Some questions of the science on state and law after the 20th Congress of the Soviet Communist Party] *Jogtudományi Közlöny* XI (1956), pp. 193–199 and 'Néhány állam- és jogelméleti kérdés az SzKP XXIII. Kongresszusának tükrében' [Some questions of the theory of state and law in the mirror of the 23rd Congress of the Soviet Communist Party] *Jogtudományi Közlöny* XXI (1966), pp. 516–519.

hiness, signalling its actors' deep personal and professional identification with the cause of Socialist revolutionarism.[12]

c) Denial of the Past, with a Dual Effect

The fate of MARXist legal theorising in Socialist Hungary became strangely defined from the beginning by an overtly purposeful monograph on the overall history of legal philosophising in Hungary. This work, prepared *au pair* with the Communist takeover to fulfil (through officialised academic debates on the field of law) most of the latter's political function,[13] had the expressed vocation to close down the past for ever. Rejecting and trampling down the values of the past by closing them back in the junk-room of an alleged pre-history, it simply condemned past achievements as harmful and, therefore, to be surpassed and forgotten, never to be resumed. No wonder that it earned its author a Kossuth-prize, the very first and highest official recognition of lawyerly intellectual accomplishment by the new regime. This book was the first MARXising grand monograph by IMRE SZABÓ, bearing all the "stylistic" marks of LENINism–STALINism,[14] which—guided by the author's intention to display his own legal-philosophical talents as well—built in fact a pile of cadavers out of his forerunners, in order to show how to "transcend" (while not staining itself with any attempt at retrospection as to the merits) and to "surpass" them (even if not troubled by genuine understanding).

It is a paradoxical after-effect (certainly neither intended nor foreseen at the time by the author) that these scarcely buried cadavers proved in fact to remain practically alive—owing to the bare fact that by being memorialised in a monograph, the past of legal theorising could earn a positive memory and reputation within the Hungarian profession up to the present day. Otherwise speaking, notwithstanding its official rejection and ideological annihilation and eradication, this very past could still be integrated into the local MARXism's background consciousness, serving as a standard to provide standing inspiration, even if in hidden forms. It was as if the author's politico-ideological service had still—albeit through detours—been counterbalanced by his own demand for true scholarship, preserved from his per-

[13] Cf. note 8, second part.

[14] Imre Szabó *A burzsoá állam- és jogbölcselet Magyarországon* [Bourgeois theory of state and law in Hungary] (Budapest: Akadémiai Kiadó 1955) 533 pp.

sonal past to some extent.[15] For, by the very act of writing, through extensive research, a number of elaborate chapters on the subject, he not only expelled past achievements intentionally and *pars et totus* from the circle of official conceivability, but also described them thoroughly and comprehensively as no one had before, and, thereby, challenged contemporary scholarship by revealing the richness of the approaches predecessors had once testified to. By the same act—*nolens volens*—he reminded readers of the same theoretical problems still unresolved, and the past approach (although condemned to become extinct) that kept its relevance—while remaining unspoken and unprocessed, yet offering an alternative to the officially Sovietised neo-primitive one-sidedness.[16]

At the same time, as a mark of its politico-ideological role, canonised declarations (standing for scholarly conclusions), too, appeared in ready form in this new theorisation. Because, in the spirit of the hurriedly adopted and ruthlessly enforced creed of its new fighters, the truth that could be uttered at all actually offered no temporary rest against tormenting hesitations and meditations but served as a revolutionary action (trans)forming society, like any revolutionary target set by superior command. That is, whatever truth was presented, it took the form of a canon officially declared, taken to be valid (and, therefore, made unquestionable) until revocation, the doubting or evading of which had to be retaliated against as a species of betrayal or sabotage. This attitude survived nearly till the end of the era, even if gradually less enforceable as time passed. However, as long as it was virulent it excluded even the feasibility of scholarly debates and any collective generation of ideas with open-ended chances. Ironically enough and in a tragic manner, this same attitude eventually destroyed its

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[15] The works of Imre Szabó, written in his twenties as a member of the Hungarian minority living in the successor-state Czechoslovakia, include, e.g., 'A jogszociológia munkaköre' [The working field of legal sociology] *Korunk* [Kolozsvár/Klausenburg/Cluj] X (1935) 11, pp. 809–815, 'Jog és erőszak' [Law and violence] *Korunk* XII (1937) 6, pp. 523–527, 'Az időszerűtlen jogtudomány' Korunk XIII (1938) 7–8, pp. 615–618, 'Szellemtudomány és pozitivizmus' [Humanities and positivism] *Korunk* XV (1940), pp. 527–534, as well as 'Néprajz, jog, szociológia: Népi jogéletkutatás' [Ethnography, law, sociology: research on popular living law] [Budapest] XXII (1942) 3, pp. 422–427 and 'Népi jogéletkutatás' *Társadalomtudomány* XXII (1942) 4, pp. 483–485.

[16] It is noteworthy that, e.g., Katalin Szegvári's monograph on Felix Somló (having remained in manuscript as a juvenile opus)—*Somló Bódog* [Felix Somló] (Szeged 1952–53) [type-written copy, 99 + 9 pp.] ed. Csaba Varga in *Jogelméleti Szemle* 2004/4 <http://jesz.ajk.elte.hu/szegvari20.html>—did not recall any ambivalence of such a kind. Applying a powerful (although, in her own way, also politicised) historico-critical method, she not only gave a theoretically high-standard summary but also could manage to accomplish it.

main representative as well, the one who had been the first to apply it to jurisprudential life in Hungary.[17]

Well, this is the context within which the entire legal thought of nearly a decade—including the reporting (even if with some critical distance) on the patterns that were to be taken over imperatively[18]—was built up, and into which the treatment of topical issues—from the main strategic debates on the law's continuity[19] and superstructural character (vis-à-vis its economic basis)[20] up to the timely issues of codification and the class-related social contents of the kind of will manifested in law—was caged.[21]

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[17] These features (along with the professional revolutionary's habit of only declaring without giving a reason) had become integrated into IMRE SZABÓ's personality so much that when he became withdrawn, widowed and struggling with illness alone, he was also abandoned by one-time subordinates as he could not change his mood of being receptive to nothing but one-sided communication. This was a personal fate in sharp contrast with that of VIKTOR KNAPP, of a similar disposition and age, who had the luck of falling out of official favour early enough, due to his sympathy towards the Prague spring in 1968. Deprived of the post directing the Law Institute of the Academy of Sciences of Czechoslovakia, he had time enough to metamorphose into the common attitude of average beings. He behaved as a friend and almost confidential conversation partner even in relation to me, despite the rather critical tone I had used when addressing him at East–West international conferences (e.g., in roundtable discussions of the European University Institute chaired by president WERNER MAIHOFER), and greeted me as one of his most faithful friends during his last years, at a ceremony conferring him an honorary doctorship by the Safranyk University at Košice (Slovakia).

[18] E.g., Vilmos Peschka 'Vita a jogfogalomról a szovjet jogelméletben' [Discussing the concept of law in Soviet legal theory] *Jogtudományi Közlöny* XI (1956), pp. 190–194 as well as, by Zoltán Péteri, 'Az állam- és jogelmélet vitás kérdései a szovjet jogtudományban' [Controversial issues of the theory of state and law in Soviet jurisprudence] *Cikkgyűjtemény a külföldi jog köréből* VI (1956), pp. 41–44 and 'A jogfogalom néhány kérdése a szovjet jogtudományban' [Some questions of the concept of law in Soviet jurisprudence] *Az MTA Állam- és Jogtudományi Intézetének Értesítője* I (1958) 2, pp. 304–314.

[19] E.g., 'Vita a jog és jogtudomány »viszonylag állandó elemeinek« problémájáról' [Debate on the problem of the »relatively constant elements« in law and jurisprudence] *Jogtudományi Közlöny* VI (1951), pp. 368–377 and Mihály Szotáczki 'A kontinuitás és diszkontinuitás kérdése a jogfejlődésben' [The issue of continuity and discontinuity in legal development] in *Jubileumi tanulmányok* 2, ed. Tibor Pap (Budapest & Pécs: Tankönyvkiadó 1967), pp. 359–379.

[20] Cf., both as a survey and sharp criticism, by the author, 'Autonomy and Instrumentality of Law in a Superstructural Perspective' *Acta Juridica Hungarica* 40 (1999) 3–4, pp. 213–235 {& <http://www.springerlink.com/content/x713702123847t53/>}.

[21] E.g., by Mihály Szotáczki, *A jogi akarat osztálytartalma* [Class contents of the will in law] (Budapest: Tankönyvkiadó 1959) 30 pp. [Studia iuridica auctoritate Universitatis Pécs publicata 6] and *Az egyéni érdek és az osztályérdek viszonya a tárgyi jogban* [Relationship between the individual and the class interest in substantive law] (Budapest: Tankönyvkiadó 1962) 31 pp. [Studia iuridica auctoritate Universitatis Pécs publicata 21].

d) »Socialist Legality«, drawn from the Bolshevik Memories of the Progressive Past of Western Europe

For the first time, it was IMRE SZABÓ who formulated—*pars pro toto* in his impressive monograph laying down the basics of Socialist jurisprudence[22]—the requirements of political STALINism, as translated by VYSHINSKY into the language of legal superstructure. The author built his doctrine of Socialist legality on statutory positivism as developed in Western Europe in the middle of the 19th century, in order to generalise it as a common feature for the entire Central and Eastern European region under the aegis of MARXism, with an approach and theoretical foundation that would rigidify MARX's and ENGELS' science-philosophical and science-methodological presuppositions (dating back to the first half of the 19th century), by rendering them exclusive as to the domain of theoretical legal thought for long decades to come.[23]

e) Search for the Germs of Scholarly Evolution

All that notwithstanding, a temporary attempt at summarisation appeared—true, concealed in lecture notes multiplied in a limited number of copies and never made regularly available again—, taking advantage of the chances before and after the Revolution of 1956, adjusted to the widest conceivable limits of a minimum conformism. For this summa promised and even achieved a reliable analysis of contemporary Western trends with thorough critical reflection, representing a unique clear moment in Hungarian Socialist legal theorising. Marked by IMRE SZABÓ's authority, his associates could at this time commit themselves to nothing but scholarly analysis.[24] However,

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[22] By Imre Szabó, *A jogszabályok értelmezése* (Budapest: Közgazdasági és Jogi Kiadó 1960) 618 pp. / *Interpretarea normelor juridice* (Bucureşti: Editura Ştiintifică 1964) 439 pp., summed up as *Die theoretischen Fragen der Auslegung der Rechtsnormen* (Berlin 1963) 20 pp. [Sitzungsberichte der Deutschen Akademie der Wissenschaften zu Berlin: Klasse für Philosophie, Geschichte, Staats-, Rechts- und Wirtschaftswissenschaften, 2].

[23] For the background, cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris] {&, as to its latest version, *The Paradigms of Legal Thinking* enlarged 2nd ed. (Budapest: Szent István Társulat 2012) 418 pp. [Philosophiae Iuris] &
<http://www.scribd.com/doc/85083788/VARGA-ParadigmsOfLegalThinking-2012>}.

[24] György Antalffy, Kálmán Kulcsár, Vilmos Peschka, Zoltán Péteri, Mihály Samu, Imre Szabó, Mihály Szotáczki & László Sztodolnik *Állam- és jogelmélet* [Theory of state and law] {University lecture notes for the term 1956/57, semesters 1 to 2} (Budapest: Felsőoktatási Jegyzetellátó Vállalat 1957 [reprints in 1958 & 1960]) 256 pp. [ELTE Állam- és Jogtudományi Kar].

not even this enthusiastic restart (only to be seen later on as a next-to-mythical memory) was given the chance of becoming the mainstream.

3. Institutionalisation Accompanied by Relaxation (from the 1960s)

a) Epigonism Becoming the Scholarly Ideal

Nevertheless, the relatively high standard of academic research—carried out under the direct control of the director of the Institute for Legal Studies of the Hungarian Academy of Sciences, academician IMRE SZABÓ,—and the fact it was imbued with genuinely scholarly ideals, remained all along an exceptional phenomenon, enclosed within the Institute's uniquely privileged ivory-tower with no practical impact upon universities.[25] Within this framework of an almost antagonistic bipolarity between the *academia* and the *universitas*, the generation close to SZABÓ's (TIBOR VAS, SÁNDOR FERI, GYÖRGY ANTALFFY and PÁL HALÁSZ[26]) with the disciples of the latter two (IGNÁC PAPP at Szeged, from whose work perhaps only a bibliographical compilation had anything of a lasting value,[27] and MIHÁLY SZOTÁCZKY at Pécs, who exerted some influence in both Hungary and the Socialist orbit but allowed—despite his often constructive and even provocative questions—his solutions to waste away in the forced doctrinarism of MARXism[28]) could not go beyond epigonism, leading to an obvious dead-end.

In consequence, the official legal theory, developed by the spirit of Communist party rank-and-file activism at law faculties, with an overwhelming dominance in both textbooks and popular writing, discredited in fact the

[25] The unbridgeable gap between the kinds of scholarship cultivated at the Academy and in universities became a legendary memory when SZABÓ started commissioning his disciples (e.g., PESCHKA) to apply genuine scholarly standards when consulting university staff (e.g., PÁL HALÁSZ) who were preparing for their academic qualification, while reviewing their prepublications, who were struck by the former's cold reflection as a personal attack, and then felt bound to react politically.

[26] E.g., Pál Halász *A normativizmus és az elméleti jogtudomány* [doktori disszertáció] {Normativism and theoretical jurisprudence [a doctoral dissertation]} [typescript] (Budapest 1963) x + 440 pp.

[27] *Magyar állam- és jogelméleti bibliográfia* 1950–1980 [Bibliography of the Hungarian theory of state and law, with English and Russian titles in translation] ed. Lajos Nagy, select. Ignác Pap (Szeged: József Attila Tudományegyetem Állam- és Jogtudományi Kar, Állam- és Jogelméleti Tanszék 1980) 202 pp.

[28] Mihály Szotáczki *A jog lényege* [The essence of law] (Budapest: Közgazdasági és Jogi Kiadó 1970) 376 pp.

theoretical profession on the whole, alienating from it legal practitioners and social theorists alike, as a mere ideological exercise. Such a theorisation could not exert major influence beyond its repeated ritual acts of self-commitment;[29] it had not become truly destructive either. Ironically enough, as in a reversed game, those cultivating it in such a corrupted manner were themselves pushed by aggressive indoctrination. Having contented themselves with having their careers assured in return for their political loyalty, university teachers did in fact acknowledge in peaceful (even jovial) coexistence both the cautious scholarly advancement by academician SZABÓ, revered and dreaded as the unquestionably number one authority (with due regard to his party, academy and university positions), and the incidental excesses by SZABÓ's students at the Academy.

At the same time, in a legal-political sense and within the confines of the tolerance of our *Brave New World* of "actually existing Socialism", some inspiration to democratise practical legal life and increase economic efficiency by humanising the field of law could also finally appear.[30]

b) STALINism in a Critical Self-perspective

IMRE SZABÓ, who had formulated the dogmatic cardinal points of his era all along—while also involving supportive companions[31]—, finally attempted, in a delicate manner but increasingly explicitly, a sensible separation from VYSHINSKY's crude and politically biased position.[32] Indeed, when criticising "Socialist normativism" while promising its MARXising transcendence, he dedicated a monograph to a novel quasi-ontologising realisation, hoping

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[29] Our subject here is jurisprudence and not the socialising/conditioning effect of legal education, affecting public consciousness and also traceable in today's dated schemes of thought used by legal professionals.

[30] See, above all by Mihály Samu, *Az új gazdasági mechanizmus állam- és jogelméleti vonatkozásai* [The new economic mechanism as assessed by the theory of state and law] (Budapest: Tudományos Ismeretterjesztő Társulat 1967) 17 pp. and 'Politika – jogpolitika – jog' [Policy – policy of law – law] in *A Magyar Jogász Szövetség 8. munkaértekezlete* (Szeged: Szegedi nyomda 1975), pp. 403–417.

[31] E.g., Zoltán Péteri 'A szocialista állam- és jogelmélet néhány kérdése az SzKP XXII. Kongresszusán' [Some questions of the Socialist theory of state and law at the 22nd Congress of the Soviet Communist Party] *Állam és Igazgatás* XII (1962), pp. 330–343.

[32] Cf., by Imre Szabó, *A szocialista jog* [Socialist law] (Budapest: Közgazdasági és Jogi Kiadó 1963) 454 pp. / *Социалистическое право* [Sotsialisticheskoe pravo] (Москва: Прогресс [Moscow: Progress] *Társadalom és jog* [Society and law] (Budapest: Akadémiai Kiadó 1964) 147 pp. [Korunk tudománya], *Szocialista jogelmélet – népi demokratikus jog* [Socialist theory of law – people's democratic law] (Budapest: Közgazdasági és Jogi Kiadó 1967) 321 pp.

that he could develop a systematic magisterial oeuvre in legal philosophy. Despite succeeding in having the outcome published in both French and Russian,[33] he might probably have been aware of his failure, with the work hardly performing anything more than a conceptual game. His theorisation on law proper was reducible to law being a reflection of something else, as the form of some dubious contents, concluded through the usual deductive channels of the dogmatic presuppositions of MARXism, all of which was eventually bound to stop exactly where it should have concerned law as such, in an explanation of some genuinely legal context. He never reverted to its continuation, never addressed ensuing problems. Confined to mere re-stylisation while hardened in doctrinarism, he formulated again and repeatedly the spectrum of the ideological tenets of the law of Socialism in a succession of further books[34]—rephrasing former writings (with decreasing theoretical depth) by self-dosing nothing but apologetics,[35] at times going so far as to justify theoretically the Bolsheviks' so-called revolutionary justice,[36] the plain denial of any spirit of law. Through his re-MARXising he may have released the leftist soaring of his early juvenile self, backed by the inflexibility of an advanced age. Acting as the pioneer of MARXism's theoretical-legal renewal, he searched for additional fora to disseminate his ideas in the Socialist world,[37] arriving back, in the final analysis, at nothing but a retrograde restatement of the genuine renaissance of MARXist doctrinarism.

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[33] By Imre Szabó, *A jogelmélet alapjai* (Budapest: Akadémiai Kiadó 1971) 308 pp. / *Les fondements de la théorie du droit* (Budapest: Akadémiai Kiadó 1973) 340 pp. / *Основы теории права* [Osnovy teorii prava] (Москва: Прогресс [Moscow: Progress] 1974) 268 pp.

[34] Cf., by Imre Szabó, *Jogelmélet* [Theory of law] (Budapest: Közgazdasági és Jogi Kiadó 1977) 467 pp. and *A jog és elmélete* [Law and its theory] (Budapest: Akadémiai Kiadó 1978) 161 pp. [Jogtudományi értekezések].

[35] Cf., as symbolic re-assertions, by Imre Szabó, 'Jogi gondolkodásunk szocialista átalakulása' [The Socialist transformation of our legal thinking] *Állam és Igazgatás* X (1960), pp. 401–414, 'Jogtudományunk nemzeti és nemzetközi jellegéről' [On the national and international character of our jurisprudence] *Jogtudományi Közlöny* XXIV (1969), pp. 213–216 and 'A Nagy Októberi Szocialista Forradalom hatása a marxista jogelmélet fejlődésére' [The influence of the Great October Socialist Revolution on the development of Marxist legal theory] *Magyar Tudomány* XXII (1977), pp. 803–810. As an attempt at offering some contrast, see also Mihály Samu 'Szocialista jogszemléletünk fejlődése' [The development of our Socialist view on law] *Magyar Jog* XXII (1975), pp. 135–142.

[36] Imre Szabó 'Forradalom és törvényesség' [Revolution and legality] *Állam és Igazgatá*s XIX (1969), pp. 199–208.

[37] Imre Szabó *Előadások Marxról és a jogról* [Lectures on Marx and the law] (Budapest: Gondolat 1976) 271 pp. / *Karl Marx und das Recht* Vorträge (Berlin: Akademie-Verlag 1981) 128 pp. [Staats- und Rechtstheoretische Studien 10].

In the meantime, his disciples started, as detached in their methodological foundations as well, expressing explicit demands to MARXise legal thought to clear it of its random or directly politico-ideological ornaments of constraints (ascribed, even if implicitly, to its specific Russian-Soviet implementation, that is, to its LENIN-cum-STALINist framework, which was suited to Asian political traditions). Firstly, they tried to liberate theorising from its degradation of serving as a simple auxiliary to the Communist Party's legal policy at the given time (which was practised in order to prevent scholars from interfering with actual practice).[38] Secondly, they separated MARXism as methodology from Socialism as a political fact imbued with ideological expectations, in order to enable the former to be freed from the latter's irrelevance to academic scholarship.[39] This was succeeded by further innovative efforts at clarification.[40]

c) Disciples Diversified in Launching their own Trends

SZABÓ's younger students (KULCSÁR and PESCHKA) as well as those affiliated with TIBOR VAS (PÉTERI) or socialised in the metropolitan university (SAMU and SZTODOLNIK) soon made their voices heard, heralding their own problem-sensitivity and facing the risk, then, of being seen as intellectually independent. Within the programmatically declared anti-pluralism of MARXism at the time—such that scholarly truth was one and indivisible, with any competition or variation amounting to subversion (to be eliminated and retaliated against at once)[41]—, any reinterpretation of the established

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[38] Vilmos Peschka 'A magyar állam- és jogtudományok és a társadalmi gyakorlat' [Hungarian studies on state and law and the social practice] *Az MTA Társadalmi és Történelmi Tudományok Osztályának közleményei* 13 (1964), pp. 429–441.

[39] Vilmos Peschka 'Marxista és szocialista jogelmélet' [Marxist and Socialist theories of law] *Jogtudományi Közlöny* XXIII (1968), pp. 165–172.

[40] As the most significant moment, cf. 'В. И. Ленин – Основоположник социалистического права' [V. I. Lenin – Osvonopolozhnik sotsialisticheskogo prava / Lenin as the founder of Socialist law] in *Ленин о праве* [Lenin o prave] (Москва: Прогресс [Moscow: Progress] 1969), pp. 274–321 [a series of papers commissioned for the Soviet jubilee but accomplishing a major re-evaluation, and therefore drastically "re-styled" by the Soviet editors]. For their uncensored text, cf. Imre Szabó, Kálmán Kulcsár, Zoltán Péteri & Csaba Varga in *Állam- és Jogtudomány* XIII (1970), pp. 3–57; and also, as the author's own contribution is concerned, 'Lenin and Revolutionary Law-making' *International Review of Contemporary Law* [Brussels] (1982) 1, pp. 47–59 & 'Lénine et la création révolutionnaire du droit' *Revue internationale de Droit contemporaine* [Bruxelles] (1982) 1, pp. 53–65.

[41] Also officialised by a central party decision, broadly publicised in Hungary through a separate brochure.

canon, even if inferred from MARX's texts (taken as a revelation, by the way), provoked excitement by its very existence as a supposedly wilful challenge to ideological indoctrination. This was dreaded and feared, calling for existential rétorsion, because this was also held to be liable to become easily multiplied and lead to unforeseeable, hard-to-control conclusions.

Two creative personalities got farthest on that road, marking the path for the development of legal theorising in Hungary. KÁLMÁN KULCSÁR's legal-sociological stand[42] and VILMOS PESCHKA's legal philosophy[43] were equally built on systematic foundations, the former on the harmonisation of MARXism with legal sociologising in Western Europe and the Atlantic world, the latter on re-scheming MARXist positions when confronted with contemporary (mostly German) legal philosophising. This double direction was complemented by the axiologism of ZOLTÁN PÉTERI[44] and the criticism on the Rule

[42] By Kálmán Kulcsár, cf. *A jogszociológia problémái* [Problems of legal sociology] (Budapest: Közgazdasági és Jogi Kiadó 1960) 269 pp. {revised in *A jogszociológia alapjai* [The foundations of legal sociology] (Budapest: Közgazdasági és Jogi Kiadó 1976) 438 pp.}, *A jog nevelő szerepe a szocialista társadalomban* [The educational role of law in a Socialist society] (Budapest: Közgazdasági és Jogi Kiadó 1961) 347 pp., followed by his collections *Társadalom, politika, jog* [Society, politics, law] (Budapest: Gondolat 1974) 365 pp. as well as *Gazdaság, társadalom, jog* [Economy, society, law] (Budapest: Közgazdasági és Jogi Könyvkiadó 1982) 254 pp.

[43] By Vilmos Peschka, cf. *A jogviszonyelmélet alapvető kérdései* [The foundational issues of a theory of legal relations] (Budapest: Közgazdasági és Jogi Kiadó 1960) 219 pp., *Jogforrás és jogalkotás* [Source of law and law-making] (Budapest: Akadémiai Kiadó 1965) 497 pp., *A modern jogfilozófia alapproblémái* (Budapest: Gondolat 1972) 392 pp. [Társadalomtudományi Könyvtár] / *Grundprobleme der modernen Rechtsphilosophie* (Budapest: Akadémiai Kiadó 1974) 235 pp. / *Gendai hōtetsugaku no kihon mondai,* trans. Kazuo Amano (Kyōto : Hōritsubunkasha, 1981), *Max Weber jogszociológiája* [Weber's legal sociology] (Budapest: Akadémiai Kiadó 1975) 134 pp., *A jogszabályok elmélete* (Budapest: Akadémiai Kiadó 1979) 231 pp. / *Die Theorie der Rechtsnormen* (Budapest: Akadémiai Kiadó 1982) 266 pp., and, as a collection, *Jog és jogfilozófia* [Law and legal philosophy] (Budapest: Közgazdasági és Jogi Kiadó 1980) 531 pp.

[44] By Zoltán Péteri, cf.—in want of any monographic treatment by him—'Die Kategorie des Wertes und das sozialistische Recht' *Wissenschaftliche Zeitschrift der Friedrich-Schiller-Universität Jena* Gesellschafts- und Sprachwissenschaftliche Reihe 15 (1966) 3, pp. 427–429 and 'Az értékek objektív megalapozásának kérdései a szocialista jogelméletben' [Questions of the objective foundation of values in the Socialist theory of law] *Állam- és Jogtudomány* XXI (1978), pp. 433–437, as well as 'Influence of Natural Law on Positive Law' in *Études en droit comparé / Essays on Comparative Law* ed. Zoltán Péteri (Budapest: Akadémiai Kiadó 1966), pp. 45–60. Cf. also, by Mihály Szotáczki, 'Jog és igazságosság' [Law and justice] *Jog és Társadalom* 1968/2, pp. 12–24 and 'A szocialista jog és igazságosság' [Socialist law and justness] *Magyar Jog* XVII (1970), pp. 394–399.

of Law by LÁSZLÓ SZTODOLNIK.[45] As the Soviet empire stood for a monolithic bloc in which divergences could, if at all, arise unevenly—through diversion of either foreign politics (Yugoslavia, and then Albania and Romania) or ideology (Yugoslavia, and partly Poland)—, the growth of research into independent trends and schools meant not only a significant enrichment of jurisprudential thought but also a diversification of Socialist jurisprudence that could reveal latent potentialities developed from within. Notably, KULCSÁR institutionalised legal sociology in Hungary in a way that disseminated its approach in the centres of orthodoxy (Moscow, Sofia and Bucharest as well). As a conceptual-analytic positivist, PESCHKA investigated a series of topics relevant to MARXist legal philosophising in order to build up his own MARXian orthodoxy step by step, derived critically from both MARXism and its roots in classical German philosophy, integrated with a number of insights taken from contemporary international monographic literature.[46]

Such a substructure provided the medium for further initiatives to evolve as launched by the following generation, dedicated to a critical survey of the state of legal philosophising,[47] clarification of its methodology and[48] ontological reconstruction,[49] as well as elaboration of the systemic correlations between law, language and logic.[50]

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[45] László Sztodolnik 'Metamorphoses of the Rechtsstaat Idea' *Annales Universitatis Budapestiensis de Rolando Eötvös nominatae* Sectio juridica, 4 (1962), pp. 171–191, preceded by Zoltán Péteri 'Sulla cosidetta »Rule of Law«' *Democrazia e Diritto* [Roma] (1960) 1, pp. 1–18.

[46] For an obituary assessment, cf., by the author, 'Vilmos Peschka (1929–2006)' *Archiv für Rechts- und Sozialphilosophie* 93 (2007) 2, pp. 253–255.

[47] E.g., by the author, as a manuscript of 1966 but censored out from publication by SZABÓ at his time, 'A jogmeghatározás kérdése a 60-as évek szocialista elméleti irodalmában' [Questions relating to the definition of law in the Socialist theoretical literature of the 60s] *Állam- és Jogtudomány* XXII (1979) 3, pp. 475–488, followed by his 'Quelques problèmes de la définition du droit dans la théorie Socialiste du droit' *Archives de Philosophie du Droit* XII (Paris: Sirey 1967), pp. 189–205.

[48] E.g., by the author, 'Quelques questions méthodologiques de la formation des concepts en sciences juridiques' in *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), pp. 205–241 and Gyula Eörsi 'Jogelméleti torzó' [A torso in legal theory] *Állam- és Jogtudomány* XXIII (1980) 3, pp. 353–381.

[49] E.g., by the author, 'Lukács's Posthumous Ontology as Reviewed from a Legal Point of View' *Acta Juridica Academiae Scientiarum Hungaricae* 22 (1980) 3–4, pp. 439–447 and 'The Place of Law in Lukács' Ontology' in *Hungarian Studies on György Lukács* II, ed. László Illés, József Farkas, Miklós Szabolcsi & István Szerdahelyi (Budapest: Akadémiai Kiadó 1993), pp. 563–577.

[50] E.g., by the author, 'On the Socially Determined Nature of Legal Reasoning' *Logique et Analyse* (1973), Nos. 61–62, pp. 21–78 & in *Études de logique juridique* V, publ. Ch[aïm] Perelman (Bruxelles: Établissements Émile Bruylant 1973), pp. 21–78 [Travaux de Centre Natio-

d) Comparatism

The re-institutionalisation of legal comparatism—which meant, at an international level, integration of Socialist law in the legitimate world-wide families of law by having it recognised as an independent type amongst them, and in a Hungarian context, professionalisation (or rehabilitation) of law as a specific subject of cognition[51]—was indeed a deed with momentous conse-

nal de Recherches de Logique], 'Law and Its Approach as a System' *Acta Juridica Academiae Scientiarum Hungaricae* 21 (1979) 3–4, pp. 295–319 & *Informatica e Diritto* [Firenze] VII (1981) 2–3, pp. 177–199, as well as *Leibnitz und die Frage der rechtlichen Systembildung* (Budapest: Institut für Staats- und Rechtswissenschaften der Ungarischen Akademie der Wissenschaften 1986 [^{2}2006]) 20 pp. & in *Materialismus und Idealismus im Rechtsdenken* Geschichte und Gegenwart, hrsg. Karl A. Mollnau (Stuttgart: Franz Steiner Verlag Wiesbaden 1987), pp. 114–127 [Archiv für Rechts- und Sozialphilosophie, Beiheft 31].

[51] In the Communist world, the first initiative was taken by BORISLAV T. BLAGOJEVIĆ in the TITOist Belgrade to found an *Institut za uporedeno pravo* (1955), with a specific law to grant it the status of a scientific institute (1974). Cf. <http://www.icl.org.yu/m7e.html>.

In the Muscovite empire, re-orientation followed slowly and gradually, as started in Czechoslovakia. Cf., e.g., Rudolf Bystricý 'Za marxistickou srovnávací právovedu' [For a Marxist comparative jurisprudence] *Právník* [Prague] 1962/8, pp. 625 et seq., Jiří Boguszak 'K otázce tzv. srovnávací právovědy' [To the question of comparative jurisprudence] *Právník* 1962/9, pp. 803–806, Viktor Knapp 'Verträge im tschechoslowakischen Recht (Ein Beitrag zur Rechtsvergleichung zwischen Ländern mit verschiedenen Gesellschaftsordnung)' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 27 (1962) 3, pp. 495–518, M. Svoboda 'Jěstě k marxistické srovnávací právovědě' [Once more on a Marxist comparative jurisprudence] *Právník* 1963/5, p. 388, Viktor Knapp 'K otázce socialistické srovnávací právní vědy' [To the question of a socialist comparative science of law] *Právník* 1963/5, pp, 391–402. It was followed by С. Л. Зивсь [S. L. Zivs] 'О методе сравнительного исследования в наука о государствие и праве' [O metode sravnitel'nogo issledovaniia v nauka o gosudarstve i prave / On the method of comparative research in the sciences of state and law] *Советское государство и право* [Sovietskoe gosudarstvo i pravo] 1964/3, pp. 23 et seq., A. Kanda 'Základni problémy srovnáváni právnich systému ruznach ekonomickych soustav' [Foundational problems of comparing legal systems pertaining to differing economic regimes] *Právnické Studie* 1965/4, pp. 699–720, В. М. Чиквадзе [V. M. Tshikvadze] & С. Л. Зивсь [S. L. Zivs] 'Справнительное правоведение в практике международная научная сотрудничества' [Sravnitel'noe pravovedenie v praktike mezhdunarodnaia nautshnaia sotrudnitshestva / Comparative jurisprudence in the practice of international scientific cooperation] *Советское государство и право* [Sovietskoe gosudarstvo i pravo] 1966/2, pp. 12–21, Martin Posch & Valentin Petev 'Vergleichung in der Rechtslehre' *Staat und Recht* (1966) 1, pp. 89 et seq., Viktor Knapp 'Quelques problèmes méthodologiques dans la science du droit comparé' *Revue roumaine des sciences sociales* Série de Sciences juridiques 1967/1, pp. 76 et seq. / 'Některé metodologické problémy srovnávací právní vědy' *Právník* 1968/2, pp. 91 et seq.

The very first scholarly stand in favour of legal comparison in Hungary is Imre Szabó 'La science comparative du droit' *Annales Universitatis Budapestinensis de Rolando Eötvös nominatae* Sectio juridica, 5 (1964), pp. 91–134, then Gyula Eörsi 'Comparative Analysis of Socialist and

quences, although, in fact, it required mere re-ideologised justification rather than reconstruction from its very roots (as in case of, e.g., legal sociology), implemented through measures of scientific organisation rather than by theoretical construction. That is, once SZABÓ (note it was he who had formerly expelled the discipline from legal curricula) decided to establish a section (with ZOLTÁN PÉTERI as head) for the comparison of laws in his Institute for Legal Studies of the Hungarian Academy of Sciences—thereby complementing the extended documentation already compiled (serving the political establishment with up-to-date information on the laws of the Soviet Union, and of all peoples' democracies as well as of the leading "capitalist" countries) with comparative source-compilations and monographs—, well, under such conditions SZABÓ's methodological re-foundation of, with manifold initiatives in developing, a specifically "Socialist" approach to the comparison of laws soon resulted in a genuine movement permeating the whole Socialist world, the covert aim of which was clearly to have Socialist law internationally recognised as a full member within the families of law on Earth. This effort was crowned with success, so much so that, as a by-product, it also made it impossible to reject the doctrine of Socialist law on political or ideological grounds from that time on. Or, the "MARXist conception of law", till then *a limine* ousted as a perverted ideology,[52] became transformed, with

Capitalist Law' *Co-Existence* 1964/2, pp. 139–151, followed by Csaba Varga 'Összehasonlító jog és társadalomelmélet' [Comparative law and social theory] *Állam- és Jogtudomány* IX (1966) 4, pp. 732–736 and again by Gyula Eörsi 'Réflexions sur la méthode de la comparaison des droits dans le domaine du droit civil' *Revue internationale de droit comparé* 19 (1967) 2, pp. 397–418 &

<http://www.persee.fr/web/revues/home/prescript/article/ridc_00353337_1967_num_19_2_14824>. This is the field where PÉTERI's scholarly oeuvre could grow into his own direction. See, as earliest writings of that genre by Zoltán Péteri, 'Z cinnosti Ústavu Státu a Práva Madarskej Akadémie Vied v oblasti srovnávacieho práva' *Právny Obzor* [Bratislava] (1968), pp. 634–639 and 'Some Aspects of the Sociological Approach in Comparative Law' in *Droit hongrois – droit comparé / Hungarian Law – Comparative Law* ed. Zoltán Péteri (Budapest: Akadémiai Kiadó 1970), pp. 75–94. Editing the Hungarian national reports for the world congresses of comparative law became a constant job for him from 1966 on until recently, beginning with *Études en droit comparé / Essays in Comparative Law* (Budapest: Akadémiai Kiadó 1966) 283 pp.

For an overview, cf. János Tóth 'Rechtsvergleichung in Osteuropa' *Journal der Internationalen Juristen-Kommission* [Geneva] VI (1965) 2, pp. 277 et seq.

[52] See, e.g., Hans Kelsen *The Communist Theory of Law* (New York: Praeger & London: Stevens 1955) viii + 203 pp., Ivo Lapenna *State and Law* Soviet and Yugoslav Theory (London: University of London – The Athlone Press 1964) xi + 135 pp. and K[onstantin] Stoyanovitch *La philosophie du droit en U.R.S.S.* (1917–1953) (Paris: Librairie Générale de Droit et de Jurisprudence 1965) 284 pp. [Bibliothèque de Philosophie du Droit IV].

the Cold War degenerating into lukewarm Peaceful Co-existence, into a societal product prevalent in its own right, simply to be acknowledged as one of many flourishing trends, standing for "the theory of Socialist law".[53]

As a secondary effect, all this also resulted in the growing professionalisation of law, on account of the fact that comparison became widespread as a method, a pre-requisite of any genuinely academic research in law. Consequently, from this time on domestic issues had to be treated, first, in a Socialist comparative context and, second, in contrast with other ("capitalist", "bourgeois" or "imperialist") solutions. In addition, practically all monographs in Hungary also had to be founded upon a historical sketch, outlining the particular development as leading to the contemporary present.

The question of why this innovative initiative, born at a right time, has not resulted in a scholarly accomplishment suitable to form grand theories as well—beyond some remarkable comparative historical monographs,[54] doctrinal elaborations and overviews[55]—remains an enigma even now.

e) (Re) Discovery of the Western Legal Philosophy as a Competitor

At a time when the ideological combat against "phenomena of anti-MARXism" was still at its peak[56] and the indivisibility of MARXism's truth was officially declared (ruling out even the chance that diverging directions or

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[53] Cf., as a representation, Imre Szabó 'The Socialist Conception of Law' in *International Encyclopedia of Comparative Law* 2, ed. René David (Tübingen, The Hague & Paris: Mohr & Mouton 1976), ch. III, pp. 49–84.

[54] Gyula Eörsi *Comparative Civil (Private) Law* Law Types, Law Groups, the Roads of Legal Development [in Hungarian 1975] (Budapest: Akadémiai Kiadó 1979) 651 pp. and, by the present author, *Codification as a Socio-historical Phenomenon* [in Hungarian 1979] (Budapest: Akadémiai Kiadó 1991) viii + 391 pp. {&, as to its latest version, *Codification as a Socio-historical Phenomenon* 2nd {reprint} ed. with an Annex & Postscript (Budapest: Szent István Társulat 2011) viii + 431 pp. & <http://drcsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>}. Cf. also, from a borderline area, the deeply theoretical developments in civil law by FERENC MÁDL and LÁSZLÓ SÓLYOM.

[55] E.g., Gyula Eörsi *A skandináv jogról és jogtudományról* [On Scandinavian law and jurisprudence] (Budapest: Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete 1974) 119 pp. and László Asztalos *Polgári jogi alaptan* A polgári jog elméletéhez [The basic doctrine of civil law] (Budapest: Akadémiai Kiadó 1987) 277 pp.

[56] The assessment of social sciences from a sole "class struggle" perspective permeated so powerfully the Hungarian Academy of Sciences even in the second half of the 1960s that on the demand of JÓZSEF SZIGETI (director of the Academy's Institute of Philosophy, soon rewarded by becoming a member himself of the Academy), a committee (to be presided over by him) was set up to co-ordinate the fight against "phenomena of anti-MARXism". On behalf of the Academy's Institute for Legal Studies, IMRE SZABÓ—the only ordinary member of the So-

competitive views on its issues could be heard at all), a collection of papers, based upon some preliminaries,[57] was eventually published as a full representation of Hungarian legal theoretical thought.[58] With its critical reflections on "bourgeois" trends, however, it tacitly rehabilitated the latter's fascinating richness and methodical values, re-integrating them into its own sphere. In addition to exploratory papers treating post-war and contemporary schools (which had broken continuity in Hungary),[59] their major texts were translated and published in Hungarian, too, in order to serve as critical editions of study materials to extend the scope of a genuinely scholarly reflection on law[60]—based on my repeated proposals and under my editorship, as a unique achievement in the Socialist empire.

viet Academy of Sciences at the time to be a jurist, who preferred, if such a choice could be made, scholarship to thought police—commissioned me, a strikingly low-ranking beginner, to represent him amongst institute directors, confined to reporting on nothing but the theoretical work carried out anyway in the Institute with a critical perspective on Western trends. Cf., by the author, *Feljegyzés* az MTA Állam- és Jogtudományi Intézetében az antimarxizmus elleni küzdelmet érintő tudományos munkáról [Note about scholarly activity in struggle against anti-MARXISM at the Institute for Legal Studies of the Hungarian Academy of Sciences] [1968/Hné soksz. a Szigeti József vezette MTA koordinációs bizottság számára {1968/MsH multipl. ms for the Coordination Committee of the Hungarian Academy of Sciences headed by József Szigeti)}] (Budapest 1968) 7 pp.

[57] E.g., Imre Szabó 'A hegeli jogfilozófia tárgya és a marxista jogelmélet' [The subject of the Hegelian philosophy of law and Marxist legal theory] *Állam- és Jogtudomány* IX (1966) 4, pp. 527–537; Kálmán Kulcsár 'Marxizmus és a történeti jogi iskola' [Marxism and the historical school of law] *Jogtudományi Közlöny* X (1955), pp. 65–85; by Vilmos Peschka, 'A magyar magánjogtudomány jogbölcseleti alapjai' [Legal philosophical foundations of the civil law doctrine in Hungary] *Az MTA ÁJI Értesítője* III (1959), pp. 37–74 and 'Thibaut és Savigny vitája' [The debate between Savigny and Thibaut] *Állam- és Jogtudomány* XVII (1974), pp. 353–381.

[58] *Kritikai tanulmányok a modern polgári jogelméletről* [Critical studies on modern Western theories of law] ed. Imre Szabó (Budapest: Akadémiai Kiadó 1963) 510 pp.

[59] E.g., Vilmos Peschka 'Das bürgerliche rechtstheoretische Denken in der ersten Hälfte des XX. Jahrhunderts' *Acta Juridica Academiae Scientiarum Hungariacae* 19 (1977), pp. 1–29; by Zoltán Péteri, 'Gustav Radbruch und einige Fragen der relativistischen Rechtsphilosophie' *Acta Juridica Academiae Scientiarum Hungariacae* 2 (1960) 1, pp. 113–160 and 'Az »újjáéledt« természetjog néhány jogelméleti kérdése a második világháború után' [Some legal theoretical questions of the »revived« natural law after World War II] *Állam- és Jogtudomány* V (1962), pp. 469–505; as well as Kálmán Kulcsár 'A jog etnológiai kutatásának problémái – ma' [Problems of the law's ethnological research today] *Valóság* XXI (1978) 9, pp. 1–11.

[60] *Modern polgári jogelméleti tanulmányok* [Studies from the modern Western theories of law] ed. Csaba Varga (Budapest: Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete 1977) 145 pp. and *Jog és filozófia* Antológia a század első felének polgári jogelméleti irodalma köréből [*Law and philosophy* Anthology of Western legal theorising from the first half of 20th

At the same time, some middle-class fellow-travellers of the interwar illegal Communism—proudly preserving the scholarly and intellectual values of their civic past—also took part in this burgeoning, mostly through some precious manuscripts papers they bequeathed.[61]

f) A Leading Mediatory Role within the »Socialist World Order«

In addition to launching *Acta Juridica Academiae Scientiarum Hungaricae* in 1957 as an English/German/Russian/French quarterly in company of quite a few monographs and national reports based on historical comparison, the Institute assumed—partly as directed toward the rigid Soviet, East German and Balkan bloc, while intending to build contacts with Yugoslavia as well, which had started a politically and ideologically independent "alternative"

century] ed. Csaba Varga (Budapest: Akadémiai Kiadó 1981) 383 pp. The new tone such an unprecedented publication heralded was at once perceived by those of Hungarian political emigration in the West. For Tibor Hanák *Az elmaradt reneszánsz* A marxista filozófia Magyarországon [Renaissance that failed to take place: MARXist philosophy in Hungary] (Bern: Európai Protestáns Szabadegyetem 1979) 423 pp. at pp. 179 and 207, "However, Hungarian philosophical life has another branch or direction as well: one searching for paths to Europe's philosophical life and heritage. This can be observed first of all in recent […] chrestomathies introducing to the non-MARXist philosophical world like, e.g., *Modern polgári jogelméleti tanulmányok* […]." "The book of selected legal philosophical studies [...] is an oeuvre supplying a great want." One should note, the contract for *Jog és filozófia* had envisaged a three-part series. The second volume was intended to overview post-war western trends, while the third one's endeavour was even more pioneering: to be the very first in the world to represent early Soviet-Russian legal theory alongside STALINist and post-STALINist Soviet developments, complemented by so-called peoples' democratic Socialist legal theory. Ironically enough, when the second volume had mostly been completed (only copyright negotiations being under way) and a substantial amount of funds had been raised (with materials collected) for the third volume as well, all this was slowed down and then finally stopped by the ongoing financial crisis of the Publishing House of the Hungarian Academy of Sciences.

The deliberateness of such an open-hearted start was also reflected in the late 1960s when "annotations" heading in the quarterly *Állam- és Jogtudomány* for foreign reviews were introduced (1966) and the biweekly *Jogi Tudósító* for translations was launched (1970). The present author collected and republished his most-in-the-depths contributions in his *Jogi elméletek, jogi kultúrák* Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [Legal theories, legal cultures: Reviews from the field of legal philosophy and comparative law] (Budapest: ELTE "Összehasonlító Jogi Kultúrák" projektum 1994) xix + 503 pp. [Jogfilozófiák].

[61] Outstanding in chapters dedicated to deontic logic at a time when it was practically banned, cf., e.g., Halász Aladár *Szászy-Schwarz Gusztáv és a jogalany* Második traktátus: A fikció [Szászy-Schwarz on legal personality / tractate on fiction] [Budapest 1957 {typescript dissertation for the "candidate" degree} 676 + 9 pp.] ed. Csaba Varga *Jogelméleti Szemle* 2005/3 in <http://jesz.ajk.elte.hu/varga16.html>.

path—a leading mediatory role to foster reconsideration of the Soviet/Socialist approach to law through the critically self-reflecting Hungarian theory.[62]

4. Disintegration (in the 1980s)

a) Attempt at Laying New Foundations for MARXism with Epigonism Exhausted
The ontological approach of SZABÓ, focusing on his return to "original" sources, idealised in fact the perspective of a hoped-to-come "renewal of MARXism".[63] All it achieved was precisely contrary to his original intention: perfection of doctrinarism with a spasmodic insistence on setting "criteria out of principles".[64] Reaching nothing but retrospective discreditation, he could, thereby, only achieve rigidifying his own position. Accordingly, intents to preserve MARXism's hegemony—despite attempts at clarification at times[65]—became reduced to mere verbosity.[66]

b) Competitive Trends Becoming Exclusive
The conceptual-analytic positivism of PESCHKA initiated deepened polemics as to contemporary Western trends.[67] KULCSÁR's sociologism centred, step by step, on the issue of modernisation (generalising, in order to build his own theory, mainly from American, Japanese and Indian approaches and case studies).[68] On behalf of others, functionalist comparative-historical theorisation as a recon-

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[62] E.g., *Aktuelle Probleme der marxistisch–leninistischen Staats- und Rechtstheorie* Material der Konferenz der Staats- und Rechtstheoretiker der europäischen sozialistischen Länder, hrsg. Zoltán Péteri (Budapest: Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete 1968) 327 pp.

[63] By Imre Szabó, cf. notes 32 to 37 and *Ember és jog* Jogelméleti tanulmányok [Man and law: Papers in legal theory] (Budapest: Akadémiai Kiadó 1987) 194 pp.

[64] The "second, amended" edition of Imre Szabó *A burzsoá állam- és jogbölcselet Magyarországon* [Bourgeois theory of state and law in Hungary] (Budapest: Akadémiai Kiadó 1980) 471 pp. proved to be of an expressly provocative effect by its (new) Foreword on pp. 16–21.

[65] E.g., Vilmos Peschka 'Wider die missverstandene marxistische Rechtstheorie', pp. 11–18.

[66] E.g., *Legal Theory – Comparative Law* Studies in Honour of Professor Imre Szabó, ed. Zoltán Péteri (Budapest: Akadémiai Kiadó 1984) viii + 464 pp.

[67] By Vilmos Peschka, *Die Theorie der Rechtsnormen* (Budapest: Akadémiai Kiadó 1982) 266 pp., *Az etika vonzásában* (Jogelméleti problémák az etika aspektusából) [Problems of legal theory from the aspect of ethics] (Budapest: Akadémiai Kiadó 1980) 196 pp. [Jogelméleti Értekezések] and *Die Eigenart des Rechts* (Budapest: Akadémiai Kiadó 1989) 199 pp.

[68] By Kálmán Kulcsár, *Rechtssoziologische Abhandlungen* (Budapest: Akadémiai Kiadó 1980) 242 pp. and *Politikai és jogszociológia* [Political and legal sociology] (Budapest: Kossuth Könyvkiadó 1987) 197 pp.

struction of the nature of institutions,[69] an openly epistemo-ontological approach,[70] efforts to formulate a sociological grand theory,[71] as well as expressly methodological reflections[72] and clearly axiological claims[73] accompanied them.[74] Well, all these were to re-contextualise—although not denying openly the tenets of the founders' MARXism—theoretical legal thought in a wide-ranging area of conflicting insights and views.

c) Western Legal Philosophy Acknowledged as a Fellow-traveller within the Socialist Orbit Proper

After the end of the short-lived coalition period following World War II, in the Socialist orbit, as is well known, the discourse with both Western European and Atlantic legal thought was broken. This very discontinuation was ended definitely when basic works representing Western ideas were translated into Hungarian, with the background intention of elevating them into part and parcel of domestic literature and academic thought by their own right.[75]

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[69] See the work on codification by the present author in note 48.

[70] By the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1998]) 193 pp. {&, as to its 3rd [reprint] ed. with Postface (Budapest: Szent István Társulat 2012) 218 pp. & <http://drcsabavarga.wordpress.com/2012/03/13/the-place-of-law-in-lukacs-world-concept-19852012/>}.

[71] By András Sajó, *Társadalmi szabályozottság és jogi szabályozás* [Regulation by society and legal regulation] (Budapest: Akadémiai Kiadó 1978) 152 pp. [Jogtudományi Értekezések] and *Látszat és valóság a jogban* [Semblance and reality in law] (Budapest: Közgazdasági és Jogi Könyvkiadó 1986) 392 pp.

[72] András Sajó *Kritikai értekezés a jogtudományról* [A critical treatise on jurisprudence] (Budapest: Akadémiai Kiadó 1983) 216 pp. [Jogtudományi Értekezések].

[73] Zoltán Péteri 'Perspectives for a Socialist Axiology of Law' in *Rechtskultur – Denkkultur* hrsg. Erhard Mock & Csaba Varga (Stuttgart: Steiner 1989), pp. 96–105 [Archiv für Rechts- und Sozialphilosophie, Beiheft 35].

[74] Complemented by the MARXising papers of PÉTER SZILÁGYI and ENDRE NAGY on partial topics.

[75] Following the pioneering breakthrough [note 55], see, among others, *Jog és szociológia* [Law and sociology] ed. András Sajó (Budapest: Közgazdasági és Jogi Kiadó 1979) 442 pp.

In the early 1980s, when KÁLMÁN KULCSÁR as the Vice-secretary of the Hungarian Academy of Sciences became responsible for a book series in social sciences of the Publishing House Gondolat ["Társadalomtudományi Könyvtár"], the translation of Carl Joachim Friedrich *Die Philosophie des Rechts in historischer Perspektive* (1955) was upon my initiative both considered and acknowledged by an official assignment issued.

Much later, exclusively the historical (first) part of Edgar Bodenheimer *Jurisprudence* The Philosophy and Method of the Law, rev. ed. [1962] (Cambridge: Harvard University Press 1974) xii + 463 pp.—in *Bevezetés a jogbölcseleti gondolkodás történetébe* (Miskolc 1991) 129 pp.—was in fact published.

Thereby, a kind of *usus*[76] was also born: referring to, while moreover systematically commenting upon, the entire professional heritage within the sole bound of critical and adaptive reflections.[77] All this having taken place under SZABÓ's patronage, it could already provide a basis for gradually expanding and then simply transcending the limits of tolerance of the until then completely closed, Moscow-dictated jurisprudential thought; this was also in the

[76] It was not only the bare fact of having masterpieces on ideologically sensitive fields translated that was unprecedentedly unique in the whole span of the Socialist period, either in Hungary or elsewhere in the bloc. It also became an exclusively Hungarian pattern in the region that ambitious anthologies with quite a few papers covering given topics (introduced by analytical surveys and accompanied with comprehensive bibliographies) were published in unbroken continuation. See, from the series „Jogfilozófiák" [Legal philosophies], launched and edited by Csaba Varga, *A társadalom és a jog autopoietikus felépítettsége* [The autopoietic structure of society and law] ed. Lajos Cs. Kiss & András Karácsony (1994) 124 pp., *Alkotmánybíráskodás – alkotmányértelmezés* [Constitutional jurisdiction – constitutional interpretation] ed. Péter Paczolay (1995) 216 pp., *Joguralom és jogállam* [Rule of law and Rechsstaatlichkeit] ed. Péter Takács (1995) 330 pp., *Jog és filozófia* [Law and philosophy] ed. Csaba Varga (1998) viii + 238 pp., enlarged ed. (2001) xii + 497 pp., *Jog és nyelv* [Law and language] ed. Miklós Szabó & Csaba Varga (2000) vi + 270 pp., *Jog és antropológia* [Law and anthropology] ed. István H. Szilágyi (2000) viii + 336 pp., *Hayek és a brit felvilágosodás* Tanulmányok a konstruktivista gondolkodás kritikájának eszmetörténeti forrásairól [Hayek and the British enlightenment: Studies from the historical sources of the criticism on constructivist thought] ed. Ferenc Horkay Hörcher (2002) xvii + 112 pp., *Államtan* [Allgemeine Staatslehre / Theory of the state] ed. Péter Takács (2003) x + 962 pp., *Európai alkotmányozás* [European constitution-making] ed. Péter Paczolay (2003) 182 pp., *Természetjog* [Natural law] ed. János Frivaldszky (2004) 218 pp., enlarged ed. (2006) 329 pp. and *A jogösszehasonlítás elmélete* Szövegek a jelenkori komparatisztika köréből [Theory of the comparison of laws: texts from contemporary comparatistics] ed. Balázs Fekete (2006) 195 pp.; from the series of „Philosophiae Iuris", *Historical Jurisprudence / Történeti jogtudomány* ed. József Szabadfalvi (2000) 303 pp., *Scandinavian Legal Realism* ed. Antal Visegrády (2003) xxxviii + 160 pp.; and from the series „Prudentia Iuris" published in Miskolc under the editorship of Miklós Szabó, *Mai angol–amerikai jogelméleti törekvések* [Present-day Anglo–American trends in legal theory] ed. József Szabadfalvi (1996) 241 pp., *Logikai olvasókönyv joghallgatók számára* [Reader in logic for law students] ed. Mátyás Bódig & Miklós Szabó (1996) 223 pp.; and finally, from the series „Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae", *A jogi gondolkodás paradigmái* Szövegek [Text to the study of the paradigms of legal thinking] [1996] ed. Csaba Varga (1998) iii + 71 pp. This was done with the intention partly to speed up western intellectual reception and partly in order to avoid entering into copyright procedures, plainly necessary for the translation of magisterial works *in extenso*.

[77] E.g., Béla Pokol's research on LUHMANN in his *Komplexe Gesellschaft* Eine der möglichen Luhmannschen Soziologien (Bochum: Brockmeyer, 1990) 271 pp. [Mobilität und Normenwandel 8] & 2., erw. Ausg. (Berlin: Logos-Verlag 2001) 219 pp.

form of re-examining its own traditions in a more differentiated way,[78] in parallel with (sometimes posthumous) editing of some bequeathed original texts.[79]

Such a foundation was already suitable for a comprehensive re-valuation of the classical Hungarian interwar legal thought and some surviving memories as well.[80]

d) Hungarian Legal Theory Transforming into a National Corpus

Assisted by all this, after decades of isolation Hungarian legal philosophy became again one of the internationally reputed workshops of vivid intellectual life. Following completion of a vast synthesising summary of the entire discipline,[81] after more than half a century and for the first time since the 1920s,[82] repeated encouragements came from abroad requesting a retrospective survey with political clichés replaced, from this time on, by diverging positions generated through public debates and also by attempts at self-critical evaluation in the professional press.[83] Also a bibliographical overview

[78] Papers by MIHÁLY SAMU, ÁGNES ZSIDAI, PÉTER PACZOLAY, JÓZSEF SZABADFALVI, ISTVÁN H. SZILÁGYI, first of all about the oeuvres in legal philosophy and legal sociology of JULIUS MOÓR, BARNA HORVÁTH and ISTVÁN BIBÓ.

[79] E.g., Barna Horváth *Forradalom és alkotmány* (Önéletrajz 1944–45-ből) [Revolution and constitution: intellectual autobiography from 1944–45] trans. Ágnes Zsidai & Endre Nagy (Budapest: ELTE Szociológiai és Szociálpolitikai Intézete 1993) 129 pp. [Történeti elitkutatások {Historical research of the elite}] and József Szabó *Ki a káoszból, vissza Európába* [Away from the chaos, back to Europe] (Budapest: Kráter 1993) 204 pp. [Teleszkóp].

[80] E.g., Gábor Hamza & András Sajó 'Savigny a jogtudomány fejlődésének keresztútján' [Savigny at the crossroads of the development of jurisprudence] *Állam- és Jogtudomány* XXIII (1980), pp. 79–111.

[81] A monument-like testimony to this process is *Állam- és Jogtudományi Enciklopédia* [Encyclopaedia of the sciences on state and law] chief-ed. Imre Szabó, I–II (Budapest: Akadémiai Kiadó 1980) 1776 pp., all through critical and self-reflective indeed, by contrasting conflicting viewpoints within an emphasisedly theoretical framework.

[82] Felix Somló 'Die neuere ungarische Rechtsphilosophie' *Archiv für Rechts- und Wirtschaftsphilosophie* I (1907–1908), pp. 315–323; by Julius Moór, 'Somló Bódog' [Felix Somló] *Társadalomtudomány* I (1921) 1, pp. 17–40 as well as 'Vorwort' to Felix Somló *Gedanken zu einer ersten Philosophie* hrsg. Julius Moór (Berlin & Leipzig: de Gruyter 1926), pp. 3–17; Barna Horváth 'Die ungarische Rechtsphilosophie' *Archiv für Rechts- und Wirtschaftsphilosophie* XXIV (1930) 1, pp. 37–85.

[83] E.g., Imre Szabó 'Az állam- és jogelmélet harminc éve Magyarországon' [Thirty years of the theory of state and law in Hungary] *Jogtudományi Közlöny* XXX (1975), pp. 129–134 and Vilmos Peschka 'Le développement de la théorie du droit en Hongrie après la deuxième guerre mondiale' *Archives de Philosophie du Droit* 16 (Paris: Sirey 1971), pp. 347–354 as well as, by the author, 'Current Legal Theory in Hungary' *Current Legal Theory* 4 (1986) 1, pp. 15–21.

was published in three languages spanning the whole Socialist period,[84] and so-called annotations started reviewing the latest domestic developments in an international forum.[85]

e) The Practical Promotion of Some Balance

As soon as legal philosophy found its proper place under the sun and could explore various subjects in touch with other disciplines in a larger theoretical frame, applied research evolved, as well. From that time on, with ideological restrictions somewhat relaxed, the obvious task at hand was to develop a viable legal policy (on the basis of the given stuff of the law and by avoiding, as far as possible, the direct over-politicisation of the issues), together with searching for the ways through which the latter's conscious use could foster due protection of the law's autonomy and prestige, even under the still extant and politically forceful Socialist conditions.[86]

A prerequisite to this all was elaboration of a modernisation strategy, within a scheme neither discrediting law by its degradation into a substitute stabilising force of the *status quo ante*, nor running ahead, doubling the law's normative substance, but allowing each and every step and piece of change to build on one other by becoming integrated, without gaps, as fed back within the modernisation process itself.[87]

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[84] See note 22.

[85] As one of the founding members of the editorial board of *Current Legal Theory* [Leuwen], CSABA VARGA undertook the bibliographical and analytical presentation of the new outputs of legal theory in Hungary from the beginning up to its cessation (1983–1998), by preparing a long series of abstracts in English of Hungarian publications.

[86] E.g., *A jogpolitika tudományos megalapozásának jogelméleti problémái* / *Правого-теоретические проблемы научного обоснования правовой политики* [Pravogo-teoreticheskie problemy nauchnogo obosnovaniia pravovoi politiki] / *Die rechtstheoretischen Probleme von der wissenschaftlichen Grundlegung der Rechtspolitik* ed. Mihály Samu (Budapest 1986) 322 pp. [Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály {Scientific and Information Department of the Ministry of Justice} kiadványai 15] & Mihály Samu *Jogpolitika – jogelmélet* [Policy of law – theory of law] (Budapest: Közgazdasági és Jogi Könyvkiadó 1989) 273 pp. As a uniquely challenging project on the borderlines, mention has to be made of *Jogelméleti jogesetek* (Kísérleti jellegű oktatási segédlet) [Cases for the theory of law: An experimental manual] comp. Péter Takács (Budapest 1994) iii + 183 pp., enlarged as Péter Takács *Nehéz jogi esetek* Jogelmélet és jogászi érvelés [Difficult cases of law: Theory of law and lawyerly argumentation] (Budapest: Napvilág Kiadó 2000) 400 pp.

[87] Kálmán Kulcsár *Modernization and Law* (Budapest: Akadémiai Kiadó 1992) 282 pp.; and, by András Sajó, *Jogkövetés és társadalmi magatartás* [Law-observance and social behaviour] (Budapest: Akadémiai Kiadó 1980) 344 pp. and *Társadalmi-jogi változás* [Socio-legal change] (Budapest: Akadémiai Kiadó 1988) 211 pp.

5. End-game of Legal Theorising as a Substitute for a State Religion (in the 1990s)

After the collapse of the political system of Socialism, MARXism as an official ideology underwent a strikingly rapid decline. Forced paths prescribed by ideological expectations and interventions had already been weakened by that time, and political changes were quasi-imminent. By this time, however, political changes happened to coincide with the most natural call for a generation change. Having reached an advanced age and withdrawn to mostly honorary entitlements, IMRE SZABÓ was only capable of reframing earlier accomplishments without formulating any new ideas.[88] His one-time disciples arrived at the point of publishing their own final syntheses, which they hoped were to crown their personal oeuvres.[89] Suddenly and by coincidence, all this anticipated and stood in fact for two generations' simultaneous retirement. On behalf of the next generation, a summary account of what MARXism had increasingly been and served for was formulated, in the spirit of closing the past.[90] There were also some essayistic surveys published to draw a temporary balance.[91] For want of a proper distance in time, however,

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[88] Cf. Imre Szabó's late writings (dictated as fully blinded) in *Állam- és Jogtudomány*.

[89] Kálmán Kulcsár *Jogszociológia* [Sociology of law] (Budapest: Kulturtrade 1997) 358 pp. and Vilmos Peschka *Appendix "A jog sajátosságához"* Tanulmányok [Appendix papers on to »The specificity of law«] (Budapest: Közgazdasági és Jogi Könyvkiadó & MTA Állam- és Jogtudományi Intézet 1993) 170 pp. [Jog és jogtudomány 1].

[90] Above all, by the author, 'Introduction' in *Marxian Legal Theory* ed. Varga Csaba (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1993) xxvii + 530 pp. [The International Library of Essays in Law & Legal Theory, Schools 9], pp. xiii–xxvii.

[91] Also formulating a definite value judgement, see, above all, Béla Pokol 'A magyar jogelmélet állapotáról' [On the state of Hungarian legal theorising] *Magyar Tudomány* [Science in Hungary] XXXVII (1992) 11, pp. 1325–1334 and Péter Szilágyi 'Jogbölcselet' [Legal philosophy] in *Magyarország a XX. században* V: Tudomány 2: Társadalomtudományok [Hungary in the 20th century / Scholarship / Social sciences], ed. István Kollega Tarsoly (Szekszárd: Babits Kiadó 2000), pp. 39–57 & <http://mek.niif.hu/02100/02185/html/1183.html>.

New insigths have been text-booked by Béla Pokol, *A jog szerkezete* [The structure of law] (Budapest: Gondolat – Felsőoktatási Koordinációs Iroda 1991) 199 pp. and *Jogbölcseleti vizsgálódások* [Investigations in legal philosophy] (Budapest: Nemzeti Tankönyvkiadó 1994) 115 pp.; as well as by *Előadások a jogelmélet köréből* Egyetemi jegyzet [Lecture notes in legal philosophy] ed. Miklós Szabó (Miskolc 1996) 322 pp., Péter Szilágyi *Jogi alaptan* [Fundamentals of law] (Budapest: Osiris 1998) 328 pp. [Osiris tankönyvek], and Antal Visegrády *Jogi alaptan* [Fundamentals of law] (Pécs: Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kar 1996) 101 pp.

all such endeavours were mostly useful only to emphasise the need for a genuine re-start.[92]

From that time on, within the pluralism of an intellectual free market incited by competing ideas MARXism has had the chance to contribute, with its methodological complexity and problem-solving sensitivity, to the former's diversity as a thought-provoking impetus of debates with a huge variety of colours, i.e., as one of the potential approaches from the broad range of free options.[93]

Having just passed the threshold of the third millennium, it is perhaps too early for us to prognosticate anything about such a legacy's future. What seems to be taken for granted is that MARXism may still have some potential to be present as an additional colour in the near future as well.[94] Moreover, it may even strengthen its position, at least regarding its inherent elements addressing "the quest for community",[95] in paradoxical support of present-day CHRISTian and other humanistic tendencies. And we can even add to the above, from the controversial legacy of MARXism's 20th-century adventure in the history of ideas, a number of still living and inspiring concepts imbued with problem-sensitivities, methodological insights and definite value-consciousness, such as the principle of historicity and the idea of social conditionality. Others include the methodological significance of the concreteness of human and social existence, the theory of alienation (with the subsequent processes of objectification and reification in societal

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[92] Cf., retrospectively, *A szocializmus marxizmusának jogelmélete* [Legal theory of the Marxism of Socialism] {workshop proceedings} ed. Csaba Varga with András Jakab [annex in] *Jogelméleti Szemle* 2003/4 <http://jesz.ajk.elte.hu/2003_4.html> & 'Marxizmus és jogelmélet' [Marxism and legal theory] = *Világosság* XLV (2004) 4, 116 pp. & <http://www.vilagossag.hu/>, as well as prospectively, by the author, 'Development of Theoretical Legal Thought in Hungary at the Turn of the Millennium', commented upon by Máté Paksy & Péter Takács, 'Continuity and Discontinuity in Hungarian Legal Philosophy' in *The Transformation of the Hungarian Legal Order 1985–2005* Transition to the Rule of Law and Accession to the European Union, ed. Péter Takács, András Jakab & Allan F. Tatham (Alphen aan den Rijn: Kluwer Law International 2007), pp. 615–638 and 638–648, respectively.

[93] Péter Szigeti & Péter Takács *A jogállamiság jogelmélete* [Legal theory of the rule of law] (Budapest: Napvilág Kiadó 1998) 294 pp.

[94] Cf., e.g., by Hermann Klenner, *Recht und Unrecht* (Bielefeld: transcript [panta rei – Forum für dialektisches Denkens] 2004) 51 pp. [Bibliothek dialektischer Grundbegriffe 12] & *Historisierende Rechtsphilosophie* Essays (Freiburg in Breslau, etc.: Haufe-Mediengruppe 2009) 702 pp. [Haufe-Schriftenreihe zur rechtswissenschaftlichen Grundlagenforschung 21].

[95] Robert A. Nisbet *The Quest for Community* A Study in the Ethics of Order & Freedom (San Francisco: ICS Press 1990) xxxv + 272 pp.

life accomplished), the immanent criticism of Capitalism and forms of post-capitalism as a civilisational idea reduced to material production and consumption, the deconstruction of "ideological" constructs, the advocacy for indigenous rights in an anti-colonialist spirit, the traditional concern for the fate of the Third World and, thereby, also the theoretical criticism of ongoing globalisation.

II.
MARXIST LEGAL PHILOSOPHISING IN AN INTERNATIONAL PERSPECTIVE

Ad 1: To the Preliminaries

In the Soviet Union, it was VYSHINSKY and his normativism (made sacrosanct after the conclusion of the infamous all-federal "debate" in the Soviet Academy's Law Institute in 1938) that institutionalised STALIN's regime in the field of law. In addition to suppressing all the initiatives born since the 1920s (by having both STUCHKA and PASHUKANIS physically liquidated), the regime excluded codification renewals as well, efforts towards which had been launched by many Soviet-Russian civilist lawyers.[96]

In contrast to all this, in Central and Eastern Europe proper, prior to the ideological *Gleichschaltung* carried out in the wake of the Muscovite territorial and political conquest after World War II, a variety of local versions was cultivated: neo-KANTianism was discussed everywhere in the region (to the West from the Baltic countries and from Bulgaria/Romania, in the vast area of German cultural influence), complemented by French institutionalism and solidarity theory (mostly in the Francophone Balkans). Mention is also to be made of the psychological trends (e.g., LEON PETRAZYCKI) mainly in St. Petersburg and the sociological theories of Russian scholars formulated in the course of their emigration (e.g., PITIRIM A. SOROKIN and GEORGES

[96] As a tactic concession, after 1941 STALIN took a number of measures, although as mere lip-service, in order to increase the chance that war efforts, having started from a weakened position, might transform into an all-popular patriotic cause for the defence of the Soviet homeland, thanks to the regime's temporarily encouraging religious and national sentiments. Meanwhile, however, he rigorously kept basic strategy unchanged in view of preventing any concession from spreading over to ideological areas, compromising his terroristic rule.

GURVITCH, who once edited an independent Russian journal of jurisprudence during their interim period of voluntary exile in Riga).[97]

Amidst such active professional lives, Budapest could not gain a central role compared, for instance, to Brno—with FRANTIŠEK WEYR and his journal[98]—, which provided the internationally acknowledged second most significant workshop of HANS KELSEN's Viennese normativism. At the same time, however, besides LEON PETRAZYCKI's foundation of a new school after he had returned to Warsaw, Budapest and Szeged also worked their way up to be equal partners to the Vienna school of positivism. Both JULIUS MOÓR and BARNA HORVÁTH were in the prime of their creative powers when World War II ended. MOÓR was on top of his professional success and national acclaim, while HORVÁTH came close to having his foundational pioneering interest in legal sociology (which had earned him an international reputation by then)—namely, a synoptic approach to *Sein* & *Sollen* founded upon his processual theory—result in a theoretical synthesis. Both had disciples. The young HORVÁTH even established a school, with students following the master from criticism of normativism to re-interpretations, within the womb of which new insights were gained from both the philosophy of science and psycho-analysis. Moreover, even the personal strains and animosity between MOÓR and HORVÁTH could by then be seen by the external world as the self-assertion of two solid blocks, able to re-build in new directions through their opposition.

