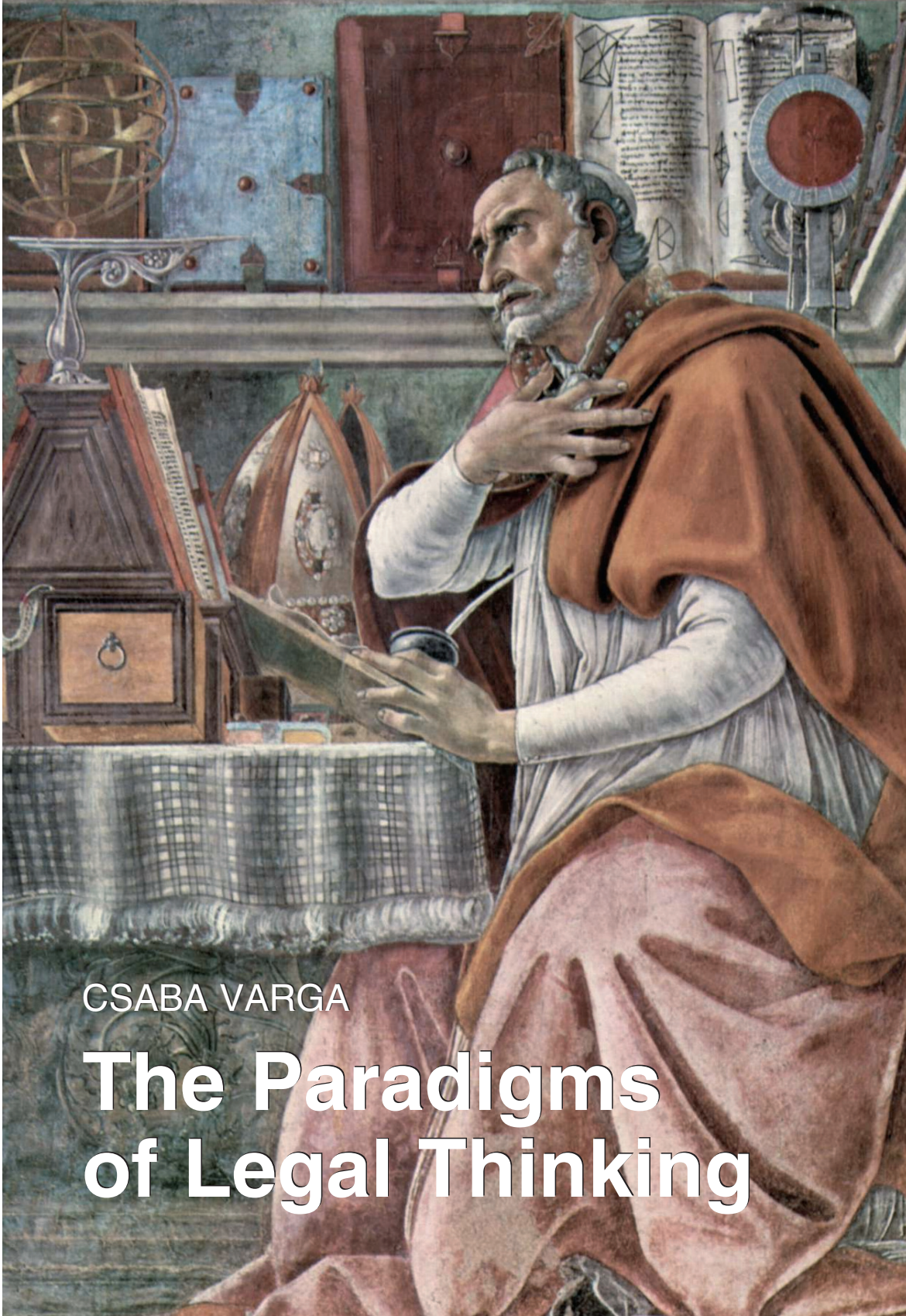


CSABA VARGA

The Paradigms of Legal Thinking

CSABA VARGA

THE PARADIGMS OF LEGAL THINKING

PHILOSOPHIAE IURIS
Edited by
Csaba Varga

Series Editor
Professor Csaba Varga

Director of the
Institute for Legal Philosophy,
Pázmány Péter Catholic University of Hungary

H–1088 Budapest, Szentkirályi u. 28 (visit)
H–1428 Budapest 8, P.O.B. 6 (mail)
+361-4297230; 4297226 (fax); 4297227 & 4297226 (secretary)
varga@jak.ppke.hu / jogbolcs@jak.ppke.hu (secretary)
http://drcsabavarga.wordpress.hu

CSABA VARGA

THE PARADIGMS OF LEGAL THINKING

SZENT ISTVÁN TÁRSULAT
Budapest 2012

The book is the translated version of the original Hungarian
A jogi gondolkodás paradigmái
(Budapest: Szent István Társulat 2004),
as the 2nd—enlarged—edition of
Lectures on the Paradigms of Legal Thinking
(Budapest: Akadémiai Kiadó 1999)

ISBN 978 963 277 299 8
ISSN 1218-0610

Szent István Társulat
H–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

TABLE OF CONTENTS

1. PRELIMINARY CONSIDERATIONS

Philosophy of science and philosophy of language

The purpose of the reasoning below is to lead the reader methodologically to the understanding of the paradigms that have shaped our concept of law from the beginning and which form the basis of our thinking in law. This presupposes a journey to the fields of philosophy of science and philosophy of language. However alien it may seem to our subject, a certain distance is still needed in order to be able to raise particular issues at all. Such issues are, for example: What does language actually mean? What does it mean that we can enter communication with others relying upon something common in language? How can we decipher a text and how is it expedient to do so? How can we unravel and disclose messages inherent in a text? How do we reason in everyday life? And how do we reason when conducting a scientific inquiry? And, anyway, what choices has human thinking faced throughout our known history?

Legal thinking / everyday thinking

This range of problems might appear to be an area remote from law, yet it proves to be of direct interest from the perspective of law. For everything that has ever surfaced in the evolution of human civilisation has appeared also in law as well, as its own particular product. At the same time, this realisation presumes the fact (and concomitantly gives it particular emphasis) that the path to law, just as to any other cultural manifestation, leads through fact, language and logic, and that is cognition. I must venture a further statement here. Namely, however shallow a truth may seem at first and however strongly it may suggest that we are just repeating evidences unquestioned at the level of everyday experience: concerning the arch between historical evolution and cultural variety we are bound to realise that

pondering the above implies more than law and the paradigmatic presuppositions of legal thinking. For the same tacit considerations that have shaped our juristic world-view throughout historical times have concomitantly altered our general thinking within and on the world. Therefore, the efforts at making them conscious not only contribute to their historical explanation but also allow us to interpret our present world as culturally colourful without abandoning our commitment to values.[1]

Rationality of law

This is why certain anthropological (more precisely: legal anthropological) foundations are indispensable. We shall see that another (apparent) detour of the kind will have direct influence upon the notion and conceptual limits of law. Since the fundamental question of how far and how much, and especially in what respect is speaking of law possible (worthwhile and necessary), can only be answered after its anthropological presuppositions and potentialities have been clarified. In more concrete terms: in the uninterrupted process in which social self-organisation is accomplished, exhibiting some orderliness at any given time, what features are we expected to expose from the incredibly complex vari-

[1] It is on the basis of such considerations that the demand for the comparative study of legal cultures has emerged, including, as its distinct field, the comparative analysis of the ways and forms of, as well as constructions and reconstructions by, judicial thinking. Cf., *Comparative Legal Cultures* ed. & introd. 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]. Cf. also, by the author, 'Comparative Legal Cultures: Attempts at Conceptualization' *Acta Juridica Hungarica* 38 (1997) 1–2, pp. 53–63 & in *Changing Legal Cultures* ed. Johannes Feest & Erhard Blankenburg (Oñati: International Institute for the Sociology of Law 1997), pp, 207–217 [Oñati Pre-publications–2].

As against culture as the root organising force which may erect tradition, cf. H. Patrick Glenn *Legal Traditions of the World* Sustainable Diversity in Law (Oxford & New York: Oxford University Press 2000) xxiv + 371 pp. Cf. also, by the author, 'Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline' *Acta Juridica Hungarica* 48 (2007) 2, pp. 95–113 & <http://akademiai.om.hu/content/gk485p7w8q5652x3/fulltext.pdf>.

eties of human pressure, restriction and coercion in order to be able to report with certainty that law proper creates this order?[2]

(example: sanctioning among Eskimos)

Let us summon some situations for the sake of example and easier understanding.

Is it law that exerts a coercive function up to the North on the eternal snowlands, where those who commit the worst imaginable sin in the eye of the locals (i.e., the theft of a canoe)—and especially when they are cought to have thieved again (despite having been, from the first theft on, called only by the nickname reminding them of their deed)—must leave the community according to the traditional customary order of the Eskimos, knowing full well that he who is expelled has very little chance of surviving his solitude on his own? Does it truly mean execution of the death penalty when the community unnoticeably performs the job at night, leaving those who perhaps refuse to leave voluntarily and making them suddenly realise that they have been left alone in the wilderness without tools because their once protective community has abandoned them during the night?[3]

(example: mass behaviour)

Or, what might have been the suggestions of the investigation initiated, then hastily closed by the gendarmerie in the Tiszazug region and all over Eastern Hungary amidst the misery following the Great War, when it turned out that once strong spouses who had been sent home from the war as cripples and helpless old people, all supposed to be taken care of by women left alone in a desperate struggle with the scanty family farmstead and raise the children, had fallen victims to arsenic poisoning? How did the series of cases, initially considered purely individual murders (especially because some deceived husbands were also found amongst those poisoned), turn into social pathology beyond legal

[2] For a preliminary draft, see, by the author, 'Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures' 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, reprinted in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994), pp. 437–457 [Philosophiae Iuris].

[3] Leopold Pospíšil *Anthropology of Law* A Comparative Theory [1971] (New Haven: HRAF Press 1974) xiii + 385 pp. and particularly on p. 94.

control, when light fell upon the mass occurrence of premeditated arsenic poisoning, as well as upon tacit agreements that by open sign language—like changing the sitting order in church, or designating a special bench under the belfry—signalled the start of the process of victimisation, both its motion by the community and voluntary acceptance on behalf of the ones doomed for death, for the whole community?[4]

(example: perceiving the unusual as natural)

Or, what could the state-frontier or the alien-office mean for the Central and Eastern European Gypsy survivors of the last World War genocide who attempted to organise an independent statehood somewhere in the Southern Baranya region, launching the trade of people and goods across the border half by smuggling and half by political means, and perceiving any measure taken to control unauthorised border-crossing and smuggling as a mere environmental risk to be eliminated?[5]

Operations by facts / norms

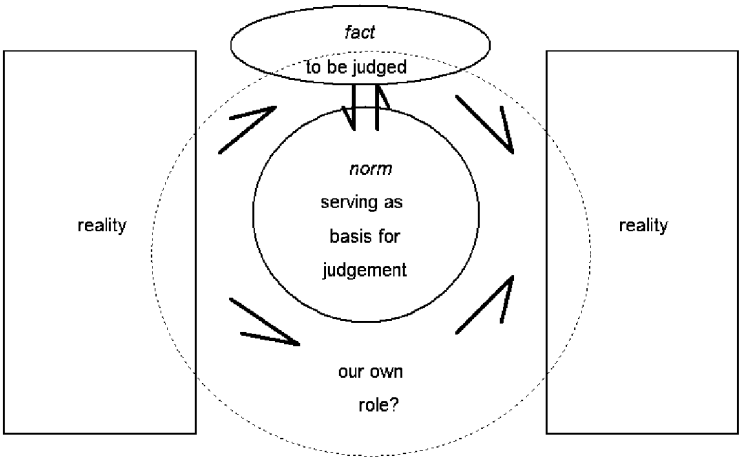
We ought also to learn about the philosophical and legal approaches to facts. What we have in mind here is the particular side of an operation called l a w - a p p l i c a t i o n in continental Europe, when the judge—on his admission—processes the "facts".[6] We usually conceive of the judicial processing of facts in common understanding as a wholly and exclusively cognitive act. Namely, in our perspective —inspired in continental Europe even in modern times by various bequeathed legal ideologies, as well as by presuppositions defining the world-view of our culture— law-application is hardly more than a two-step process, in the course of which an official, called law-applier, reveals some recently cognised facts, and, in the next step, ascribes to such facts the consequences prescribed by law for the facts constituting the case in law. Well, later on we shall see that this is not in the least so simple, because the actual

[4] See, e.g., Béla Bodó *Tiszazug* A Social History of a Murder Epidemic (Boulder, Colorado: East European Monographs & New York: Columbia University Press 2002) xxi + 320 pp. [East European Monographs 589].

[5] Cf., in the light of short-stories by István Gáll, e.g., *Vaskor* [Iron age] (Budapest: Szépirodalmi Könyvkiadó 1980) 317 pp.

[6] For a monographic treatise, see, by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

process of administering justice implies complex operations in complex situations. Looking at the other side of the judicial process we ought to speak also of the operations the judge performs with norms. The questions we must put are the following: Does something like a logic of norms exist? What is the true basis and genuine nature of any relationship between norms? And what does the judge actually do when he claims to operate with norms? What does he do when he says he makes a decision? The knowledge hammered into us suggests that he, so to say, "applies the law". We will see, however, that under the banner of "law-application" something different and more complex proceeds behind the scenes. Apparently, it is exclusively the judgeable fact and the norm that serves as the standard for judgement that wedge into the judge's practical intercourse with reality (*Figure 1*). Both these seem to be independent of the actual actors, no matter whom we place between them. Can we therefore trust their objectivity? Will it be these and nothing but these that start speaking in us, or the other way around, will we also end up somewhat speaking in them?



(*Figure 1*)

Finally, we are bound to put the question of what this argumentation is for. Why must we philosophise on law? Why is it necessary and worthwhile to do so at all? Will we profit in any way, shape or form from reasoning on law from such a perspective?

Benefits from the aspect of legal philosophy

One of the usual answers only hints rather routinishly that on the European continent, where our legal culture was formed, philosophising on law has always played an important role. Unlike the pragmatism characteristic of Anglo–American tradition, European legal thinking with Roman–German roots has often made efforts—in a rather impractical manner, sometimes led by abstractly alienated and dry doctrines—to ground its answers by tracing them back to ready-made thesis-recipes as necessary and direct conclusions drawn from distant airy ideas. The fundamentals of mental construction was formed in general by legal philosophical considerations, thus playing a definitive role at all times.

Clarification of presuppositions

Although the thoughts above may bear some elements of truth, we can still come a lot closer to a theoretically satisfying explanation by simply stating (which will, of course, be valid for the Anglo–American tradition, too) that human thought necessarily relies on antecedents and p r e s u p p o s i t i o n s that are generally not made conscious. On the other hand, as unconscious and undisclosed as they may be, they are bound to remain silent, hidden definitions of our thinking, merely natural accessories to our intellectual environment.

Being amidst things that are given

Let us just think of everyday events: when commuting in the real world we do not need to learn about the philosophy of the pavement to safely foresee the practical consequences of our actions. Eventually, if we kick into a stone our foot will hurt. If we collide with a moving car we will probably hurt ourselves, and so on. We do not need to become philosophers to be aware of the fact that we incessantly encounter things that are g i v e n (we should recall FRANÇOIS GÉNY's contrasted notions: *le donné* [*ce qui est donné*] and *le construit*

[*ce qui est construit*],[7] which also implies that what we have erected will be given for others). Thus our lives evolve amidst given things, and we already have preconceived judgements about them, a formed—at an everyday level, to the extent necessary for everyday life—knowledge confirmed by experience. It is simply excluded in practice to come across a situation that requires philosophising about such issues. Together with our everyday knowledge, an everyday practical routine is also established to avoid stones lying on the pavement, and to guide our steps with the background knowledge that we might meet rushing people or dangerously rule-breaking vehicles along our usual walking path.

What makes 'legal' legal? Where does the legal character of any phenomenon come from?

In the same way are we aware that everything related to the normative organisation of our everyday life apparently evolves without problems—inasmuch as we allow our lives to advance with the automatism of everyday routine. On the other hand, legal philosophy takes a stand just opposite to pure spontaneity: it is destined for enabling us to provide directions and achievable goals for legal processes by steeling them with a consciousness characteristic to the legal profession. For instance, by searching for preconditions we might attempt to peek behind the scenes erected by law in front of its own functioning and try to identify what actually goes on when the law, so to say, 'operates', and the manner in which this occurs. What does truly happen in the course of functioning, and what do the law and its agents allow us to see from it? What is added by the profession and legal tradition that distinguishes the operations performed in the name of the law from practical reasoning in everyday life? We can immediately admit, of course, that once such a theoretical reconstruction is started, something inconvenient will follow. Well, the ostensibly p r o b l e m - f r e e and reliable pavement, to which we do not need to pay much attention in

[7] By François Gény, *Méthode d'interprétation et sources en droit privé positif* I–II (Paris: Librairie Générale de Droit et de Jurisprudence 1899) xxv + 446 pp. and particularly on p. 422, as well as *Science et Technique en droit privé positif* I–IV (Paris: Sirey 1914–1921).

everyday life when absent-mindedly walking on the street or stepping up and down the sidewalk (that is, the common objects of our trivial knowledge that guarantee us to act adequately and securely in law just like in everyday life) will all of the sudden become p r o b l e m a t i c .

Nothing is self-evident but based on conventions

We may know from the philosophy of science, destined to inquire into the undisputed fundament of our knowledge, that as soon as we have to explain in LUDWIG WITTGENSTEIN's manner what the operation of "2+2" means, the manner in which we actually arrive at the thought (provable merely on grounds of human convention) that "2+2=4",[8] it comes immediately to the surface that none of the premises of such an explanation—i.e., of all explanations—is self-evident. Like everywhere else, here too it is routine, presuppositions and preconceived judgements (i.e., explanatory principles) that play a determinant role which our civilisational ancestors have acknowledged through the continuity of social existence by means of mere convention (that is, as the conventionally accepted rules of the game, i.e., excluding any proof),[9] transmitting them to us and to all generations to come.

★

Rebuilding the prestige of the law and of its proper tradition

With regard to its distinct timeliness, not yet disappeared in the mist of the past, it is worth mentioning to what degree the prestige of the legal profession and tradition have been eroded in Hungary in the past 50 years called "the existing systems of Socialism". In this half-century-long practice of mercilessly consistent experimentation and overall social

[8] Cf., based on Saul A. Kripke's *Wittgenstein on Rules and Private Language* An Elementary Exposition (Cambridge, Mass.: Harvard University Press 1982) x + 150 pp., Charles M.Yablon 'Law and Metaphysics' *The Yale Law Journal* 96 (1987) 3, pp. 613–636 and especially at pp. 624–628.

[9] For a general philosophical stand, see David K. Lewis *Convention* A Philosophical Study (Cambridge, Mass.: Harvard University Press 1969) xii + 213 pp.

violence with the subjected human beings—treating them as hostages and subjects of someone else's history—under the banner of an ideology referring to the so-called Scientific Socialism (used as if standing for forced modernisation and thereby as an excuse for the paroxysm of inhumanity), the law has lost its prestige, and the destruction of moral balance and of the dignity of any ordering and autonomy of law have discredited the knowledge in the Humanities so fatally that we had better start reconstruction almost from scratch, laying the foundations anew, facing the fact of having been again distracted onto a forced course by a historical delay.

after their erosion

Awareness of the fact that members belonging to the legal profession formed one of the most cultured circles of society—as long as its traditions were not substituted with Soviet-Russian staunch-supporter patterns, turning everything traditional inside-out, and corrupting jurists into social outcasts craving survival even in their personal existence[10]—may strengthen our confidence in the future. Being conscious of such a past may make it seem utterly bizarre when we recall tragicomically primitive situations when—due to JÁNOS KÁDÁR's personal devotion—practically illiterate comrades from the *nomenklatura*, struggling with even the basics of the alphabet, could become ministers of justice, when half-barbarians, having horror-inducing fear of reading and not being all that good at writing, and, for this reason, giving political weight for their rude antipathy towards their eventual bibliophile colleagues (especially if these latter happened to speak languages), could become chief prosecutors. According to survey data, even decades after the communist take-over, blocking even the sheer

[10] See, e.g., Tibor Szamuely *The Russian Tradition* ed. Robert Conquest (London: Secker & Warburg 1974) v + 443 pp., especially part I: »The Russian State Tradition«, as well as André Siniavski *La civilisation soviétique* (Paris: Albin Michel 1988) 345 pp., particularly chapters III–IV: »L'État des savants: Lénine« and »L'État-église: Staline«. For a contemporary documentation of a genuine STALINist arrangement, cf. Merle Fainsod *Smolensk under Soviet Rule* [1958] (New York: Vintage Russian Library 1963) xv + 484 pp.

possibility of an institutional consolidation[11], those rank-and-filers (wearing tracksuits or dressed in leather jackets and chow-coloured shoes, defined as the so called "civilian" attire of the Ministry of Interior, reminiscent of the one of one-time LENIN-boys, administering terror in the Hungarian Soviet Republic of 1919), appointed as judges, could decide civil cases based on no references or ones unknown in the formal hierarchy of the sources of law of our "people's democracy". No need to emphasise that this rank-and-file justice hardly differed from Bolshevik revolutionary justice, which itself relied purely on the alleged proletarian consciousness.

Legal culture

Legal culture in Hungary was incredibly strong up to 1948 and this professional culture obviously presumed a high level of the general culture.

(with a connection between law and philosophy)

Politicians, historians, and we citizens, may equally encounter and reveal problematic features of this past. However, the legal profession has shown something relieving, something we descendants can confidently rely on. Since memory undoubtedly suggests that it could equally be meritable to work in the civil service and legal profession, and still lead a creative, intellectually demanding life, imbued with European ideals, keeping a clear conscience, even when having some outstanding performance on the public scene. Even philosophising, which today may often seem so frivolously cynical, futile or even life-alien, was not merely a means of escaping from reality to virtuality or some useless spending of time. On the contrary, the ethos of both philosophy and law joined together in historical times, from which the jurist could learn how common efforts might help preserve values and actively contribute to the nation's cause. And this proves to be

[11] Cf., by the author, 'A bírósági joggyakorlat jogforrási alapjai: Esettanulmány (Összefoglaló értékelés a pécsi járásbírósághoz 1962-ben érkezett polgári ügyek jogforrástani problematikájú felméréséről)' [Sources of law of judicial practice: A case-study (Survey on referring to legal sources in decisions of civil cases at the Pécs District Court in 1962)] *Állam- és Jogtudomány* 34 (1992) 1–4, pp. 245–264.

relieving, independent of whether or not we agree with the world-views, perspectives, situational judgements or conclusions of any of the past actors. The prestige and dignity of law was able to develop precisely in such an environment. The philosophical background of the legal profession served exactly the foundation, preservation and control of this prestige and dignity. All of this was to contribute to the fact that the path leading to the Rule of Law was taken early in the history of the nation, alongside initiatives that were pioneering in comparison to contemporary European patterns.[12] Reliance on potentialities, drawing on traditions and past experiences, the re-establishment of European and national values under the new conditions, these are all preconditions to and tokens of being able again to successfully reconstruct legal culture step by step.

[12] For a contrast between past and present, 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], in particular »Past and Present«, pp. 23–27 and 'Law as Social Issue' in his *Law and Philosophy…*, pp. 459–475.

2. METHODOLOGICAL DIRECTIONS IN THINKING

Measure gaining independence in setting standards

In the first place, we must discuss—at least through some examples—the major methodological directions that characterised human thought throughout recorded history. We will attempt to flash some expressive instances from the immense treasury of possibilities and paths followed, focusing on the evolution of legal, geometrical, and finally, philosophical thought.

2.1. THE EXAMPLE OF LEGAL DEVELOPMENT

Diffuse practice as law

In the following, we will lay particular stress on the development of thinking relating to the ideal of law, throughout which the measure gains full independence in its use as a legal instrument. Therefore, we will not touch upon technical issues of the development of legal instrumentalities, although in almost all cultures compromise-seeking and even counter-running trends demanding their place also prevailed, somewhat paralysing and compromising the there and then main directions.

2.1.1. Classical Greek antiquity

Let us first consider legal development in classical Greece. Thanks to archaeological legacy and written sources, we know almost everything about classical Greek culture, except for law,[1] poorly represented in these traditions. One

[1] On Greek law in general, see Louis Gernet *Droit et société dans la Grèce ancienne* [1955] (Paris: Sirey 1964) 245 pp. [Publications de l'Institut de Droit romain de l'Université de Paris XIII]; John Walter Jones *The Law and Legal Theory of the Greeks* An Introduction (Oxford: Clarendon Press 1956)

of the reasons for this may be that although ways and laws [νομοσ, *nomos*] were developed to a considerable extent, there was no law proper with the Greeks in early classical times, at least in the conceptualised sense of modernity.[2] Instead, what we could find with them was some sort of a diffuse practice, a dissipated and fragmented everyday use, hardly measurable by the standards of discipline and definiteness, distinction and internal closedness of modern law—apart from the fact that at times it manifested itself in the following of previous collective decisions.[3] Greek antiquity might not have been able to develop the media refined enough to contribute to the survival of the Greek culture of

x + 327 pp. and especially on pp. 1–36; Louis Gernet *Droit et institutions en Grèce antique* [Paris: Maspero 1968] (Paris: Flammarion 1982) 330 pp. [Champ historique 106] as well as Richard Garner *Law and Society in Classical Athens* (London & Sydney: Croom Helm 1987) viii + 161 pp., especially chs. I on »Justice, Traditional Values and Law« and IV on »Law and Drama«.

[change in the meaning of *nomos*]

[2] It is a later outcome—of DRAKON's and SOLON's era—that the rules of authority are named *thesmos*, with no regard of the fact as to whether public agreement backed them or not; and *nomos* [*nomoi*] stands for every rule accepted by the community independently of its origin. Change in the use of words comes forth in the 5th and 4th centuries BC—as revealed by Martin Ostwald in his *Nomos and the Beginnings of the Athenian Democracy* (Oxford: Clarendon Press 1969) xiv + 228 pp., deriving its origin from the beginning of KLEISTHENES' rule (507 BC)—when the *thesmos* implying a dictatorial rule of law becomes outworn, and the expression *nomos* spreads widely concomitant to the use of *psēphisma* initially having meant 'voting'. The laws of DRAKON and SOLON continue to prevail, however, they can exclusively be called *nomos*, since there was actually no voting on them. Thus, *nomos* is gradually regarded as more general, more fundamental and more constant [νομοσ = law; *nomothe tai* = legislator, law-giver] as a normative pattern, as opposed to the rather individually shaped, concrete and temporary decree [*psephisma*, *psephismata*]. Cf. Douglas M. MacDowell *The Law in Classical Athens* (London: Thames and Hudson 1978) 280 pp. [Aspects of Greek and Roman Life], pp. 44–45 and S. C. Todd *The Shape of Athenian Law* (Oxford: Clarendon Press 1993) 433 pp. in particular at p. 18, who place this change of use in words to sometime after 403–402 BC.

[3] As can be read in DEMOSTHENES' speech against TIMOCRATES [20.118, 23.96, 39.40, 57.63; Ais. 3.6]: "I will judge according to the laws and decrees of Athens, and matters about which there are no laws I will decide by the justest opinion."

and sensibility in law in European civilisation, the same way that the refinement of thoughts and material culture could survive, as revealed by HOMER's works.

in want of any separate legal profession

This may be one of the reasons why there was no legal profession at the time yet, not even as a separate layer, analysing legal issues and operating/cultivating the law itself as a specific store of instruments destined for influencing and patterning public life. Moreover, public figures did not yet identify themselves as such and did not specify the availabilities pertaining to their respective fields, separating (for instance) law from other mechanisms of public policy. Or, as one of the most classic experts of the issue wrote (perhaps not unintentionally ambiguously): "The Greeks did not allow their law to lapse into abstract technicality and to become a tool of professional jurists."[4]

Lead measuring rule through curving the straight

In the following, I wish to contemplate the pattern represented by the early Greek thought related to law. What and how ARISTOTLE wrote about equity and the lead measuring rule of the master builders of Lesbos might have been a drop in the bucket. Accordingly,

> "The puzzle arises because what is decent is just, but is not what is legally just, but a rectification of it. The reason is that all law is universal, but in some areas no universal rule can be correct; and so where a universal rule has to be made, but cannot be correct, the law chooses the [universal rule] that is usually [correct], well aware of the error being made. And the law is no less correct on this account; for the source of the error is not the law or the legislator, but the nature of the object itself, since that is what the subject-matter of actions is bound to be like.
>
> Hence whenever the law makes a universal rule, but in this particular case what happens violates [the intended scope of] the universal rule, here the legislator falls short, and has made an error by making an uncodificational rule. Then it is correct to rectify the deficiency; this is what the legislator would have said himself if he had been present there, and what he would have prescribed, had he known, in the legislation.

[4] Paul Vinogradoff *Outlines of Historical Jurisprudence* II: The Jurisprudence of the Greek City (London: Oxford University Press 1922), p. 11.