And yet, Hungary could not become a centre setting professional standards and quality-marks for the region. Perhaps this was not even primarily because the so-called Little Entente, that is, the successor states erected from her dismemberment after the Great War, generated isolation around her. Maybe it is of a more explanatory force if we recall that in such a politically suffocating atmosphere, the only way out for Hungary could be across either Rome or Vienna, in addition to Munich and Berlin. Consequently, Hungarian professionals may have preferred making themselves partners there to endeavours to set up their own international fora in Hungary, of either journals or series launched to encourage international participation.

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[97] *Закон и суд* Вестник Русского юридического общества [*Zakon i sud* Vestnik Russkogo iuriditchheskogo obshchestva] [Statute and court: Review of the Russian legal community, Riga] I–VIII (1929–1938) [reprint (Riga: Общество юристов Латвии [Obshchestvo iuristov Latvii] 2000) 1961 pp.].

[98] *Internationale Zeitschrift für die Theorie des Rechts* [Brünn] I–XII (1926–1938). Cf. also <http://cs.wikipedia.org/wiki/Frantiπek_Weyr_(právník)>.

(It is MOÓR who had a primary interest in developing contacts within the region. However, these did not exceed the attraction of his personal authority and did not extend to organising genuine regional cooperation. All such contacts were in fact exhausted by individual actions, such as publishing in Sofia, acknowledging the intention of Estonia's ILMAR TAMMELO to visit him from Berlin,[99] or, in the heights of World War II, reviewing in depth the legal philosophical oeuvre of BÉLA [VOJTECH] TUKA who, after World War I recognised the Slovak in himself by remaining in Pozsony—detached to Slovakia as its capital Bratislava—, and became both a national hero and the number one jurisprudent of Slovakia).[100]

Ad 2: To STALINism

Scholarly ambition remained vivid and almost undiminished in Hungary. The demand for writing monographs became on par with press publicity in support of the ideology of class struggle. Or, the Communist constraint of providing apologetics for STALINism prevented the formation of any genuinely scholarly accomplishments, suitable to treat subjects *sine ira et studio*. In parallel with the dictatorial arrangement, a hierarchy was built in scholarship as well, in service of a substitute-for-religion type of official state ideology as a Soviet epigonism. It may be indicative of Hungary's strong position within the block that IMRE SZABÓ, a scholar with Western learning and a wide intellectual horizon, in a modest relaxation of the Soviet monolithic attitude happened to be the exclusive jurist for many years within, as the sole elected member of, the Soviet Academy of Sciences.

At the same time, the world-revolutionary imperial attitude of the Soviet Moloch evoked similar reactions on behalf of its Cold War adversaries. As a consequence, Western and Atlantic literature, in a way typical of big powers'

[99] Cf., by the author, 'Julius Moór und das »Überleben« von Tammelo's Manuskript – Eine zeitgeschichtliche Anmerkung' in *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. Raimund Jakob, Lothar Phillips, Erich Schweighofer & Csaba Varga (Münster, etc.: Lit Verlag 2009), pp. 303–306.

[100] Cf., as edited by the author, *Aus dem Nachlaß von Julius Moór* (Budapest: ELTE "Comparative Legal Cultures" Project 1995) xvi + 158 pp. [Philosophiae Iuris] {& <http://philosophyoflaw.wordpress.com/>} & Moór *Schriften zur Rechtsphilosophie* [note 1].

politicised attitudes, identified Soviet legal theory with anything of Socialism's MARXism[101]—practically all along.[102]

Ad 3: To Institutionalisation Accompanied by Relaxation

a) Late Separation from VYSHINSKY's Theory

It is illustrative of the force of Soviet homogenisation that VYSHINSKY's so-called Socialist normativism,[103] a positivist extremity with the underlying doctrine of arbitrary will (ideologised as transforming the "objective" necessities of the economic basis into the state's legal superstructure) remained uncriticisable, free from any frontal attack for a long period. Even

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[101] With the collection of *Marxian Legal Theory* [note 85], I attempted a late breakthrough.

[102] First of all, Н. Г. Александров [Nikolai Grigorevich Aleksandrov] *Сущность права* [Sushchnost' prava / The essence of law] (Москва: Госюриздат [Moscow: Gosiurizdat] 1950) 54 pp., С. С. Алексеев, Д. А. Керимов & П. Е. Недбайло [Sergey Sergeevich Alexeev, Dzhangir Ali-Abbasovich Kerimov & Petr Emelyanovich Nedbailo] 'Метологические проблемы правоведения' [Metodologicheskie problemi pravovedenija / The methodological problems of jurisprudence] *Правоведения* [Pravovedenie] 1954/4, pp. 15 et seq. and Б. В. Шейндлин [Boris Vladimirovich Sheindlin] *Сущность советского права* [Sushchnost' sovetskogo prava / The essence of Soviet law] (Ленинград: Изд-во Ленинградского Университета [Leningrad: Izd-vo Leningradskogo Universiteta] 1959) 138 pp. As a collection, cf. Soviet Legal Philosophy ed. John N. Hazard, trans. Hugh W. Babbs (Cambridge, Mass.: Harvard University Press 1951) xxxvii + 465 pp. [Twentieth Century Legal Philosophy Series 5]. A thorough overview is provided by Zoltán Péteri in his 'A jogfogalom néhány kérdése a szovjet jogtudományban' [Some questions of the concept of law in Soviet jurisprudence] *Az Állam- és Jogtudományi Intézet Értesítője* II (1958), pp. 304–314. The Yugoslavian pattern, as exemplified by Radomir D. Lukić Teorija drzáve i prava [Theory of state and law] I–II (Beograd 1954) {reprint as Радомир Д. Лукић *Теорија државе и права* 1: Теорија државе & 2: Теорија права (Београд: Завод за уцбенике и наставна средства БИГЗ 1995) 491 + 344 pp. [Сабрана дела др Радомира Д. Лукина 2–3]}, followed a most severly dogmatic path.

[103] Following А. Я. Вишинский [Andrey Yanuarevich Vyshinsky]'s *Вопросы права и государства у К. Маркса* [Voprosy prava i gosudarstva u K. Marksa / Questions of law and state at Marx] (Москва: Изд-во Акалемии наук СССР [Moscow: Izd-vo Akademii nauk SSSR] 1938) 47 pp., see his *Вопросы теории государства и права* [Voprosy teorii gosudarstva i prava / Questions of the theory of state and law] (Москва: Гос. изд-во юрид. лит-ру [Moscow: Gos. izd-vo iurid. lit-ry] 1949) 417 pp.; see also А. К. Сталгевич [Alfred Kryshianovich Stalgevich] 'К вопросу о понятии права' [K voprosu o poniatii prava / To the issue of the notion of law] *Советское государство и право* [Sovetskoe gosudarstvo i pravo] 1948/7, pp. 49–63 and М. С. Строговч [Mikhail Solomonovich Strogovich] et al. *Теория гоиударства и права* [Teoriia gosudarstva i prava / Theory of state and law] (Москва: Гос. изд-во юрид. лит-ру [Moscow: Gos. izd-vo iurid. lit-ry] 1949) 510 pp.

after his personal downfall, rather than being verbally contradicted, it was only challenged indirectly and sideways, *a propos* of an apparently peripheral issue, formulated in the manner of a officious follower's zealous humility. Notably, it was questioned: how much is a norm's legal quality affected if it would not result in a jural relation—no matter how partial the field and exceptional the occurrence is.[104] As dams are likely to burst at a minor crack or mole-hill, it was such an innocent and marginal query into which the until-then suppressed dilemmas of the acceptability of judicial law making and the legal nature of customary law—along with the justifiability of a sociological approach and the recognition of values as external yardsticks—did in fact stream.[105]

No one may dare to claim that legal thinking could have taken a different path. Albeit there was no expressed political manifestation to force implementation of VYSHINSKY's doctrine in Hungary, still the neophytes' political oversensitivity in making the domestic scene harmonised could result in a local variant and nothing else. Only the residue of some critical details allowed methodological supplements and additions that were able to build in some potential for transcendence in the long-run.

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[104] С. Ф. Кечекьян [Stepan Fedorovich Kechekyan] 'Нормы права и правоотношения' [Normy prava i pravootnosheniia] *Советское государство и право* [Sovetskoe gosudarstvo i pravo] 1955/2, pp. 23–32, А. А. Пионтковский [Andrey Andreevich Piontkovsky] 'Некоторые вопросы общейт теории государства и права' [Nekotorye voprosy obshchei teorii gosudarstva i prava] *Советское государство и право* [Sovetskoe gosudarstvo i pravo] 1956/1, pp. 14–28 as well as А. К. Сталгевич [A. K. Stalgevich] 'Некоторке вопросы теории социалистических правовых отношении' [Nekotorye voprosy teorii sotsialisticheskikh pravovykh otnoshenii] *Советское государство и право* [Sovetskoe gosudarstvo i pravo] 1957/2, pp. 2. et seq., in criticism of which И. Э. Фарбер [I. E. Farber] 'К вопросу о понятии права' [K voproszu o ponjatii prava / To the issue of the notion of law] *Советское государство и право* [Sovetskoe gosudarstvo i pravo] 1957/1, pp. 38–50 proved a rear *echelon*. See also D. A. Kerimow, Harry Gläss, Julius Leymann & Alfred Wiese 'Über den Begriff des sozialistischen Rechts' *Staat und Recht* 1958/11, pp. 1150–1154 and N. V. Zhogin 'Vishinsky's Distortions in Soviet Legal Theory and Practice' *Soviet Law and Government* 4 (1965) 2, pp. 48–56.

[105] E.g., L. S. Iavich 'A Contribution to the Question of the Methodology of Jurisprudence' *Soviet Law and Government* 2 (1963) 2, pp. 11–16 and M. S. Strogovich 'Problems of Methodology in Jurisprudence' *Soviet Law and Government* 4 (1966) 4, pp. 13–22. The early and pioneering achievement by Ю. Ю. Веинголд [Yurii Yulianovich Veingold]—*Право как социологическая категория* [Pravo kak sotsiologicheskaia kategoriia] (Фрунзье [Frunze] 1962) 315 pp.—remained unheard off and unshared by in its temporary Soviet medium.

b) From Ideological Self-closure to an Apparently Scholarly Openness

The instances that can be presented for an overview organised by countries representing characteristic attitudes[106] provide a telling example of switches between extremities.

As to ideologically thoroughly closed societies, a strict functional division prevailed in the German Democratic Republic. It separated—both institutionally and bibliographically, that is, in view of researchers' and researches' profiles, library collections, and the passes permitting access thereto—the Building of Socialism (allowing nothing but Socialist works for inspiration), on the one hand, from the Criticism of "Imperialism", on the other. Only the latter justified the study of "bourgeois" literature, and only with the aim of "annihilating" it. Accordingly, thinking about Western sources from the end of 19th century (including MAX WEBER, of course) was short-cut by their being castigated as "the enemy", without the chance of being considered as a referential impetus for building Socialism.

In the Soviet Union—anything of Western literature being scarce and practically unavailable, and, moreover, regarded as irrelevant to progressive thought (the way in which Cyrillic script separates from Latin culture)—, no formal division was institutionalised. According to the well-established practice, monographs prepared within the confines of the Institute of State and Law of the Soviet Academy of Sciences [*Институт государства и права Академии Наук СССР*] did entail rare historical and contemporary references to Western literature (mostly as embellishment, without any serious intention of analysis or debate, and taken from a rather meagre choice, merely to subject them to superficial rejection by some catchphrases),[107] upon the basis of a Socialist comparative platform (with a mere glance at theory and practice in the so-called peoples' democracies), that is, only to serve as a far-away memento of scholarly ideals.

After the intervention in 1968, in Czechoslovakia's law libraries only sources in Slavic languages remained freely available in addition to domestic publications (e.g., even from Hungary, mostly titles published in Russian were available).

As to Romania and Bulgaria, no official discrimination was present, since overall poverty had already resulted in the practical lack of either

[106] Cf., as a bibliographical background material, Viktor Knapp 'La philosophie du droit dans les pays Socialistes' in *Contemporary Philosophy* A Survey, ed. Raymond Klibansky (Firenze: La Nuova Italia Editrice 1971), pp. 156–169.

[107] E.g., V. A. Tumanov 'Contemporary Anti-Marxism and the Theory of Law' *Soviet Law and Government* 8 (1969) 1, pp. 3–20.

Western resources or non-MARXist literature. So anything diverting from Balkans-style Socialism could provide additional colours at the most, without genuinely expanding the field of topical discussion.[108]

In fact, it was only Yugoslavia and (especially the Czech and Moravian areas of) pre-1968 Czechoslovakia that could present a visible exception, with MARXism cultivated by scholarly ambition. However, even this school of thought was not ready for confrontation with open-ended competition. Scholars concentrated all their efforts on building up a genuinely MARXian theory seen as its renewal (as theoretical pluralism within MARXism was accepted there in view of fostering internal debates), as a genuine "renaissance of MARXism". Hence, they needed nothing specific besides Western MARXism. In total, however, by rejecting external criticism and building from inside exclusively, they proved to be far more unyielding and dogmatic than their Soviet forerunners did.[109]

This is why true openness could be encountered in Poland alone. There, in a successful continuation of local tradition as to psychological, logical and analytical directions, conceptual analysis was given priority in both

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[108] Except for some theoretical and critical papers written by Anita M. Naschitz with a passion of radicalism yet preserving theoretical ambitions all along, e.g., 'Critica unei »critici« burgheze a teoriei marxist–leniniste a statului şi dreptului: cu priviere la lucrările lui H. Kelsen: Teoria politică a bolşevismului şi Teoria comunistă a dreptului' [Criticism of a bourgeois »critic« on the Marxist–Leninist theory of state and law] *Studii şi cercetări juridice* 1958/2, pp. 29–58 and 'Filozofia existen¸ialista a dreptului — filozofie a pseudodreptului şi a lichidării legalităţii: In legatura cu lucrarea lui G. Cohn: »Existen¸ialismul şi ştiinţá dreptului«' [Existentialist philosophy of law as the philosophy of pseudo-law and of the liquidation of legality] *Studii ºi cercetări juridice* 1961/1, pp. 25–54.

[109] There were exceptions nevertheless. These included the integral publication of Toma Živanović's non-MARXist oeuvre—*Sistem sintetičke filozofije prava* [The system of a synthetical philosophy of law] I–III (Belgrad 1922, 1951, 1959)—, and, above all, Ota Weinberger's stand of a revolutionising force—*Die Sollsatzproblematik in der modernen Logik* (Praha: Československo Akademie Ved 1958) 161 pp.—which, stirring up huge debates even with its repercussions, pointed out that ought-propositions are not cognitive categories and, therefore, are not to be characterised by either truth or falsity. By the way, it is just this sensitive issue that became the critical test of the LENINian so-called reflection theory all through the Socialist world. For my attempt similar to the one above, rejected in my homeland for reasons of prevailing dogmatism as unacceptable from the outset, see 'A magatartási szabály és az objektív igazság kérdése' [Rule of behaviour and the question of objective truth, 1964] in Csaba Varga *Útkeresés* Kísérletek – kéziratban [*Searching for a path* Unpublished essays {a collection of papers from 1964 to 1994, bound to remain unpublished mostly for political reasons] (Budapest: Szent István Társulat 2001), pp. 4–18 [Jogfilozófiák]. The query was positively answered—exclusively from the viewpoint of formal logic, by the way—by Franz Loeser 'Zur Frage der Wahrheit in der Moral' *Deutsche Zeitschrift für Philosophie* 9 (1963) 9, pp. 1104 et seq.

social theory and sociology, as well as in political science and jurisprudence. As a consequence, MARXism itself as a *per definitionem* ideological and policy-oriented approach was excluded from the competing approaches that required exactness in cool detachment as a scientific ideal. As a perhaps paradoxical after-effect, theoretical jurisprudence there became increasingly sterile and at the same time irrelevant to public debates. Having transformed into a local school or branch of the then-mainstream Western European and mainly Anglo–American analytical-conceptual directions, Polish legal theorising narrowed down, with practically nothing locally timely to say—in addition to suffering self-closure in professionalism, being only preoccupied with itself. Unlike in Hungary, Polish Communist party rank-and-file university staff was often the force cultivating legal theory, like conceptual mathematics at a high intellectual level, when jurisprudence proper was at stake, and who used MARXism without much critical distance when theorising departed from sheer legal conceptuality to arrive at fields marked by class struggle ideology, especially in the theory of the state. In such a strange symbiosis, MARXism could return to becoming overtly predominant, at least in the sense that for issues where the subject concerned was manifested as an aspect of power, in a political context, or as ideology and/or social practice (e.g., legal policy or law on the state and state administration), MARXism still prevailed full-fledged, all liberal appearances notwithstanding.[110]

Unfortunately for Hungary, the country did not have any comparable social scientific tradition. A fundamentalist past that had once used axiological approaches in building up feasible teleologies was bound to return again. All in all, there were theoretical manifestations with diverse stands and approaches (including international trends domesticated and alternatively formulated), only to collide both excitingly and edifyingly within the all-covering umbrella of MARXism. The play was often on an ideological razor's edge. There is no need to emphasise that this involved risks, but it was usually done in a way that carried timely messages for society (even if indecipherably sometimes, when they were over-coded by caution).[111]

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[110] This resulted in a practical division of labour according to personal gifts and chosen career paths. For instance, in Poland, ZIEMBIŃSKI, PODGÓRECKI and WRÓBLEWSKI, and OPAŁEK and BORUCKA-ARCTOWA rarely abandoned the proper terrain of theoretical or empirical scholarship, while the oeuvre of the then-director of the Institute of Legal Sciences of the Polish Academy of Sciences, ADAM LOPATKA, scarcely treated any genuinely scientific problem at all.

[111] It was by no mere chance, therefore, that besides HEGEL, THOMAS MANN became the stylistic ideal, as a prerequisite of survival, for the theoreticians at the Institute for Legal Studies of the Hungarian Academy of Sciences. Thanks to this, censors of the Communist Party

Appearing explicitly dramatic at times, it guaranteed both the weight and seriousness of theoretical issues with a direct impact upon society, not infrequently stirring up wide intellectual circles and public opinion as well.[112]

c) From Political Ideology to Genuine Scholarship

Thereby an exceptional balance could be achieved in Hungary through the parallel fulfilment of expectations representing two extremes in apparent mutual exclusion of one another. For in this Soviet world empire, the actual choice ranged from

- a directly ideological and political servicing (characteristic of the East German,[113] Soviet[114] and post-1968 Czechoslovakian patterns); via

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central cultural bureau (headed by GYÖRGY ACZÉL and contributed to by, among others, ILDIKÓ LENDVAI, now faction leader, then president, of the Socialist Party governing the country) preferred in fact withdrawing us from their range of actual control to bothering with our overcomplicated abstractions. At the same time, for the Institute staff, any participation in debates in the public fora of journalism was strictly prohibited, as the only available means of corporate self-defence from political control.

[112] Research in the law on the state by, e.g., OTTÓ BIHARI and ISTVÁN KOVÁCS, were often in the focus of international press interest—true, not without political overtones but still within a scientific context. Owing to his commitment to modernisation and wide personal reputation in sociology, pieces by KÁLMÁN KULCSÁR were much sought-after in the broadest intellectual circles. As to personal memory, my collection on *Jog és filozófia* [Law and philosophy] [note 60] had aroused nation-wide intellectual interest (relaxing the practically absolute isolation of law from topics debated in general public fora at the time). It was only subsequently, after the collapse of the regime, that I could gain some idea of how many people, in addition to practicing lawyers, studied my legal-philosophical treatment on LUKÁCS, both in the journals of the committed left and of the avant-garde, such as the social scientific journal *Valóság* [Reality] and as published [note 70 as to its English version] by the literary publisher *Magvető* [Seedsower] in the popular series "*Gyorsuló idő*" [The speedening time], mostly without (at least not exclusively) the aim of obtaining *par excellence* law-related knowledge but owing to its widely known intention to use MARXism as a Trojan horse in an eventual and latent transcendence of MARXism.

[113] E.g., 'Rechtsbegriff und Rechtsnorm: Internationales Symposium des Instituts für Staats- und Rechtstheorie vom 12. bis 14. 5. 1966. in Jena' *Wissenschaftliche Zeitschrift der Friedrich-Schiller-Universität Jena* Gesellschafts- und Sprachwissenschaftliche Reihe 15 (1966) 3, pp. 405–476 and Rainer Gollnick 'Internationales Symposium in Jena zum sozialistischen Rechtsbegriff' *Staat und Recht* 1966/8, pp. 1336–1345.

[114] П. Е. Недбайло [Petr Emelyanovich Nedbaylo] *Применение советских правовых норм* [Primenenie sovetskih pravovykh norm / The application of Soviet legal norms] (Москва: Госюуриздат [Moscow: Gosiurizdat] 1960) 510 pp.; as the initiation of comparativism, С. Л. Зивс [Samuil L. Zivs] 'О методе сравнительного исследования в наука о государстве и праве' [O metode sravnitelnogo issledovaniia v nauka o gosudarstve i prave / On the method of com-

- the emergence of some reconciliation[115] (representing the Romanian[116] and Bulgarian patterns) and via
- the undivided assumption of some scholarly ethos, yet only in view of, and through, the consistent political enforcement of the superiority of the MARXism of Socialism (as in the Yugoslavian[117] and pre-1968 Czechoslovakian[118] patterns); up to

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parative investigations in the science of state and law] *Советское государство и право* [Sovetskoe gosudarstvo i pravo] 1964/3, pp. 23 et seq.; В. П. Казимирчук [Vladimir Petrovich Kazimirchuk] *Право и методы его изучения* [Pravo i metody ego izucheniia] (Москва: Юридическая Литература [Moscow: Iuridicheskaia Literatura] 1965) 204 pp.; *Конкретно-социологические исследования в правовой науке* [Konkretno-sotsiologicheskie issledovania v pravovoi nauke] red. Б. М. Бабий [B. M. Babiy] (Киев: „Наукова Думка" [Kiev: Naukova Dumka] 1967) 192 pp.; L[ev Samoylovich] Jawitsch *The General Theory of Law* Social and Philosophical Problems, trans. H. Campbell Creighton (Moscow: Progress 1981) 293 pp. [Marxist–Leninist Theory].

Developments are always uneven. For the sake of balance it has to be pointed that the Soviet Union was also the scene of both pioneering and progressive initiatives in, e.g., launching research on the law's logical and linguistic aspects and a MARXising re-foundation of legal axiologism. See, e.g., in result of the debate on the magisterial book of О. Г. Дробницкий [Oleg Grigorevich Drobnitsky] *Мир оживских предметов* Проблема ценностьи и марксисткая философия [Mir ozhivshikh predmetov: Problema tzennosti i marksistkaia filosofia / The world of revivified objects: The problem of value and Marxist philosophy] (Москва: Политиздат [Moscow: Politizdat] 1967) 351 pp., И. Ф. Балахина [I. F. Balakhina] 'Проблемы ценностье – внимание последователей' [Problemy tsennoste – vnimanie posledovatelei / The problem of values] *Вопросы философии* [Voprosy filosofii] 1965/9, pp. 153–154.

[115] E. g., Paul Cosmovici 'Traits spécifiques du concept du droit relevés par la science juridique de Roumanie' *Revue roumaine des sciences sociales* Série de Sciences juridiques 22 (1978), pp. 51–63.

[116] An outstanding example is provided for this by laying the foundations of the way how legal technique is to be understood. Cf., by Anita M. Naschitz & Inna Fodor, *Rolul practicii judiciare în formarea şi perfecţionarea normelor dreptului Socialist* [The role of judicial practice in formation and perfection of Socialist legal norms] (Bucureşti: Editura Academiei Republicii Populare Romîne 1961) 300 pp. and *Conştiinţa juridică Socialistă* [Socialist legal consciousness] (Bucureşti: Editura Ştiinţifică 1964) 281 pp. as well as 'Tehnica legislativă şi metodologia în drept' [Legislative technique and legal methodology] *Studii şi certetări juridice* 13 (1968) 1, pp. 45–57.

[117] E.g., Radomir D. Lukić *Teorija države i prava* II: Teorija prava (Beograd: Nauæna knjiga 1957), pp. 42–47 restricted "regulation in a legal form" to cases alone where antagonistic class conflicts were at stake. For differing directions, see, e.g., Berislav Perić *Pravna znanost i dijalektika* Osnove za suvremenu filozofiju prava [Legal knowledge and dialectics: Foundations of contemporary philosophy of law] (Zagreb 1962) {6. izd. Narodne novine 1990) 293 pp. [Biblioteka Udžbenici 156; Udžbenici Sveučilišta u Zagrebu / Manualia Universitatis Studiorum Zagrabiensis]}.

[118] E.g., Michal Lakatoš *Otázky tvorby práva v socialistické společnosti* [Questions of lawmaking in socialist society] (Praha: Nakladatelství Československé akademie věd 1963) 231 pp.

- ensuring scholarly self-development in parallel with preserving ideological semblance (characteristic of the Hungarians); and to
- attaining personal (topical or disciplinary) separation of politics from scholarship, that is, of legal theory as ideology and, respectively, as conceptual analysis, in addition to an empirical sociological description of facts (as in the Polish as well as the pre-1968 Czech and Moravian patterns).

Remarkably, although the Polish pattern inspired many contemporaries struggling for their way on more difficult paths[119] and impressed them with the promise of safety closed in positivism and the ethical quality of the stance eventually taken, its final achievement, permeated with the ideal of some "self-interested scholarship", proved to be of a dubious value. For its cultivation consumed its initial energies. Opposed to Muscovitism without any social embedment of its own, it withdrew to the status of a specimen of West-inspired counter-epigonism, confined to peripheral stakelessness.

For, at a time when ambitions to scholarly autonomy were to be appreciated properly, debates generated at the price of hard labour under repressed conditions could nevertheless lead to individualistic paths beaten successfully—even if contradictorily, but in a way best suited to their underlying conditions. "For—as noticed earlier[120]—, despite being disabled and hamstringed, the greatest available variety of trends of thought could evolve in our country under the order superimposed on us from above both as a strait-jacket and as a protective shield; moreover, there was not one of these designated as a focus from which one had to step out and back, in contrast to HARTianism as a compulsory garment in the otherwise most liberal Great Britain."

[119] Polish theoretical legal thought in general and OTA WEINBERGER's logical-cybernetic path in Prague in particular had a rather attractive call in Hungary. As an outcome, there evolved a practice of preparing rough translations of relevant papers into Hungarian (animated especially by ATTILA HLAVATHY, head of the department responsible for theoretical backing at the Public Prosecutor's Office). Moreover, it is by no means mere chance that I published two dozen review articles on Polish books during that period while I dedicated hardly half a dozen reviews to all other Socialist titles.

[120] By the author, 'The Hart-phenomenon' *Archiv für Rechts- und Sozialphilosophie* 91 (2005) 1, p. 92, note 46.

Just to recall few examples from countries with limited favourable conditions: the locally important Romanian programme announcement[121] or the Bulgarian and Romanian debates on legal continuity[122]—albeit scarcely transcending the intellectual level of the Hungarian debate a decade earlier, i.e., at STALINism's peak—were proved definitely most inspiring by their impacts on their respective environments. Or, the Yugoslav and pre-1968 Czechoslovakian debates conducted under the pretext of "humanising" MARXism could eventually only contribute to the further survival of the hegemony of MARXism.[123] Nevertheless, they did open gaps and break splits in a monolith such that new trends were introduced and antagonisms revealed, in addition to the very fact that debates had occurred, generated in a more or less academic manner. Through accumulation, they sowed the seeds of later development.

Otherwise speaking, Polish works—remarkable scholarly achievements—may have happened to presume less courage than apparently poor Romanian or Albanian ones. There were in fact also monographic accomplishments of standing academic import in East Germany, the Soviet Union or Romania. All in all, the Socialist output touched on foundational issues

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[121] In fact, Ion Gheorghe Maurer [member of both the National Assembly and the Communist Party Central Committee for three decades, then Head of State and Prime Minister for one and a half decades, simultaneously with his directorship at the Institute for Legal Research of the Romanian Academy of Sciences] outlined—in his 'Cuvînt înainte' *Studii si cercetări juridice* 1956/1, pp. 1–47—the foundations of Sovietised Rumanian legal MARXism with thirty references to, or quotations from, the French scholarship, which was an act unheard-of in this very epoch. In an altered political atmosphere, his successor, Traian Ionascu—'Dezvoltarea Stiintei juridice Socialiste în Republica Populară Romînă' *Revista Romănă de Drept* 1964/8, pp. 34–56—, could also rely on domestic literature alone, without referring to Soviet authors.

[122] Cf., primarily, Traian Ionascu & Eugene A. Barasch 'Les constantes du droit – Droit et logique' *Revue roumaine des sciences sociales* Série de sciences juridiques 8 (1964) 2, pp. 129–143 and Neno Nenovski *Priemstvenostta v pravoto* [Continuity in law] (Sofia: Nauka i Izkustvo 1975) 167 pp {Нено Неновски *Преемственность в праве* (Москва: Юрид. лит-ра [Moscow: Iurid. lit-ra] 1977) 167 pp.}. For a Western reflection, see also Alice Erh-Soon Tay & Eugene Kamenka 'Marxism–Leninism and the Heritability of Law' & Frank Münzel 'Chinese Thoughts of the Heritability of Law' Review of Socialist Law 6 (1980) 3, pp. 261–291.

[123] It was by no mere chance that the Budapest school of LUKÁCS' disciples (ÁGNES HELLER, GYÖRGY MÁRKUS, FERENC FEHÉR, and so on), media favourites for international leftist progressives of the age, joined unconditionally in these trends. In legal theory, this was represented by the new dogmatism in Yugoslavia and sporadically cultivated in Czechoslovakia. By contrast, this had no professional echo at all in Hungary despite a few accidental references by VILMOS PESCHKA, who was motivated by a moral espousal of a trend officially rejected.

of the philosophy and methodology of jurisprudence in general,[124] and of legal logic,[125] cybernetics[126] and further key topics[127] in particular, in ad-

[124] Kazimierz Opałek *Problemy metodologiczne nauki prawa* [Methodological problems of legal sciences] (Warszawa: Państwowe Wydawnictwo Naukowe 1962) 363 pp.; Aleksander Peczenik *Wartość naukowa dogmatyki prawa* Práca z zakresu porównawczej metodologii nauki prawa [The scientific value of legal dogmatics] (Kraków: Nakl. Uniw. Jagiellonskiego 1966) 261 pp.; Leszek Nowak *Próba metodologicznej charakterystyki prawoznawstwa* [The methodological characteristic of legal knowledge] (Poznan 1968) 205 pp. [Uniwersytet im. Adama Mickiewicza w Poznaniu: Prace Wydziału Prawa 38].

[125] Stefan Grzybowski *Wypowiedz normatywna oraz jej struktúra formalna* [Normative expression and its formal structure] (Kraków: Nakładem Uniwersytetu Jagiellonskiego 1961) 155 pp. [Zeszyty Naukowe Uniwersytetu Jagiellonskiego: Ropzprawy i Studia XXXIX]; Jan Gregorowicz *Definicje w prawie i w nauce prawa* [Definitions in law and in the science of law] (Łódz 1962) 99 pp. [Łódzkie Towarzystwo Naukowe: Wydział I, 52]; *Études de logique juridique* III: Contributions polonaises à la théorie du droit et de l'interprétation juridique, publ. Ch. Perelman (Bruxelles: Bruylant 1969) 120 pp. [Travaux de Centre National de Recherches de Logique]; Werner Grahn *Die Rechtsnorm* Eine Studie (Leipzig: Karl-Marx-Universität Sektion der Rechtswissenschaft 1979) 175 pp. [Methodologie der marxistisch–leninistischen Rechtswissenschaft 6].

[126] As a forerunner, see, e.g., Н. Д. Андреев & [N. D. Andreev & Dzhangir Ali-Abbassovich Kerimov] 'О возможностия кибернетики при решении правовых проблем [O vozmozhnostiiakh kibernetiki pri reshenii pravovych problem / On the potential use of cybernetics in solving legal problems] *Вопросы философии* [Voprosy filosofii] 1960/7, pp. 106–110., Д. А. Керимов [D. A. Kerimov] *Кибернетика и право* [Kibernetika i pravo / Cybernetics and law] *Советское государство и право* [Sovetskoe gosudarstvo i pravo] 1962/11, pp. 98–104, by Viktor Knapp, *O možnosti použití kybernetických metod v právu* [On the possible uses of cybernetic methods in law] (Praha: Nakladatelství Československé akademie věd 1963) 242 pp. and 'De l'application de la cybernétique au domaine du droit' Revue de Droit contemporain [Bruxelles] 1962–63/2, pp. 13–34, О. А. Гаврилов [O. A. Gavrilov] 'О возможностьи использования методов кибернетики в нормативческой деятельности [O vozmozhnosti ispolzovaniia metodov kibernetiki v normatvorcheskoi deiatelnosti / On the possibility of providing cybernetic methods in practical law-making] *Советское государство и право* [Sovetskoe gosudarstvo i pravo] 1965/10, pp. 119–123, N. Benjamin 'Zur Anwendung mathematischer Methoden in der staatlichen Leitung und Rechtspflege' Staat und Recht 1965/6, pp. 899–921, *Вопросы кибернетики и право* [Voprosy kibernetiki i pravo / Issues of cybernetics and law] red. В. Н. Крудявцев [Vladimir Nikolayevich Kudryavtsev] (Москва: Наука [Moscow: Nauka] 1967) 310 pp. and *Kybernetika a právo* Buletin o aplikaci kybernetickych metod ve vede o státu a právu a v právni praxi [Cybernetics and law: Bulletin on the application of cybernetic methods on the fields of state and law and also in legal practice], I–, red. Josef Eliás (Praha: Ústav státu a práva ČSAV 1967–). Later works went more in details as, e.g., Andrzej Kisza *Model cyberneticzny powastawania i działania prawa* [The cybernetic model of law] (Wroclaw 1970) 204 pp. [Prace Wrocławskiego Towarzystwa Naukowego, A/133] and *Основы применения кибернетики в правоведении* [Osnovy primeneniia kibernetiki v pravovedenii / Foundations of the application of cybernetics in jurisprudence] red. Н. С. Полевой & Н. В. Витрук [Nikolay Stepanovich Polevoy & Nikolay Vasilevich Vitruk] (Москва: Юрид. лит-ра [Moscow: Yurid. lit-ra] 1977) 271 pp.

dition to local sociological-ethnographical descriptions[128] and the history of relevant ideas.[129] There were also initiatives breaking new paths worthy of international attention, like ANITA M. NASCHITZ's attempt to found the MARXist variant of axiology and natural law[130] and MARIA BORUCKA-ARCTOWA's efforts, providing, for ever-changing law, a quasi natural-law foundation by defining life conditions in society that can be taken as minimum and optimum at the same time.[131]

d) International Recognition of Socialist Jurisprudence as an Independent Trend
Owing to some internationally renowned prominent representatives (such as IMRE SZABÓ, VIKTOR KNAPP[132] and HERMANN KLENNER[133]), Socialism's

[127] Zygmunt Ziembiński *Normy moralne a normy prawne* Zarys problematyki [Moral and legal norms: Outlines] (Poznan 1963) 222 pp. [Uniwersytet im. Adama Miczkiewicza w Poznaniu: Prace Wydziału prawa 6]; Franciszek Studnicki *Przepływ wiadomości o normach prawa* [???] (Kraków: nakł. UJ 1965) 114 pp. [Zeszyty Naukowe Uniwersytetu Jagiellońskiego CXIX: Prace Prawnicze 22]; Maria Borucka-Arctowa *O społecznym działaniu prawa* [On the social effect of law] (Warszawa: Państwowe Wydawnitwo Naukowe 1967) 282 pp.

[128] E.g., R. Vulcanescu *Etnologie juridica* [Legal ethnology] (Buçuresti: Editura Academiei Rep. Soc. Romania 1970) 339 pp.; Durica Krstić *Pravni obièaji kod Kuća* [Legal customs of Kuca] (Beograd 1979) 234 pp. [Srpska Akademiia Nauka i Umetnosti, Balkanoloski Institut 7].

[129] Валерий Дмитриевич Зорькин [Valeriy Dmitrievich Zor'kin] *Позитивистская теория права в России* [Pozitivistskaya teoriia prava v Rossii / Positivist legal theory in Russia] (Москва: Изд-во МГУ [Moscow: Izd-vo MGU] 1978) 269 pp.; *История русской правовой мысли* Биографии, документи, публикации [Istoriya russkoi pravovoi mysli: Biografii, dokumenti, publikatsii / The history of Russian legal thought: Biographies, documents, publications], ed. С. А. Пяткина [S. A. Pyatkina] (Москва: Изд-во Остожье [Moscow: Izd-vo Ostozh'e] 1998) 600 pp.

[130] By Anita Naschitz, 'Wert und Wertungsfragen im Recht' *Revue roumaine des Sciences sociales* Série de Sciences juridique 9 (1965), pp. 3–23 and '»Le problème du droit naturel« à la lumière de la philosophie marxiste du droit' *Revue roumaine des Sciences sociales* Série de Sciences juridiques 10 (1966) 1, pp. 19–40.

[131] Maria Borucka-Arctowa 'The Conception of Legal Consciousness as a New Approach to the Problems of Natural Law' in *Contemporary Conceptions of Law* ed. Adam Łopatka (Warsaw: Polish Academy of Sciences Institute of State and Law 1979), pp. 153–170.

[132] E.g., Viktor Knapp *Filozofické problémy socialistického práva* [The philosophical problems of socialist law] (Praha: Nakladatelstvi Československá Akademie Ved 1967) 287 pp. See also his 'Legal Sciences' in *Main Trends of Research in the Social and Human Sciences* (Paris & The Hague: Mouton 1978), part II [Unesco].

[133] E.g., by Hermann Klenner, 'The Marxist Conception of Human Rights' *Retfærd* (1977), No. 6, pp. 8–20 and *Vom Recht der Natur zur Natur des Rechts* (Berlin: Akademie-Verlag 1984) 234 pp.

MARXism eventually legitimated its existence as a trend of legal theorising acknowledged worldwide.[134] However, as a counter-balance (by marking its almost exclusive political acceptance) the Western Cold War practice also continued. Separated from Western MARXism, Western interest in regional theoretical developments remained unduly selective, in striking disrespect of the genuine merits of scholarly achievement. Only Soviet and ideologically biased authors could come into its focus. Authors like KERIMOV,[135] TUMANOV, NEDBAILO and others, or the Polish Academy of Sciences Institute of Law director, ADAM ŁOPATKA, the East German KARL A. MOLLNAU[136] or the Bulgarian academician POPOV,[137] who were by no means weighty or outstanding, were favoured by this.

Notwithstanding all that, as to the internal development of legal theorising in the region, remarkable works and noteworthy contributions emerged, owing to which possibilities opened up for genuinely progressive strategic steps as well. Indeed, scholarly advancement is indicated by collections[138] and journals launched in the period,[139] as well as by individual accomplish-

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[134] E.g., by Jerzy Wróblewski, 'State and Law in Marxist Theory of State and Law' *Wayne Law Review* 22 (1976) 3, pp. 815–839, 'Problems of Legality in Marxist Theory' *Archiv für Rechts- und Sozialphilosophie* 62 (1976), pp. 497–515 and 'The Philosophical Problems of Legal Theory in Marxist Interpretation' *Archivum Iuridicum Cracoviense* XI (1978), pp. 41–56.

[135] With a military procurator's past in [East-]Germany but with an ability to communicate in Russian exclusively, cf., e.g., *Право и коммунизм* [Pravo i kommunizm / Law and communism] red. В. А. Керимов [V. A. Kerimov] (Москва: Юридическая литература [Moscow: Iuridicheskaia Literatura] 1960) 207 pp.

[136] Karl A. Mollnau *Vom Aberglauben der juristischen Weltanschauung* (Berlin: Akademie-Verlag 1974 & Frankfurt am Main: Verlag Marxistische Blätter 1975) 73 pp. [Zur Kritik der bürgerlichen Ideologie 53].

[137] Petur N[ikolov] Popov *Kritika na sovremenniia burzhoazen praven normativizma* [Criticism of contemporary bourgeois legal normativism] (Sofia: Nauko i Izkustvo 1964) 591 pp.

[138] From among the early festschrifts, see *Études juridiques en l'honneur du Professeur Trajan A. Ionesco* réd. Ion Vintu, Anita M. Naschitz & Ion Nestor as a special issue of *Revue roumaine des Sciences sociales* Série de Sciences juridiques 12 (1968) 1, 155 pp. For collections at an international level, cf. *Archives de Philosophie du Droit* 12: Marx et le droit moderne (Paris: Sirey 1967) x + 391 pp. and Norbert Reich *Marxistische und sozialistische Rechtstheorie* (Frankfurt am Main: Athenäum 1972) 235 pp. [Studien und Texte zur Theorie und Methodologie des Rechts 12], and at a national one, *Law and Future of Society* [ed. Adam Łopatka & Anna Szklennik] (Warsaw: Polish Academy of Sciences Institute of State and Law & Polish Section of International Association of Philosophy of Law and Social Philosophy 1977) 177 pp.; *Contemporary Conceptions of Law / Die marxistische Konzeption des Rechts* red. D. Kerimow (Moskau: Gesellschaftswissenschaften und Gegenwart 1979) 90 pp. [Probleme der modernen Welt 26].

[139] E.g., *Archivum Iuridicum Cracoviense* [Komisja Nauk Prawnych PAN, Oddział PAN w Krakowie] I– (1968–).

ments that soon became internationally acclaimed, like the treatise of RADOMIR D. LUKIĆ,[140] or the theoretically founded and sophisticatedly developed re-institutionalisation of legal sociology in the Socialist orbit by KÁLMÁN KULCSÁR.[141] Other examples include the legal philosophy that VILMOS PESCHKA dogma-critically developed from the tenets of MARXism using HEGEL and LUKÁCS as bipolar frames,[142] or the re-introduction of legal comparatism with theoretical foundations and methodological outlines on its Socialist specificities, extended to the whole region, by IMRE SZABÓ and ZOLTÁN PÉTERI[143] and—at last but not least—the historico-comparative private-law elaboration of GYULA EÖRSI, formulating pioneering recognitions, rich in insights of a thought-provoking depth, testifying to an imposingly profound erudition.[144]

e) Together with Western Trends

An integration that may ensure the place of legal philosophising within the orbit of Socialism's MARXism as one of the internationally renowned contem-

[140] By Radomir D. Lukić, *Théorie de l'Etat et du droit* [1951] trad. Marc Djidara (Paris: Dalloz 1974) 600 pp. [Philosophie du Droit 13] and 'La giustizia e l'objettività del diritto' *Rivista internazionale di Filosofia del Diritto* XLI (1964) VI, pp. 679–688 as well as *Sur la philosophie du droit* éd. Radomir Lukić (Beograd 1978) 658 pp. [Académie serbe des Sciences et des Arts: Classe des Sciences sociales].

[141] For an evaluation in summary, see Péter Szilágyi 'Jogbölcselet' [note 97]. Unfortunately, the festschrift published in honour of KÁLMÁN KULCSÁR does not cover his legal profile, focusing solely on his production in the field of political sciences and sociology.

[142] The festschrift dedicated to him—*Van és legyen a jogban* Tanulmányok Peschka Vilmos 70. születésnapjára [Is and ought in law: Lectures in honour of Vilmos Peschka's 70th birthday] (Budapest: Közgazdasági és Jogi Könyvkiadó & MTA Jogtudományi Intézete 1999) 421 pp. [Jog és jogtudomány 16]—offers, unfortunately, no overview, evaluation or bibliography.

[143] Starting with *Studies in Jurisprudence* for the Sixth International Congress of Comparative Law (Budapest: Akadémiai Kiadó 1962) 147 pp. and *Études en droit comparé – Essays in Comparative Law* ed. Zoltán Péteri (Budapest: Akadémiai Kiadó 1966) 283 pp., the Hungarian contributions to the international congresses of comparative law have regularly been published up to the present day.

As the first distinctively scholarly position of Socialist comparatism, see *A Socialist Approach to Comparative Law* ed. Imre Szabó & Zoltán Péteri (Budapest: Akadémiai Kiadó & Leyden: Sijthoff 1977) 235 pp.

A festschrift for Péteri appeared as the special issue of *Acta Juridica Hungarica* (ed. Csaba Varga) 40 (1999) 3–4, pp. 121–246, then, as *Ius unum, lex multiplex* Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy) ed. H. István Szilágyi & Máté Paksy (Budapest: Szent István Társulat 2005) 573 pp. + bibliography [Philosophiae Iuris // Bibliotheca Iuridica: Libri amicorum 13].

[144] Cf. note 55.

porary trends, each of them serving as the imprint of underlying cultural aspirations with the potential of equal representation in scholarship, may have been a great advance indeed. In addition to Hungary's launch of a new school of theoretical legal thought—in which SZABÓ (all along regarded as an equal partner in science-political games) had still preserved his authority both formally and informally notwithstanding the fact that in legal philosophy it was PESCHKA, and in legal sociology, KULCSÁR, who marked Socialism's MARXism as a professional direction in law—, the accomplishments made in Poland and pre-1968 Prague were equally worthy of recognition.[145] All this could not change the mainstream, of course. The political treatment of anything of MARXism in the Soviet Union and the German Democratic Republic was still not capable of transcending the horizons drawn by "class struggle" and "ideological combat" against the phenomena of "anti-MARXism".[146]

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[145] Jerzy Kowalski *Funkcjonalizm w prawie amerykanskim* Studium z zakresu pojecia prawa [Functionalism in American law] (Warszawa: Pañstwowe Wydawnictwo Naukowe 1960) 261 pp.; Kazimierz Opałek & Jerzy Wróblewski *Współczesna teoria i socjologia prawa w Stanach Zjednoczonych Ameryki Polnocnej* [Theory and sociology of law in the USA] (Warszawa: Pañstwowe Wydawnictwo Naukowe 1963) 320 pp.; Zdenek Kryštufek *Historické základy právního pozitivismu* [Historical outlines of legal positivism] (Praha: Nakladatelstvi Československi Akademie Věd 1967) 189 pp.; Анатолий Александрович Тилле [Anatoliy Aleksandrovich Tille] Социалистическое сравнительное правоведение [Sotsialisticheskoe sravnitelnoe pravovedenie / The socialist comparative jurisprudence] (Москва: Юрид. лит-ра [Moscow: Yurid. lit-ra] 1975) 207 pp. as well as Анатолий Александрович Тилле & Георгий Васильевич Швеков [Anatoliy Aleksandrovich Tille & Georgiy Vasilevich Shvekov] *Сравнительный метод в юридических дисциплинах* [Comparative method in legal disciplines] [1973] (Москва: Высш. школа [Moscow: Vyssh. shkola] 1978) 192 pp.

[146] *Против современной правовой идеологии империализма* red. Владимир Александрович Туманов [Vladimir Aleksandrovich Tumanov] (Москва: Прогресс [Moscow: Izd-vo inostrannoy lit-ry] 1962) 340 pp. and *Против совренной буржуазной теории права* [Protiv sovremennoi burzhuaznoi teorii prava / Against the contemporary bourgeois theory of law] red. Владимир Александрович Туманов [V. A. Tumanov] (Москва: Прогресс [Moscow: Progress] 1969) 288 pp.; as well as, by V[ladimir] A[lexandrovich] Tumanov 'Contemporary Anti-marxism and the Theory of Law' Soviet *Law and Government* 8 (1969) 1, pp. 3–20 and *Contemporary Bourgeois Legal Thought* A Marxist Evaluation of the Basic Concepts, trans. John Gibbons (Moscow: Progress 1974) 311 pp. [Theories and Critical Studies] / *Pensée juridique bourgeoise contemporaine* Appréciation marxiste des conceptions fondamentales, trad. Sarwat Anis Al-Assiuty (Moscow: Edition du Progrès 1974) 392 pp. / *Bürgerliche Rechtsideologie* trans. Anni Helmbrecht (Berlin: Staatsverlag 1975) 344 pp.

Ad 4: To Disintegration

a) Loss of Attraction as Mere Epigonism

The Soviet,[147] East German[148] and Czechoslovakian[149] legal theories were summations of dogmas and ideological statements in want of any genuine innovation and, therefore, discouraged any monographic research with new scholarly recognitions. They, thus, became increasingly relegated to producing text-books alone, in addition to articles published in the official periodicals of the profession (like *Советское государство и право* [Sovetskoe gosudarstvo i pravo, Moscow], *Staat und Recht* [Berlin] and *Právník* [Prague].

b) Exclusivity of Competing Directions

At the same time, some divisions began to mark the scene. First of all, authors independent of MARXism won international fame (foremost JERZY WRÓBLEWSKI, followed—to a much lesser extent, due to his 'detours' in political science—by KAZIMIERZ OPAŁEK and—although not competing with the former in productivity or ingenuity, yet remaining the most spiritually intact of them—ZYGMUNT ZIEMBIŃSKI), in company with survivors who had never been MARXists themselves as, for instance, the Moravian OTA WEINBERGER. Curiously enough, some magisterial oeuvres of Socialism's MARXism (such as the ones by PESCHKA and KULCSÁR, the Polish STANISŁAW EHRLICH[150]—with a wide reputation already in political sociology—and GERHARD HANEY[151]—perhaps with less outstanding and lasting personal accomplishments yet standing out from the East German bloc with his un-

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[147] E.g., as a belated recognition, M. S. Strogovich 'Judicial Law: As Subject, System, and Discipline' *Soviet Law and Government* 19 (1981) 3, pp. 21–35.

[148] See, as one of the nonetheless most known products of East Germany, Gerhard Haney 'Der materialistische Rechtsbegriff (Ein Diskussionsbeitrag)' in *Festschrift für Erich Buchholz* I (Berlin: Humboldt-Universität 1987), pp. 62–71.

[149] E.g., *Law, Culture, Science and Technology* (Prague: Èeskoslovensky Komitet IVR 1987), with J. Cuper 'Types of Metascientific Reflection in Marxist–Leninist Science of State and Law' on pp. 102–128 in it.

[150] By Stanisław Ehrlich, *Le positivisme juridique, la sociologie du droit et les sciences politiques* (Wrocław: Zakład. Narodowy Imienia Ossolińskich, Wydawn. Polskiej Akademii Nauk 1965) 18 pp. [Accademia polaccoa di scienze e lettere / Biblioteca di Roma / Conferenze 28] and *Studia z teorii prawa* [Studies in legal theory] (Warszawa: Państwowe Wydawn. Naukowe 1965) 404 pp. [Z prac Katedry Teorii Państwa i Prawa Uniwersytetu Warszawskiego 4].

[151] By Gerhard Haney, *Sozialistisches Recht und Persönlichkeit* (Berlin: Staatsverlag der Deutschen Demokratischen Republik 1967) 317 pp. / *Социалистическое право и личность* Sotsialistitsheskoe pravo i litshnoszt'] (Москва: Прогресс [Moscow: Progress] 1971) 335 pp.

conditional humanism) could join the former, as entitled to equal respect. Those emerging by unfolding research as independent authors could also awaken international attention.[152]

c) Fellowship with »Bourgeois« Trends

Thereby, a kind of natural co-existence started to be welcome again in both international co-operation[153] and national self-representation[154]—with only the Soviets, East Germans, post-1968 Czechoslovakians, Bulgarians and Romanians remaining outside, persisting with confrontation without critical depth.[155] As a memento of Soviet imperialism, the Baltic countries remained a still unknown dark spot on the map of Europe. Their local literature could not even pass the internal Soviet borders, and their representatives were excluded even from Socialist internationalism.[156] As to Albania, even textbooks remained unknown. Providing elementary information, its Tirana-based journal *Drejtësia Popullore* [People's law] had a table of contents in French, and library research could find some references—especially to crime-prevention and vendetta—in Kosovo's Serbian language literature.

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[152] E.g., Csaba Varga *Politikum és logikum a jogban* A jog társadalomelmélete felé [The political & the logical moment in law: Towards a social science theory of law] (Budapest: Magvető 1987) 502 pp. [Elvek és Utak] or Sofia Popescu *Conceptii contemporane despre drept* (Bucuresti: Editura Academiei Republicii Socialiste România 1985) 187 pp.

[153] E.g., *Synthesis Philosophica* [Zagreb] III (1988) 1, special issue on 'Contemporary Philosophy of Law', pp. 223–331.

[154] See the periodical (collection-like and short-lived, on account of the early death of its founding editor-in-chief JERZY WRÓBLEWSKI), characterised by an expressedly Western European ideal of style, of *Studies in the Theory and Philosophy of Law* [Łódz] I–V (1986–1989).

[155] E.g., *Проблемы государства и права в современной идеологической борьбе* [Problemi gosudarstva i prava v sovremennoi ideologicheskoi bor'be / Problems relating to the state and law in the contemporary ideological fight] red. Я. Радев & В. А. Туманов [Ya. Radev & V. A. Tumanov] (Sofia: Nauka i izkustvo & Москва: Юридическая Литературa [Moscow: Iuridicheskaia Literatura] 1983) 206 pp.

[156] The richness of the problems covered by their literature during the Soviet period became cognisable only afterwards, insofar as this can be judged at all from the few hundred multiplied specimens of their publications in the Russian language that could, after independence was regained, become available in Hungarian libraries (due to my initiative and thanks to the libraries of the University of Tartu and the Latvian Academy of Sciences in Riga). For, during the Soviet era, neither the world's richest specialised collection at the Leyden Institute of Socialist Law nor the legendarily richest-in-its-Baltic-profile private library of Professor DIETRICH A. LOEBER [Kiel] had had reliably full documentation.

d) An own Trend, Internationally Recognised

Despite any emphatically independent presence,[157] the past still haunts us. Until the Cold War's complete end, each step forward, independent of whether or not it was promising in itself, remained Janus-faced and ambivalent. For instance, the co-operative acknowledgement of the intellectual output of the region at once became devalued by the *Realpolitik* of a world split into two, which perceived the Soviet Union as the sole representative of Socialism for the Western academic community, thereby also discouraging exactly the creative and reformatory innovations, achieved at the price of great risk, in the Socialist bloc's inner and outer peripheries, to such a degree that the issue had to be raised whether or not any respect could be achieved for immanent scholarly values in a world so politically torn apart. Or, otherwise formulated, whether or not this is the over-politicised and simplifying way of thinking, characteristic of great powers, that may have also captivated the free world's scholarship to such a degree that this could deform it into one of the last buttresses of the world's bipolar division by dedicating all their interest to the Soviets, leaving unnoticed achievements in Central Europe, a bloc of some one hundred million inhabitants.[158]

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[157] E.g., *Polish Contributions to the Theory and Philosophy of Law* ed. Zygmunt Ziembiński (Amsterdam: Rodopi 1987) viii + 212 pp. [Poznan Studies in the Philosophy of Sciences and the Humanities 12].

[158] Until my own compilation [note 90], there was scarcely any monograph or anthology processing Western and so-called Eastern MARXism in one corpus.

As against the previous decades' clearly ideological attitudes in referring to the underlying authoritarian and totalitarian political scheme—mostly as "Communist" or "Soviet" in, e.g., Edgar Bodenheimer 'The Impasse of Soviet Legal Philosophy' *Cornell Law Quarterly* 38 (1952) 2, pp. 51–72; Hans Kelsen *The Communist Theory of Law* (New York: Praeger & London: Stevens 1955) viii + 203 pp.; Lapenna *State and Law* & Stoyanovitch *La philosophie du droit en U.R.S.S.* [note 52]; Dieter Pfaff *Die Entwicklung der sowjetischen Rechtslehre* (Köln: Verlag Wissenschaft und Politik 1968) 286 pp. [Abhandlungen der Bundesinstitute für ostwissenschaftliche und internationale Studien XIX]; Umberto Cerroni *Il pensiero giuridico Sovietico* (Roma: Editori Riuniti 1969) 260 pp.—, the designations were to develop into "MARXist" and "Socialist" or, rarely, "MARXist–LENINist", as in, e.g., *Marxistische und sozialistische Rechtstheorie* hrsg. Norbert Reich (Frankfurt am Main: Athenäum 1972) 235 pp. [Studien und Texte zur Theorie und Methodologie des Rechts 12]; Dieter Kühne *Der marxistisch–sozialistische Rechtsbegriff* Eine kritische Stellungnahme (Berlin & München: Duncker & Humblot 1985) 123 pp. [Münsterische Beiträge zur Rechtswissenschaft 11]; Per Mazurek 'Marxistische und sozialistische Rechtstheorie' in *Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart* 4th ed. Arthur Kaufmann & Winfried Hassemer (Heidelberg: Müller 1985), pp. 327–343 [Uni-Taschenbücher 593]; Alois Troller *Das Rechtsdenken aus bürgerlicher und marxistisch–*

e) A yet Progressive Role

The stressed discontinuity of the pre-Socialist past—and, in the Soviet Union, the total neglect of the academic accomplishments (in St. Petersburg, Kazan, Odessa, etc.) of the whole development of legal-theoretical thought in the Tsarist era prior to the Bolshevik revolution[159]—with the official negation of any connection (in terms of the history of ideas) to Western thought[160] seemed finally to come to an end. Following more than half a century of almost complete disinterest in both Roman law and the Western history of political and legal ideas, eventually the memory of the former civilisational achievements—with an aspiration to revive them—reappeared along with a sense of the continuity and scholarly cultivated preservation

leninistischer Perspektive (Zürich: Schulthess 1986) 80 pp. and Valentin Petev *Kritik der marxistisch–sozialistische Rechts- und Staatsphilosophie* (Berlin: Duncker & Humblot 1989) 161 pp. [Münsterische Beiträge zur Rechtswissenschaft 37]}.

[159] Cf., e.g., by the author, 'Philosophy of Law in Central and Eastern Europe: A Sketch of History' *Acta Juridica Hungarica* 41 (2000) 1–2, pp. 17–25 {& 'Central and Eastern European Philosophy of Law' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 98–100 [Garland Reference Library of the Humanities, 1743]}.

[160] Just as recalling how in the history of commerce in books, the printing of pamphlets as part of the market of pulp literature increased the spread of French Enlightenment ideas and disseminated new insights, it is useful to remember that academic publishing during the Tsarist era was limited to a few hundred copies; the basic classics of Western thought were neither translated nor made available in Soviet times; and even the elementary foundations of Western philosophy were exclusively taught in specific faculties. As a result, there emerged an acutely differing civilisation in the Soviet Union, distinct from the Western one, both in terms of the underlying mentality and of the intellectual framework. The only sources for comprehension of the Western world were afforded by quite sporadic and disdainful references in the usual textbooks on historical materialism.

Even in Hungary, very few of those privileged had the possibility to arrive, on the field of the history of politico-legal ideas, from the rudimentary rejection—by, e.g., György Antalffy, Ignác Papp & Béla Popovics *Lectures on the History of Political and Legal Thinking* (Szeged 1973) 127 pp. [Acta Universitatis Szegediensis: Acta juridica et politica 20/6]—to, by Grzegorz Leopold Seidler, *Myśl polityczna starozytności* [The political thought of the Antiquity] (Kraków: Wyd. Literackie 1961) 255 pp., *Myśl polityczna œredniowiecza* [The political thought of the Middle Ages] (Kraków: Wyd. Literackie 1961) 364 pp. {in Hungarian unified trans. István Kállay, Béla Popovics & Teréz Zsembery: *Politikai gondolkodás az ókorban és a középkorban* (Budapest: Közgazdasági és Jogi Könyvkiadó 1967) 454 pp.}, and *Doktryny prawne imperializmu* [The legal doctrines of imperialism] (Kraków: Wyd. Literackie 1957) 174 pp. & (Lublin: Wyd. Lubelskie 1979) 270 pp. {in Hungarian trans. Ferenc Márkus: *Az imperializmus jogi doktrínái* Tanulmányok (Budapest: Közgazdasági és Jogi Könyvkiadó 1961) 202 pp.}, attempting at a genuine (though MARXising) description, sophisticated enough to be withdrawn from circulation and reprinting programs rather soon.

of the past across various historical eras.[161] This had already begun through analysis of its issues within their own environment[162] as well as through publication of compendia synthesising the merits of past research that were worthy of continuation.[163]

Ad 5: To the Present state

Obviously, the more the motive forces of the one-time Communist political and ideological unification, with its dictatorial superstructure's institutional fora of control, became shaken, the more diverse the conditions specific to the countries involved became. In the diversity thus emerging, the desiderata listed below have turned into a common prerequisite (although far from being fulfilled everywhere in a balanced manner):

a) in order to substantiate a brand-new start, one is expected to exert an ideological and political criticism of the Communism's anti-human tendencies,[164] while outlining the potentialities offered by the Rule of Law;[165]

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[161] Vladik Sumbatovic Nersesyantz of the Institute of State and Law of the Soviet Academy of Sciences was literally the only one in Soviet Russia for decades to cultivate jurisprudence based on the history of ideas, whether Western or Eastern. This took place under conditions in which Roman law was practically unknown and the pre-Bolshevik centuries of the history of the Russian state and law were referred to only occasionally, in philological studies carried out on the history of institutions or, let's say, of typography. Cf., e.g., his *Историко-правовые исследования* [Istoriko-pravovie issledovaniia: Problemi i perspektivi / Legal-historical inquiry: Problems and perspectives] (Москва: Академия Наук СССР. Институт государсва и права [Moscow: Akademiia Nauk SSSR Institut Gosudarstva i Prava] 1982) 178 pp., *Право и закон* Из истории правовых учении [Pravo i zakon: Iz istorii pravovih utshenii / Right and law: From the history of legal teachings] (Москва: Наука [Moscow: Nauka] 1983) 365 pp., *Political Thought of Ancient Greece* (Moscow: Progress Publishers 1986) 210 pp.

[162] E.g., *Wissenschaftliche Zeitschrift der Friedrich-Schiller-Universität Jena* 28 (1979) [Wert und Recht: a special issue]; Ioan Ceterchi & Sofia Popescu 'Droit et valeur' *Revue roumaine des Sciences sociales* Série de Sciences juridiques 28 (1984) 1, pp. 13–20; Нено Колев Неновски [Neno Nenovski] *Право и ценности* [Law and values] (София: Изд. на БАН 1983) 146 pp. & (Москва: Прогресс [Moscow: Progress] 1987) 248 pp.

[163] E.g., Viktor Knapp *Teorie práva* [Theory of law] (Praha: C. H. Beck 1995) xvi + 247 pp. [Právnické učebnice].

[164] Above all, В. С. Нерсесйанц [V. S. Nersesyantz] *Наш путь к праву* От социализма к цивилизму [Nash put' k pravu: ot sotsializmua k tsivilizmu / Our road to law: From socialism to civilism] (Москва: Российское право [Moskva: Rossiyskoe pravo] 1992) 349 pp.

[165] E.g., Karl A. Mollnau 'Sozialistischer Rechtsstaat (Versuch einer Charakterisierung)' Neue Justiz 43 (1989) 10, pp. 393–397; О. А. Омельченко [O. A. Omel'chenko] *Идеа правового государства* Истоки, перспективы, тупики [Ideia pravovogo gosudarstva: Istoki, perspek-

b) in order that re-continuation of the broken past can be considered at all, it is necessary to survey the historical preliminaries to recent ideas[166] and institutions; in the context of the above,
c) as a part of raising the issue of "what is to remain from MARXISM?"[167] and, under the circumstances of an allegedly "constitutional" (in fact,

tivy, tupiki / The idea of the legal state: Sources, perspectives, topics] (Москва „Манускрипт" [Moscow: "Manuskript"] 1994) 139 pp.; *Пръемственность и новизма в государственно-правовом развитии России* [Preemstvennosty i novizma v gosudarstvenno-pravovom razvitii Rossii / Standing and novel elements in the development of state and law in Russia] red. В. С. Нерсесйанц [V. S. Nersesyantz] (Москва [Moscow] 1996) 41 pp. [Новое в юригические науке и практике / Novoe v iuridicheskoi nauke i praktike].

[166] E.g., in Russia proper, Едуард Вениаминович Кузнецов [Eduard Veniaminovich Kuznetsov] *Философия права в России* [Filosofiia prava v Rossii / Legal philosophy in Russie] (Москва: Юрид. лит. [Moscow: Iurid. lit-ra] 1989) 205 pp., *Русская философия права* Философия веры и нравственности: Анатолия [Russkaia filosofiia prava: Filosofiia very i nravstvennosti: Antologiia / Russian philosophy of law: An anthology of the philosophy of justice and morality] red. А. П. Альбов [A. P. Al'bov] et al. (Санкт-Петербург: Алетеия [Sankt-Peterburg: Aleteiia] 1997) 398 pp. as well as Н. М. Азаркин [Nikolai Mikhailovich Azarkin] *История юридической мыль России* Курс лекции [Istoriia iuridicheskoi mysli Rossii: Kurs lektsii / Lectures on the history of legal thought in Russia] (Москва: Юридическая Лиературa [Moscow: Iuridicheskaia Literatura] 1999) 528 pp., and, as monographised, И. А. Илйин [I. A. Il'in] *Философия права* Нравственная философия [Filosofiia prava: Nravstvennaja filosofiia / Philosophy of law: Moral philosophy] (Москва [Moscow] 1993); in Estonia, *Историческое в теории права* [Istoricheskoe v teorii prava / Historicity in legal theory] red. И[горь]Н. Грязин [I. N. Gryazin] (Tartu: Riiklik Ülikool 1989) 239 pp. [Studia Iuridica (Historia et theoria) 3] and *Внетеоретические формы отражения права* [Vneteoreticheskie formy otrazheniia prava / Theoretical forms of legal mirroring] red. И. Н. Грязин & П. М. Ярвелайд [I. N. Gryazin & Peeter M. Järvelaid] (Tartu Ülikool 1990) 178 pp. [Studia Iuridica (Historia et theoria) 5] with a commemorative elaboration on ILMAR TAMMELO (pp. 128 et seq.) and VASILY IVANOVITCH SINAISKY (pp. 136 et seq.), as well as Ilmar Tammelo *Varased tööd* (1939–1943) red. Peeter Järvelaid (Hamburg: Loeber 1993) 223 pp. [Eesti õigusteaduse allikad 1]; in Bulgaria, reimpression of Венелин Йорданов Ганев [Venelin Ganev] *Курс по обща теория на правото* Увод. Методология на правото [Kurs po obshcha teoriia na pravoto: Uvod metodologiia na pravoto / Course-book on general theory of law: Methodological introduction to law] 5th ed. predg. Нено Неновски [Neno Nenovski] (София: Акад. изд. „проф. Марин Дринов" [Sofija: Akademichno Izdatelstvo] 1995) 124 pp.; and, in Romania, Barbu B. Berceanu *Universul juristului Mircea Djuvara* [Mircea Djuvara's legal universe] (Bucureşti: Editura Academiei Române 1995) 247 pp.

[167] E.g., with a dramatic *cesura* drawn by the transition, Hermann Klenner 'Was bleibt von der marxistischen Rechtsphilosophie?' in *15th World Congress on Philosophy of Law and Social Philosophy* Plenary Lectures (Göttingen 1991), pp. 113–131 [reprint in *Neue Justiz* 45 (1991), pp. 442–445], Lothar Lotze 'Wege und Irrwege der marxistischen Rechtstheorie' *Archiv für Rechts- und Sozialphilosophie* 78 (1992), pp. 396–406 and Varga 'Introduction' to *Marxist Legal Theory* ed. Varga [note 96], pp. xiii–xviii.

shamelessly "velvet") recommencement[168] (when prominent figures withdrew in discreet silence without facing their personal involvement[169]), some extended research ought to be carried out on the lessons to be drawn,[170] maybe in parallel with studies on National Socialism and other forms of 20th century totalitarianism.[171]

III. Temporary Balance

From among the legal theories of Socialism's MARXism, Hungarian scholarship played a rather balancing role all along. This naturally also involved narrowing and distorting simplifications, especially in the 1950s, even if somewhat milder as compared to the rest of STALIN's "peace camp". Its domestic effect was a hardly justifiable deformation with the loss of the sense of true scholarship. However, what it might have developed into if it had followed a path similar to neighbours (from Italy via Austria to West Germany), with Hungary having been successfully saved from our destiny, may perhaps be most reliably judged by the international role Hungarian theoretical legal thought was able to play even under such conditions. Well,

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[168] Cf., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] {& <http://drcsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/>} & *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008) 292 pp. [PoLíSz Series 7] {& <http://drcsabavarga.wordpress.com/2010/10/25/varga-transition-to-rule-of-law-–-constitutionalism-and-transitional-justice-challenged-in-central-and-eastern-europe-2008/>}.

[169] From the German Democratic Republic, only HERMANN KLENNER (Berlin) and GERHARD HANEY (Jena) had the intellectual integrity of continuing their scholarly undertakeable work. The afterlife of the rest is mostly unknown.

[170] E.g., by Анатолий Александрович Тилле [Anatoliy Aleksandrovich Tille], *Право абсурда* Социалистическое феодальное право [Pravo absurda: Sotsialisticheskoe feodal'noe pravo / The law of the absurd: The socialist feudal law] (Москва: МП „Конт" [Moskva: MP „Kont"] 1992) 239 pp. and *Советский социалистический феодализм* [Sovetskiy sotsialisticheskiy feodalizm / Soviet socialist feudalism] 1917–1990, 2nd ed. (Москва: „Проблем-2000" [Moscow: Probel-2000] 2005) 259 pp.

[171] During the last of the Austrian–Hungarian IVR Symposia we organised with OTA WEINBERGER at Graz/Leibnitz, I discussed at length with HUBERT ROTTLEUTNER of the Free University of Berlin the whys and hows of erecting an institute specialised in carrying out such parallel investigations. The double standard in rejecting red/brown dictatorships has blocked, however, any progress in this direction.

despite any pressure, interference or direct political control, the path Hungarian legal philosophy took has from a relatively early period (throughout and practically without interruption) been characterised by dialogue (simultaneously in several directions) and successful mediation. For it strove to take a middle-of-the-road stance within the Socialist orbit, between the dogmatically over-ideologised Muscovite pole (represented by the Soviet Union and East Germany, accompanied by post-1968 Czechoslovakia and Bulgaria, united in politics and ideology) and the Polish pattern at the other limiting point (offering a political-rhetorical servicing of MARXism while actually bringing about a Western and Atlantic peripheral copy, with some achievements in genuine scholarship)—in addition to the former's rivalry with the Yugoslav TITOan and pre-1968 Prague directions targeting the revitalisation (or "renaissance") of MARXism, re-dogmatising it with a neo-scholastic zeal in fact but refraining from any direct criticism of the West when building its qualifiedly MARXist theory. Moreover, Hungarian theorising had attempted to take a mediator's role (in representation of the entire Socialist bloc) from the turn of the 1950s and 1960s on between the Muscovite orthodoxy and the Western world, by exporting its rich offering in academic journals and monographic productions mostly in English to the rest of the world (especially the Third World). Most Hungarians who contributed to conferences in Moscow, East Berlin and other Socialist capitals could share the almost absurd experience that they encouraged, initiated and managed the flow of the exchange of publications and pieces of information between, say, the Institute for the Theory of State and Law of the Academy of Sciences of the German Democratic Republic (located in the Otto-Nuschke-Strasse, next to the Berlin Wall) and the *Freie Universität Berlin* (some thousand steps in distance) exactly via Budapest. What is even more, the contemporary Western European and Atlantic (in Soviet terminology: "bourgeois", in East German terminology: "imperialist") intellectual influence was mostly channelled via conventionalisations brought through a MARXising filter by Hungarian legal philosophy.[172] For owing to

[172] This became apparent to me through the occasions of my regular participation at the [East] Berlin *Rechtstheoretische Tagungen* organised bi-annually by KARL A. MOLLNAU within that Institute as well as my decade-long co-operation under the auspices of the Institute for State and Law of the Soviet Academy of Sciences (with significant involvement by the Institute of State and Law of the Czechoslovak Academy of Sciences), which was initiated by VLADIK NERSESYANTZ with the view of exploring the moment of historicity in theoretical jurisprudence. It is characteristic that neither the Yugoslavs nor the Poles took part in these. At the same

its procession through (by tracing it back to) original MARXian sources, all this seemed to be irrefutable, and not to be neglected. At the same time, the Hungarian pattern maintained a delicate balance between avoiding scandals and maximising the positive effect it could provoke.[173]

Merely conceivable phenomena do not materialise everywhere, in every circumstance. Depending upon specific conditions, even unshaken scholarly freedom in a liberal atmosphere may result in theoretical conformism, resulting in (and degenerating into) either repeated re-treatment of a single theoretical vision or dominance alternating among a few selected submainstreams or schools, constantly switching over into one another. To be sure, Hungarian legal theoretical thought has shown optimum internal diversity all along, from its upswing starting in the 1960s. To mention just one example, the early collection edited by IMRE SZABÓ in 1963[174] already presented on behalf of all those working in the field quite an abundance of internal problems of legal MARXism, where his own critical view on Socialist normativism (once expounded by VISHINSKY) was extended to a re-appraisal of legal sociologism and historical approach, legal comparatism and axiologism, natural law and the promise of the Rule of Law, and some years later this successful initiative was followed by an elaboration of the historical and theoretical foundations of human rights in a similarly diversified approach.[175] Contrastingly expressed, we might even claim that Hungarian legal theory has from the era of political relaxation proved relatively richer in trends debating and competing with each other than, say, the almost unchallenged HART-unison in Great Britain, which had in fact been monopolistic for decades, after subordinating the variety of approaches to a single one, practically without exception.[176]

Hungarian legal theorising took the professional requirements of scholarship rather seriously within the bounds of feasibility of the times. Possibly

time, however, Hungarians (ZOLTÁN PÉTERI, CSABA VARGA and ANDRÁS SAJÓ) were active in contributing to a bilateral academic co-operation launched by the Belgrade legal theory professor RADOMIR T. LUKIĆ, President of the Serbian Academy of Sciences and Arts, for nearly a decade.