> Hence what is decent is just, and better than a certain way of being just—not better than what is unconditionally just, but better than the error resulting from the omission of any condition [in the rule]. And this is the reason why not everything is guided by law. For on some matters legislation is impossible, and so a decree is needed. For the standard applied to what is indefinite is itself indefinite, as the lead standard is in Lesbian building, where it is not fixed, but adapts itself to the shape of the stone; likewise, a decree is adapted to fit its objects."[5]

Despite the simplistic nature of this device, it signalled an available alternative, even if just symbolically, yet decisively for posteriority by the offered technique. In every known earlier civilisation (ancient Mesopotamia and the Jewish communities prior to their Diaspora), the measuring instrument was something solid—firmly built, with a fixed shape, not changing its size. It was something concrete that not only symbolised length, but incorporated its self by its physically identifiable form. Such an instrument presupposed the measure to be capable of defining both the framework for and the parameters of measuring. In traditional understanding, length is a feature measured along a straight line. Accordingly, the measuring instrument for length was constructed along a straight line, capable of being directly used on a flat surface without further adaptation or mediation, and the length could be determined by simply reading off the result. Well, the characteristic of the lead measuring rule was that it could be bent, and thereby easily adapting to curved surfaces. Even the outside surface length of a wave, with the inner curve of its crest could be measured with it. It could, hence, take the shape of any spatial object when used for measuring whatever one pleased to measure.

with measure adjusted to what was to be measured

We may claim that such a measuring instrument was rather a handy tool than any stiff stick. Considering the fact that it meant the only way to measure the length of curved, bent or angular surfaces, it certainly must not have been invented and used by chance. However, once the idea was

[5] Aristotle *Nikomachean Ethics* trans. Terence Irwin [1985] (Indianapolis & Cambridge: Hackett Publishing n.y.), 1137b, pp. 144–145.

applied to law, it immediately became obvious that it also stood for something more or else. As ARISTOTLE observed: by bending the straight, the underlying principle of the measuring measure was lost, for the measurement itself was adjusted to what it was meant to measure. What was to be applied as a measure was eventually broken into the casual and random characteristics of the object to be measured. Thereby, the m e a s u r e itself became a function of the object to be m e a s u r e d. In other words, even length itself, as a characteristic believed to be decisive until then of a straight line drawn on a flat surface, was relativised and the measure became a function of the measured object.

from anthropomorphous, ancient unmediatedness

Reconstructions provided by the history of science suggest that most of our civilisational abstractions (differentiation, counting, measuring, figurative representation, and so on) are rooted in our ancestors' ritual approaches to their ancient gods, whom they also contracted with later on. In the centre stood the humble being performing the rite, and our modern idea of regarding everything as absolute developed in its primitive forms through the subsequent generalisation of the most personal equivalents, set once by these humans to pattern and represent themselves in human sacrifice (a cultural achievement that was ultimately transplanted into lay practice)—that is, it developed from a routinised practice having become standardised.[6] In sum, unmediated direct-

[symbolic value of equivalence of the one performing the sacrifice]

[6] Cf., e.g., from the works of A. Seidenberg, 'The Separation of Sky and Earth at Creation' *Folklore* 70 (1959), pp. 474–482 and 80 (1960), pp. 188–196; 'The Ritual Origin of Geometry' *Archive for History of Exact Sciences* 1 (1960–61), pp. 188–257; 'The Ritual Origin of Counting' *Archive for History of Exact Sciences* 2 (1962–66), pp. 1–40; 'On the Area of a Semi-Circle' *Archive for History of Exact Sciences* 9 (1972), pp. 171–211; and 'The Ritual Origin of the Circle and Square' *Archive for History of Exact Sciences* 25 (1981), pp. 269–327. According to one of his recent works—A. Seidenberg & J. Casey 'The Ritual Origin of the Balance' *Archive for History of Exact Sciences* 23 (1980), pp. 179–220—, the origin of measurement is rooted in ancient sacrifice: whoever performs the sacrifice provides (by his weight or height) the measure itself, and the act of measuring is aimed at defining a s y m b o l i c v a l u e of equivalence, when substituting the personal sacrifice with the variables of whom performs the sacrifice (i.e., with the representative in appearance of the very existence and life of the one performing the sacrifice, then, with the value substituting it: first with

ness is the ancient condition, the protoform and once existing unity, from which various independent ideas, forms and applications have later branched off.[7]

Graspability of the law: repetition and tables of laws

As soon as we presume the presence of such a measuring instrument, we must also recognise that law as usually accepted within European culture is excluded. For our thinking tradition has always presumed law (1) to precondition some sort of a measure, and (2) for this measure to be available in human environment. For, apparently, presumptions of human thinking assume as a psychological condition the certainty of having the measure with us, of being able to take hold of it; and also the certainty that it will be tomorrow what it was yesterday, whether resorted to by others or by us; and to point at the particular material feature, formed unchangeably in itself, that incorporates it. As if it were a *sine qua non* to have it within the reach of our or anyone else's hands at any time. Moreover, we request it to be capable of telling us at any time and under any conditions what the law is. This is why the archetype of any idea of law is a table or a book of laws, as rooted in the fundamental psychological needs of mankind. This also explains why the human race was so stubborn in incessantly fighting for recording the law throughout past millennia. It also provides the explication to the culture of customary rites from which the very first independent legal profession originates, that is, the practice

beasts, then with fruits and the like). The relative measurement gains independence and claims absoluteness only during the slow process of secularisation of the rite (*ibid.*, p. 211).

[from magic to intellectual planning]

[7] Norm-setting, obligatoriness, authority: their origination from a magic world-concept is ascertained by the historians, on the one hand, and since Axel Hägerström's research—*Der römische Obligationsbegriff* im Lichte der allgemeinen römischen Rechtsanschauung, I (Uppsala: Almqvist & Wiksell and Leipzig: Harrasowitz 1927) [Skrifter utgivna av K. Humanistiska vetenskapssamfundet i Uppsala 23]—they are also held as symbols of the greatest achievement of man venturing to form a society, i.e., rendering reality plannable by intellectually forecasting reality, on the other. "It is an admirable world—Gernet writes in his *Droit et institutions*…, p. 117—, in which an intellectual creation may appear as objective reality, in which the law, known by the name *jus* or *δικαιον,* may assert, by this irreducible element of the exigency of realisation, the idea of a force differing from the very force."

devoted to the repetition of the law, by which the accepted measurement was publicly announced every year.[8]

English ideal of law; measure independent of man acting

The above holds for the higher and more abstract levels of generality too. English law presumes an underlying customary order, thought to have always existed. Even its naming reflects the prevailing ideology: this is the "immemorial custom of the Realm",[9] notwithstanding the fact that the whole construct is sheer historical fiction: something that is merely (pre)supposed and whose proof or provability is not even raised. It is an axiomatic foundation on the acknowledgement of which the whole idea of order and also all procedures within the given order are built.[10]

[law-reciting]

[8] Cf., by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp. especially Part One, as well as Sigurður Líndal 'Law and Legislaton in the Icelandic Commonwealth' *Scandinavian Studies in Law* 37 (Stockholm: Jurisförlaget 1993), pp. 55–92. The 'law-chanter' [*nomodos*] must presumably have been the forerunner of all this from the age of CHARONDAS, the most ancient Greek legislator [Athenaios *Deipnosophistai* 619b], in such a widespread manner that CICERO learnt as a child the *Twelve Tables* as a compulsory song [*De Legibus* 2.23, 59], and Martianus Capella in the 5th century recorded that "many of the Greek cities used to recite laws and public decrees to the lyre" [9.926]. Cf. L. Piccirilli 'Nomoi cantati e nomoi scritti' *Civiltà classica e cristiana* 2 (1981), pp. 7–14 and Rosalind Thomas 'Written in Stone? Liberty, Equality, Orality, and the Codification of Law' in *Greek Law in its Political Setting* Justifications not Justice, ed. L. Foxhall & A. D. E. Lewis (Oxford: Clarendon Press & New York: Oxford University Press 1996) 172 pp., in particular on pp. 14–15. Several times a year being ordered to have read publicly, *Magna Carta* also spread in a way that everyone should have heard it. C. R. Cheney 'The Eve of Magna Carta' *Bulletin of the John Rylands Library* XXXVIII (1955–56), p. 340, quoted by M. T. Clanchy *From Memory to Written Record* England 1066–1307 (London: Edward Arnold 1979) xiii + 330 pp. at p. 213.

[9] William Blackstone *Commentaries on the Laws of England* I (London 1765), p. 73. Cf. Károly Szladits, Jr., *Az angol jog kútfői* [The sources of English law] (Budapest: Grill 1937) 145 pp. [A Budapesti Kir. Magyar Pázmány Péter Tudományegyetem Magánjogi Szemináriumának kiadványai 10], §§ 3–4, pp. 8–10.

[Common Law]

[10] "Blackstone's »general customs« or »customs of the realm« are those fundamental principles in legal relationships which for the most part are not to be found in any express formulation, but are assumed to be inherent in

However, judicial experience needs probably to add that independently of what the juristic world-concept suggests, deciding what the customary order "says" will ultimately be declared by the judge in the given case.[11] That is to say, whatever the accepted ideology may be, we still presume the existence of some measure as an ideal, a magical basis of reference, if and in so far as required by practice and also handed down as tradition. Both the deontology inspired by the prevailing juristic world-concept and the theoretical reconstruction revealing what lies under the ideological veil assure us that t h e r e i s s o m e m e a s u r e i n l a w and it d o e s n o t d e p e n d o n e i t h e r o f u s, and certainly not on either of the actual actors. It remains independent of us even if it can only be actualised by the judge deciding in the case. What the judge rules in the given case is his responsibility. The role of the judge is to decide the dispute with an authority independent from either of the parties. The ideology of Common Law adds one more consideration: the judge makes the decision he makes because he has no other choice. If he can make this only one as conclusive from the prevailing law and order, then it must have been given and must have always existed independently of him.

our social arrangements. They are, in short, the Common Law itself." Sir Carleton Kemp Allen *Law in the Making* [1927] 6th ed. (Oxford: Clarendon Press 1958) 643 pp. at p. 70. Cf. also René David *Les grands systèmes de droit contemporains* Droit comparé (Paris: Dalloz 1964) 630 pp. [Précis Dalloz], especially at para. 350.

[11] The classic English power of text-interpretation is symbolised by the manner in which Bishop BENJAMIN HOADLY expressed—*Sermon Preached before the King* (1717)—and JOHN CHIPMAN GRAY commented—*The Nature and Sources of the Law* (1909) 2nd ed. (New York: Macmillan 1948) xviii + 348 pp. on p. 102—on it: "Bishop Hoadly has said: »Whoever hath an a b s o l u t e a u t h o r i t y t o i n t e r p r e t any written or spoken laws, it is he who is truly the Law-giver to all intents and purposes, and not the person who first wrote or spoke them«; *a fortiori*, whoever hath an absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver." Cf. 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 I], p. 154.

[who says what the law is is truly the law-giver]

Continental ideal of law; law as given

Concerning the basis of this tradition of thought—presuming that law can only be what was already given and previously existed in some shape or form—, the Civil Law conception is not much different from that of the Common Law. According to the Civil Law ideology prevailing on the European continent, law at any given time is embodied in a set of statutes, that is, books of enacted laws, and these are always ready-to-take: t h e l a w i s g i v e n . Therefore, the only thing a judge is expected to do is to apply the law to individual situations. It is exclusively the law that asserts itself through the judge making a decision. The human, who happens to be a judge and must apply the law, takes part in the process only by chance and without any personal contribution to the outcome. For judges are the mere artificial media and mundane symbols of a process (moving and actualising this process) that will take place "objectively" in any case, that is, independently of them.

Σ: Measurement and measuring relativise each other

To sum up, the legal world-view of the classical Greek antiquity bears the presence of the idea of an external measure quite loosely. There is no actual principle with the Greeks. What could serve for a principle is already broken into the casual, particular and arbitrary features of the event to be measured. Thus, the measurement itself becomes a function of the measured.

in an anthropomorphous directness

Thereby measuring remains direct, anthropomorphous and practical indeed, that is, unmediated, accepting mediation only with compromises to casual incidentality. However, the generalisation of measuring is marching on inevitably, so that the measure may become the exclusive factor controlling the act of measuring, independently even of the individuality of incidental cases.

2.1.2. Roman legal development

Need for an unambiguously clear measure

2.1.2.1. The *δικαιον*-period Research aimed at reconstructing the Roman concept of law reveals the already established use of strict conceptual distinctions. For, according to Roman mentality, we can only imagine and name things that are unambiguously clear and built upon notions with marked outlines.

Law as a means to complement the ethical world order:

The Roman jurisprudents were practical-minded professionals: it did not even occur to them to fall into sheer abstractions or raise theoretical questions about the definition of law. Their disciples, the Romanists, were mainly interested in unravelling—by systematising—the Roman heritage from a doctrinal point of view. Nowadays it might seem a commonplace, but from within a socialisation in a legal culture built upon abstract conceptualisations, I have been shaken by a realisation I had to face nearly four decades ago. A legal scholar from Paris, MICHEL VILLEY, who was like a patron-father to me in my early scholarly years, presumed for himself rather eccentric views for the time. Being a legal philosopher well-learned in Greek, Roman, and mediaeval Latin sources, and also a committed Catholic who studied ARISTOTLE and Saint THOMAS AQUINAS convinced to find the panacea for our age's problems in their wisdom, he may have felt an inner vocation to consider the ages after classical Roman antiquity and the early reception the dead-end of errings within v o l u n t a r i s m .[12] Tireless in argumentation, he proved repeatedly and very consistently that the ideal of law prior to modern times had still been a medium for a naturalistic self-discipline, supporting the moral world order in its self-assertion. It was not pure invention, or the toy for absolutisms, and was not used to enforce momentary ideas. It embodied the very foundations of co-existence and not the incidentalities of politics changing according to momentary interests and power relations. Law was not only originated from sacral roots but still lived on for a long time afterwards in its ethos as the prime agent ensuring the continuity and the implementation of sacrality. It was not one of the normative orders rivalling among others in chaos but the superior one, because it carried the promise of fulfilment of the ideal of the idea of collectivity, organising society to a genuine community. VILLEY's such and similar

[12] Michel Villey 'Essor et décadence du volontarisme juridique' *Archives de Philosophie du Droit* III: Le rôle de la volonté dans le droit (Paris: Sirey 1957), pp. 87–136.

challenging arguments[13] have yet to be disproved by specialists of Roman law (the want for rejection is, of course, far from being a positive proof, since it may also happen that students specialised in Roman law are not interested in features of the common heritage in the same way he was).

justness that can be reached by relentless search

According to VILLEY, Roman law followed the Greek pattern for a long period of time.[14] It was the *δικαιον* that served for law.[15] As to its origins, *δικαιον* [*dikaion*] means what is just; or, taking a step further back in origins, the *δικαιον* is what is considered just, what is achieved, helping

[13] Cf. Michel Villey 'Questions de logique dans l'histoire de la philosophie du droit' *Logique et Analyse* (1967), No. 37, pp. 3–22, reprinted in *Etudes de logique juridique* IV, dir. Ch. Perelman (Bruxelles: Bruylant 1967), pp. 3–22 [Travaux du Centre National de Recherches de Logique]; as well as Michel Villey 'La notion romaine classique de *jus* et le *dikaion* d'Aristote' in *La filosofia greca e il diritto romano* I (Rome: Accademia Nazionale dei Lincei 1976), pp. 71–80 [Problemi attuali di scienza e di cultura 221].

[the role of laws?]

[14] Todd describes particularly impressively (esp. on pp. 58–61) the dilemmas of exploring a culture when posterity is left to nothing else than disconnected fragments, belletristic texts and philosophical contemplations to reconstruct the one-time meaning and function of words. Although it was told in an address made before a court that "in cases where no *nomoi* exist, you have sworn to judge according to what in your opinion is most just" [*gnomēi tēi dikaiotatēi*] [Demosthenes 39.40]; yet it turns out from more detailed investigation that it is only the parties who referred to the law at the most and only if they felt it would support their cause. Because the *dikastai* gave no reasons for their decisions which actually bound exclusively the parties then and there; they knew no appeal (let's consider: to whom could have appeal been made against the *polis*?); and the judgements were not collected (reported) officially and not referred to before the courts, either. Law therefore did not make the impression of a rule to be simply applied, nor did it request liable obedience. However, parties regarded reference to it as their privilege, because for them it was a conclusive position informing them about the desirable frameworks and units of the debate's probable and just resolution.

[or public morality?]

[15] "[T]he Greeks regarded law primarily as the embodiment of justice—it is *τό δικαιον* as interpreted by the city." "Greek law in its application was meant to be a frame for public opinion. […] [J]ustice should be administered to the members of a community in accordance with the standards of morality and common sense prevailing in this community." Vinogradoff, pp. 19 and 11, similarly Ugo Enrico Paoli *Studi sul processo attico* (Padova: Cedam 1933) xxvii + 219 pp. [Studi di diritto processuale 2], particularly on p. 72, and Todd, para 6.b.iv, pp. 90–91.

the ones whose task it is to achieve it.[16] More precisely, *δικαιον* is the individual justness of the individual case, what the parties involved have to finally reach, provided they search for it relentlessly. Or, *δικαιον* is not simply law, moreover, it expressly differs from the ideal of law of modern cultures.[17] The only conclusion that can be drawn from this realisation is that law as experienced today did not exist in early classical antiquity. No trace of it can be found either with the Greeks or the Romans prior to the republican era.

All through its evolution, law has been a casual and incidental product, emerging from within a more or less spontaneous social process. It did by no means represent anything given, present or disposable. It was not something

possible outcome of a process / that can be found, even if through several ways around

[16] In its etymological contexture (e.g., based on Homer's *Iliad* XVI, 541–542), the construction is confirmed by Sebastião Cruz in his *Ius Derectum (Directum)* Dereito (Derecho, Diritto, Droit, Direito, Recht, Right, etc.) 7th ed. [1971] (Coimbra [Gráfica de Coimbra] 1986) 74 pp. and especially at pp. 34–35 as well as M[aria] Paola Mittica *Il divenire dell'ordine* L'interazione normative nella società omerica (Milano: Giuffrè 1996) vii + 292 pp. [Seminario Giuridico della Università di Bologna CLXV], in particular ch. VII, pp. 189ff. On the full complexity of its set of concepts, cf. Henry George Liddell & Robert Scott *A Greek-English Lexicon* [1843] rev. Sir Henry Stuart Jones (Oxford: Clarendon Press 1973), p. 429. Garner (passim, especially ch. I, para. 2 on »*Dike* and Justice«) is extremely critical of such an interpretation; his reconstruction of the concept (p. 4) and Martin Ostwald 'Ancient Greek Ideas of Law' in *Dictionary of the History of Ideas* Studies in Selected Pivotal Ideas, ed. Philip Paul Wiener (New York: Scribner 1973), p. 678, are at the same time mostly reminding of the world-view of the Chinese *Tao*. For the background, also see C. W. Westrup 'Sur la notion du droit et sur le mode primitif de formation du droit positif, c'est-à-dire du droit coutumier' *Tijdschrift voor Rechtsgeschiedenis* XI (1932), pp. 1–18.

[17] F. M. Cornford—*From Religion to Philosophy* A Study in the Origins of Western Speculation (New York & Evanston: Harper & Row 1957) xi + 275 pp. [Harper Torchbook], para. 97, pp. 172–177—deduces the word *dika* from the concept of the c u s t o m and o r d e r of nature (cf. Homer *Odyssey* XI, 218 and Plato *Laws* 904E), immediately relating it to the Buddhist *dharma*, the Vedic *Rta* (cf. Hermann Oldenberg *Die Religion des Veda* [Berlin 1894], p. 196), and to the concept of the Persian *asha* (cf. P. D. Chantepie de la Paussaye *Manuel d'histoire des réligions* trans. I. Levy [Paris 1904], p. 467).

[*dika* = natural order]

freely avoidable, or—this being the advantage of constituted things—it could be rejected only with a reason, by repelling an otherwise natural continuation. Law, in its evolution, is not something exposable as a real object, like a Mosaic stone. Neither it is an end product, like a book of laws. For law is the outcome of p r o c e s s e s everywhere and at any time, but especially during this period. In its classical Greek understanding, law is a result anyone can/could arrive at. Only provided, of course, that one is prepared to take part in the common shaping of the law as a good judge, sensitive to communitarian values, and experienced in finding paths to them. Naturally, finding the path presumes a journey, yet journeys done with a given purpose may have several ways around. It may happen that we arrive somewhere other than we initially meant to. Well, with the regime of *δικαιον* there is no assurance that we will find the path or reach the desired result. The only thing we can be sure of is that the path c a n b e found; yet there are no guarantees that it will finally be reached in fact. Proper media and proper personalities are required: a judge who is able to find the path within the given medium. To sum up, law is not given and not present; it is not a certainty and is not graspable either. Neither is it a tangible product, ready to be applied. Rather it is the result of a long process that can only be reached through a persistent search for a path with harmony and reason. It has several chances but can be found after all. And, at last, it is open while suited to the community's values.

With no formal reference, any pattern can serve as a spring-board

As Villey put it: rule in the pre-classical ages only served for a s p r i n g b o a r d to arriving at law proper, that is, *δικαιον*.[18] Any legal proposition the judge would make refer-

[18] Michel Villey *La formation de la pensée juridique moderne* (Paris: Montchretien 1975) 715 pp. introduces on p. 67 the tension vibrating between "the search for rules manifesting justice while ensuring the coherence of the solutions on the one hand, and the disdainful mistrust towards rules never actually achieving the justness and thus utterly unsuitable to embody t h e l a w as such", on the other. As he continues (*ibid.*), the late Max Kaser from among the Romanists kept stressing the "relentless, hesitating search for what is just", while Riccardo Orestano ['Diritto romano' in *Novissimo Digesto Italiano* (Torino: Giappichelli 1960)] accuses the

ence to could serve as a starting point at the most, in finding the concrete justness of the concrete case. For justness was thought to be individual, which the parties in the trial had to achieve. To put it another way, law was not yet conceptualised. It made its appearance in speech, in the sequence of words, but it was not yet forced into clear-cut conceptual schemes as elements of a logified system. What was actually regarded as law was used to launch the debate, and provide its framework. Still, it was not meant to predetermine the outcome thereof. Individual solutions or recipes ready-to-take and acceptable as law were only available through the judge acting on behalf of the community. Thus, it did not serve as a recipe to be applied under any conditions.

For rule was imagined in thought at most but not in law

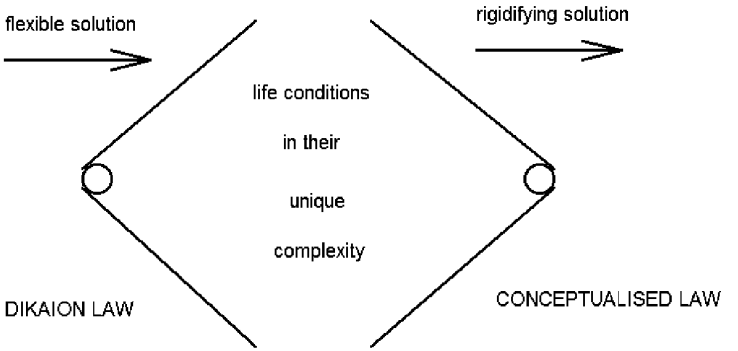
Anyway, PAULUS declares clearly that "*non ex regula ius sumatur, sed ex iure quod est regula fiat*", what means—in FRANCIS BACON's transcript—that "It is a sound precept not to take the law from the rules, but to make the rule from the existing law. […] The rule, like a magnetic needle, points at the law but does not settle it."[19] As far as we know, the conflict of LABEO and SABINUS begins here, because one of them would apply the *regula* generalisingly as a strictly legal proposition to whatever case, while the other regarded it only as a mirror of law with no normative strength by its self. And even if we may be pleased to learn that QUINTUS MUCIUS started to classify law according to *genera*, we have to learn also that before the logical elaboration of the norm concept, these *definitiones* were nothing else than sheer descriptions lacking any conceptual ideas behind them. Therefore, *regulae* were not more than a summarising opinion about the law at their time, and their misconceived overestimation—in a way completely alien to the exclusively utilitarian empiricism of the Romans—was only done by glossators at quite a distant age as "a manifestation of a general tendency to abstract and generalise the decisions found in the Roman legal texts and to explore and make explicit their

present posterity of "hunting for interpolations, in order that by shadowing its being used in an open-ended search, the law of the Romans can be represented in some well-established systemic uniformity."

[19] *D.* 50.17.1., as well as Francis Bacon *Aph.* 85, quoted by H. F. Jolowicz 'Roman *regulae* and English Maxims' in *L'Europea e il diritto romano* Studi in memoria di Paolo Koschaker, I (Milano: Giuffrè 1954), p. 220.

relation with each other."[20] Thus it was to refer back to the leaden instrument of measure rule of ARISTOTLE, as a practicable "signpost in the labyrinths of the law".[21]

On the other hand, anything that could be regarded as substantially contributing to finding the case's just and legally acceptable solution could become the law's component. In contrast therefore with the path of conceptualisation that may offer answers to life's complexity only in its own one-dimensioned way—at the level of argumentation, deduction and justification—, the *δικαιον* provided answers based exclusively on a morally demanding ethos to solving the individual cases bearing their infinite complexity in mind (*Figure 2*).



(*Figure 2*)

[20] Peter Stein *Regulae iuris* From Juristic Rules to Legal Maxims (Edinburgh: University Press 1966) x + 206 pp. on pp. 73., [Pomponius, *D.*1.2.2.41] 48, 131 and 102. However, at times it is distinctly expounded that "*Regula est generalis et brevis definitio ac sententia, quando videl. plures casus similes brevi traditione concluduntur, non per specialem casuum expressionem sed ejusdem rationis assignationem.*" [A *regula* is a general and brief definition and statement, whereby, in a brief communicaton, many similar cases are summarised, not to give expression to a special case, but to convey the *ratio* of those cases.] Everardus Bronchorst *Commentarius* (1624), 4 as quoted by Stein, pp. 294–295.

[21] D. van der Merwe '*Regulae iuris* and the Axiomatisation of the Law in the Sixteenth and Early Seventeenth Centuries' *Tydskrif vir die Suid-Afrikaanse Reg* (1987) 3, pp. 286–302 on p. 301.

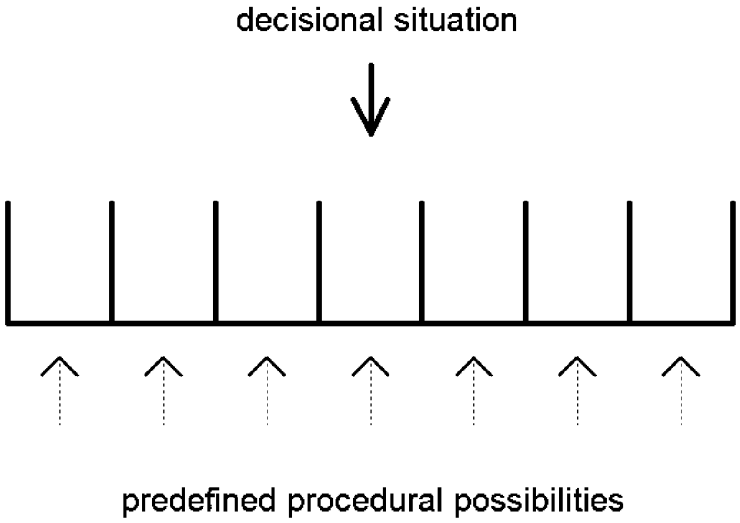
Open reasoning *vs.* closed reasoning

According to the underlying thought pattern, law built upon the ideal of *δικαιον* can be considered o p e n argumentation. A reasoning is open if it allows any set of solutions without previous determination. It is open if it may refer to or rely on anything the parties involved recognise as helpful in finding the individually just solution. A reasoning is open when it sets the only goal to arrive at a decision acceptable for the community. Well, to better understand the issue, let us contrast open argumentation to what it negates, c l o s e d reasoning. Let us imagine a hierarchical relationship with rigid subordination schemes, for example, the one established in the army. The service regulation in the army provides a one-way commanding chain including the exclusivity of closed argumentation. That is to say, whatever event is to be faced, the subordinate can communicate only by choosing and applying one from among the previously codified set of patterns, and the other way around, the superior may respond by choosing any one from the patterns applicable in the responding channel. Be it the case that the enemy breaks the lines and is shooting the target, or that the subordinate wishes to use the restroom, the communication will follow a homogenised pattern. This is perfect closedness itself. In any possible situation that may occur, the party entitled to determine the path of communication will choose one of the previously established patterns and this pre-selection may decide the issue for good (*Figure 3*).[22] This response

[delegation of cases and subsidiarity of decision]

[22] Referring a case to another forum—of experts, or to an investigating commission or a preparatory committee for decision-making—is always a double-edged instrument. In justified cases and especially ones requiring additional knowledge, it is the only way of careful substantiation. However, it is often used as a pretext for delaying and deadlocking resolution—seemingly not refusing to face the case in merit but suggesting responsible thoughtfulness. It is no mere chance that cases at fora of collective decision making (parliaments, companies) often get lost exactly when being further delegated to committees. The principle of s u b s i d i a r i t y (from the term '*subsidium*' = 'assistance') in the Catholic social teaching addresses exactly this, i.e., the need and indispensability of responsible decisions to be taken at proper levels, requiring acts and decisions made directly at the levels most suited to their character, to prevent power concentration due to

will be definitive and of merit. The subordinate cannot contest this response. At the most the superior of his superior can do it in a subsequent procedure (e.g., for assessing the said superior's personal achievement), qualifying the case, maybe, as missing the point, but only posteriorly. In sum, nobody can influence the direct operative force of the answer. On the other hand, in the case of open reasoning, one can take any direction and make reference to anything, since the only goal of the procedure is that the discussion (not limited in its sources of inspiration, means, or references) should lead to a result accepted by the community, through which the chosen procedure will ultimately get justification as well.



(*Figure 3*)

delegation to a higher hierarchical level and thereby the dissolution of direct local responsibility. Cf., e.g., A[lbert] Beckel 'Subsidiaritätsprinzip' in *Katholisches Soziallexikon* hrsg. Alfred Klose (Innsbruck, Wien, München: Tyrolia-Verlag 1964), pp. 1202–1208.

2.1.2.2. Praetorian law After a certain period of time the law as described above also had to be restricted and limited. While according to the idea of *δικαιον* any reference could be included in the reasoning—with the only restriction that the arguments originate from law, or at least be retraceable to legal tradition—because the exclusive target was the individual justness of the individual case, in the republican era a search started for closing the argumentation.

Searching for a closure

As is well known, there are two ways of setting limits to reasoning. On the one hand, we can determine p r o c e d u r a l l y who can participate in the given reasoning, in what way and sequence, and within what time frames. We can also define the form of procedure, for instance, the way an argument one of the parties intends to introduce to the process ought to be presented.

Procedural: *no writ, no right*
In merit: patterning substantive arguments

> Let us recall that a similar procedural formalisation eventually became the fundamental organising means of English law as well.[23] For about a thousand years, the question of whether law exists and what it may be for a given subject was determined by the availability of a specific judicial procedure, namely a formula instituting an action which could ensure the judicial enforcement. For this reason the adage "no writ, no right" could become the foundational principle of Common Law thinking. For generations of jurists this adage provided the basis for the particular understanding that it is not necessary for the law to be recorded in books as letter-formulas, neither to assign primary importance to abstractly defining what a person's rights are in an imaginary situation, since if proper judicial procedure is institutionalised and made available, and, as the case may be, the parties recourse to it, the process must ultimately lead to the proper declaration of what the law is. That is to say, law is built upon trust, upon the continuity of tradition arching over generations: in as much as the due process of law is ensured, this itself is a guarantee that the proper solution will follow in due way and time.

[23] On the history, practice and theory of writs, i.e., the Anglo-Saxon formulas in comparison with the Roman *actio*, see, e.g., Hans Peter *Actio und Writ* Eine vergleichende Darstellung römischer und englischer Rechtsbehelfe (Tübingen: Mohr 1957) x + 122 pp.