[173] It was in such an atmosphere that, e.g., the collection *Rozvoj teorií a státu a právu a současnost* red. J. Blahož & V. S. Nersesyantz (Praha: Academia 1988) 316 pp. was prepared, including my contribution.

[174] Cf. note 58.

[175] *Socialist Concept of Human Rights* ed. József Halász (Budapest: Akadémiai Kiadó 1966) 309 pp.

[176] Cf., by the author, 'The Hart-phenomenon' [note 120], pp. 83–95.

trying to neutralise the various control channels (especially by the Communist Party Central Committee Bureau, responsible for ideological issues, and the Ministry of the Interior attempts at infiltration) at all times,[177] it could attain quite a recognisably dominant position both in Hungary and the Socialist world. For it abstained from the political and ideological excesses recurrent in both the Muscovite world and Yugoslavia and Poland, thereby preventing accentuated public attention or scandals. Thanks to his over-dominance exerted through personal control, IMRE SZABÓ could achieve the circumstance that neither the fora and personalities of *academia* & *universitas* nor theoretical trends themselves became outlawed in Hungary under the label of "anti-state activity". Of course, this also implies that we had no emblematic scholar resorting to voluntary exile as ADAM PODGÓRECKI had to undertake.[178]

Such and similar features may testify to a high level of commitment, serving the cause of scholarship. A theoretical culture like this, constantly forming through internal debates, was suitable to produce significant results in a number of varied fields. All in all, under the restrictive conditions of Communist dictatorship and despite its ideological dictates, Hungarian theoretical-legal scholarship successfully filled a fermentative role, serving as a model, in at least four mutually related, basically paradigmatic and crucial fields of the theoretical cultivation of legal sciences in the second half of the 20th century:

[177] Professional socialisation at the Institute for Legal Studies of the Hungarian Academy of Sciences included, from the outset, appropriation of the linguistic and stylistic ideal of legal philosophising practised then and there. This was basically patterned on KARL MARX's and THOMAS MANN's complexity of expression and several-times-periodic construction crammed with recurrent interpretive structures, as well as a thoroughly abstract language, made even less easily decypherable by the definitely German-originated sentence construction, while also abounding in foreign terms. So many impediments built with such a baroque verbosity may have deterred even the targeted readers. For sure, the Communist party's professional censors saved themselves not only the almost insurmountable trouble of figuring out the possible meaning of these piles of words but they actually refrained even from merely consuming them.

[178] Author of *Założenia polityki prawa* Metodologia pracy legislacyjnej i kodyfikacyjnej [Legal policy: Methodology of legislation and codification] (Warszawa: Wydawnictwo prawnicze 1957) 139 pp., *Socjologia prawa* [Legal sociology] (Warszawa: Wiedza Powszechna [1962]) 226 pp. [Seria Sygnaly], *Prestiż prawa* [Prestige of the law] ([Warszawa:] Książka i Wiedza 1966) 208 pp. and *Zarys socjologii prawa* [Outlines of legal sociology]. (Warszawa: Państwowe Wydawn. Naukowe 1971) 484 pp., ending by *Law and Society* (London & Boston: Routledge & K. Paul 1974) vii + 316 pp. [International Library of Sociology], compelled to emigrate to Canada in 1977 with his wife, the sociologist MARIA ŁÓŚ.

(1) through making the sociological approach accepted in the Socialist orbit and, owing to its perspective, by presenting the substance of juridicity in the mirror of a new set of criteria in addition to the sole ones recognised by the mainstream positivistic approach it could "explode" the narrow-mindedness of "Socialist normativism" throughout, arriving at a theoretical transcendence that could result in conclusions also appreciable in international dimensions;
(2) through embracing the historico-comparative perspective as, having made it accepted generally in the Socialist world, it cultivated it with extraordinary force and reliable accomplishments;
(3) through introducing an ontological perspective (as against the methodology adopted in Socialism's MARXism, exhausted by its exclusive epistemological perspective), so that it could not only give its developments a theoretical framework but—owing to the ontic explanation of the "lawyerly worldview" [*juristische Weltanschauung*] surpassing the inherent limitations implied by the merely epistemic approaches that are usual in social practices based on mere ideological forms—could also decisively contribute to breaking through any single-focus approach in jurisprudential thought; and
(4) in all of this—as a common effect in synthesis of all of the former—through evolution of a theory of law and modernisation, addressing crucial issues for the future elbowroom and possibilities of Central and Eastern Europe in a responsive way and with a long-run strategic sensitivity.

In conclusion, legal theorising in Hungary has sheltered the relative seriousness, pathos, scholarly commitment, ethical ambition and strategic and tactical responsibility, with the professionalism achievable under the given conditions. Through all this, the Hungarian pattern offered a relatively near-to- optimum alternative in its solutions and responses, a kind of optimality scarcely challengeable by counter-examples lived through under the almost half-of-a-century-long reign of "actually existing Socialism".

AUTONOMY AND INSTRUMENTALITY OF LAW
from a Superstructural Perspective*

1. The Strange Fate of Concepts

Concepts may also have a strange fate. This is even more true if the concepts are placed into differing functions while maintaining the appearance of conceptual identity, thereby tearing them out from the function they were initially meant to fulfil, and planting them into an environment alien to their true nature, where their original determinations can no longer prevail—if not turning them upside-down. Well, if some concepts have to cope with such a fate, then they can surely meet the requirements arising from roles only apparently alien to their nature, more causing controversy than helping create clarity within the medium where they are placed. We can defeat latent dysfunctions only by making them manifest first. Similarly, we can clarify conceptual relations only after their original meanings and functions are disclosed in their original context.

If we inquire about the teachings of Marxism—attempting to circumscribe what Friedrich Engels called the materialist conception of his-

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* In its first version, in *Acta Juridica Hungarica* 40 (1999) 3–4, pp. 213–235 & <http://springer.om.hu/content/x713702123847t53/fulltext.pdf>, abridged from 'A jog mint felépítmény: Adalékok az alap–felépítmény kategóriapár történetéhez' [Law as superstructure: outlines of the history of the pair of categories »base« and »superstructure«] *Magyar Filozófiai Szemle* XXX (1986) 1–2, pp. 35–75, endeavoured at its time to liberate legal philosophising in Hungary by arguments of Lukács from within the same Marxism, from the forced conceptualisation of placing the phenomenon »law« in the relationship of »base and superstructure«, then a compulsory practice dictated by the officially declared "hegemony of Marxism".

tory[1]—, the response will surely rely on the categories of base and superstructure, and formulate the conclusions that KARL MARX arrived at after decades of research. These two categories, however, initially the concise fitting metaphorical formulations of a scholarly presupposition, already started to walk their own independent way in MARX's time. This presupposition, driving the scientific inquiry, that is, a working hypothesis in itself, has first advanced into a scholarly proposition taken as an axiomatic statement sufficient in and of itself, and then into a doctrine, that is, the system of such fundamental propositions. This obviously implied a complete change of functions, since whatever was the starting point now became the final conclusion. In consequence, their apparently concrete deduction is no longer a proof, because of being reduced to a single chance as an illustration of something previously taken as the truth. Such a treatment of concepts naturally went along with theoretical rigidification, with the consequence of further concepts being channelled into forced paths. When a theory infiltrated with such concepts intends to remain consistent with itself, these forced paths radiate in a chain-like reaction, pervading the entire theory, ultimately only to lead to deformation of the whole theory. This unavoidably brings forth full conceptual uncertainty.

Considering that law is primarily a superstructural phenomenon in the MARXian thinking tradition, philosophical evaluation of the categories of base and superstructure may have, for long periods of times, directly influenced the philosophical explanation of law in the orbit of MARXism as well. On the other hand, however fundamental the conception of law as a superstructural component in MARXist legal theory may seem in principle, the uncertainty inherent in its theoretical content just grows, and the silence of criticism will soon transform into the criticism of silence.

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[1] Friedrich Engels 'Karl Marx: »Zur Kritik der politischen Ökonomie«' [1859] in Karl Marx & Friedrich Engels *Ausgewählte Schriften* I (Moscow: Verlag für Fremdsprachige Literatur 1951), p. 343: „materialistiche Auffassung der Geschichte"; or Karl Marx *Die Deutsche Ideologie* [1845–46] in his *Der historische Materialismus* Die Frühschriften, hrsg. S. Landshut & J. P. Mayer, II (Leipzig: Kröner 1952), p. 10 [Kröner Tauschenausgabe 92]: „Wir kennen nur eine einzige Wissenschaft, die Wissenschaft der Geschichte."

An acceptable clarification would again presume cultivation of MARXist philosophy at the level of modern[2] and post-modern[3] times and repeated analyses in all fields with the theoretical aim of returning to the origins of MARX's methodological thinking—in short, this would presuppose what GEORGE LUKÁCS called the renaissance of MARXism. In the absence of this, legal theory must, if anything, at least clarify for what reasons and in what ways its concept on its own subject has changed, and what methodological presuppositions and theoretical results result from expounding law through the use of the categories of base and superstructure.

In the following, as a follow-up to my earlier paper in which the original meaning and functions of the categories of base and superstructure were reconstructed and their deformations and distorting effects on the theoretical understanding of law through its rigidification into sheer doctrinarism were traced,[4] I shall attempt (1) to survey some current issues of philosophical interpretation in relation to these categories, and (2) to outline some potential advantages and theoretical content when these categories are applied in and to legal theorising.

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[2] For a comprehensive survey accompanied by the overall assessment of the theoretical contribution of MARXism to legal studies, cf. *Marxian Legal Theory* ed. and introd. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1993) xxvii + 530 pp. [The International Library of Essays in Law & Legal Theory, Schools 9]. For a report on the current state of legal theorising in the region, cf., by the author, 'Legal Scholarship at the Threshold of a New Millennium' in *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot) = *Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn, pp. 515–531

{& *Acta Juridica Hungarica* 42 (2001) 3–4, pp. 181–201 & <http://www.ingentaconnect.com/content/klu/ajuh/2001/00000042/F0020003/00400027> & <http://springer.om.hu/content/tna87eew2v0jen8y/fulltext.pdf>}.

[3] For the chances of MARXism to continuation in the region, cf., e.g., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: [Akaprint] 1995) 190 pp. [Philosophiae Iuris] & <http://drcsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/> &

<http://en.wordpress.com/tag/taxi-drivers%E2%80%99-blocade-1990/>, particularly at chs. on »No-law« and »Rule of Law«, pp. 19 et seq. and 156 et seq., respectively.

[4] Cf., by the author, 'Autonomy and Instrumentality of Law in a Superstructural Perspective' *Acta Juridica Hungarica* 40 (1999) 3–4, 213–235

& <http://springer.om.hu/content/x713702123847t53/fulltext.pdf>.

I. A Relational Category

As is almost usual with this specific tradition of thinking, the categories of base and superstructure have played an ideological role while attached to varying political practices throughout the one and a half centuries of their development. This explains why the categories of base and superstructure have become core issues for historical materialism cultivated as a political practice itself; categories in the case of which classification and labelling as 'superstructure' imply consequences that do not require any further inquiry.

2. Base and Superstructure: The Original Meaning

The reconstruction of their original meaning, balanced so that they can at the same time display the optimum of both a strong message and justifiability in theory, is a task yet to be fulfilled, if it is at all possible (its final results having only been tentatively advanced as hints within the renaissance of Marxism, as outlined in George Lukács' posthumous Social Ontology), and bears a double task within it. It firstly implies reconstruction of Marx's system of ideas by returning to the identification of the methodological insights formulated in his oeuvre. Secondly, it requires analysis of past periods with the prejudices, presuppositions and entire mentality characteristic of Marx, which obviously will result in new analyses and evaluations in accordance with present-day requirements for old analyses.

The philosophical literature, under the push during the last decades of "actually existing socialism" in Hungary to return to Marx's own methodological considerations, first and foremost emphasised the relative character of the categories of base and superstructure. Thus, base and superstructure are not intelligible categories in and of themselves, but "as correlative categories, they give expression to the undetachable nature, objective in reality, of the relationship between two sides".[5] They do not serve to "make the inventory" of social reality, since they are merely dedicated to characterising phenomena already circumscribed in other ways, from one given perspective: to express the "correlation and relationship"

[5] Róbert[né] Rónai *Alap és felépítmény, társadalmi-gazdasági alakulat – A termelési mód* [Base and superstructure, socio-economic formation & The mode of production] (Budapest: MSzMP Politikai Főiskola Filozófiai Tanszéke 1973) 72 pp. at p. 23.

of heterogeneous totalities to one another.[6] For this reason, they do not have "autonomous and independent meanings"; hence, we ought to speak rather of the category of "relationship between base and superstructure" instead that of "base and superstructure".[7] On the other hand, we ought not necessarily neglect the consideration that these metaphorical and illustrative[8] expressions were borrowed from architecture.[9] Recognising the metaphorical origin, however, is not decisive in and of itself. It can only become decisive insofar as we place the expression in its original contextual environment. In such a case, it becomes conspicuous that MARX did not actually exclude the relative autonomy of the superstructure (neither did he actually confirm it);[10] that is, there is a difference between MARX's concrete inquiries and theoretical generalisations concerning the issue of whether or not the effects of base and superstructure are bilateral or mutual.[11]

The last period of philosophising in terms of MARXism in Hungary before the fall of the imposed regime of communism—as opposed to during earlier periods of STALINist simplification, which accepted the superstructure only as the class-homogeneous formation of a base bearing class-contents—stated unambiguously that superstructure is also multi-layered from a class perspective.[12] However strange it may seem, it still does not claim more than what ANTONIO GRAMSCI formulated half a century ago:

> "By base and superstructures forming a »historical block« [*blocco storico*], the complex, contradictory and heterogeneous totality of superstructures is the reflection of the totality of social relations of production."[13]

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[6] Miklós Kallós & Endre Roth *A társadalmi rendszer* [Social system] (Bucharest: Politikai Könyvkiadó 1978) 316 pp. on p. 156.

[7] Zygmunt Bauman *Általános szociológia* [General sociology] [Zarys marksistowskiej teorii spoleczentswa (Warsaw: PWN 1964)] (Budapest: Kossuth 1967) 601 pp. on p. 117.

[8] Bauman, pp. 116–117.

[9] Kallós & Roth *A társadalmi rendszer* [note 6], p. 156.

[10] R.W. Makepeace *Marxist Ideology and Soviet Criminal Law* (London: Croom Helm & Totowa, New Jersey: Barnes and Noble 1980) 319 pp. at p. 20.

[11] Paul Phillips *Marx and Engels on Law and Laws* (Oxford: Robertson 1980) xiii + 238 pp. [Law in Society Series], p. 201.

[12] Sándor Kárpáti *A társadalom gazdasági alapja és felépítménye* [The economic base and superstructure of a society] (Budapest: MSzMP Budapesti Marxizmus–Leninizmus Esti Egyeteme 1982) 26 pp. at pp. 8–10; *Filozófiai kislexikon* [Philosophical lexicon] (Budapest: Kossuth 1970), p. 9; Rónai *Alap és felépítmén*y [note 5], p. 21.

[13] Antonio Gramsci [Philosophical and historical problems, para. on base and superstructure] from his 'Il materialismo storico e la filosofia di Benedetto Croce' in his *Opere* 2, 8th ed.

The circumstance that GRAMSCI speaks of superstructures in plural in relationship to a given base is self-evident once we apply the concept of superstructure as a generic term from the beginning. It also provides a sensitive hint, suggesting that superstructure can only exist as opposed to the base. That is, superstructure reconciles such heterogeneous phenomena that represent a kind of commonness only in one single respect: as totalities, they have particular relations to the group of social phenomena indicated as their base.

3. Exerting Social Influence as a Conceptual Minimum

May I note that such a characterisation of superstructure excludes from the very start any other perspective from playing a role in the qualification of any given phenomena as superstructure. The acceptable conceptual minimum is as set by LUKÁCS' Ontology as a requirement for all components of social existence, that is, to appear to be exerting social influence in whatever way. Therefore, in this respect, the actual volume of influence exerted will hardly further specify the quality of the superstructure, even if it is not to be felt in too wide of a range and is not so much a determinant for other superstructures and their base as one might consider typical in other cases. Consequently, it may be a major rhetorical or terminological success yet not be justified or have any theoretical content whatsoever, if the superstructure were degraded into a "substructure" in the case of a phenomenon that one considers to have less social influence than may have been initially hoped for.[14]

Conceiving of base and superstructure as relational categories explains why a minimum of influence is already sufficient, or the historically concretely defined grade, character and quality of this minimum may make it suitable to surface in relation to base and superstructure. The conceptual minimum aims at drawing external boundaries; therefore, it does not by any means limit the truth of the fact that the sole content of these relational categories is the connection of various areas, a fact that is precisely—and exclusively—manifest in their mutual influence.

(Rome 1966) [Quaderni del carcere I], trans. in his *Filozófiai írások* [Papers in philosophy] (Budapest: Kossuth 1970), p. 94.

[14] E.g., István Hermann 'A benyújtott számla' [The account presented] *Élet és Irodalom* (26 January 1980), p. 4.

If we say, using the language of LUKÁCS' Ontology, that social existence is an irreversibly advancing process in which the mutual influence, characteristic of the respective complexities, takes place, then it becomes evident that base and superstructure are just the area in which such mutual influence is manifested, this being conceptually equivalent to social existence from the perspective of LUKÁCS' Ontology. However, if the relative category receives its meaning from the fact of mutual influence and from the incessant motion manifest in its dynamism, then it will be confusing, and, moreover, plainly misleading if, when describing superstructure, we suggest stand-still staticism or immobile objectivity expressed in the form of states of rest, and not of dynamic functioning. This is typical of exemplificative definitions,[15] which present the superstructure more as an anatomical cross-section than an organism living by actually exerting influence (reminiscent of LUKÁCS' characterisation of mechanical materialism, according to which, after all, vulgar materialism uses patterns taken from a quasi-religious world-view in the form of metaphors of some active "creator", on the one hand, and passive "creatures", on the other).[16]

Regardless of what criteria we set for such phenomena, their real presence and importance will only be seen in the motion and dynamism of the phenomena in question. This is clearly shown by LUKÁCS' analysis of class-character and ideology. For there can be no set boundaries, because humans take part in social struggles with their entire intellects, and for this very reason, any affirmation or negation of a statement is defined from the perspective of classes. Thus, no boundaries can be drawn as to where an ideology ends and something else starts—since the quality that would underlie such a distinction "is not inherent in the abstract statement itself".[17] The response to such questions can always be revealed from the actual motion of the phenomenon and the historically concrete process of the course in which it will finally become defined. Of course, this is not a novel recognition but merely an application of MARX's methodological idea. It is also

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[15] E.g., *Filozófiai kislexikon* [note 12], p. 9; Lajos Erdélyi 'Alap és felépítmény' [Base and superstructure] in *Történelmi materializmus* [Historical materialism] (Budapest: Kossuth 1980), p. 95.

[16] György Lukács *A társadalmi lét ontológiájáról* [Zur Ontologie des gesellschaftlichen Seins] III [Prolegomena: Prinzipienfragen einer heute möglich gewordenen Ontologie] (Budapest: Magvető 1976), pp. 350 et seq.

[17] Hans-Heinz Holz, Leo Kofler & Wolfgang Abendroth *Conversations with Lukács* ed. Theo Pinkus (London: Merlin 1974) 155 pp. on pp. 43–44.

a fundamental principle of LUKÁCS' Ontology that social existence, similar to other types of existence, is process-like, manifest in its irreversible advancement.

4. Relationships within the Prevailing Totality

Emphasising the dynamic nature of superstructure excludes the possibility of conceiving of it as a passive medium with respect to the base, in which "the former defines the latter in an absolute manner, »by the force of the laws of nature«"[18]. base and superstructure are by no means opposable to one another on grounds of some sort of exclusivity, and also their treatment as relative categories can merely be raised upon the basis of their inseparability accepted from the beginning. "Base and superstructure as correlative categories express the relationship between two sides objectively inseparable in reality."[19] This refers to the limits of the metaphor of "base" and "superstructure", to the fact, that their meaning borrowed from architecture cannot be extended further.[20]

In its architectural use, the base does not bear an independent function, its only function being to remain static, that is, subordinated and merely instrumental. It is designed to support the superstructure and to facilitate its self-realisation. With regard to the relationship between economics and other spheres, it is precisely the instrumental role of the latter that is relevant. The economic sphere bears relatively independent functions and values that were absolutised by the STALINian conception, attaching a teleology borrowed from a quasi-religious world-view to the process of history. At the same time, in architecture, the creation of base and superstructure is a process following a strict succession, which, even if being irreversible, is still breakable at any moment. If this occurs, the construct will not be finished, yet it will be complete according to the level and measure of its readiness at any given time. Well, it was this notion of succession and previous foundation that led philosophical thought into a dead-end when, instead of starting from inseparable intertwinement, it pre-

[18] Lukács *A társadalmi lét…* III [note 16], p. 349 [„die absolute »naturgesetzliche« Determiniertheit" in *Prolegomena*, p. 520, in the last MS in German, typed with autograph corrections, at M/153 in Lukács Archives and Library of the Hungarian Academy of Sciences].

[19] Rónai *Alap és felépítmény* [note 5], p. 23.

[20] Kallós & Roth *A társadalmi rendszer* [note 6], p. 160.

sumed that a base can be created in and of itself, which itself will create a suitable superstructure for its own service.

When speaking of the relationship between base and superstructure, we have already established that the issue can only be raised upon the philosophical foundations of total interrelations between totalities, being reasonable exclusively as the relationship between inseparable conceptual sides. How their relationship is apprehensible within this range is a fundamental question of MARXist philosophy, not yet adequately formulated to this day. We can see from the very beginning how subtle, while still striving to unravel multiple interrelations, the answers MARX outlined were when he analysed socio-economic relations in early times; how and why these formulations on the system of relations later became one-sided in the generalisations of the classics of MARXism; how further simplification and use leading to theoretical distortion eventually convinced ENGELS to reconstruct this system of relations as well in his late letters, on the plane of theoretical generalisation in its actual complexity; and, finally, how it almost turned into mechanical determinism in STALINist theory[21]—primarily in order to justify voluntaristic political practice, by drawing it into the mist of an almost automatically self-fulfilling quasi-historical necessity.

5. Attempts at Interpretation in Hungary

In Hungary, beginning with (and practically ending by) the 1980s, in light of such antecedents the philosophy of MARXism searched for points of references to correct the distortions incurred in the previous era and to reconstruct MARX's original methodological ideas. The attempts were manifold indeed. In the present paper, I can present but a few characteristic examples, worthy even today of philosophical reflection from a methodological perspective.

One of the approaches sought a modern formulation of the (as alleged, eventually) determinant role of the economy by comparing and reformulating the relevant stances taken by the classics of MARXism in this matter.

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[21] Cf., by the author, 'A jog mint felépítmény: Adalékok az alap–felépítmény kategóriapár történetéhez' [Law as superstructure: outlines of the history of the pair of categories »base« and »superstructure«] *Magyar Filozófiai Szemle* XXX (1986) 1–2, pp. 35–75, particularly at paras. 1–2.

> "What we do not acknowledge is that ideas and opinions may have a development independent of the economic conditions. Ideas always originate on grounds of certain economic conditions—that is, the economic base—, but after being born they react upon this base, influence its development and play an active social role."[22]

This approach clearly shows the efforts to eliminate the relics of the mechanical deterministic approach by pointing to the interrelations manifest in the social existence in their dialectic interaction. Thanks to its subtleness, this formulation is hardly refutable but it is still questionable as a complete response, because it suggests that a system of economic conditions (as a kind of base) could apparently be created alone, without any previous interaction with some sort of a superstructure, that is, as if something mutually exclusive could exist b e f o r e and a f t e r the course of the development of base and superstructure.

Another approach tried to provide an answer through the help of the LENINist theory of reflection. According to this, the reference was provided by establishing that "[t]he superstructure reflects the economic base." The actual meaning soon came to light after the key-notion had been interpreted: "We call reflection the phenomenon when the processes within one given system have an impact upon another system."[23] The notion of reflection thus defined is by no means unproblematic as it helps the survival of trends of ideas that, during the development of MARXism in the 20th century, replaced the ontological approach more and more exclusively and distortingly with an epistemological one, thereby evoking sharp criticism from LUKÁCS as he wrote his Ontology.[24] It is true, however, that notionally we cannot speak of distortion in the case of LUKÁCS, as the definition of reflection we quoted ascribes both epistemological and ontological importance

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[22] Kárpáti *A társadalom...* [note 12], p. 16.

[23] Kallós & Roth *A társadalmi rendszer* [note 6], p. 162.

[24] Cf., e.g., with my own efforts since the time of my *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1998]) 193 pp., which was already qualified by one of its reviewers, namely, the editor of LUKÁCS' works in German, as an early formulation of autopoietical theory. See Frank Benseler in *Zeitschrift für Rechtssoziologie* 8 (1987) 2, pp. 302–304. For the understanding of autopoiesis in an ontological reconstruction of apparently epistemological (or, properly speaking, epistemology-bound) processes in law, cf., by the author, *Theory of the Judicial Process* The Establishment of Facts [1992] 2nd {reprint} ed. with Postfaces I and II (Budapest: Szent István Társulat 2011) viii + 308 pp. & <http://drcsabavarga.wordpress.com/2012/03/13/varga-theory-of-the-judicial-process-the-establishment-of-facts-19952011/>.

to this notion, but, once having provided that 'reflection' becomes a mere synonym of 'exerting influence', it will necessarily lose its particular quality to embody an independent category. On the other hand, it is also problematic if both 're|flection' and 're|action' presume a previously existent agent, which could be born sufficiently in and of itself in order to enter into contact with other factors only later. This is to say that reflection theory obscures exactly the most sensitive issue in the relationship of base and superstructure, namely that this is a relationship between aspects that originally have developed together, mutually and bi-directionally from the earliest points of their development.

Finally, there was an attempt that tried to provide answers based on LUKÁCS' Ontology in opposition to the simplifications rigidified into prejudices within MARXism. Accordingly,

> "essentially we can distinguish two kinds of mutual aspects within the total interrelations of social complexity: mutual conditioning, on the one hand, and boundness to conditions, on the other, in case of the latter one moment irreversibly preconditioning the other."

The first type of correlation is—in LUKÁCS' terminology—characterised by the predominance of one of the moments, and the other, by ontological priority. Well, based on this conclusion, only the latter can be the case with regard to the economy, since

> "[t]here was a period in history when the economy functioned without legal regulation, and even today there are numerous areas and relations of economic life which lack legal ordering."[25]

The efforts of the author may have been aimed at disproving the prejudice that wanted to express relationships between law and economy, as well as economy and other sectors, respectively, in the form of a relationship between contents and forms. This attempt was fully successful, moreover, as LUKÁCS' standpoint, too, is unambiguous:

> "form and content ever and always, in the individual subject, complex, process, etc., determine together and only together its specificity, its being as it is [*gerade-so-sein*] (including generality). But it is

[25] V[ilmos] Peschka 'Ideologische Vorurteile über das Verhältnis zwischen Wirtschaft und Recht' *Acta Juridica Academiae Scientiae Hungaricae* 30 (1989) 3–4, pp. 259–274.

> for this very reason impossible that in the determination of real and separate complexes to one another, the one should figure as content, and the other as form."[26]

My doubts arise in relation to the question whether or not any distinction between the two types of mutual aspects derives from this. This is a decisive question, and answers to it are hard to offer as they would presume a philosophically consistent and thought-through re-examination of the multi-directional reasoning in LUKÁCS' Ontology.

6. The LUKÁCSian Stand

In the decades that preceded the "after-MARXism" period, philosophy in Hungary did not take any serious steps toward seizing one of the century's most significant MARXist attempts. Thus, what an outsider may say cannot be more ambitious than the expression of personal meditations. Accordingly, LUKÁCS did indeed speak of ontological priority, but he had to do so independently of the merits of the question. For once he adopted NICOLAI HARTMANN's principle on the ontological construction of structures to build the ontology of complexes on grounds of the distinction between the respective modes of existence, he could not avoid raising the issue of ontological priority, for that was how the separation of the respective spheres of existence was accomplished. This does not necessarily imply that there are such comprehensive complexities within the given spheres of existence, about which the ontological [*seinhaftige*] statement is intelligible: "One of them can exist without the other, without the opposite being the case."[27]

It will be the task of the still-favoured LUKÁCS-philology to clarify these conceptual interrelations. In any case, it is a fact that ontological priority and the predominance of the role played by any one side within this relationship were formulated with contradictory inconsistency on the pages of LUKÁCS' Social Ontology. Ontological priority is, on the one hand, the characterisation of a situation when one phenomenon can exist without another but the latter cannot without the former; and, on the

[26] Lukács *A társadalmi lét...* [note 16] I, p. 409 [George Lukács *Marx's Basic Ontological Principles* trans. David Fernbach (London: Merlin 1978) 173 pp. at p. 151].

[27] Lukács I, p. 307 [Lukács *Marx's...*, p. 31].

other, it is the characteristic of one given side within an interaction that (as the predominant moment) ultimately exerts the last and decisive influence. LUKÁCS mentions ontological priority first when speaking of the distinction between the organic and inorganic, as well as social, modes of existence. Later he mentions it with regard to the relationship between being and consciousness, only to make clear immediately their relationship (again as ontological priority) with respect to base and superstructure.[28] He subtly states that MARX "does not reduce the world of consciousness with its forms and contents directly to the economic structure, but rather relates it to the totality of social existence"; but he does so as if forgetting that "the totality of social existence" is basically inconceivable without "the world of consciousness with its forms and contents".[29] The situation is rather similar when he emphasises that "the ontological priority of production, as a predominant moment, prevails everywhere", and he does not see any inconsistency in recording through the next sentence that the relationship between production and consumption "stands very close to the reflexive determinations discussed with regards to HEGEL".[30] Ontological priority becomes the synonym of predominance manifest in the interaction when LUKÁCS discusses the relations between material processes and "purely" mental ones in relation to production:

> "The more socialised a society is, the more inseparably intertwined in the material production the two processes are. Nobody denies their ontological differences, but the primary ontological fact of their effects in the field of social existence is that they inseparably co-exist […]. Issues of primacy can only be raised reasonably when the inseparable co-existence is recognised in the analysis of this group of phenomena."[31]

Finally, we can also find examples of the ways in which actual ontological priority slips into a medium where mere interactions prevail:

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[28] Lukács I, p. 147.

[29] Lukács I, p. 307 [Lukács *Marx's*..., p. 32].

[30] Lukács I, p. 331.

[31] Lukács III, p. 352. [„Je mehr die Gesellschaft sich vergesellschaftet, desto untrennbarer sind beide Prozesse, gerade in der materiellen Produktion, ineinander verschlungen. Ihre ontologischen Verschiedenheiten werden damit natürlich nicht geleugnet. Aber das primär ontologische Faktum ihres Wirkens im Bereich des gesellschaftlichen Seins (und ausser dessen Bereich gibt es weder etwas Geistiges, noch von teleologischen Setzungen in Gang gebrachte materielle Prozesse) ist ihre untrennbare Koexistenz." *Prolegomena*, p. 525.]

> "From the ontological priority of one mode of existence a positive or negative evaluation by no means derives from the perspective of some sort of a hierarchy of values. It is only about the bare establishment of the fact that the biological reproduction of life forms the existential base of all manifestations of life, and that the former is ontologically possible without the latter, but not the other way round. The true opposition, as applied to this simple fact, does not derive from the fact itself, but from its specific nature realised within social existence, from the continuous socialisation of the biological-human existence, as a result of which, with time, an entire complexity has taken shape from the ontogenetical reproduction within social existence, and this is the economic sector. The more socialised the human activities are, which, after all, serve to fulfil the demands set by the human biological-ontogenetical reproduction, the stronger the mental resistance is to recognising the primacy of the economic sector over the others."[32]

As much as it is unambiguous that the biological reproduction of life has ontological priority in the sense that it forms the base of all other manifestations of life, so too is it least evident that the economic sector—in the socialised forms of its development, or even at a primitive stage—could be born and function without the development of cognition, the concomitant formation of the complexities designed for the institutionalisation of regulation and order, and without interaction with these. Speaking of large and comprehensive complexes, for instance, the function of social regulation can surely be fulfilled not only by a given partial complex recognised as distinctively legal. It can be fulfilled as well by spontaneous forms (which LUKÁCS already regarded as quasi-legal) that ensure, even in case of a simple co-operation (as in, e.g., the first Robinsonian labour act),

> "the most precise regulation of the obligations of the participants on the base of the concrete labour-process and the division of labour arising from it (beaters and hunters in hunting)".[33]

Thus, in this very context, the question is entirely irrelevant what other complexities the elements and functions form that are, surpassing the bare factual sphere of relations of production, indispensable for the functioning of the economy. There is but one important fact, namely, that for the sake of their own reproduction, humans need to form and operate numerous

[32] Lukács II, p. 237.
[33] Lukács II, pp. 208 et seq.

other functions beyond production, which they cannot give up. At the same time, the self-reproducing human has a crucial role in the formation and operation of such functions.

Returning to the answers concerning the relationship between base and superstructure, we can establish that all these answers were in fact reductionist, as they tried to originate the superstructure from the economic base. Therefore, if we accept the fact of their inseparable existence as a point of reference, then the only thing we can examine within their relationship as base and superstructure is the dynamism of their interaction—being aware that "the basic fact of materialist dialectics is that there is no real interaction (no real reflection determination) without a predominant moment".[34]

The previous development can hardly claim to have clarified the relationship between ontological priority and the predominant moment inherent in the interaction, either by adopting LUKÁCS' use of notions or by pointing beyond it. It is adequate only to raise doubts about the mutually excluding senses of the uses of these notions by shedding light upon their contradictory applications in LUKÁCS' oeuvre. It does not propose anything with regard to the provability of their meanings according to LUKÁCS' strict definition (ontological priority as the possibility of the existence of a phenomenon not preconditioned by the existence of another phenomenon, and the predominant moment as the ultimate determining role exercised by one side within mutually preconditioning interactions), or, providing that they are provable, whether they are provable as categories opposed to one another or merely in some different correlation. In light of our initial question regarding the relationship between base and superstructure, we can still establish that social existence is a complex composed of further complexes already at primitive stages of development, the existence of which is manifest in its irreversibly progressing processual nature—in the form of i n t e r a c t i o n s within which the complex chain of mediations and juxtapositions does not follow unilinear determinations, as everything that mediates (in a given direction) is itself mediated (in another direction). In LUKÁCS' Ontology, it is the category of socialisation that marks the increasingly prevailing tendency of development, manifest in the increasing internal complexity of social existence, the assertion of the particularities of its relatively independent components, and the gradual coming to prominence of purely social determinations. In consequence,

[34] Lukács I, p.333 [Lukács *Marx's...*, p. 63].

in the network of mutual correlations, the purely "material" and the purely "ideal", or the "economic" and other aspects—more comprehensively: the "base" and the "superstructure"—cannot be separated from one another in a way in which the former is able to exist without the latter. This only holds for the greater comprehensive aspects of social existence (that is, for its functions and complexes), and not for its specific forms, as religion, art, politics, law or state, developing and differentiating themselves from one another in a given phase of social development. At the same time, it holds for both that, taken as processes, they are irreversible. (LUKÁCS' example relies on the quote taken from MARX's *Grundrisse*: "Man is a *zoon politikon* in the strictest sense of the word, he is not only a social animal, but an animal which can be isolated only within society.")[35] This is to say that once social existence has developed, the practical defiance of any of its forms can only be conceived as the realisation of one given concrete form of sociality. (Thus, I can establish the absence of state, law, religion or art, defined in one or another way, but this will not alter the necessary fact that some form fulfils, or helps the completion of, the integration of society and regulation of its fundamental conditions, as well as the transcendental and aesthetic self-expression of human beings.)

LUKÁCS does not furnish a convincing answer as to how the ultimate definition in any given interaction prevails and in what concrete way(s) it does so. Nevertheless, he often states on the plane of principles that this does not take place in a mechanical way, nor in a necessarily and directly causal way. On the other hand, remaining true to the genuinely MARXian tradition, he seeks to present the theory of social action built upon alternative possibilities of decision through the empirical presentation of historical examples and concrete case-analyses. His is a theory in which, from multiple mediation and juxtaposition (from the range of mobility of the alternative possibilities of decision, always given in their concrete uniqueness, but on a socially general plane, in every case having well-defined boundaries and drives), the actual decisions derive, pointing in a certain direction of development. Hence, in the process of social determination, it is by no means simply external factors—force, interest, etc.—that have a role, but rather this very concrete process of self-determination will actually take

[35] „Der Mensch ist im wörtlichsten Sinn ein »*Zoon politikon*«, nicht nur ein geselliges Tier, sondern ein Tier, das nur in der Gesellschaft sich vereinzeln kann." Karl Marx *Grundrisse der Kritik der politischen Ökonomie* (Rohentwurf) 1857–1858 (Berlin: Dietz 1953) 1102 pp. [Marx-Engels-Lenin-Institute-Moskau] in p. 6. Quoted also by Lukács II, p. 280.

place through the mediation of social total determination in the recognition of the alternatives of decision and their circumscription, as well as in the evolution and self-assertion of the qualities of human personality in the background (also preconditioned by the actual social total process). LUKÁCS offers a good explanation of the variety of the factors of influence at work here:

> "Whatever may be the immediate relations of pure power, the fact remains that the men who represent these or who are subjected to them are men who have to reproduce their own life under definite concrete conditions, who accordingly possess definite aptitudes, skills, abilities, etc., and who can only behave and adapt accordingly. So if a new distribution of the population takes place from extra-economic power relations, then this is never independent of the economic inheritance of the past developments, and a double settlement of the future economic relations necessarily arises from an interaction between the human groups who are stratified in this way."[36]

Thus, whatever we called the predominant moment of the interactions prevails only through largely indirect channels—and is not always reconstructible through exact means. For this very reason, it can by no means be the task of MARXist philosophy to flatten these complex phenomena into abstract principles, and to apply them deductively and simplistically to the various fields of human cognition. Its task is rather to investigate the concrete means of their interaction—those mediations that lead to the ultimate determination within, and which also result in the emergence of the particular autonomy of, the examined field—by placing these areas into the actually prevailing social totality and unravelling their particular dialectic.

The mutuality, from the very start, of the relationship between base and superstructure is enough to explain why MARXism uses the categories of base and superstructure within this mutuality as relative categories marking the predominant side. If we go further in the analysis of the complexity of this definition and free their relationship from the remnants of teleology and the wishful thinking that seeks to read superior goals into it, and, furthermore, if we recognise in LUKÁCS' Ontology the attempt to fulfil the old need not to rigidify the presentiments in philosophy into doctrines by applying them insensibly to reality but to forge our own notions and tools from them to support our genuinely open-ended inquiries, then

[36] Lukács I, p. 335 [Lukács *Marx's...*, p. 65].

we will also realise why LUKÁCS did not undertake continuation of the philosophical tradition inherent in the categories of base and superstructure in his great synthetical work, crowning his oeuvre, and why he only referred to them critically, instead of using them in his own reasoning.

I believe that this behaviour conceals a hidden stance, namely, the act of having returned to the original MARXian tradition. By this I mean the methodological stand taken by MARX in his *Grundrisse*: the analysis of concrete correlations should always be done within the concrete set of categories of the given correlations. The categories of base and superstructure should only be made use of in the simplifying and summarising characterisation of one given side or aspect of certain correlations. LUKÁCS expressed himself using his own system of categories, in the language of the ontology of social complexes, with a previously unknown accuracy, and without actually scrutinising the *Grundrisse* or using methods of figurative description reminiscent of MARX.

7. LUKÁCS's Recognitions

From the numerous relationships between base and superstructure, the following recognitions were of primary interest for LUKÁCS:

(1) The various sides of social existence—thus, especially, the phenomena embodied by the categories of base and superstructure—are in a relationship in which they mutually precondition one another. This is to say that once they have been historically born and have unravelled their particularities, they have become such strong elements of social existence that no reasonable abstraction is conceivable any longer in relation to them.

(2) This mutual preconditioning is characterised by the uninterrupted process of interactions, which becomes so complex as social progress advances that the ultimately determining side, that is, the one playing the predominant role, can only prevail through multiple mediations.

(3) The various complexities taking part in the process gradually develop their particularities as social progress advances, thereby increasingly re-asserting their relative separation and autonomy. Consequently, the truth will become more and more transparent (in a way to unravel further particularities) so that

> "each complex bears the characteristic that allows it to react to the drives generated by the general motions of the social existence in economy in its own particular way".[37]

(4) This will make the reaction by other social partial complexes not only particular (due to their structure and functioning), but it also implies that their own past (with all the eventualities included) plays a determinant role in shaping their properties.[38] The fact that the past continuously builds onto the present is of an ontological nature, which we can only establish by subsequently reconstructing its concrete form, without being able to alter, in the name of any superior teleology, the ways and value-criteria of the selection we may have once made in the past. Thus, we can hardly state that "every concrete social superstructure integrates only those from its historical antecedents that correspond with its own base in their content",[39] unless we presume the existence of a superior guardian providing some rationality for the process itself. Certain possibilities of errors, distortions arising from the ideological way of thinking, direct receptions and influences owing to human negligence or impotence, and so on, may all be inherent in the experience of the past and in the actual process of the selection made from it. The fact that the various abilities, experiences, ways of reaction, styles of action, and, moreover, the memories of the already experienced past, all build indestructibly in the social existence, inspired LUKÁCS to strongly emphasise that restoration is possible only when mechanically objectified conditions are meant, it being entirely excluded with respect to social processes.[40] Under given specific conditions, however, it is by no means excluded as a point of principle for inadequate answers and solutions of the past to serve as building stones for the future, or eventually to become its determining factors.

8. Some Criticism

And at this point the author stops with his conclusions.

All these notwithstanding, I still think that it would be unreasonable to expect to prove any correlation between the categories of base and super-

[37] Lukács II, p. 252.
[38] Lukács II, p. 189.
[39] Erdélyi 'Alap és felépítmény' [note 15], p. 99.
[40] Lukács *A társadalmi lét...* III [note 16], p. 115.

structure in LUKÁCS' oeuvre, or to expound it philosophically beyond the above level. One of the reasons for this is that LUKÁCS created a general theory within the ontology of social complexes, without having drawn the outlines of the theories concerning its individual fields (or complexities) beforehand. Thus, as opposed to the methodological pattern followed by MARX, who always started mental constructions by erecting from the bottom (searching for an answer to the historical problems of his time in the analysis of economic conditions, and, through continuous feedback to the concrete experience, arriving at conclusions that presented history as the one of class struggles and indicating the fundamental driving force of history in the economic sphere), LUKÁCS drew his constructions from the top, as if having been inspired from previously established mental constructs, sometimes in a way clearly reminiscent of deductive thinking patterns. So, as opposed to the path MARX followed as a thinker, whose scientific-theoretical ideals and historical-philosophical recognitions were formed through a series of economic analyses dealing with the most minute details in his works ranging from *A Contribution to the Critique of the Political Economy* to *The Capital*, and, while using shortened and simplifying summaries and generalisations, always relied on actual analyses, well, in case of LUKÁCS, the line between the scholar and the ideologist is by no means as easy to draw. The areas, far from the political and economic, that stood in the centre of LUKÁCS' professional interest—and I mean literature and aesthetics here—, relied on certain preferences and prejudices ever at work in his entire oeuvre, showing normative and preconceived judgement from the very start. At the same time, LUKÁCS accepts as natural the fundamental principle of MARXism on the primacy of the economic sphere when analysing the mutual conditioning and influence between the various complexities. Thus, what the *Grundrisse* speaks of as the determination "in the last resort" is neither expounded nor explained by the definition LUKÁCS gives on the "predominant moment" in a mutual relationship. This means that he treated the actual question arising in the relationship between base and superstructure as answered, without giving an explanation, except as to its acceptance as the ontological characteristic of social existence itself. He regarded this as the axiomatic principle of his system of thought. And a principle as such can only be asserted within deductive reasoning as an issue of an act of positing, yet this is not the kind of category which should be used for a genuine, scholarly, in-depth investigation.

II. The Law's Understanding

9. Law Interpreted as Superstructure

The MARXist tradition, expressing relations within society through the categories of base and superstructure, is so strong world-wide and especially in the Central and Eastern European region that legal theory must unavoidably face dealing with the conception of law taken as superstructure. The traditional paths of this conception—or the forced paths eventually inherited—are already so beaten that an outside viewer may sense the MARXist concept of law as if necessarily leading to some sort of a "general quasi-economic theory of determinism".[41] It is a fact that in our region one of the core issues of all basic treatises within legal theory until the decay of the Moscow-imposed regime of socialism was either the relationship between law and economics (in MARXism proper), or a theoretical explanation of how legal systems belonging to different social-economic formations can exert influence upon one another (in the late periods of MARXism, these came to form an agenda for those philosophising on the senses and hows of legal development,[42] as patterned by ALAN WATSON,[43]). Undoubtedly, it would be a worthwhile task for MARXist jurisprudence (provided that it can outlive at all the fall of "actually existing socialisms" in the Central and Eastern European region) to finally conduct historical research to examine by comparative means, relying on concrete historical material, the development of the respective solutions of statutory regulations and judicial decisions, as well as the line and logic of this development. The analysis of various legal institutions could provide additional information that would

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[41] Alice Erh-Soon Tay & Eugene Kamenka 'Marxism-Leninism and the Heritability of Law' *Review of Socialist Law* VI (1980) 3, pp. 261–274 at p. 268.

[42] For general overviews of inter-cultural influences in legal development, cf. *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1] and *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I].

[43] Formulated for the first time by Csaba Varga's review essay 'Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező' [Transplantation of laws, or borrowing as the universal factor of legal development'] *Állam- és Jogtudomány* XXIII (1980) 2, pp. 286–298.

enable us to answer the question of what the "ultimately" determinant role of the economy can mean at all in the legal sphere.

Being able to explain the contradictory relationship between law and economics, on the one hand, and the effects of different legal systems upon one another, on the other, requires as a primary matter theoretical clarification of the concept of law as an element of the superstructure, by making it properly differentiated from other superstructural components.

As to its differentiation, by the end of the 1960s, socialist legal theory, keeping a distance from the last defenders of the STALINist dogma on the total discontinuity between differing types of law,[44] arrived at the conclusion that law is actually dichotomous, being formed of both social and normative contents.[45] This point of view was approached from various directions. Some started from the thesis that law is reflection of reality, thus seeing the mirror of reality in direct (social) contents that must be transformed into indirect (normative) contents in order to be able to express it as law, and thereby also to serve the processes of legal influence.[46] Others started from the dialectics of means and ends. These latter argued that law can achieve the fulfilment of its function only through its own technical-legal functions.[47] Both of the above arguments contained some elements of truth, but I still believe that neither of them provided sufficient explanation, because they conceived of law as the total of statutory and judicial instruments, and of the legal superstructure as static, being the mere set of legal enactments (either objectified as or merely declared to embody the law).

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[44] E.g., R. Arlt & W. Lungwitz 'Die Entwicklung des sozialistischen Rechts und die bürgerliche Traditionen' *Staat und Recht* 1963/5, pp. 800 et seq.

[45] E.g., Vilmos Peschka *Jogforrás és jogalkotás* [Sources of law and law-making] (Budapest: Akadémiai Kiadó 1965) 497 pp. in ch. IV, para. 1; Victor Dongoroz 'Dreptul penal socialist al tării noastre: Raportul dintre con¸inutul normativ °i con¸inutul social-politic al dreptului penal din Republica Socialista România' *Studii si cercetări juridice* 1965/3, pp. 465 et seq.; Anita M. Naschitz '»Le problème du droit naturel« à la lumière de la philosophie marxiste du droit' *Revue roumaine des Sciences sociales* Série de Sciences juridiques, X (1966) 1, pp. 19–40, para. III; Mihály Szotáczki *A jog lényege* [The essence of law] (Budapest: Közgazdasági és Jogi Kiadó 1970) 376 pp., ch. IV, para. 2; Нено Нечовски [Neno Nenovski] Преемственность в праве [Priemstvenosta v pravoto (Sofia: Nauka i Izkustvo 1975) / Continuity in law] (Москва [Moscow]: Юрид. Литература [Jurid. Literatura] 1977) 167 pp., ch. V.

[46] Particularly at Peschka.

[47] Particularly at Nenovski. In socialist legal theory, the basic reference is usually provided by the paper (of primordial importance at its time) of Traian Ionascu & Eugen A. Barasch 'Les constantes du droit: Droit et logique' *Revue roumaine des Sciences sociales* Série de Sciences juridiques VIII (1964) 2, stating (on p. 143) "the continuity of logic" in law through the separation of "the essence to be realised" (as the goal) and "the technique of realisation" (as its instrument).

As far as the general nature of the notion of legal superstructure is concerned, theory has only recently got to a point able to recognise that qualities regarding the entire superstructure cannot be referred and related to, or deduced from, the individual components of a given superstructure. Thus, not even a formulation taken in itself that claims that

> "[t]he superstructural nature of the legal part of the superstructure cannot be considered as a disunity of individual statutory rules; neither can the statutory rules be weighed independently, taken in their uniqueness. The role of the superstructure concerns the entirety and the concrete generality of a given social phenomenon"[48]

can resolve the basic dilemma or show the way out from it. For it merely substantiates the fact that the quality of superstructure is born from certain objectivations: partly the enacted rules and partly the official institutions of the law.

10. Conclusions Drawn for the Law's Understanding

Drawing conclusions from the legal-philosophical perspective elaborated within LUKÁCS' social ontology,[49] we might arrive at rather far-reaching results, which are also new in their methodological outlook and theoretical approach. Accordingly,

(1) Law is an irreversible process-like phenomenon from an ontological point of view. Its motion is defined primarily by the place it has taken in the total social complex and, within this—through various socio-political and other kinds of mediations—, by its relationship to the sphere of the economy.

(2) The motion within the total social complex displays, at the level of the given individual partial complexes, a continuously reproducing dialectic unity between stability and change.

(3) From an ontological perspective, the social existence of the complex of law can be reduced to its actually exerting social influence. (Thus, the current Hungarian law is not only the sum of the statutory provisions in force, and not merely the judicial or-

[48] Imre Szabó *Les fondements de la théorie du droit* (Budapest: Akadémiai Kiadó 1973) 340 pp. at p. 152.

[49] Cf. Varga *The Place of Law*… [note 24] , ch. VI.

ganisation with its personal and institutional machinery, but the sum of these two in its actual operation, influencing social life and forming one of its factors.) The same is not necessarily to be said, in the direct sense of actually exerting social influence, of each fundamental component, form of objectivation or internal rule.

(4) Therefore, there is and there can be no equivalence between the law as a functioning agent and the law as actual functioning—that is, between law taken as a store of technical instruments (the organisational-institutional background of the mechanism of exerting influence, i.e., legal provisions and the machinery dedicated to their enactment and enforcement), on the one hand, and law taken as the fulfilment of its functions (its actual motion and social effect, i.e., the actual form which it takes in the practical life of society), on the other.

(5) The past at any given time is real for the present in as much as we draw from it. Thus, human progress—with regard to the available store of technical instruments as well—manifests itself rather in the placement of old elements into a new context and influencing mechanisms than in the formation and use of quite new elements.[50]

(6) From this derives the fact that we can by no means leave the instrumental character of law out of consideration. At the same time, we must discuss with the same emphasis the various kinds of sociological and moral, economic and political components of the instrumental use of law, and the issue of adequacy between the goals to be achieved through law and the instruments applied for that purpose.

(7) From an ontological viewpoint, law is unified as a phenomenon for two reasons, its internal complexity notwithstanding. For its forms of objectification can only be assessed through their actual operation and action, on the one hand, in the same way as their internal principles, instrumental values and structural complexity (independently of how much they are historically concretely well-defined without

[50] According to Naschitz [note 45], the "human factor", and according to Nenovski [note 45] (ch. VII–VIII), "social existence" as well as the "sociological phenomenon of social control in all social formations", are the moments responsible for the fact that differing traditions notwithstanding, humankind may arrive at common or, at least, similar solutions while engaged in legal problem-solving.

any alternative that in fact appears on the scene) may gain ontological significance exclusively through their actual operation and realisation, on the other. That is, whatever boundaries the law's internal order draws between the respective processes of law-making and law-applying, only those implemented in actual social practice will prevail so as to be sensed at all ontologically.

(8) This also implies that the dialectic of stability and change can be caught in action only within the totality of the legal complex. For this very reason, we cannot claim the exclusive trigger of change to be legislation (officially institutionalised for this very purpose)—that is, the enactment of laws according to a procedure and in a form prescribed by previously enactments—, and its exclusive medium to be law-application (officially institutionalised for this very purpose)—that is, the establishment and enforcement of the legal consequences of a given action according to a procedure and in a form prescribed by previous enactments. In the final analysis, the motion at any given time of the social total complex and the internal complexity of the legal partial complex (including its tradition, structural complexity and relative weight, as well as its internal strength to function and exert a socially desirable influence through the fulfilment of its own enacted rules of the game) will define the way in which the legal complex reacts to the external challenges of continuity and change.

In the domain of law as a field that operates a formal store of means in accordance with formalised procedural patterns, response by any one social partial complex to the challenges by any other complexes, that is, the means of its reacting, is mostly achieved through the manipulating operation of its already available set of means, instead of through either individually generating or formally changing any such means. In its ontological reconstruction, however, the unceasing process of manipulation presupposes and also results in the unceasing process of transforming the actual characters—that is, the social significance and meaning—of the relevant instruments taken from the available store of means.[51]

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[51] For the ways in which the law's complexity reproduces itself while responding variably to the changing variation of socially felt needs, cf., by the author, *A jog mint folyamat* [Law as process] (Budapest: Osiris 1999) 430 pp. [Osiris-könyvtár: Jog] & <http://www.scribd.com/doc/46269606/varga-a-jog-mint-folyamat-2001>, passim and *The Paradigms of Legal Thinking* [1999] enlarged 2nd ed. (Budapest: Szent István Társulat 2012) 418 pp. [Philosophiae Iuris] & <http://www.scribd.com/doc/85083788/VARGA-ParadigmsOfLegalThinking-2012>, particularly at chs. V–VII.

LEGAL THEORY IN TRANSITION
(A Preface from Hungary)*

One part of Europe came to be detached for decades from the rest, reconstructing herself after the Second World War, when one of the big four, having won the cause, altered its course actually to occupy that which it had started only to control militarily. This was the case of Central Europe, put at the debatable mercy of the Soviet Union, that is, the case of an entity that, albeit known to have been wedged in between the West and the East of Europe for more than sixteen centuries,[1] became subsequently re-named even geographically (maybe motivated by the hypocritical wish to both reconcile and legitimise that which the Cold War leaders of the Atlantic world called *Realpolitik*) as Eastern Europe. The Byzantine-cum-Mongolian heritage of law, surviving through the Bolshevik regime in Russia, was thereby extended westward and began to master a huge part of Europe. This also raised the wishful perspective of a new millennium for Moscow as the next—i.e., the Third—Rome, which started its rule by introducing its politico-legal regime with all the ideological annexes in its new empire, to serve its underlying goals.

Countries with legal cultures established long ago, rooted in the common past of Civil Law in Europe—drawing from the Greek and Roman traditions mediated mostly through German doctrines, which preferred abstract logical conceptualisation—became drastically subjected to Muscovite experimentation. The communist take-over all over the region, including the Russian Zone of Germany, Poland, the Czech and Slovak lands, Hungary, Slovenia and Croatia, with the three Baltic states as well as the entire mosaic of Balkans, led to the imposition of a brutal scheme, which was in fact

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* Originally prepared in 2000 to serve as a co-Preface to the volume of proceedings to be co-edited by Werner Krawietz, closing six years of co-operation within two PHARE/TEMPUS projects which I had directed. The volume—*On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* co-ed. with Werner Krawietz (Berlin: Duncker & Humblot [2003]), pp. xi + 139–531 [*Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn]—was subsequently published with the sole preface of its German co-editor.

[1] Jenő Szűcs 'The Three Historical Regions of Europe: An Outline' *Acta Historica Academiae Scientiarum Hungaricae* 29 (1983) 2, pp. 131–184 {& *Les trois Europes* trad. Véronique Charaire et al. (Paris: Éditions L'Harmattan 1985) 127 pp. [Domaines danubiens 2] & *Die drei historischen Regionen Europas* trans. Béla Rásky (Frankfurt am Main: Verlag Neue Kritik 1990) 107 pp.}.

(and remained up to the end) both alien and inferior in civilisational level to most of the target countries in Central Europe. For it was an aggregate woven from Byzantine state traditions, the Mongol style of ruling, as well as the Asian ethos of despotism.[2] It is to be noted that their stubborn prevalence had already marked Russia's departure from the epoch-making path taken by the West centuries ago: a new form of human civilisation signalled by the Renaissance, the separation of Church and State, as well as the development of social contract theories to erect political entities based upon the idea of democracy and parliamentarism. In a late determination of *rapprochement*, Russia's very first tentative steps towards a Europeanising modernisation were exactly blocked by the Bolshevik revolution that diverted Russia even farther away from the European path, by launching a new—genuinely STALINist—perspective of salvation.

MARXism, as canonised in Moscow—with claims to be a scientific theory, although actually imbued with orthodoxy, composed of chiliastic ideas and doctrinarian Utopianisms, expressed in the language of a revolutionising ideology and serving as a scapegoat for the mercilessly executed STALINism —offered a miserable background as a substitute for both scholarly reflections and religious (moral and transcendental) foundations. In the legal superstructure, all this was expressed as socialist normativism, which reduced law to the presumed will of the ruling class (represented by its omnipotent Communist Party, and Party itself, by its self-electing *nomenklatura*[3]). Thereby, social complexity became dichotomised into the economic basis, on the one hand, and an entire network of superstructure serving only the former, on the other. Accordingly, law became classified as a specimen of the latter while being subservient to the former, without its own independence and prestige,[4] and, moreover, without any merger of dis-

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[2] Tibor Szamuely *The Russian Tradition* ed. Robert Conquest (London: Secker & Warburg 1974) xi + 443 pp.

[3] The *номенклатура* is a group of persons holding state and party positions or pertaining to so-called popular (albeit tightly controlled) movements (used as the third—transmission—pillar of the Bolshevik state structure), defined by *nomenklatura* lists, who—granted by secret laws or party or syndicate (etc.) regulations—were in practice exempt from both criminal prosecution and the related fines while they were entitled to enjoy specific privileges such as free access to state-owned residences and *dacha*s, cars with drivers and special shops, accompanied by further amenities. Cf. <http://en.wikipedia.org/wiki/Nomenklatura>.

[4] For the theoretical background, cf., by the author, 'Autonomy and Instrumentality of Law in a Superstructural Perspective' [1986] *Acta Juridica Hungarica* 40 (1999) 3–4, pp. 213–235, as well as—assessing its consequences—'Liberty, Equality, and the Conceptual Minimum of

cretion or ability to develop its own instruments of mediation and distinctive operation.[5]

Under such political and ideological conditions, tactics for survival varied from country to country, school to school, thinker to thinker. In Hungary, for instance, as a point of principle, MARXism embodied the only language available for use in scholarship—with the sole exception of theology, ousted from the circle of disciplines officially acknowledged within the Humanities. At the same time, in practice, MARXism was taken as an umbrella for everything worth considering, covering—paradoxically—a whole range of diverging ideas and methodological approaches. That is, MARXism was intended to serve as a strait jacket at a time when even the bare imagination of any pluralism was heavily rejected in both the directions of actions and scholarly opinion. All limitations notwithstanding, MARXism in Hungary provoked highly controversial debates outside whatever official stand had ever been taken, and this resulted in divergent paths of research and ways of theoretical developments being tested as working hypotheses. The outcome was a variety of approaches and ensuing debates, sometimes flourishing to such an extent that vivid discussions on core issues in Hungary could have been favourably contrasted with the unison of, let's say, HERBERT HART's contemporary orthodoxy, then predominate in all of England. At the same time, there was a large field of marginalia in legal theorising held as suspected of purporting to speak against MARXism, and which was, therefore, strictly censored from the official terrain of research.

Legal Mediation' in *Enlightenment, Rights and Revolution* Essays in Legal and Social Philosophy, ed. Neil MacCormick & Zenon Bankowski (Aberdeen: Aberdeen University Press 1989), ch. 11, pp. 229–251 {& [reprint] in *Marxian Legal Theory* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1993), pp. 501–523 [International Library of Essays in Law & Legal Theory, Schools 9]}.

[5] For an overview on the state of law and politics in Central and Eastern Europe from STALIN's time to the collapse of Communism, including the transformation of individual regimes into a Rule of Law scheme as well, cf., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE University Project on Comparative Legal Cultures 1995) 190 pp. [Philosophiae Iuris] {& <http://drcsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/>}. For a general overview, cf. Volkmar Gessner, Armin Hoeland & Csaba Varga *European Legal Cultures* (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I], part III: »Totalitarian Legal Culture« ed. Csaba Varga, pp. 167–242; for the documentation of one single aspect, namely, of transitional justice, cf. *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub].

Among others, law as language, law as logic, law as technique, as well as law as value and law and anthropology, were classified as anathemas in terms of academic interest. *En revanche*, a counterbalance was reached by the favour accorded to historico-comparative approaches, at levels of both individual institutions and comprehensive cultures of regulation. Moreover, investigation with a narrowly epistemological horizon came to be replaced by ontological reconstruction, dedicated to the law's actual functioning in practice, instead of its mere ideological criticism. In this way, the scholarly outcome could be worthy of consideration even after Socialism collapsed. For, the analysis of social embeddings spanning from direct determination to the complexity of partly self-defining processes could already serve as a catch-word and gave rise to thoroughly elaborated theories of social action. Legal development and modernisation through the law were also given a historico-comparative foundation, which was able to lead to a kind of ontological reconstruction.

Accordingly, reconsideration of the methodologies underlying MARXist approaches took its start at a relatively early time, and thus was able to introduce irreversible advances into academic thought and public debates as well. As to philosophy, its ambition aimed at re-affirming the law's distinctiveness[6] and the ontological explanation of how legal phenomena can prevail in society. So a differentiation was made between actual processes and the professionally ideologised ideal (as an active *sine qua non* asserting itself in modern formal legal arrangements).[7] As to macro-sociology, the factors that are at play in limiting legal action and social modernisation were comparatively modelled by historical case-studies.[8] And finally, as to the theoretical foundation of social policies, scholars inquired into the factors and chances of improving the legal culture prevalent in Hungary.[9]

Ironically enough, the course of events took a paradoxical turn. After the Second World War was over, GEORGE LUKÁCS—instead of eventually start-

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[6] Cf. Vilmos Peschka *Die Eigenart des Rechts* (Budapest: Akadémiai Kiadó 1989) 199 pp.

[7] Cf. Csaba Varga *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1999]) 192 pp. {&, as to its 3rd [reprint] ed. with Postface (Budapest: Szent István Társulat 2012) 218 pp., also <http://drcsabavarga.wordpress.com/2012/03/13/the-place-of-law-in-lukacs-world-concept-19852012/>}.

[8] Cf. Kálmán Kulcsár *Modernization and Law* (Budapest: Institute of Sociology of the Hungarian Academy of Sciences 1988) 282 pp.

[9] Cf. *Die rechtstheoretischen Probleme von der wissenschaftlichen Grundlegung der Rechtspolitik* ed. Mihály Samu (Budapest: Ministerium von Justiz 1986) 322 pp. [Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály kiadványai].

ing to star in his dreamy Vienna—had to move from Moscow back to Budapest to exact the dirty job of *épuration* extended to the academic elite, active in the Humanities in Hungary. Nonetheless, in the final outcome his neophytism resulted in an unexpected action. For his deepened philosophical insight, built upon abstract conceptualisation, eventually transcended the level at which political infiltration could be feasible. And by the end of his life, his *Zur Ontologie des gesellschaftlichen Seins* challenged MARXist orthodoxy through the totality approach he introduced, albeit his primitive aim could only be to contribute to the rebirth of MARXism. Therefore, in the final analysis the efforts to reconstruct MARXism also led to eventual transcendence indeed, with the chance of his ontology growing into modern social science theory.

When finally Socialism collapsed, MARXism as its official ideology also collapsed. Pluralism of rivalling approaches appeared as the first consequence. That is, to engender a theoretical renewal no ideas needed to be imported. In the natural course of events, firstly, latent pluralisms had to be made manifest, and then, re-contextualisation ensued. And with the rest of the job completed, MARXism was left behind as a strange orthodoxy, alien to the old/new cultural context.

From the first moments of transition, perspectives of joining the North Atlantic Treaty Organisation and the European Union have defined the agenda. In order to assist the basic move, PHARE/TEMPUS projects were offered to set up frameworks suitable to provoke a change by means of incentives and institutional reforms built in university curricula. The basic idea was to implant nucleuses of reform that could exert a self-multiplying effect, so that by radiating all over the fields of law, they could even reach practitioners of the legal profession in a longer run. In my case, this was implemented first by a three-year project from 1990,[10] centred upon the metropolitan university so its results could subsequently spread nation-wide. Second, a further three-year project from 1995[11] organised all the faculties

[10] TEMPUS Joint European Project No. 0426–90 ["Bridges"], directed by Professor Nikolas M. Roos (Maastricht) and co-ordinated by Csaba Varga (Budapest, Eötvös Loránd University), involved a few universities from Freiburg via Liège to Nancy as an already established scheme of partnership.

[11] TEMPUS Structural Joint European Project No. 9090–95 ["Towards a Legal Community through Common Traditions"], directed by Csaba Varga, involved—in partnership with the Eötvös Loránd University and the Pázmány Péter Catholic University in Budapest as well as the universities at Miskolc, Pécs and Szeged—the ones at Alicante, Barcelona (*Pompeu Fabra*), Berlin (*Freie Universität*), Bologna, Brussels (European Academy of Legal Theory), Edin-

of law working in Hungary into one partnership. Priority was given to bridging gaps between the present state of contemporary Western scholarship and the Moscow-patterned self-sufficiency[12] by making modern authors of magisterial oeuvres and papers representing 20th century trends and achievements in legal theoretical thought available in translation in Hungary.[13] This ambition was complemented by publishing original treatments

burgh, Granada, Graz, Groningen, Konstanz, Lisbon (*Instituto Superior de Ciencias de Trabalho e da Empresa Departamento de Sociologia*), Lund, Maastricht, Madrid (*Autonóma*), Münster, Oñati (International Institute of the Sociology of Law), Palma de Mallorca, Rome (*La Sapienza*), Salamanca, San Sebastian, Tilburg, Trento, Vienna, Zaragoza, in affiliation—without TEMPUS approval—of the ones at Athens, Helsinki, Thessaloniki and Turku.

[12] Hungary was the sole successful exception to the predominant pattern set by Moscow and [East]Berlin in that "bourgeois legal theory", instead of being simply submitted to "annihilating criticism" (without previous debating at depth), was publicly published in translation in order to call for discussion. Cf., for a representation of RUDOLF STAMMLER, EUGEN EHRLICH, HERMANN KANTOROWICZ, LEON PETRAZYCKI, MAX WEBER, FELIX SOMLÓ, FRANÇOIS GÉNY, GIORGIO DEL VECCHIO, GUSTAV RADBRUCH, HANS KELSEN, BENJAMIN N. CARDOZO, ROSCOE POUND, JEROME FRANK, AXEL HÄGERSTRÖM, A. VILHELM LUNDSTEDT and KARL OLIVECRONA (with Vilmos Peschka's introductory paper and the editor's bio-bibliographical notes), *Modern polgári jogelméleti tanulmányok* [Contemporary western legal theory] ed. Csaba Varga (Budapest: [Institute for Legal Studies of the Hungarian Academy of Sciences] 1977) 145 pp. and *Jog és filozófia* Antológia a század első felének polgári jogelméleti irodalma köréből [Law and philosophy: An anthology of western legal theory from the first half of the present century] ed. Csaba Varga (Budapest: Akadémiai Kiadó 1981) 383 pp.