On the other hand, one can select and delimit the sources from which arguments can be taken. In such a case, independent of the intention (be it that the actor in our previous example asks for permission to open fire or to go to the restroom), the arguments will be strictly codified both in their merits and in the way they can be presented: they can only be from the set of previously established patterns. This is comparable to making pigeonholes for notions, defining the number, sequence and order of the holes. Whatever consideration we may hold, one can only choose from the given arguments. One can choose either of them almost at full discretion, feeling perhaps somewhat restricted in choice by the rules of use attached to the set of arguments, whichever best suits our interests at the given moment or our strategies to serve given purposes. Either in the case that the answer is delivered under the enormous burden of personal responsibility or with a sheer routine concealing the lack of genuine interest, from this point on one can proceed only by fitting the opinion into the clothes of previously established p a t t e r n s , the entire argumentation taking the shape of some sort of repetition of the chosen patterns in the needed versions, configurations, sequence (etc.).

At the *praetor*: delimiting the procedure + sources

In praetorian jurisdiction the unbound freedom of reasoning was surpassed by delimiting the procedures that could be followed and then attaching the referable sources of arguments to well-defined authorities.

Relevancy:

One of the key instruments to implementing the above changes was the institutionalisation of r e l e v a n c e and raising awareness of it. Relevancy[24] introduced a new principle of selection, as, in opposition to open reasoning, it was built on formal criteria. (For the sake of conceptual clarifi-

[24] Or 'pertinence', that is, "something that is in a reasonable connection with the issue in question". André Lalande *Vocabulaire technique et critique de la philosophie* [1926] (Paris: Presses Universitaires de France: 1991), ['rélevance / pertinence'], p. 915. Regarding its philosophical foundation—on the basis of LEIBNIZ' saying: "*Dic cur hic; respice finem*" [Say, why are you here; look to the end]—see F[erdinand] C[anning] S[cott] Schiller 'Relevance' *Mind* (April 1912), No. 82 , pp. 153–166.

cation, we must make it clear that no relevancy with substantive claims would be relevancy any longer. With substantive arguments, we may also reason by referring to something that can forward the judgement.) Once restrictions are made—be they of procedural nature or delimiting the sources or the character of the arguments—we unavoidably advance and thereby pre-select certain procedural channels or paths. By the force of qualifying them as relevant we make them exclusively available, and by introducing these arguments to the procedure we allow the case to be brought up, or allow us to join it. All in all, the procedure has been transformed into pattern-following: by having attached any step in the procedure to a criterion, we have reduced judicial invention to a function of previously established patterns.

dependent on criteria

Once relevancy is institutionalised, it will exclusively depend on the applied criteria that when interpretation is required—e.g., in case of a rule saying "Dogs are not allowed into the park!"—, using the word 'dog' will depend on the selected terms of whether we mean an animal with brown colour and weighing a few pounds, or rather one which usually has an unpleasant odour, dirties the place very quickly, suddenly starts biting, barking or running in all directions, and whose rushing into the park may disturb those who wish to have a rest, and so on.

in selection of values

No matter what is to be defined (dog, house, fence, car or human being), each definition will necessarily display an inexhaustibly rich mine of possible traits and aspects from among the ones we can count with. Each of them can turn out to be (possibly or exclusively) relevant. All the above depends on what criteria we set. Thus, we place relevancy into a position to individually pre-select the values to be protected and, in addition, we define them as well.

Reduction of law-application to establishing the facts of a case

Thereby the enclosure of the law into one single—though rather sizeable—"pigeonry" is consummated. Because the legal situations—that can be raised and formulated as relevant—are placed onto single pigeonholes of a finite number. As facts constituting a case in law (or as legally qualifiable specific configurations of elementary factual situations) only such facts/situations can be selected that were separately

specified here as such (or that can be formed as configurations of these). Law application will become from this time on the art of classifying the various factual situations into such pigeonholes and of meting out the legal consequences defined for those individual pigeonholes.

"rabulistics"

At the dawn of the Modern Age, especially by the social criticism the Reformation and the entire Baroque period exerted, the law's formalisation as confined to this pigeon-holing and especially the "nit-picking"—"Talmudistic" or "rabulistic"—abuses as sources of manipulation uncontrollable by those uninitiated were represented in ironic or critical tones (also as an early anticipation of the future's dehumanisation and alienation).

For instance, the encyclopedist and European educator, JOHANNES AMOS COMENIUS, who also lectured at the Hungarian North-Eastern town Sárospatak, summarised his contemplations about law as follows:

"*Finis juris* In the last place, they led me into still another very spacious lecture room where I saw a greater number of distinguished men than anywhere else. The walls around were painted with stone walls, barriers, picket-fences, plank-fences, bars, rails, and gate staves, interspersed at various intervals by gaps and holes, doors and gates, bolts and locks, and along with it larger and smaller keys and hooks. All this they pointed out to each other, measuring where and how one might or might not pass through. »What are these people doing?« I inquired. I was told that they were searching for means how every man in the world might hold his own or might also peacefully obtain something from another's property without disturbing order and concord. »That is a fine thing!« I remarked. But observing it a while, it grew disgusting to me."

"*Perplexitas juris* Besides, I observed that all this science was founded upon the mere whim of a few men to whom one or another thing seemed worthy of being enjoined as a statute and which the others now observed. Moreover (as I noticed here), some erected or demolished the bars or gaps as the notion entered their heads. Consequently, there was much outright contradiction in it all, the rectification of which caused a group of them a great deal of curious and ingenious labor; I was amazed that they sweated and toiled so much upon most insignificant minutiae, amounting to very little, and occurring scarcely once in a millenium; and all with not a little pride. For the more a man broke through some bar or made an opening that he was able to wall up again, the better he thought

of himself and the more was he envied by others. But some (in order to show the keenness of their wit) rose up and opposed him, contending that the bars should be set up or the gaps broken thus so. Hence arose contentions and quarrels, until finally separating, they painted each his case in his own way, at the same time attracting spectators to themselves."[25]

Relevancy also in our elementary acts

We will see in another context that relevancy's role is not restricted to closed reasoning. Everyday thinking and common language use are both built upon relevancies.[26] We rely on relevance whenever we approach facts in either everyday life or scientific reconstruction. To put this in a life-like form of expression: we can perceive something only if it is "reminding" of something previously perceived. Moreover, in the basic act of perception (that is, when using organs of sense or engaging into some sort of perception) the stimulus will be interpreted by the neural processes of the organism only in relations to and through some expressly or tacitly acknowledged relevances.[27]

[25] Johannes Amos Comenius *Labyrinth of the World* [Jan Amos Komenský: Labyrint sveta a ráj srdce (Amsterdam 1663)], ch. XV: The Pilgrim Observes the Legal Profession, in <http://www.oldlandmarks.com/lab15.htm>. For the issue of pigeon-holing as a taxonomy aiming at classifying the objects, see also para. 2.3.1.4.

[26] Cf. George H. Kendal *Facts* (Toronto: Butterworth 1980) x +106 pp. and, in a wider context, see, by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp., especially in ch. 3.

[*Gestalt* psychology]

[27] The so-called *Gestalt* psychology had a revolutionary realisation, namely that in the process of perception, the conscious does not build the whole from the parts; on the contrary, following the recognition of the interpretable whole as reminiscent of something previously interpreted, the individual components and their variations are identified afterwards. On the classics, see Kurt Koffka *Principles of Gestalt Psychology* (London & NewYork: Kegan Paul & Harcourt, Brace 1935) xi + 720 pp. [International Library of Psychology, Philosophy and Scientific Method] and Max Wertheimer *Productive Thinking* [1945] (London: Associated Book Publishers & Tavistock 1966) xvii + 302 pp. [Social Science Paperbacks]; and, in a current elaboration, D. W. Hamlyn *The Psychology of Perception* A Philosophical Examination of Gestalt Theory and Derivative Theories of Perception (London: Routledge 1957) 120 pp. [Studies in Philosophical

Reduction to typical situations in legal cases

As far as law is concerned, as societal development advanced also human situations became more and more complex, so their immense variety could only be expressed if reduced to so-called t y p i c a l situations. Therefore, since various situations may occur, these have to be projected on some previously established (codified) typical situations so that they can be processed through law and be transformed into a case within the law, making them available to regulation or normative patterning. The human process of normative standardisation and adjudication is limited due to its very nature, therefore an artificial filter must be applied. As a comparison, let us consider a situation in which we face an immense body of water, and our only disposable means to drain it would only be, according to our example, a set of pipes of given shape and permeability. Yet, we also need to realise that as soon as we start thinking in terms of pipes and procedures, we cannot (and actually do not) consider water "in general" any more.

Once some specific linking element surfaces, it is no longer the water "in general" that will interest us, but exclusively its rather practical (technological) aspects, namely, the intriguing question of how we can start and efficiently end the work with our pipes and procedures. So to speak, from now on the relevance as such and relevance only will become directly more and more relevant.[28; 29]

Psychology] and David Katz *Gestalt Psychology* Its Nature and Significance, trans. Robert Tyson (London: Methuen 1951) x + 157 pp. [Methuen's Manuals of Modern Psychology 2]; for further analysis, see Hubert Paul Grice *Studies in the Way of Words* (Cambridge, Mass. & London: Harvard University Press 1989) viii + 394 pp. and Frank Jackson *Perception* A Representative Theory [1922] (Aldershot: Gregg Revivals 1993) 180 pp. [Modern Revivals in Philosophy]; for a philosophical summary, Charles Landesman *The Eye and the Mind* Reflections on Perception and the Problem of Knowledge (Dordrecht & London: Kluwer 1993) x + 157 pp. [Philosophical Studies 58].

[relevancy as the pitfall in legislation and in law-application]

[28] The role of the legal advisor lies in revealing the relevant factual circumstances. Legislation differs from other curing mechanisms in that its virtue and possibility to fail is primarily not in the merit of its answers but in finding adequate relevancies. We may have some good advice for how to ease tensions, but purposeful within law can only be the institutionalisation

2.1.2.3. JUSTINIAN's codification In the mature Roman imperial era—culminating in JUSTINIAN's time—the formal features of law became systematic and exclusive, permeating law as a whole. Our historical knowledge ascribes the change and the formation of numerous instruments of modern legal arrangements (conceptual system and regulatory tools) to JUSTINIAN. Yet, closer analysis revealed that nothing really new emerged under his reign. Actually, it is the conclusion of legal development that was done in his time. May we ask: what and how was concluded? The usual answer holds: through c o d i f i c a t i o n . Albeit in reality the jurisprudents assigned by JUSTINIAN—about whom we may find classical reference in TITUS LIVIUS[30] and others—did not do anything but search for and choose from various sources of

Codification as the only referable corpus of sources:

of a procedure that successfully combines the selection of relevancies suitable for launching a procedure (that is, factual circumstances provable within a trial procedure) with a legally operable sanctioning mechanism. By the example of the successive series of English statutes on race relations promulgated due to various good intentions and idealistic pressures, see, by the author, 'The Law and Its Limits' [1985] *Acta Juridica Academiae Scientiarum Hungaricae* 34 (1992) 1–2, pp. 49–56 & reprinted in *Indian Socio-Legal Journal* An International Journal of Legal Philosophy, Law and Society [Jaipur: Indian Institute of Comparative Law] 25 (1999) 1–2, pp. 129–134, reviewing Antony Allott *The Limits of Law* (London: Butterworth 1980) xxii + 322 pp., especially pp. 212–236.

[29] T y p e - c o n s t r a i n t ascribed to a codified set is characteristic of formalised conceptual systems and procedural orders, which may have alienating effects when transferred onto fields alien to own merits and inherent nature. GEORGE STEINER—in his *Language and Silence* (Harmondsworth: Penguin 1967), especially at pp. 136–137—called the attention upon the merciless destructive effects that are to realise when private intimacies (especially sexual habits and intimate communication) are publicised by the media: it is not of a liberating but emptying effect for future generations, since breaking privacies into types degrades the audience into external pattern-followers, depriving living individualities of the magic of incomparable uniqueness. Only generations in deprivation may come after us, as personal intimacies (exclusive to our respective You and Me) would no longer exist but repetitions and configurations composed out of standardised patterns.

[alienating effects of type-constraint]

[30] Livy [Titus Livius *Rerum Romanorum ab urbe condita*] English translation II, trans. B. O. Foster (Cambridge, Mass: Harvard University Press & London: Heinemann 1967), III, 9–57, especially at pp. 113–195.

law and, finally, select the ones they considered suitable. That is to say: they incorporated the selected sources into a compilation which the Emperor declared as the only one referable at his courts. The outcome was one single body of laws and it was made exclusively referable. So JUSTINIAN was the first to combine legal codification with the prohibition of interpretation.[31]

ius will be reduced to *lex*, i.e., to what is formally posited

After the sources of law had been consolidated, anyone could tell what the law of the empire at any given time was. The only requirement was to verify what was f o r m a l i s e d as law, as having formally been incorporated in the compilation. For a contrast, let us recall that not long ago the law was the *δικαιον*: some sort of a formless medium, which hardly qualified as worthy of being called *ius*. Well, the mass of such *ius* constituted the material from which the Emperor had to choose. What the jurisprudents compiled into the *Digesta* and JUSTINIAN's *Codex* became the prevailing body of the law to be enforced by the imperial power, by having promulgated it as an imperial edict, that is, by the act of their enactment as the law. The imperial *lex* thereby reduced the idea of *ius* proper to what was legally p o s i t e d . In consequence, s t a t u t e became the exclusive carrier of the law, making it irrelevant (and even forbidden) to refer to anything else as law. (As nowadays, the law can be criticised from an external point of view at the most, projecting a judgement from outside onto the values

[prohibition of interpretation]

[31] We know that the law is in the hand of the party who is entitled to give it the last interpretation as an authority. Thus, the prohibition of interpretation used to serve the inviolability and unassailability of the will having posited the law both in monarchic codifications (JUSTINIAN, FREDERICK THE GREAT), and, for instance, in the protection of the French revolutionary legislation against judicial sabotage. The inevitable failure, present in all known periods of history, is described by, e.g., Hans-Jürgen Becker 'Kommentier- und Auslegungsverbot' in *Handwörterbuch zur Deutschen Rechtsgeschichte* II (1978), pp. 963ff. For a related case study, see, by the author, 'A törvényhozó közbenső döntése és a hézagproblematika megoldása a francia jogfejlődés tükrében' [The legislator's intermediate decision and the solution of issues of gap in the mirror of French legal development] *Jogtudományi Közlöny* XXV (1971) 1, pp. 42–45.

formulated within the law or expressing sheer opinions about the regulation.)

Law is what has been enacted, and interpretation prohibited

As seen above, JUSTINIAN invented the instrumentality for ensuring the enforcement of his code, which later became a well-known tool of FREDERICK THE GREAT. For he created an imperial committee next to him to clarify interpretational problems that could occur in the process of application.[32] We ought to realise that the notion itself became thereby suspicious, because a negative value judgement stained the original meaning of 'interpretation'. Perhaps this is the first instance where the word 'interpretation' disguised 'lawyering' as 'pettifogging' or 'nit-picking'. It is the first time that a false contradiction (refuted by us as sheerly ideological) appears between the allegedly clear meaning of legal provisions and the unambiguity of whether or not they have been actually followed, on the one hand, and the intentional ambiguity of the procedural definition of meanings and their burdening with possibilities of evasion, on the other.[33] For, thereby, the very act of demanding and performing 'interpretation' has been made suspicious in and of itself, from the very beginning. The entire late-Roman thinking in terms of codification is built upon the assumption according to which if the emperor wishes to say what the law is, he will do so and, by doing so, the issue itself is solved: all subjects of the empire will promptly know what the law is, so that they can conform themselves to it and avoid sanction.

Law is objectified: applicable to any situation

Or, one could say that the law has—even if only primitively, in pure formality—been objectified through its

[32] Cf., by the author, *Codification*..., in particular at p. 37, and notes 31 and 34 at pp. 44–45.