[13] In the series of "Jogfilozófiák" [Legal philosophies], founded and edited by Csaba Varga, the translation of Hans Kelsen *Reine Rechtslehre* [1934] ed. Csaba Varga (Budapest: Eötvös Loránd Tudományegyetem Bibó István Szakkollégium 1988) [reprint Budapest: Rejtjel Kiadó 2001]) xxii + 106 pp. was followed (in edition of Budapest: Osiris) by Carl Schmitt *Politische Theologie* ed. Péter Paczolay (1992) xxii + 41 pp., Georg Jellinek *Allgemeine Staatslehre* [as a cross-selection] ed. Péter Szilágyi (1994) 124 pp., *A társadalom és a jog autopoietikus felépítettsége* [The autopoietic (re)construction of society and law] [as a cross-selection of Niklas Luhmann & Gunther Teubner] ed. Lajos Cs. Kiss & András Karácsony (1994) 124 pp., *Alkotmánybíráskodás – alkotmányértelmezés* [Constitutional judiciary and constitutional interpretation] ed. Péter Paczolay (1995 [reprint 2000]) 216 pp., *Joguralom és jogállam* [Rule of law and Rechtsstaatlichkeit] ed. Péter Takács (1995) 330 pp., as well as H. L. A. Hart *The Concept of Law* [the very first foreign translation of its posthumous final version] ed. Péter Takács (1995) 375 pp. [Osiris Könyvtár: Jog], all within the range of the first project. The range of the second project (Budapest: Osiris, then [Books-In-Print], then Szent István Társulat) spanned from *Jog és filozófia* Antológia a század első felének kontinentális jogi gondolkodása köréből [Law and philosophy: An anthology of continental legal thinking from the first half of the present century] [reprint of the first selection {note 12} as complemented by texts of RUDOLF VON JHERING, RUDOLF STAMMLER and ALEXANDRE P. D'ENTRÈVES] ed. Csaba Varga (1998) 238 pp., *A jogi gondolkodás paradigmái* Szövegek [Texts on the paradigms of legal thinking] ed. Csaba Varga (Budapest: ETOPrint 1998) iii + 71 pp. and *Kiáltás gyakorlatiasságért a jogállami átmenetben* [Cry for prac-

of topical issues for text-book use,[14] as well as Hungarian pre-war classics either in reprint[15] or from manuscript as their first (posthumous and critical) editions,[16] as well as uncovering hidden archival heritage.[17]

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ticality in the transition to the Rule of Law] ed. Csaba Varga (1998) 122 pp. [Windsor Klub], via *Jog és nyelv* [Law and language] ed. Miklós Szabó & Csaba Varga (2000) vi + 270 pp., *Jog és antropológia* [Law and anthropology] ed. István H. Szilágyi (2000 [reprint 2005]) viii + 366 pp., *Összehasonlító jogi kultúrák* [Comparative legal cultures] ed. Csaba Varga (2000 [reprint 2006]) xl + 397 pp., *Historical Jurisprudence* [including reprints instead of translations] ed. József Szabadfalvi (2000) 303 pp., to *Jog és filozófia* Antológia a XX. század jogi gondolkodása köréből, 3rd enl. ed. Csaba Varga (2001 [reprints 2003 & 2008]) xii + 497 pp., *Hayek és a brit felvilágosodás* Tanulmányok a konstruktivista gondolkodás kritikájának eszmetörténeti forrásairól [Hayek and the British enlightenment: Studies on the sources of the criticism of constructivist thinking] ed. Ferenc Horkay Hörcher (2002) xviii + 112 pp., *Alkotmányelmélet és európai integráció* [Constitutional theory and the European integration] ed. Péter Paczolay (2003) 108 pp., *Államtan* [Allgemeine Staatslehre] ed. Péter Takács (2003 [reprint 2005]) xvi + 962 pp., *Scandinavian Legal Realism* [including reprints instead of translations] ed. Antal Visegrády (2003) xxxviii + 160 pp., *Természetjog* Szöveggyűjtemény [Natural law: texts] ed. János Frivaldszky (2004) 218 pp. & (2006) 332 pp., and Jerome Frank *Amerikai jogi realizmus* [American legal realism] ed. Attila Badó (2006) 164 pp. In preparation were—and, unfortunately, also remained (albeit in an advanced stage)—two reprint collections, on *Gesetzgebungslehre* (ed. Péter Szilágyi) and *Law and Morality* A Two-hundred-year Debate (ed. Péter Takács).

[14] In the series of (Budapest: Osiris) "Osiris Könyvtár: Jog", Csaba Varga *Előadások a jogi gondolkodás paradigmáiról* (1998 [pre-print 1996; reprints 1999 & 2000 as well as (Budapest: Szent István Társulat 2002 & 2003)]) 388 pp. [in a Francofort book-faire sponsored edition: *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. {& <http://law.sfu-kras.ru/viewcategory/30.html> [legal_thinking]}, and in a thoroughy revised and enlarged 2nd ed. (Budapest: Szent István Társulat 2012) 418 pp. [Philosophiae Iuris] & <http://www.scribd.com/doc/85083788/VARGA-ParadigmsOfLegalThinking-2012>] and Csaba Varga *A jog mint folyamat* [Law as process] (1999 [reprints (Budapest: Szent István Társulat 2002 & 2004)]) 430 pp. {& <http://www.scribd.com/doc/46269606/varga-a-jog-mint-folyamat-2001>}, as well as in the series of (Budapest: Osiris, then Szent István Társulat) "Jogfilozófiák", Csaba Varga *A jog társadalomelmélete felé* [Towards a social science theory of law] (1999 [reprints 2001, 2002, 2003 & 2004]) xi + 326 pp.

{& <http://www.scribd.com/doc/46270293/varga-a-jog-tarsadalomelmelete-fele-1999>}, István H. Szilágyi *A jogi antropológia főbb irányai* [Main directions of legal anthropology] (2000 [reprint 2005]) 173 pp., Csaba Varga *A jog mint logika, rendszer és technika* [Law as logic, system and technique] (2000) 223 pp. {& <http://www.scribd.com/doc/46269957/varga-a-jog-mint-logika-2000>}, János Frivaldszky *Természetjog* Eszmetörténet [Natural law: history of ideas] (2001) 371 pp., Csaba Varga *Útkeresés* Kísérletek – kéziratban [Searching for a path: unpublished manuscripts] (2001) 167 pp. and Péter Paczolay Az alkotmányelmélet fejlődése és az európai integráció [The development of constitutional theory and the European integration] (2003) 153 pp. In preparation remained until ever János Frivaldszky's *Interszubjektivitás a jogban* [Inter-subjectivity in law].

[15] Felix Somló *Schriften zur Rechtsphilosophie* ed. Csaba Varga (Budapest: Akadémiai Kiadó 1999) xx + 114 pp. [Excerpta Historica Philosophiae Hungaricae Iuris, red. Csaba Varga] was

Basically, these projects addressed one undecided query. Namely: whether or not opening the doors towards Western European and English–American scholarship could lead to reform of local achievements that represented national traditions as corrupted during the MARXian interlude? Should it be a process of disruption or just continuous learning, resulting in more and differentiated views, enriched in methodological insights, conceptual descriptive force and unbiased reflection in scholarship? What can ensue from these in practice? Is there anything that could historically or notionally be *sui generis* in the transition from Communist dictatorship to a multi-party parliamentary democracy, or is the whole undertaking hardly more than a routine move implied by any Rule of Law scheme? Is there anything extraordinary in the process itself that would necessitate or justify extraordinary measures as well?

Társulat 2006) xxii + 485 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Bibliotheca Iuridica: Opera Classica 3] {& <http://philosophyoflaw.wordpress.com/>} and *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas, ed. Csaba Varga (Budapest: Szent István Társulat 2006) 246 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae], and is still to be followed by Barna Horváth *Schriften zur Rechtsphilosophie* ed. Csaba Varga, I: Prozessuelle Rechtslehre (1926–1948); II: Gerechtigkeitslehre (1926–1948); III: Papers in Emigration (1949–1971) (Budapest: Szent István Társulat) [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae].

[16] Barna Horváth *The Bases of Law* [1948] (Budapest: Szent István Társulat 2006) liii + 94 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris] {a draft key-paper for a planned workshop in Budapest}, as well as, by István Losonczy (Pécs), *Abriß eines realistischen rechtsphilosophischen Systems* (Budapest: Szent István Társulat 2002) 144 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae] {a summary of realisations in response to the commission by ALFRED VERDROSS, editor of *Österreichische Zeitschrift für öffentliches Recht*, annexed by a paper [1937] of him reprinted from the same journal} and *Jogfilozófiai előadások vázlata* [Outlines of lectures in legal philosophy, 1948] (Budapest: Szent István Társulat 2002) xvi + 282 pp. [Jogfilozófiák] {reproducing his contemporary roneotyped textbook}. Cf., by the present author, 'Philosophysing on Law in the Turmoil of Communist Takeover in Hungary (Two Portraits, Interwar and Post-war)' in *The 2005 ALPSA Annual Publication* of the Australian Legal Philosophy Students Association, ed. Max Leszkiewicz (Brisbane 2005), pp. 82–94 on MOÓR & LOSONCZY.

[17] *Aus dem Nachlaß von Julius Moór* ed. Csaba Varga (Budapest: ELTE "Comparative Legal Cultures" Project 1995) xv + 158 pp. [Philosophiae Iuris] {& <http://philosophyoflaw.wordpress.com/>} in which, among letters addressed to SOMLÓ and MOÓR, the only genuine intellectual self-biography written by HANS KELSEN to MOÓR as well as ILMAR TAMMELO's first monographic essay presented at Tartu, in a German translation prepared to MOÓR, were also photocopied.

In the working period of the second project, two international workshops were organised, mostly by partners' representatives, in order to face the complexity of the above issue. The job was manifold. We started by discussing new approaches as contrasted to old/local traditions in theory, continued by examining some topical issues taken as case-studies and ended with a round-table debating two key issues, notably the nature of the challenge of transition, in the context of the chances and possibilities, as well as the means and risks of reforming the theoretical part of the curriculum, with special regard to post-graduate studies.

European-wide co-operation proved to be rather easily routinised, as legal philosophising in Hungary has already had a solid record of debating law-philosophical themes internationally. In addition to individual and national contributions to international gatherings, co-operation within the International Association for Philosophy of Law and Social Philosophy has already materialised in collections of proceedings,[18] and the journal *Rechtstheorie* has also dedicated a special issue to such co-operational proceedings.[19]

And now—considering that the key prerequisite of any development in scholarship is the clear identification of what are its paradigms, with what boundaries it works and what chances it offers in limiting cases—the time was simply ripe for reconsideration. And the old query addresses the capability of any system to integrate tensions that may grow rather acute by re-

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[18] *Rechtsgeltung* Ergebnisse des Ungarisch–österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1985, ed. Csaba Varga & Ota Weinberger (Stuttgart: Franz Steiner Verlag Wiesbaden 1986) 136 pp. [Archiv für Rechts- und Sozialphilosophie, Beiheft 27]; *Rechtskultur – Denkkultur* Ergebnisse des Ungarisch–österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1987, ed. Erhard Mock & Csaba Varga (Stuttgart: Franz Steiner Verlag Wiesbaden 1989) 175 pp. [Archiv für Rechts- und Sozialphilosophie, Beiheft 35]; *Theoretische Grundlagen der Rechtspolitik* Ungarisch–österreichisches Symposium der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1990, hrsg. Peter Koller, Csaba Varga & Ota Weinberger (Stuttgart: Franz Steiner Verlag Wiesbaden 1992) 185 pp. [Archiv für Rechts- und Sozialphilosophie, Beiheft 54]. Unfortunately, due to local reasons on behalf of the partner, the proceedings of the Finnish–Hungarian symposia in Helsinki and Turku in the late 1980s [*Modernisation, Legitimity, and the Law* Approaches and Methodologies: Finnish and Hungarian Papers in Legal Theory, ed. Aulis Aarnio & Csaba Varga] were not processed through to the extent enabling them to submit for publication.

[19] *Verfassungsstaat, Stabilität und Variabilität des Rechts im modernen Rechtssystem* Internationales Symposium der Budapester Juristischen Fakultät, ed. Werner Krawietz, Mihály Samu & Péter Szilágyi, *Rechtstheorie* 26 (1995) 3 [Sonderheft], pp. ii + 201–506.

solving them as apparent antinomies, instead of forcing them through up to the point that the system breaks down, either latently or dramatically.

The symptoms are gained from past experiences with the law's ill-adaptation. The situation is aggravated by the world-wide need to work out also—besides (and perhaps in parallel, as an alternative, to) the well-established patterns of modern formal law—some more responsive form and potentiality of law, which could prove to be more efficient in particular domains and more adaptive to changing environments, and which could, thereby, contribute to defining what is worthy of preservation from the homogenised distinctiveness of modern formal law.

DEVELOPMENT OF THEORETICAL LEGAL THOUGHT IN HUNGARY
at the Turn of the Millennium*

The overall picture about the development of theoretical legal thought in the Central and Eastern European region with Hungary included is rather paradoxical indeed. Namely, there has been neither a major breakthrough nor shifts of emphasis in the past one to two decades. However, the evolution of tendencies perceptible anyway does indicate the potentiality for a strong impulse that may grow to changes with milestone significance in the near future.†

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* Presented at the international conference at the Eötvös Loránd University in Budapest in May and published amongst its proceedings in *The Transformation of the Hungarian Legal Order 1985–2005* Transition to the Rule of Law and Accession to the European Union, ed. Péter Takács, András Jakab & Allan F. Tatham (Alphen aan den Rijn: Kluwer Law International 2007), pp. 615–638.

† For the literature in Hungarian, see the domestic version of the present paper 'A jogbölcselkedés állapota Magyarországon' *Állam- és Jogtudomány* XLVII (2006) 1, pp. 1–29 & in *A magyar jogrendszer átalakulása 1985/1990–2005* Jog, rendszerváltozás, EU-csatlakozás, szerk. Jakab András & Takács Péter, II (Budapest: Gondolat & ELTE ÁJK 2007), pp. 1132–1154.

The abbreviations used are as follows: Akad = Akadémiai Kiadó [Publishing House of the Hungarian Academy of Sciences]; Budapest = Bp; *AJur* = *Acta Juridica Academiae Scientiarum Hungaricae* as well as (from 2001 on) *Acta Juridica Hungarica*; *Annales* = *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae: Sectio Juridica*; *ARSP* = *Archiv für Rechts- und Sozialphilosophie*; *Conn* = *The Connecticut Journal of International Law* 8 (1993) 2; *Iura antiqua* = *Iura antiqua – iura moderna* Festschrift für Ferenc Benedek zum 75. Geburtstag, hrsg. Gábor Hamza et al. (Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kar & Dialóg Campus 2001) [Studia iuridica auctoritate Universitatis Pécs publicata 127]; *Ius unum* = *Ius unum, lex multiplex* Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy) ed. István H. Szilágyi & Máté Paksy (Bp: Szent István Társulat 2005) [Philosophiae Iuris / Bibliotheca Iuridica: Libri amicorum 13]; *Justice* = *La notion de justice aujourd'hui* [Séminaire international] coord. Petre Mares & Jean-Pierre Clero (Târgoviste: Valahia University Press 2005); *LawCult* = *Law Culture and European Integration Process* ed. J. Ćipkar (Košice: Právnická fakulta UPJŠ 2004); *LegAss* = *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya

1. International Environment

As known, the period between the end of the Second World War and the turn of the millennium became increasingly dominated by an analytical approach worldwide—first in the Atlantic world, then also spreading slowly to Europe.[1] Accordingly, Anglo–American analytical jurisprudence (in tandem with its somewhat parallel European equivalent) is the direct legacy of the turn of the millennium for our present day. Therefore, it is no mere chance that for the recent time we can mostly encounter the immeasurable sprawling of these, by their growing into the only preferable way of thinking about law. In result of this, impoverishment and depletion of all the other directions are to follow, exemplifying the aggressiveness of any kind of imperialism in this easy victory (that may make us prey to some kind of a scholarly vogue), indicating some deep uncertainty at the same time.

Because, despite the general intellectual revival following the Second World War with the demand to face (by looking back on) law itself as a potential source of danger—in the course of which, first, revival of the law's ontological foundations and epistemological properties could be re-formulated with some natural law perspective in describing its borderlines; then,

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University Graduate School of Law Center for Asian Legal Exchange 2006); *Modern* = *La modernisation du droit* réd. Radomir Lukiæ (Beograd 1990) [Académie Serbe des Sciences et des Arts, Colloques scientifiques LII: Classe des Sciences sociales 11]; *Pécs* = *Közjogi intézmények a XXI. században* Jog és jogászok a XXI. század küszöbén [Institutions of public law in the 21st century: Law and lawyers at the threshold of the 21st century] (International conference, Pécs, October 16, 2003) Jogfilozófiai és politikatudományi szekció [Section of legal philosophy and political sciences] ed. György Andrássy & Antal Visegrády (Pécs: [Pécsi Tudományegyetem Állam- és Jogtudományi Kara] 2004); *Rth* = *Rechtstheorie*; *Sectio* = *Publ. Univ. Miskolc*: *Sectio juridica et politica*; *Sonderh*I = *Rechtstheorie* 26 (1995) 3 [Sonderheft Ungarn: *Verfassungsstaat, Stabilität und Variabilität des Rechts im modernen Rechtssystem* Internationales Symposium der Bper Juristischen Fakultät, hrsg. Werner Krawietz. Mihály Samu & Péter Szilágyi (Berlin: Duncker & Humblot)]; *Sonderh*II = *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot [2003]). pp. xi + 139–531 [*Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn]; *Theor* = *Theoretische Grundlagen der Rechtspolitik* Ungarisch–österreichisches Symposium der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1990, hrsg. Peter Koller & Csaba Varga & Ota Weinberger (Stuttgart: Franz Steiner Verlag Wiesbaden 1992) [ARSP Beiheft 54].

[1] See, e.g., *A Treatise of Legal Philosophy and General Jurisprudence* I–V, ed. Enrico Pattaro (Dordrecht: Springer 2005) or the immense ongoing undertaking of an *IVR Encyclopaedia of Jurisprudence, Legal Theory and Philosophy of Law* ed. Aleksander Peczenik <http://www.ivr-enc.info/en/index.php>.

these ontological and epistemological approaches became unified, in order to culminate later on in a clash between formalism and anti-formalism in the context of law and language, law and logic, law and rhetoric—, well, following the subsequent internal self-emptying of formalism and exhaustion of anti-formalism,[2] all such progress has suddenly become (in a typically European continental way) relegated to the background with striking rapidity, just to yield to that new kind of denaturation (perhaps at the same time also as a particularly perverse fulfilment) by the advance of analyticalism.

For it occurred the first time in the European history of ideas that a space, apparently emptied out by itself, was filled by the direct theoretical influx of an Anglo–American legal thought. Although, due to the fact that—figuratively speaking—MICHEL VILLEY and CHAÏM PERELMAN have been replaced by H. L. A. HART and RONALD M. DWORKIN in determining the tone of ongoing debates, the effect of post-Second World War continental natural law and anti-formalism, limiting and even alleviating the earlier predominance of legal positivism, could even further intensify, on the one hand. However, this became realised under the aegis of linguistic analysis alien to the continental legal perspective by its origins, having also emerged in Anglo–American jurisprudence as a by-product of the intention at formalising ethics, and thus, later on, only transferred in a by far not organic way to the field of law, on the other. Nonetheless, this analytical image of law, due to its mere artificiality and inner tendency to simulate law in a virtualised manner (instead of actual investigation into the subject matter), required and also cultivated legal sociology as a specific requisite to legal theory, as an indispensably auxiliary discipline in the macro- and micro-level research of legal reality, in which—let us recall here—a worldwide and emphatic co-operation between continental and Anglo–American legal scholarship could well have developed since the emergence of legal sociology, that is, for nearly a century now. Although the analytical study of law has (by overestimating its own potential) in the meantime gained predominance in most of Western Europe,[3] it has still proven short-lived (at least in its form known until now) in historical dimensions.

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[2] More precisely, after the death of VILLEY and PERELMAN without having established proper schools or institutional continuation, in want of appropriate successors.

[3] In which, of course, with basic definitions unchanged, features of the one-sidedness are being gradually eroded, moreover, with a demand for and also attempt at universality (by metamorphising into a comprehensive general theory) also assessed.

Its striving for exclusivity at the fora of legal theorising with a profoundly sterile predominance was met with rejection by those of the professional community teaching practical subjects of positive law (as perceivable now in the Nordic and Western European restriction of legal theoretical and philosophical subjects in the university curricula, assessable as a compulsive reaction). Meanwhile, the fora of the theoretical inquiries about law seem to join forces in the hope of some re-orientation with new beginnings.

In summary, the international reality of the turn of the millennium[4] is hardly more than a cavalcade of basic ethoses and approaches, in which the American scene is continuing to be dominated by the re-consideration of the feasible contents and ways of the judicial development of law through principles drawn from the constitution with human rights ideologies in the background, while the European stand stresses a pretended harmony of post-modernity, nurturing itself from the cacophony of manifold ambiguities and vaguenesses.[5]

2. The Situation in Hungary

By the end of the Communist party rule, theoretical legal thought in Hungary[6] had undergone substantial changes: it definitely became open as it continuously adapted itself to its international environment in a permanent

[4] Cf., e.g., in a bibliographical elaboration, the series of *Current Legal Theory* <http://www.cirfid.unibo.it/cult> or, in the mirror of a series of personal self-reports, *The Law in Philosophical Perspectives* My Philosophy of Law, ed. Luc J. Wintgens (Dordrecht, Boston, London: Kluwer 1999) xix + 282 pp. [Law and Philosophy Library 41].

[5] An especially instructive example is offered by the destiny of PECZENIK who could first, as the President of the International Association for Philosophy of Law and Social Philosophy [IVR], build up his own memorial, then had to live to see, before his sadly early death, the teaching of theoretical legal subjects being questioned by all the three faculties in Sweden. For the *a propos* of such faculty boards' re-evaluation was just his speciality on the field, namely, philosophising and theorising on law reduced to the long-term sterility of mere conceptual analysis.

[6] Cf., e.g., Vilmos Peschka 'Gyula Eörsi: Philosopher of Law' *Ajtur* 43 (2002) 1–2, pp. 43–56 as well as, by the author, 'The Place of Law in Lukács' Ontology' in *Hungarian Studies on György Lukács* II, ed. László Illés et al. (Bp: Akad 1993), pp. 563–577 & 'O espaço do direito na ontologia de Lukács' *Novos Rumos* [São Paulo] 18 (2003), No. 39, pp. 4–17 {& <http://www.institutoastrojildopereira.org.br/novosrumos/artigo_show.asp?var_artigo=59> & <http://www2.marilia.unesp.br/revistas/index.php/novosrumos/article/viewFile/2307/1896>} & 'Autonomy and Instrumentality of Law in a Superstructural Perspective' *Ajtur* 40 (1999) 3–4, pp. 213–235.

dialogue less in debate with than in an increasingly creative participation to (and as an acknowledged part of) it. In all this, in parallel with the total rejection of the imposed political regime of Socialism,[7] a kind of continuity and permanence reasonably could yet prevail, without an expressed break or division. For its once decisive authors had gradually risen anyway to great old names in the representation of the past and, thereby, also to antecedents in a sequence of the historical generation of ideas. Its most creative authors were writing opuses of synthesis in reconsideration of their established views, surrounded anyway by international attention; and its mid-generation was to experiment with its own ways to make it possible for a fresh Euro–Atlantic way of thinking to be cultivated as well in the domestic medium, especially in the classical fields of legal philosophy, sociological jurisprudence and linguistic-logical reconstruction. Moreover, in addition to the emergence of works preparing for the future, attempts at re-integrating the past (once spectacularly renounced by the Communists' alleged revolutionary discontinuity) may have also started.

This way, irrespective of the nature and success of the political change in the country anyway, there was no need for any spectacular shift in theoretical legal thought. Even if it may seem alien to scholarship's self-esteem and sublime intellectuality, let me make the following remark: as a result of the mere fact that academic publishing had finally become the exclusive matter of financing (freed from administrative constraints and privileged positions characteristic of the dictatorial regime which used to select according to non-academic merits from the outset) and due to the statutory re-framing of the status of universities with the first grades of academic (scientific) qualification relocated under their responsibility, they could after all become (again) the fundamental workshop for the cultivation of scholarship, in parallel with the doubling of the number of faculties of law within a few years. Well, in contrast to the past regime spanning half a century, all this

[7] E.g., by the author, 'Liberty, Equality, and the Conceptual Minimum of Legal Mediation' in *Enlightenment, Rights and Revolution* Essays in Legal and Social Philosophy, ed. Neil MacCormick & Zenon Bankowski (Aberdeen: Aberdeen University Press 1989), pp. 229–251 & [reprint] in *Marxian Legal Theory* [note 26], pp. 501–523 & 'Слобода, једнакост и појмовии минимум правне комуникације' *Зборник Матице Спрске за брушшвене науке* [Novi Sad] 1990, No. 88, pp. 59–78, as well as 'Law as a Social Issue' in Szkice z teorii prawa i szczegółowych nauk prawnych Professorowi Zygmuntowi Ziembinskiemu, ed. Sławomira Wronkowska & Maciej Zieliński (Poznan: Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza w Poznaniu 1990), pp. 239–255 [Uniwersytet im. Adama Mickiewicza w Poznaniu: Seria Prawo 129].

has offered entirely new and hitherto unknown prospects for both preparing own textbooks and publishing a wide number of papers at the growing fora of publication.[8]

Or, new vistas were opened during the last two decades to be overviewed here, first of all in (A) the publication of own textbooks, lectures and notes varying now from one alma mater to the next one, with the need also to regularly revise, rewrite and enlarge them; in (B) the cultivation of scholarship expanding to newer fields, from among which (a) the investigation into the connections between law and language and logic and rhetoric could result in the reformulation of earlier results with an increasingly synthesising force, (b) the Anglo–American type of conceptual analysis (hardly practised in Hungary till then) entered the scene with the downright claim to found an exclusive school within an unprecedentedly short period of time, and (c) after an almost complete silencing for more than half a century, the idea of natural law started to vindicate its own place under the sun through a series of published historical overviews and monographic papers; on (C) the key subsidiary and apparently marginal fields, there came (a) a disciplinary restart of (α) the classical cultivation of the history of ideas, (β) legal anthropology gained new force and a somewhat independent form, (γ) legal sociology became a nation-wide movement indeed, while (δ) in the field of legal comparativism, foundational works have been born, and all this—if the projected researches would in fact start and produce substantial results—might (b) augment the circle of problems covered by theoretical legal investigation with newer topics, such as (α) the research into the doctrinal bases of law, (β) the enquiry from the case-historical and narrative aspect of "law and literature" and, by (γ) expressing our day's preference to economism and drive to quantify, the theorising in terms of "law and economics".

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[8] Just to give a hint of the abundance unseen till then, it may suffice to refer to the presence of a journal initiated and edited in chief by Béla Pokol—*Jogelméleti Szemle* [*Review of legal theory*] (2000–), published electronically <http://jesz.ajk.elte.hu/>—as well as the series of books *Jogfilozófiák* in Hungarian and *Philosophiae Iuris* in western languages, launched and edited by Csaba Varga (now in the Institute for Legal Philosophy he founded at the Catholic University in 1995 which has been awarded—as the first ever had at department level in Hungary—"A Place of Excellence" by the National Accreditation Committee), and the series *Prudentia iuris* launched and edited by Miklós Szabó at the University of Miskolc.

(A) Two major circumstances brought new perspective, internal encouragement and special dynamism into textbook-writing. The first is that in a country of ten million inhabitants, there are now eight faculties of law offering their own programmes for quite an extended and deepened teaching in legal theory as a basic course.[9] The second is that with a new system of academic qualification introduced, most faculties launched doctoral schools which, within the perspective of PhD thesis-writing, may have added—as an extra impulse—the preparation of teaching aids. Besides summarisation and recapitulation in textbooks,[10] sophisticated elaborations of partial topics as well as foundational translations[11] and re-editions have been pro-

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[9] For a description of courses, see, by the author, 'The Teaching of Legal Philosophy in Hungary' *IVR Newsletter* (February–July 2004), No. 33 <http://www.ivr2003.net/bologna/newsletters/33.pdf>, pp. 23–24. It is to be noted that by the academic year starting in 2006, Natural Law is also transformed into an obligatory subject, and Comparative Legal Cultures as well as Sociology of the State (political sociology) are classed within optionally obligatory subjects.

[10] E.g., Béla Pokol *The Concept of Law* The Multi-layered Legal System (Bp: Rejtjel 2001) 152 pp. & Csaba Varga *Lectures on the Paradigms of Legal Thinking* (Bp: Akad 1999) vii + 279 pp. [Philosophiae Iuris] {& <http://law.sfu-kras.ru/viewcategory/30.html> [legal_thinking]}.

[11] *Bevezetés a jogbölcseleti gondolkodás történetébe* [Introduction to the history of legal philosophical thought] ed. Miklós Szabó (Miskolc: Miskolci Egyetem Jogelméleti és Jogszociológiai Tanszék 1991) 129 pp., for the most part translated from Edgar Bodenheimer's *Jurisprudence* The Philosophy and Method of the Law (Cambridge: Harvard University Press 1981). As the collection of foundational texts in philosophy of law, see, e.g., *A jogi gondolkodás paradigmái* Szövegek [Texts to the study of the paradigms of legal thinking] ed. Csaba Varga (Bp: [ETO Print] 1998) iii + 71 pp. [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae III/2] as well as *Jog és filozófia* Antológia a XX. század jogi gondolkodása köréből [Law and philosophy: Anthology of legal theorizing from the first half of the 20th century] ed. Csaba Varga (Bp: Szent István Társulat 2001) xii + 497 pp. [Jogfilozófiák]. As a collection of specific papers, see, e.g., *Logikai olvasókönyv joghallgatók számára* [A reader of logic for students of law] ed. Mátyás Bódig & Miklós Szabó (Miskolc: Bíbor Kiadó 1996) 223 pp. [Prudentia iuris 4]; *Mai angol–amerikai jogelméleti törekvések* [Current Anglo–American trends in legal philosophy] ed. József Szabadfalvi (Miskolc: Bíbor Kiadó 1996) 241 pp. [Prudentia iuris 5]; *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1] {translated in a new, enlarged composition in *Összehasonlító jogi kultúrák* ed. Csaba Varga (Bp: [Osiris] 2000) xl +397 pp. [Jogfilozófiák]}; *A jogösszehasonlítás elmélete* Szövegek a jelenkori komparatisztika köréből [The theory of comparative law: Texts from con-temporary legal comparativism] ed. Balázs Fekete (Bp: Szent István Társulat 2006) 195 pp. [Jogfilozófiák]. As an author-focussed translation, see, e.g., Javier Hervada *Introducción crítica al derecho natural* [Pamplona: EUNSA 1993] trans. by Katalin Hársfai as *Kritikai bevezetés a természetjogba* (Budapest: Szent István Társulat 2004) 199 pp.

duced for study purposes either in the compulsory main subject of legal theory (following propedeutics) or the specialist seminaries attached to it, as well as in doctoral courses, re-systematising of or problematising on legal theoretical thought, which are expected to superimpose to one another.

(B) Obviously, only just a few major fields can be mentioned to indicate the transformation of the fields of scholarship cultivated, in addition to the fortunately growing number of either *festschrift* volumes of essays in honour of eminent personalities or proceedings of conferences held either on anniversaries or in international or domestic workshops, on the one hand, and to endeavours at laying the foundations,[12] clarifying key problems,[13] collecting authors' own papers,[14] on the other. Let me highlight some of them below.

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[12] E.g., by Béla Pokol, *Komplexe Gesellschaft* Eine der möglichen Luhmannschen Soziologien (Bochum: Brockmeyer 1990) 271 pp. [Mobilität und Normenwandel 8] & *Complex Society* One of the Possible Luhmannite Theories of Sociology (Bp: Co-ordination Office for Higher Education 1991) 179 pp. and 'Law as a System of Professional Institutions' *Conn*, pp. 507–527 & 'Law as Professional System of Institutions' *Rth* 21 (1990) 3, pp. 272–289, on the one hand, as well as Péter Cserne 'From Law to Social Science and Back Again – the First Step: Remarks on the Juristic Origin of some Weberian Concepts' in *Ius unum*, pp. 457–472 and András Karácsony 'Gesellschaftstheorie und Recht' *Annales* 37 (1998), pp. 27–39, on the other.

[13] E.g., István Balogh 'Begründungsprobleme der Gerechtigkeitstheorie' *ARSP* 92 (2006) 1, pp. 28–58; Tamás Földesi 'Civil Disobedience: The »Step-brother« of Civil Rights' in *Annales* 32 (1991), pp. 21–37; Péter Takács 'Begriff des Gemeinwohls' in *Annales* 41–42 (2002), pp. 177–185; by András Tamás, 'The Law as a Command in the Pure Theory of Law and Technical Theory of Jurisprudence' in *Emlékkönyv Antalffy György egyetemi tanár oktatói működésének 40. és születésének 70. évfordulójára* [Festschrift for Professor György Antalffy's 40th anniversary of teaching and 70th anniversary of birth] ed. Károly Tóth (Szeged 1990), pp. 225–239 [Acta Universitatis Szegediensis de Attila József nominatae: Acta juridica et politica 39/1–23], 'The Law as Modernization Technique' *AJur* (1990) 3–4, pp. 263–282, 'The Technical Element in Law' in *Sectio* 5 (1990) 1–4, pp. 81–95, 'Regulation by Law and Regulation by Government in the Rule of Law and the Technical Theory of Jurisprudence' in *Kovács István-emlékkönyv* [Festschrift] ed. Károly Tóth (Szeged 1991), pp. 383–396 [Acta Juridica et Politica XL], 'Law-making and Administration' in *Ünnepi kötet Boytha Györgyné tiszteletére* [Festschrift] ed. Gyula Bándi (Budapest: Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar 2002), pp. 108–114; by the present author, *Codification as a Socio-historical Phenomenon* (Bp: Akad 1991) viii + 391 pp. as well as 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan et al. (Bruxelles: Bruylant 2004), pp. 779–800, 'Codification at the Threshold of the Third Millennium' *AJur* 47 (2006) 2, pp. 89–119 {&, for all, <http://drcsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>}, 'The Basic Settings of Modern Formal Law' in *European Legal Cultures* [note 37], pp. 89–103, 'Central and Eastern European Philosophy of Law' / 'Codification' / 'Ex Post Facto Legislation' / 'History (Historicity) of Law' / 'Legal Ontology

(a) Investigation relating to law and language,[15] law and logic[16] as well as rhetoric, seems to occupy a special place from the outset. Namely, no

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(Metaphysics)' / 'Validity' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 98–100 / pp. 120–122 / pp. 274–276 / pp. 371–373 / pp. 617–619 / pp. 883–885 [Garland Reference Library of the Humanities, 1743]; and, in *Theor*, Kálmán Kulcsár 'Politics and Legal Policy', pp. 17–27, Mihály Samu 'Legal Policy and its Axiological Background', pp. 95–102 and Péter Szilágyi 'Zur theoretischen Grundlegung der Rechtspolitik der Gesetzgebung', pp. 104–109.

[14] E.g., by Csaba Varga, *Law and Philosophy* Selected Papers in Legal Theory (Bp: [Akaprint] 1994) xi + 530 pp. [Philosophiae Iuris]

{& <http://drcsabavarga.wordpress.com/2010/10/25/varga-law-and-philosophy-–-papers-in-legal-theory-1994/>}, Études en philosophie du droit / Estudios de filosofia del derecho (Bp: 1994) xii + 332 pp. [Philosophiae Iuris]

{& <http://drcsabavarga.wordpress.com/2010/10/24/varga-etudes-en-philosophie-du-droit-estudios-en-filosofia-del-derecho-1994/>}, Rechtsphilosophische Aufsätze (Bp: 1994) x + 292 pp. [Philosophiae Iuris] {& <http://drcsabavarga.wordpress.com/2010/10/24/varga-rechtsphilosophische-aufsaetze-1994/>}, *Rechtsphilosophische Aufsätze* (Bp: 1994) xv + 281 pp. [Philosophiae Iuris] {& <http://drcsabavarga.wordpress.com/2010/10/24/varga-pravo-teoriya-i-filosofiya-1994/>}.

[15] By the author, *Theory of the Judicial Process* The Establishment of Facts (Bp: Akad 1995) vii + 249 pp.—with preliminary inquiries such as 'Judicial Reproduction of the Law in an Autopoietical System?' in *RTh* Beiheft 11 (1991), pp. 305–313 & *AJur* XXXII (1990) 1–2, pp. 144–151, 'Institutions As Systems: An Essay on the Closed Nature, Open Vistas of Development, as well as the Transparency of the Institutions and their Conceptual Representations' *AJur* 33 (1991) 3–4, pp. 167–178, 'On the Nature of the Judicial Process' <http://www.univie.ac.at/RI/IRIS2006/papers/varga.pdf>, then, with preliminarily published papers, such as 'Changing of Paradigms in the Understanding of Judicial Process' *Sonderh*I, pp. 415–424, 'The Judicial Process: A Contribution to its Philosophical Understanding' *AJur* 36 (1994) 3–4, pp. 145–164 & in *ARSP* Beiheft 69 (1998), pp. 206–219, 'The Mental Transformation of Facts into a Case' *ARSP* LXXVII (1991) 1, pp. 59–68, 'The Non-cognitive Character of the Judicial Establishment of Facts' *AJur* 32 (1990) 3–4, pp. 247–261 & in *ARSP* Beiheft 53 (1994), pp. 230–239, 'Descriptivity, Normativity, and Ascriptivity: A Contribution to the Subsumption/Subordination Debate' in *ARSP* Beiheft 54 (1992), pp. 162–172, 'The Judicial Establishment of Facts and its Procedurality' in *Sprache, Performanz und Ontologie des Rechts* Festgabe für Kazimierz Opałek zum 75. Geburtstag, ed. Werner Krawietz & Jerzy Wróblewski (Berlin: Duncker & Humblot 1993), pp. 245–258, 'On Judicial Ascertainment of Facts' *Ratio Juris* 4 (1991) 1, pp. 61–71 & 'La nature de l'établissement judiciaire des faits' *Archives de Philosophie du Droit* 40 (1996), pp. 396–409—and 'What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of »The Judicial Establishment of Facts«' in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza et al. (Berlin: Duncker & Humblot 2003), pp. 657–676 {&, for all, <http://drcsabavarga.wordpress.com/2012/03/13/varga-theory-of-the-judicial-process-the-establishment-of-facts-19952011/>}.

[16] Miklós Szabó 'Law as Translation' *ARSP* Beiheft 91 (2004), pp. 60–68 and 'Practical Equivalence' *ARSP* Beiheft 97 (2005), pp. 187–195 and, by the present author, 'The Context of the Judicial Application of Norms' in *Prescriptive Formality and Normative Rationality*

matter how pioneering a role it once used to play from the end of the 1960s in the theoretical loosening of the positions of classical positivism (or, in Hungary, of Socialist normativism), including their transcendence by developing new paradigms,[17] today it still represents the memory of some connection to the European past because, even if detached by its framework of interpretation, it can still be correlated to the law's one-time comprehension by ontologies and epistemologies while, perhaps up to the present day, it is the most powerful trend that has proved most effective in describing the whys and hows of the law's actual construction and operation by looking behind the law's ideologically postulated formal construction and operation, in order to reconstruct their genuine components.

(b) The analytical trend in legal scholarship—borrowed from the Anglo–American mainstream with presuppositions characteristic of a definite political philosophical viewpoint and cultivated mostly in frameworking interpretations, whose Hungarian reception has practically no reflection to either its continental parallels or to its further developed variants (continental or realised elsewhere)—has obviously arrived from outside, with proper claims, approach, methodology, sources, and conceptual world. However—as this became clear in, e.g., Poland, in competition with MARXism nearly for three decades now—, this analytical trend not only had a fermenting

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in Modern Legal Systems Festschrift for Robert S. Summers, ed. Werner Krawietz et al. (Berlin: Duncker & Humblot 1994), pp. 495–512, 'No Logical Consequence in the Normative Sphere?' in *ARSP* Beiheft 60 (1995), pp. 31–37, 'Law, Language and Logic: Expectations and Actual Limitations of Logic in Legal Reasoning' in *Verso un sistema esperto giuridico integrale* ed. C. Ciampi et al., I (Padova: Cedam 1995), pp. 665–679, as well as 'Legal Logic and the Internal Contradiction of Law' in *Informationstechnik in der juristischen Realität* Aktuelle Fragen zur Rechtsinformatik 2004, hrsg. Erich Schweighofer et al. (Wien: Verlag Österreich 2004), pp. 49–56 [Rechtsinformatik 9] and 'Rule and/or Norm, or the Conceptualisibility and Logifiability of Law' in *Effizienz von e-Lösungen in Staat und Gesellschaft* Aktuelle Fragen der Rechtsinformatik (Tagungsband der 8. Internationalen Rechtsinformatik Symposions, IRIS 2005) hrsg. Erich Schweighofer et al. (Stuttgart, etc.: Boorberg 2005), pp. 58–65.

[17] By the author, '»Law«, or »More or Less Legal«?' *Ajfur* 34 (1992) 3–4, pp. 139–146, as well as—as papers preliminary to his *Lectures* [note 10]—'Norms through Parables in the New Testament: An Alternative Framework for Time and Law' in *Time and Law* Is it the Nature of Law to Last?, ed. François Ost & Mark Van Hoecke (Bruxelles: Bruylant 1998), pp. 213–224 [Bibliothèque de l'Académie Européenne de Théorie du Droit], 'Measuring through Patterning in Law: Development of an Idea in Europe' *Ajfur* 39 (1998) 1–2, pp. 107–130, 'Patterns of Thought, Patterns of Law' *Ajfur* 38 (1997) 3–4, pp. 93–105, 'Paradigms of Legal Thinking' *Ajfur* 40 (1999) 1–2, pp. 19–41, and 'The Nature of Law and Legal Thinking' in *Justice*, pp. 112–124.

effect but was also able to challenge the typically continental patterns of thought accustomed in Hungary by raising new questions. With this, it can reach (if it has not already reached) not only its conceptual world and to some extent also its underlying political and philosophical worldview being adapted but also becoming itself the natural subject of legal discourses.[18]

(c) Together with all the "bourgeois" legacies cultivated as legal philosophy mostly along new-KANTian methodological confines between the two World Wars in Hungary, it was natural law that suffered the greatest losses of the Muscovite-style of ideological homogenisation in Hungary, stricken, in addition to being silenced, by another circumstance as well, notably, that natural law as such hardly existed for almost one whole century in Hungary, because even its earlier cultivation, both in the pre-war and inter-war periods, was done rather theologically than as an organic part of legal philosophising. All that notwithstanding, today it occupies an in-between position, because both in general and in its having covered by lawyers, it is part of the international catholic intellectual revival and also of a reconsideration of basic issues demanded by the age. At the same time it is also activated both as the ever-green historical counter-pole to legal positivism (under general criticism and attack now)[19] and as the literally ultimate promise of offering some axiological foundation and point of reference, suitable to define (upon its tradition lived through millennia) reliable criteria so wanted for our world having lost its direction and being endangered from several sides.

(C) On the auxiliary and marginal areas, (α) history of ideas was so to speak never regularly cultivated in a classical sense earlier in Hungary. Our related scanty literary outputs, starting from, say, the end of the 19th century, is scarcely more than a set of occasional digressions, anniversary commemorations or prefaces. In contrast, what is about to come to fruition at present (and perhaps in the hope of a better future) already now shows the signs of a certain abundance. Namely, researchers have started becoming specialised in studying certain historical trends and schools from antiquity[20]

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[18] E.g., Mátyás Bódig 'The Political Character of Legal Institutions and its Conceptual Significance' *Ajtur* 46 (2005) 1–2, pp. 33–50.

[19] E.g., Ferenc Hörcher *Prudentia iuris* Towards a Pragmatic Theory of Natural Law (Bp: Akad [2000]) 176 pp. [Philosophiae Iuris] and Szilárd Tattay 'Are Legal Semiotics and Natural Law Irreconcilable?' in *Justice*, pp. 101–110.

[20] E.g., András Földi 'Zum Begriffsgeschichte der Verantwortung' in *Ius unum*, pp. 89–116; by Tamás Nótári, 'Summum ius summa iniuria: Comments on the Historical Background

to the early modern[21] and modern age,[22] in addition to reconsidering contemporary development—mostly through Western[23] and Central and Eastern European[24] or domestic[25] antecedents—, includ-ing both reprints (at

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of a Legal Maxim of Interpretation' *AJur* 45 (2004) 3–4, pp. 301–322, 'On Some Aspects of the Roman Concept of Authority' *AJur* 46 (2005) 1–2, pp. 95–114, 'The Scales as the Symbol of Justice in the Iliad' *AJur* 46 (2005) 3–4, pp. 249–259; Miklós Szabó 'Formal Justice and Positive Law: The Graeco-Roman Heritage' in *Bona discere* Festgabe für János Zlinszky zum 70. Geburtstag, hrsg. O. Péter & B. Szabó (Miskolc: Bíbor 1998), pp. 253–267.

[21] E.g., Szilárd Tattay 'Natural Law and Natural Rights in Ockham's Legal Philosophy' in *Ius unum*, pp. 539–555.

[22] E.g., András Karácsony 'Legal Hermeneutics in German Jurisprudence since the Early 17th Century' *Annales* 44 (2004), pp. 189–205.

[23] In a classical sense, Mátyás Bódig 'Hart's Jurisprudence: Its Relation to Philosophy' *AJur* 42 (2001) 1–2, pp. 1–23; by the present author, 'Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven' *ARSP* LXXVI (1990) 3, pp. 348–366 & 'Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions' *AJur* 36 (1994) 1–2, pp. 3–27, 'Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)' in *Perspectives on Jurisprudence* Essays in Honor of Jes Bjarup, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law 2005) [= *Scandinavian Studies in Law* 48], pp. 517–529 & *Rivista internazionale di Filosofia del Diritto* LXXXI (2004) 4, pp. 691–707 as well as 'The Hart-phenomenon' *ARSP* 91 (2005) 1, pp. 83–95; as a contemporary overview in *Pécs*, Antal Visegrády 'Legal Theories at the Turn of the 3rd Millennium', pp. 43–52 & Gábor Monori 'Feminist Jurisprudence in the 21st Century', pp. 55–68.

[24] By the author, 'Philosophy of Law in Central and Eastern Europe: A Sketch of History' *AJur* 41 (2000) 1–2, pp. 17–25.

[25] E.g., Péter Szilágyi 'Die Anfänge der ungarischen Rechtsphilosophie' in *Annales* 43 (2003), pp. 21–34; by József Szabadfalvi, 'Short History of Legal Philosophical Thinking in Hungary until the Mid-Twentieth Century' *Acta Iuridica Cassoviensia* 25 (2004), pp. 36–45, 'Revaluation of Hungarian Legal Philosophical Tradition' *ARSP* 89 (2003) 2, pp. 159–170, 'The Role of the Hungarian Legal Philosophical Tradition in the Renewal of National Legal Culture' in *LawCult*, pp. 236–248, 'Transition and Tradition: Can Hungarian Traditions of Legal Philosophy Contribute to Legal Transition?' *Sonderh*II, pp. 167–185, 'Portrait-sketches from the History of Hungarian Neo-Kantian Legal Philosophical Thought' *AJur* (2003) 3–4, pp. 245–256 & 'Neo-Kantian Legal Philosophical Thinking in Hungary' *Recueil des Travaux* [Novi Sad] XXXVII (2003) 1–2, pp. 271–281, 'Wesen und Problematik der Rechtsphilosophie: Die Rechtsphilosophie von Gyula Moór' in *Sectio* 15 (1998), pp. 209–229 & *RTh* 30 (1999) 3, pp. 329–353 and 'Some Reflections on the Anglo-Saxon Influence in the Legal Philosophical Traditions' *AJur* (2001) 1–2, pp. 111–119 & 'The Spirit of the Common Law in the Hungarian Legal Philosophical Thinking' *Hungarian Journal of English and American Studies* 9 (2003) 2, pp. 199–208; Csaba Varga 'Philosophysing on Law in the Turmoil of Communist Take-over in Hungary (Two Portraits, Interwar and Post-war)' [on Moór & Losonczy] in *2005 ALPSA Annual Publication* ed. Max Leszkiewicz (Brisbane 2005), pp. 82–94; Ágnes Zsidai 'Die Erscheinung der Perspektive: Synoptische Rechtstheorie von Horváth Barna' in *Annales*

times enlarged into collections)[26] and translations,[27] moreover, at times also

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44 (2004), pp. 207–226; András Karácsony 'In the Attraction of Natural Right: Bibó István's Conception of Law' *Annales* 41–42 (2002), pp. 223–233.

[26] For re-editing pieces of international literature, see *Historical jurisprudence* ed. József Szabadfalvi (Bp: [Osiris] 2000) 303 pp. [Philosophiae Iuris], Hans Kelsen *Az államelmélet alapvonalai* [Grundriß einer allgemeinen Theorie des Staates, 1926] trans. Gyula Moór, ed. József Szabadfalvi (Miskolc: Bíbor Kiadó 1997) 121 pp. [Prudentia iuris 7], *Scandinavian Legal Realism* ed. Antal Visegrády (Bp: [Szent István Társulat] 2003) xxxviii + 162 pp. [Philosophiae Iuris], and *Marxian Legal Theory* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1993) xxvii + 530 pp. [The International Library of Essays in Law & Legal Theory: Schools 9]; for re-editing from the domestic legacy (in a chronological order of the sources), Bódog Somló *Schriften zur Rechtsphilosophie* ausgew. Csaba Varga (Bp: Akad 1999) xx + 114 pp. [Philosophiae Iuris]; Julius Moór *Rechtsphilosophische Aufsätze* hrsg. Csaba Varga (Bp: Szent István Társulat 2006) xxii + 485 pp. [Philosophiae Iuris] {& <http://philosophyoflaw.wordpress.com/>}; by Barna Horváth, *Schriften zur Rechtsphilosophie* I: 1926–1948: Prozessuelle Rechtslehre; II: 1926–1948: Gerechtigkeitslehre; III: 1949–1971: Papers in Emigration, hrsg. Csaba Varga (Bp: Szent István Társulat 2013) [Philosophiae Iuris] {in preparation}; *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas, hrsg. Csaba Varga (Bp: Szent István Társulat 2006) 246 pp. [Philosophiae Iuris].

[27] As dedicated to trends and schools and topics, e.g., *Természetjog* Szöveggyűjtemény [Natural law texts] ed. János Frivaldszky (Bp: Szent István Társulat 2004) 218 pp. [Jogfilozófiák]; *Jog és nyelv* [Law and language] ed. Miklós Szabó & Csaba Varga (Bp: [Books in Print] 2000) vi + 270 pp. [Jogfilozófiák]; *Jog és antropológia* [Law and anthropology] ed. István H. Szilágyi (Bp: [Osiris] 2000) viii + 366 pp. [Jogfilozófiák]; *Joguralom és jogállam* [Rule of law and Rechtsstaatlichkeit] ed. Péter Takács (Bp: [Osiris] 1995) 330 pp. [Jogfilozófiák]; *Alkotmánybíráskodás – alkotmányértelmezés* [Constitutional adjudication – constitutional interpretation] ed. Péter Paczolay (Bp: [Osiris] 1995) 216 pp. [Jogfilozófiák] & (Bp: Rejtjel ^{2}2003) 212 pp. [Rejtjel politológia könyvek 15]; in personal oeuvres, Saint Thomas Aquinas *A Summa Theologiae kérdései a jogról* [The Questions of Summa Theologiae relating to law (I-II, qq. 90–108 & II-II, qq. 57–62)] ed. Csaba Varga (Budapest: Szent István Társulat 2011) ix + 269 pp. [Jogfilozófiák]; Jerome Frank *A bíráskodás az értelem ítélőszéke elõtt* Válogatott írások [Selected texts on courts and trial] ed. Attila Badó (Bp: Szent István Társulat 2006) 164 pp. [Jogfilozófiák]; Helmut Coing *Grundzüge der Rechtsphilosophie* [1993] trans. Béla Szabó as *A jogfilozófia alapjai* (Bp: Osiris 1996) 294 pp. [Osiris tankönyvek]; H. L. A. Hart *The Concept of Law* [1994] trans. Péter Takács as *A jog fogalma* (Bp: Osiris 1995) 375 pp. [Osiris könyvtár: Jog]; *Hayek és a brit felvilágosodás* Tanulmányok a konstruktivista gondolkodás kritikájának eszmetörténeti forrásairól [Hayek and the British Enlightenment: Historical sources on the criticism of constructivism] ed. Ferenc Horkay Hörcher (Bp: 2002) xvii + 112 pp. [Jogfilozófiák]; *A társadalom és a jog autopoietikus felépítettsége* Válogatás a jogi konstruktivizmus irodalmából [The autopoietical construction of society and law: From the literature of legal constructivism] ed. Lajos Cs. Kiss & András Karácsony (Bp: [Osiris] 1994) 124 pp. [Jogfilozófiák], as well as *Válogatás Niklas Luhmann írásaiból* [Luhmann selected] ed. Dénes Némedi (Bp: Művelődési Minisztérium Marxizmus–leninizmus Oktatási Főosztálya 1987) 144 pp. [Szociológiai füzetek] and *Luhmann-könyv* [A Luhmann-book] ed. Jenő Bangó & András Karácsony (Bp: Rejtjel 2002) 253 pp. [Bibliotheca iuridica: Acta congres-

original (posthumous) texts editions.[28] In laying social theoretical foundations for legal philosophical thought, a key role may be played by (β) anthropology and (γ) sociology. As to legal anthropology, the very start of its cultivation is remarkable itself.[29] On the other hand, legal sociology is refounding itself to become an independent discipline by elaborating monographs[30] and papers[31] in addition to textbooks and the launching of its own periodi-

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sum 2]; Zenon Grocholewski *La filosofia del diritto di Giovanni Paolo II* [1991] trans. Péter Szabó as *II. János Pál jogfilozófiája* (Bp: Szent István Társulat 2003) 72 pp. [Pázmány könyvek 4].

[28] E.g., Hans Kelsen *Reine Rechtslehre* [1934] trans. István Bibó [1937] ed. Csaba Varga as *Tiszta jogtan* (Bp: Eötvös Loránd Tudományegyetem Bibó István Szakkollégium 1988 [reprint Bp: Rejtjel 2001]) XXII + 106 pp. [Jogfilozófiák]; *Aus dem Nachlaß von Julius MOÓR* hrsg. Csaba Varga (Bp: ELTE "Comparative Legal Cultures" Project 1995) xv +158 pp. [Philosophiae Iuris] {& <http://philosophyoflaw.wordpress.com/>} & Csaba Varga 'Documents de Kelsen en Hongrie: Hans Kelsen et Julius Moór' *Droit et Société* (1987), No. 7, pp. 337–352; Barna Horváth *The Bases of Law* [1948] ed. Csaba Varga (Bp: Szent István Társulat 2006) liii + 94 pp. [Philosophiae Iuris]; István Losonczy *Abriß eines realistischen rechtsphilosophischen Systems* hrsg. Csaba Varga (Bp: Szent István Társulat 2002) 144 pp. [Philosophiae Iuris].

[29] E.g., by István H. Szilágyi, 'Let us Invent Hungarian Legal Anthropology' in *Sonderh*II, pp. 187–196 and 'The Roma Way – Comparative Legal Studies: Comparative Law, Sociology and Anthropology' in *Ius unum*, 129–148, as well as István H. Szilágyi & Sándor Loss 'Opening Scissors: The Legal Status of the Gypsy Minority in Nowadays Hungary' in *Sonderh*II, pp. 483–494.

[30] First of all, Kálmán Kulcsár *Modernization and Law* (Bp: Akad 1992) 282 pp.

[31] E.g., Attila Badó & János Bóka & Zsolt Nagy *Hungarian Lawyers in the Making* Selection Distortions after the Democratic Changes in Hungary (Szeged 2003) 20 pp. [Acta Universitatis Szegediensis: Acta juridica et politica 63/1]; by András Sajó, 'Subjektive Rechte im Bewusstssein der Ungarn' *Zeitschrift für Rechtssoziologie* 11 (1990) 1, pp. 91–100, 'Social Change and/or Legal Change' in *Laws and Rights* ed. Vincenzo Ferrari (Milano: Giuffrè 1991), pp. 935–953, 'The Role of Legal Profession in Social Change in Hungary' & 'Contemporary Problems of the Judiciary in Hungary' in *The Social Role of the Legal Profession* ed. Kahei Rokumoto (Tokyo: International Center for Comparative Law and Politics 1993), pp. 141–150 & 131–139, 'The Role of Lawyers in Social Change (Hungary)' *International Law* 25 (1993) 2, pp. 137–146 and 'L'industrie d'État du changement et l'effort stabilisateur du droit' in *Modern*, pp. 33–49; by the present author, 'The Law and its Limits' *AJur* 34 (1992) 1–2, pp. 49–56; by Antal Visegrády, 'Die Probleme der Effektivität des Rechts' in *Tanulmányok Földvári József tiszteletére* ed. László Korinek (Pécs 1996), pp. 170–179 [Studia Juridica Auctoritate Universitatis Pécs publicata 124] & 'Zur Effektivität des Rechts' *ARSP* Beiheft 82 (2002), pp. 51–57, 'Measurement of the Effectiveness of Legal Rules' in *Jura antiqua*, pp. 265–275, 'Judicial Practice as an Element of Legal Development' in *Sonderh*I, pp. 425–432 and 'Rule of Law and Efficiency of the Legal System' in *Sonderh*II, pp. 331–340, 'Legal Cultures and Effectiveness of Law' in *Sectio* 21 (2003) 1, pp. 301–310, 'Legislation and jurisprudence' in *»Adamante notare«* Essays in Honour of Professor Antal Ádám on the Occasion of his 75th Birthday, ed. Nóra Chronowski (Pécs 2005), pp. 211–218 [Studia Juridica Auctori-

cal.[32] However, it is still far from that flourishing which proved to be an effective force forming society at the time of Socialism through both theoretical (macro-sociological) and concrete-empirical (micro-sociological) investigations. Lastly, (δ) legal comparativism is scarcely more today than a respectable subject to teach,[33] which (despite partial analyses on the field[34]) is still waiting for being recapitulated in textbooks and for a re-start of preparing for monographs (as widely done in the Socialist past as acknowledged internationally) by academic encouragement. Nevertheless, it is now widely recognised that comparativism is simply an old-new *sine qua non* and, after proper university fora will have been formed, its cultivation shall also become regular. As a result of all this, (b) research may fortunately expand to further areas which at last (α) attempt to lay foundations for the doctrinal study of law,[35] (β) realise interdisciplinarity between living law and philo-

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tate Universitatis Pécs publicata 135]; Antal Visegrády & István Kajtár 'Rechtstheoretische und rechtshistorische Erläuterungen zur Effektivität des Rechts' *AJur* (1990) 3–4, pp. 293–295 and Antal Visegrády & Mária Schadt 'The Development of Legal Knowledge of University Students' in *Tanulmányok dr. Földvári József professzor 75. születésnapja tiszteletére* ed. Mihály Tóth & Csongor Herke (Pécs: Pécsi Tudományegyetem Állam- és Jogtudományi Kar 2001), pp. 117–127.

[32] E.g., the yearly *Kontroll* 2003/1–, with rotating university backgrounds and chairs to edit it.

[33] Cf., e.g., Zoltán Péteri 'Teaching of Comparative Law and Comparative Law Teaching' *AJur* 43 (2002) 3–4, pp. 243–262.

[34] Balázs Fekete 'Legal Assistance and the Transplant of Constitutional Models: A Hungarian Case-study from the Early Socialist Era' in *LegAss*, pp. 235–248; Attila Harmathy 'Comparative Law and Changes of the Law' *AJur* 40 (1999) 3–4, pp. 159–167; by Zoltán Péteri, 'La modernisation et le droit Socialiste hongrois' *Modern*, pp. 25–32 as well as, in *LegAss*, 'Law and the Legal Families of the World: The Problem of Classification', pp. 113–123 & 'Law Teaching as a Form of Legal Assistance', pp. 275–285; by Béla Pokol, 'Forms of Judicial Power' in *Tanulmányok dr. Nagy László egyetemi tanár születésének 90. évfordulójára* (Szeged 2004), pp. 351–384 [Acta Juridica et Politica 64], 'Statutory Interpretation and Precedent in Hungary' *Osteuropa Recht* 2000/3, pp. 262–277 & 'Rechtsauslegung und Präjudizienrecht in Ungarn' *Zeitschrift für öffentliches Recht* 55 (2000) 4, pp. 87–99; by the present author, 'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' *AJur* 44 (2003) 1–2, pp. 21–44.

[35] E.g., by Máté Paksy, 'Quelques réflexions sur la jurisprudence relative à l'article 4 du Code civil français' in *Justice*, pp. 75–85 & 'Conservatisme juridique? Essai sur la critique positiviste et antipositiviste de la méthode »génétique« de l'interprétation' in *Ius unum*, pp. 475–498; Vilmos Peschka 'The Retroactive Validity of Legal Norms' *AJur* 40 (1999) 1–2, pp. 1–17; Béla Pokol 'The Structure of Legal System' *AJur* 43 (2002) 3–4, pp. 219–232; Csaba Varga 'Validity' *AJur* 41 (2000) 3–4, pp. 155–166; Attila Rácz 'The Binding Force of Legal Rules: Their Validity, Effectiveness, and Applicability' *AJur* 37 (1995–96) 1–2, pp. 37–48.

sophical jurisprudence within the (American-type) informality of "law and literature" (having by now also penetrated Europe), or (γ) try to find more guarantee for plannability and foreseeability in the intermediate sphere of "law and economy"[36] (just as once legal behaviourism hoped to realise the indexation of foreseeability through the statistics of judicial behaviour).

From among all these directions with re-starts and attempts, mutual influences and intertwinings, it is the repeated debate on law taken as language and logic (in a continuous struggle with the tradition of legal positivism) that comes out as the most innovative in effects, as it resulted (nearly one and a half decades ago) in recognising law first as a process, then (searching for the societal embedding of processes) as a culture, having generated by today the law's investigation in a deeper medium, in the historico-comparative examination of legal cultures themselves. That is, the rejection of positivism's tight-fistedness and the relevant studies in classical legal comparativism (attempting at some self-transcendence) could after all establish a new interest, namely, the investigation within the perspective of comparative legal cultures, already involving (as both a promise and as a perspective) the aspiration for comparative judicial mind, that is, the comparison of how justices arrive at judicial conclusion in different cultures with differing ideas on which ways law and order is to be standardised and reached.

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[37] E.g., *Comparative Legal Cultures* ed. Varga Csaba (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1] and *European Legal Cultures* ed. Volkmar Gessner & Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I], followed, by the present author, [Comment to The Notion of Legal Culture] in *Changing Legal Cultures* ed. Johannes Feest & Erhard Blankenburg (Oñati: International Institute for the Sociology of Law 1997), 207–217 pp. [Oñati Pre-publications–2] & 'Comparative Legal Cultures: Attempts at Conceptualisation' *AJur* 38 (1997) 1–2, pp. 53–63 and 'Varieties of Law and the Rule of Law' *ARSP* 82 (1996) 1, pp. 61–72.

[38] As preliminary studies, see, e.g., Kálmán Kulcsár 'Political Culture – Legal Culture, Conflicts and Harmony: A Study on East-Central Europe' in *Rth* Beiheft 12 (1991), pp. 321–342, Mihály Samu 'Culture and Law: Legal Culture' in *ARSP* Beiheft 40 (1991), pp. 7–84, as well as András Sajó 'Authoritarian Law' in *Out and into Authoritarian Law* ed. András Sajó (The Hague: Kluwer Law International 2002), pp. 1–22.

3. Outlook I: The Historico-comparative Study of Legal Cultures and of the Legal Mind

The comparative study[37] (assuming also historical explication) of legal cultures[38] may even reverse the order accepted so far in the cultivation of universal jurisprudence. Because it can be justifiably proposed that at the intersection of legal history, legal theory, legal anthropology and comparative law, it is individual legal cultures (i.e., sets of traditions organised—despite their specific and growing interactions—into autochthonous blocs) that need to be characterised first, so that the formalistic envelope usually examined by comparative law, that is, the positivated institutional superstructure, can be built in these.

The actual novelty in all this is the recognition of the presence of paradigms perceivable locally in a given time and space, that is, the presumption that in principle every viable culture generates (or may generate) some kind of geniosity mostly characteristic of it alone, with kinds of technical procedure promising very much potentially and also performing much in fact, which guarantees (systematically and with the required particular balance) both the synchrony and the optimally achievable success of preservation and renewal at any time. That is, the once usual extensive (quasi-questionary) description reduced normally to the mere listing (in a catalogue-like manner) of data, as some specific legal mapping, can and shall be replaced by a characterisation aiming at highlighting the specificities and the potentially fertilising force of *la mentalité juridique*[39] developed in a given culture according to changing criteria in function of timely challenges and tradition continued.

Thus, investigations for an ontology of law carried out within my researches on LUKÁCS[40] have already presented the prevailing lawyerly ideology as an ontological component of the given legal reality; and the developments on the paradigms of legal thinking[41] have tried, at the level of analysis

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[39] The term was introduced as a key term by PIERRE LEGRAND.

[40] By the author, *The Place of Law in Lukács' World Concept* (Bp: Akad 1985, reprint 1998) 192 pp. {&, as to its 3rd [reprint] ed. with Postface (Budapest: Szent István Társulat 2012) 218 pp., also <http://drcsabavarga.wordpress.com/2012/03/13/the-place-of-law-in-lukacs-world-concept-19852012/>}.

[41] Varga, *Lectures* [note 10] with preliminary papers [note 17].

[42] E.g., by the author, 'Legal Traditions? In Search for Families and Cultures of Law' *Ajfur* 46 (2005) 3–4, pp. 177–197.

at least, to uncover law from its dys-anthropomorphising and depersonalising formalistic envelope by presenting it in its own complexity, involving its application, too, as a directly social human product in the shaping of which both the entire society in general and especially its lawyerly *élite* in particular (and, after all, every single addressee actually contributing to the hermeneutic process of shaping the public understanding of law) take part with—in principle—full responsibility.

A possible and desirable research in this circle will above all contrast the positions of legal positivism (classical comparative law) to the stand taken after the disintegration of positivism (comparative legal cultures). Within such a context, even the selection of either 'legal culture'[42] or 'legal tradition'[43] as a key term will be a crucial issue, together with the dilemma of how far the hitherto properly working genealogical category of "legal family" remains (or may remain) an operative concept in future development with growing unification and globalisation as future trends.

This will presumably involve the assumption of definite attitudes in extremely topical debates (forecasting developmental tendencies) such as, e.g., the convergence between Civil Law and Common Law within the European Union (as a prerequisite to a genuine unification or, at least, an important stepping stone in advance); the codification of the law common for the European Union (especially as to its means, methods and techniques for judicial actualisation); as well as the description of the process actually going on under the aegis of the interpretation and application of the provisions of national legal orders in the jurisprudence of the common judicial fora of the European Union. The last concern to be addressed in this circle is globalism and its legal treatment, with particular attention to the effect of its foreseeable developmental perspectives on the sustainability of the diversity of legal cultures and ways of thinking having evolved so far mostly within national bounds.

For what is just going on either within re-considerations after the European Union's completed and forthcoming enlargements or under the aegis

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[43] Most lately, e.g., Jaakko Husa 'Emancipation or Deprivation for the European Legal Mind? The Contribution of the Legal Tradition Approach' *Maastricht Journal of European Law* 13 (2006) 1, pp. 81–107.

[44] As of a landmark value, see H. Patrick Glenn *Legal Traditions of the World* Sustainable Diversity in Law (Oxford & New York: Oxford University Press 2000) xxiv +371 pp.

[45] Konrad Zweigert 'Solutions identiques par des voies différentes (Quelques observations en matières de droit comparé)' *Revue internationale de Droit comparé* XVIII (janvier–mars 1966) 1, pp. 5–18.

of globalisation (and whose starting point, even if of a symbolic value, is the efforts at constitution-making at the level of the Union, together with present-day failures) will presumably determine the fate of mankind for centuries. A clarification of the mutual relations of such great trends is a task to be carried out by the profession, along with meditation on the issue of what is referred to by scholarship as the sustainability of diversity in law and legal traditions.[44]

All this may provide foundations for yet another topic of research, founded on the dilemma raised once by ZWEIGERT,[45] who was the first, four decades ago, to problematise on the chance of *solutions identiques* through *voies différentes* in law, for the first sight involving an apparent paradox.

Well, exactly such is the direction already raised in international literature as a potentiality one decade ago (highlighted by me, as it happens) under the name of the "comparative judicial mind", aiming at mutually contrasted comparative examinations—firstly, through the accepted judicial ways of thinking and argumentation (or, in English, canons); secondly, through legal techniques applied[46]—of the factors that may allow legal statements with similar conclusions to be drawn from dissimilar laws, on the one hand, and assure (in most of them) the adaptation to changing conditions at all times, by responding reliably and flexibly to new challenges through a practical development of the law, on the other. At the same time, this same examination may afford ontological reconstruction as well, expecting to inform on the very nature of law: how and with what technical instruments (in addition to the posited legal text) will the actors' own professional values, skills, conceptual sensitivity, paths, lawyerly ideology (etc.) contribute to the actual shaping of the specific culture of the given legal order and its preservation and renewal through changes of times.

Some research of a comparable scope took place nearly one century ago, in the decades between the inquiries of FRANÇOIS GÉNY in France (around the turn of the 19th and 20th centuries) and of JEAN DABIN in Belgium (between the two World Wars), approaching law in an ontological perspective

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[46] Cf., e.g., by Csaba Varga & József Szájer 'Fiction' & 'Présomption' & 'Technique juridique' in *Dictionnaire encyclopédique de Théorie et de Sociologie du Droit* dir. André-Jean Arnaud, 2e éd. corrigée et augmentée (Paris: Librairie Générale de Droit et de Jurisprudence 1993), pp. 259–261 & 470–472 & 605–607, as well as Mihály Maczonkay 'Pragmatic Legal Reasoning and its Antecedents in Roman Law' in *Jura antiqua*, pp. 169–186.

[47] Cf., e.g., by the author, 'Doctrine and Technique in Law' in <www.univie.ac.at/RI/IRIS2004/Arbeitspapierln/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc> & *Iustum Aequum Salutare* IV (2008) 1, pp. 23–37 & <http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>.

(describing the construction of its proper existence) through a focus on conceptual patterns, transformations and jumps—that is, techniques applied—in the actual process of its application.[47] Present-day trends in hermeneutics, legal semantics and pragmatics (with language taken as metaphor, as symbolism, as medium of post-WITTGENSTEINian speech-acts in the background) all point to the promise and necessity of an examination of such kind. However, up to now, nothing of the kind has taken place in the law. For it is only the United Kingdom and some sporadic irradiations where attempts can at all be encountered at offering explanations in terms of legal semiotics or as based on a comparison of, e.g., English and German juristic methods.

In so far as we reflect such methodological insights onto the present facts of the European Union and the conceivable perspectives of globalisation taking place, research should cover the effects of the law commonly codified by the Union, its judicial and administrative application by the common fora of the Union with repercussions on the chances of survival of the historical particularities and relative autonomy (differing conceptuality, structure, problem-sensitivity, technical store of instruments, as well as skills) of individual national legal systems.

However, formulated from the opposite direction, all this is to raise the issue whether or not, and in what sense and extent, the law of the European Union is going to be (i.e., to become or to embody) some independent *sui generis* formation or, otherwise speaking, how far its making, together with its administrative usage and judicial application, will be a scene, medium and issue of competition of the (above all) English, French and German internal (domestic) traditions (each of them in a constant fight to expand their respective influences) for a genuinely inter-national (i.e., EU-level) recognition. This is a complex issue in itself, with a number of topics to be treated. Firstly, there is the issue of whether the parallelity between the so far separate mentalities of continental Civil Law and Anglo-Saxon Common Law will be preserved or they will rather intermingle with one another eventually. Secondly, the patterns, techniques and chances of the common European law's codification. Thirdly, the patterns actually followed in the jurisprudence of the common judicial fora of the European Community. And, in general, the mapping of the legal traditions which make up the European Union, with the description of their respective weighs and interrelationships as well as of the chances of their survival despite their continuous transformation and metabolism (with special regards to their re-

spective sources of the law, conceptuality and techniques, as well as judicial methodology).

There is a particular stress on being sensitive enough while responding to the concern of sustainability, that is, the prospects of an alternative between remaining roughly the same in mutual interaction or assimilating incessantly to the rest (with the issue of the pressure and/or predomination by certain actors) and of what role some historically-evolved traditions may eventually play in forming this, by defining its basic directions and (besides adaptation) becoming a factor of stability and strength at any time.

Reverting to the initial ideas, those issues that may need further elaboration in the near future do include, primarily, the definition of the law's identity and, thereby, also of the criterion of juridicity by either the exclusivity of some or the plurality of all its aspects and contexts (above all, whether the understanding of law and juridicity is being reduced to some posited text or becomes dissolved in the facts of legal practice, the so-called 'judicial event'), and, arising from these, also the explanation of the role law-applying may play in terms of either creative responsibility or executory mechanicity, with the variety of factors in the making and eventual shaping of the law, the relative autonomy of their paths, as well as, simultaneously, the doctrinal frames and relatively open chances of legal development, with the significance attributed to the law in resolution of social conflicts involved.