["Lawyers make bad Christians"]

[33] This becomes public conviction accompanying European legal development all along from the Middle Ages on, culminating in the paradox of "*Juristen, böse Christen*". For "the more learned such people are in the law, the readier they are in practice to compromise it" [quoted by A. Migne *Patrologia Latina* 211.667D in Alexander Murray *Reason and Society in the Middle Ages* (Oxford: Clarendon Press 1978) xiv + 507 pp. on p. 223]. As a modern presentation, we may find its most classic expression with MARTIN LUTHER, especially in his *Tischgespräche* [or his *Table Talk* (London: Religious Tract. Soc. n.y.) 127 pp.].

conceptualisation. From now on the law is embodied by conceptually generalisable norms which can be safely applied to any concrete individual situation in a way that the relevant norms offer a decision for the cases in question.

through pigeon-holing, not through a logical way yet

However, this took place through a kind of naive directness, without the completion of the conceptualisation of the law's terms. For the systemic doctrine-building, carried out subsequently by the Pandectists' works of reception that generated the doctrinal study of law through centuries' concept-refining effort—along analytical conceptual splittings, differentiations, classifications, definitions and generalisations—had still been in a rather initial stage. What was done was indeed a juxtaposition of "thought cycles rather than logical progression".[34] They made classes or qualification instead of deducing.[35] "It is difficult to exaggerate just how unsystematic, and generally disorganized, Roman law was in the way it was set down."[36]

Society planned as posited by the law

Indeed, the idea of a code was thereby born. In other words, this is the projection of the prevailing pattern onto law, represented in European history in its most pure form

[34] Alan Watson *The Spirit of Roman Law* (Athens & London: The University of Georgia Press 1995) xix + 241 pp., ch. 7: »Juristic Law: Reasoning and Conceptualization«, pp. 82–97.

[35] E.g., Michel Villey 'Logique d'Aristote et droit romain' *Revue Historique du Droit français* 29 (1951), pp. 309ff; Alan Watson 'Illogicality in Roman Law' *Israel Law Review* 7 (1972) 1, pp. 14–24; Franz Horak 'Die römischen Juristen und der »Glanz der Logik«' in *Festschrift für Max Kaser zum 70. Geburtstag*, hrsg. Dieter Medicus & Hanas Hermann Seiler (München: Beck 1976), pp. 29–55.

[graduality of logical development]

[36] Alan Watson 'The Importance of »Nutshells«' *The American Journal of Comparative Law* 42 (1994) 1, pp. 1–24 on p. 3. There was "one, and only one, exception" from this, the *Institutiones* attributed to GAIUS in an interpolation by JUSTINIAN (otherwise unknown from other sources). It is JUSTINIAN's *Institutiones* that first appears in print (Mainz: Peter Schoeffer 1468) as a work exclusive for centuries which might at all suggest Europe the idea of both concept and structure, until HUGO GROTIUS *Inleidinge tot de hollandsche Rechtsgeleerdheid* (1631), Lord STAIR *Institutions of the Law of Scotland* (1681) and—finally—Sir GEORGE MACKENZIE *Institutions of the Law of Scotland* (1684) attempted at attaining some systematisation of local laws.

by FREDERICK THE GREAT. As is known, he dreamt about becoming the progenitor of his empiredom, the exclusive centre of creation radiating to and demanding prevalence everywhere.[37] This assumes the idea that whoever posits the imperial will, will posit society by his act as well.[38]

Law: that what derives from positivation logically and linguistically

Once law is created on the basis of such an understanding, it also becomes clear that the normative production will necessarily result in positivation in a marshalling sense that further positivations will only be derived from it. It is essential to comprehend that within a culture of regulation like this, that what derives from the leading positivation (or its derivatives) will derive l o g i c a l l y and l i n g u i s t i c a l l y (within the boundaries, given and elaborated at the time, of the culture of logic and language use)—that is, unambiguously, out of an intellectual necessity also conceived of as by the force of logic, allowing no varieties and exceptions.

Duality of creation / execution

Enlightened European absolutisms were laid on this fundamental idea. The monarchs assumed that in the political hierarchy of a well-arranged empire, it is the creator, the sole Ego that assumes the Divine role and responsibility of making order, that truly counts. Therefore, every office and office-holding beyond this will be sheer application, that is, i m p l e m e n t a t i o n , in the strict sense of execution. Or, this means the execution of something that has already been decided in all its details, the commission to practice of an ideal that sprung forth from a head destined for such a noble job. The prevailing opinion of the time expressed a mechan-

[37] In a most telling form of expression, see Thomas Babington Macaulay 'Frederick the Great' [1842] in Lord Macaulay's *Essays* and Lays of Ancient Rome [popular ed.] (London: Longmans 1895), pp. 795–834 and in particular on pp. 808 and 815, as well as Thomas Mann 'Frederick the Great and the Grand Coalition: An Abstract for the Day and the Hour' [Friedrich und die große Koalition: Ein Abriß für den Tag und die Stunde, 1914] trans. H. T. Lowe-Porter, in his *Three Essays* (London: Secker 1932), pp. 156–157.

[38] GEORGE LUKÁCS—'Solzhenitsyn's Novels' in his *Solzhenitsyn* trans. W. D. Graf (London: Merlin 1969), pp. 52–55—criticises STALIN for the same reason, namely that by this he deprives society of its driving forces and subjects it to degeneration, into a sheer tool of an external will.

ical world-view dividing this world to Creator and creature (as opposed to the discretional monarchical arbitrariness of feudal absolutisms), according to which the judge deciding and resolving social conflicts—reminiscent of CHARLES DE MONTESQUIEU's expression—is hardly more than a living mouth that can only pronounce the provisions of and nothing but the law.[39]

The responsibility of the judge is to be borne by the legislator

Yet, the conviction reducing the judge's role to the living mouth in service of the law will necessarily assume the humble realisation that the weight of the personal contribution to, and the responsibility to be borne for, the decisions is next to nothing. Obviously, this is not because someone has broken the order of society and anarchy is ruling, but because this is what derives from the very idea of order. Precisely because there is an overall order, the order is an o v e r a l l one—implying that no one has (or can have) any further role in addition to the one of the law. If the magisterial decision can only be done within the limits of statutory definitions, the responsibility for it and every consequence will also have to be borne by the legislator, the sole master of statutory definitions. There is no other player on the stage and no further role missing either.

Quod dixit dixit: either a decision concludes or there is no law there

Finally, we should recall the structure of the *Digesta* and the lasting effect of the solution it offered. The *Digesta*—just as with all subsequent codes undertaking the embodiment of laws in one single *corpus* (instead of re-enacting them as logically inter-related parts constituting a system)[40]—compiled the chaotic series of provisions into one given body, and nothing more. A historical collection was thereby

[39] "[T]he national judges are no more than the mouth that pronounces the words of the law [*la bouche qui prononce les paroles de la loi*], mere passive beings, incapable of moderating either its force or rigour." Montesquieu *De l'esprit des lois* [1748], book XI, ch. VI, in his *Oeuvres complètes* I (Paris: Lefèvre 1839), p. 196; *The Spirit of Laws* trans Thomas Nugent (London: G. Bell & Sons, Ltd. 1914) in <www.constitution.org/cm/sol_11/htm#006> & <http://www.constitution.org/cm/sol.txt>.

[40] On the separation of the types of codification as targeting either the q u a n t i t a t i v e accumulation or the q u a l i t a t i v e reformulation of the law, see, by the author, *Codification…*, ch. XI, para. 2.

accomplished, accumulating (without any arrangement, correction, adaptation, hierarchisation, systematisation or reformulation) largely divergent legal opinions and considerations. Still, it marked a crucial milestone in legal development, considerably simplifying the chaotic mass of situations as subjects to decision. From then on the logic for procedure became feasible, as follows: the law embodied in a text either includes a passage for the case or not. If it does, then the debate—in accordance with the ancient principle of *quod dixit dixit*: by the bare existence of the *locutio*—is resolved and the decision made, since the only job is to apply the provision for the situation, and this will already lead to the decision. In the reverse case, when there is no relevant passage, the only conclusion that can be drawn is that the case does not have a legal solution, since there are no provisions for its solution.

2.1.3. Enlightened absolutism

Systematic and comprehensive legislation:

Enlightened absolutism usually means the era prior to the bourgeois transformation mainly in Western Europe, and especially in France, Germany and other countries of similar historical evolution. Enlightened absolutism also means the particular era of legal development when the monarch, by the force of his centralised power, becomes capable of asserting his own interests as state interests, and initiates a s y s t e m a t i c and c o m p r e h e n s i v e l e g i s l a t i o n to set an organisational framework for their practical implementation.

by operating the economy, setting up state finances and state army

The monarch's goal is irrelevant in the above perspective. It is enough to learn that there are not just ideas, games and bettering intentions that may guide him, but also the constraint of choosing between the prospects of imperial survival and destruction. The country and the sovereign's cause cannot survive unless feudal division is overcome. To gain predominance, the monarch must establish the state finances as separate from his own. An impersonal, rational and comprehensible order in financing imperial unity has to be established so that—as the second precondition—a state army can be set up by replacing the rivalry between various

feudal lords' private armies with a centralised army under royal command. In order to be able to dispose of state finances, needed to equip and maintain the state army, the sovereign must interfere—as the third precondition—in the economy, thereby making separate sources of income available for state purposes.

through bureaucratically routinised administration

This is the point where modern development in Europe starts, when the monarch dares to intervene with trade, agricultural and industrial affairs, and when—only thinking of FRANÇOIS MARIE AROUET DE VOLTAIRE's black journalism[41]—even the question of uniform measures arises as an issue of state unity. It also implies the realisation—and this is the moment for us to see law and legal organisation as a *sine qua non*—that a complex and bureaucratically routinised administration is needed to handle the financial and military affairs. For the monarch who excels only in superimposing his own will (by force, strategy or art) in the given moment can no longer set the course for the future. Exclusively a monarch who creates and organises the financial support of war and peace—by funding and bureaucratically operating institutionalised state machinery—can have hope of success in prevailing over the new hegemonies.

through legislation and the consolidation of laws

In order to implement these, the ruler must provide for complex and comprehensive legislation. An enormous mass of provisions is needed for accomplishing a suitable regulation in a way to unify the existing sources of law and make them free of contradictions. State offices have to be set up and an army of state officials appointed (as organised into brand a new profession) for that an impersonal application of the aggregate of new regulations at a mass size to be possible by guaranteeing the proper operation with practical implementation of the law. Codification performing the sheer quantitative summation of the law into one body of laws (practically exhausted in recording and, occasionally,

[41] Voltaire *Dictionnaire philosophique* in his *Oeuvres complètes* VII (Paris: Firmin-Didot 1876). See also, by the author, *Codification...*, especially at pp. 95–97, and notes 16–18 at pp. 127–128.

reforming the customary law) did not prove enough for the new job of processing, systematising, and also compiling such an enormous quantity of norms.

by reviving JUSTINIAN's pattern

Monarchs and jurisprudents went back to an instance as old as the one of classical Roman empire, almost forgotten in Europe: JUSTINIAN's legislation. (Later on we may realise how different a perception of the Roman-Byzantine archetype they had, depending on what formed the basis of their experience: the dismembered variety of customary laws on the European Continent, or the uniform royal administration of justice on the British Isles. For divergent experience could see different traditions in the same historical roots, thus giving birth to differing traditions.[42])

Axiomatism: drafted and applied as a system

The solution was to design legiferation in the spirit of the a x i o m a t i c ideal of s y s t e m so that the aggregate of all individual norm-enactments could be organised into, and applied as relevant parts of, a system. The idea of such a system proved to be rather specific from a systemic point of view as well, since it could qualify as a system at all only for the reason that its individual provisions were promulgated together as parts of one consolidated act. The above codificatory idea suggests that what in legislation was enacted as a total sum of rules was simply considered a system. Or, both the process and its outcome proved to bear an ideological character, staying independent of actual contents. In the ultimate analysis, such a product is a system because it claims to be, and it operates as a system because the legal profession recognises it by operating it as such. All in all, it qualifies as a system since the legal profession actually

[42] Referring to the compilation undertaken by JUSTINIAN as the synonym for objectifying the law by committing it into writing, see, e.g., Bede [the Venerable] in *Historica Ecclesiastica gentis Angolorum II, 5 [Bede A History of the English Church and People* trans. L. Sherley-Price (Harmondsworth: Penguin 1968) 364 pp. on p. 108], who mentions *exempla Romanorum* when speaking of the barbarian *Laws of Aethelberht* (around 731 AD)—while it is known that he did not see (and might not have seen) anything like that: he heard about it at the most, distantly in space and time as about a one-time experience, through several intermediaries, practically as about a legend.

enforces it through its living practice as if it were, in every respect, conceived indeed according to the requirements of systemicity: presented in a sequence of general and particular rules, logically related to each other and ready for further breakdown. That is to say, the contingency built into the construction and structure of such a system is counterbalanced by judicial practice, which, secondarily positing —while applying—the law, actually forms a genuine system out of it. Paradoxically enough, any aggregate will transform into a real system if it is applied as a system consistently and recurrently.

The result needs to be derivable by the force of logical necessity, in an exclusively justifiable way

What does the idea of system consist of here? Systemic character is embodied, first of all, in that it is applied as if it expressed an internal logical consistency and necessity. So, it is applied in a way that it can result in nothing but one single decision, exclusively conclusive and fulfilling all requirements for justification. And also the operations within the system suggest a formalised and logified medium, as if the given result derived therefrom by the force of formal logical necessity, that is, in an exclusively justifiable way.

In a contingent regulation, gaps are necessarily also contingent

What is added to the notion of codification by the Enlightened absolutism is the idea of system as such. The pattern offered by JUSTINIAN in his *Codex Justinianus* was, however, contingent. For if there is a set within logic that is known to be contingent, the elements thereof will also be fully contingent. Consequently, the sub-set of elements missing from the set will also be contingent. That is to say, in an arbitrary aggregate in which the occurrence of the actual components is entirely arbitrary, even the set of missing components will be arbitrary. In other words, if the components in the set are called "law", and the missing ones "gaps in law", both the gaps and their fillings whatever way they were born must be arbitrary as well.

The *Landrecht*'s systemic ideal degenerated into casuism

In Enlightened absolutism, the idea of system transcended the pattern set by JUSTINIAN only in that it replaced the mere collection of norms within an incidental chaos by conscious and foreplanned norm-positing. No doubt that a system was thereby created in the sense of a provident,

thoroughly planned and coherent building, yet the implementation of its axiomatic ideal was only crowned with partial success. The doctrinal rigidity of the Prussian *Landrecht* gave birth to a non-viable gnome, and FREDERICK THE GREAT's attempts at a minutely accurate regulation degenerated into genuine casuism.[43] It actually fulfilled the requirements of an axiomatically built system through elevating practically each individual norm-proposition to the rank of axiom, instead of deducing the system from axiomatic premises, breaking it down gradually and consistently.

In consequence, independently of how much we strive after filling the casual g a p s, we cannot alter the contingency of the system itself. As soon as one gap is filled other gaps may emerge, because no comprehensive principle and in-built ground for further arrangement will be provided through filling any series, even on a massive scale, of individual gaps. To better understand this issue, we will use an

In a contingent set, filling the gaps will also remain contingent:

[43] From the tremendous mass of some twenty-two-thousand sections of regulation, quite a number apply only for picket- and board-fences respectively, and the instructions for cases of child-murder require more than a hundred paragraphs.