4. Outlook II: The Paradigmatic Enigma of the Transition to Rule of Law

The seemingly temporary topicality of the problems indicated above[48] is in the last analysis also telling about the very existence and ultimate meaning and self-identity of law. It is to be remembered that dictatorships born in Europe and the Far East between the two world wars (with the regime of national Socialism in the lead) raised already somewhat similar questions.

[48] For the related problems, see, by the author, comprehensively, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Bp: 1995) 190 pp. [Philosophiae Iuris] {& <http://drcsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/>}, and partially, 'Transformation to Rule of Law from No-law: Societal Contexture of the Democratic Transition in Central and Eastern Europe' *Conn*, pp. 487–505 & 'The Building up of a Rule of Law Structure on the Ruins of a Regime Based upon the Denial of Law in Central Europe' in *Law at the Turn of the Twentieth Century* International Conference Thessaloniki 1993, ed. L. E. Kotsiris (Thessaloniki: Sakkoulas 1994),

pp. 219–239, 'The Transformation of Legal Culture in the Central European Transition' in *Rättsliga kulturer och normativa strukturer* Nordiskt Rättssociologiskt Forum, 25–27 augusti 1995 (Lund 1995), pp. 1–18, 'Constitutionalism, the Rule of Law, and the Challenge of Transition' in *Constitutionalism & Politics* International Symposium, November 11–14, 1993, ed. Irena Grudzinska Gross (Bratislava: Slovak Committee of the European Cultural Foundation 1994), pp. 151–154 [IV Bratislava Symposium 1993], 'Local Legal Tradition in Question' in *The Legacy of the Past* ed. Vladimira Dvoráková & Emil Vorácek (Prague: University of Economics Department of Political Science 1994), pp. 315–325, 'Complexity of the Challenge Facing Central and Eastern Europe' in *European Legal Cultures* [note 37], pp. 415–429, and 'Nedelitel'né právo a právna πtátnosſ *Právny obzor* [Bratislava] 75 (1992) 1, pp. 92–95. See also Péter Paczolay 'Constitutional Transition and Legal Continuity' *Conn*, pp. 559–574; by András Sajó, 'Legal Socialization in Hungary and the Transition from State Socialism' *Comparative Social Research* 14 (1994), pp. 97–110, 'The Limited Impact of Communist and Democratic Socio-legal Experiences' *AJur* (2000) 3–4, pp. 119–154 and 'Pluralism in Post-Communist Law' *AJur* 44 (2003) 1–2, pp. 1–20; as well as *Legal Problems of Transition in Hungary* Hungarian National Reports Submitted to the Fifteenth International Congress of Comparative Law (Bristol, July 26 – August 1, 1998) ed. Zoltán Péteri (Bp: 1998) 138 pp. [MTA Jogtudományi Intézete: Working Papers 11].

For the ideal of the rule of law, see, in *Sonderh*I, Péter Paczolay 'Constitutional and Legal Change during the Transition from Socialism to Democracy in Hungary', pp. 265–290, Miklós Szabó 'New Constitutionalism Based on an Old Notion: The Rule of Law in the Mirror of the Decisions of the Hungarian Constitutional Court', pp. 291–303, Péter Szilágyi 'Verfassungsstaatlichkeit und Veränderung des Rechts in Ungarn', pp. 305–328, András Tamás 'Constitutionalism and Changing Law', pp. 329–338, and Mihály Samu 'Verwirklichung der Volksmacht im Rechtsstaat', pp. 349–363; as well as, in *Sonderh*II, Miklós Szabó 'Transition into the Rule of Law: Deconstruction, Reconstruction, Construction', pp. 283–295 and Péter Szilágyi 'The System of Sources of Law and the Rule of Law in the Flow of the Change of Regimes', pp. 397–410; as well as, by András Sajó, 'New Legalism in East Central Europe: Law as an Instrument of Social Transformation' *Journal of Law and Society* 17 (1990), pp. 329–344, 'Rule by Law in East-Central Europe: Is the Emperor's New Suit a Straightjacket?' in *Constitutionalism & Democracy* Transitions in the Contemporary World, ed. D. Greenberg et al. (New York & Oxford: Oxford University Press 1993), pp. 321–335 and 'On Old and New Battles: Obstacles to the Rule of Law in Eastern Europe' *Journal of Law and Society* 22 (1995) 1, pp. 97–104; as well as Miklós Szabó 'The »Rule of Law« and the »Socialist Legality« in *Sectio* 9 (1994) 1–13, pp. 195–206.

For its inter-relations to constitutionality, see András Bragyova 'Constitutional Review and Democracy' *AJur* 40 (1999) 3–4, pp. 125–159 as well as, in *Sonderh*II, Mátyás Bódig 'Legislation and the Limits of Law', pp. 141–150, Tamás Győrfi 'The Constitutional Limits of Legislative Power', pp. 355–368 and Ferenc Hörcher 'The Question of the Limitation of the State by the Law: A Comparison of Kelsen's and Hayek's Approach', pp. 369–380.

For a critical assessment, cf., by András Sajó, 'Universal Rights, Missionaries, Converts and »Local Savages«' *East European Constitutional Review* 6 (1997) 1, pp. 44–49 and 'Was macht der Westen falsch bei der Unterstützung der Rechtsreformen in Osteuropa?' *Kritische Justiz* (1997) 4, pp. 496–503.

However, these last ones may have arisen mostly from doctrinal interest. For the regimes concerned were either terminated by war victory, only to be replaced by a new regime due to intervention by the authorities of military occupation rather than to democracy only lately and gradually superimposed (in Germany, Italy and Japan), or they expired in a peacefully old age, bearing their own democratic transcendence in themselves, nurtured by a kind of underlying social concord (Spain, Portugal).

In contrast to instances from the interwar period, the collapse of Communism took place everywhere in the region imbued with aspirations to a democratic rule of law and with the determination for developing also its cultural medium—even if its low intensity, counter-run by bygone habits and burdened with growing uncertainty (especially intensified Eastwards), resulted in the partial revival of centuries-old local traditions (reactivating, in the East proper, also Byzantine and Mongolian roots). All in all, from a lawyer's perspective, this was not only the encounter of value-negation (from the aspect of a democratic constitutional arrangement) with a (new) value-assertion but this also amalgamated otherwise antagonistic positions, in terms of which the democratic change of regimes was directly prepared by the preceding dictatorial system while the new democratic attitude to the criminal past also had to be defined partly by the former (dictatorial) system. Because the new cannot raise itself out of nothing. Even if it has plenty of external patterns to draw from, it has to define itself—its ethics, its initiatives and the latter's ways and boundaries—in relationship to its own predecessor. In the strain of the *sine qua non* of judging the past while taking a stand between this age-old pair of opposites of any western legal philosophising, justice and legality, it cannot avoid the necessity of deciding either for one of them or for a compromise of balancing in-between them, which are mutually excluding in face value yet in fact complementary sides, serving and thereby also reciprocally presupposing one another. For, as we know, past law also had had a kind of positivity, on the one hand, while the transition from it was required exactly by the affirmation of democratic values, inescapably reclaiming for judging and condemning the same past, on the other. Then again, we can see that inequitable, unfair, moreover, overtly unworkable responses can and could be given to this complex intellectual and moral challenge, in so far as one of those particular positions is absolutised (in a way unsuitable to verification, because withstanding interpretability in a logic of problem-solving but solely accepting it in a logic of demonstration, that is, in the very formal, artificially constructed world of the law, where any conclusion and its opposite with a variety of in-between

compromise solutions can be upheld, if met—by chance—by the final legal force). And this practical outcome of rejecting the very chance of facing with the past in law hardly indicates anything else than (in want of the above material comprehension) the one-sidedness of some inequitable blindness, issuing from the primitive condition in which the question itself was in fact posed polarisingly, to the exclusive alternative of taking a stand between some either/or.[49]

What follows as a symbolic message from all the above, from the necessary failure of seeking merely formal solutions, is just the need for reconsidering law by recognising that its positivation cannot be more than a surface phenomenon exclusively. It becomes conspicuous only in borderline situations (away from everyday routine) that anyone positing it posits it based on definite value-choices. And such value-choices refer back to society as to the source of everything societal, as to its hermeneutical medium, and also as to the subject owing to whom the law gets actualised and reactualised, conventionalised and reconventionalised. Obviously, any agent is in principle free to deviate from values generally followed, moreover, to effect an operation bound to failure. Any choice can indeed be done by free will. The only option excluded is to claim to have been acting under some external constraint. For, in the final analysis, the only thing the law has is its own formality, that is, its being objectivated in/as a text. Accordingly, the law itself has no coercive force either, as it does not assert itself through any mechanicity, with no alternative offered. Or, this is to say that the agent is free to choose any solution he finds

[49] Focussed on just one but crucial segment of the problem, cf., e.g., *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Bp 1994) xxvii + 178 pp. [Windsor Klub]. As to details, by András Bragyova, 'Legality and ex post facto Political Justice' *AJur* (1991) 3–4, pp. 179–215 and 'Constitutional Law as Limit to Legal Change: The Constitutional Court and the Backward-looking Laws in Hungary' & 'Конституционное право йак органичение изменениям конституционный суд и ретроградное законодательсво в Венгрии' in *The Role of Judicial Review Bodies in Countries in Transition* [International Symposium, Nagoya University Center for Asian Legal Exchange, 29–30 July, 2005], pp. 1–10, resp. 1–11; András Sajó 'Legal Consequences of Past Collective Wrongdoing after Communism' *German Law Journal* 6 (2005) 2, pp. 425–437; by Csaba Varga, 'Do we have the Right to Judge the Past? Philosophy of Law Considerations for a Period of Transition' *RTh* 23 (1992) 3, pp. 396–404, 'The Dilemma of Enforcing the Law' in *Rechtsnorm und Rechtswirklichkeit* Festschrift für Werner Krawietz zum 60. Geburtstag, hrsg. Aulis Aarnio et al. (Berlin: Duncker & Humblot 1993), pp. 427–435; by Ágnes Zsidai, 'Systemwandel und Beseitigung von Ungerechtigkeiten: Politik im Grenzbereich von Recht und Moral' in *Sonderh*I, pp. 493–506 & 'Minerva's Wingless Owl: Thoughts about the Transparency Investigation in Hungary and the Change of Function of the Historical Office' in *Sonderh*II, pp. 341–352.

conclusive (and can turn to be successful if there is no legal objection to it and/or if the society's legal institutionalisation will not reject it), however, his responsibility is as undivided as if he had taken any other choice. It usually becomes clear in borderline situations that in respect of the requirements of the law's formal positivity, on the one hand, and the (final and instrumental) values to be protected in and by the law, on the other, it is not strain or tension that is at stake (and even less a case of contradiction) but—putting it briefly—the sensitive relationship between goals and means.

In such relationships, there may be goals in a merely instrumental role as compared to ultimate material goals, but differentiations like this can only stratify the instrumental side.[50] Consequently, catch-words (ideals and values) of our culture, homogenised under the aegis of law in everyday social heterogeneity, like "democratism", "human rights", "constitutionality", or "legality"—, well, all these are to be interpreted within such a framework, even if some of them are placed at the highest level(s); otherwise speaking, even if they seem to be ultimate goals viewed from lower levels of institutionalisation, they obviously cannot claim to have anything more than the role of serving (viewed from the aspect of the ultimate material goals to be achieved). Henceforth, their suitability in their concrete actuality can quite well be questioned and alternative solutions and new balances within their circles can equally be searched for.[51]

Or, by summing all this up,[52] we can tell scarcely more: No matter how carefully we tend and protect the treasure we used to be deprived of during the imposed regime of Socialism, that is, the prestige of law, after all we

[50] Cf., e.g., by the author, 'Buts et moyens en droit' in *Giovanni Paolo II* Le vie della giustizia: Itinerari per il terzo millennio (Omaggio dei giuristi a Sua Santità nel XXV anno di pon tificato) a cura di Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75 & 'Goals and Means in Law' in *Jurisprudencija* [Vilnius] (2005) 68(60), pp. 5–10 & <http://www.thomasinternational.org/projects/step/conferences/20050712Bp/varga1.htm> as well as 'Law, Ethics, Economy: Independent Paths or Shared Ways?' <http://www.thomasinternational.org/projects/step/conferences/20050920barcelona/varga1.htm>.

[51] Cf., e.g., Csaba Varga 'Rule of Law – At the Crossroads of Challenges' *Iustum, Aequum, Salutare* I (2005) 1–2, pp. 73–88 {& <http://www.jak.ppke.hu/hir/ias/20051sz/20051.pdf>}.

[52] By Csaba Varga, 'Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisations (The Experience of Lithuania)' *AJur* 46 (2005) 1–2, pp. 1–11 and, in *LegAss*, 'Transition to Rule of Law: A Philosophical Assessment of Challenges and Realisations in a Historico-comparative Perspective', pp. 185–214 and 'Legal Renovation through Constitutional Judiciary?', pp. 287–312.

have to realise that all this—together with our own legal culture in general—is only destined for man. It must not serve itself and must not turn into anti-human fetishisation either.

Nevertheless, the above claim does involve its reverse as well, because the very fact of presenting ultimate values in the context of goals and means raises necessarily the theoretical dilemma of whether or not our ideals are universal indeed or depend on the here and now at any time, which, historically speaking, can only be particular and concrete.[53] All the issue is now further coloured by the phenomenon of globalism, obviously insisting on the ways and means of the universal expansion of the American pattern of democracy (complemented to by the ideology of human rights and the so called rights language) to be widely accepted.[54] Evidently, this is the key issue of the overall legal transfers. For the ever growing catalogue of failures accompanying them worldwide[55] seems to indicate something of which even our legal sociology of the late Socialist period was quite aware. Notably, there are no entities in law reducible to mere formalities as replaceable freely, at will. For all appearances notwithstanding, anything formalised in law is at the same time contextualised in the legal system, conditioned by a given medium of interpretation, with meanings attributed to in the given culture. And it is for this very reason that a purely technical term borrowed from an external system can turn to be as alien and destructive in a medium unfamiliar to it[56] as an understanding and arrangement of democracy exported into some differing historical context and cultural ideal of order.

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[53] In its first formulation, cf., e.g., by the author, 'Le droit en tant qu'histoire' in *Modern*, pp. 13–24.

[54] E.g., *Western Rights?* Post-Communist Application, ed. András Sajó (The Hague, etc.: Kluwer Law International 1996) xviii + 383 pp. and *Human Rights with Modesty* The Problem of Universalism, ed. András Sajó (Leiden & Boston: Martinus Nijhoff Publishers 2004) 312 pp.

[55] Cf., e.g., by the author, 'Transfers of Law: A Conceptual Analysis' in *LegAss*, pp. 21–41.

[56] Cf., e.g., by the author, 'Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context' *Ajur* 43 (2002) 3–4, pp. 219–232 & in *La structure des systèmes juridiques* [Collection des rapports, XVI[e] Congrès de l'Académie internationale de droit comparé, Brisbane 2002] dir. Olivier Moréteau & Jacques Vanderlinden (Bruxelles: Bruylant 2003), pp. 291–300.

5. Incongruity in Practice

The medium conditioning theoretical legal thought is necessarily shaped by the field of studies in positive law that on their turn dialogise with legal practice on a day-to-day basis. However, transition to the rule of law, once having promised an easy victory in Hungary (to be fully achievable through just reiterated magic formulas in theory and practice) has by now, viewed from inside the European Union, become the subject of harsh external criticism,[57] as all we in Central Europe are being called to account for the want of the paradigmatic change in legal practice that has been successfully implemented in Western Europe since the Second World War, that is, for the lack of shifts of emphasis from rules to principles, of the practical dissolution of the law's positivity—or, briefly, of all the developments whose recognition and also theoretical implementation with us are for the time being embryonic at the most.

For that what had once solidified as ideals for our "actually existing system of Socialism" could hardly be more than a Russian vision on Western Europe, as seen for instance by LENIN in his emigration (searching for its improvement by drawing back to the Byzantine and Mongolian tradition of a well-centralised state) and turned into brutal reality by STALIN's regime.

All in all, although the official slogans of Socialist legality and its theoretically refined normativism discredited themselves for the Hungarian legal profession, nevertheless these remained the very pattern which even the bravest actors of that era dared only to criticise, that is—and all that notwithstanding—these were the only ones available to provide a basis even for any re-organisation or theoretical renewal whatsoever.

So, that what had taken place in Western Europe following the Second World War might be perceived by the contemporary legal profession (with its most enlightened representatives included) here with a shudder at the most, even with bewilderment and—despite the geographical proximity—only from a great and unbridgeable distance (as symbolized by the Iron Curtain). Or, the role of principles, the fertilising potential that can be drawn from general clauses, the strength of definitions that can be developed out of the "nature of things" and, above all, the underlying democratic and res-

[57] In a most powerful overview, cf., e.g., Zdenek Kühn 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement' *The American Journal of Comparative Law* LII (Summer 2004) 3, pp. 531–567.

ponsive human attitude could hardly accumulate here to a full sense of professional culture in local minds.

The suspicion inspired by such absurd and at times expressly destructive pernicious slogans as the "disintegration of imperialism", the "escalating crisis of legality", the "legal uncertainty" having allegedly become predominant in Anglo-Saxon case law and statements on "the ruling class withdrawing its rule itself" (etc.), must have prevented any attempt to see clearly from becoming besmirched. At the same time, what the regime of Socialism imposed upon the region as its adequate legal arrangement was hardly more than the European ideal (by then already shaken and collapsed) of the early 20th century. Moreover, what we are mostly just about to restore from our own past as memories of civic ideals is exactly what was left behind (convincingly as its pre-history, that is, once and for all) by Western Europe six decades ago, when it started to recommence after the Second World War—independently of whether or not we are to remember it with nostalgic esteem. So, our Western European and Atlantic companions in the EU and NATO may have good reasons to realise that we, recently-joined full members of the Union—Poland, Czech Republic and Hungary (etc.)—walk about at the fora established in Luxembourg, Strasbourg and Brussels in a rather strange attire, one they may remember only from the times preceding their grandparents' age.

6. Perspectives

Our ways of cultivating law by erecting theories are rich in approaches and views, trends and methods, and abound in debates and outcomes. Hungarian legal theorising is rather open to the outside world but is more receptive in adopting Anglo–American patterns than duly reflecting on the developments of either continental companions in the Union or the neighbouring Central and Eastern European region.[58] Thus, for example, it still fails to

[58] The overly significant role played in science organization by the Hungarian Academy of Sciences and its Institute for Legal Studies during Socialism may have fulfilled functions that can scarcely be exploited now in a democracy arising from the diffuse eventualities of spontaneity. For these could once include an established framework for practical education preparing for scientific research, extensive and systematic legal bibliographising, profound and regular critical reviewing of domestic and foreign legal literature, presentation of Hungarian legal scholarship abroad with a comprehensive international academic co-operation, regarding

realise that actual motions of the law both in the Union[59] and as covered by globalisation trends[60] do have and need to have own particular legal theories. It also fails to realise that from now on our foreseeable future depends less on merely own will than on the balanced encounter of our domestic law and legal vision with their European surroundings.[61] The future of legal positivism (with our image of the law's self-identity included) depends on the relative strength of trends prevailing within the Union and on our ability to influence them. Or, the genuine place our law, jurisprudence and theoretical legal thought may occupy under the sun, will henceforth be determined by our actual performance in the Union. And, in a Union-level co-operation, the issue of who will have proven to be great or small will exclusively depend on their respective ability to exert a pressure in or a decisive effect on a game, in which all players have mostly equal access proving their conclusive force.

Or, there is an elementary interest in developing theory, the more so because what will eventually certainly remain is the human factor with the chance of mastering the law by developing deeper insights and more responsive commitment to values that may inspire man to make the most out of the instruments at his disposal.

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which the network of contacts and partnerships in our neighbourhood and wider region as well was almost perfect and smoothly working. Nevertheless, compared to the level of international integration at the time, even our Western European and Atlantic presence might have been more powerful than today, in the epoch of globalisation, when international representation unorganised is almost equalling to national interests relinquished.

[59] E.g., as preliminary studies, Miklós Szabó 'Tradition of a Common European Legal Culture' in *LawCult*, pp. 192–195; by the present author, 'European Integration and the Uniqueness of National Legal Cultures' in *The Common Law of Europe and the Future of Legal Education* ed. Bruno De Witte & Caroline Forder (Deventer: Kluwer Law and Taxation Publishers 1992), pp. 721–733 [METRO] and 'On the European Identity in Law' in *European Legal Cultures* [note 37], pp. 3–13; by Antal Visegrády, 'Some Problems of the Judge-made Law in Central-Eastern Europe' in *Tanulmányok Benedek Ferenc tiszteletére* [Studies in honour of Ferenc Benedek] (Pécs 1996), pp. 303–309 [Studia Iuridica auctoritate Universitatis Pécs publicata 123], 'Legal Cultures in the European Union' *Ałjur* (2001) 3–4, pp. 203–217, and 'Political and Legal Cultures of the New Democracies of Central and Eastern Europe' in *La réinvention de l'État* dir. S. Milacic (Bruxelles: Bruylant 2003), pp. 123–139.

[60] E.g., Balázs Fekete 'The Fragmented Legal Vocabulary of Globalisation' *Ałjur* 45 (2004) 3–4, pp. 323–333.

[61] E.g., by the author, 'Legal Scholarship at the Threshold of a New Millennium (For Transition to Rule of Law in the Central and Eastern European Region)' *Ałjur* 42 (2001) 3–4, pp. 181–201 & in *SonderhII*, pp. 515–531 & in *Siuolaikinè filosofija* Globalizacijos amžius, red. Jūratë Morkūnienè (Vilnius: Lietuvos Teisès Universitetas 2004), pp. 287–307.

TWENTIETH CENTURY CONTEMPORANEITY

CHANGE OF PARADIGMS IN LEGAL RECONSTRUCTION
(CARL SCHMITT and the Temptation to Finally Reach a Synthesis)*

1. Dangers of Intellectualism

In a dangerous age, all that one does or fails to do, all that one says or leaves unpronounced, is dangerous. To live or to die in a dangerous age, to try to understand or just to escape to mainstream-driven mediocrity, to assume the fate of one's community or to long for exile in isolation, all are equally dangerous.

What is an ANNA AKHMATOVA, a HENDRIK HÖFGEN or even a CARL SCHMITT to do if destined to come into being just then and there and not elsewhere at another time? Should the individual become resigned to swimming with the current, personality suppressed as assimilated to the surrounding average? Or should he/she opt to become hopelessly destroyed by the pressure to fight the extremities, even if alone, even if marching thereby to senseless martyrdom?

If there is only one truth, it is always and everywhere the one to manifest itself. Of course, it may be coloured by the context of the age, which endows it with additional moments and overtones. But, providing that such a colouring can transform anything into something else, is comprehension

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* Presented at a Hungarian national workshop on Carl Schmitt in Budapest in 2002—*Világosság* XLIV (2003) 7–8, pp. 93–102 & in *Carl Schmitt jogtudománya* Tanulmányok Carl Schmittről, szerk. Cs. Kiss Lajos (Budapest: Gondolat 2004), pp. 308–322 [ELTE Bibliotheca Iuridica, Acta Congressuum 9]—and published in *Perspectives on Jurisprudence* Essays in Honor of Jes Bjarup, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law 2005) [= *Scandinavian Studies in Law* 48], pp. 517–529 & *Rivista internazionale di Filosofia del Diritto* LXXXI (ottobre / dicembre 2004) 4, pp. 691–707 {as well as 'State and Law – Challenging and Challenged (Building in a Changing World as Debated by Schmitt and Kelsen)' *Curentul Juridic / Juridical Current* [Tîrgu-Mure°] XIII (2010) 4, No. 43, pp. 26–41 & <http://revcurentjur.ro/arhiva/attachments_201004/recjurid104_2F.pdf>}.

available at all? Can I understand you? Can my culture understand yours? Can my sheer intellectualism, cultivated as a substitute for life and pampered in everyday repletion and impunity, comprehend others' hunger for truth, who may struggle solely for personal or community survival in dramatic situations, desperately balancing on a razor's edge? Or, can my irresponsibility, switching over to the indifference of a libertine or even to anarchism (when childishly surfeited with guaranteed comfort and order), understand others who may spasmodically seek the way out from national humiliation and helplessness? Well, in our postmodern age of almost unlimited freedom, we are free to pass judgements on others. However, giving a primitive thumbs-down, as an act to put others down, is still not more demanding in manners and human quality than the defeats we may eventually have to face, provided that the latter results from a resolution to expend good and strenuous efforts.

The truth is one, yet it may appear in a variety of forms. Which is the one we ought to fight for? Are we inevitably bound to act as self-generated *demiurge*s to make all possible choices? To select from truths, thoughts and, moreover, the ways of expressing them? These may, though. be our own creatures; yet any of them can turn to be seen by others as dangerous, worthy of liquidation, as if nothing had happened. After all, we are expected to take all the troubles of the world on our shoulders as Atlas did—whether they crop up far away or just within ourselves. Or, as the judgement goes, he who heralds them will also be held responsible for them.

When gifts of human intellect and the ability to cognise the world were profaned by communists in Hungary for half a century, we still had some grounds to believe that GEORGE LUKÁCS, making a mockery of a thinker's talent in his *The Destruction of Reason*, would scarcely survive his comrades' self-closing Bolshevism. For it was a work that directly translated all ideas and values to the language of a dogmatically relentless Messianism, founded on belief in the proletarian world-revolution, only to banish anything they could not make use of as an 'irrationalistic' perversion, a monster.[1] And here emerges a rather paradoxical thought: encumbered with the twofold

[1] With reference to Georg Lukács' *Die Zerstörung der Vernunft* (Berlin: Aufbau-Verlag 1954) 692 pp., Tibor Löffler—'Carl Schmitt konzervatív állam- és jogbölcselete' [Carl Schmitt's conservative philosophy of state and law] *Valóság* XXXVII (1994) 11, pp. 99–104 at p. 99—mentions a kind of "calvary in the history of ideas" encountered. See also, for the treatment of SCHMITT in *Die Zerstörung* by LUKÁCS, the present author's *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985, [2]1998) 193 pp., para. 3.1 at pp. 59 et seq.

burden of the common European past, that is, the painful experience of the red and the brown dictatorships of the 20th century, we now seem to be heading straight towards an age once again suspiciously controlled by ideologies,[2] when responsibility for (and even the sinfulness of) perceptions, thoughts and conceptualisations, quite harmless in themselves, is again raised—this time by the overseas flagship of the scarcely ended Cold War as a dogmatic consequence of doctrinarian liberalism, cultivated almost in a way that substitutes for old-time religion.[3]

2. SCHMITT in Facts

It is generally known about CARL SCHMITT that he experienced the national socialist takeover at the age of 45, the peak of his professorial career.[4] With rather limited possibilities to choose, if at all, from basically bad alternatives, his reaction was typical of the intellectual, official and financial circles that were significant then and there. Neither his origins, nor his values, nor his commitment to the advance of his nation pre-destined him to an immediate, principled and uncompromising confrontation. He belonged to those

[2] Cf., e.g., by the author—upon reviewing Paul F. Campos' *Jurismania* The Madness of American Law (New York & Oxford: Oxford University Press 1998) xi + 198 pp. —, 'Rule of Law? Mania of Law? On the Boundary between Rationality and Anarchy in America' [in Hungarian 2002] in *Prudentia Iuris Gentium Potestate* Ünnepi tanulmányok Lamm Vanda tiszteletére, szerk. Nótári Tamás & Török Gábor (Budapest: MTA Jogtudományi Intézete 2010), pp. 492–504.

[3] E.g., at the closing session of Workshop I on 26 October, 2002, discussing the dilemma of "Legal Culture vs. Legal Tradition" within the Conference on Epistemology and Methodology of Comparative Law in the Light of European Integration organised by the European Academy of Legal Theory in Brussels, Chairman H. PATRICK GLENN (of McGill University, Montreal, awarded the Grand Prize by the International Academy for Comparative Law, for his *Legal Traditions of the World* Sustainable Diversity in Law [Oxford: Oxford University Press 2000] ssiv + 371 pp.) claimed in his conclusion that legal 'culture' is not only derived as a concept but may turn to be "dangerous" as well. Both expressive of the particularism of German Romanticism in resistance to the universalism of the French Enlightenment and exclusive, it was said to be mostly preoccupied only with what differs. This is why he claimed he opted for 'tradition' in law as a contextualising term instead of anything burdened with a negative charge. Or, as argumentation cut short in an American way can hold, either we accept traditions in mutuality without cultural exclusivity or Bosnia and Lebanon will be the consequence.

[4] As a description by a contemporary émigré, see Karl Loewenstein 'Dictatorship and the German Constitution: 1933–1937' *The University of Chicago Law Review* 4 (1936) 1, pp. 537–574.

driven to deep reflection upon, and thorough consideration of, the meaning of the developments of the first few decades of the 20th century—namely, the shame of the German war defeat, followed by the widespread feeling of total helplessness that lasted one and a half decades, with the loss of direction of the Weimar democracy offering no sensible perspective—, experiencing the brutal events of the moment as one of the possible ways out of the continued crisis, that is, as a choice by no means desirable or attractive, yet momentarily suitable to break the standstill. The period during which he was close to the new power lasted no more than a few years, but furnished a basis for accusations that often overshadowed everything else.[5] Having lived ninety-seven years, paradoxically, during the overall time spanning from his professorial appointment to his human collapse at a late age (following the loss of his wife and then of his only child) he could devote scarcely three decades to regular and intensive scholarly work. Of this period it is, all in all, three years upon which his stigmatisation as a *Kronjurist*[6] was founded, which led to retaliation by the Americans and then the Nuremberg arrest by the allies for two years.

3. SCHMITT and KELSEN

Given such a sinister background, may we embark upon theorising at all? When we cannot even be sure whether or not SCHMITT should be considered a satanic embodiment of totalitarian immorality or simply the herald of the imminent bankruptcy of legal positivism and political liberalism?[7] As is well known, legal positivism and the liberal conception of the state were already becoming problematic then and there. Taking into consi-

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[5] Cf., e.g., Peter Caldwell 'National Socialism and Constitutional Law: Carl Schmitt, Otto Koellreutter, and the Debate over the Nature of the Nazi State, 1933–1937' *Cardozo Law Review* 16 (1994) 2, pp. 399–427 as well as, by Bernd Rüthers, *Entartetes Recht* Rechtslehren und Kronjuristen im Dritten Reich, 2., verbesserte Aufl. (München: Beck 1988) 230 pp. and *Carl Schmitt im Dritten Reich* 2., erweiterte Aufl. (München: Beck 1990) 162 pp.

[6] Waldemar Gurian 'Carl Schmitt, Kronjurist des dritten Reich' *Deutsche Briefe* [ed. Otto Knab for emigree German Catholics in Switzerland] I (October 26, 1934), pp. 52–54, quoted by Dominique Séglard 'Présentation' in Carl Schmitt *Les trois types de pensée juridique* (Paris: Presses Universitaires de France 1995), p. 27 [Droit, éthique, société].

[7] Instead of crisis or bankruptcy, today's literature—e.g., Gabriel Guillén Kalle *Carl Schmitt en España* La frontera entre lo Político y lo Jurídico (Madrid: G. Guillén 1996) 228 pp. in p. 213—prefers to report rather on "deficiencies".

deration their historical development and outcome at the time, SCHMITT may have rightly challenged their theoretical defensibility by inquiring into their very social foundations and, especially, cultural, psychological and anthropological presuppositions. However, what is really at stake here is not simply scepticism as a scholarly stand painstakingly asserted by SCHMITT but the nature of SCHMITT's dilemma itself. For, whether I understand SCHMITT's theoretical interest either as a posterior foundation and justification of his *a limine* rejection of legal positivism and constitutional liberalism or as a search for correction having experienced their failure, I see here political accusation rather than genuine theorising aimed at responding on the merits to the scholarly demands and historico-philosophical perspective of SCHMITT's systematic oeuvre.

Limiting the immense domain of issues he raised to mere legal philosophising alone, perceiving a kind of reaction—that is, a powerful polemical counterweight—in SCHMITT's oeuvre may offer an opportunity to start theorising *in medias res*. Expressed in words of a conciseness classical by now: "Would SCHMITT have been a »decisionist« had KELSEN not been »normativist«? Nobody shall ever know; but it is clearly the case that SCHMITT did counter KELSEN at every point […]."[8] Well, obviously, the situation and its context are certainly not irrelevant to the way debates are conducted;[9] moreover, they may downright encourage conceptualisation in artificially contrasted counter-notions as well,[10] while the reasons for the interest having emerged and its direction been determined may probably be found in SCHMITT's personal comprehension of the present as having polarising tendencies ("friend vs. enemy") within it.[11]

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[8] Giovanni Sartori 'The Essence of the Political in Carl Schmitt' *Journal of Theoretical Politics* I (1989) 1, pp. 63–75.

[9] The *Enzyklopädie Brockhaus* (1942) characterises SCHMITT's theory in a reserved tone as "situational [*situationsgemäß*] jurisprudence". See Ingo Müller *Hitler's Justice* The Courts of the Third Reich [Furchtbare Juristen: Die unbewältigte Vergangenheit unserer Justiz (München: Kindler Verlag 1987)] trans. Deborah Lucas Schneider (London: I. B. Tauris & Co 1991) xviii + 349 pp. at p. 42.

[10] SCHMITT himself refers to the significance of *Gegenbegriffsbildung* in polemic situations as a "counter-concept" suitable for the contrasted exposition of one's own stand in his *Hugo Preuß* Sein Staatsbegriff und seine Stellung in der deutschen Staatslehre (Tübingen: Mohr 1930) 34 pp. [Recht und Staat in Geschichte und Gegenwart 72], p. 1.

[11] E.g., Carl Schmitt *Der Begriff des Politischen* mit einer Rede über das Zeitalter der Neutralisierungen und Entpolitisierungen (München: Duncker & Humblot 1932) 81 pp. [Wissenschaftliche Abhandlungen und Reden zur Philosophie, Politik und Geistesgeschiche 10]. For the background, cf. Sándor Pethő *Norma és kivétel* Carl Schmitt útja a totális állam felé [Norm

SCHMITT might have interpreted the KELSENian path leading through a dozen books from 1911 on to the synthesis undertaken in his *Pure Theory of Law* in 1934[12] as a call to strike just an opposite path in counterbalance, clearly marking out the confines and limits of the KELSENian response. After all, KELSEN's self-closing in the exclusivity of legal positivism and in the logical perfection achieved in his Pure Theory (excluding any objection to his inferring and conferring validity through a mostly linguistico-logical derivation) could, not without any justification, abhor him. Likewise, his rejection from the outset of the idea that anyone should take any social-historical responsibility under the aegis of the rule of the formal homogeneity of law and of the deontology of the lawyers' profession, as well as the value-relativism (equalling total indifference) and the moment of discretion he found to have yet been concealed by the apparent logicality of normative inference in any legal decision (by no means encountering or generating any kind of existential responsibility in real life), could have rightly compelled him to formulate his own point of view with sharp rigour.

He might well have felt that the KELSENian path of tearing law as a rule out of the law's very s o c i a l c o n t e x t u r e by elevating it into a linguistically constructed imperative, wedged into real-life processes as an artificial objectification, could scarcely be anything more than the self-deceit of a heathen act of setting up a substitute to God, leading nowhere. For law cannot be, either as a mere rule or as a linguistic-logical reference through an aggregate of rules, the source of its own justification, sense and aim, foundation and limitation, at the same time. In his view, taking law simply as a rule of the game purports only to endow the individualism of liberalism, disruptive to any kind of organic community, with a latent ideological justification, which rules out authority as such from man's life, while also depriving the state of its role to define the once unchallengeable frameworks of social existence, and reducing it to serve merely as a scene for the fights waged by rivalling groups to control the power within the boundaries of any given state.

Under such a purist approach, any material aim, that is, any goal and substantive purpose that state and law have emerged at all in human history in order to realise, becomes completely irrelevant and utterly incidental. It

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and exception: Schmitt's road towards the total state] (Budapest: MTA Filozófiai Intézete 1993) 256 pp. [Doxa könyvek].

[12] Rudolf Aladár Métall 'Bibliographie der Reinen Rechtslehre' in [Separatabdruck aus] Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik (Leipzig & Wien: Franz Deuticke 1934), pp. 1–8.

would be as if, when people associate, establishing institutions once and now, it were not the survival (re-production and re-generation) of (first, familial, then, tribal or national, etc.) communities that is at stake but the mere replacement of disorganised violence by organised compulsion amongst individuals and their incidental groupings.

SCHMITT interpreted the exclusive formalism of KELSEN's normativism to have been born out of the widespread admiration of the Enlightenment and the myth of rationalism[13] that, while relying on some of the structural elements of Catholic theology (starting out from the presupposition of a basic norm, to be broken down hierarchically upon reckoning with an omnipotent legislator who predetermines the available space by filling it discretionarily), avails itself of an intellectual scheme, characteristic of some Deist worldviews, namely, reproduction of some totality with the required balance, through its own spontaneous—autopoietical—operation, upon the basis of given material laws and operational regulations. SCHMITT traced the predisposition of liberalism to "conversationalism" back to similar roots—that is, its tendency to substitute discussion for decision-making[14] and, thereby, also to resign from any materiality, proper aim or mission (by fulfilling any genuine duty), beyond observing the game's rules, and setting the limits of what can be discussed.

However, realising the significance of the historical moment and the responsibility to be borne for its shaping then and there, he considered this intellectuality to be deliberate destruction, moreover, pure treason, when times are peripeteic and critical for the nation, only disguised by the unbiased methodological cover of f o r m a l i s m . Or, if order conforming to the Weimar Constitution (born itself from the forced conditions following defeat in war) results in nothing but political confrontation without any prospect of advancement (blocking the state machinery from effective functioning)—he argued in opposition to KELSEN at the state court—, then this

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[13] SCHMITT criticises KELSEN's normativism as the embodiment of "rule-of-law rationalism" in the debate on Hermann Heller's 'Der Begriff des Gesetzes in der Reichsverfassung' in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* 4: Verhandlungen der Tagung der deutschen Staatsrechtslehrer zu München am 24. und 25. März 1927 (Berlin & Leipzig: de Gruyter 1928), Diskussionsreden, pp. 168–189.

[14] JUAN DONOSO CORTÈS called its social agent *la clasa discutidora*. Tradition traces it back to the commentaries by XENOPHON, in which—aware of the destructive nature of both public disorder [*taraxè*] and irresolution [*akrisia*]—the wisdom of statesmen is identified with the ability to discern between *polemikon* and *presbeia* [i.e., the knowledge of distinguishing when to fight against and when to mediate between].

exceptional situation, brought about by such a total impasse, invests the executive with sovereign power to decide. Or, a d e c i s i o n has to be made at last to avoid chaos, and this is the very moment in which the political comes openly to the fore, as law is emptied with no further reserve, for it cannot offer any specific guidance any longer. SCHMITT's participation in the debate[15] also helped him to formulate a personal stand,[16] with his theoretical recognition marking a turning point.[17]

4. On Bordering Conditions

Well, I shall raise a preliminary question: b o r d e r l i n e s i t u a t i o n s may, though, end dramatically—with the fall of a republic or someone

[15] See Carl Schmitt *Der Hüter der Verfassung* (Berlin: Duncker & Humblot 1931) vi + 159 pp. [Beiträge zum öffentlichen Recht der Gegenwart 1], on the one hand, and,by Hans Kelsen, 'Wer soll der Hüter der Verfassung sein?' *Die Justiz* 6 (1930–31), pp. 576–628 {& (Berlin-Grunewald: B. Rotschild 1931) 56 pp.} as well as 'Das Urteil des Staatsgerichtshof vom 25. Oktober 1932' *Die Justiz* 8 (1932–33), pp. 65–91, on the other. Cf. also C. M. Herrera 'La polémica Schmitt–Kelsen sobre el guardián de la Constitución' *R.E.P.* (Octubre–diciembre 1994), No. 86, pp. 195–227 as well as, by David Dyzenhaus, 'Legal Theory in the Collapse of Weimar: Contemporary Lessons?' *American Political Science Review* 91 (1997) 1, pp. 121–134 and *Legality and Legitimacy* Carl Schmitt, Hans Kelsen and Herman Heller in Weimar (Oxford: Clarendon Press 1997) xiv + 283 pp., furthermore John P. MacCormick 'The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers' in *Law as Politics* Carl Schmitt's Critique of Liberalism, ed. David Dyzenhaus (Durham & London: Duke University Press 1998), pp. 217–251.

[16] "The stab with a dagger in 1918, the knife with which Leviathan is being cut to tiny pieces, the poisoned weapon of legality used by parties to stab each other in the back, the knife of those controlling power and law in his day, into which he wanted to avoid running—as their one-time dialogue is recalled by his conversation partner[…]. The dagger as a metaphor of civil war! This was the occasion for him to cite his beloved DONOSO CORTES: »If I have to choose between the dictatorship of the dagger and the sword, then I shall prefer the dictatorship of the sword.«" Nicolaus Sombart *Jugend in Berlin* 1933–1943, Ein Bericht, erw. und überarb. Aufl. (Frankfurt am Main: Fischer Taschenbuch Verlag 1991) 301 pp. [Fischer Taschenbücher 10526]on p. 258. ["Der Dolchstoß von 1918, das Messer, mit dem der Leviathan in kleine Stücke geschnitten wird, die vergiftete Waffe der Legalität, die eine Partei der anderen in den Rücken stößt, das Messer der Macht- und Rechthaber seines Zeitalters, in das er nicht laufen wollte […]. Der Dolch als Metapher des Bürgerkrieges! Das war der Moment, um seinen geliebten DONOSO CORTES zu zitieren: »Vor die Wahl gestellt, zwischen der Diktatur des Dolches und der Diktatur des Säbels zu wählen, wähle ich die Diktatur des Säbels.«"]

[17] Carl Schmitt *Politische Theologie* Vier Kapitel zur Lehre von der Souverenität (München & Leipzig: Duncker & Humblot 1922) 56 pp.

having apoplexy or heart failure—, but w h e r e and when does it become visible how our social organisation or human organism functions? In everyday life? Or in exceptional borderline situations? W h a t is our partnership l i k e in fact? Is this to be deemed during our honeymoons and the luckily problem-free everydays? Or, rather, i n t h e w a y we have preserved our affection towards one another despite the tearing test of our most difficult conflicts? Well, in the circumstance that KELSEN saw no problem here, SCHMITT seemed to find the routine of normality (no longer reflected upon because established practices do not call for particular justification), that is, the inertia and self-propelling of logism, conventionalised in and by practice. In SCHMITT's understanding, KELSEN's position was acceptable as a status-description but by no means as an explanation and even less as a specification of final principles. Therefore, the question of what potential can be mobilised in one's organism does manifest itself in the latter's ability to respond differentiatedly to varying crisis situations, and not in its problem-free everyday operation. And, providing that the limits, potentialities and final criteria can only be defined by testing through exceptions, this very limiting testing will also be the factor to finally define the operation in question.[18] Or, advancing one step further in the store of examples (arriving on a terrain more familiar to us), the question of w h a t in fact is an 'easy case' within everyday routine can only be answered by the responses we have hardly earned, yet give to 'hard cases'.[19] The attention focussing on borderline situations in e x c e p t i o n a l i t y and the discretion involved in

[18] All this laid the foundations of a separate topic of interest especially in continental scholarship. See, e.g., Ernst Forsthoff 'Über Maßnahmegesetze' in *Forschungen und Berichte aus dem öffentlichen Recht* Gedächtnisschrift für Walter Jellinek, 12. Juli 1855 – 9. Juni 1955, hrsg. Otto Bachof (München: Izog 1955), pp. 221–236 {reprinted in his *Rechtsstaat im Wandel* Verfassungsrechtliche Abhandlungen, 1950–1964 (Stuttgart: Kohlhammer 1964), pp. 78–98 [Veröffentlichungen des Instituts für Staatslehre und Politik e.V. Mainz, 6]}; Peter Schneider *Ausnahmezustand und Norm* Eine Studie zur Rechtslehre von Carl Schmitt (Stuttgart: Deutsche Verlags-Anstalt 1957) 295 pp. [Quellen und Darstellungen zur Zeitgeschichte 1]; Christian-Friedrich Menger 'Das Gesetz als Norm und Maßnahme' in *Das Gesetz als Norm und Maßnahme* hrsg. Christian-Friedrich Menger (Berlin: de Gruyter 1957), pp. 3–34 [Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 15]; Konrad Huber *Maßnahmegesetz und Rechtsgesetz* Eine Studie zum rechtsstaatlichen Gesetzesbegriff (Berlin: Duncker & Humblot 1963) 182 pp.; Germán Gómez Orfanel *Exception y normalidad en el pensamiento de Carl Schmitt* (Madrid: Centro de Estudios Constitucionales 1986) xv + 307 pp. [El derecho y el justicia 5], especially part II, pp. 153–188.

[19] Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], para. 5.1.2, pp. 162–171.

such a decision mark a border in the sense in which and with the effect by which JOHN RAWLS confronted principles in borderline situations (to ascertain whether or not principles may cover them), in order to describe principles in reflective equilibrium, that is, to define what these principles exactly denote in the final account.[20]

As far as the law's operation is concerned, speaking metaphorically, law can be characterised as functioning smoothly (by the force of its given linguistic-logical context as driven by the inertia of a motion once set in play), (re)generating itself by performing the necessary applications—as long as it does not encounter any obstacle, i.e., any situation diverted from the routine to require a particular, individual decision. Well, according to SCHMITT, this is the sense in which KELSEN's allegation is correct. However, once the source of the motive force is exhausted or any unforeseen obstacle emerges, a new impulse is needed. Or, otherwise speaking, once the original conditions are changed or a new situation arises, a specific decision has to be taken. Methodologically, this is to say that the very nature of law unfolds itself in its continuity and ability to regenerate. And, in this more comprehensive respect, SCHMITT's position seems to transcend KELSEN's, moreover, to complement it. Accordingly, the operation of law is a self-(re)generating automatism of the formalism described by normativism, supplemented at times, if necessary, by the autonomy of a sovereign (and, in as much, also political) decision to be made in a space free of law formalistically, setting by such an actualisation new boundaries for the law (and thereby re-conventionalising its meaning) in an environment altered, as compared to the one originally conceived.

The question arises: is this formula, based on a slightly mechanical cumulation of the partial results, the only thinkable answer? Obviously not. Moreover, not even SCHMITT was of such a simplistic opinion.

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[20] To the methodological proposal of reflective equilibrium—by John Rawls *A Theory of Justice* (Cambridge, Mass.: The Belknap Press of the Harvard University Press 1971) xv + 607 pp. at pp. 20–21, 48–51 and 120, with reference to Nelson Goodman's *Fact, Fiction, and Forecast* (Cambridge, Mass.: Harvard University Press 1955) 126 pp. at pp. 65–68—, cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp., p. 110. As a case-study applied to the topic of social care, cf. Norman Daniels *Justice and Justification* Reflective Equilibrium in Theory and Practice (Cambridge: Cambridge University Press 1996) xiii + 365 pp. [Cambridge Studies in Philosophy and Public Policy].

The conclusion as reached to this point can be depicted as follows below:

$$\textit{operation of law} = \textbf{KELSEN} + \textbf{SCHMITT}$$

which can be synthesised in the synoptic formula

$$\textit{operation of law} = \begin{matrix} \textit{KELSEN} \\ \textit{SCHMITT} \end{matrix} = \textbf{SCHMITT}$$

Or, to sum up, that which determines in the final analysis will be the agent determining under limiting conditions. Hermeneutics, including the dilemma of either 'determination of meaning' or 'meaning getting determined',[21] predicts that I may reasonably endeavour to channel legal problem-solving by filtering it through given paths of reasoning as ascribed to facts (generalised and re-conceptualised from brute facts) that may constitute a case in law and then also qualify the latter as one of the linguistico-logically generated cases of some conceptually established institution, so that eventually legal problem-solving (as conceptualised by principles, rules and other standards of practice, implementing values and policies) may build into an increasingly coherent jurisprudence. Yet, despite the official terms of the play, instead of making my judgement (as a declaration of what "the law" is), determined by 'law' and 'facts', as a conclusion from them, I can only transform the multi-faceted complexity and ambivalence of real-life situations (with contradictions that may emerge as a function of equally feasible varying conceptualisations and through a number of inevitable logical jumps) into a conclusion in the law's binary and dichotomic language, asserted with no conditionality and no dialectics of sublation available any longer.[22]

[21] Cf. Chaïm Perelman 'Avoir un sens et donner un sens' *Logique et Analyse* (1962), No. 5, pp. 235–250.

[22] Cf., by the author, 'What is to Come after Legal Positivisms are over?' in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin, Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676 and, integratively, *Theory of the Judicial Process* The Establishment of Facts [1995] 2nd {reprint} ed. with Postfaces I and II (Budapest: Szent István Társulat 2011) viii + 308 pp. & <http://drcsabavarga.wordpress.com/2012/03/13/varga-theory-of-the-judicial-process-the-establishment-of-facts-19952011/>.

5. With KELSEN in Transubstantiation

As decades have passed since the personal controversy between KELSEN and SCHMITT in Weimar, it is not genuinely relevant for posterity to investigate whether or not the two one-time companions, with differing family backgrounds and traditions, and differing historical aspirations, values and commitments (with SCHMITT having personally contributed to the dismissal of KELSEN as a university professor, although this was impending in the Nazi era anyway), actually referred to each other in their respective oeuvre from the time of the HITLERian takeover on, and if they did, in what depth and to what extent. Their paths and emphases, their sensitivities and inspirations divided finally, depending on the way they understood and theorised about the crisis of Weimar democracy. True, they went on their paths separately but without having left everything behind. Just to the contrary. True, they may have gone on, but only with oeuvres unchangingly defined by the survival of the original dilemma, of the search for the latter's consequent theoretical solution, with a kind of continued attention to their one-time selves and subsequent reactions.

This is all the more remarkable if we consider that the most significant theoretical rectification was made by KELSEN, whose course in life was not burdened with political dramas and radical turning points and who in person had not been forced to do penance. For (1) in 1925, he declared that "the act of law-application is just as much a legal enactment, law-making, establishment of law, as is the legislative act; either of them is just one of the two steps in the process of creating law",[23] although he had stated less than a decade before this was "a great m y s t e r y" in theoretical law-explanation, underivable from and untraceable to practically anything.[24] Then, (2) in

[23] Hans Kelsen *Allgemeine Staatslehre* (Berlin: J. Springer 1925) xvi + 433 pp. [Enzyklopädie der Rechts- und Staatswissenschaften 23], pp. 233–234.

[24] "[J]uristically, it is a mystery. […] This is the great mystery of the law and State […]." Hans Kelsen *Hauptprobleme der Staatrechtslehre* entwickelt aus der Lehre vom Rechtssatze (Tübingen: Mohr 1911) xxvii + 709 pp. in pp. 334 and, especially, 441. The question of conceptual functions is raised here, whether or not "exceptionality" at SCHMITT is what "mystery" has once been with KELSEN, namely, that what is termed today as irreducible "logical jump" and "conceptual transformation". For the last terms as introduced by Aleksander Peczenik—'Non-equivalent Transformations and the Law' in *Reasoning on Legal Reasoning* ed. Aleksander Peczenik & Jyrki Uusitalo (Vammala: Vammalan Kirjapaino Oy 1979), pp. 47–64 [The Society of Finnish Lawyers Publications, Group D, No. 6] and 'Formalism, Rule-scepticism and Juristic Operationism' [manuscript]—, cf., by the author, *Theory of the Judicial Process* [note 20], paras 3.4–5.

1934, he re-formulated the theory of gradation adopted from ADOLF MERKL in 1925, in accordance with the new realisation that "[a]pplication of law is at the same time creation of law. […] [E]very legal act is at the same time the application of a higher norm and the creation of a lower norm"—that is, by realising that law-making and law-applying do actually overlap at any step of gradation, as seen from opposite directions.[25] A decade later, (3) in the re-formulation of the Pure Theory of Law in 1946 and, then, in 1960,[26] more and more definitely through inverting the logic of his early investigations, he qualified the constitutivity of the official (i.e., exclusive and irreplaceably unique) 'ascertainment' of fact and norm as the exclusive product of the competent judicial organ to be a criterion of what is from within the law; moreover, (4) he even emphasised the unchallengeability of the legal force of the procedurally final ascertainment, which, by the way, reversed his entire reconstructive play of normative derivation and conclusion.[27] Well—while remaining aware of the fact that (5) KELSEN remained at fault until his death for holding a theory of meaning and a proper legal logic that supported the claim of his Pure Theory of Law (with the admission that all his repeated attempts at formulating either of them were eventually accompanied by the realisation of failure as they only reached contradictions)[28] —, in the final account all this manoeuvring is in fact nothing else than the in-

[25] Hans Kelsen *Pure Theory of Law* [Reine Rechtslehre, 1934, ch. V, para. 31/f] trans. from the 2nd ed. [1960] Max Knight (Berkeley: University of California Press 1967) x + 356 pp. at p. 234. "This definition, however, can never be complete. […] [T]he higher-grade norm, in relation to the act executing it […], has always the character of a framework to be filled in by the former." Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik (Leipzig & Wien: Deuticke 1934) xiv + 236 pp., ch. VI, para. 33, p. 91.

[26] Hans Kelsen, *General Theory of Law and State* trans. Anders Wedberg (Cambridge, Mass.: Harvard University Press 1946) xxxiii + 516 pp. [20th Century Legal Philosophy Series 1] and *Reine Rechtslehre* Zweite, vollständig neu bearbeitete und erweiterte Auflage (Wien: Deuticke Verlag 1960) 534 pp.

[27] For the context, cf., by the author, 'Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions' [1986] in his *Theory of the Judicial Process*, Appendix I, pp. 165–202 {& 'Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven' *Archiv für Rechts- und Sozialphilosophie* LXXVI (1990) 3, pp. 348–366} and 'A bécsi iskola' [The Vienna School] in Chertes – Frivaldszky – Győrfi – H. Szilágyi – Varga *Jogbölcselet* XIX–XX. század: Előadások [Lectures on 19th to 20th century legal philosophy] ed. Csaba Varga (Budapest 2002), ch. VII, pp. 60 et seq. [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae, Budapest].

[28] First of all, Hans Kelsen *Allgemeine Theorie der Normen* hrsg. Kurt Ringhofer & Robert Walter (Wien: Manz 1979) xii + 362 pp.

clusion, as a final criterion channelling legal motion onto its proper track, of the underlying moment of a *decisio* into his world built upon the culture of norms. Of course, we may rightly regard the theoretical contents of such a factual act of the moment of *decisio* as pointing beyond pure decisionism, at least in a SCHMITTian sense.[29] On the other hand, certainly, what it becomes included in is no longer normativism either, at least in its earlier KELSENian sense.

6. Polarisation as the Path of Theoretical Development

Eventually, the question of exactly what is may in its original meaning only be relevant to the history of ideas, in search of a solution. That is, it is only in a synthesis formed by 'counter-concepts'[30] that the sublation of the constituting concepts is accomplished, gaining additional meaning through the duality inherent in the act of *Aufhebung*, in which there is no longer room for exclusivities; for the synthesis is born out of precisely the confrontation of counter-concepts, resulting in an entity not found either partially or totally in the original components. As is well known, counter-concepts are by no means simply various conceptual variables of an analytical idea but indications of the variety of the diverging paths of problem-solving, proper to different cultures of thinking.[31] From now on, therefore, what may have been or appeared the same may truly be different, as—having transcended their original notional context and exclusivity—they may have become indeed something else. Recalling the debate on legal inference in Germany

[29] Legal sociology, cultural sociology and anthropology—with moral philosophy and social psychology in the background—may, of course, specify which kinds of normativity enter the space, freed of any positive (officially applicable) law.

[30] It is primarily Alf Ross—*Towards a Realistic Jurisprudence* A Criticism of the Dualism in Law (Copenhagen: Munksgaard 1945) 304 pp.—who founded a theory on this assumption.

[31] Such a consciousness is reflected in the warning by SCHMITT as early as in 1927, saying that once KELSEN wants to prevent jurisprudence from being controlled by rightist/leftist political forces, this at last only strengthens "the hope that the theory of the law of the state will become aware of its factual presuppositions and consciousness, and that it will therefore be better protected against one-sided party politics and leave behind its unfruitful and arbitrary logism." Schmitt in Heller 'Der Begriff des Gesetzes...' [note 13], quoted by Clemens Jabloner 'Hans Kelsen' in *Weimar* A Jurisprudence of Crisis, ed. Arthur J. Jacobson & Bernhard Schlink (Berkeley, Los Angeles, London: University of California Press 2000), pp. 67–76 [Philosophy, Social Theory, and the Rule of Law], p. 72.

a quarter of a century ago, I may be of the opinion that either subsumption or subordination is the case— notwithstanding the fact that I also have to be aware of the circumstance that these two are only valid as complemented by one another. In any case, they do not gain the recognition resulting from their confrontation either separately or in unity but through their being resolved (and, thereby, also dissolved) in a hermeneutical synthesis.[32] Or, in other words, they do not have meaning in and by themselves but they express a culture through their aggregate, which provides an exclusive medium for them to be construed at all.

This, in turn, leads us to conclude that, properly speaking, perpetual questions of legal philosophy are at stake here, in which neither KELSEN's one-sidedness, nor SCHMITT's trans-polarising rectification (under dramatic conditions in a de-humanising environment) is the first or the last response. Their conflict is just a humble moment in the long course of human pondering, a memorably fine piece of scholarly reflection.[33]

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[32] For the line of thought of Arthur Kaufmann—*Analogie und »Natur der Sache«* Zugleich ein Beitrag zur Lehre vom Typus, 2. verbesserte Aufl. (Heidelberg: Decker & Müller 1982) xiii + 88 pp. [Heidelberger Forum 12] and *Beiträge zur juristischen Hermeneutik* sowie weitere rechtsphilosophische Abhandlungen (Köln, etc.: Heymanns 1984) xii + 260 pp. {debated by Vilmos Peschka *Appendix »A jog sajátosságához«* Tanulmányok [Papers in appendix to the specificity of law] (Budapest: Közgazdasági és Jogi Könyvkiadó & MTA Állam- és Jogtudományi Intézete 1992) 170 pp. [Jog és jogtudomány 1]}—see, by the author, *Theory of the Judicial Process* [note 20], ch. 3, especially paras 3.6.1 and 3.9.

[33] "A judicial decision is correct today if it may be assumed that another judge would have decided in the same way. Here »another judge« refers to the empirical type of the modern, legally learned lawyer. […] The fact that a decision's »conformity to statute« is no longer identified with its correctness, does not mean abandoning any objective standard and leaving everything up to the subjectivity of the judge. Thus a judge [...] must strive to ensure that his decision corresponds to what is actually practiced. […] A judicial decision is correct if it is foreseeable and predictable." Carl Schmitt *Gesetz und Urteil* Eine Untersuchung zum Problem der Rechtspraxis (Berlin: Otto Liebmann 1912) vi + 129 pp. on p. 64.

Rediscovering similar methodological insights in other cultures under differing circumstances, David Dyzenhaus —'Holmes and Carl Schmitt: An Unlikely Pair?' *Brooklyn Law Review* 63 (1997) 1, pp. 165–188 and 'Why Carl Schmitt? Introduction' in *Law as Politics* [note 15], pp. 1–20—inquires into both its early and late replica—spanning from the debates between JEREMY BENTHAM and JOHN AUSTIN, via the ones between OLIVER WENDELL HOLMES and KARL LLEWELLYN half a century later, up to the ones between HERBERT LYONEL ADOLPHUS HART and RONALD M. DWORKIN another half a century later—, having resulted in a confrontation in Anglo–American jurisprudence only comparable to SCHMITT's criticism upon KELSEN.

Moreover, all such widely known Civil Law and Common Law presuppositions can also be fully embedded in the dual allegation summarised by SCHMITT's present-day critic [William

For these two thinkers confronted each other with exceptional theoretical strength and determination amidst historical tragedies of peoples, and it is exactly this that gives additional meaning to our present-day interest in the ways their views were formed.[34] And as far as society's ability to be humanised through scholarship is still an issue for us, we have to ponder over such debates, bearing in mind as well the lessons derived from the disputable pieces of the past.[35]

E. Scheuerman 'Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt' *History of Political Thought* 17 (1996) 4, pp. 571–590]; namely that (1) discretion inevitably results from the eventual indeterminacy of the law and that (2) only homogeneity of judicial practice can guarantee foreseeability and security. Therefore, it is worthwhile to notice that SCHMITT had arrived at such ultimate conclusions as early as in his very first book, while KELSEN only arrived at them half a century later, towards the end of his life. The permanence of practice (*ad* 2 above) is, however, a normative and factual concept at the same time, displaying the same Janus-faced quality in the law's definition (*ad* 1 above) as the moment of *decisio* does in KELSEN's norm-logism as transcended by SCHMITT. Or, further parallels can also be searched for between the two thinkers, first of all with respect to the separability of *Sein* and *Sollen* (in which SCHMITT's inherent anti-formalism resulted in a deeper contentual sensitivity from the beginning).

[34] The present paper is intended to focus on one single aspect of SCHMITT's oeuvre that has been throughly intensely debated, namely the promise of a correction of (as a 'counter-challenge' to the challenge posed by) KELSEN's Pure Theory of Law with its internal consequentiality as an explanation of the operation of law—although that which SCHMITT finally provided was by no means an elaborated theory in counter-conceptualisation. Or, my concern has been just a fragmentary attempt to test some methodological insights from his oeuvre, without touching upon comprehensive evaluations. For these latter, cf., e.g., Eleonore Sterling 'Studie über Hans Kelsen und Carl Schmitt' *Archiv für Rechts- und Sozialphilosophie* XLVII (1961), pp. 569–586; Hubert Rottleuthner 'Substantieller Dezisionismus: Zur Funktion der Rechtsphilosophie im Nationalsozialismus', pp. 20–35 & Volker Neumann 'Vom Entscheidungs- zum Ordnungdenken: Carl Schmitts Rechts- und Staatstheorie in der nationalsozialistischen Herausforderung', pp. 153–162, both in *Recht, Rechtsphilosophie und Nationalsozialismus* hrsg. Hubert Rottleuthner (Wiesbaden: Steiner 1983) [ARSP Beiheft, 18]; André Dorémus 'Esquisse pour une mise en perspective des rapports entre Carl Schmitt et le régime hitlérien' in *La »révolution conservatrice« dans l'Allemagne de Weimar* dir. Louis Dupeux (Paris: Kimé 1992), pp. 302–314 and especially p. 308, with a view also to "legal personalism [*potesta directa*]".

[35] Cf. also Paul Gottfried *Carl Schmitt* (London: The Claridge Press 1990) 72 pp. [Thinkers of our Time]; Ian Ward *Law, Philosophy and National Socialism* Heidegger, Schmitt and Radbruch in Context (Bern, etc.: Peter Lang 1992) 267 pp., especially Section C, chs. 7 and 8; *Estudios sobre Carl Schmitt* coord. Dalmacio Negro Pavón (Madrid: Veintiuno 1996) 486 pp.

KELSENian Documents in Hungary
A Chapter on Contacts, Including the Genesis of *Selbstbiographie*⋆

1. Preludes

By 1948, the communist take-over introduced relentless political and ideological homogenisation [*Gleichschaltung*] in Hungary, which deformed theoretical thought in law, too, for almost half of a century. MARXising in a forced Muscovite style, transforming even genuine theorising into a political instrument, closed down all imaginable perspective from the first moment on, as it detached the cultivation of scholarship from its own natural and tradition-secured medium, that is, from the continuity with its own past and the recent developments in western and Atlantic contemporaneity. What remained had been non-ending annihilating criticism of such developments in part of the world labelled as "imperialism", which, however, as preceded by mere search for orientation, by the coming of decades and step by step could include some intent at inner understanding and mutual influencing as well. In the wake of such a gradual change of settings, all this was followed by re-mapping of the predecessors' memory (under the guise of educational history) and recovering also the past (while re-founding sociology as an old-new discipline).

2. The Search for MOÓR's Bequeath

JULIUS (GYULA) MOÓR (1888–1950) as institutional predecessor, BARNA HORVÁTH (1896–1973) as pioneer of empirical sociology, and ISTVÁN BIBÓ (1911–1979), imprisoned for political reasons, as the living source of socio-

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⋆ First published as 'Kelsen-dokumentumok Magyarországon' in *Hans Kelsen jogtudománya* szerk. Cs. Kiss Lajos (Budapest: Gondolat & MTA Jogtudományi Intézete & ELTE Állam- és Jogtudományi Kar 2007), pp. 58–85 [Bibliotheca iuridica: Acta congressum 16]; translation is made for inclusion in *Echo de Kelsen* ed. Gonzalo Ramirez (Bogota: Universidad Exterior de Columbia 2012) {forthcoming}.

logical elite research, were the first among those reconsidered.[1] How could they help reassessing the past at all? This time BIBÓ and his colleague at Szeged, JÓZSEF SZABÓ (1909–1992), had been at the dramatic margin of personal and family survival, with their house searched, then fired off, and imprisoned. Their master, HORVÁTH fled for emigration to the States. The genuine enigma remained the giant MOÓR all through, who happily happened to die in cancer just before he could be subjected to further humiliation and up-to-martyrdom persecution by communists. Everything considered, for the communists burying the past seemed to be perfected. MOÓR's chair was occupied by others' students, and his once pupils were intimidated enough so that they had better conceal their intellectual identity.[2] This is why in my professional youth the memory of this outstanding personality was almost a faceless abstraction without any humane characterisation.

In these fugitively poor years professorial bequeaths of books were relatively easy to find. As a diligent young, I was successful to enrich the Library of Parliament several times,[3] in addition to develop my own collection.[4] All through, innerly I had the strong presumption that MOÓR's personal library, famous for a great professor and well-to-do bachelor, had to survive somewhere, and the path to finding it might be via the families of his sisters. Fresh member of the Hungarian Academy of Sciences, my boss VILMOS PESCHKA

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[1] For antecedents, cf., by the author, 'A szocializmus marxizmusának jogelmélete: Hazai körkép nemzetközi kitekintésben' [Legal theory of the socialism's Marxism: Hungarian overview in an international contexture] in *A szocializmus marxizmusának jogelmélete* szerk. Varga Csaba & Jakab András [függelék in] *Jogelméleti Szemle* 2003/4 & <http://jesz.ajk.elte.hu/varga16.html> and in 'Marxizmus és jogelmélet' [szerk. Varga Csaba] = *Világosság* XLV (2004) 4, pp. 89–116 & <http://www.vilagossag.hu/pdf/20031018121513.pdf>.

[2] A sorrow memento of the circumstances and moral pitfalls is documented by the author in '»A Horthy-fasizmus állam- és jogbölcselete«: Az ELTE ÁJK tanácsülésén 1955. január 29-én rendezett vita Szabó Imre készülő könyvének IX. fejezetéről' [Legal philosophy & theory of the state of Horthy-fascism: Eötvös Loránd University Faculty Board debate on ch. 9 of Imre Szabó's book under preparation] sajtó alá rend. Varga Csaba *Jogelméleti Szemle* 2004/3 <http://jesz.ajk.elte.hu/varga19.html>.

In fact, metropolitan justice and legal logician KORNÉL SOLT [SCHOLZ] only dared to tell me in the end of 1980's that he served as an assistent to Professor MOÓR, or financial law professor of the capital university TIBOR NAGY whispered on his MOÓR-related memories to me a decade later.

[3] Among other, bequeaths of interwar administrative highest court justice BALÁZS BIRÓ (Budapest/Balatonszárszó), historian of economic thought ÁRPÁD DÁNOS (Budapest), professor of labour relations ANDOR WELTNER (Budapest) and the interwar Pál Teleki Institute could be transferred by me to the Library of Parliament.

[4] E.g., I could select from the rich library of notary public TAMÁS SIKLÓSI (Bonyhád) and interwar constitutional law professor ISTVÁN CSEKEY (Pécs).

(1929–2006) was officially entitled to assign service cars for professional programs, so we started mapping the countryside until, in 1977, we could eventually identify the tiny village Csönge near the western border, where his sister's husband served as a local pastor. Although in the meantime they moved to the nearing town Celldömölk, KÁROLY FEHÉR simply ascertained that all MOÓR's library and correspondence was saved by him. And from the shelves and cabinets he took and showed us condolatory letters, law journals published during the 1919 short-lived Hungarian Soviet Republic and handouts interwar illegal communists mailed to MOÓR's mailbox regularly, in company of precious old first or critical editions which were lifted out from the rest for their direct theological relevance. Returning to Csönge, in a gateless garage besides an emptied parsonage we saw this rest of the once great library—lumped in one mass, rot and covered by dust, while mixed with mouse and frog remains. After he had in short notice given me family consensus to offer those approximately ten thousands items to the Library of Parliament as its future special collection,[5] I drove several times there to securely set apart MOÓR's own bequeath.[6] From his items I pulled out all manuscripts (notes and letters), except to hand-written indexes, in order to place them in my own collection until they would be offered to the Manuscript Division of the Library of the Hungarian Academy of Sciences, and in the meantime I also published them in a *fac simile* edition.[7]

This is the environment in which documents coming from or relating to HANS KELSEN, too, were found. It is accidental that they could survive. It is accidental that after communists had persecuted MOÓR and despoiled his flat (all this in reaction to his MP speech having warned against the danger of imminent communist take-over), his belongings could at all be saved in the metropolitan Piarist monastery thanks to his interwar professorial colleague, the poet and aesthetician prior SÁNDOR SÍK (1889–1963). And it is

[5] Cf. Károly Jónás 'A Moór–Somló-hagyaték' in Károly Jónás & Katalin Veredy *Az Országgyűlési Könyvtár története* 1870–1995 [History of the Library of Parliament] (Budapest: [Magyar Országgyűlés] 1995), pp. 205–206.

[6] It was mixed with the literary library of the poet SÁNDOR WEÖRES's father and the pedagogical collection of MOÓR's brother-in-law, the free-mason pupil of HENRI BERGSON, LAJOS GOCKLER. MOÓR's own library, as it has revealed itself from dedications, was a continuation of BÓDOG (FELIX) SOMLÓ's collection, which may have been a continuation of the one of the famous economist, governor of the Austrian–Hungarian Central Bank, GYULA KAUTZ.

[7] *Aus dem Nachlaß von Julius MOÓR Gyula hagyatékából* hrsg. / szerk. Varga Csaba (Budapest: ELTE "Comparative Legal Cultures" Project 1995) xv + 158 o. [Philosophiae Iuris] {& <http://philosophyoflaw.wordpress.com/>}, with 'Preface / Előszó' and 'Anhang / Függelék' on the story.

accidental that when SÍK died and the order got dissolved, this bequeath could be transplaced to Csönge, where the family cared in fact for long for it—all the epoch's misery notwithstanding.

3. MOÓR's Collegiality

JULIUS MOÓR became critically interested in HANS KELSEN and the Vienna School from the beginning of his professional career.[8] And KELSEN reacted as a correct and involved partner, sending his new publications with a colleague's dedication and correcting by hand the misprints of his new product *„als Manuskript gedruckt"*.[9] MOÓR started the reading of KELSEN's "Outlines of a General Theory of the State" the winter of 1926 and ended it on 14 February 1927, as noticed in the book itself. He put his reflections on the margins, underlined the text in various colours, and indicated feasible problems of translation when he met ambiguity, nonsense or genuine untranslatability. Indeed, he communicated his intent at translation to KELSEN at once,[10] which in fact materialised the same year.[11] So it is natural that he may have turned to the author asking for some background material, necessary to substantiate his future introduction to the translation. This was replied by KELSEN on 20 February 1927, exculpating his being late for his right hand broken in the meantime—claiming that extra time was needed for "collecting" the material.[12]

This letter—dictated by KELSEN to his wife, MARGARETE,[13] and surviving exclusively in MOÓR's collection[14]—shows that KELSEN was just instigated

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[8] Julius Moór *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) xxii + 485 o. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Bibliotheca Iuridica: Opera Classica 3] {& <http://philosophyoflaw.wordpress.com/>} shows that from his first foreign language publication in 1922 on, he treated KELSENian ideas in approximately one hundred printed pages.