[minuteness involves the chance of rapid obsolescence]

"The editors of the *Landrecht*, not taking into consideration the fact that the demands of life cannot be forced into a predefined framework but must draw their nourishment from the enlivening principle of freedom, strove for pushing life conditions into thousands and thousands of minute paragraphs, so if one is eventually bound to look into the Prussian *Landrecht* will in any case »miss the wood for the tree«, as BLUNTSCHLI makes the appropriate remark. And as these thousands and thousands of minute rules compromised the demands of life rather than sanctioned them, […] we may easily see the reason […] why this Code became outdated within barely 20 years." "The ones who prepared the Code had to therefore attempt to create rules for every possible case; because it is most impossible to force those judges to be exhausted in mechanical activity who while being faced with the thousands and thousands of manifestations of life, are destined to untie the most variably complicated knots: the untenability of this major principle in the Code is obvious to an extent not to require any further proof." Sándor Daempf *A magánjog és tárgya* különös tekintettel a magyar általános magánjog codificatiojára [Private law and its subject, with special emphasis on the codification of Hungarian general private law] (Pécs: printed by Endre Madarász Jr. 1877) viii + 327 pp. on pp. 175–176 and 177–178.

expressive comparison. Let us suppose that we would like to hit certain circles on a target. We may agree to each shoot three times a round and afterwards see how many hits each of us had. Yet, in a less fair manner, we may also agree to use machine guns, leading even to the possible physical destruction of the entire target (just like late communist top *nomenklatura* rank and files in Hungary considered it hunting to chase the game in jeeps and shoot at it with machine guns). It might be a justified hope that shooting vehemently enough will increase the chance of hitting the target despite major dispersion. Returning to the pattern by JUSTINIAN: no system can actually be revealed from his Code. Nevertheless, what it displays is merely a total set of incidentalities. In such cases we may attempt to completely fill the gaps by destroying the target. There are no other alternatives. There is no genuine solution in law in particular, for law does not even have the clear physical outlines of a target. In conclusion, there are no available means of achieving a complete and gapless regulation in law without a genuine systemic idea and some minimum capacity of its breaking down in the background and/or without a systematic doctrine prevailing in the law's practical application.

only a principled regulation can offer a solution

In sum, the idea of system of Enlightened absolutisms makes an advance similar to blowing up the target, instead of shooting at it with individual bullets and counting the individual hits. Also the feasibility of gaps in law is thereby excluded, for the emergence of the question itself is excluded: did we have a hit at all? Obviously, this is a radical solution, requiring radical intervention. Instead of a fairly easy (yet unknown for the time) search for a solution in principle, the chance of any response is rather excluded by over-securing what is attempted as over-execution.

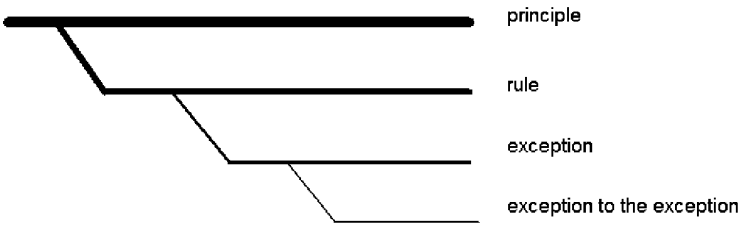
Reconstruction of the law from the general and breaking it down to a series of particulars:

2.1.4. The codificational ideal of the *Code civil*

After exuberant attempts (concluded by FREDERICK THE GREAT's *Preussisches Landrecht*),[44] for the first time in legal development a genuine systemic completeness was achieved

[44] See, by the author, *Codification*…, pp. 71–90.

by reconstructing the law in a logically coherent structure, gradually building up the law's system in a consistent way, starting from the general and breaking it down to a series of particulars—that is, as the hierarchically constructed and co-ordinated summation of fundamental principles, rules, exceptions to the rules and, finally, exceptions to the exceptions (*Figure 4*).



(*Figure 4*)

Regulatory completeness in principle

The axiomatic construction could only result in regulatory completeness, as the ideal of regulation proper strove for completeness.

Principled regulation makes the filling of gaps also principled

No wonder that in practice the enacted rules are not complete in and of themselves. It often happens. The decisive change is that there is a solution in principle and actual gaps are no longer in a position to refute the claim for completeness as a reasonable objection. From then on, no matter how true, it is useless to mention that, for instance, mining law, labour law, social law and other modern fields are missing from the system of the *Code civil*. Notwithstanding that entire fields of regulation are missing from its regulatory system, it still includes tacitly accepted or expressly recorded p r i n c i p l e s which define, through either setting the framework or direct wording, what the legislator actually intended to regulate. At the same time the same principles guarantee in practice that everything the legislator meant to regulate (that is, what is included "in principle" in the regulation) will unambiguously be enforced through the judicial process.

The regulation at any time is a function of the legislatory intention: the rest is the job of the judge

According to its official understanding, in this new culture of thought the legislator did everything he meant to do. The work is perfectly done on his part. Therefore, from this point on, it is exclusively the judge's job to draw all the conclusions that can be drawn at all from the legislatory enactment and to apply them to the case to be decided. (In the reverse sense, the judge may also reconstruct the situation as follows: although the legislator did whatever he wished to do, the work is still deficient, full of gaps. It is the judge's job to complete it by continuing the legislator's work. The question of deciding what path to choose for intellectual reconstruction concerns the judge alone. Thus, he may substantiate ideologically added claims at please alongside the above path of reconstruction, yet this will not affect the completeness in principle accomplished by legislation.)

With this, even a regulation by some instances can also be regarded as complete

Historically, it is a striking observation that in every legal culture, where the demand for and the ideology of a complete regulation were formulated, there was also a second consideration asserted, namely that the law—not against its generality but as a consequence of it—not only "c a n be applied", but "m u s t be applied" to individual situations. So, the initial presumption characteristic of the underlying legal culture manifests itself again: on the level of the entire law and order, the completeness in principle of the positive regulation is ideologically presumed, accompanied by the further assumption that new laws (entering and also shaping the regulation) are issued as additional components to the aggregate of norms organised into a system.

Gaplessness of law: denial of justice is prohibited

From this concept of system an entirely new choice is derived as well, creating some sort of basis for further ideological options in application. It concerns the practical consequences of the declaration that there are no gaps in law. For the law in its given wording has already provided a f u l l response and this is what to rely on when making a decision, perhaps building on the exception to the rule, or, as the case may be, on the rule itself. Whenever there is no rule directly applicable, one may argue starting from assessing previously established general principles. Based on that assumption, we shall also accept it as a response by the

system that the system does not provide any answer to the issue to be decided now in law. It complements the formal prohibition of "denial of justice" as sanctioned by the French *Code civil*. As known, the Code did not prescribe at all that decisions of merit shall be made and legal actions admitted in every case, but it provided that the judge who rejects to administer justice by the allegation of the law's silence, obscurity or insufficiency is to be found guilty in the offence of "denial of justice".[45]

Firstly, an age of exegesis

This is the age of e x e g e s i s , a true mirror (refusing any compromise) of the proper spirit of continental law, with overwhelming mistrust towards any social spontaneity, which only believes in what is fixed and in its rigid, mechanical operation, in what is logified but knows no excuse, no difference, no consideration of additional circumstances, i.e., in formal necessity and predetermination only.[46] For that what matters is the letter of the code, the implementation into practice of what has been posited as a behavioural pattern, and the jurist is only aware of his task in so far as he

[45] "Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité et de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice." *Code civil* § 4. The conclusion is evident: "this empowers the judge to fill the gaps in law, so to say permitting the usurpation of legislative power"—Chaïm Perelman writes in his *Droit, morale et philosophie* (Paris: Librairie Générale de Droit et de Jurisprudence 1968) vii + 147 pp. on p. 125 [Bibliothèque de Philosophie du Droit]—, while, in compensation, this new scheme obliges him to justify his decisions. In its posited contexts, see Louis Favoreu *Du déni de justice en droit public français* (Paris: Librairie Générale de Droit et de Jurisprudence 1964) 582 pp. [Bibliothèque du Droit Public 61]), and cf. also Máté Paksy 'Quelques réflexions sur la jurisprudence relative à l'article 4 du Code civil français' in *La notion de justice aujourd'hui* [Séminaire international] coord. Petre Mares & Jean-Pierre Clero (Târgovişte: Valahia University Press 2005), pp. 75–85.

[with filling of gaps unrestricted]

[46] A contemporary author describes expressively that "The text offers safe principles; however, as soon as we move away from it, everything becomes necessarily uncertain". Laurent, p. 109, quoted by Paul Dubouchet *La pensée juridique avant et après le Code Civil* 4[e] éd. (Paris: L'Hermes 1998) 492 pp. on p. 176.

handles actual situations of life merely as a subject of application, with empathy exclusively towards the law.[47]

Secondly, free law finding: law as an aggregate of gaps

Parallel to the promulgation of great modern codes, at the end of 19th century debates revolving around the completeness of regulation and the feasibility of filling its gaps arose also in Hungary. As opposed to the mainstream view excluding gaps from the law, the reverse statement was also formulated, saying that the system itself is nothing in fact but an infinite sequence of gaps. (This latter realisation formed the ideological basis for the so-called "free law" movement, fashionable in Europe at the end of the 19th century and at the beginning of the 20th century.) Close to the end of his life, GEORGE LUKÁCS argued in his *Ontology of the Social Being* that as soon as societal development reaches a given level, denying it and returning to any previous stage is possible only on ground of this particular level. That is, for example, we cannot return to a Robinsonian way of life without assumed cognisance and actual negation of the societal development level we have reached up to that point. We simply cannot step backwards in a way as if the memories of our past existence were erased. Well, the ideology lies in the achievement of modern codes providing regulation, which build upon principles. Therefore, stating that law is nothing

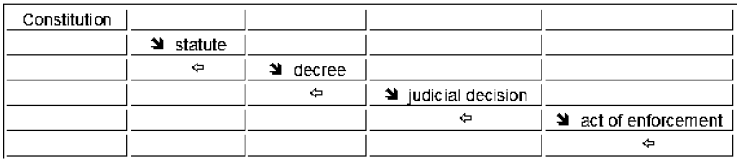
[*more geometrico*]

[47] "Law is nothing but the written statute. Therefore the task of the faculties of law is to teach how to interpret the law. Its method is necessarily deductive. The articles of the Code are theorems each, and the connections between them need to be revealed and the conclusions thereof need to be drawn. Thus the lawyer is just a geometer, nothing else". Louis Liard *L'enseignement supérieur en France* 1789–1889, II (Paris: Colin 1894), p. 397. – This is nothing else than "a geometric exposition of clearly abstract formulas"—as RAYMOND SALEILLES is cited by Léon Husson 'Analyse critique de la méthode de l'exégèse' in *Archives de Philosophie du Droit* 17 (Paris: Dalloz 1972), p. 126—, which is at the same time the expression of "French nationalist rationalism and anti-historic taxonomicity". Dubouchet *La pensée juridique*…, p. 172. – As Antonio Gambaro 'Codes and Constitutions in Civil Law' in *Italian Studies in Law* 2, ed. Alessandro Pizzorusso (Dordrecht, Boston, London: Nijhoff 1994) remarks on p. 99, note 61, "the continental lawyer remains, at the bottom of his heart, profoundly tied to the exegetic method, despite his formal adhesion to other methodologies". Cf. also P. Rémy 'Éloge de l'exégèse' *Droits* 1 (1985), pp. 115–123.

but an aggregate of gaps is far from being a denial of systemic completeness, but is an alternative answer derived from the same idea of system. One can state that gaps may eventually emerge. On the other hand, one can also state that the total system of regulation is basically a sequence of gaps comprised by the system only in principle to qualify them as its parts. Although, at the moment we admit that the given system of law comprises in principle what the law intends to regulate, the recognition of the underlying thesis is already accomplished.

KELSEN'S *Stufenbautheorie*: unity of law-making / law-application, as well as of construction / operation

HANS KELSEN's *Stufenbautheorie* is built on this particular realisation. According to him, law-making and law-application cannot be separated from one another into two independent entities, notwithstanding that the old paradigm built upon the duality and sequence of "construction" and "operation" suggested so. Within the system of law—from the fundamental constitutional norm [*Grundnorm*] conferring validity on the entire legal arrangement, via the laws, decrees and judicial decisions, up to the enforcement act of individual decisions by the ultimate authority—every intermediate step is double-faceted, qualifying both as law-making (to fill the vacuum by its own particular regulation in full discretion, consecutive to the basic settlement through superior principles and norms) and law-application (to implement the limitations prescribed by superior norms in the reverse direction). Thus, with the exception of the two extreme poles, every intermediate step qualifies f i r s t l y as law-application and s e c o n d l y as law-making (*Figure 5*).



↘ = law-application
⇦ = law-making

(*Figure 5*)

Regulation: filling with some instances a vacuum which is otherwise free of law

We were not mistaken much in microphysics when we stated that air is essentially a vacuum somewhat disturbed by material pollution. As a vacuum it is void of material substances, although nitrogen and oxygen, as well as the various granules of genuine polluting substances constantly mix with it. In the same way we might state that the area covered by codificational regulation (e.g., the hundreds of rules in the *Code civil*) is a sort of pollution successfully challenging the vacuum, the area free of regulations.

Law does not respond through its rule but through its system: this is in what it is gapless

Accordingly, the new achievement of development is the idea of s y s t e m itself. Hence the law offers a response to relevant questions not only through its individual rules (or, in case of gaps, remains silent not only through the lack of an individual rule) but also through its system proper. In law conceived as a system there can be no gaps whatsoever, at least in principle. What may happen is that the parties addressed a question to the law which is not its case.

2.1.5. Turning point in the way of thinking

With measure grown into an independent factor, the person to be measured himself can become quite incidental

Analysing thought patterns we have arrived at a definite turning point. As we could see, there was no actual independent measure in case of the lead measuring rule of Lesbos. We could realise that, to some extent, the measure was created in result of the act of measuring. Gradual development in the West has arrived to claim ideologically the e x c l u s i v i t y f o r m e a s u r e s . Everything initially created for man's service was thereby successfully liberated from him—and from the concrete situation at any given time even to his detriment. The excessive objectification can turn the measure into an independent factor so much that even the person performing the act of measuring can become entirely irrelevant. By routinishly using ready-to-take measures, the act of their application can lose any creative contribution whatsoever. The measure of measuring has become externalised and externally identifiable, moreover, tangible in the strict sense of the word. Hence it is freely available to anyone, but can easily degenerate into one dominating everyone. At any rate, thrust to the other extreme, the measuring has become a sheer function of the measure.

2.2. THE EXAMPLE OF GEOMETRY

Without getting involved too much with the issues falling out of the reach of law, let us attempt to follow the same methodological considerations and lines of development through the example of geometry. Anticipating the result, we will witness the relativisation of both measure and measurement along the evolution of geometry on a global scale.