[9] Hans Kelsen *Grundriß einer allgemeinen Theorie des Staates* Als Manuskript gedruckt (Wien [als Privatdruck {von Rudolf M. Rohrer, Brünn} gedruckt] 1926) 64 pp.

[10] Matthias Jestaedt 'Einleitung' in *Hans Kelsen im Selbstzeugnis* Sondernpublikation anlässlich des 125 Geburtstages von Hans Kelsen am 11. Oktober 2006, hrsg. Matthias Jestaedt (Tübingen: Siebeck 2006), p. 10 note 16 makes it clear that MOÓR's letter is only hypothesised by the reply.

[11] Hans Kelsen *Az államelmélet alapvonalai* (Szeged 1927) xiii + 90 pp.

[12] „die Zusammenstellung der von Ihnen gewünschten Daten"

[13] Jestaedt, p. 8 note 11.

[14] Jestaedt, p. 9 note 12 knows about KELSEN's reply from my edition.

by MOÓR's intent at translation—resulting in that "my ideas would be spread over the Hungarian sphere of culture as well"[15]—to outline the intellectual path he had until then covered. Probably this hand-written letter was committed to paper without copies, so nothing of it remained in his Viennese archive. Accordingly, after his death the executor of his last will could only find a first, manuscript version of his biography with no title in the bequeath, so RUDOLF ALADÁR MÉTALL was not informed either on KELSEN's own authoritative indication defining in this letter that that was a '*Selbstbiographie*' or on its antecedents, goal, type-written variant, expedition, and use in a Hungarian introduction to KELSEN's translation alone. Consequently, he named it neutrally as „*eine handgeschriebene, etwa 12 Seiten umfassende unveröffentlichte »Selbstdarstellung« Kelsens (Wien, Februar 1927)*".[16]

This '*Selbstbiographie*' in annex to his letter must have accompanied the list of KELSEN's publications which has not survived:[17] it is an original typescript of eight paginated pages on parchment paper, with autograph ink corrections, supplied by MOÓR's usual highlighting.

Preceding his international reception and fame (though with some translations in Japan), this time KELSEN's ideas just started spreading over in Central and Western Europe with the publication of *Grundriß*.[18] Consequently, KELSEN was wise to take MOÓR's undertaking of a translation equipped with a translator's introduction seriously, as a promise of break-through.

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[15] It is to be noted that owing to the forceful Germanisation of Hungary after the Habsburgs had beaten down the revolution of 1848 and also to the multiplication of the Jewish population and especially of the German–Jewish middle class in the capital, all speaking German, epoch-marking authors like SIGMUND FREUD or THOMAS MANN could encounter their first international echo and reception in Budapest, followed in its wake also by early translations into Hungarian.

[16] Rudolf Aladár Métall *Hans Kelsen* Leben und Werk (Wien: Manz 1969), Einleitung.

[17] „In der Anlage sende ich Ihnen in Form einer Selbstbiographie und eines Schriftenverzeichnisses das gewünschte Material."

[18] According to Rudolf Aladár Métall *Bibliographie der Reinen Rechtslehre* (Leipzig & Wien: Franz Deuticke 1934) pp. 68 [Separatabdruck aus Hans Kelsen *Reinen Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik], MOÓR's initiative was only preceded by the translations of *Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft* (1916) into Japanese (Tokyo, 1923, xvi + 149 pp.), *Der soziologischer und der juststischer Staatsbegriff* (1922) also into Japanese (Tokyo, 1924, vii + 400 pp.), *Der Begriff des Staates* (1922) into English (*The International Journal of Psycho-Analysis* 1924, 38 pp.), and *Grundriß einer allgemeinen Theorie des Staates* (1926) into French (Paris, 1926, 85 pp.) and Czech (Brno, 1926, 84 pp.). MOÓR's translation was only followed by the same text in Japanese (*Waseda Law Review* 1927, 118 pp.) and 'Vorwort' to the second edition of *Hauptprobleme der Staatsrechtslehre* (1923) also in Japanese (Tokyo, 1927, 15 pp.) the same year.

The importance of these documents—several times published in the meantime[19]—is enhanced by the fact that all what KELSEN authored as self-consideration was a *Vorwort*, the above *Selbstbiographie*, and an *Autobiographie* from two decades later.[20] The document in my possession now speaks about a forty-six-year-old scholar at the threshold of becoming an international figure, who draws a balance of his path and theoretical experience when he just privately responds to a Hungarian companion, a professor at Szeged, who is seven years junior to him. Or, it merits to be called as its author did it, '*Selbstbiographie*', and not as his once friend identified its first version classifyingly-descriptively and without its factual contexture, as '*Selbstdarstellung*'.

Finally, the present history may be complemented by MOÓR's autograph pen-written *in extenso* copying of the outlines of KELSEN's intellectual development he published as a preface to the second edition of his first magisterial synthesis, *Hauptprobleme der Staatsrechtslehre*.[21] And the end is made even more complete by a change of letters on daily issues from one decade later,[22] as well as by some KELSENian dedications[23]—representing all that has survived and is cognoscible now.

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[19] Csaba Varga 'Documents de Kelsen en Hongrie: Hans Kelsen et Julius Moór' *Droit et Société* (1987), No. 7, pp. 337–352 {& <http://www.reds.msh-paris.fr/publications/revue/pdf/ds07/007-03.pdf> [reply on p. 344 & as *fac simile* in annex, 'Selbstbiographie' on pp. 345–348]; *Aus dem Nachlaß von Julius MOÓR* [note 7] [reply on p. 23 and 'Selbstbiographie' on pp. 15–22]; in *Hans Kelsen im Selbstzeignis* [note 10] [reply on p. 21 note 2 and, as 'Selbstdarstellung [1927]', described and annotated on pp. 21–29]. I have realised only from Jestaedt's *Hans Kelsen im Selbstzeignis* that there is also another edition of the above *Selbstbiographie* in German by Stanley E. Paulson in his 'Hans Kelsen – Über die Entstehung der Reinen Rechtslehre: Die erste autobiographische Skizze' in Hans Kelsen & Renato Treves *Formalismo giuridico e realtà sociale* a cura di Stanley L. Paulson (Napoli: Edizione scientifiche Italiane 1992) 211 pp. [Diritto e cultura per la storia della filosofia sociale tedesca 2], pp. 33–37.

[20] Jestaedt 'Einleitung' [note 10], p. 6 note 6 records that KELSEN assessed intellectually his own developments and achievements in *Vorwort* (what MOÓR copied), *Selbstbiographie* (what he drafted to the use by MOÓR, and *Autobiographie* (1947) exclusively—in addition to some American-type CV-s with groups of data alone.

[21] 'Vorwort' in Hans Kelsen *Hauptprobleme der Staatsrechtslehre* entwickelt aus der Lehre vom Rechtssatze, 2. Aufl. (Tübingen: Mohr 1923), pp. V–XXIII.

[22] Published in *fac simile* in *Aus dem Nachlaß* [note 7], p. 40.

[23] In *fac simile* in Varga 'Documents de Kelsen' [note 19], annexes, as well as in *Aus dem Nachlaß*…, pp. 50–51.

4. BIBÓ as a Disciple Translating

The interest of my former colleague at the Academy Institute for Legal Studies, ENDRE NAGY, in the intertwinement of legal and sociological thought in Hungary (including BARNA HORVÁTH and his Szeged School students) may have been the first to draw my attention to ISTVÁN BIBÓ's bequeath in the Manuscript Division of the Library of the Hungarian Academy of Sciences, with a contemporary translation of KELSEN's Pure Theory of Law, which he undertook as his student at Geneva. Considering the fact that my students at the metropolitan Eötvös Loránd University were the ones strong enough in strive for intellectual independence to found their István Bibó College and make it acknowledged as a self-autonomous body as co-financed by GEORGE SOROS' Open Society Foundation,[24] a chance offered for undertaking its edition,[25] regarded as highly timely while quite fitting in my own professional endeavour of lifting up all ideological bounds.

As to relevant circumstances, KELSEN was in the middle of his fifties' and next to world fame, and BIBÓ just after graduation. As reconstruction holds,[26] BIBÓ was a student of the Hungarian Royal Franz Joseph University between 1929–1933. He substantiated his interest in international law by legal philosophising, so he became assistant to Professor HORVÁTH. The summer of 1931 he spent two months in Vienna, and his extended reading resulted in two prize-winning seminar works, published later on,[27] which debated pre-1934 KELSENian thought. With government tuition he spent the academic year 1933–34 also in Vienna, enlisted to courses by ADOLF MERKL and ALFRED VERDROSS. He followed the next year enrolled at the

[24] Subsequently, they launched the first party challenge of communist Hungary with their FIDESz, which now governs the country with two-third majority.

[25] Hans Kelsen *Tiszta Jogtan* [1934] Bibó István fordításában [1937], szerk. Varga Csaba, a fordítást gondozta Erdélyi Leonóra (Budapest: Eötvös Loránd Tudományegyetem Bibó István Szakkollégium 1988 [reprint: (Budapest: Rejtjel Kiadó 2001)]) XXII + 106 pp. [Jogfilozófiák].

[26] Csaba Varga 'Bevezetés' in Kelsen *Tiszta Jogtan* [note 25], pp. XIV–XVI.

[27] By István Bibó, *Kényszer, jog, szabadság* [Coercion, law, liberty] Szeged: Szegedi Városi Nyomda és Könyvkiadó Rt. 1935) VIII + 151 pp. [Acta Litterarum ac Scientiarum Reg. Universitatis Hung. Francisco-Josephinae, Sectio Juridico-Politica, VIII] and *A szankciók kérdése a nemzetközi jogban*. [The question of sanctions in international law] (Szeged: Szegedi Városi Nyomda és Könyvkiadó Rt. 1934) 50 pp. [A M. Kir. Ferencz József Tudományegyetem Jog- és Államtudományi Intézetének Kiadványai, 3].

Institut Universitaire des Hautes Etudes Internationales at Geneva,[28] with international law lectured by PAUL GUGGENHEIM and KELSEN.

The timetable BIBÓ preserved informs on Friday that „10^{15}–11^{15}: *Théorie générale du droit international* (*Problémes choisis: L'illicité et sa sanction*); 14^{15}–16^{15}: *Discussions et travaux pratiques*", a familiar topic to BIBÓ inspiring his first foreign language paper,[29] to be highly praised by HORVÁTH during BIBÓ's habilitation.[30] As a representative of Szeged University, he took then part at the second congress of the *Institut International de Philosophie du Droit et de Sociologie Juridique* (with KELSEN as one of vice-presidents and lecturing on *L'âme et le droit*) in Paris between 1 and 4 October 1935. Further on, between 16 June and 5 September 1936 he took part as Carnegie-scholar at the Hague *Académie de Droit Internationale* summer course on international peace (whose preparation is related by KELSEN's reply), and between 7 July and 13 October 1938 he could be at Geneva again (serving as first rank temporary clerk at the Secretariat of the League of Nations).

The translation was undertaken by 1937.[31] KELSEN's permission[32] suggests that BIBÓ started it from the Preface on.

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As to KELSEN and Hungary, the archives of the *Kelsen-Institut* in Vienna has never been searched for revealing further traces of contact. Bibliographic summation[33] extends the field of effects to international law, constitutional law and public administration, as well as political philosophy and political

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[28] In the spring of 1987 I could also meet a once mate at the Australian National University Research School of Social Sciences History of Ideas Unit in Canberra, J. G. STARKER, who had retired as the editor of *The Australian Law Journal*.

[29] István Bibó 'Le dogme du »bellum justum« et le théorie de l'infaillibilité juridique: Essai critique sur la théorie pure du droit' *Revue Internationale de la Théorie du Droit* (1936) 10 (1936) 1, pp. 14–27.

[30] Cf. József Ruszoly 'Bibó István a szegedi karon' [Bibó at Szeged University] *Jogtudományi Közlöny* XLVIII (1992) 3–4, pp. 103–108.

[31] Ms 5111/11 at the Manuscript Division of the Library of the Hungarian Academy of Sciences, IV + 104 typescript pages.

[32] Ms 5117/243 in *fac simile* in Kelsen *Tiszta Jogtan* [note 25], p. XVII.

[33] András Jakab 'Kelsens Rezeption in Ungarn' in *Hans Kelsen anderswo / Hans Kelsen Abroad* Der Einfluss der Reinen Rechtslehre auf die Rechtstheorie in verschiedenen Ländern, III, hrsg. Robert Walter, Clemens Jabloner & Klaus Zeleny (Wien: Manz 2010), pp. 41–71 [Schriftenreihe des Hans-Kelsen-Instituts 33].

sciences. Exhaustive research is also wanted in home public collections.[34] Moreover, there is no public knowledge about the whereabouts of the intellectual bequeath of Professor HORVÁTH. Perhaps he and/or his students in the Szeged School[35] may have preserved some more references worth of interest.[36]

[34] Neither SOMLÓ's diary (I–IV) in the National Széchenyi Library Manuscript Division, nor the notices and records as well as dedications in SOMLÓ–MOÓR's special collection have never been systematically reviewed.

[35] Cf. *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas, hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) 246 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae].

[36] JÓZSEF SZABÓ's daughter, ENÉH, only remembers total despoilment by police, for instance. There is no information on the bequeath, if any, of TIBOR VAS (1911–1983), who joined the communists.

THE »HART-PHENOMENON«*

Within the present framework, I shall ponder about a miracle, and then, a phenomenon that has, from the middle of the 20th century up to the present day, contributed additional colours and also proper style and problem-sensitivity to our legal thinking, by defining the theoretical-legal issues that can

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* In its original version presented at a Hungarian national workshop on H. L. A. Hart in Budapest in 2002—*Világosság* XLIV (2003) 1–2, pp. 75–87—and published subsequently in *Archiv für Rechts- und Sozialphilosophie* 91 (2005) 1, pp. 83–95. A further version, enlarged mostly by intimacies relating to the very enigma of the personality as drawn from recent recollections—like Nicola Lacey *A Life of HLA Hart* The Nightmare and the Noble Dream (Oxford: Oxford University Press 2004 [2006]) xxii + 422 pp.; Jenifer Hart *Ask me no more* (London: Peter Halban 1998) xviii + 230 pp.; Karen Armstrong *The Spiral Staircase* My Climb Out of Darkness (London: HarperCollins 2004) 320 p. & (New York: Knopf 2004) xxii + 305 o. [Borzoi Book] and Isiah Berlin *Flourishing: Letters* 1928–1946, ed. Henry Hardy (London: Chatto & Windus 2004), p. 511 {& <http://leiterreports.typepad.com/blog/2005/02/isaiah_berlin_o.html>, on the one hand, and Carole Angier 'Belonging and not Belonging' *The Spectator* (4 December 2004) in <http://www.spectator.co.uk/books/21220/part_2/belonging-and-not-belonging.thtml>; 'Jenifer Hart' *The Telegraph* (9 April 2005) in <http://www.telegraph.co.uk/news/obituaries/1487412/Jenifer-Hart.html>; Samantha Besson 'Deconstructing Hart: A Review' *German Law Journal* 6 (2005) 7, pp. 1093–1108; G. Edward White 'Getting Close to H L A Hart' *Melbourne University Law Review* 29 (2005), pp. 317–336 {& <http://findarticles.com/p/articles/mi_go2438/is_1_29/ai_n29214114/?tag=content;col1>}; Frank Brennan SJ 'Juggling God and Caesar' *The Australian* (October 28, 2006) in <http://www.theaustralian.com.au/news/features/juggling-god-and-caesar/story-e6frg6z6-1111112428660>; Amanda Perrau-Saussine 'An Outsider on the Inside: Hart's Limits on the Jurisprudence' *University of Toronto Law Journal* 56 (2006), pp. 371–388; Ralph Erskine in *Journal of Intelligence History* 8 (2008) 1 in <http://www.intelligence-history.org/jih/reviews-8-1.html> and John Finnis 'H. L. A. Hart: A Twentieth-century Oxford Political Philosopher (Reflections by a Former Student and Colleague)' *American Journal of Jurisprudence* 54 (2009), pp. 161 et seq. {& <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1477276>}, on the other—, has in the meantime been elaborated to the forthcoming volume of *H. L. A. Hart jogtudománya* szerk. Cs. Kiss Lajos (Budapest: Gondolat 2012) [Bibliotheca iuridica: Acta congressum], not reproduced here.

be raised at all in the Anglo–American world. In brief: our investigation will be focussed on a few features of the 'HART-miracle' and, then, the 'HART-phenomenon'.

I. THE HART-MIRACLE

The way HERBERT LYONEL ADOLPHUS HART made his debut out of complete anonymity (without any known predecessors and quite without antecedents even in his own professional oeuvre) into the theoretical legal thought of the United Kingdom has become so well-known to us that we tend to consider it as something to be taken for granted without any special notice. We are not even used to pondering to what extent the echoes and local value of such a debut might have been augmented by the circumstances in comparison to which it indeed meant novelty. According to HART's own autobiography, the start of his academic career was by no means the usual one either: it was not one that could be proposed as a pattern for succeeding generations. For he did not need to show the mark of a genius. Neither did he have to compete with a number of talented colleagues and launch breathtakingly new tendencies to become a professor at Oxford, to become this proud beacon almost unique in scholarly excellence. For

> "After the war the HARTs returned to Oxford, in a way unimaginable in our age of specialisation and incessant academic publication. HERBERT HART had taken his First in Greats in 1929, then practised at the Chancery Bar and served in intelligence during the war: he had not written a word of philosophy when he returned to New College as Fellow and philosophy tutor in 1945."[1]

We all know that talent, as distributed to everyone by fate, neither regards statistical probabilities, nor the available space to be filled in symmetrically. On the contrary, some ability can manifest itself in the most diverse fields, in the most diverse ages and among the most diverse peoples, excelling in one way or another, with no other explanation than, perhaps, environmental influence (such as the traction effect of prominent talents already at work, undertaking a mission deeply rooted in national consciousness, socialisation by schools and/or communities, or simply escaping forward by breaking out in an age that erodes character).

[1] Geoffrey Wheatcroft 'Fellow-travelling Fellow: On a Don with all the Right (Left-wing) Connections' *The Telegraph* (05 January 2012) <http://www.telegraph.co.uk/culture/4712854/Fellow-travelling-fellow.html>.

1. The Scene of Britain at the Time

Firstly, it is not too usual to remind the oblivious posterity that HART's encounter with theoretical legal issues took place in England after the Second World War amidst a professional desert, barely disturbed by breezes but sleep-inducing in every way. On our own behalf, however, we may safely remember that some of our talented compatriots did study the genius of English law on the spot just before WWII broke out, hoping to find through it a perspective to break away from the tightness of the German orientation, hegemonic in Hungary in those days. Among those who followed this path I would recall KÁROLY SZLADITS JR., civilist, then, as an émigré, a famous international bibliographer of law at Columbia University, as well as BÉLA CSÁNK, my one-time English teacher in the Buda Castle area within walking distance from the Institute for Legal Studies of the Academy of Sciences, chief executive of the Ministry of Justice during the inter-war period (and therefore deprived of his pensions by the invading communists), followed by the widely renowned legal sociologist BARNA HORVÁTH. The former could, exactly because of having searched for the roots of a law with a great past with rich potential and traditions in England, able to renew itself through continued adaptation, ultimately complete his investigations by finding something of a tradition of law forming a rounded whole.[2] However, the latter, aiming at bringing home inspiration for the like-minded, could achieve success only in research of distant ages, with nothing else promising a rich harvest than the long ago past. So what could he aim for in his great magisterial work, mapping out the entire historical spectrum of English legal theorising?[3] First of all, he became immersed in the olden times serving as a common source. In the name of completeness and intellectual symmetry, he wanted to draw a balance before the not yet concluded present. Therefore, he presented the four decades that had then passed of the 20th century, dedicated to his British contemporaries for the sake of some aesthetical balance, as a way to use flowers of rhetoric to add some attractiveness to what was actually just *fleurs du mal* thriving on total disintegration then

[2] Károly Szladits Jr. *Az angol jog kútfői* [Sources of English law] (Budapest: Grill 1937) vii + 145 pp. [Budapesti Királyi Magyar Pázmány Péter Tudományegyetem Magánjogi Szeminárium 10] as well as Béla Csánk *Adalékok az angol törvénykezési joghoz* [Outlines of the English justice system] (Budapest: Sysvester 1937) 129 pp. and *Az angol sajtójog vázlata* [A sketch of English press law] (Budapest: Franklin 1941) 134 pp.

[3] Barna Horváth *Angol jogelmélet* [English legal theory] (Budapest: Magyar Tudományos Akadémia 1943) xi + 657 pp. [M. Tud. Akadémia Jogtudományi Bizottsága 13].

and there. What resulted from all this as an actual achievement, which was productive for HORVÁTH too, was only the so-called historical jurisprudence, representing the concluded past,[4] as well as American legal realism, like some geographically distant relative.[5] It is paradoxical that having completed his analysis of the processual dream of law (on six-hundred densely written pages surveying more than a half-thousand book-size *opus*es as sources), built on tradition with case-law flexibility but through the simultaneous confirmation of the unbroken superiority and continuity of law focussing—instead of on substantive limitations through legislation—on the availability of each case with merit that was being debated before an independent judicial forum, HORVÁTH had, without drawing strikingly novel consequences heralding a new world, suddenly stopped listening (in the monotonous, routine-like manner of the mimesis of a cool, distanced enthusiasm) to half-boring details from authors found next to be uninteresting, and come forward with a situation report that also gave sense to his investigations, projected into the future:

> "We might term as analytical the trend of the classical English school today. However, it is the one among all the contemporary tendencies to appear as the legal theory of a bygone era. It is formalist, positivist, rationalist. It isolates law so much that all this finally becomes a lifeless, empty scheme. Ideological motives are also at work to monopolise law by elevating it out of the chaos of everyday life. Scholarly inclination to withdraw to an ivory-tower has always asserted this: noli me tangere!
>
> What is, then, the direction of the future? Sociological trends and neo-realist endeavours searching for new paths seem to be the most vivacious today. But actually the new philosophy supplies legal philosophy with the deepest impulses. Both of its genuine sources spring forth with fresh living force: the very insight of law gets significantly deepened and philosophical understanding shows unprecedented differentiation and productive capacity.
>
> In legal philosophy, too, only such novel complex philosophies can have a future. After HUME, one cannot go back to an age before scepticism. No lasting theory can be built out of doctrines once corroded by acids of scepticism any longer. But it seems that one cannot go back to a pre-HEGELian age, either. Analysis has conceptually dissolved every-

[4] Cf., in the light of a Hungarian anthology, *Historical Jurisprudence / Történeti jogtudomány* ed. József Szabadfalvi (Budapest: [Osiris] 2000) 303 pp. [Philosophiae Iuris / Jogfilozófiák].

[5] As a summary most complete up to the present day in Hungary, cf. Kálmán Kulcsár *A jogszociológia problémái* [Problems of legal sociology] (Budapest: Közgazdasági és Jogi Könyvkiadó 1960) 269 pp., ch. II.

> thing and, thanks to scepticism, we can no longer believe in the simplicity of anything that can in such a way be taken apart."[6]

Or, it turns out from this diagnosis that what is outdated and dead in the first four decades of the 20th century is mostly English, and everything thrilling, everything full of vitality and lively differentiation as developed through a number of independent schools, is American. For the English authors with results deserving any mention whom HORVÁTH might have encountered in the course of his explorations were either philosophers having since become classical (who had, of course, besides a few incidental remarks, nothing to do in depth with law) or ordinary academic teachers of law (who hardly displayed any achievement meriting being remembered by posterity).

We would be wrong, however, if we tried to explain this as an erroneous viewpoint or a bias by the Hungarian visitor. For not even the classical universal survey of the history of legal philosophy from 1955 deigned to mention English contemporaries of the century.[7] It appears from bibliographies, too, that hardly any works worthy of attention were born; indeed, no really significant, coherent reflexive thought that can be organised in a legal theory was formulated at all.[8] All we can learn from a retrospective summary of the 20th

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[6] Horváth *Az angol jogelmélet* [note 3], p. 606.

[7] Carl Joachim Friedrich *Die Philosophie des Rechts in historischer Perspektive* (Berlin, Göttingen, Heidelberg: Springer 1955) 153 pp. [Enzyklopädie der Rechts- und Staatswissenschaften] or *The Philosophy of Law in Historical Perspective* (Chicago: The Chicago University Press 1958) x + 253 pp. The same is true for other overviews concerning the era preceding HART, e.g., Guido Fassò *Histoire de la philosophie du droit* XIXe et XXe siècles [*Storia della filosofia del diritto* III (Bologna: Il Mulino 1974)] 312 pp. (Paris: Librairie Générale de Droit et de Jurisprudence 1977) 312 pp. [Bibliothèque de Philosophie du Droit XX] as well as Albert Brimo *Les grands courants de la philosophie du droit et de l'État* 3e éd. (Paris: Pedone 1978) 574 pp.

[8] Some of the few achievements, nevertheless, are, e.g., John W. Salmond *Jurisprudence* or the Theory of the Law, 3rd ed. (London: Stevens 1910) xiv + 520 pp; A. C. Gupta 'The Method of Jurisprudence' *Law Quarterly Review* 33 (1917) 2, pp. 154–160; Carleton Kemp Allen *Law in the Making* (Oxford: Clarendon Press 1927), 2nd ed. rev. & enl. (Oxford: Clarendon 1930) xxviii + 405 pp.; Carleton Kemp Allen 'Jurisprudence—What and Why?' [*Juridical Review*, Dec., 1930] in his *Legal Duties* And Other Essays in Jurisprudence (Oxford: Oxford University Press 1931 [reprint Aalen: Scientia Verlag 1977]) xvi + 318 pp. {it is illustrative that the famous author himself could hardly find anything in his own century to remember, for his references were made either to old antecedents and specimens of historical jurisprudence in England or to then pioneering American trends}; Wolfgang Gaston Friedmann *Legal Theory* (London: Stevens 1944) xvi + 448 pp.; Glainville L. Williams 'International Law and the Controversy Concerning the Word »Law«' *British Yearbook of International Law* 22 (1945), pp. 146–163;

century is that "[i]n the Britain of the early 1950s, wrote NEIL MACCORMICK, »jurisprudence as the general study of law and legal ideas was in the doldrums«."[9]

2. The Personal Career

Secondly, I would mention that the lexical brevity of HART's biography regarding the facts of his professional career is indeed confusing:

> "A practising lawyer at the Chancery Bar before WW2, Hart returned to Oxford after 1945 to teach philosophy at a time when Oxford was becoming a major centre of linguistic philosophy. He applied his legal experience and philosophical insights to the study of law when elected professor of jurisprudence at Oxford, a chair he occupied from 1952 to 1968."[10]

Did he have, accordingly, no master worthy of mention at all? Nor any kind of achievements of his own? Is it imaginable that Oxford University had to search from among advanced beginners to find eventually someone to succeed Sir FREDERICK POLLOCK, Sir PAUL VINOGRADOFF, Sir HENRY MAINE and ARTHUR L. GOODHART?[11] We know that HART used to be a free student

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Glainville L. Williams 'Language and the Law' [parts 1–5] *Law Quarterly Review* 61 (1945), pp. 71–86, pp. 179–195, pp. 293–303, pp. 384–406 as well as pp. 62 (1946), 387–406; G. W. Paton *A Text-book of Jurisprudence* (Oxford: Oxford University Press 1946) x + 528 pp.; Julius Stone *The Province and Function of Law* Law as Logic, Function and Social Control (London: Stevens 1946) lxiv + 918 pp.; H. J. Paton *Moral Law* Or Kant's Groundwork of the Metaphysic of Morals (London: Hutchinson University Library 1948) 142 pp. [Philosophy] {as an analysis accompanying his translation of KANT}; Joseph Needham {as Sir William Dunn lecturer of biochemistry at Cambridge University} *Human Law and the Laws of Nature in China and the West* (Geoffrey Cumberlege / London: Oxford University Press 1951) 44 pp. [L. T. Hobhouse Memorial Trust Lecture No. 20]; Glainville L. Williams *Salmond on Jurisprudence* [1902] 11th ed. (1957) xxix + 550 pp.; as well as, by Graham B. J. Hughes, 'The Existence of a Legal System' *New York University Law Review* 35 (1960) 5, pp. 1001–1030 and 'Professor Hart's Concept of Law' *Modern Law Review* 25 (1962) 3, pp. 319–333.

[9] J. M. Kelly *A Short History of Western Legal Theory* (Oxford: Clarendon Press 1992) xvi + 466 pp.

[10] David Walker in *The Fontana Dictionary of Modern Thinkers* ed. Alan Bullock & R. B. Woodings (London: Fontana Paperbacks 1983), p. 307.

[11] Let us mention here that HART had worked, during the Second World War, in the decoding division of military intelligence on the interpretability of deciphered codes, in a close working relationship with GILBERT RYLE and STUART HAMPSHIRE. He used to be a close friend of ISAIAH BERLIN and co-operated, back in Oxford, with J. L. AUSTIN, who later became known for his pioneering work in linguistic philosophy. When Professor GOODHART was promoted

at New College of *Literae Humaniores*, i.e., of Greek and Latin languages, ancient history and philosophy, without having ever acquired Ph.D. in philosophy or any degree in law.[12] We know that he tutored students of philosophy as a fellow of the New College.[13] However, although a remarkable man and not even particularly young at the time, he had still not yet authored any significant work.[14] All that we know relates rather to the contemporary intellectual environment:

> "Between the end of the Second World War and the publication of *The Concept of Law,* jurisprudence in Britain was scarcely an exciting and burgeoning field of enquiry. It was not taught widely and, where it was taught, was often an optional course. It was an animadversion—an excursus from the real study of practical legal subjects that would equip students for professional careers in the law. There were few chairs of jurisprudence […]. Law schools were not as large nor as numerous as they have become. Nor was law teaching predominantly carried out by full-time legal academics—practitioners engaged in part-time teaching had a more important role than now, and the practical orientation of the syllabus was more marked."[15]

In addition, we may also learn that it was around this time that a kind of fermentation had just started that would lead soon to a rapid growth in the number of legal academics involved in higher education.[16]

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from the Chair of Jurisprudence to be the head of University College, A. H. CAMPBELL was invited from Edinburgh but, as CAMPBELL did not wishing to leave his home, eventually the lecturer HART was invited who, although unknown in his profession at the age of 45, yet was well known at Oxford for his brilliant debating style. No wonder that this selection also created some adverse feelings. Neil MacCormick 'Herbert L. A. Hart: In Memoriam' *Ratio Iuris* 6 (1993) 3, pp. 337–338.

[12] Robert S. Summers 'H. L. A. Hart's The Concept of Law' *Journal of Legal Education* 45 (1957) 4, pp. 587–596.

[13] Joseph Raz 'H. L. A. Hart' in *H. L. A. Hart y El Concepto de Derecho* ed. Agustín Squella (Valparaiso 1986), p. 17 [Revista de Ciencias Sociales No. 28].

[14] Except for two twenty-page articles—in philosophy and legal philosophy—as well as for a brief account on JEROME FRANK. Cf., e.g., Stanley L. Paulson 'The Published Writings of H. L. A. Hart: A Bibliography' *Ratio Iuris* 8 (1995) 3, pp. 397–406.

[15] Colin M. Campbell 'The Career of the Concept' in *The Jurisprudence of Orthodoxy* Queen's University Essays on H. L. A. Hart, ed. Philip Leith & Peter Ingram (London: Routledge 1988), pp. 1–25, quotation on p. 2.

[16] The boom—"the first period"—started also in related fields in the early 1960s. Cf., e.g., Roger B. M. Cotterrell 'Sociology of Law in Britain: Its Development and Present Prospects' in *Developing Sociology of Law* A World-wide Documentary Enquiry, ed. Vincenzo Ferrari (Milano: Giuffrè 1990), pp. 11–22 [Seminario Giuridico della Università di Bologna, Miscellanee 7], p. 790.

3. The Opus' Career

Well, this was the setting in which the publication of *The Concept of Law* in 1961 made a hit. Our third question is related just to this: was it indeed a 'hit'? Actually, it was praised as "the foundations of contemporary legal philosophy in the English speaking world and beyond", "a classic in its field", only comparable to BENTHAM's, an oeuvre that "can keep company even with the massively erudite and acutely perceptive works of the great Austrian jurist HANS KELSEN", itself "a distinguished contribution", one "among the great works of twentieth century jurisprudence", "immediately recognized as a major contribution"—as proclaimed by his enthusiastic disciples, HACKER, MACCORMICK and RAZ.[17] Reckoning with bibliographical facts reveals a somewhat more prosaic way to success. The second edition (1964) of DIAS' widely used textbook devotes three references and criticism of one page to it in all. The third edition (1970) dedicates eight references and three pages to the subject, while the fourth (1976) introduces HART on six pages with a critical tone.[18] As to the Australian STONE (having started his career in London), he inserts three pages into his lengthy chapter on KELSEN, criticising HART' rule of recognition as "something of an oversimplification".[19] The second edition (1965) of the current textbook by the later Lord LLOYD OF HAMPSTEAD also concentrates on HART's simplifying concept of rule and on the shortcoming he identifies in that the author "seems to ignore certain of the sociological foundations of legal systems".[20]

Indeed, reminiscencies today also seem to confirm such a claim. A colleague reveals—for sympathy, only a decade after HART's death—that nothing

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[17] *Law, Morality, and Society* Essays in Honour of H. L. A. Hart, ed. P. M. S. Hacker & Joseph Raz (Oxford: Clarendon Press 1977) vi + 312 pp., Preface; P. M. S. Hacker 'Hart's Philosophy of Law' in *ibid.*, pp. 12–18; Neil MacCormick *H. L. A. Hart* (London: Arnold / Stanford: Stanford University Press 1981) viii + 184 pp. [Jurists: Profiles in Legal Theory 1], p. 3. Not without irony, A. W. B. Simpson ['Recognizing the Legal' *Times Literary Supplement* (December 11, 1981), p. 1447] avails himself—in reviewing MACCORMICK's book and attributing HART's influence to a great extent to his fascinating intellectuality manifested in personal debates—of apostolic metaphors describing those who 'long sat at his feet' to watch 'the lives of the saints' with 'miracles achieved' and 'penitential sufferings'.

[18] R. W. M. Dias *Jurisprudence* [1957] 2nd ed. (London: Butterworths 1964) lxxii + 556 pp., especially p. 371; cf. also 3rd ed. (1970) and 4th ed. (1976).

[19] Julius Stone *Legal System and Lawyers' Reasonings* (London: Stevens / Stanford: Stanford University Press 1964) xxiv + 454 pp., especially on pp. 132–133.

[20] Dennis Lloyd *Introduction to Jurisprudence* 2nd ed. (London: Stevens 1965) xxxii + 469 pp. at pp. 117–118.

but philosophy arose HART's interest and exclusively from the methodological point of view learned from his colleagues during their common information service of the war, that is, of linguistic analysis. Or, as applied to law, it could not be more than sheer field of exercise. For

> "Law, as he explained, merely provided him with issues on which he could »philosophize«; I think he was referring to the fact that the operation of the law makes use of notions, such as responsibility and voluntary acts, in which he and other Oxford philosophers were at this time interested."[21]

Consequently, it cannot be mere chance if

> "in attempting to make sense of the way we think and talk about the institution of law, HERBERT suffered from serious limitations. He was quite uninterested in the history of legal institutions. He knew little or nothing of comparative law or of the variety of legal traditions, which might have suggested that there was no such thing as a concept of law, but rather differing conceptions of law and legality, and of the place of legal institutions in the organization of social life. Although much influenced by KELSEN, he never seems to have attended to the fact that KELSEN's legal theory evolved in the civil law tradition in which law that is the product of legislation occupies center stage, which is not the case in the common law world. In the course of writing *The Concept of Law*, he developed some interest in legal anthropology, but not enough to avoid serious mistakes—he thought, for example, that early or primitive legal systems did not contain what he called secondary rules, saying who can do what and how, whereas in fact all early societies had elaborate rules on whom one could marry."[22]

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[21] A.W. Brian Simpson 'Herbert Hart Elucidated' *Michigan Law Review* 104 (2006) 6, pp. 1437–1459 {& <http://www.michiganlawreview.org/assets/pdfs/104/6/Simpson.pdf>} at p. 1453. Or, he plainly expressed—to David Sugarman 'Hart Interviewed' *Journal of Law & Society* 32 (2005), pp. 267 et seq. at 271—in a law-related conversation that "as a barrister, »I soon began to discover that I had no real interest in law as such. My fundamental interests were in philosophy«".

[22] Simpson, ibid.

Well, it does really seem that the well-criticised[23] inadequacy and uncertainty of the HARTian response to the social nature of law[24] and the apparently self-evident claim with which HART describes law on the basis of hypothesised uses of language (with tacit presumptions and rationalisations included, although not empirically verified but treated as *sine qua non* foundations), t h r o u g h public discourses conducted a b o u t and speech-acts made in the law, will become a pivotal point both in the casual reception and the overall evaluation of the oeuvre as a modern (postmodern?) British response. This is a rather important point indeed. Beyond the posterior wisdom according to which, usually, "Philosophers do not solve problems; they generate them.",[25] from this time on this kind of pseudo-sociologising logical analysis of law became fashionable as the usual standard quintessence of legal philosophical thought.[26] It is to be noted that in addition to these

[23] Even the 'Brion Simpson Obituary' remembers that "He was critical of what he saw as HART's lack of attention to the workings of the common law tradition. HART's emphasis on law as a system of rules was more appropriate for the analysis of continental civil law systems. For SIMPSON, the English common law system »consists of a body of practices observed and ideas received by a caste of lawyers«. Historically, cohesion was produced through institutional arrangements, such as the way the legal profession is organised, rather than by way of rules, which only developed when the previous consensus based on tradition or custom broke down. For SIMPSON, legal history and legal anthropology were therefore central tools in coming to an understanding of what law is; for HART they were irrelevant." Christopher McCrudden in <http://www.guardian.co.uk/law/2011/feb/01/brian-simpson-obituary>.

[24] W. G. Runciman's letter to *London Review of Books* 27 (March 17, 2005) 6 in <http://www.lrb.co.uk/v27/n03/thomas-nagel/the-central-questions> opinions that "Although HART called *The Concept of Law* an essay in descriptive sociology, it is, as he seems subsequently to have accepted, not strictly descriptive nor very much of a sociology. But in arguing that judicial decisions involve the application to second-order rules of primary rules, he was making a case, by which many of his readers were persuaded, to the effect that judicial decisions, whatever exactly they may be, are neither the execution of sovereign commands nor exercises in moral philosophy." Moreover, there is a philological trouble as well. "The puzzle is that, as NICOLA LACEY documents, he owned a heavily annotated copy of the English translation of MAX WEBER's sociology of law, but claimed that it was by PETER WINCH's book *The Idea of a Social Science* that he was influenced in his account of the 'internal aspect of rules'. His references to WINCH, however, are not to either of the two places where WINCH cites what he calls WEBER's 'important' paper on RUDOLF STAMMLER in which the concept of 'following a rule' is discussed in detail."

[25] Simpson [note 21], p. 1457.

[26] It is perhaps enough to remind, from among those acclaimed today as the most excelling ones, of the theories by RONALD M. DWORKIN and ROBERT ALEXY with their limitations in explanation, owing to their culture-specific character. For the former, cf. notes 45 and 46, for the latter, from Robert Alexy, *Theorie der juristischen Argumentation* Die Theorie des rationalen

unprecedented and unexplained (not even conceptually introduced) presuppositions, the author has also contributed to their becoming widely questioned, for he embarked upon a new path of research not only without naming it, but even prefacing his book with a rather provocative programmatic declaration, attributing an outstanding significance to the sociological aspect. He meant to provide a key to the understanding of his work by stating that

> "[n]otwithstanding its concern with analysis the book may also be regarded as an essay in descriptive sociology; for the suggestion that inquiries into the meanings of words merely throw light on words is false."[27]

A similar criticism was formulated in the equally early sociological observation, in terms of which tracing back complex questions burdened with empirical presuppositions to simple conceptual analysis and systemic (taxonomic) definition by no means promotes theoretical advancement; moreover, its one-sided emphasis may in fact, by eliminating the truly sociological aspects, block the way to deeper cognition.[28]

4. Verbal Sociologism

With all this—and this is my f o u r t h remark—, the question of the unity or duality (or synthesis) of theorising upon infra-legal analysis, on the one

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Diskurses als Theorie der juristischen Begründung (Frankfurt am Main: Suhrkamp 1978) 396 pp. [Surhkamp Taschenbuch Wissenschaft 436], *Theorie der Grundrechte* (Frankfurt am Main: Suhrkamp 1986) 548 pp. [Suhrkamp Taschenbuch Wissenschaft 582] as well as *Recht, Vernunft, Diskurs* Studien zur Rechtsphilosophie (Frankfurt am Main: Suhrkamp 1995) 292 pp. [Suhrkamp Taschenbuch Wissenschaft 1167].

[27] H. L. A. Hart *The Concept of Law* (Oxford: Clarendon Press 1961) viii + 263 pp. [Clarendon Law Series], p. vii. By the way, HART's stand was already present back in his first works. For instance, upon the criticism by EDGAR BODENHEIMER of his inaugural speech—'Modern Analytical Jurisprudence and the Limits of its Usefulness' *University of Pennsylvania Law Review* 104 (1955–1956) 8, p. 1080–1086—, revealing the lack of sociological foundations, he answered (with no grounds but firm self-consciousness, reminding of the way KELSEN had debated EHRLICH half a century before) that, in contrast to sociologists, lawyers have first to establish "the linguistic fabric of their own enterprise" to be able to have a start therefrom. H. L. A. Hart 'Analytical Jurisprudence in Mid-twentieth Century: A Reply' *Ibid.,* 105 (1955) 7, pp. 953–975.

[28] J. P. Gibbs 'Definitions of Law and Empirical Questions' *Law and Society Review* 2 (1968) 3, pp. 429–446, especially pp. 429, 435 and 446.

hand, and of investigating external factors sociologically, on the other, has laid the foundations for a general criticism of HART's work at several levels and in a way that points beyond the HARTian reduction of legal phenomenon to (an aggregate of) rules and, within this, his separation of secondary rules (of recognition) from primary rules. It was considered problematic and unproved from the outset that descriptive sociology could be reached from within any conceptual analysis. For, as explained, the latter can only take the given ideological framework as previously accepted, although it cannot be properly understood or interpreted exclusively from within.[29] Another, no less acute remark—which struck me, too, on first reading more than three decades ago (when Professor VERA BOLGÁR of Michigan presented me with her own copy on the occasion of her retirement) and even dispirited me for quite a long period—is that the HARTian analysis as based on language use reflects "an essentially bourgeois world-view and concerns",[30] supposing almost exclusivist and elitist preliminary considerations and rationalities to be universally given and accepted, although they rather suggest the esoterism of some sort of "clubbishness".[31] As was expressed, thereby a "societal consensus" is postulated that is by no means an extant consensus but merely artificially hypostasised, the fact notwithstanding that it actually serves both as a crucial starting point and connecting link in any logical inference for the HARTian oeuvre.[32]

Or, putting it more bluntly, for exactly this very reason, his perspective cannot be but merely "idealist". That is,

> "the elegantly constructed legal system described in *The Concept of Law,* with its unity determined by the rule of recognition, and identifying by determinate criteria the individual laws which constitute the system, is not the blueprint for all legal systems, or indeed of any legal system, even our own, which has ever actually existed."

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[29] Such stands—in addition to the early comment by Judith N. Shklar *Legalism* (Cambridge, Mass.: Oxford University Press 1964) ix + 246 pp. or by E. H. Taylor 'H. L. A. Hart's The Concept of Law in the Perspective of American Legal Realism' *Modern Law Review* 35 (1972) 6, pp. 606–620, objecting to the lack of realism—used to appear mostly in *The British Journal of Law and Society*: cf. I. D. Willock 'Getting off with Sociologists', I (1974) 1, pp. 3–12, in particular p. 3 and—blaming Hart for drawing an "ideological scheme" instead of theory-building—C. M. Campbell 'Legal Thought and Juristic Values', I (1974) 1, pp. 13–30. For a comprehensive overview, cf. Martin Krygier 'The Concept of Law and Social Theory' *Oxford Journal of Legal Studies* 2 (1982) 2, pp. 155–180, particularly p. 155.

[30] Philip Leith 'Introduction' in *The Jurisprudence of Orthodoxy* [note 14], [p. vi].

[31] Campbell 'The Career...' [note 15] in *ibid.*

[32] Malcolm Wood 'Rule, Rules and Law' in *ibid.* [note 15], pp. 27–59.

Therefore, its utility cannot lie even in any field-study description but exclusively in the fact that it provides "a classic analysis of the theoretical implications of the typical tradition of liberal western legalism, a tradition now in decline".[33]

Yet, finally all this proved to be just a preliminary to the expression of feelings that something was missing, provoked precisely by the enthusiastic disciple's loyalty of MACCORMICK, who had elevated his master to KELSEN's level on the top of an imaginary Pantheon of 20th-century legal philosophy. Nevertheless, we have to realise that the KELSENian oeuvre, in which KELSEN's own analysis and WEBER's sociology are just "complementary", still emerges solitarily as some lonely giant, both in the sequence of creative periods and the superimposition of cumulative recognitions (accompanying the growing disciplinary and explanatory force) of KELSEN's work,[34] to which merits one may also add the rather fertile capacity to feedback of all the inconsistencies and internal tensions one may still encounter in the oeuvre.[35] Anyway, we can project the statement by the German-born jurist

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[33] Simpson 'Recognizing...' [note 17], *ibid.*

[34] See, by Stanley L. Paulson, 'Toward a Periodization of the Pure Theory of Law' in *Hans Kelsen's Legal Theory* A Diachronic Point of View, ed. Letizia Gianformaggio (Torino: Giappichelli 1990), pp. 11–47 [Analisi e diritto 2], 'Four Phases in Hans Kelsen's Legal Theory? Reflections on a Periodization' *Oxford Journal of Legal Studies* 18 (1998) 1, pp. 153–166. Taking into account the theoretical understanding of legal process (including both the law's emergence and operation) by highlighting the determining or merely mediating/controlling role what language and logic actually play in law (and, therewith, also the meaning of the KANTian category of imputation or ascription), I have proposed four periods spanning from the *Hauptprobleme der Staatsrechtslehre* (1911), via the *Allgemeine Staatslehre* (1925) and the *Reine Rechtslehre* (1934), to the *Allgemeine Theorie der Normen* (1960). Cf., by the author, 'Kelsen's Theory of Law-Application: Evolution, Ambiguities, Open Questions' *Acta Juridica Hungarica* 36 (1994) 1–2, pp. 3–27 {& 'Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven' *Archiv für Rechts- und Sozialphilosophie* LXXVI (1990) 3, pp. 348–366} as well as 'A bécsi iskola' [The Vienna school] in *Jogbölcselet* XIX–XX. század, Előadások [Lectures on legal philosophy in the 19th to 20th centuries] ed. Csaba Varga (Budapest: Szent István Társulat 1999), pp. 60–68 [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae].

[35] It is worth mentioning that HART could not, despite having visited KELSEN and dedicated two bulky papers to his Pure Theory, arrive at a genuine understanding of continental normativism. Perhaps this is one of the reasons why in *Essays on Kelsen* ed. Richard Tur & William Twining (Oxford: Clarendon Press 1986) viii + 345 pp. HART is only represented by disciple RAZ, and with a reprint of 'The Purity of the Pure Theory' *Revue Internationale de Philosophie* 35 (1981), pp. 441–459. In brief, HART appropriated from KELSEN exclusively what he could HARTianise from his oeuvre. He even recalls—H. L. A. Hart 'Kelsen Visited' *University of*

RHEINSTEIN (who made WEBERian thought known in the United States) back on our own problem now:

> "These facts that the ideas are held in actual human minds and that they actually influence social conduct belong in the world of the »is«; the ideas themselves, however, form the realm of the »ought«. Each of them constitutes a legitimate field of investigation, the former of the social scientist, the latter of the lawyer and analytical jurist. Their investigation requires different methods however. Nothing but confusion can result when they are mixed together."[36]

The subsequent history (with the branching off) of the issue obviously pertains to the fields of sociology and the humanities, particularly to the study of social normativity and especially to the conflicting areas of legal sociology and jurisprudence, in which KELSEN might well have acquired appropriate practice in his remarkable polemics with EHRLICH[37] half a century before he met HART, and which, then, presumably led to legal sociology gaining new strength in Great Britain today, looking back on considerable traditions in any event.[38]

California at Los Angeles Law Review 10 (1962–1963) , pp. 709–728, reprinted in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press 1983), pp. 283–308 at p. 287—that ending their public debate in America, KELSEN outraged "emphasizing in stentorian tones, so remarkable in an octogenarian (or in any one), that »Norm was Norm« and not something else, [by which] I was so startled that I literally fell over backwards in my chair."

[36] For the complementarity of the oeuvres of WEBER and KELSEN, cf. Max Rheinstein *Max Weber on Law in Economy and Society* (Cambridge, Mass.: Harvard University Press 1954) lxiv + 363 pp. on p. lxxi.

[37] Collecting and re-assessing the pieces of the classical debate during WWI, see *Hans Kelsen und die Rechtssoziologie* Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber, hrsg. Stanley L. Paulson (Aalen: Scientia Verlag 1993).

[38] Only as a postface are "three further d e f e c t s" also mentioned. "The f i r s t was a byproduct of the school of philosophy to which HERBERT belonged. He conceived of a legal system as a system of rules, identified by a master rule, and then, without making this explicit, proceeded on the unstated assumption that rules must have texts; hence, problems over the proper application of a rule came to be viewed by him as problems created by the open texture of language. This is well brought out in *The Concept of Law* when he discusses adjudication under the subheading »Interpretation«. This is quite radically mistaken; it is entirely possible for rules to exist without being codified in text at all. For instance, there is in English middleclass circles a rule, and one pretty widely respected, that when you are invited out to dinner you arrive bearing a bottle of wine. Not uncommonly the issue arises […]. These problems over the requirements of social convention have nothing whatever to do with the open texture of language, nor are they solved by attending to the text of the rule, for there is no text, and it would not help us if there were. Adjudication is often like that. / The s e c o n d defect is that the book

5. Growing into the British Pattern

Well, according to my fifth remark, a particular "air of Oxford",[39] arising from the enthusiasm of disciples to build their own doctrine and test it as applied to their own (career-starting) fields of investigation, which was finally organised into "an orthodoxy by the self-styled Oxford School of Jurisprudence", can be dated back to the time when two volumes of *Oxford Essays in Jurisprudence* (1961 and 1973), the doctoral theses by RAZ and MACCORMICK (1970 and 1978) as well as a memorial volume dedicated to HART (1977)[40] were published.[41] However, this soon attracted attention, accompanied increasingly by a certain pity,—although the national pride of "our own champion" was cherished for a while[42]—in London and even other centres of English-speaking civilisation, because the legal philosophy of Oxford started to present itself as promoted step by step to a pan-British pattern, the exclusively relevant way of theoretical investigation, notwithstanding the fact that its style (tailored to and invented for itself) actually impoverishes scholarly interest, reducing its resources and potentialities to one single aspect.[43]

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devotes virtually no attention whatever to the working of the common law tradition; indeed, the common law does not appear in the index and is hardly mentioned in the entire book. […] Common law adjudication has no rules of recognition, written or unwritten. All it has is a set of conventional practices used to demonstrate propositions about what the law is, and the forlorn hope that these propositions may be frozen and encapsulated in some definite text. And uncertainties and disagreements as to how one argues the law are not problems about the open texture of the rule or rules of recognition. HERBERT never engaged in any form of empirical study as to how, in the common law tradition, law emerges out of the process of argument and adjudication. / The third defect is that HERBERT never gave the simplest account of the way in which law is supported by the use of coercive force." Simpson [note 21], pp. 1456–1457.

[39] A. G. G. 'Preface' in *Oxford Essays in Jurisprudence* Second Series, ed. A. W. B. Simpson (Oxford: Clarendon Press 1973), [p. v.].

[40] *Oxford Essays in Jurisprudence* [I] ed. A. G. Guest (Oxford: Oxford University Press 1961) xix + 292 pp. and [II] ed. A. W. B. Simpson (Oxford: Oxford University Press 1973) x + 306 pp.; Joseph Raz *The Concept of a Legal System* An Introduction to the Theory of Legal System (Oxford: Clarendon Press 1970) viii + 212 pp. and Neil MacCormick *Legal Reasoning and Legal Theory* (Oxford: Clarendon Press 1978) xi + 298 pp. [both in Clarendon Law Series]; as well as *Law, Morality and Society* [note 16], *ibid.*

[41] "A powerful and articulate analytical jurist, HART gave special impetus to the resurgence of his discipline, not only in Britain but also in the United States where he lectured extensively in the 1950's and 1960's." Robert S. Summers 'The New Analytical Jurists' *The New York University Law Review* 41 (1966) 5, pp. 861–896, quotation on p. 896.

[42] Campbell 'The Career…' [note 15], p. 22.

[43] William Twining 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' *Law Quarterly Review* 95 (1979), pp. 557–580, especially on p. 565. Cf. also Robert Sa-

II. The Hart-phenomenon

All these remarks are relevant mostly because one of the most accomplished works in legal philosophy of the 20th century is at stake. It is one, even according to its most furious critics, written in a well-proportioned style, affording good reading, of a somewhat pro-British focus, attractively practical, concise with great promise and merits, while simultaneously avoiding the trap of academic abstractness and empty self-containment.[44] The *opus* is one of the most widely read books of the last decades and one published in perhaps the most languages, helping law to become one of the paradigmatic aspects, while patterning fields (with easily available examples) of humanistic—and, in general, philosophical—thought. Hart's personal success became consummate: towards the end of the 20th century, the great fame of the Oxford scholar grew into a living classic, as is deserved by one of the most distinguished representatives of living legal thought.[45]

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muel Summers 'Legal Philosophy Today – An Introduction' in *Essays in Legal Philosophy* ed. R.W. Summers (Oxford: Blackwell 1968), pp. 1–21 at p. 20.

[44] Campbell 'The Career…' [note 15], p. 22.

[45] On my repeated visits to him between 1987 and 1991 in the University College club, I saw Hart radiate nobility, wisdom, good spirits and simplicity at the same time. He talked with moderation, while always paying attention to his partner. He was pleased to learn about the plan to have his book translated into Hungarian; he even envisaged travel to Hungary again (to repeat his earlier visits to Budapest and Lake Balaton back in the 1930s). He negotiated with his publisher in order that I could obtain the copyright of his book in due time. As a leading figure of the board of trustees, he offered (and later fulfilled his promise) to recommend Budapest to the then most affluent and constructive American foundation as the then contemplated venue of one of the forthcoming events within the *Tanner Lectures,* focussing this time on a topic (which I, as an American Council of Learned Societies guest scholar at Yale Law School, believed to be the best, that is, a cost–benefit analysis of democratism) that promised to shatter the intellectual influence of the Soviet world-empire (then seeming dreadfully stable yet showing discernible symptoms of disintegration) as an "ideological diversion" in the academic field. He sent me as many as four letters, addressed from the Senior Common Room, each hand-written and accompanied by a portrait drawing of himself, for the coming book (which came out only posthumously, as internationally the very first translation of its 2nd edition with a Postscript edited by Penelope A. Bulloch & Joseph Raz [Oxford: Clarendon Press 1994]: *A jog fogalma* trans. & bibl. Péter Takács [Budapest: Osiris 1995] 375 pp. [Osiris-könyvtár: Jog]). It is also characteristic of his modest everydayness and informality that—according to hearsays—his death was caused by a complication that occurred after he (having regularly travelled by bicycle even in his later years) fell down due to a wrong manoeuvre.

6. Origination of a Strange Orthodoxy

His success became consummate indeed: he originated a genuine orthodoxy in a double sense. While ADOLF MERKL and ALFRED VERDROSS—receptive to the neo-KANTian methodological thought then most influential in Europe—became associates of KELSEN to generate a series of works inspiring a common trend of legal theorising for Central Europe from Germany to the Baltic to the Balkans and with centres equally in Vienna, Brno and Prague,[46] HART has conquered the world alone, with ideas formulated in practically one single book of a modest extent and nearly without notes. While the Vienna School had culminated in a diffuse orthodoxy, having generated its own neology as well[47] (let us recall in Hungary the efforts of, e.g., BARNA HORVÁTH to develop his anti-orthodoxism of synoptic synthesis[48] in

[46] Already in the very year of the publication of *Reine Rechtslehre*, approximately a thousand works pertaining to the "school" from Europe to Japan had been listed by Rudolf Aladár Métall *Bibliographie der Reinen Rechtslehre* [Separatabdruck aus Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik] (Leipzig & Wien: Franz Deuticke 1934) 68 pp. See, as a primary source, *Revue internationale de la Théorie du Droit / Internationale Zeitschrift für Theorie des Rechts* [Brno] I–XIII (1926–1940).

[47] Cf., e.g., *Law, State, and International Legal Order* Essays in Honor of Hans Kelsen, ed. Salo Engel & Rudolf A. Métall (Knoxville: The University of Tennessee Press 1964) ix + 365 pp.; *Festschrift für Hans Kelsen zum 90. Geburtstag* hrsg. Adolf J. Merkl & René Marić (Wien: F. Deuticke 1971) viii + 326 pp.; [Essays in Honor of Hans Kelsen: Celebrating the 90th Anniversary of his Birth] *California Law Review* LIX (1971) 3, pp. 629–858; *33 Beiträge zur Reinen Rechtslehre* hrsg. Rudolf Aladár Métall (Wien: Europaverlag 1974) 559 pp.; [Kelsen et le positivisme juridique] *Revue internationale de Philosophie* 35 (1981) 4, No. 138, pp. 441–560; *Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker* hrsg. Ota Weinberger & Werner Krawietz (Wien & New York: Springer 1988) 393 pp. [Forschungen aus Staat und Recht 81]; *Normativity and Norms* Critical Perspectives on Kelsenian Themes, ed. Stanley L. Paulson & Bonnie Litschewski Paulson (Oxford: Clarendon Press 1998) liii + 627 pp.; and especially Wolfgang Schild *Die Reinen Rechtslehren* Gedanken zu Hans Kelsen und Robert Walter (Wien: Manz 1975) 48 pp. as well as the series *Schriftenreihe des Hans-Kelsen-Institut* with 31 published volumes so far (Wien: Manz 1977–20019).

[48] With a synoptic approach, allowing the understanding of normativity and facticity as projected onto each other in sublation of the KANTian methodological dualism of *Sein* and *Sollen*, on the one hand, and presenting law, instead of the staticity of mere positivation, through the dynamism of the entire legal process leading to the decision made, on the other (inherent in the Anglo-Saxon *mentalité juridique* but also suggested by modern scientific world-concept, conceiving of reality itself as a process), see Barna Horváth *Schriften zur Rechtsphilosophie* I: 1926–1948: Prozessuelle Rechtslehre; II: 1926–1948: Gerechtigkeitslehre; III: 1949–1971: Papers in Emigration (Budapest: Szent István Társulat 2013) [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae] {in preparation} as well as, by Csaba Varga, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris] and *A jog mint folyamat* [Law as process] (Budapest: Osiris 1998) 430 pp. [Osiris könyvtár: Jog].

opposition to JULIUS MOÓR's integration with the Vienna School[49]), HART served as an exclusive reference for decades (as a starting point with a well-developed conceptual framework and standards to help decide whether or not a question can be formulated at all in a theoretically relevant way) with a separate school as much in Cracow[50] as at a number of universities of North and Latin America, Western Europe and other continents as well.[51] Or, what is even more, the underlying intellectual pattern, that is, an exclusive authority having elevated its own common-sense-founded approach to an axiomatic value with absolute validity as a standard with no limitations, has itself, through multiplying its effect by its elitist influence, established a school. HART himself was a thinker endowed with the sober gift and humility of scepticism. Having been transformed into a school, however, his theory grew into a movement contented with less tolerance of tentative ways toward a free search for a solution. His reasoning, having evolved from everyday speech but led to far-reaching theoretical consequences, may have contributed to rendering (in Hungary as well[52]) both RAWLSism and DWORKINism (and who else should be mentioned next?) also intellectually thinkable and undertakeable in already known terrains.[53]

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[49] Cf. Julius Moór *Schriften zur Rechtsphilosophie* (Budapest: Szent István Társulat 2006) xxii + 485 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Bibliotheca Iuridica: Opera Classica 3] {& <http://philosophyoflaw.wordpress.com/>}.

[50] First of all, as authors of *Archivum Iuridicum Cracoviense* ([1965, No. 1–]), primarily Marek Zirk-Sadowski and Tomasz Gizbert-Studnicki.

[51] The *Issues in Contemporary Legal Philosophy* The Influence of H. L. A. Hart, ed. Ruth Gavison (Oxford: Clarendon Press 1987) 357 pp. is characteristic in making it visible that the "management" of the cultivation of HART's doctrine did in fact never truly transcend the scope of Oxford.

[52] Cf., e.g., Mátyás Bódig *Hart, Dworkin és a jogelmélet posztmetafizikai fordulata* [Hart, Dworkin and the post-metaphysical turn in legal philosophy] (Budapest: Osiris 2000) 202 pp. [Doktori mestermunkák].

[53] My students at the University of Sydney back in 1986 were fond of three books: HART's treatise, helping them become acquainted with law; DWORKIN's, initiating them into the "politically correct" way of argumentation on the East and West coasts of America; as well as the early search for adventure (since transcended) by the then young HUGH COLLINS—*Marxism and Law* (Oxford: Oxford University Press 1982) viii + 159 pp. Marxist Introductions]—substantiating their revolt against their parents' generation and its "bourgeois rule of law", judged for having been turned down since 1968. At this time I used to incorporate into my lectures as a background the destructive side-effects of MARXism (used as a substitute for religion in Central and Eastern Europe), which could, nonetheless, support a relatively exciting and intellectually productive present. For, despite being disabled and hamstringed, the greatest available variety of trends of thought could evolve in our country under the order superimposed on us from above both as a strait-jacket and as a protective shield; moreover, there was not one of

Are we thereby making a virtue out of weakness? By no means. What I venture here is simply to point out certain parallelisms, trying to understand how the European continental tradition of encouragement to thinking—authenticated and hallmarked by quite a few magisterial works born out of decades of tireless cogitation and debates in the case of KELSEN and his colleagues in the early 20th century—was replaced, as a result of HART's reception, by the channelling of thinking as a new tradition in English-speaking civilisation by the second half of the 20th century. Or, the same question may also be formulated in this way (without expecting an answer here and now): how could a school of the German–Austrian liberal tradition, aspiring to more or less open thinking, yield its place to a rather more closed school of thought, in the intellectual environment in which parts of the liberal tradition become generators of novel conformity and self-imposed shackles (sometimes even more merciless than some earlier patterns of an authoritative mentality)?

7. Mastering Periods of the 20th Century

It is a fact that, within a few decades, HART became for the Anglo–American world what KELSEN—on WEBERian social scientific foundations—had already been for the European continent in a previous age and among the intellectual conditions of a bygone world order. Any real difference between their respective impacts is either accidental or can be ascribed to the cultural diversity shaping their intellectual circumstances; and this points far beyond the scope of problems discussed here.

In the 20th century, focal points designing the major trends of the world shifted: styles and mentalities, world concepts and traditional approaches gained new meanings; values wholeheartedly professed up to a point in time became suddenly seen from different or additional perspectives; and, in a certain sense, even old antagonisms and controversies, previously referred to as differences either between the German and the French or between the continental and the Anglo-Saxon ways of thinking, were reevaluated or rewritten.[54] Positivism, which had prevailed in continental Europe since the

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these designated as a focus from which one had to step out and back, in contrast to HARTianism as a compulsory garment in the otherwise most liberal Great Britain.

[54] Just one of the aspects of the extremely complex issue is the challenge of legal unification in the European overall integration process, which has already provoked enormous debates (ranging from pragmatic realism to revolutionary Utopianism) on the transcendability of the

NAPOLEONic era of classical nation-state codifications, underwent a landslide shock and came near to dissolution after WWII (partly in response to experiences accumulated between the two world wars),[55] and the path-breaking initiative of the philosophy and methodology of science and linguistics all followed the way that was first put into a form in law by HART's laying of the foundations of an autonomous legal concept (for which the Anglo–American analytical tradition was probably more familiar anyway).

One of the greatest and most lasting achievements of 20th-century jurisprudence is, in all certainty, the formulation of the legal concept particular to the European continent (by KELSEN)[56] with a solid sociological foundation (by WEBER), as contrasted with the challenge of the free law (by EHRLICH) and the dilemmas of justice, expedience and security in law as the possible internal antinomy underlying the very idea of law (by RADBRUCH). No doubt, the thoroughly practical reconsideration of the concept of law was, however, undertaken by Anglo–American legal thought. This is why I dare assert with professional conviction and without fear of contradiction that the places in the imaginary Pantheon of 20th-century legal philosophising occu-

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nearly thousand-year-old separation between Civil Law and Common Law, on the one hand, and on the feasibility and prospect of a common private law codification, on the other. Cf., by the author, 'Codification on the Threshold of the Third Millennium' *Acta Juridica Hungarica* 47 (2006) 2, pp. 89–119 {& <http://www.akademiai.com/content/cv56l91505t7k36q/fulltext.pdf> & in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 189–214}, originally as 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800 {&'Codification et recodification: Idées, tendances, modèles et résultats contemporains' in *Studia Universitatis Babeº–Bolyai* Iurisprudentia, LIII (iulie–decembrie 2008) 2 [*La recodification et les tendances actuelles du droit privé* Bãl¸i, 9–12 octombrie 2008], 11–29 & <http://studia.law.ubbcluj.ro/articole.php?an=2008>}.

[55] In the light of the author's survey, cf. his 'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' Acta Juridica Hungarica 44 (2003) 1–2, pp. 21–44

{& <http://www.akademiai.com/content/x39m7w4371341671/?p=056215b52c56447c8f9631a8d8baada3&pi=1>

& <http://www.akademiai.com/content/x39m7w4371341671/fulltext.pdf>}.

[56] As to its background ethos, KELSEN's oeuvre is nothing but the translation and systematic implementation of the expectations of Civil Law professional deontology in the language of legal theory. Cf., by the author, 'Kelsen's »Pure Theory of Law«' in Csaba Varga *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE Project on "Comparative Legal Cultures" 1994), pp. 289–293 [Philosophiae Iuris]

{& <http://drcsabavarga.wordpress.com/2010/10/25/varga-law-and-philosophy-–-papers-in-legal-theory-1994/>}.

pied by MAX WEBER and HANS KELSEN (as accompanied by EUGEN EHRLICH and GUSTAV RADBRUCH, whom I deem to have been decisively significant minor masters), representing the first half of the century, are complemented indeed by the places occupied by H. L. A. HART and RONALD M. DWORKIN in the representation of the second half of the 20th century.

8. Raising the Issue of Reception in Hungary

From the foregoing, the question offers itself: "Is reception of HART's theory conceivable in Hungary? Has it already taken place? And, if so, then, to what extent?"[57]

One may guess that such a reception has already taken place and not only with respect to HART but (thanks mainly to the legal philosophical interest in contemporary Atlantic political philosophy) also with respect to DWORKIN for the most part. It has definitely taken place anyway to the extent justified by their proper contributions to human thought. After all, the emphatic presence of precisely these two thinkers is definitely more visible in our domestic discussions[58] than that of classical continental early-20th-century authors, whose scholarly contribution is certainly by no means less important from the point of view of the internal potentials of the continental jurisprudence of renewal.[59] Without a more exhaustive description of the

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[57] *H. L. A. Hart* Tudományos profil [Scientific profile], comp. Lajos Cs. Kiss & Péter Takács (Budapest: ELTE ÁJK 2001), p. 20 [ELTE ÁJK Miscellanea 4].

[58] E.g., JÁNOS KIS, ZSOLT KROKOVAY and FERENC HUORANSZKY from the terrain of political philosophy, MÁTYÁS BÓDIG and TAMÁS GYŐRFY from the one of legal philosophy, and GÁBOR HALMAI from the one of an applied constitutional theory.

[59] It would be perhaps too early to draw far-reaching conclusions from the amazing withdrawing of HART's analytical positivism to a more limited space. Surveys in synthesis—like Arthur Kaufmann *Rechtsphilosophie in der Nach-Neuzeit* Abschiedsvorlesung, 2. Aufl. (Heidelberg: Decker & Müller 1992) xiii + 61 pp. [Heidelberger Forum 64] or Helmut Coing *Grundzüge der Rechtsphilosophie* 5. Aufl. (Berlin & New York: de Gruyter 1993) xii + 317 pp. [De Gruyter Lehrbuch]—only discuss it with reference to JOHN AUSTIN's command-theory [*Lectures on Jurisprudence* (1861)] as an attempt to detach law from ethics, while others—*Einführung in Rechtsphilosophie und Rechtstheorie der Gegenwart* hrsg. Arthur Kaufmann & Winfried Hassemer, 4. Aufl. (Heidelberg: Müller 1985) xxvi + 445 pp. [Uni-Taschenbücher 593], *Du positivisme juridique* (Centre de Philosophie politique et juridique de l'Université de Caen 1988) 123 pp. [Cahiers de philosophie politique et juridique 13] or even *Juristen* Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert, hrsg. Michael Stolleis (München: Beck 1995) 702 pp.—do not even find it worth mentioning.

state of legal theorising in Hungary, it would be problematic to say anything more in advance about the field. Nevertheless, it is a fact that the fertilising abundance of German and Austrian philosophical and doctrinal studies has ceased since the drastic imposition of MARXism in Hungary fifty-five years ago; the French theoretical breakthrough from the turn of 19th and 20th centuries (with the humanistic *libre recherche scientifique* by GÉNY, the idea of solidarity by DUGUIT, or the institutionalism of HAURIOU, anticipating the speech-act theory by more than half a century at several points[60]) has never been truly explored in our region (in contrast to the Balkans, which have a French orientation); the message of the research by EHRLICH or RADBRUCH has still not been reflected upon in depth; the stimulating Belgian dilemma from between the two world wars on the transformative role played by the law's technicality has remained an undiscovered *terra incognita*;[61] even the methodological insight proper to Scandinavian legal realism is without adequate echoing in domestic research.[62]

In sum, it seems as if the (in itself justified) question regarding the feasibility and progress of an otherwise desirable reception has advanced the similarly reasonable question: what direction should our legal reflection follow in the future at all? How far have we got in incorporating into our legal theorising the various ways of thinking, schools, problem-sensitivities and

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[60] E.g., from François Gény, *Méthode d'interprétation et sources en droit privé positif* Essai critique (Paris: Chevalier-Marescq 1889) xiii + 606 pp. [Bibliothèque de jurisprudence civil contemporaine I] and *Science et Technique en droit privé positif* Nouvelle contribution à la critique de la mèthode juridique, I–IV (Paris: Sirey 1913–1924), and, from Léon Duguit, *Le Droit social, le droit individuel et la transformation de l'État* (Paris: Alcan 1908) 154 pp. and, as summed up, Roger Bonnard *Léon Duguit, ses oeuvres, sa doctrine* (Laval: Barnéoud & Paris: Marcel Giard 1929) 51 pp. {as off-print from *Revue de Droit public et de la Science politique en France et à étranger* 1929/1}, as well as Maurice Hauriou *Principes de droit public…* (Paris: Larose & Ténin 1910) xi + 734 pp.

[61] E.g., in particular, Jean Dabin *La technique de l'élaboration du droit positif* Spécialement du droit privé (Bruxelles: Bruylant & Paris: Sirey 1935) xii + 367 pp.

[62] For its comprehensive evaluation, see, by the author, 'Skandináv jogi realizmus' [Scandinavian legal realism] in *Jogbölcselet* [note 28], pp. 81–91; for its key texts, *Scandinavian Legal Realism / Skandináv jogi realizmus* ed., pref. & bibl. Antal Visegrády (Budapest: Szent István Társulat 2003) xxxviii + 160 pp. [Philosophiae Iuris / Jogfilozófiák] and, for a few translations from HÄGERSTRÖM, LUNDSTEDT and OLIVECRONA, *Modern polgári jogelméleti tanulmányok* [Papers from modern western legal theory] ed. Csaba Varga (Budapest: Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete 1977) 145 pp. as well as *Jog és filozófia* Antológia a század első felének polgári jogelméleti irodalma köréből [Law and philosophy: Anthology from the literature of western legal theory of the first half of 20th century] ed. Csaba Varga (Budapest: Akadémiai Kiadó 1981) 383 pp.

methodological choices that have emerged from long ago or the recent past or semi-present on the European continent, in which we are all rooted? Or is it perhaps desirable for us to be mesmerised by others' realisations without having developed our own traditions preliminarily? For only the latter may help us preserve collective experience, and offer ways to re-consider our responses to challenges in transition to the rule of law and European integration, that is, how to adapt to new conditions, preserving continuity by re-integrating with our own past?[63]

All in all, I think, one can but applaud the present situation in Hungary with different generations engaged in legal philosophising, drawing from different traditions and methodological preferences, in a number of dedicated institutes and chairs, contributed to by philosophers as well as students of political and social theory. It is promising to see all the competing workshops proceeding, engaged in constructive discussion, while resorting to all reserves in argumentation. In as far as immeasurable differences in culture allow any comparison at all, this in itself seems to offer somewhat more of a rich and thriving background than the meagre professional field that once preceded the 'HART-miracle' in its birthplace, as well as the almost compulsory focus-effect to step out and back, displaying neither too much abundance of outcomes nor overflowing with enterprising spirit, which followed it as 'HART-phenomenon', respectively.

Reception is not alien to living thought; neither is preservation of traditions. Both serve, in their own sublating ways, to preserve both identity through continuity and the readiness to renewal, by maintaining some balance between the two.

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[63] Cf., by the author, 'Legal Scholarship at the Threshold of a New Millennium' in *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot [2003]), pp. 515–531 [Rechtstheorie 33 (2002) 2–4: II. Sonderheft Ungarn]

{& *Acta Juridica Hungarica* 42 (2001) 3–4, pp. 181–201 & <http://www.ingentaconnect.com/content/klu/ajuh/2001/00000042/F0020003/00400027>

& <http://springer.om.hu/content/tna87eew2v0jen8y/fulltext.pdf>}.

LITERATURE? A SUBSTITUTE FOR LEGAL PHILOSOPHY?*

1. The Enigma of Law and its Study

"Law and Literature"? It helps human quality to enrich us. It helps channel back again into the law's domain that which is endless and incomprehensible throughout, and which escapes from all final explanation. It reconstructs the milieu in which we can float at most but which we will never have acquired. It helps us recognise in our existence the image of God we can hardly perceive with eyes dedicated to earthy matters. It helps us cogitate about the mystery of our existence in the Universe, the existential unthinkability of our presence thrown into being. It helps the human quality restored in us, whereto we still always escape back when our artificial being in this very world makes us dry, shrivelled, empty or weightless.

As is commonly known, our science is great albeit hyperbolic. We provided ourselves with scientific methodology to proceed step by step with the help of the logic of a world we made from ideas and conceptualised, and we erect intellectual buildings by executing relentless demands drawn from it. By the same token, in the meantime, however, we inevitably also deconstruct our world. And, thereby, we transformed that which has been so deep as to be impossible to break through and untransparently phenomenal, into simplicity reduced until it could be seen from one single aspect that we have sliced out of it. Moreover, we also prescribed what to see in it, and we also slowly began to see it—and nothing except it—indeed.

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* An address to the national conference on Law and Literature organised by the Institute for Legal Philosophy of the Catholic University of Hungary in Budapest on May 12, 2006, published in Hungarian as 'Irodalom? Jogbölcselet?' *Magyar Napló* XIX (2007) 8, pp. 17–22 and in proceedings—edited by István H. Szilágyi—*Iustum Aequum Salutare* III (2007) 2, pp. 119–132 & <http://www.jak.ppke.hu/hir/ias/20072sz/11.pdf>.

Hoping for a securer state, we built a fortress we believed to be firm as a rock around ourselves from mere consequences. We bedded ourselves methodically into mortar as far as we could; and on the fundament of our estate under our soles we scan the firmament to foresee whether or not we may once put even stars under the settling yoke of our intellect. When walking proudly and bravely, we think to navigate our existence on the field we have created without recognising that we have augmented it by a ballast in the meantime. For if sky and earth quake, we have to realise that we find ourselves in the old uncertainty. As lotus or corals live in water and others do live on them, we cuddle up together. And although flood floats and waves play with us with tide raising and sinking, in our misappointed sense—feeling ourselves at home in such a floating—we constitute, hand in hand, a standing mainland for ourselves.

Thus, our scholarship is great even if hyperbolic. It forecalculates how and in what way we should go on, and we may know whether we have gone on actually, because we may come on steadily indeed. For in that it has a message at all, it tells the truth. For we may actually delve into it deeper with the help of methodicality—with regard to all matters we may be at all immersed in. Our civilisation is pushed by our scholarship increasingly further; thus, we dig even deeper and deeper until, slowly, our sight will be lost. Sometimes we already forget where we have begun to dig at all. By now we mostly see—exclusively, even if ever from nearer—that which we may sense on the edge of our spade. And the more our eye becomes accustomed to it, the less sight remains to see anything else. Whilst we approach, we also drift apart inevitably.

Indeed, science is to be found wherein there is sacrifice, too. This is where it is important—unavoidably—to develop partialities in ourselves. This is where we make order by fabricating concepts for ourselves, and also by establishing necessary links as laws amongst them. And independent of how much uncertain it is—both from where it starts and where it concludes—we call such links established as knowledge by right, because we get more by it than otherwise. In this manner, we have already built an artificial world around ourselves.

Under such conditions, it is worthwhile to know what we are actually doing, so that after having made a sacrifice for it, we may also rebuild the fullness of our human beings. For we may get used to our new world to a great extent. And we should realise after all that our science has never been and will never be anything complete or completed. Certainly, the outcome is not reality itself but *alter ego* humanly constructed and construed, which we have made

primitive by virtualising as slices of what God created or what happened to us, i.e., as proofs and stems remaining in our sense. All this is as if we magically identified ourselves with something else, and for this, we build for our own use, from twigs and leaves, entities—animals or humans—living as a cosmos in themselves. Well, the actuality produced by our scholarship as a world of concepts is by no means more viable in itself than the noble action of our magical act. And still: if it is feasible to do *that* and *that* can be learnt and practiced, then we may precipitate effects through such substitutes too.

In sum, there is science. It also has to be as it proved to be useful for humanity, in the humans' earthly struggle.

2. "Law and Literature"

Law is scholarship on human ordering. It addresses the issue as to whom anything may be attributed and ascribed, and in what, and how, proper balance should be manifested, a balance that we would like to measure, with scales set up in our earthly existence. In the final account, our law is the constant refinement of the autocracy of human will through various deflectors. Whilst we spade even deeper in our scholarship on human ordering, we become in fact already increasingly involved in ourselves by our deflectors, driven by and getting entangled with other deflectors. After a while, sometimes we cannot any longer know for sure what is actually driven by what. And if, instead of an appeal to, or interest in, our choice, namely, of our human fallibility, we try to read the scale from the miracle of Creation, then the innocence of admiration, of the mysticism of reunion with the divine essence, of the maiden and still devoted astonishment will also sooner or later be replaced by a scale reading as transformed into its own and distinct profession, which, through its artificial ways, will achieve its methodicality born from that professionalisation so that, eventually, it cannot see in its self-mirror anything else than its own self, virtualised by its own means.

Law, then literature? Literature, then law? Even the expression makes them transcendent as there is neither law, nor literature inside. The profession of jurisprudence, always sinking into its own devices while becoming emotionless as to the grandiose donation capable of being astonished at the real world, looks in and through them—as the primitively taintless expression of anything human (compared to legal artificiality)—for the heady clarity of fullness and for the regenerating force of its conception, which withstands explanations to the very being.

Returning back to the original indication: "Law and literature"? Well, 'law' here is what it is not any longer and, in turn, literature'—that is all. Like *The Jolly Joker* (as an extra trump card), 'literature' in such a connection is all that is still capable in our world of giving an account of the fullness of being lost repeatedly, so as to realise newly its inexhaustibility, and to persuade us as to the original fallibility of whatever explanation and final setting, with the limited devices at our disposal. Therefore, it can stand for anything else and it will depend on custom, fashion or just any occasional mainstream idea, whether we hold onto whatever word, human expression or catharsis that is recurrently sensed by humans in its naming. Since it could as well be fable or myth, a primitive popular event shooting out from atavistically ancient directness, just as well as the playing of a string quartet, thunderstorm or volcano breakout, or again, the playing of moths or animal rut. We call it 'literature' as we do also mostly rely on text, with an understanding of texts and contexts in it. We refer to it as if understanding a text differed from understanding a world. That is, we act as if law were simple text-reproducing concretisation, instead of the (unmatched but always accessible) wisdom of the realisation that we weigh much and many times whilst we equalise balance only rarely—at a time when we can hardly do anything else. For, we hardly abide by anything else in law than tradition, within the frameworks of which we wish exactly—and just through the law and its responsively responsible practice—to relax.

Hamlet? *Michael Kohlhaas*? *Raskolnikov*? Heroes of FRANZ KAFKA, ROBERT MUSIL, WILLIAM SHAKESPEARE, HEINRICH VON KLEIST and FYODOR DOSTOYEVSKY coming out from and then returning to fog? Instead of the self-reassuring conformism of the peacockery of hypocrisy, FRIEDRICH NIETZSCHE shouted to the world the majestic royal nudity of Humanism still based on the Enlightenment. In lack of any resignation resulting from unprocessed conscience, SÖREN KIERKEGAARD concluded, in turn, a self-loss of being thrown into existence. Now, where are we ourselves? And what may we do mainly? For want of anything better, meditate while in front of our wise books, reading *The Trial of the Genius* by BARNA HORVÁTH[1] in order to care, protect and defend ourselves, and even more so at a time when we have already begun to choke from our own playing of false self-reassurance, still rounded off to mere geometry or rhetoric in our retained honesty. It seems to be purposeless to

[1] Barna Horváth 'Der Rechtsstreit des Genius: I. Sokrates & II. Johanna: a) Der Tatbestand b) Das Verfahren' *Zeitschrift für öffentliches Recht* XXII (1942) 1, pp. 126–162 & 2–3, pp. 295–342 and 4–5, pp. 395–460.

have constructed, like the Chess Turk by WOLFGANG VON KEMPELEN,[2] a lawyer moved by piston-valves of the rationale of some selected schemes.[3] This is so because all that notwithstanding, a human is hidden in the machinery, behind the bewigged-cloaked external appearances. That is, what is hidden is not rationality disciplined in The Turk's torso but benevolence, mixed with fallibility, because there is a spell of drama in the air when the lawyer starts calculating or concluding a deal with an apparently cool head. The tempting remembrance of the Greek theatre[4] is not by chance, therefore. For all those fighting are humans, although mere fate will decide after all. We rectify, and intervene to struggle with self-created rules, which could perhaps be cruder without us; we even try to hold down the hand of the fate, although no human effort is ever to succeed in full. We may have fought ourselves to get into the arena without, however, pushing out fate's hand. In turn, we are already so many and flail with so wide a range of weapons that sometimes we already trample each other; moreover, here and now we ourselves stumble upon our deflecting devices more and more.

What remains still? Nothing else but struggle and confidence. Can fight and trust be added to them? They are a strange combination at first glance, since the former was already practiced before the law, and the latter serves as a balm despite the law, too. And then, what might be the lesson to be drawn from all this? Maybe the first is the fact that no device can dispense of a manufacturer. Later on, it does not work instead of or without a user. Therefore, we have to resist the command of the self-laudating idol in front of us that, instead of the Good Lord, would make us adore this humanly created civilisation up to the point when, grovelling in front of it, we would also give up our civility and responsibility.

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[2] Cf. <http://www.kempelen.hu/index_en.html>, <http://en.wikipedia.org/wiki/The_Turk> and <http://www.museumofhoaxes.com/hoax/Hoaxipedia/Great_Chess_Automaton/>.

[3] Cf., by the author, 'Leibniz und die Frage der rechtlichen Systembildung' in *Materialismus und Idealismus im Rechtsdenken* Geschichte und Gegenwart, hrsg. Karl A. Mollnau (Stuttgart: Franz Steiner Verlag Wiesbaden 1987), pp. 114–127 [Archiv für Rechts- und Sozialphilosophie, Beiheft 31].

[4] What will survive in medieval mysterium and morality plays or school dramas unchangingly unifying theatric performance and justice publicly administered, with experiencing the transmission of community messages as a community function. Cf., e.g., John C. Gillespie 'Theatrical Justice' *Northern Ireland Legal Quarterly* 31 (1980) 1, pp. 67–72 as well as—equipped with sharpened problem-centredness—Harold Garfinkel 'Conditions of Successful Degradation Ceremonies' *American Journal of Sociology* LXI (1956) 5, pp. 420–424. For a summary, see Klaas Tindemans *Recht en tragedie* De scène van de wet in de antieke polis [diss.] (Leuven: Katholieke Universiteit Faculteit Rechtsgeleerdheid 1995/1996) viii + 428 pp.

"Law and Literature" recalls that which is infinite in fallibility and which is not transparent in its simplicity, that is, the situation confronted that we may not avoid deciding about despite the fact that we may not get to a final understanding. This is so because we may tear much from the wires, albeit we cannot solve their totality. What is said here and now—for want of anything better—as "Law and Literature" is, therefore, only a life-substitute. Like an artificial *ersatz,* it helps us to see out from our everyday complexities, exemplifying why our personal existence is difficult to grasp, a condition that we cannot surpass, even if we may improve it to make it more noble with love offered to everyone. All this is like a monastic psalm: they do and we do what we all have to do, as this is the only thing that may convey meaning on our daily efforts, on human labour, without being able to replace it. This is one of the chances which we may securely draw on.

3. Varieties of "Law and Literature"

"Law and Literature"? We may brood over the helplessly expansive imperialism of the caducity of great nations, the undemanding servility of the self-emptying confidence of past conquerors, when their *gloire* has already dissipated.

Law and Literature differs from its antecedents. In the thoroughly based Anglo–American classical studies of more than a century ago, the literary *analogon* (either in personal paths of life or in problematic) still served as the medium of professional leisurely adventure;[5] and SHAKESPEARE's oeuvre was used (in general[6] or as concentrated on his individual pieces, figures, *topoi*,[7] or

[5] Its early treatments—with the exception to, e.g., *The Lawyer* In History, Literature, and Humour, ed. William Andrews (London: W. Andrews 1896) 276 pp.—were hardly more than collections of interesting features of mere biographical data—e.g., Gilbert Ray Hawes 'Literature and the Law' *The Green Bag* An Entertaining Magazine for Lawyers, XI (1899) 5, pp. 234–237 and George H. Westley 'From Law to Literature' *The Green Bag* XII (1900) 9, pp. 446–449—or dythirambs of the literary value of old lawyerly documents—William S. Holdsworth 'Literature in Law Books' *Washington University Law Quarterly* XXIV (February, 1939) 2, pp. 153–172—or a series of free associations on the ungraspability of anything law—e.g., Benjamin N[athan] Cardozo 'Law and Literature' [*Yale Review* (July 1925)] *Columbia Law Review* 39 (1939) 1, pp. 119–137—, and it is only at a later time that analyses with a philological care will crop up—e.g., from two periods of time, Edmond N. Cahn 'Goethe's View of Law – with a Gloss out of Plato' *Columbia Law Review* 49 (1949) 7, pp. 904–920 and Daniel Boland 'Images of Law in Classical Russian Literature' *Irish Student Law Review* 8 (2000), pp. 53–65—and mostly for a propedeutic purpose.

[6] Cf., e.g., Franklin Fiske Heard *Shakespeare as a Lawyer* (Boston: Little, Brown, and Co. 1883) 119 pp.; Cushman K. Davis *The Law in Shakespeare* 2nd ed. (St. Paul: West Pub. Co.

as connected with his once lawyerly professional practice[8]) as a theological, ethical or political warehouse of patterns to forge an understanding of the nature and infinity of law as one of the deepest human challenges; jurist authors

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1884) 303 pp.; Edw[ard] J[oseph] White *Commentaries on the Law in Shakespeare* With Explanations of the Legal Terms Used in the Plays, Poems and Sonnets, and a Consideration of the Criminal Types Presented, Also a Full Discussion of the Bacon–Shakespeare Controversy, 2nd ed. (St. Louis, Mo.: The F. H. Thomas Law Book Co. 1913) xlviii + 524 pp.; Sir George Greenwood *Shakespeare's Law* (London: C. Palmer [1920]) 48 pp.; Sir Dunbar Plunket Barton *Links between Shakespeare and the Law* forew. James Montgomery Beck (London: Faber & Gwyer Ltd. [1929]) xxxix + 167 pp.; George W. Keeton *Shakespeare and his Legal Problems* forew. Lord Darling, P. C. (London: Black 1930) x + 239 pp.; George W. Keeton *Shakespeare's Legal and Political Background* (New York: Barnes & Noble [1968]) viii + 417 pp.; O[wenn] Hood Phillips *Shakespeare and the Lawyers* (London: Methuen 1972) ix + 214 pp.; F. V. MacKinnon *The Timeless Shakespeare* The Natural Law in Shakespeare ([Gloucester, Ont.: Times of Gloucester Press 1985]) xiv + 161 pp.; Robin Headlam Wells *Shakespeare, Politics and the State* (London & Basingstoke: Macmillan Education 1986) ix + 174 pp. [Context and Commentary]; Nancy L. Cook 'Shakespeare Comes to the Law School Classroom' *Denver University Law Review* 68 (1988) 3, pp. 387–411; Daniel J. Kornstein *Kill all the Lawyers?* Shakespeare's Legal Appeal (Princeton, N.J.: Princeton University Press 1994) xvii + 274 pp.; by Ian Ward, *A Kingdom for a Stage, Princes to Act* Shakespeare and the Art of Government (Nottingham: University of Nottingham Department of Law 1997) 25 pp. [Research Papers in Law] and *Shakespeare and the Legal Imagination* (London: Butterworths 1999) ix + 241 pp. [Law in Context]; B. J. Sokol & Mary Sokol *Shakespeare's Legal Language* (London & New Brunswick, NJ: Athlone Press 2000) 497 pp. [Shakespeare Dictionary Series].

[7] Cf., e.g., R[ocellus] S[heridan] Guernsey *Ecclesiastical Law in Hamlet* The Burial of Ophelia (New York: Shakespeare Society of New York 1885) 50 pp. [Papers {of the Shakespeare Society of New York} 1]; Paul S. Clarkson & Clyde T. Warren *The Law of Property in Shakespeare and the Elizabethan Drama* (Baltimore: The Johns Hopkins Press 1942) xxvii + 346 pp.; Darryl J. Gless *Measure for Measure* The Law, and the Convent (Princeton, N.J.: Princeton University Press 1979) xviii + 283 pp.; Arthur Melville Clark *Murder under Trust* Or the Topical Macbeth and Other Jacobean Matters (Edinburgh: Scottish Academic Press 1981) xii + 195 pp.; Jack Benoit Gohn '*Richard II*: Shakespeare's Legal Brief on the Royal Prerogative and the Succession to the Throne' *Georgetown Law Journal* 70 (1982) 3, pp. 943–973; Donna B. Hamilton 'The State of Law in *Richard II*' *Shakespeare Quarterly* 34 (1983) 1, pp. 5–17; *Shakespeare and Hungary* [Special theme section:] The Law and Shakespeare, ed. Holgar Klein & Péter Dávidházi, co-ed. B. J. Sokol (Lewiston, NY: Edwin Mellen Press 1996) 452 pp.; William M. Hawley *Shakespearean Tragedy and the Common Law* The Art of Punishment (New York: P. Lang 1998) 208 pp. [Studies in Shakespeare 7]; Paul W. Kahn *Law and Love* The Trials of King Lear (New Haven: Yale University Press 2000) xx + 203 pp.; B. J. Sokol & Mary Sokol *Shakespeare, Law, and Marriage* (Cambridge, UK & New York: Cambridge University Press 2003) x + 262 pp.; Mark A. McDonald *Shakespeare's King Lear with The Tempest* The Discovery of Nature and the Recovery of Classical Natural Right (Lanham, Md. & Oxford: The University Press of America 2004) ix + 317 pp.

[8] Cf., e.g., Frederick C. Hicks 'Was Shakespeare a Lawyer? A Review of the Literature in Question' *Case & Comment* [Rochester, N.Y.: Lawyers Co-operative Pub. Co.] 22 (1916) pp. 1002–1011; Ernest Law *Shakespeare's »Tempest«* as Originally Produced at Court (Chatto &

in that period turned with interest to other literary manifestations too,[9] just as they constructed examples in the fine arts[10] or architecture[11]. By contrast, as Law and Literature expressedly becomes a movement in the United States of America,[12] it is not a product of philosophical self-reflection pressed any lon-

Windus [1920] 35 pp. [Shakespeare Association Papers 5]; W. Nicholas Knight *Shakespeare's Hidden Life* Shakespeare at the Law: 1585–1595 (New York: Mason & Lipscomb [1973]) ix + 325 pp.; Daniel J. Kornstein *Kill all the Lawyers?* Shakespeare's Legal Appeal (Lincoln & London: University of Nebraska Press 2005) xvii + 274 pp.

[9] E.g., D. A. Hester 'Law and Piety in the »Antigone«: A Reply to J. Dalfen, »Gesetz ist nicht Gesetz...«' *Wiener Studien* XIV (1980), pp. 5–11; Joseph Allen Hornsby *Chaucer and the Law* (London & Norman, Oklahoma: Pilgrim 1988) ix + 180 pp.; Rosemary Cambridge 'Aequitas and Iustitia in Mediaeval German Psalters' in *Mediaeval German Studies* Presented to Frederick Norman (London: University of London Institute of German Studies 1965), pp. 31–38 or Lida Kirchberger *Franz Kafka's Use of Law in Fiction* A New Interpretation of *In der Strafkolonie*, *Der Prozess*, and *Das Schloss* (New York: P. Lang 1986) 212 pp. [New York University Ottendorfer Series, neue Folge 22]; Shamsul Islawm *Kipling's »Law«* A Study of his Philosophy of Life (London: Macmillan 1975) xiii + 174 pp.; or Enid G. Hildebrand 'Jane Austen and the Law' *Persuasions* [Journal of the Jane Austen Society of North America] 4 (1982), pp. 34–41 and Günther H. Treitel 'Jane Austen and the Law' *Law Quarterly Review* 100 (1984), pp. 549–586; or E. Simon 'Palais de Justice and Poetic Justice in Albert Camus' *The Stranger*' *Cardozo Studies in Law and Literature* 3 (1990) 1, pp. 111–125.

[10] Pl. Edgar Wind 'Platonic Justice, Designed by Raphael' *Journal of the Warburg and Courtauld Institutes* 1 (1937–1938), pp. 69–70; Frederich Cummings 'Poussin, Haydon, and The Judgement of Solomon' *The Burlington Magazine* 104 (1962), pp. 146–152.; Thomas Puttfarken 'Golden Age and Justice in Sixteenth-Century Florentine Political Thought and Imagery: Observations on Three Pictures by Jacopo Zucchi' *Journal of the Warburg and Courtauld Institutes* 43 (1980), pp. 130–149; Jonathan B. Riess *Political Ideals in Medieval Italian Art* The Frescoes in the Palazzo dei Priori [Perugia (1297)] (Ann Arbor: University of Michigan Press 1981) xii + 187 pp. [Studies in the Finerts: Iconography 1]; *Law and the Arts* ed. Susan Tiefenbrun (Westport, Conn. & London: Greenwood Press 1998) xii + 256 pp.

[11] Interestingly enough, English–American pragmatism produced a lot on this field like, e.g., Katherine Fischer Taylor *In the Theater of Criminal Justice* The *Palais de justice* in Second Empire Paris (Princeton, N.J.: Princeton University Press 1993) xxii + 161 pp. [Princeton Series in Nineteenth-century Art, Culture, and Society]; Clare Graham *Ordering Law* The Architectural and Social History of the English Law Court to 1914 (Burlington, VT: Ashgate 2003) xvii + 499 pp.; Martha J. McNamara *From Tavern to Courthouse* Architecture & Ritual in American Law: 1658–1860 (Baltimore & London: Johns Hopkins University Press 2004) xv + 162 pp. [Creating the North American Landscape].

[12] Just to mention few inspiring representatives, cf., e.g., Stanley Fish 'Working on the Chain Gang: Interpretation in the Law and in Literary Criticism' [*Critical Inquiry* 9 (1982) Fall, pp. 201 et seq.] in his *Doing What Comes Naturally* Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (Oxford: Clarendon Press 1989), pp. 87–103; Sandord Levinson 'Law as Literature' *Texas Law Review* 60 (1982) 3, pp. 373–403; James Boyd White 'Reading Law and Reading Literature' *Texas Law Review* 60 (1982) 3, pp. 415–445; Richard H. Weisberg *The Failure of the Word* The Protagonist as Lawyer in Modern Fiction (New Haven &

ger without interests but is a device for avoiding scientific methodicalness in tribal discordance resulting from brutalised inside fights, when demands are launched and historical entitlements are declared. I am the one who once took part in the parade of the American world when saloon-TROTSKYists, hidden in the mantle of the mainstream Critical Legal Studies, with unbarbered heads and in unwashed engine uniforms, flung in the face of wondering European legal sociologists: "Then damn the theory!"—although those latter asked only for the basis of this new-world toy, which played many times with us as a subversion, at an international scientific conference summoned at Oñati in the Basque Country—and saw his friends, theorists of Harvard with international reputations who could whisper about the line that cannot be easily found between respectability and political correctness. So too I was the one who took part in the Anglo–American Critical Legal Studies meeting in the crumbling New College building in Oxford, convened for a fashionable meditation limited to criticism, when on the cocktail-grass of the break the distinguished guest, invited from Hungary, having noticed the always closed gate of the ancient chapel opening for a few minutes for ritual reasons, called out ardently, and the domestic participants, recruited from suburbs, as new staff without the antique titles of their Bodleian Library has always used, reproved immediately the intruder: "Up? To church? Why? We never go there!". Well, accordingly my ruminations formed from such experiences and my

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London: Yale University Press 1984, [2]1995) xvi + 218 pp.; by James Boyd White, *When Words Lose their Meaning* Constitutions and Reconstitutions of Language, Character, and Community (Chicago & London: The University of Chicago Press 1984) xv + 377 pp. & *Heracles' Bow* Essays on the Rhetoric and Poetics of the Law (Madison, Wisconsin: The University of Wisconsin Press 1985) xviii + 251 pp. [Rhetoric of the Human Sciences]; Robin West 'Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Thought' *New York University Law Review* 60 (1985) 2, pp. 145–211; Richard Posner *Law and Literature* A Misunderstood Relation (Cambridge: Harvard University Press 1988) rev. and enl. ed. (Cambridge, Mass. & London: Harvard University Press 1998) ix + 422 pp. [Law in Literature]; *Interpreting Law and Literature* A Hermeneutic Reader, ed. Sanford Levinson & Steven Mailloux (Evanston, Illionis: Northwestern University Press 1988) xvi + 502 pp.; R[ichard] Weisberg 'The Law–Literature Enterprise' *Yale Journal of Law & the Humanities* 1 (1988) 1, pp. 1–67; Robin West 'Communities, Texts, and Law: Reflections on the Law and Literature Movement' *Yale Journal of Law & the Humanities* 1 (1988) 1, pp. 129–156; James Boyd White 'What Can a Lawyer Learn from Literature?' {reviewing Posner's above book} *Harvard Law Review* 102 (1989) 8, pp. 2014–2047; Richard Weisberg *Poethics* and Other Strategies of Law and Literature (New York: Columbia University Press 1992) xvi + 312 pp.; James Boyd White *Acts of Hope* Creating Authority in Literature, Law, and Politics (Chicago & London: University of Chicago Press 1994) xv + 322 pp.; Ian Ward *Law and Literature* Possibilities and Perspectives (Cambridge: Cambridge University Press 1995) xi + 264 pp.

Australian and American impressions of three decades ago, the revolutionism of the generation of 1968 culminated first in so-called Critical Legal Studies. Then, following the split into different isms, it disintegrated into so-called re-segregation deconstructionisms called either feminist or otherwise (sometimes ethnic), demanding historical revision and justice to be done by a re-division of the chance-giving cards. For instance, in the sanctum of Yale feminist jurisprudence presented itself in interjections, the sentimentalism of injuries, which the champions of intellectual methodicalness, self-styled masters of reason, listened to with cold faces. When they asked for its theory of knowledge and methodology, the answer was a more impetuous cry of pain, since—I realised—all this was just showing the scandal of domination until now (with catatonic anger flung always in face of the "male chauvinism of white domination"), namely, that today's female revolutionists did not even have vocabulary with which they could express themselves. "From what might we gather"—they said, mostly with contemptuous rejection—"even if the Bible also speaks by you and for you?" Well, after such representatives had experimented, with a foundation based on narrative jurisprudence, how to ontologise law through the style analysis of the language of legal processes, that is, how to reveal from behind its striking neutrality the relations of domination as a basic structure (which they felt intolerable), such legal theories began slowly wandering to the domain of literature (of course, not to the European or American versions, which they hated, but to their *black*, *latino* or *hispanic* variations)—in the United States of America, at the end of the millennium, following the barbarian coming into power of the generation of students who rioted in 1968—since there was neither law nor theoretical demand in their production but sheer emotional self-conditioning and claims (that could otherwise be received with full respect).[13] Under such conditions, not even the literary moment was too empathetic with them in the sense of European refinement, as the whole white male kit—from HOMEROS to EUGEN IONESCU—could have been thrown away with pleasure in exchange for a good Puerto Rican woman slave story or for any pretext of female humiliation.

[13] As formulated by Tamás Nagy—*Narratív tematika a kortárs amerikai jogelméletben* [Narrative topics in contemporary American legal theorising] (Szeged 2003) 29 pp. [Acta Universitatis Szegediensis: Acta Juridica et Politica LXIII/15], p. 22—: "Writings by representatives of feminist jurisprudence and race-consciousness [...] begin look like literary texts proper." Or, it may be claimed that „KAFKA's *The Trial* is as good a jurisprudence as any other legal theory". Igor Gräzin 'On Myth, Considered as a Method for Legal Thought' *Law and Critique* 15 (2004) 2, pp. 159–181, abstract.

Law and Peace. Law and Modernisation. And Development, and Language, and Economy, and Literature—and all along the prayer-mill, in order to speak, having somewhat transcended MARXism, *à propos* of law in terms of political action and of the claim of a new class heralding new conquests, instead of law in a genuine sense or the morality and human values underlying it. Or, literature is just a pretence here[14]—with anonymous stories, instead of the civilisational meditations and debates of thousand years, as portrayed by SOPHOCLES, JEAN RACINE, WILLIAM SHAKESPEARE, JOHANN WOLFGANG GOETHE, or just ALBERT CAMUS and FRIEDRICH DÜRRENMATT—because those rebels' demands, as sensed momentarily, can now be declared.

The French version of Law and Literature[15] is, as referred to earlier, dynamically forming but its footing is lost and the road missed, as for the time being it is hardly more than some panting feeding generated by the feeling of being overdue.[16] Of course, I believe that it may finish by borrowing

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[14] When it serves mere rhetorical purposes by signalling the legal absurdity of police actions exemplified by, e.g., Michelle R. Ghetti 'Seizure through the Looking Glass: Constitutional Analysis in Alice's Wonderland' *Southern University Law Review* 22 (1994–1995) 2, pp. 231–254.

[15] E.g., Eugène Henriot *Moeurs juridiques et judiciaires de l'ancienne Rome* d'après les poètes latins, I–III (Paris: Librairie de Firmin Didot Frères, Fils et Cie. 1865) {reprint: (Aalen: Scientia 1973) & (Pamploma: Analecta, D.L. 2007) [Colección de Derecho: Derecho romano]}.

[16] Cf., e.g., Stamatios Tzitzis 'Scolies sur les *nomina* d'Antigone représentés comme droit naturel' *Archives de Philosophie du Droit* XXXIII (Paris: Sirey 1988), pp. 243–258; Christian Biet 'La justice dans les *Fables*: La Fontaine et »le droit des gens«' *Le Fablier* [Revue des Amis de Jean de la Fontaine] (1992), No. 4, pp. 17–24; *Le droit et sa perception dans la littérature et les mentalités médiévales* Actes du Colloque du Centre d'Études Médiévales de l'Université de Picardie, Amiens, 17–19 mars 1989, publ. Danielle Buschinger (Göppingen: Kümmerle 1993) 237 pp. [Göppinger Arbeiten zur Germanistik 551]; Philippe Malaurie *Droit et littérature* Une anthologie (Paris: Cujas 1997) 342 pp.; *Littératures classiques* [Toulouse] (automne 2000), No. 40; *Droit et littérature dans le contexte suédois* dir. Philippe Bouquet & Pascale Voilley (Paris: Flies 2000) 190 pp.; Thierry Pech *Conter le crime* Droit et littérature sous la Contre-Réforme: les histoires tragiques (1559–1644) (Paris: H. Champion 2000) 480 pp. [Lumière classique 24]; Anne Rubinlicht-Proux *Le droit saisi par la littérature* [thèse de doctorat] (Villeneuve d'Ascq: Presses universitaires du Septentrion [2001]) v + 323 pp. [École des hautes études en sciences sociales, 1997]; 'Droit et littérature' [dir. Christian Biet] *Europe* 80 (avril 2002), no. 876: droit & littérature, pp. 3–199; *Lettres et lois* Le droit au miroir de la littérature, dir. François Ost, Laurent Van Eynde, Philippe Gérard & Michel van de Kerchove (Bruxelles: Facultés universitaires Saint-Louis 2001) 402 pp. [Publications des Facultés universitaires Saint-Louis 89]. As revealed by François Ost *Raconter la loi* Aux sources de l'imaginaire juridique (Paris: Odile Jacob 2004) 443 pp. and *Droit et littérature* Dossier, dir. Laurence Brogniez (Bruxelles: Le Cri 2007) 173 pp. [*Textyles* Revue des Lettres belges de langue française, No. 31], it is the late translation of Posner's provocative book [in note 12], unnoticed for a decade—*Droit et littérature* (Paris: Presses Universitaires de France 1996) xii + 464 pp. [Droit, Éthique et Société]—that would give a new impetus to an enervate culture reactivated now in France.

the American naming patterns without following the latter's fashionable zigzags, and will strengthen as an auxiliary branch of studying law, and standing for interdisciplinarity itself,[17] as mixed with specific literary and artistic analysis.

4. The German Study of Artistic Representations

It is perhaps typical that the Germans—who, due to their past romanticism, founded on classical monographies (and in scholarly grounded manners), exemplify analyses that might result from the fullness of human beings' fallible swirl over the law—do not relegate to any wonder-expectation anything like *Recht und Literatur* or *Recht und Kunst*. Instead, they do their job. With scholarly thoroughness founded a century ago, they use the literary legacy to a spectacular depth. And through a series of historical overviews and panoramic processing[18] of oeuvres rising like symbols—first of all by

[17] For instance, the course by Marie-Anne Frison and Alain-Gérard Slama—<http://66.249.93.104/search?q=cache:odh5vYr7lQQJ:www.sciences-po.fr/formation/cycle1/annee2/ouverture_2006/mafr_slama.pdf+%22droit+et+litt%C3%A9rature%22+frison-roche&hl=hu&gl=hu&ct=clnk&cd=1>—stops at the wisdom—concluded from the legende of Horus, *Le Roman de Renart* [around 1175, attributed to PIERRE DE SAINT-CLOUD], SHAKESPEARE's *The Merchant of Venice*, RACINE's *Antigoné* and *Bérénice*, BALZAC's *César Birotteau*, DOSTOYEVSKIY's *The Brothers Karamazov*, ANATOLE FRANCE's *The Crime of Sylvester Bonnard*, and finally, KAFKA's *The Trial*—in accordance to which in contrast to English–American literature, interested in procedural subtleties solely, the French literature focuses on cases when governmental measures can overweight law.

[18] Cf., e.g., Adolf Keysser *Recht und Juristen im Spiegel der Satire* I–II (Bad Rothenfelde: Holzwarth 1919) [Kulturbilder aus dem Rechtsleben 1–2]; Kurt Rathe 'Der Richter auf dem Fabeltier' in *Festschrift für Julius Schlosser* zum 60. Geburtstage, hrsg. Arpad Weixlgärtner & Leo Planiscig (Zürich, Leipzig & Wien: Amalthea-Verlag 1927), pp. 187–205; by Hans Fehr, *Das Recht in der Dichtung* [Kunst und Recht, II] (Bern: Francke 1931) 580 pp., *Die Dichtung im Recht* [Kunst und Recht, III] (Bern: Francke 1936) 327 pp. and *Die Tragik im Recht* (Zürich: Schulthess 1945) 113 pp.; Hans Frank [Reichsminister] *Recht und Kunst* (Leipzig: Der Oberbürgermeister 1939) 38 pp.; Hans Erich Nossack *Das Verhältnis der Literatur zu Recht und Gerechtigkeit* (Wiesbaden: Steiner 1968) 16 pp. [Akademie der Wissenschaften und der Literatur Mainz: Literatur 2]; Max Arnold Nentwig *Richter in Karikatur und Anekdote* (Köln: Schmidt 1981) 100 pp.; Thomas Würtenberger 'Satire und Karikatur in der Rechtsprechung' *Neue Juristische Wochenschrift* (1983), pp. 1144–1151; Albert von Schirnding *Recht und Richter im Spiegel der Literatur* (Stuttgart, etc.: Boorberg 1990) 28 pp.; by Arthur Kaufmann, 'Recht und Gnade in der Literatur' *Neue Juristische Wochenschrift* (1984), pp. 1062–1069 and *Recht und Gnade in der Literatur* (Stuttgart: Boorberg 1991) 36 pp.; *Literatur und Recht* Literarische Rechtsfälle von der Antike bis in die Gegenwart (Kolloquium der Akademie der Wissenschaften in Göttin-

SHAKESPEARE, KLEIST and KAFKA[19]—as well as monuments of world literature,[20] they look for the literary precipitation of the law's drama with the involved (and sometimes insoluble) dilemma that our fallible human history

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gen im Februar 1995) hrsg. Ulrich Molk (Göttingen: Sallstein 1996) 416 pp.; Hermann Weber *Annäherungen an das Thema »Recht und Literatur«* (Baden-Baden: Nomos 2002) viii + 190 pp. [Juristische Zeitgeschichte 6: Recht in der Kunst 9]; *Prozesse und Rechtsstreitigkeiten* um Recht, Literatur und Kunst, hrsg. Hermann Weber (Baden-Baden: Nomos 2002) vii + 98 pp. [Juristische Zeitgeschichte 6: Recht in der Kunst 11]; *Dichter als Juristen* hrsg. Hermann Weber (Berlin: Berliner Wissenschafts-Verlag 2004) 157 pp. [Juristische Zeitgeschichte 6: Recht in der Kunst 18]; Hermann Weber *Recht und Juristen im Bild der Literatur* (Berlin: Berliner Wissenschafts-Verlag 2005) viii + 230 pp. [Juristische Zeitgeschichte 6: Recht in der Kunst 19]; Susanne Kaul *Fiktionen der Gerechtigkeit* Literatur, Film, Philosophie, Recht (Baden-Baden: Nomos 2005) 196 pp. [Interdisziplinäre Studien zu Recht und Staat 35].

[19] Cf., e.g., with respect to WILLIAM SHAKESPEARE, Josef Kohler *Shakespeare vor dem Forum der Jurisprudenz* (Würzburg: Stallel 1883–1884) v + 300 pp. & (Berlin: Rotschild 1919) xi + 366 pp., Georg Illies *Das Verhältnis von Davenants »The Law against Lovers« zu Shakespears »Measure for Measure« und »Much Ado about Nothing«* (Halle a. S.: C. A. Kaemmerer & Co. 1900) 90 pp. [Inaug.-diss.] and von Hans-Wilhelm Schwarze *Justice, Law and Revenge* »The Individual and Natural Order« in Shakespeares Dramen (Bonn: Bouvier 1971) xi + 188 pp. [Studien zur englischen Literatur 6]; in respect to HEINRICH VON KLEIST, Heinrich Christian Caro *Heinrich von Kleist und das Recht* Zum 100 jährige Todestage Kleist's (Berlin: Puttkammer & Mührbrecht 1911) 51 pp., Josef Körner *Recht und Pflicht* Eine Studie über Kleists »Michael Kohlhaas« und »Prinz Friedrich von Homburg« (Leipzig & Berlin: B. G. Teubner 1926) 44 pp. [Zeitschrift für Deutschkunde: Ergänzungsheft 19], Adolf Fink 'Michael Kohlhaas – ein noch anhänginger Prozeß: Geschichte und Kritik der bisher ergangenen Urteile' in *Rechtsgeschichte als Kulturgeschichte* Festschrift für Adalber Erler zum 70. Geburtstag, hrsg. Hans-Jürgen Becker & al. (Aalen: Scientia 1971), pp. 37–108, Horst Sendler *Über Michael Kohlhaas – damals und heute* (Berlin: de Gruyter 1985) 45 pp. [Schriftenreihe der Juristischen Gesellschaft zu Berlin 92], *Kleists Kohlhaas* Ein deutscher Traum vom Recht auf Mordbrennerei, hrsg. Friedmar Apel (Berlin: K. Wagenbach 1987) 154 pp. and *Recht und Gerechtigkeit bei Heinrich von Kleist* hrsg. Peter Ensberg (Stuttgart: Akademie-Verlag 2002) 204 pp. [Frankfurter Kleist-Kolloquim]; and eventually, with respect to FRANZ KAFKA, Claus Hebell *Rechtstheoretische und geistesgeschichtliche Voraussetzungen für das Werk Franz Kafkas* Analysiert an seinem Roman »Der Prozess« (Frankfurt am Main: Peter Lang 1993) ix + 229 pp. [Historisch-kritische Arbeiten zur deutschen Literatur 11] and Janko Ferk *Recht ist ein »Prozess«* Über Kafkas Rechtsphilosophie (Wien: Manzsche Verlags- und Universitätsbuchhandlung 1999) x + 116 pp.

[20] Cf., e.g., in chronological order of subjects, Herman Funke *Die sogennante tragische Schuld* Studie zur Rechtsidee in der griechischen Tragödie [Inaug.-Diss.] (Köln: Photostelle der Universität Köln 1963); Dieter Kaufmann-Bühler *Begriff und Funktion der Dike* in den Tragödien des Aischylos (Heidelberg 1954) 117 pp. [Univ. Diss.]; by Michael Gagarin 'Dike in the »Works and Days«' *Classical Philosophy* 68 (1973), pp. 81–94 and 'Dike in Archaic Greek Thought' *Classical Philosophy* 69 (1974), pp. 186–197; Herbert Kolb 'Himmlisches und irdisches Gericht in karolingischer Theologie und althochdeutscher Dichtung' *Frühmittelarterliche Studien* 5 (1971), pp. 284–303; Erich Klibansky *Gerichtsszene und Prozeßform* in erzählenden deutschen Dichtungen des 12.–14. Jahrhunderts (Berlin: Ebering 1925) 63 pp. [Germanische

is to face. They reconstruct the law's world picture using other arts like fine arts[21] and architecture,[22] giving an opportunity to dissertations' monogra-

Studien 40]; Hermann Conrad 'Recht und Gerechtigkeit im Weltbild Dante Alighieris' in *Speculum Historiale* Geschichte im Spiegel von Geschichtsschreibung und Geschichtsdeutung: Johannes Spötl aus Anlass seines 60. Geburtstages, hrsg. Clemens Bauer et al. (Freiburg i. Br.: Alber 1965), pp. 59–66; Hans Fehr *Das Recht in der Sagen der Schweiz* (Frauenfeld: Huber 1955) 149 pp.; Gerhard Stuby *Recht und Solidarität im Denken von Albert Camus* (Frankfurt am Main: Klostermann 1965) 210 pp. [Philosophische Abhandlungen 26].

[21] For a general overview, see, e.g., Peter A. Jessen *Die Darstellung des Weltgerichts bis auf Michelangelo* (Berlin: Weidmann 1883) 62 pp.; Georg Voss *Das Jüngste Gericht* in der bildenden Kunst des frühen Mittelalters: Eine kunstgeschichtliche Untersuchung (Leipzig: E. A. Seeman 1884) 90 pp.; by Ernst von Moeller, 'Die Augenbinden der Justitia' *Zeitschrift für christliche Kunst* 18 (1905), pp. 107–122 & 141–152, 'Die Waage der Gerechtigkeit' *Zeitschrift für christliche Kunst* 20 (1907), pp. 269 et seq. & 291 et seq. as well as pp. 346 et seq., 'Die Zahlensymbolik in ihren Beziehungen zur Gerechtigkeit' *Zeitschrift für christliche Kunst* 21 (1908), pp. 137–148 and 'Das Auge der Gerechtigkeit' *Das Recht* 21 (1908), pp. 305–310; Hans Fehr *Das Recht im Bilde* [Kunst und Recht, I] (Erlenbach-Zürich & München & Leipzig: Eugen Rentsch 1923) 171 + 194 pp.; Georg Frommhold *Die Idee der Gerechtigkeit in der bildenden Kunst* Eine ikonologische Studie (Greifswald: Bamberg 1925) 75 pp.; Friedrich Holtze 'Die blinde Themis' *Deutsche Juristen-Zeitung* [Sonderausgabe (1925)] 26 pp.; Ursula Lederle *Gerechtigkeitsdarstellungen* in deutschen und niederländischen Rathäusern [Heidelberger phil. Diss.] (Philippsburg: Dt. Rechtsverl. 1937) 106 pp.; Ernst König 'Die sog. »Gerechtigkeitsbilder« der altniederländischen Malerei' in *Das Recht in der Kunst* (Berlin: Deutscher Rechtsverlag 1938), pp. 198–208; Karl Simon *Abendländische Gerechtigkeitsbilder* (Frankfurt: Kramer 1948) 108 pp.; Paul Schoenen 'Die Kunst in Dienste des Rechts' in *Recht und Rechtspflege in den Rheinlanden* (1819–1969) Festschrift für 150jährigen Bestehen der Oberlandsgerichts, hrsg. J. Wolffram & A. Kelin (Köln: Wienand 1969), pp. 439–488 & 488–512; Rainer Kahsnitz 'Gerechtigkeitsbilder' in *Lexikon der christlichen Ikonographie* 2 (1970), pp. 134–140; Franz Joseph Dölger *Die Sonne der Gerechtigkeit und der Schwarze* Eine religionsgeschichtlilche Studie zum Taufgelöbnis, 2. Aufl. (Münster: Aschendorff 1971) x + 172 pp. [Liturgiewissenschaftliche Quellen und Forschungen 14] [repr. 1914 {Liturgiegeschichtliche Forschungen 2}]; Otto Rudolf Kissel *Die Justitia* Reflexionen über ein Symbol und seine Darstellung in der bildenden Kunst (München: Beck 1984) 143 pp.; Kunibert Bering *Kunst und Staatsmetaphysik des Hochmittelalters in Italien* Zentren der Bau- und Bildpropaganda in der Zeit Friedrichs II. (Essen: Die Blaue Eule 1986) 222 pp. [Kunst: Geschichte und Theorie 5]; Hans Latz & Wolfgang Pleister *Recht und Gerechtigkeit im Spiegel der europäischen Kunst* (Köln: Du Mont 1988) 287 pp.; Wolfgang Sellert *Recht und Gerechtigkeit in der Kunst* (Göttingen: Sallstein 1993) 135 pp.; Marc Bähli *Das Recht am eigenen Bild* (Basel, Genf & München: Helbing und Lichtenhahn 2002) xxxiii + 182 pp. [Basler Studien zur Rechtswissenschaft, A: Privatrecht 60].

[22] E.g., exclusively by Karl Frölich, *Alte Dorfplätze und andere Stätten bäuerlicher Rechtspflege* (Tübingen: Osiander 1938) xvi + 17 pp. [Arbeiten zur rechtlichen Volkskunde 2], *Mittelalterliche Bauwerke als Rechtsdenkmäler* (Tübingen: Osiander 1939) 46 pp. [Arbeiten zur rechtlichen Volkskunde 3], *Stätten mittelalterlicher Rechtspflege im niederdeutschen Bereich* (Gießen: Schmitz 1946) 52 pp. [Arbeiten zur rechtlichen Volkskunde 4], *Rechtsdenkmäler des deutschen Dorfs* (Gießen: Schmitz 1947) viii + 46 pp. [Gießener Beiträge zur deutschen Philologie 89] and *Denkmäler mittelalterlicher Strafrechtspflege in Ost- und Mitteldeutschland* (Giessen: Schmitz 1946) 27 pp. [Arbeiten zur rechtlichen Volkskunde 5].

phic treatment.[23] And all this is done so that both the genuine uncharted mystery of our human world, which composes the very substrate (background and medium, conditions and deep reasons) of legal problematisation in an almost limitless variegation, and our constant search for value-mediation, also weighing and balancing in cases of the apparently flat denial of values, can be shown by live examples.

Reaffirming the unerasable human moment that is hidden in the law, we may encounter f u r t h e r—and especially Spanish[24]—contributions as well, occasioned by literary[25] and fine arts[26] pieces.

Interest is also rising in Hungary[27]. It must be founded on monographisation, while its proper message can only be deciphered through essayism. For it may

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[23] As partial monographising, see, e.g.—treating the oeuvre of ALBRECHT DÜRER—Thomas Würtenberger 'Recht und Gerechtigkeit in der Kunst Albrecht Dürers' in *Kunst und Recht* Festgabe für Hans Fehr, I (Karlsruhe: Müller 1948), pp. 221–235 [Arbeiten zur Rechtssoziologie und Recthsgeschichte 1], Werner Schultheiss 'Albrecht Dürers Beziehungen zum Recht' in *Albrecht Dürers Umwelt* Festschrift zum 500. Geburtstag Albrecht Dürers am 21. Mai 1971 (Nürnberg: Verein für Geschichte der Stadt Nürnberg 1971), pp. 220 et seq. [Nürnberger Forschungen 15], Hermann Eichler *Recht und Reich bei Dürer* (Innsbruck: Univ.-Verlag Wagner 1976) 31 pp. [Forschungen zur Rechts- und Kulturgeschichte 8]; in respect of further giants, Erdmund Hegel 'Rembrandt und das Recht' in *Das Recht in der Kunst* (Berlin: Deutscher Rechtsverlag 1938), pp. 170–181 and Mia Jerz & Honoré Daumier *Der Mensch und die Justiz* (Boppard: Boldt 1966) 142 pp.; as to other manifestations, Georg Troescher 'Weltgerichtsbilder in Rathäusern und an Gerichtsstätten' in *Wallraf-Richartz-Jahrbuch* XI (Frankfurt 1939), pp. 139 et seq., by Guido Kisch, 'Gerechtigkeitsbilder auf Basler Renaissance-Medaillen' *Zeitschrift für schweizerisches Recht* 72 (1953), pp. 341–371 and *Recht und Gerechtigkeit in der Medaillenkunst* (Heidelberg: Winter 1955) xxiii + 170 pp. [Abhandlung der Heidelberger Akademie der Wissenschaften, Philosophisch-Historische Klasse, I]; Antonius David Gathen *Rolande als Rechtssymbole* Der archäologische Bestand und seine rechtshistorische Stellung (Berlin: de Gruyter 1960) xxiv + 121 pp. [Neue Kölner rechtswissenschaftliche Abhandlungen 14]; Erich Engelhard 'Die Gerechtigkeit auf Ofenplatten' *Landeskunde Vierteljahresblätter* [Trier] 13 (1967), pp. 7–10; Ulf-Dietrich von Hielmcrone *Die Darstellungen der Justitia* im Landesteil Schleswig [Diss.] (Kiel 1974) 181 pp.; by Lambert E. van Holk, 'Justitia: Bild und Sinnbild im 17. Jahrhundert in den Niederlanden' in *Forschungen zur Rechtsarchäologie und rechtlichen Volkskunde* hrsg. Louis Carlen, 3 (Zürich: Schulthess 1981), pp. 155–199 and 'Eine mittelalterliche Rechtslegende und ihre Darstellung in der Kunst des 17. Jahrhunders' in *Forschungen zur Rechtsarchäologie und rechtlichen Volkskunde* 5 (1983), pp. 135–157; Margariet A. Becker-Moelands 'Die Titelbilder juristischer Bücher' [hrsg. Amsterdamer Verleger Lodewijk Elzevier] in *Forschungen zur Rechtsarchäologie und rechtlichen Volkskunde* 8 (Zürich 1986), pp. 41–77; Ernst Windisch 'Justitia: Porträt eines Mädchens, Porträt eines Vogels' in *Festschrift für Hildebert Kirchner* zum 65. Geburtstag (München: Beck 1985), pp. 393–411.

[24] E.g., Juan Ruiz Obregón *Examen crítico de algunas ideas de derecho público que se leen en Don Quijote* (Madrid 1905) 247 pp. [Tesis: Universidad de Madrid Facultad de Derecho]; José Ma-

> "sound on the »voice« of humaneness, which is recurrently muted by the impersonal procedures of law and the abstractions of decision-makers."[28]

What it is all about is perhaps not simply bridging the gap between the law's proposition and the case of law—with unavoidable tensions confronting the general and the individual, the abstract and the concrete (as interwar legal philosophies claimed steadily[29])—and perhaps it is not even about some re-

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ría Martínez Val *En torno al »Quijote«* Dos ensayos jurídicos (Cuidad Real: Instituto de Estudios Manchegos 1960) 41 pp.; Rodolgo Batiza *Don Quijote y el Derecho* (México: Porrúa 1964) 207 pp.; José Pérez Fernández *Ensayo humano y jurídico de »El Quijote«* (Madrid: Imprento Pueyo 1965) 302 pp.; Jorge Eugenio Castañeda 'El Derecho et el Quijote' *Revista de Derecho y Ciencias Politicas* [Lima] 37 (1973) 1, pp. 5–67 & 2, pp. 199–250; Miguel Ángel Ciuro Caldani *Filosofía, Literatura y Derecho* Estudios y notas (Rosario [Argentina]: Fundación para las investigaciones jurídicas 1986) 133 pp.; Albert Fina Sanglas *Justicia y literatura* (Barcelona: Bosch, D.L. 1993) 218 pp. [Letras y letrados]; Roberto González Echevarría *Love and the Law in Cervantes* (New Haven, Conn. & London: Yale University Press 2005) 292 pp. {& *Amor y ley en Cervantes* trans. Isabel Ferrer Marrades (Madrid: Gredos 2008) 363 pp.}; Pedro Talavera *Derecho y literatura* El Reflejo de lo jurídico (Granada: Comares 2006) xv + 208 pp. [Biblioteca Comares de ciencia jurídica]; *El Derecho en la épocy del Quijote* Seminario Internacional, organizado por el Instituto de Estudios Jurídicos Internacionales Conde de Aranda: Universidad Rey Juan Carlos, Campus de Vicálvaro, del 15 al 17 de marzo de 2005, coord. Bruno Aguilera Barchet (Pamplona: Editorial Aranzadi 2006) 258 pp.; Carlos Prat Westerlindh *La justicia en »El Quijote«* (Madrid: Dykinson 2006) 105 pp. [Cuadernos »Luis Jiménez de Asúa« 29]; *Implicación derecho literatura* Contribuciones a una teoría del Derecho, dir. José Calvo González (Granada: Comares 2008) x + 492 pp..

[25] E.g., *Shakespeare and the Law* ed. Daniela Carpi (Ravenna: Longo 2003) 138 pp. [Il portico: Sezione Materiali letterari 128] and *Literature and Law* ed. Michael J. Meyer (Amsterdam: Rodopi 2004) viii + 244 pp. [Rodopie Perspectives on Modern Literature 30].

[26] E.g., by Lodovico Zdekauer, *L'idea della Giustizia e la sua immagine nelle arti figurative* (Macerata: Bianchini 1909) 77 pp. and *Iustitia* Immagine e idea (Siena: Lazzeri 1913) 44 pp.; Wolfgang Stechow 'Römische Gerichtsdarstellungen von Rembrandt und Bol' *Oud-Holland* 46 (1929), pp. 134–139; W. Deonna 'La Justice à l'Hotel de Ville de Genève et la fresque des juges aux mains coupés' *Zeitschrift für schweizerische Archäologie und Kunstgeschichte* 11 (1950), pp. 144–149; Selma Jónsdóttir *An IIth Century Byzantine Last Judgement in Iceland* (Reykjavík: Almenna Bókafetagi 1950) 95 pp.; Door mr. G. Overdiep 'Justitia, waar is uw blinddoek?' in *Pro excolendo iure patrio* 1761–1961, com. Herman Scheltema et al. (Groningen: J. B. Wolters 1961), pp. 87–122; Mab van Lohuizen-Mulder *Raphael's Images of Justice, Humanity and Friendship* A Mirror of Princes for Scipione Borghese (Wassenaar: Mirananda 1977) 202 pp.

[27] As an auxiliary to legal history, it can also found an interdisciplinary field of research as exemplified by, e.g., István Kajtár *Bevezetés a jogi kultúrtörténetbe* [Introduction to the cultural history of law] (Budapest & Pécs: Dialóg Campus 2002) 156 pp. [Institutiones iuris].

[28] Nagy *Narratív tematika…* [note 13], 6. pp.

[29] As collected from the representative authors, see Felix Somló *Schriften zur Rechtsphilosophie* (Budapest: Akadémiai Kiadó 1999) xx + 114 pp., Julius Moór *Schriften zur Rechtsphiloso-*

fining correction or supplementation (which motivated the French movement[30]). Instead, it is more about live meditation, professional methodicalness stepped back in order to gain further perspectives[31] and renewed reflection from a distance, so that the underlying reason for our profession can be recurrently rethought.

5. Some Literary Reconsiderations

Due to the artistic expression and internal inexhaustibility of literary presentation, in the parallel examination of law and literature even apparent truisms can feature as genuine enigmas, fertilising theoretical research.

As to the necessary connection between the transcendence of final issues and the worldly undertaking of law, one may draw from *The Tragedy of Man* by IMRE MADÁCH[32] (dramatist, surpassing his teacher[33] even as a professional thinker) the wisdom that may unite faith, hope and love. For

> "in the act of man steadily committing mistakes, who often fights in vain and without success, the verification of the existence of God is

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phie (Budapest: Szent István Társulat 2006) xxii + 485 pp., *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas (Budapest: Szent István Társulat 2006) 246 pp. and István Losonczy *Abriß eines realistischen rechtsphilosophischen Systems* (Budapest: Szent István Társulat 2002) 144 (all ed. Csaba Varga and in [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae]).

[30] François Ost & Laurent Van Eynde in <http://66.249.93.104/search?q=cache:AJD4ire0GaMJ:www.dhdi.free.fr/recherches/theoriedroit/articles/osteyndelit.doc+%22droit+et+litt%C3%A9rature%22+Ost&hl=hu&gl=hu&ct=clnk&cd=12> speaks about, e.g., scholarly diversion ("as a humanist decoration apt to clarify the dryness of legal evidence"), critical subversion ("revealing the king naked and the song's false disharmony"), and foundational conversion ("when the narrative turns to be the basis for making it »thought over«, »evaluated«, moreover, »prescribed« as well").

[31] "perspective on" in Richard A. Posner 'Remarks on Law and Literature' *Loyola University Chicago Law Journal* 23 (1991–1992) 2, pp. 181–195, quote at p. 182.

[32] Gyula [Julius] Moór *Az Ember Tragédiája jogbölcseleti megvilágításban* [The *Tragedy of Man* in the light of legal philosophy] (Budapest: Magyar Tudományos Társulatok Sajtóvállalata 1923) 15 pp. [off-print from *Napkelet* I (1923) 7]. Cf. also <http://en.wikipedia.org/wiki/Imre_Madách> and *The Tragedy of Man* trans. George Szirtes in <http://mek.niif.hu/00900/00918/html/index.htm>.

[33] In so far as running counter to his master, ANTON VIROZSIL, he will be an early follower of the doctrine of "natural law with variable content", theorised by RUDOLF STAMMLER. *Ibid.*, pp. 13–14.

> not included. To the contrary, it is man having languished in unsuccessful struggle and discouraged by the uncertain end, who needs strong trust in God in order to be able to restore the negative balance of his struggles having a penchant for denying life itself, towards life and further struggle."

Such optimism is only feasible if it is oriented toward personal felicity through one of his or her community, which is precisely embodied by the Hungarian traditional public law focus on community, as testified to by the doctrine of the Holy Crown, in contrast to the Germanic model of private law dedication, rooted in their feudal experience.[34]

For me, the KLEISTean story of *Michael Kohlhaas* used to provide a basic cultural anthropological exemplification of the ancient wisdom, which, enshrined by the Jewish, Islamic and autochthonous cultures, subordinates conflict-resolution to community peace (the classic '*shalom*'), to prevent, from the beginning, the unravelling of any one-sidedness without scale and proportion, especially of the relentless fights for justice.[35] Albeit for others (and also in a self-justifying manner) this is just the allegory of paradoxes, since

> "the verdict will repeat then the offence convicted by itself", as "*Kohlhaas* would have never achieved his justice […], if he had not taken it himself", as a result of which, however, "the total compensation […] will deprive him of his life".[36]

Or, through the dramatic presentation of one of the earliest known allegories of rival interests and roles, as played by SOPHOCLES' *Antigone*, we may tentatively consider laying aside all our resultant sympathy for a moment, since we may be convinced that it is the espousal of *Antigone*'s rejection of any compromise that will force *Kreon* to act. For the community's very survival would be endangered by an equal acknowledgment of the mixed qualities of an emotionally fighting party, led by tradition, on the one hand, and of the conspirator, on the other, in the brother departed. That is to say exactly that the simple-minded inflexibility of *Antigone* may exclude for *Kreon* the possibility of any wise, humanely refined offer, with a compromise

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[34] Quote at *ibid.*, p. 5, and comment at p. 15.

[35] Cf., by the author, *The Paradigms of Legal Thinking* [1999] enlarged 2nd ed. (Budapest: Szent István Társulat 2012) 418 pp. [Philosophiae Iuris] & <http://www.scribd.com/doc/85083788/VARGA-ParadigmsOfLegalThinking-2012>, para. 2.3.3.

[36] J. Hillis Miller 'Laying down the Law in Literature: The Example of Kleist' *Cardozo Law Review* 11 (1989–1990) 5–6, pp. 1491–1514, quote at p. 1500, note 29 & p. 1501.

achieving a counter position without a final sharpening, while looking for any choice for cooperation.[37]

Or, pushing up to the final sense DOSTOYEVSKY's permanently rooted humane thoughts, we may dawn on the idea that offences are neither to be matched with one another, nor are they to be matched with their penalties, since—as we may learn from common wisdom as opposed to the forcedly impersonal typification of the law—"[e]very story is individual, while the final sentence is however the same".[38]

6. Conclusion

In the end, we may realise that for such an interest, it is not literature that is from the outset endowed with some predestined role. As the embodiment of a type of thinking, literature is the symbol and synonym of reflected life, a field where "the mystery manifesting itself through different fates"[39] can be represented. Otherwise expressed, literature is hardly anything other here than a substitute for theology, rooted in earthly existence as a supply to foster feeling transcendence. Law, too, came into being to serve this, although we cannot explain what it is originally and what law could serve it the best, and how. Nevertheless, the closest to the issue may be the *Confessiones* by AUGUSTINUS (preceding the time when theology as a distinct scholarship was born), since it targeted our faith in God as humanity's basic need, expressed by love streaming from humanity.

[37] Posner 'Remarks on Law and Literature' [note 31], pp. 183. és 193–194.

[38] Harriet Murav 'Dostoïevski et le droit' in *Europe* [note 16], p. 115. Cf. Varga *Paradigms of Legal Thinking* [note 35], para. 2.3.1.5.

[39] Ost et al. *Lettres et lois* [note 16].

APPENDIX

THE PHILOSOPHY OF TEACHING LEGAL PHILOSOPHY IN HUNGARY*

I. Why and How to Philosophise in Law?

Philosophy of law is not the proper field for philosophers to exercise how airy ideas can be applied in—as extended to—whatever areas through simple over-projection. As a contemporary classic, the French master Michel Villey once reproached them, "What do they know indeed? Something of mathematics, a bit of sociology somewhat touched by the idea of evolutionism, some logic and morals, perhaps. Thereby they have transplanted into the field of law scientific systems based upon experiences alien to it."[1] Then, what we

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* Presented at the 23rd World IVR Congress of Philosophy of Law and Social Philosophy; abstracted in *Law and Legal Cultures in the 21st Century: Diversity and Unity* Special Workshops Abstracts (Kraków: Jagiellonian University Press 2007), p. 16 and first published in *Iustum Aequum Salutare* 5 (2009) 2, pp. 165–184 & <http://www.jak.ppke.hu/hir/ias/20092sz/12.pdf> & in *Alternative Methods in the Education of Philosophy of Law and the Importance of Legal Philosophy in the Legal Education* Proceedings of the 23rd World Congress of the International Association for Philosophy of Law and Social Philosophy "Law and Legal Cultures in the 21st Century: Diversity and Unity" in Kraków, 2007, ed. Imer B. Flores & Gülriz Uygur (Stuttgart: Franz Steiner Verlag 2010), pp. 49–60 [Archiv für Rechts- und Sozialphilosophie, Beiheft 122] {& 'Macaristan'da Hukuk Felsefesi Öğretiminin Felsefesi' [çeviren Casım Akbaş] in *Hukuk Felsefesi ve Sosyolojisi Arkivi* 18, haz˝rlayan Hayrettin Ökçesiz / Gülriz Uygur (Istanbul: Istanbul Barosu Yayınları 2008), pp. 11–27}.

[1] „Que savent-ils? Des mathématiques, une sociologie plus ou moins marquée par l'évolutionnisme, de la logique, parfois de la morale. Ainsi ont-ils transplanté dans notre discipline des systèmes scientifiques fondés sur des expériences extrinsèques."

do properly mean by legal philosophising? First of all, I guess, something of propedeutics maybe, that is, initiation into what is at stake behind the scene and what is addressed indeed when we talk about law.

Accordingly, in order for that legal philosophising can be able to lead to the law's g e n u i n e u n d e r s t a n d i n g , open approach is expected without prejudice and partisanship, based upon nothing except to conclusions drawn from comparative historical experience both socio-political and legal. For ideas and institutional developments follow one another in endless series of mutual effects with ones witnessing the others' nature unfolding, nurturing them from their primitive conception up to their mature growing. This is why it is heavily suggested that "jurisprudence should be mandated at an early stage of the students' law curriculum".[2]

Maybe the first danger to be avoided by legal philosophising is to be biased or swept away by any preconceived ideas, or to serve a merely partisan role. As to contemporary mainstream trends, two of the limiting instances of the misconceived use of legal philosophising can be exemplified by the extreme formalism of HANS KELSEN, when his *Reine Rechtslehre*'s internal purism is interpreted in such an exclusivity that will refute all actual dialoguing with political, social, moral, or religious views in legal scholarship, on the one hand, and the jurisprudence of RONALD DWORKIN, when it addresses the adept only to make presuppositions accepted that reduce philosophising to incitation believing in democracy as a sheer instrument to propagate the prevalence of either his personal or group morality of liberalism, on the other.[3]

Such extreme formulations at the borderline of theory and ideology already circumscribe the main function of any philosophising on and in law, by

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[2] Seow Han Tan 'Teaching Legal Ideals through Jurisprudence' *The Law Teacher* 43 (2009) 1, pp. 14–36 & <http://www.tandfonline.com/doi/pdf/10.1080/03069400802703128>, Summary, speaking on experience gained at the National University of Singapore.

[3] Bjarne Melkevik *Pourquoi étudier la philosophie du droit?* Quelques réflexions sur l'enseignement de la philosophie du droit [Colloque SPQ »Enseigner la philosophie« (Collège de Bois de Boulogne 1998)] in <http://www.reds.msh-paris.fr/communication/textes/mel3.htm> opinions that „Le KANTisme juridique, représenté de façon privilégiée par HANS KELSEN, a fait tort à la réflexion philosophique sur le projet juridique moderne en voulant, peut-être contre l'intention même de KANT, cantonner le projet juridique moderne à l'intérieur d'une pureté se refusant aux dialogues avec les convictions politiques, sociales, morales et religieuses des individus." According to the law of pendule, however, owing to the contribution of RONALD M. DWORKIN, „l'enseignement de la philosophie du droit est devenu une incitation à avoir foi dans »nos« Institutions. De plus, il forme les personnes à croire que la démocratie n'est que le moyen, l'instrument pour propager la »moralité libérale«."

making explicit what is in most cases only implicit, that is, revealing those cultural understandings that lurk behind our first, primitive approach to law. One nice formulation of it comes from Asia as a call to the circumstance that owing to the bad historical experience of any statal action or formalism (that is, the thoroughly founded distrust of whatever form of law), even the teaching of the rule of law—believed to be of a curative effect by the donors in the West—may exert counter effects in the target cultures where it may easily be interpreted as one more instrument of undue—exploitative—intervention.[4] Another formulation comes from Africa, pointing to their concern for that usual traditionalised patterns of communal existence will on the final account survive, notwithstanding the criticism western human rights abstract doctrines and principles exert on them.[5] Or, the genuine rub

[4] Observed in Nepal, Yubaraj Sangriola *Developing a New Thought in Teaching Jurisprudence* (November 12, 2009) in <http://ksl.academia.edu/ProfDrYubarajSangroula/Blog/1154/Develpoing-a-new-thought-in-Teaching-Jurisprudence-> writes—on behalf of the Kathmandu School of Law—that "In developing traditional societies, as widely supported by western hard positivism, the law is an instrument of political dictation. The western aid in many developed countries for rule of law is helping to continue »regressive status quo«."

It is to be noted that some western description of Russia's orientation after the fall of Bolshevism may have had the same realisation with a similar message. Cf., among others, M. A. Smith *Russia's State Tradition* (Camberley, Surrey: Royal Military Academy Sandhurst, June 1995) 12 pp. [Conflict Studies Research Centre E78] as well as my own observation upon the study of World Bank casual papers on the after-effect of its actions, concluding that "for want of the cultural conviction that law has in the meantime transformed from a peremptory instrument of direct state intervention into a neutral mediator between equal parties, business life may stand fast, rejecting even an attempt at reforming the old law (or touching upon any law)." Csaba Varga 'Reception of Legal Patterns in a Globalising Age' in *Globalization, Law and Economy* Proceedings of the 22nd IVR World Congress, IV, ed. Nicolás López Calera (Stuttgart: Franz Steiner Verlag 2007), pp. 85–96 [ARSP Beiheft 109], referring to Kathryn Hendley 'Legal Development in Post-Soviet Russia' *Post-Soviet Affairs* 13 (1997) 3, pp. 228–251.

[5] Mark Hannam & Johanthan Wolff 'Teaching Jurisprudence in Namibia' *The Philosophers' Magazine* (2009), No. 46 [July 28] in <http://www.philosophypress.co.uk/?p=498> demonstrate this allegation by the following: "The first example concerns an individual's right to gather fallen wood (an issue that KARL MARX was much exercised about in Germany in 1842). Customary law protects living trees from being felled because they are crucial to the maintenance of the character and quality of the pastoral farmland. However, dead wood is available for anyone to collect and use as firewood. Fallen wood is common property and can be gathered by anyone. Under constitutional law, wood within enclosed farmland is recognised as the property of the landowner, whether live or dead. It is privately owned even as it falls to the ground. Since (in Namibia) constitutional law trumps customary law, so too the rights of the landowner now trump the rights of the wood gatherer." "Our second example concerns polygamy (something MARX appears to have been less exercised by, although FREDERICK ENGELS discusses it in *The Origin of the Family, Private Property and the State*). African customary law frequently

is in that we seldom clarify the very basics of our acceptance of law, independently of the fact that the social psychological imprint of a historically evolving accomodation, characteristic of us, is not necessarily shared by other cultures as well.[6]

II. The State of Teaching Legal Philosophy

Legal philosophy as an educational subject is either simply in decay or only subject to question as to its genuine and sufficient *raison d'être* in several quarters of continental Europe nowadays, the fact notwithstanding that Europe—currently in the process of internal unification as coupled with the formative progress of worldwide globalisation—now has to face repeatedly new and disturbing challenges that call for deepened self-reflection.

For legal philosophising is almost dead since professorial rivalry broke out after the early death of MICHEL VILLEY and his most successful compromising efforts in post-war France; is restricted to serving as mere propedeutics in Austria and forced to withdraw almost systematically in Germany; is exhausted by internal faculty fights for sheer survival in the Nordic countries. So (and in a rather paradoxical manner), it can feature solid and reliable marks of flourishing exclusively in the peripheries of Europe taken in a geo-

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allows for polygamy—normally one man with multiple wives—and there are economic and social reasons that explain why this tradition has persisted up to the present day. In some African countries legal protections have been introduced to regularise polygamy, for example by giving all wives in one marriage defined property rights. However, human rights groups have argued that in Namibia the practice of polygamy often provides cover for the forced marriage of teenage girls in direct contravention of their constitutional rights."

[6] „HUGO GROTIUS argued that even if we reject the theological basis for natural law, these laws themselves were sufficiently evident to reason for us to feel obligated to follow them. This step allowed natural law theory to survive the Enlightenment's assault on religious belief, and to continue to flourish up to our day as a secular theory of law and obligation." *Ibidem*. See also, by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], para. 2.3.2.2, pp. 80–81. By the way, the socio-psychological and anthropological substantiatin of such a claim is due mainly to Scandinavian legal realism as portreyed in Csaba Varga 'Skandináv jogi realizmus' in *Jogbölcselet* XIX–XX. század, Előadások [Lectures on philosophy of law in the 19th to 20th centuries] szerk. Varga Csaba (Budapest: Szent István Társulat 1999 [reprint 2000, 2002, 2004, 2006]), pp. 81–91 [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae].

graphical sense: in its Romance parts like Italy and Spain, on the one hand, and what is called Central Europe, exemplified particularly by Hungary and Poland, on the other, where it is rewarded by being seen as a genuine subject suitable to initiate students into the very depths—why and how—of thinking in and on law. For, following this sketchy survey, Belgium together with Holland, the Baltic countries and Portugal—the genuine edges of Europe proper—are among those midway to successfully withstanding the push by subjects of positive law to replace a general theoretical perspective with the potential that the latter discipline can offer for problematising and problem solving in their respective fields.

Moreover, on the European continent and *en guise* of a leeway, the struggle for survival often results in the amalgamation of legal philosophy with (as reduced to or justified through) circles of topics alien to or just touching on the very subject, standing for the timely mainstream of public debates—on human rights, or biogenetics or legal informatics.

In the Common Law world—where since a century only dream expressed exceptional longing for channelling legal education into the classical spirit of *universitas*, instead of practical pragmatic introducing to mere skills and know how[7]—jurisprudence is taught as it has been during the last half of the previous century, that is, in the narrow sense of the subject, except in certain seats of learning in the United States of America and especially the United Kingdom, where Oxford, Cambridge, Edinburgh and some institutions in London excel in the weight and depth devoted to its diverse aspects. Substitution of legal philosophising with mainstream currents of publicly shared interest in so-called feminist jurisprudence, law & society, law & economics, as well as law & literature is very much present in English-speaking countries, too.

Latin America, Mexico, Japan and Korea, on the one hand, and Québec, Israel and Turkey, on the other, seem to continue the practice taken from the old continental pattern of philosophy/theory of law, cultivated to an adequate depth within the curricular structuring of studies, mostly with emphasis added to juristic methodology and the search for paths granting it a more universal framework under the aegis of comparative jurisprudence.

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[7] Cf., e.g., Ernest Wilson Huffcut 'Jurisprudence in American Universities' *Annals of the American Academy of Political and Social Science* 2 (January 1892), pp. 56–61, stating the counter-productive effect of that "the law schools are intended to serve only the interest of the legal profession" (p. 57), and Thomas A. Cowan 'A Report on the Status of Philosophy of Law in the United States' *Columbia Law Review* 50 (1950) 8.

Having in view the fragility of our present epoch, it is high time to overview where and for what purpose the teaching of legal philosophy stands nowadays, and which kinds of approaches, methods and alternatives to the usual *ex cathedra* performances and all-inclusive textbooks it uses. Considering also the challenges from the European developments of progressing unification and worldwide trends of globalisation, it is worth surveying how much the teaching material itself is prepared to reckon with them, in forms of either the subject's specific concerns or those challenges that are themselves being mirrored in the background literature at least.

III. The Philosophy of Teaching Legal Philosophy

In an educational context, legal philosophy is conceived of either as an independent academic subject with its own exclusive and peculiar subject matter covering a special field of knowledge that needs to be learned and mastered by future professionals, or as perhaps one of the most adequate media that can be used to teach the artful skill of how to think reasonably in a conventionalised manner on law and also in a scholarly way on law. In the first case, legal philosophy is a domain of positive knowledge that may need the lexical learning of data before the whole field can finally be acquired. In the second case, legal philosophy is only a temporary and instrumental survey and exercise of those most eminent approaches to and long since canonised paths of thought in law, through an intellectual encounter by means of which the student may prepare to enter—by familiarising himself or herself with—the professional tradition itself. Or, the first alternative stops at the outer appropriation of some external body of knowledge, while the second aims at an inner initiation to a profession by making disciples prepared for its active mastery.

Knowing that there is no clear-cut borderline between the two understandings, as they are rather methodological types of how to transform the preoccupation of a hundred past and present scholarly generations into a curricular subject in a manner suitable to be taught to adepts in the numbers of and with methods available in class-rooms, I have always opted for the second choice. In its turn, any choice has consequences as to how the teaching subject will be structured, summed up in books and lectured about, as well as how it must be re-reflected in so-called repetitions and presented during examinations.

Acquisition of a positive body of knowledge needs exhaustive treatment in textbooks, with as many representatives and currents (schools and directions) overviewed (defined and described) as are recognised by the academic community as having contributed to theoretical legal thought with remarkable achievements. I guess this is the organisation of learning that classes itself—as a result of being arranged systematically as spanning from the diversity of naming the discipline itself, via the history of relevant ideas, to its systematic parts (such as law-making, law-application, legal relations, legal consciousness and so on)—amongst the first to be forgotten once students have taken exams on them, in order to avoid having them crop up again in their mind in any form and under any conditions for the rest of their professional lives. For it defines itself from the beginning as part of learning for its own sake in a *l'art pour l'art* manner, without the methodological force of catalysing and channelling towards solution (or, at least, conceptualisation) those dilemmas the students are to encounter in the future and, more importantly indeed, without the potential of a genuine enigma raised and maybe also formulated when practical challenges with no adequate framework of contextualisation are to be met at whatever time.

As opposed to the above, initiation into thinking and arguing in and on law is to my conviction an exercise once started and never to end. Accordingly, with time and age progressing, it can also mature without becoming obsolete or dated in any of its components. For the only chance it can have is to superimpose layers and levels of understanding it later comes upon, by synthesising them within (as integrated into) it at increasingly higher (meta-) levels. Otherwise speaking, this perspective of the teaching of legal philosophy promises a gapless process of self-enrichment. In accordance with its underlying basic ethos, legal philosophising understood this way means devotion for life, that is, a call for self-dedication to problem solving through contemplation, to be restarted repeatedly. Accordingly, the most education in legal philosophy can endeavour to achieve at all is exclusively highlighting crucial points and dramatic examples, as well as settings and crossings, insights and the latter's limitation by scholarly criticism, through and by the exemplification of which characteristic dilemmas of legal thinking can be shown. That is, everything is exemplary in it, representing acute problems once encountered. And, considering the fact that most of its components revolve around the imagination of law and the implementation into practice of such an imagination (relating all of these to further mental representations activated through thought processes), all its domains are so rounded and thoroughly interrelated that any contribution

to and exemplification of it may in fact shape, by either corroborating or just re-questioning, all or part of the rest. This is why for the curriculum[8] in theoretical legal subjects[9] I devised when the Faculty of Law of the Catholic

[8] For earlier relevant publications by the author, cf. *A felsőfokú jogi oktatás főbb mai rendszerei* [The main systems of legal education today] (Budapest: Magyar Tudományos Akadémia Állam- és Jogtudományi Intézete 1967) 210 pp., 'A jogi képzés formái a Szovjetunióban' [Forms of legal education in the Soviet Union] *Állam- és Jogtudomány* X (1967) 4, pp. 538–552, 'A jogelméleti oktatás helye a jogászképzés főbb rendszereiben' [The place of legal theory in the main systems of legal education] *Állam- és Jogtudomány* XI (1968) 3, pp. 484–495, 'A felsőfokú jogi képzés csehszlovákiai rendszeréről' [On higher legal education in Czechoslovakia] *Állam- és Jogtudomány* XII (1969) 3, pp. 531–539, 'Egy sajátos diszciplína felbukkanása: Az európajog oktatásának néhány kérdése' [The emergence of a specific discipline: What to teach in European law and how?] *Iskolakultúra* [Pedagógusok szakmai-tudományos folyóirata] XVIII (2008) 11–12, pp. 83–88, as well as 'Elsőként oktatnak természetjogot Magyarországon... Kiválósági hely lett a katolikus egyetem jogbölcseleti intézete' [Natural law is taught the first time in Hungary... The Institute for Legal Philosophy of the Catholic University has been granted the title of »Place of Excellence«] [interview by -et-] *Új Ember* [Catholic weekly] LXII (July 30, 2006) 31 [No. 3024], p. 3 {& <http://ujember.katolikus.hu/Archivum/2006.07.30/0305.html>} and 'Place of Excellence: »Kiválósági hely« lett a Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Karának Jogbölcseleti Tanszéke' [The Institute for Legal Philosophy of the Pázmány Péter Catholic University has been granted the title of »Place of Excellence«] [interview by Zsolt Pál Dorogi] *Ítélet* [Judgement, by the Faculty of Law of the Pázmány Péter Catholic University] 2006/október in <www.swys.hu/ITELET_06_10.pdf>, pp. 6–7.

[9] For a literary background in recent overviews, see, e.g., as the proceedings of two international colloques held in Paris in 1994 and Cracow in 2007, respectively, *L'enseignement de la philosophie du droit* dir. Michel Troper & Françoise Michaut (Bruxelles: Bruylant 1997) 170 pp. [La pensée juridique] and *Alternative Methods in the Education of Philosophy of Law and the Importance of Legal Philosophy in the Legal Education* Proceedings of the 23rd World Congress of the International Association for Philosophy of Law and Social Philosophy »Law and Legal Cultures in the 21st Century: Diversity and Unity« in Kraków, 2007, ed. Imer B. Flores & Gülriz Uygur (Stuttgart: Franz Steiner Verlag 2010) 114 pp. [Archiv für Rechts- und Sozialphilosophie, Beiheft 122], as well as, from the English–American literature, Albert A. Ehrenzweig 'The Teaching of Jurisprudence in the United States' & R. H. Graveson 'The Teaching of Jurisprudence in England and Wales' *Journal of Legal Education* 4 (1951–52) 2, pp. 117–126 & 127–140 and Wolfgang Friedmann 'Vitalizing the Teaching of Jurisprudence' *Journal of Legal Education* 4 (1951–52) 4, pp. 392–400; Denis Browne 'Reflections on the Teaching of Jurisprudence' *Journal of the Society of Public Teachers of Law* 2 (1952–54) 2, pp. 79–90; Thomas A. Cowan 'Notes on the Teaching of Jurisprudence' *Journal of Legal Education* 15 (1962–63) 1, pp. 1–26 & Walter Probert 'Some Reflections on the Teaching of Jurisprudence' *Journal of Legal Education* 15 (1962–63) 3, pp. 255–268; R. B. Seidman 'On Teaching Jurisprudence in Africa' *Journal of the Society of Public Teachers of Law* 9 (1966–67) 1, pp. 145–149; and lastly, R. B. M. Cotterrell & J. C. Woodliffe 'The Teaching of Jurisprudence in British Universities' *Journal of the Society of Public Teachers of Law* 13 (1974–75) 2, pp. 73–89; Peter Sheldrake 'Jurisprudence in the Law Course' *Journal of the Society of Public Teachers of Law* 13 (1974–75) 2, pp. 342 et seq.; A. Hilaire Barnett & Dianna M. Yach 'The Teaching of Jurisprudence and Legal Theory

University of Hungary[10] was founded fourteen years ago, the emphasis was always put on readings rich in raising queries and formulating dilemmas rather than in sheer—even if vast—compendia summarising factual data, compounded merely of names, schools and notional nets, as if taken from some perfected taxonomy. This is why, instead of any ideal of totality or comprehensiveness, only representativeness has ever been accentuated, in the sense that we had better see a problem through one glass (as if we ourselves were from the outset in a tirelessly resumed try at fighting it), as compared to having and memorising a mere list of those who have encountered and tackled the problem at any (past or present) time. And finally, this is why the opportunities for problem solving are continuously enlarged by both texts selected for reading & class lecturing (with repetitions) within a number of smaller groups, being aware of the fact that a number of well-selected examples may gradually grow into a lawyerly world concept as rounded and perfected, while a mere catalogue of names and concepts enlisted may not. Otherwise expressed, the gist of teaching how to think in and on law is to share the very sensation of actually doing it in person, by preparing the students to experience it themselves and by provoking them to sense a difference made in their relevant skills—sensitivities and abilities—before and after.

If teaching legal philosophy is not reduced to a textbook intended to be exhaustively memorised but rather aims at helping students acquire their own approach to the enigma of the whys and hows of the law's very existence, this necessitates class lectures as *ex cathedra* quasi-theatrical performances[11] to be complemented with a series of open-ended attempts at genuine problem-solving (or, I would rather say instead: problematising) through so-called exercises and repetitions, in the course of which students themselves are expected to discuss readings by extracting from amongst them preferably the way how to raise questions and formulate tentative answers themselves.

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in British Universities and Polytechnics' *Legal Studies* 6 (1985) 2, pp. 151–171; Roger Cotterrell 'Pandora's Box: Jurisprudence in Legal Education' *International Journal of the Legal Profession* 7 (2000) 3, pp. 179 et seq.

[10] For an earlier experience of the same tradition, see, e.g., Miriam T. Rooney 'Jurisprudence – A Teaching Problem' *Catholique Lawyer* 4 (1958) 2, pp. 172–177.

[11] In lectures, I am highlighting only turning points of problem solving, showing mostly dilemmas and wide intellectual (historical and cultural) contextures within which a reasonable answer can be formulated.

IV. Programme at the Catholic University of Hungary

In the following, the programme of teaching theoretical subjects in law in Hungary will be shown as exemplified by the university[12] that has went the farthest in the country to substantiate its pioneering aims through a genuinely demanding (and repeatedly reconsidered[13]) reform program. Graduate and postgraduate courses—also offered in English from the year 2008 on—will be surveyed in the subsequent paragraphs, rather sketchily in cases of theoretical subjects in law in general but mostly in details in so far as legal philosophy proper and its neighbouring domains are concerned in particular.

1. Graduate Studies

In the model program,[14] INTRODUCTION TO LAW AND NOTIONS IN LAW (semester 1) is followed by THEORY OF THE STATE I–II (semesters 2–3), then concluded by THEORY OF LAW I–II (semesters 5–6), all mandatory, with two hours of lecture per week in each case. Both Theory

[12] In Hungary, faculties of law have some discretion in how to fill the commonly agreed and governmentally approved curricular framework in legal education. The most demanding curriculum in teaching philosophy of law from among the nine working faculties in Hungary has to this very day been developed by the Institute for Legal Philosophy within the Catholic University of Hungary, which I happened to design by reshaping it repeatedly for fourteen years from now, since the Faculty of Law of the Pázmány Péter Catholic University was founded. The other faculties—in Budapest (Eötvös Loránd University), Szeged, Pécs, Miskolc, Budapest (Károli Gáspár Reformed Church University), Debrecen, Győr (in chronological sequence of their law programme established)—have their own programme, varying in subjects, timing, topics and teaching materials, as well as in underlying philosophies as well. (It is to be noted that the law departments of both the Central European University and the Andrássy Gyula German Speaking University—both in Budapest—offer exclusively specialisation programs for post graduation.) For their characterisation from one single aspect, see József Szabadfalvi 'Teaching the History of Legal Philosophical Thinking in Hungarian Legal Education' *Rechtstheorie* XXXVII (2006) 1, pp. 109–120.

[13] For a preceding stage, see, by the author, 'The Teaching of Legal Philosophy in Hungary' *I*[nternazionale] *V*[ereinigung für] *R*[echts- und Sozialphilosophie] *Newsletter* (February–July 2004), No. 33 <http://www.ivr2003.net/bologna/newsletters/33.pdf>, pp. 23–24.

[14] Within certain limitations, credits allow individual study plans. The Catholic University has the average total number of 4000 (decreasing up to 2500) graduate students in law, whose studies are programmed as classed within five years. Semesters span from September to January and from February to June.

of the State and Theory of Law are complemented to by repetitions, one hour per week,[15] and all are ended by oral colloquies.

a) Basic Subjects

As to THEORY OF LAW I, it introduces to the fundamentals of law and legal thinking, the basic notions of our approach to and understanding of law, covering the *paradigms of legal thought* and a number of complementing *systematic issues*, in addition to some selected *readings*, mostly highlighting aspects of the main topics in the light of recent international literature.

Accordingly, it deals, firstly, within the *paradigms of legal thought*, with the METHODOLOGICAL DIRECTIONS IN THINKING (through the example of legal development [by the classical Greek antiquity & especially *dikaion* justice, the Roman praetorian law & Justinian's codification, the Enlightened absolutism & the French *Code civil*], of geometry [of Euclid, as challenged by Bolyai/Lobachevsky, & ending in Einstein's revolution], as well as of the potentialities—in human thinking making use of texts—of Autonomy with fertilising ambiguity [exemplified by the New Testament's parabolic argumentation, Cicero's rhetorical testimony, Augustine's confessional style, the Talmudic lesson of tradition accumulated, Orthodox Christianity, & Modern "irrationalism", all leading to problematise Beyond conceptual straitjackets & to the correspondence between Patterns of thought and patterns of law, exemplified equally by autochthonous anthropological and Far Eastern (Chinese & Japanese) patterns, as well as by some early tendencies of the Calvinist Reformation] & of Heteronomy with axiomatic intents [Thomas Aquinas, Grotius & Leibniz]; with an overview on the Dilemma of the evolution of thinking; the SCIENCE-THEORETICAL QUESTIONS RAISED BY THE PHILOSOPHY OF HISTORY; the PARADIGMS OF THINKING (the Paradigm of paradigms [Conventionality, Cultural dependency & the Nature of paradigms], Basic notions [Need for a change of paradigms, False alternative of objectivism & subjectivism {with an interim response afforded by Cognitive sciences}] in the understanding of Facts [what are facts?, with the overall Connection of the infiniteness of the world & *talethés*, and J. Israel on the

[15] Repetitions with mandatory participation are held in small groups, preferably of 15 students in the maximum. They themselves are credited, and active presence on with prior preparation to them and a small memorandum on one of their discussed topics is a sine qua non precondition of any exam to pass in the relevant parts of Theory of the State and Theory of Law. A number of students are deeply motivated to excel in them, as those with the best achievements may be honoured with the best or next-to-best note, in substitution to an ordinary colloquy note as well.

dialectics of language & practical human existence] & Notions [what are notions?, with a glance at Watson on the motives of legal development], annexed by the Dilemma of what is to mean to have norms at all); the DILEMMAS OF MEANING (with its theories called Lexical [including the Debate between Szabó & Wróblewski], Contextual [with the Dilemma of easy case & hard case, as well as the notion of Normality at Foucault & Szász included], Hermeneutical [with the Dilemma of the *Missionaries in the Boat* & the Enigma of having texts amidst tradition & change in law], Open textured, and Deconstructive), followed by the Social construction of meaning (Speech-acts & Social institutionalisation) and the Systemic response given by autopoiesis; and finally, the PARADIGMS OF LEGAL THINKING with the Nature of law (Taken as a process, Having a composite multifactoral structure, and Continuously building from acts) & the Nature of legal thinking itself.

The main topic is extended to, secondly and as complemented by, *systematic issues* of APPROACH TO AND UNDERSTANDING OF LAW (whether or not there is "Outside" & "inside" of the law; Rule, fact & principle in the notion of law; the Distinctive features of law), the CONSTRUCTION OF LAW (Ambivalence of rationalism, Limits of a systemic approach to/in law, the Want of logical consequence in the normative sphere, Utopias of rationality in legal development, Validity & its senses in law, Graduality in law), the LAW'S FUNCTIONING (Interconnection between law-making & law-application, and the Social conditionality of reasoning in law), and the EFFECTS & SOCIAL LIMITS OF LAW (Law serving as programme & as a model).

The teaching material relevant to the above is also made available in English, for the first part, in form of a textbook—Csaba VARGA *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], pp. 9–217—, and, for the second part, in a series of articles—Csaba VARGA *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994) xi + 530 pp. [Philosophiae Iuris]—, from which few selected titles[16] are to be studied in addition to some further papers.[17]

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[16] 'Domaine »externe« et domaine »interne« en droit', pp. 99–117; 'Law and its Approach as a System', §§4–6: pp. 243–255; 'The Nature of the Judicial Process', §2.3: pp. 308–314; 'On the Socially Determined Nature of Legal Reasoning', §1: 317–332 & §3: pp. 337–362; 'Is Law a System of Enactments?', pp. 391–398 [also in his Lectures on the Paradigms…, Appendix II: pp. 231–237]; 'Anthropological Jurisprudence?', §§1–2: pp. 438–450.

[17] By the author, 'Validity' *Acta Juridica Hungarica* 41 (2000) 3–4, pp. 155–166 {& <http://www.ingentaconnect.com/content/klu/ajuh/2000/00000041/F0020003/00383612> & <http://springer.om.hu/content/mk0r8mu315574066/fulltext.pdf>}.

As to the third part, the *readings* do include Michel VILLEY's 'Histoire de la logique juridique' [1967],[18] Chaïm PERELMAN's 'Désaccord et rationalité des décisions' [1966],[19] George LAKOFF's 'Cognitive Science and the Law' [1989],[20] H. L. A. HART's *The Concept of Law* [1994],[21] Stanley B. FISH's 'Fish v Fiss' [1989][22] & Werner KRAWIETZ's 'Die Lehre vom Stufenbau des Rechts – eine säkularisierte politische Theologie?' [1984],[23] all accessible in Hungarian translation, too.[24]

As to THEORY OF LAW II, it covers the problematisation characteristic of some selected *main recent trends and directions of legal philosophising* and a number of complementing *systematic issues*, in addition to quite a few selected *readings*, partly exemplifying and partly adding to the central topic.

Accordingly, it does include, firstly, as a *contemporary overview of how to think on and in law*, after an introduction (to Philosophico-methodological approaches & One- and multi-factored explanations) is made, Classical positivism (Bentham & Austin), Marxism (its Understanding of law in general & Russian-Soviet legal theorising, with Selected problems of Socialisms' Marxism in particular), Vienna school (Kelsen's *Hauptprobleme der Staatsrechtslehre* and *Grundriß einer allgemeinen Theorie des Staates* & Kelsen's *Pure Theory of Law* & its late revisions), Scandinavian realism (Hägerström and Lundstedt & Olivecrona and Ross), Existentialism (legal hermeneutics,

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[18] In *Annales de la Faculté de Droit et des Sciences économiques de Toulouse* XV (1967) 1, pp. 65–82 & 'Questions de logique juridique dans l'histoire de la philosophie du droit' in *Études de logique juridique* II: Droit et logique / Les lacunes en droit, publ. Ch. Perelman (Bruxelles: Bruylant 1967), pp. 3–22 [Travaux du Centre National de Recherches de Logique].

[19] In *Archivio di Filosofia* ed. Enrico Castelli (Roma: Istituto di Studi Filosofici 1966), pp. 87–93.

[20] [multipl.] [Berkeley: University of California 1989] 49 pp. [Yale Law School Legal Theory workshop on April 27, 1989].

[21] (Oxford: Clarendon Press 1961), ch. VII §1: pp. 120–132 [Clarendon Law Series].

[22] In his *Doing what Comes Naturally* Change and the Rhetoric of Theory in Literary and Legal Studies (Durham & London: Duke University Press 1989), pp. 120–140.

[23] In *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* hrsg. Werner Krawietz & Helmut Schelsky (Berlin: Duncker & Humblot 1984), pp. 255–271 [Rechtstheorie, Beiheft 5].

[24] The first five above titles in *A jogi gondolkodás paradigmái* Szövegek [Paradigms of legal thought: Texts] ed. Csaba VARGA (Budapest: [AkaPrint] 1996 [reprint Budapest: Szent István Társulat 2003]) iii + 71 pp. [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae Budapest, III Fasciculi 2] & the last one in *Jog és filozófia* Antológia a XX. század jogi gondolkodása köréből [Law and philosophy: Anthology of the 20th-century legal philosophy] ed. Csaba VARGA, 3rd enl. ed. (Budapest: Szent István Társulat 2001 [reprint 2003]) xii + 497 pp. [Jogfilozófiák].

Maihofer, and "the nature of things"), Modern analytics (Hart & Dworkin), Modern natural law (Radbruch) & Natural law today (Fuller),[25] as well as, secondly, as complementing *systematic issues*, the Ontological foundation of law, Ex post facto legislation, Law & values, Law & morality, the Internal morality of law, Codification & its limits, Rationality & codification of law, Legal technique, Presumption, Fiction (with Understanding & Kinds of fictions), Kelsen's doctrine on law-application (Theory of gradation, constitutivity & procedurality, as well as Self-transcendence & the issue of "who watches the watchmen?"), & the Types of openly creative law-application.[26]

As to its third part, the *readings* are extended to a cross-selection of international literature in both more details of and complementation to the above topic—including Rudolf JHERING's *Der Kampf ums Recht* [1872],[27] Eugen EHRLICH's *Freie Rechtsfindung und freie Rechtswissenschaft* [1903],[28] Hermann KANTOROWICZ' *Der Kampf um die Rechtswissenschaft* [1906],[29] Rudolf STAMMLER's *Richtiges Recht* [1908],[30] Hans KELSEN's 'The Pure Theory of Law and Analytical Jurisprudence' [1941] & 'Positivisme juridi-

[25] Using CHERTES – FRIVALDSZKY – GYŐRFI – H. SZILÁGYI – VARGA *Jogbölcselet* XIX–XX. század: Előadások [Lectures on philosophy of law: 19th to 20th centuries], ed. Csaba Varga (Budapest: [Szent István Társulat] 2003), 186 pp. & *Jogbölcselet* Kiegészítő előadások [Supplementary lectures in philosophy of law] with János FRIVALDSZKY 'Igazságosság és jogi igazságosság' [Justice in general & justice in law], Tamás GYŐRFI 'Jog és erkölcs' [Law & morality] and Attila CHERTES 'Jog és érték' [Law & value] (Budapest: [Szent István Társulat] 2003) 51 pp. [both in the series of Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae].

[26] By Csaba VARGA, from his *Law and Philosophy*, 'Reflections on Law and on its Inner Morality', pp. 77–89, 'Presumption and Fiction', pp. 169–185, 'Legal Technique', §II: pp. 190–197, 'Logic of Law and Judicial Activity', §4: pp. 277–281 & 286–288, 'Towards the Ontological Foundation of Law', pp. 375–390; from his *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991), ch. X, pp. 273–317; 'Ex Post Facto Legislation' in *The Philosophy of Law* An Encyclopedia, ed. Christopher Berry Gray (New York & London: Garland Publishing 1999), pp. 274–276 [Garland Reference Library of the Humanities, 1743]; 'Law-application and its Theoretical Conception' *Archiv für Rechts- und Sozialphilosophie* LXVII (1981) 4, pp. 462–479; from his *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995), Appendix II: pp. 165–201.

[27] Adapted from its trans. Cézár Szilassy (Budapest: Franklin 1907) 107 pp.

[28] [Vortrag] (Leipzig: Hirschfeld 1903), from his *Recht und Leben* Gesammelte Schriften zur Rechtstatsachenforschung und zur Freirechtslehre, hrsg. Manfred Rehbinder (Berlin: Duncker & Humblot 1967) 252 pp. [Schriften des Instituts zur Rechtssoziologie und Rechtstatsachenforschung der Freien Universität Berlin 7], pp. 170–202.

[29] [Gnaeus Flavius] (Heidelberg: Winter 1906) 49 pp.

[30] [Vortrag] in his *Rechtsphilosophische Grundfragen* Vier Vorträge (Bern 1928), pp. 51–82.

que et doctrine du droit naturel' [1963],[31] Gustav RADBRUCH's 'Gesetzliches Unrecht und übergesetzliches Recht' [1946],[32] Lon L. FULLER's 'The Case of the Speluncean Explorers' [1946],[33] Ronald DWORKIN's 'Is Law a System of Rules?' [1967],[34] all made accessible in Hungarian translation[35] as well—, followed by papers of Csaba VARGA—explaining on the *Exposé des motifs ministériel* & its role in the law's interpretation, as well as the Preambles in western constitutions & the Preamble in general (notion, contents, functions, normativity) (available also in English in his *Law and Philosophy*[36]), as closed by Law in transformation?[37]—on the specific uses of legal technique while offering a kind of perspective.

b) Facultative Seminars

Students holding any specific interest in either Theory of the State or Theory of Law may inscribe to *facultative seminars*,[38] in the course of which they themselves are expected to prelegate and discuss on readings relevant to the subject.

The menu offered by the Institute for Legal Philosophy includes—from the Theory of law part—COMPARATIVE LAW (Introduction & Families of Law);[39]

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[31] In *Harvard Law Review* (November 1941), from his *What is Justice?* Justice, Law, and Politics in the Mirror of Science: Collected Essays (Berkeley & Los Angeles: University of California Press 1960), pp. 266–287, and in *Mélanges en l'honneur du Jean Dabin* I (Brussels: Bruylant & Paris: Sirey 1963), pp. 141–148, respectively.

[32] In *Süddeutsche Juristen-Zeitung* I (August 1946), No. 5, pp. 105–108, reprinted from his *Rechtsphilosophie* 5. Aufl. (Stuttgart: Koehler 1956), pp. 347–357.

[33] In *Harvard Law Review* 62 (February 1949) 4, pp. 616–645.

[34] In *University of Chicago Law Review* 35 (1967) 1, pp. 14–46, reprint in *The Philosophy of Law* ed. Ronald M. Dworkin (Oxford: Oxford University Press 1977), pp. 38–65 [Oxford Readings in Philosophy].

[35] All in *Jog és filozófia* [note 17].

[36] 'Die ministerielle Begründung in rechtsphilosophischer Sicht', §§II–III: pp. 128–139 & 'The Preamble: A Question of Jurisprudence', §II: pp. 141–167.

[37] 'Átalakulóban a jog?' [on Philippe Nonet & Philip Selznick *Law and Society in Transition* (1978)] *Állam- és Jogtudomány* XXIII (1980) 4, pp. 670–680.

[38] This optionality works within a mandatory framework in terms of which each semester a minimum number of facultative seminars have to be taken and passed with successful exam for that the semester can be concluded.

[39] By Zoltán PÉTERI, based upon René DAVID *Les grands systèmes de droit contemporaines* Droit comparé, 2ième éd. (Paris: Dalloz 1966) 640 pp. [Précis Dalloz] {trans. Lajosné Nagy (Budapest: Közgazdasági és Jogi Kiadó 1977) 494 pp.} & Konrad ZWEIGERT & Hein KÖTZ *An Introduction to Comparative Law* trans. Tony Weir, 3rd rev. ed. (Oxford: Oxford University Press 1998) xxvi + 714 pp.

LAW & LANGUAGE; BASIC ISSUES OF CONTEMPORARY ANGLO–AMERICAN LEGAL THEORISING; THE "DEATH" OF LEGAL PHILOSOPHISING IN A POST MODERN AGE; HUNGARIAN LEGAL PHILOSOPHY; CODIFICATION;[40] EUROPEAN CONSTITUTIONAL PHILOSOPHY; THEORY OF BASIC RIGHTS; MORAL DILEMMAS IN CONSTITUTIONAL ADJUDICATION;[41] LAW & JUSTICE IN INTERPERSONAL RELATIONS;[42] LAW, ARTS & NARRATION; LAW & LITERATURE;[43] LEGAL ANTHROPOLOGY;[44] LEGAL CONDITIONS OF THE DOMESTIC ROMA MINORITY;[45] and LAW & ECONOMICS.

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[40] Using, by the author, *Codification as a Socio-historical Phenomenon* [1991] 2nd {reprint} ed. with an Annex & Postscript (Budapest: Szent István Társulat 2011) viii + 431 pp. & <http://drcsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>.

[41] By Tamás GYŐRFI, within the framework of which the argumentative strategy in American, German and Hungarian constitutional adjudication cases relating to Abortion, Euthanasia, Capital punishment, Freedom of religion & of expression, as well as Equality & discrimination, & Affirmative action are surveyed through the study of 64/1991 (XII. 17.) ABh. [= Hungarian Constitutional Court decision]; 48/1998 (XI. 23.) ABh.; Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern PA. v. Casey, 505 U.S. 833 (1992); 39 BVerfGE 1, 1975; 88 BVerfGE 203, 1993; Cruzan v. Director, MDH, 497 U.S. 261, 343 (1990); 23/1990. (X. 31.) Abh.; Gregg v. Georgia, 428 U.S. 153 (1976); 4/1993. (II. 12.) ABh.; 8/1993 (II. 27.) ABh.; 10/1993 (II. 27.) ABh.; Wisconsin v. Yoder, 406 U.S. 205, 216 (1972); 93 BVerfGE 1, 1995; Lynch v. Donnelly, 465 U.S. 668, 701 (1984); Reynolds v. United States, 98 U.S. 145 (1978); Sherbert v. Verner, 374 U.S. 398 (1963); Brandenburg v. Ohio, 395 U.S. 444 (1969); 36/1994 (VI. 24.) ABh.; as well as Regents of the University of California v. Bakke, 438 U.S. 265 (1978), Gratz v. Bollinger, 539 U.S. 244 (2003) & Grutter v. Bollinger, 539 U.S. 306 (2003) in addition.

[42] By János FRIVALDSZKY, showing the classical view of law with legality presupposing a just order of human co-existence in which humans, unless the legal is not replaced by the political in interpersonal dimensions, are taken as altruistically consensus-oriented.

[43] By István H. SZILÁGYI, covering the Movement, Law in/as literature, involving Historical & Anthropological perspectives, with special regard to Socrates, Shakespeare, Marquez & Eco), based upon Ian WARD Law and Literature Possibilities and Perspectives (Cambridge: Cambridge University Press 1995) xiv + 264 pp.

[44] By István H. SZILÁGYI, overviewing its trends & history as well as social control, order & disputes, views on humans, & also ethnographical folk-law research, based upon his *A jogi antropológia főbb irányai* [Main trends in legal anthropology] (Budapest: Szent István Társulat 2000 [reprint 2005]) 173 pp. [Jogfilozófiák] & *Jog és antropológia* [Law and anthropology] ed. István H. Szilágyi (Budapest: Szent István Társulat 2000 [reprint 2005]) viii + 366 pp. [Jogfilozófiák], as well as MAX GLUCKMAN 'Natural Justice in Africa' *Natural Law Forum* 9 (1964), pp. 25–44 & STANLEY DIAMOND 'The Rule of Law versus the Order of Custom' *Social Research* 38 (1971), pp. 42–72 { both reprinted in *Comparative Legal Cultures* and translated in *Összehasonlító jogi kultúrák* [note 52]}.

[45] Partly based upon Angus [M.] FRASER *The Gypsies* (Oxford: Blackwell 1992) ix + 359 pp. [Peoples of Europe].

As to curricula exemplified and surveyed in details, the series of so-called research seminars on TRANSITION TO RULE OF LAW is one of the recurrent optional subjects.

TRANSITION TO RULE OF LAW I (Basics)—with the aim at introducing to specific problems arising from transitions to democracy from dictatorship, as a case-study, and their potentialities under limiting conditions (as discussed in common upon selected students' presentation of given texts, previously studied by all participants), clarifying foundational issues in a historico-comparative manner by the example of the Hungarian transition in replacement/change of the previous regime within an international perspective—covers the topics of Statutory denial of law [*gesetzliches Unrecht*] (in the legal arrangements of both National Socialism and Socialisms), Extraordinarity of the challenge in transition after Soviet-type Socialisms & Debates on civil disobedience, all upon the reading of Csaba VARGA *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris].

In continuation, TRANSITION TO RULE OF LAW II (Systematic Issues)—by concentrating upon the treatment of the criminal past by coming to terms with it in/by law, as well as the contemporary meaning of the "rule of law" with the issue of constitutionality implied—covers the themes of the Dilemma of facing the past in law, Rule of law (understanding, ethos-centeredness, openness when responding to given challenges, and its uninterrupted formation) & the Quest for legality and constitutionality (or law as an art of balancing—through mediating amongst—values in conflict), using Csaba VARGA *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008) 292 pp. [PoLíSz Series 7] & *European Legal Cultures* ed. Volkmar GESSNER, Armin HOELAND & Csaba VARGA (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), Part V: »Transition to the Rule of Law«, pp. 413–490 [Tempus Textbook Series on European Law and European Legal Cultures I] as stepping stones for deliberations.

In closure, TRANSITION TO RULE OF LAW III (Globalism)—dealing with the impact of globalism on and its intertwinement with the processes and new challenges of transition in the region, in both global and local contexts—reviews the Chances of transfer of laws and pattern-borrowing in a globalising world (problematising upon aggregates of rules set in texts as the mere skeleton of any living—liveable—law, arising from the mass of conventionalisations through tensions of everyday life) & Post

modernity and the new a-historicism (in example of claims based upon universal principles as confronted with the historically particular rootedness of human ideals), after the reading of *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba VARGA (Budapest 1994) xxvii + 178 pp. [Windsor Klub][46] with quite a few mostly western views[47] is made.

LAW AND LANGUAGE aims—through the study of basic contemporary writings relating to the interconnection between law and language—

[46] Documenting the whole body of travaux préparatoires to, and the Acts I & II on, statutory limitations in Germany & the Law on the illegality of the Communist regime in Czechoslovakia with the latter's Constitutional Court assessment.

[47] By Gianmaria AJANI 'La circulation des modèles juridiques dans le droit post-socialiste' *Revue internationale de Droit comparé* 46 (1994) 4, pp. 1087–1105 & 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' *The American Journal of Comparative Law* XLIII (Winter 1995) 1, pp. 93–117; Paul H. BRIETZKE 'Designing the Legal Frameworks for Markets in Eastern Europe' *The Transnational Lawyer* 7 (1994) 1, pp. 35–63; Armin HÖLAND 'Évolution du droit en Europe centrale et orientale: assiste-t-on à une renaissance du »Law and Development«?' *Droit et Société* (1993), No. 25, pp. 467–488; Jeane J. KIRKPATRICK 'Introduction' to her *Dictatorship and Double Standards* Rationalism and Reason in Politics (New York: Simon and Schuster 1982), pp. 1–18; Ewa ŁETOWSKA & Janus ŁETOWSKI 'Poland: In Search of the »State of Law« and its Future Constitution' in their *Poland* Towards to the Rule of Law (Warszawa: Wydawnictwo Naukowe Scholar 1996), pp. 10–22 [Institute of Legal Studies of the Polish Academy of Sciences]; Ugo MATTEI *Introducing Legal Change* Problems and Perspectives in Less Developed Countries [manuscript] [World Bank Workshop on Legal Reform, Washington D.C., 14 April 1997] (Berkeley & Trento 1997) 19 pp.; Juan E. MÉNDEZ 'Accountability for Past Abuses' *Human Rights Quarterly* 19 (1997) 2, pp. 255–282; Stanislaw POMORSKI 'Meanings of Decommunization by Legal Means' *Review of Central and East European Law* 22 (1996) 3, pp. 331–337; Vladimir SHLAPENTOKH *Russia* Privatization and Illegalization of Social and Political Life (Michigan State University Department of Sociology: 25 September 1995) 44 pp. [CND (95) 459]; Denis SZABO *Intégration normative et évolution de la criminalité* [manuscript] [Paris: Institut de France, September 16–17, 1995] (Montréal 1995) {published subsequently in *Valeurs et modernité* d'Alain Peyrefitte (Paris: Odile Jacob 1996), pp. 202–230}—all available in the author's translation in *Kiáltás gyakorlatiasságért a jogállami átmenetben* ed. Csaba VARGA (Budapest: [AKAPrint] 1998) 122 pp. [A Windsor Klub könyvei II]—, as well as Richard H. Fallon, Jr. '»The Rule of Law« as a Concept in Constitutional Discourse' *Columbia Law Review* 97 (January 1997) 1, pp. 1–56; Robert Nisbet *The Quest for Community* (San Francisco: ICS Press 1990), pp. 3–65; Susanne Karstedt 'Coming to Terms with the Past in Germany after 1945 and 1989: Public Judgments on Procedures and Justice' *Law & Policy* 20 (January 1998) 1, pp. 15–56 & Dr M. A. Smith *Russia's State Tradition* (Camberley, Surrey: Royal Military Academy Sandhurst, June 1995) 12 pp. [Conflict Studies Research Centre E78]—to be made also available in the author's translation in *Kiáltás gyakorlatiasságért…* 2nd enl. ed. Csaba VARGA (Budapest: Szent István Társulat 2013) {in preparation}.

at researching the Grounds of such a *sine qua non* association, the nature of the Juridical construction of reality, the essence of Conceptualisation in and by law, as well as the Enigma of interpreting the law, in order to finally arrive at a deeper understanding of what law and language genuinely are. The introductory lecture is followed from the next week on by the participants' summarising and discussing the relevant texts, upon their previous study on behalf of all the participants. The underlying texts include Wesley Newcomb HOHFELD's 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' [1913],[48] H. L. A. HART's *Definition and Theory in Jurisprudence* [1953],[49] Alf ROSS' 'Tű-Tű' [1951],[50] A. W. B. SIMPSON's 'The Analysis of Legal Concepts' [1964],[51] Karl OLIVECRONA's 'Legal Language and Reality' [1962],[52] Arthur KAUFMANN's 'Gedanken zu einer ontologischen Grundlegung der juristischen Hermeneutik' [1982],[53] Emilio BETTI's 'Di una teoria generale della interpretazione' [1965],[54] Peter GOODRICH's 'Historical Aspects of Legal Interpretation' [1986][55] & Owen M. FISS' 'Objectivity and Interpretation' [1982],[56] made available also in Hungarian translation.[57]

c) Closing Subjects

In the first half of the closing year (semester 9), there are two further courses offered by the Institute for Legal Philosophy which, in one way or another, are mandatory to all students.

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[48] In *Yale Law Journal* 23 (1913) 1, pp. 16–59, from its corr. ed. (New Haven & London: Yale University Press 1964), part I: pp. 23–64.

[49] [An Inaugural Lecture] (Oxford: Clarendon Press 1953) 28 pp., from his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press 1983), pp. 21–48.

[50] In *Festskrift til Henry Ussig* (Borum & Illum 1951), from Harvard Law Review 70 (1957) 5, pp. 812–825.

[51] In *The Law Quarterly Review* 80 (October 1964), pp. 535–558.

[52] In *Essays in Jurisprudence* To Honor of Roscoe Pound ed. R. A. Newman (Indianapolis & New York: Bobbs-Merrill 1962), pp. 151–191.

[53] In *Europäische Rechtsdenken in Geschichte und Gegenwart* Festschrift für Helmut Coing zum 70. Geburtstag hrsg. N. Horn (München: Beck 1982), pp. 537–548.

[54] In *Rivista giuridica umbro-abbruzzese* 41 (1965) 1, pp. 9–34 & 'On a General Theory of Interpretation: The raison d'être of Hermeneutics' *The American Journal of Jurisprudence* 32 (1987), pp. 245–268.

[55] In *Indiana Law Journal* 61 (1986) 3, pp. 331–354.

[56] In *Stanford Law Review* 34 (1982) 4, pp. 739–763.

[57] *Jog és nyelv* [Law and language] ed. Miklós SZABÓ & Csaba VARGA (Budapest: Osiris 2000) vi + 270 pp. [Jogfilozófiák].

Both of them end by an exam essay to be written on topics selected to each examinee individually as communicated on the spot by the Institute.

One of them is NATURAL LAW (by János FRIVALDSZKY), obligatory to all to treat the philosophical foundations of any legal arrangement and regulation. It covers the Features of classical natural law, especially at Thomas Aquinas and in the Modern age, including Law & Equity, & Morality, its Interpersonal logic, & Legal sociology, & the Nature of things, & Norm-positivism, & Political philosophy and Subsidiarity, & Nature, & the Social doctrine of the Church, based upon the textbook by János FRIVALDSZKY *Klasszikus természetjog és jogfilozófia* [Classical natural law and legal philosophy] (Budapest: Szent István Társulat 2007) 476 pp., with some additional reading, available also in Hungarian translation.[58]

The other is the mandatory optional selection from within either COMPARATIVE LEGAL CULTURES or SOCIOLOGY OF LAW, or POLITICAL SOCIOLOGY (Sociology of the State).

As to COMPARATIVE LEGAL CULTURES, conceived of as a kind of synthesis between legal theory and classical comparative law, it is to introduce disciples to a disciplinary interest in diverse traditions underlying individual families of law, including their respective modes of thinking, with due respect to historical and contemporary alternatives, the di-

[58] In *Természetjog* Szöveggyűjtemény [Natural law: Texts] ed. János FRIVALDSZKY (Budapest: Szent István Társulat 2006) 329 pp. [Jogfilozófiák], including Michel VILLEY 'Observations d'un historien sur le droit naturel classique' *Archiv für Rechts- und Sozialphilosophie* 51 (1965) 1, pp. 19–34; Viktor CATHREIN *Moralphilosophie* (Freiburg: Herder 1890), part I, book 5, ch. 5, §§1–3; Jacques LECLERQ *Leçons de droit naturel* I: Le fondement du droit et de la société (Namur: Wesmael-Charlier 1933), pp. 60–62 [Études morales, sociales et juridiques]; Jacques MARITAIN *Les droits de l'homme et la loi naturelle* [1943] (Paris: Hartmann 1947), ch. I: pp. 53–113; Sergio COTTA 'Il concetto di natura nel diritto' *Studium* [Bimestrale di cultura] 83 (1987) 4–5, pp. 533–545 & *Il diritto nel'esistenza* (Milano: Giuffrè 1991), pp. 244–251; Alfred VERDROSS 'Was ist Recht? Die Krise des Rechtspositivismus und das Naturrecht' *Wort und Wahrheit* [Wien] VIII (1953) 8, pp. 587–594; Johannes MESSNER *Das Naturrecht* Handbuch der Gesellschaftsethik, Staatsethik und Wirtschaftsethik [1955] (Innsbruck, etc.: Tyrolia Verlag 1966), pp. 304–312; Daniel Mark NELSON *The Priority of Prudence Virtue and Natural Law* in Thomas Aquinas and the Implications for Modern Ethics (Pennsylvania State University Press 1992), ch. V: pp. 128–154; Xavier DIJON *Droit naturel* I (Paris: Presses Universitaires de France 1998), pp. 19–38; et Francesco D'AGOSTINO *Il diritto come problema teologico* (Torino: Giappichelli 1995), pp. 143–167.

/con-vergence of civil law & common law, as well as to transfers of law *en masse* as a challenge by both the European Union and the progressing globalisation processes, in order that the own legal arrangement can be seen as contrasted with other arrangements in a historico-comparative context.

Its topic is composed of, as INTRODUCTORY part, Law as culture, the Limits of classical comparative law & the own field of comparative legal cultures, Western legal culture (roots & alternatives), Variations for cultures of law, Rule of law? mania of law? (on the boundary of rationality & anarchy in the United States of America), & Post modernity (exemplified by the experience of Canada); as EUROPEAN UNION part, Comparative judicial mind, Common law & civil law (encounters), Preservation & change (case-studies in Jewish, Islamic, & Far-Eastern legal cultures), as well as EU-convergence I: Idea of law & methods underlying the attempts at common codification, II: Style of common jurisdictions & III: the dilemma of some *sui generis* law in common or national particularisms in competition to prevail within the Union; and finally, as GLOBAL part, Commensurability & sustainability of the diversity of legal cultures & judicial minds, as well as Transfers of law *en masse* & the Perspectives of globalism.

As teaching material, two collections of texts—*Comparative Legal Cultures* ed. Csaba VARGA (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1][59] & *European Legal Cultures* ed. Volkmar GESSNER, Armin HOELAND & Csaba VARGA (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), Part I: »Common Traditions« & Part II: »The European Legal Mind«, pp. 1–166 [Tempus Textbook Series on European Law and European Legal Cultures I]—with a number of further articles[60] are to be studied.

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[59] A. M. HONORÉ 'Legal Reasoning in Rome and Today' *Cambrian Law Review* (1973), pp. 58–67 & Bernard RUDDEN 'Courts and Codes in England, France and Soviet Russia' *Tulane Law Review* 48 (1974) 14, pp. 1010–1028, also available in Hungarian translation of the partly reduced & partly enlarged version of *Comparative Legal Cultures*, published as *Összehasonlító jogi kultúrák* ed. Csaba VARGA (Budapest: [Osiris] 2000 [reprint 2006]) xl + 397 pp. [Jogfilozófiák].

[60] Julius GERMANUS 'Das islamische Recht' *Acta Juridica Academiae Scientiarum Hungaricae* 16 (1974) 1, pp. 1–25 & Peter G. SACK 'Law & Custom: Reflections on the Relation between English Law and the English Language' *Rechtstheorie* 18 (1987) 3, pp. 421–436 {available in translation in the above [note 52] collection}, in addition to papers by Csaba VARGA—'[Comment to The Notion of Legal Culture]' in *Changing Legal Cultures* ed. Johannes Feest & Erhard Blankenburg (Oñati: Internatonal Institute for the Sociology of Law 1997), pp. 207–217 [Oñati Pre-publications 2] & 'Comparative Legal Cultures: Attempts at Conceptualization'

d) Written Memoranda and the Thesis

During one of the terms of the 2nd to the 4th years, a *written memorandum* of 15 printed pages at least, on any topic from within the circles of basic graduate teaching subjects has to be prepared. Its title can be freely selected from the list prealably postered by all chairs or as agreed upon individually by the authorised staff. Yearly some average of 15 memoranda is written from the field of legal philosophy proper. It happens that an excelling outcome is subsequently published in the national professional press.[61]

Acta Juridica Hungarica 38 (1997) 1–2, pp. 53–63; 'Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline' *Acta Juridica Hungarica* 48 (2007) 2, pp. 95–113

{& <https://commerce.metapress.com/content/gk485p7w8q5652x3/resource-secured/?target=fulltext.pdf&sid=54jelq45> & <http://www.akademiai.com/content/gk485p7w8q5652x3/fulltext.pdf>} & 'Legal Traditions? In Search for Families and Cultures of Law' *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 {& <http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf> & <http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf>}; 'Taxonomy of Law and Legal Mapping: Patterns and Limits of the Classification of Legal Systems' *Acta Juridica Hungarica* 51 (2010) 4, pp. 253–272 & <http://akademiai.om.hu/content/9u2w571071085670/fulltext.pdf> {as well as '*Theatrum legale mundi* On Legal Systems Classified' *The Romanian Journal of Comparative Law* I (2010) 1, pp. 105–133 {abstract: <http://www.rjcl.ro/en/articole-revista/276>};

'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44

{& <http://www.akademiai.com/content/x39m7w437134167l/fulltext.pdf>}; 'Codification on the Threshold of the Third Millennium' in *Legal and Political Aspects of the Contemporary World* ed. Mamoru Sadakata (Nagoya: Center for Asian Legal Exchange, Graduate School, Nagoya University 2007), pp. 189–214 & 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann & Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800; as well as 'Transfers of Law: A Conceptual Analysis' in *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 21–41 & 'Reception of Legal Patterns in a Globalising Age' in *Globalization, Law and Economy / Globalización, Derecho y Economía* Proceedings of the 22nd IVR World Congress, IV, ed. Nicolás López Calera (Stuttgart: Franz Steiner Verlag 2007), pp. 85–96 [ARSP Beiheft 109]—collected in Hungarian in his *Jogfilozófia az ezredfordulón* Minták, kényszerek – múltban, jelenben [Philosophy of law at the turn of millennia: patterns & forced paths in the past & present] (Budapest: Szent István Társulat 2004) 450 pp. [Jogfilozófiák].

[61] E.g., on Islamic conception of human rights in *Jogtudományi Közlöny* [Journal of legal science], on legal semiotics also in *Jogtudományi Közlöny*, on failure in Hungary and success in Germany of facing with the past in law, in college, as well as on the misconceived understanding of law and the rule of law, as reduced to legal voluntarism and textual positivism for the sake of legal certainty in the Hungarian transition process in *Valóság* [Reality], *Magyar Szemle* [Hungarian review], *Iustum Aequum Salutare*, *Közjog* [Public law], and *Társadalomkutatás* [Social research].

In order to start the closing state examinations during the 10th semester, a *thesis* of the minimum volume of 50 printed pages, developing its freely chosen topic through the consultation of international literature in several languages, is also to be submitted. Of the average of ten theses per year submitted to the Institute for Legal Philosophy, logic in law & electronic processing in view of legal automatisation, paradoxes of rationality in law, classical Jewish legal thought, Islamic & Japanese arrangements with their modernisation prospects, quest for communitarian background, universality & particularity of human rights, globalisation & legal imperialism, search for substantivity in law, "say it with music" on the terrain of law, "styles" of law & legal mapping, in addition to rule of law and to transition to the rule of law—these are only some of the recurrent topics for students to prefer.

Theses are to be defended before a jury composed of three members of the Institute, one of them submitting a previously written criticism upon the thesis in question. Its author presenting his/her aims, methodology and working hypothesis, the procedure follows by open discussion and ends by the jury assessment with a written justification to the note granted.

The best(s) of the theses can be further elaborated and detailed in case its author wishes to present it at the next conference of the National Scientific Students' Circle, where, during the past decade, several papers submitted on behalf of the Institute for Legal Philosophy won high-ranking decoration for their achievement in legal theory.

2. Postgraduate Studies

In the model program,[62] three semesters are reserved for classroom specialising courses held from within, among others, legal philosophy as well. Such courses are optional with the outcome that at least a dozen of (usually deeply motivated) students will, when planning for their paths of credit earning, actually make a choice for it.

[62] Within certain limitations, credits allow individual study plans. The Catholic University has the average total number of one hundred postgraduate students in law, whose studies are programmed as classed within three years in a distribution that the first three semesters are dedicated to courses and preparation for thesis-writing and the second three ones solely to actual thesis-writing. Semesters span from September to January and from February to June.

Topics in legal philosophy are selected with the view of covering broad fields and timely new challenges and developments, so that doctoral students may sum up and synthesise their graduate studies in legal theorising at the same time. Six times two hours' lecturing being reserved for each of them, the course is organised in a way that except to the convening occasion with a full introductory and exploratory lecture by the present author, the next five times will rather be dedicated to the students' own presentation of readings and active debating upon issues with their professor's moderation.

Accordingly and in sequence, MODERNISATION, TRANSITION TO RULE OF LAW & GLOBALISM (semester 1) is followed by THEORY OF THE LEGAL PROCESS with Comparative Judicial Mind included (semester 2), to be ended by DIRECTIONS OF TODAY'S LEGAL THINKING (semester 3), all to be closed by oral examination.

In the course of MODERNISATION, TRANSITION TO RULE OF LAW & GLOBALISM, theories of modernisation developed in Hungary during the last period of Socialism, local & western views on democratic transition, rule of law conceptions of Western Europe & the Atlantic world, recent debates on the universality of human rights, as well as the challenges of globalisation are confronted within a legal philosophical and macro-sociological perspective to the contemporary issue of the transition to rule of law in the Central & Eastern European region, with special regard to the responsibility to be borne by the state, the dilemma of legal borrowing, as well as to the abstract universalism and the historical particularity of actual challenges & responses (with the dysfunctionality of the temptation of doctrinarism in any strongly principled stand) within the understanding of the meaning(s) of the rule of law, and also to the encounter of globalism with some post modern trends (e.g., constitutionalisation, rights language & extra-juridical mediation) are overviewed, as compared to contemporary experience relating to ongoing processes in Latin America, Africa & Asia.

As to its teaching material, in addition to the stuff of the same course, one of the following titles is to be read: Kálmán KULCSÁR *Modernization and Law* (Budapest: Akadémiai Kiadó 1992) 282 pp., Béla POKOL *The Concept of Law* (Budapest: Rejtjel 2001) 152 pp., *European Legal Cultures* ed. Volkmar GESSNER, Armin HOELAND & Csaba VARGA (Aldershot, etc.: Dartmouth 1996), Part III: »Totalitarian Legal Culture«, pp. 167–241 & Part V: »Transition to the Rule of Law«, pp. 413–490 [Tempus Textbook Series on European Law and European Legal Cultures I].

In the next course on THEORY OF THE LEGAL PROCESS, in wake of legal philosophising receptive of post Wittgensteinian language philosophy, official judicial expectations regarding both the establishment of facts and the operation with norms (to be fulfilled properly according to juristic professional ideology) are confronted with actual (and therefore theoretically reconstruable) processes taking place within the law's formalism, with special regard to the connections between law & language, & logic, & intellectual representation. As the inquiry concludes, it is responsively purposeful human thinking committed to values and justifications through given referential channels that stand behind all the variety characteristic of diverse thought patterns and types of reasoning, making a difference among themselves mostly in their respective cultural appearances exclusively.

For reading, it makes use of, in addition to Csaba VARGA *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp. & his 'Doctrine and Technique in Law' *Iustum Aequum Salutare* IV (2008) 1, pp. 23–37

& <http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>

& in <www.univie.ac.at/RI/IRIS2004/Arbeitspapierln/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc>, an individual selection for one of the texts offered in the menu.[63]

[63] Miklós SZABÓ 'Szó szerint… A jog és a nyelv interferenciájáról' [Word for word... Or, on the interference of law and language] in *Jog és nyelv* ed. Miklós Szabó & Csaba Varga (Budapest: [Books-in-Print] 2000), pp. 1–54 [Jogfilozófiák]; Miklós SZABÓ *A jogdogmatika előkérdéseiről* [On the presuppositions of legal dogmatics] (Miskolc: Bíbor Kiadó 1996) vi + 309 pp. [Prudentia Iuris 6]; *European Legal Cultures* ed. Volkmar GESSNER, Armin HOELAND & Csaba VARGA (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), Part I: »The Common Traditions«, pp. 3–86 & Part II: »The European Legal Mind«, pp. 89–166 [Tempus Textbook Series on European Law and European Legal Cultures I]; as well as, by Csaba VARGA, 'The Quest for Formalism in Law: Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion' *Acta Juridica Hungarica* 50 (2009) 1, pp. 1–30 {& <http://www.akademiai.com/content/k7264206g254078j/>} and 'Heuristic Value of the Axiomatic Model in Law' in *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. mit Raimund Jakob, Lothar Philipps, Erich Schweighofer (Münster, etc.: Lit Verlag 2009), pp. 119–126 [Austria: Forschung und Wissenschaft – Rechtswissenschaft 3], as well as 'Legal Logic and the Internal Contradiction of Law' in *Informationstechnik in der juristischen Realität* Aktuelle Fragen zur Rechtsinformatik 2004, hrsg. Erich Schweighofer, Doris Liebwald, Günther Kreuzbauer & Thomas Menzel (Wien: Verlag Österreich 2004), pp. 49–56 [Schriftenreihe Rechtsinformatik 9]; and Hessel E. YNTEMA 'Equity in the Civil Law and the Common Law' *The American Journal of Comparative Law* 15 (1967) 1, pp. 60–86 {available both in English and in translation in the collections in note 52}.

In the last course relating to DIRECTIONS OF TODAY'S LEGAL THINKING, main currents that nurture legal thought in our age are overviewed. It is meant to get thoroughly acquainted with (a) foundational conceptions of law patterning our century's legal thought (through the analysis of Kelsen & Hart), and (b) important schools, authors and problematics hitherto inaccessible in Hungarian language (as, e.g., historical jurisprudence, Scandinavian realism, Losonczy's realism, or social theory constructivism), as well as (c) critical reflection upon both earlier (Schmitt) and contemporary western and Atlantic trends, as extended to (d) the features of the mainstream with some future prognosis.

The teaching material spans from—as exemplified by—*Historical Jurisprudence* ed. József Szabadfalvi (Budapest: [Books-in-Print] 2000) 303 pp., Hans KELSEN *Tiszta Jogtan* [Reine Rechtslehre, 1934] trans. István Bibó, ed. Csaba Varga (Budapest: ELTE Bibó István Szakkollégium 1988 [reprint Budapest: Rejtjel 2001]) xxii + 106 pp., *Scandinavian Legal Realism* ed. Antal Visegrády (Budapest: Szent István Társulat 2002) xxxviii + 159 pp., István LOSONCZY *Abriss einer realistischen rechtsphilosophischen Systems* [1948] ed. Csaba Varga (Budapest: Szent István Társulat 2002) 144 pp. & *Hayek és a brit felvilágosodás* Tanulmányok a konstruktivista gondolkodás kritikájának eszmetörténeti forrásairól [HAYEK and the British Enlightenment: Studies on the historical sources of the criticism upon constructivist thought] ed. Ferenc Horkay Hörcher (Budapest: Pázmány Péter Katolikus Egyetem 2002) xvii + 112 pp. [all from the series of Philosophiae Iuris]; via H. L. A. HART *A jog fogalma* [The Concept of Law, 2nd ed.] trans. Péter Takács (Budapest: Osiris 1995) 375 pp., Ferenc HÖRCHER *Prudentia iuris* Towards a Pragmatic Theory of Natural Law (Budapest: Akadémiai Kiadó 2000) 176 pp. [Philosophiae Iuris] & Vilmos PESCHKA *Appendix „A jog sajátosságához"* [Appendix to "The particularity of law"] (Budapest: Közgazdasági és Jogi Könyvkiadó 1992) 170 pp. [Jog és jogtudomány 1]; up to, by Csaba VARGA, 'Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)' in *Perspectives on Jurisprudence* Essays in Honor of Jes Bjarup, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law 2005) [= *Scandinavian Studies in Law* 48], pp. 517–529 & *Rivista internazionale di Filosofia del Diritto* LXXXI (ottobre–dicembre 2004) 4, pp. 691–707, and 'The Hart-phenomenon' *Archiv für Rechts- und Sozialphilosophie* 91 (2005) 1, pp. 83–95, presupposing the students' previous study of & active debating upon most of the texts.

3. Conclusion

The implied target of teaching legal philosophy cannot be less than preparing future members of the legal profession to master the ways of why and how to think in and on law. This is messaging by far more than the mere usual—but simplifying—conviction "that juridical competence reduced to the exclusive knowledge of positive law which is in perpetual mutation in all its contents, foundations and notions used, cannot help either in its adaptation to changes nor in mastering the ways of reasoning and arguing in it".[64] Or, to be sure, it is by no means so-called *juristische Methodenlehre* at stake here alone. For what is usually called juristic methodology is just a modest part of the enterprise itself: its parcel formalised and logified so that the conventionally accepted ways—or canons[65]—of operations within the bounds of the law can eventually be met. Or, to think in and on law is a methodical reflection itself that can perhaps be best acquired through becoming familiarised with outstanding instances of legal philosophising, taken from exemplary patterns either in abstract philosophical conceptualisation or as actuated by any dilemma at hand. For the teaching aims at initiation into working within the law's homogenised intellectual virtuality of those students who are prepared to face positions for or against which they are also ready to argue rationally and with personal conviction at any future time. For it is to be noted that any such learning process starts with readiness to doubt ready-made clichés through critical reflection and ends by reaching a personal decision, both responsive and responsible. The best way of familiarisation with professional dealings is reading as much as students can, transforming formal learning into a devotion intellectually joyful and an experience hopefully successfully fed back in practice.

As to the selection of readings, the mainstream Western European and English–American contemporary literature can serve as a *sine qua non* only provided that it will not exhaust the list of titles to be dealt with and will then be complemented by classics of landmark German legal philosophising as well as domestic authors and ones taken from our neighbourhood in Central Europe and the Balkans as well.

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[64] *L'enseignement de la philosophie du droit* [note 2], couverture: „qu'une compétence juridique réduite à la seule connaissance d'un droit positif, en perpétuelle mutation dans son contenu, dans ses bases et dans les concepts qu'il emploie, ne permet ni de s'adapter au changement, ni même de maîtriser le raisonnement et le mode d'argumentation juridiques".

[65] A. M. Honoré 'Legal Reasoning in Rome and Today' *Cambrian Law Review* (1973), in particular para. III, pp. 64 et seq.

Or, global learning with a local focus—this might be the ideal filled with historical sensitivity drawing from our own past and caring for the future, while offering an open and global perspective, with a dialectical interplay between the universal and the particular (the abstract-general and the concrete-individual) to be re-assessed again and again.

IV. Perspectives

Students assembled in our law schools with a commitment to play a role in public life are to know from the beginning that any landmark ending of the system of "actually existing socialism" (having paralysed our society for half a century, disintegrating its micro-textures and deforming the very roots of its ability to self-control and regenerate) requires lawyers who are also aware of the lasting foundations of law behind the facade of its ever- changing formalisms. Therefore, it is no longer sufficient to teach those laws that are applicable in Hungary and in the European Union. Instead, we must also teach the historical and theoretical matrix of law in constant formation, and its philosophical and economic milieu with the theological and moral motives behind it. For the dilemmas that have for thousands of years shaped lawyers' minds (with the implied teleology of individual legal arrangements) in this worldly *ordo* are also to be revealed from behind the flux of everyday routine. Or, the educational vocation is by no means simply to equip subordinate employees with procedural skills as technicians trained to execute administrative tasks. Philosophical and historical subjects in law have to cast light on those considerations that motivate the order itself, to provide guidance in matters vague and undecided, to spur pioneering initiatives both on unbeaten paths and through pondering on how to change the prevailing.

The objective is to initiate students into what is behind timely routine, to help them explore our world by forming visions and elaborating conceptions on it through weighing pros and cons in the course of making creative and responsible decisions. The goal is to enable students to form independent opinions by orientating themselves, by making choices, so that they may launch innovations while facing the challenges of the epoch (too controversial, burdened by the chance of fatal errors, in an age when superpowers tend to claim the right for themselves to define what is ultimate wisdom and what will be the destiny of mankind), issues that should be—albeit are in fact scarcely—resolved personally in our brave new world of democracy.

A vocational credo[66] resulting in a scholarly conclusion[67] has summarised the adventure of becoming acquainted with the philosophy implied by teaching legal philosophy in Hungary this way:

> "We followed a path that led to law from the paradigms of legal thinking, and from the self-assertion of legal formalism to its overall cultural determination. Yet, our human yearnings peeked out from behind the illusory reference of our security and we could discover reliable, solid grounds only in the elusive continuity of our social practice. In the meantime it proved to be a process that we had thought to have been present as a material entity and what we had believed to be fully built up proved to build continuously from acts in an uninterrupted series.
>
> What we have discovered about law is that it has always been inside of us, although we thought it to have been outside. We bear it in our culture despite our repeated and hasty attempts at linking it to materialities.
>
> We have identified ancient dilemmas as existent in our current debates as well. We have found long abandoned patterns again. We have discovered the realisations of common recognitions in those potentialities and directions in law, which we believed to have been conceptually marked off once and for all.
>
> However, we have found an invitation for elaboration in what has revealed itself as ready-to-take. Behind the mask, and in the backstage, the demand for our own initiation, play, role-undertaking and human responsibility has presented itself. We have become subjects from objects, indispensable actors from mere addressees. And, we can be convinced that despite having a variety of civilisational overcoats, the culture of law is still exclusively inherent in us who experience it day by day. We bear it and shape it. Everything conventional in it is conventionalised by us. It does not have any further existence or effect beyond this. And with its existence inherent in us, we cannot convey the responsibility to be borne for it on somebody else either. It is ours in its totality so much that it cannot be torn out of our days or acts. It will thus turn into what we guard it to become. Therefore, we must take care of it at all times since we are, in many ways, taking care of our own."

After the fall of Communism, having joined the European Union and living subject to, and preferably also as a factor shaping, globalism in progress, the law's reduction to national boundaries and positivated exclusivity has been

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[66] In extensive quote from the author's 'Búcsúírás' [Farewell notice] in Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar *2003-ban végzettek évkönyve* [Yearbook of those graduated in 2003] (Budapest: Alumni 2003), pp. 119–122.

[67] By the author, *Lectures on the Paradigms…*, para. 7: »Concluding Remarks«, p. 219.

shaken anyhow in our region, too. Law is not any longer the entity that classical positivism used to teach it to be.[68] Mixed forms are established as core elements of juridicity. Law is dissolved in new forms of sociality. Prevailing *mentalités juridiques*[69] actualise it to respond to new challenges under the coverage of new formalities. Therefore, to grant the lawyer a vision of the contexture—potentials and limitations—within which he or she can operate by drawing from it is the very last and lasting task of legal education; a task that can only be fulfilled adequately by historical and theoretical approaches to law under timely conditions.

The strength and weakness of what we can do now lie exactly in how we can respond to the actual *Weltgeist*, by transforming it into a renewed *esprit juridique* for the time ahead of us.

[68] Cf., by the author, 'What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of »The Judicial Establishment of Facts«' in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin & Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676, republished in his *Theory of the Judicial Process* The Establishment of Facts, 2nd {reprint} ed. with Postfaces I and II (Budapest: Szent István Társulat 2011) viii + 308 pp. & <http://drcsabavarga.wordpress.com/2012/03/13/varga-theory-of-the-judicial-process-the-establishment-of-facts-19952011/>.

[69] Expression of Pierre Legrand (Paris-Sorbonne). Cf., among others, by the author, *Comparative Legal Cultures* On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism (Budapest: Szent István Társulat 2012) 251 pp. [Philosophiae Iuris] & <http://drcsabavarga.wordpress.com/2012/03/12/varga-comparative-legal-cultures-2012/> & also <http://www.scribd.com/doc/59602888/1/COMPARATIVE-LEGAL-CULTURES>, passim.

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by
Csaba Varga

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