Geometry as master science:

First of all, let us mention that geometry, together with astronomy, was the science-pattern for the Greeks—just as it was in Mesopotamia, and in a number of Near Asian cultures based on agriculture, or in Antiquity in general. Namely, awareness of the meteorological prospects represented a crucial issue in those times for the proper cultivation of land, this being indispensable for them to duly plan when to sow and harvest. Geometry was also used for mapping out and assigning the lands, mainly to be able to plan irrigation and construe the irrigation networks and devices. All measurements concerning both the sky and the earth were a function of their geometrical knowledge.

ideal system

Therefore, it was not ordained by chance that the first ideal system ever invented by man serving as a pattern for science all through the millennia, was geometry.[48]

[48] For the whole range of issues, see David R. Lachterman *The Ethics of Geometry* A Genealogy of Modernity (New York, etc.: Routledge 1989) xiv + 255 pp.; for a full overview, Jeremy Gray *Ideas of Space* Euclidean, Non-Euclidean, and Relativistic, 2nd ed. (Oxford: Clarendon Press 1989) xi + 242 pp. [Oxford Science], on EUCLID ch. 2, on BOLYAI and LOBACHEVSKY ch. 10, for the EINSTEINian turn, part 3; for an overview of non-EUCLIDean developments, Roberto Bonola *Non-Euclidean Geometry* A Critical and Historical Study of Its Developments, trans. H. S. Carlslaw (New York: Dover 1955) xii + 268 pp.; for the professional treatment of all these issues, Evert W. Beth *The Foundations of Mathematics* A Study in the Philosophy of Science, 2nd rev. ed. (Amsterdam: North-Holland Publishing Company 1968) xxvi + 741 pp. [Studies in Logic and the Foundations of Mathematics], particularly at pp. 150–154; and for the background, Hermann Schuling *Die Geschichte der axiomatischen Methode im 16. und beginnenden 17. Jahrhundert* Wandlung der Wissenschaftsauffassung (Hildesheim & New York: Olms 1969) 199 pp. [Studien und Materialen zur Philosophie]. In a

2.2.1. EUCLIDean geometry

EUCLIDean geometry is the first (and already perfect) formulation of axiomatic systems.

Axioms / theorems

An axiomatic set of propositions or enactments consists of two kinds of components: a x i o m s and t h e o r e m s. Axioms are the logically formulated general theses which constitute the system. As basic propositions they are of a foundational character, inasmuch as they define the system. According to the system's presuppositions, all further proposition can be nothing but that which has been logically derived from the axioms. This definition already defines the theorems as well. Theorems are propositions that derive from the axioms out of logical necessity.[49; 50]

classical presentation, cf. also Blaise Pascal 'De l'esprit géométrique' in his *Oeuvres complètes* III par Jean Mernard (Paris: Desclée de Brouwer 1991), pp. 360–437 [Bibliothèque Européenne].

[axiom + theorem]

[49] According to its classical definition, on the one hand: *αξιωνα* = "Telles sont des choses qu'on appelle axiomes, que tout le monde considère comme indémontrables pour autant que tous regardent comme se comportant de cette manière, et à l'égard desquels nul n'élève des doutes; car on appelle souvent simplement axiomes aussi des propositions quelconques ayant une autorité immédiate ou besoin de quelque rappel." [Proclus (F) 193, 15–17] „Dies sind die von allen als unbeweisbar erklärten Axiome, insofern ihre Richtigkeit von allen anerkannt und von niemand in Zweifel gezogen wird.". Proklus Diadochus [410–485 AD] *Kommentar zum Ersten Buch von Euklids »Elementen«* übertragen P. Leander Schönberger, hrsg. Max Steck (Halle: Deutsche Akademie der Naturforscher 1945), pp. 219 and 171 [302], and Proclus de Lycie *Les commentaires sur le premier livre des Éléments d'Euclide* trad. Paul Ver Eecke (Bruges: Desclée de Brouwer 1948), pp. 171 and 68, respectively; on the other hand: = '*das Geforderte, die Forderung*' [Proclus (F) 76, 17–19]: „Wo es sich also um ein allgemeines Akzidens handelt, das der gesamten Materie eigen ist, da ist von Theoremen zu sprechen." *Ibid.*, p. 221. Cf. Árpád Szabó 'Anfänge des euklidischen Axiomensystems' *Archive for History of Exact Sciences* I (1960–1962), pp. 37–106, especially at pp. 65 and 67. Its first English occurrence defines as follows "The Theoremes, (whiche maye be called approued truthes) seruing for the due knowledge and sure proofe of all conclusions […] in Geometrye." Robert Recorde *The Pathwaie to Knowledge* (1551), quoted in <http://mail.mcjh.kl.edu.tw/~chenkwn/mathword/t>.

[axiomatic definition of a system]

[50] "An axiomatic system is defined when we select some of the sentences of a formal language as a x i o m s, and then take the set of all those remaining sentences which follow from the axioms by some concept of

With the EUCLIDean system of geometry, a new and previously unknown way of thinking appears, in which the basis of our knowledge on what human methodical cognition may rely later on, that is, the principle accepted as a starting point unprovenly, is separated from the theses derived from it.[51] In its terms, one proposes a f i n i t e number of theses and thereby creates a c l o s e d system of thought, concomitantly declaring all the ultimate and incontestable truths valid within the system. Nothing further is needed, nor is anything left in need of explanation. It is entirely enough to state the axioms. Once this statement is made everything else will derive from the axioms—out of the aforementioned logical necessity, that is, without further active human intervention. This also means that stating the axioms is enough to be able to control the entire system. Within deductive logic the proposition of axioms defines the whole system. The axiomatic system is p e r f e c t and c o m p l e t e in and of itself.

By proposing axioms, the system is accomplished as perfect and complete

The set of axioms and theorems adds up to a construction of thought that is not only unchanged, but u n c h a n g e a b l e . Since if we state that the theorems derive from the axioms, we thereby also state that the axioms are ultimate propositions not themselves derived from anything, but allowing derivation. An axiom cannot be reduced to any proposition whatsoever, at least within the system. In other words, axioms are the ultimate truth-propositions of a system. The system is unchangeable because regardless of whether we enumerate all the theorems or not, they are still logically inherent in the axioms. We have seen, however, that the axioms are irreplaceably given in the system, insofar as if either of them could be deducible from another, this would

unchangeable, because the axiom is the ultimate truth-proposition

logical validity as the t h e o r e m s of the axiomatic system." Robert John Ackermann *Modern Deductive Logic* An Introduction to its Techniques and Significance (London: Macmillan 1970) viii + 261 pp. [Modern Introductions to Philosophy], p. 182.

[51] According to Árpád Szabó *A görög matematika kibontakozása* The rise of Greek mathematics (Budapest: Magvető 1978) 250 pp. [Gyorsuló idő], p. 119, science is born with the separation of theses underlying deductivity from ones drawn as the former's conclusion.

immediately cause its degradation into a theorem. If one of the theorems proved not to be deducible from an axiom or logically related to another theorem in a manner such that both are derived from an axiom, then the system as such would necessarily collapse.

which needs application exclusively

We shall see examples below for this dilemma and option, shedding some light upon this way of thinking proper. In the development of human thought, its inspiration represents a new recognition, namely that the only thing to do with a system is to apply it. It can only be acknowledged and used, but not contested. As soon as it is perfected as a system, it is already complete in every respect and for all purposes; and it is definite, moreover, perfect. If anything were taken out of the system, it would necessarily cause it to collapse as a whole. With anything added to it, an entirely new system would grow out of nothing. Adding to or taking out of the system we unavoidably re-posit or de-posit it as well. The system is by definition an unchangeable and irreplaceable entity as long as it prevails as a system. Just like a PETRARCA-sonnet: perfect and definite both in structure and formation. Any alteration whatsoever would drive the whole construct to collapse. It can be solely built in this particular way and no other. All of its elements (phonetic, metric or rhymic) are forged into one strict unity. That is, it is not only factually completed and perfect as it is, but unchangeable with respect to the future as well.

System: sufficient in itself because logically necessary

Thus, the system is complete and perfect. Not only is it definite, but it is also s u f f i c i e n t in and of itself because it incorporates gapless l o g i c a l n e c e s s i t y in all of its aspects and directions.[52]

[52] ERNŐ SARLÓSKA speaks of the confessionality of scientific methodology—"In infinite time nature itself is infinite, and so is the book of life: *mathesis* is the candle, and we cannot read without it being lit."—in his 'Bolyai Farkas eszmevilága' [Farkas Bolyai and his world of ideas] *Tiszatáj* 29 (1975) 2, pp. 42–44.

2.2.2. Challenge by BOLYAI and LOBACHEVSKY

What is the exemplary aspect to BOLYAI's and LOBACHEVSKY's achievement? What did one of them accomplish in Temesvár (Transylvania) and the other in Russia?

Finding a new variant within the system creates itself a new system

Our answer might seem too laconic: both of them plainly analysed the potentialities inherent in geometry. Among other things, they again raised the issue of what answers are provided by the EUCLIDean system to relevant inquiries, and what were the answers to these formulated by geometers through the past millennia. Both BOLYAI and LOBACHEVSKY considered a number of long-routinised questions and answers, such as the ones concerning the shortest path between any two points, or the relationship between any two parallel lines. They happened to arrive at realisations that marked a new epoch simply by relating to the above issues. Within the EUCLIDean system they were able to identify a theorem that proved not to have been derived from the axioms.[53] May we emphasise again that dealing with the whole problem is merely a game, properly speaking a mental experiment. Whatever the answer, we might say, it is all the same. Obviously, neither the questions nor the answers would provoke any sensation in everyday life. Had they stated something entirely new, it would still not have made much of a difference. Had they been arisen in daily conversation, they would by no means have brought the conversation to a halt. However, the situation is different when questions of principle are involved, these being the

[BOLYAI's recognition in geometry]

[53] "He attempted to prove the axiom indirectly, i.e., to assume that the statement of the axiom is not true, and to derive some contradiction from this. […] JÁNOS BOLYAI […] came to the conviction already in 1823 that these strange geometrical theses add up to a geometrical theory free of contradiction, to a novel geometry. […] According to this the axiom of parallelism is independent from the other EUCLIDean axioms: by accepting it, the EUCLIDEan geometry will emerge in negation of the novel non-EUCLIDEan geometry; by ignoring it, the absolute geometry will emerge involving the common elements of the two geometries." Ákos Császár 'Magyar származású matematikusok hozzájárulása a matematika fejlődéséhez' [Contribution of mathematicians of Hungarian origin to the development of mathematics] *Természet Világa* (1998), special issue III, pp. 3–10.

core issues for an axiomatic system, the only genuine questions that matter.[54]

creating a new world out of nothing, relying purely on thoughts

BOLYAI, when he completed his analysis, surprised by his own realisation, shouted with joy: "I have created another new world out of nothing."[55] Asking back: what is the "nothing" here? And what does the "new" stand for? Well, as to what concerns his start from "nothing", relying purely on his thoughts, he had created something that did not exist before. And as to the "another new world": he had mentally constructed something previously unknown, as it had not been posited. Needless to say, it could not have been formulated at all, since the EUCLIDean geometry embodied a completely perfect and closed system. Now, however, their achievement dramatically challenged the system: BOLYAI and LOBACHEVSKY, parallel in time albeit independently, offered an alternative equal in value through their systemic answers to systemic questions. Within axiomatism this meant the creation of something new, and not simply its copying or continuation.[56]

[its novelty]

[54] "What was damaged is not the truth or validity of a geometrical axiom; not even a claim of such an axiom for evidence, eternity, or absolute certainty. It is something much more sacred that collapsed: the non-EUCLIDean revolution invalidated the law of the freedom from contradiction." Imre Tóth *Bécstől Temesvárig* Bolyai János útja a nemeuklideszi forradalom felé [From Vienna to Temesvár: The way of János Bolyai towards the non-Euclidean revolution] (Budapest: Typotext Elektronikus Kiadó 2002) 123 pp.

[55] From JÁNOS BOLYAI's letter to his father, FARKAS BOLYAI: "now I must not tell anything but that I have created a new, different world out of nothing; all that I had sent [to you] until now is like a house of cards compared to a tower. I am convinced that it will be not less to my credit than if I had invented something". Tibor Toró '*Habent sua fata*: Bolyai János 1823. november 3-i temesvári levelének sorstörténete' [History of János Bolyai's letter from Temesvár on November 3, 1823] *TermészetVilága* (2003), special issue I [devoted to Bolyai] in <www.chemonet.hu/TermVil>.

[description of reality leading to an abstract theory]

[56] "Until JÁNOS BOLYAI, geometry used to describe the surrounding reality, inseparably from it. It was points, straight lines, planes what our views inflict on us powerfully. We should not forget that it was only for reasons of order that EUCLID's axioms were born; in order that we can orientate ourselves in the chaos of concepts and statements by clarifying what is obvious and what needs to be proven. […] It was BOLYAI to transfer

Any *appendum* or *correctivum* gives rise to a new system

In the realm of axiomatism, thinking is conceivable in one way only. Accordingly, if an answer qualifies as an *appendum* (as previously not included in the system) or a *correctivum* (as changing the basic propositions of the system) in its relation to the system, this will utterly transform the system itself into an entirely new one. Historically speaking, the consequences for geometry could be easily foreseen. At the same time, it also anticipated the prospects of epoch-making new answers for general human thinking.

Once the fact that partial answers to partial questions may generate a new system is accepted, we are bound to accept some further consequences as well.

The world's description is neither objective and final nor there are several competing ways for it:

(1) First and foremost we ought to realise that the world can be d e s c r i b e d , at least in principle, i n m o r e t h a n o n e w a y . Thus an "objective" or "in-and-of-itself sufficiently true" description is by definition excluded. For the same reason this description is neither a definite entity that would put brains to rest and end science. On the contrary, there are many competing ways to describe the world. Descriptions (and alternatives to them) that do not allow us to judge other ones are also imaginable. In such cases it is up to the history of science to respond *a posteriori* sometime in the future to the reasons why scholars and scholarship have preferred certain descriptions to the others. Why was COPERNICUS' helio-centric world-view not accepted earlier, surpassing the geo-centric one? And when the change-over came about, what were its underlying reasons?[57]

geometry into the realm of abstract theories. He has shown that logically more than one geometry is possible." András Prékopa 'Bolyai János forradalma' [The revolution by János Bolyai] *Természet Világa* (July, August, September 2002).

[57] In case studies, see, e.g., Arthur Koestler *The Sleepwalkers* A History of Man's Changing Vision of the Universe (London: Hutchinson 1959) 624 pp.

less contradictions + greater explanatory force + more contexts + less entities

Scholarship usually favours theories
(a) with less contradictions,
(b) of greater (stronger or deeper) explanatory force, and
(c) offering explanation for more features and aspects of the world,
(d) without presupposing (as principles of existence, construction, or functioning) more than the indispensable minimum of independent entities.

Occam's razor: only as many substances as are indispensable for the explanation

Let us resort to an example that has majored the history of philosophical thought over centuries. As is known, systems of thought are erected for the purpose of being able to explain the world by means of interrelated propositions so as to gain a result free from contradictions, that is, coherently and consistently. This holds for all kinds of cognition, including the eventual contemplation of the existence of God. If in a scientific issue the existence of God is acknowledged, then no substance can be more than a derivative from and manifestation of some pre-existent godly essence. Henceforth the question of "should we posit the existence of God, and how should we do it?" will no longer be isolated but will depend on our chosen natural scientific *Weltanschauung* of understanding the world. We may ask in another manner: why should we avoid positing the existence of God, if we cannot arrive at an adequate answer without it? Or, the reverse: why posit the existence of God, if an adequate answer can be found without it? A methodological consideration of this kind was already formulated in the Medieval era. William of Occam was the first to raise it—hence the term *Occam's razor*—, suggesting that we should not theorise with more substances than absolutely indispensable, moreover, it is not worth doing so for the sake of keeping theoretical purity by separating the levels of analysis.

(duality of the Kantian Is / Ought, facts / norms)

Kantian conceptualisation can also be mentioned here, as being a tradition that explaining social complexity in terms of a scientific worldview is built upon the duality of 'Is' and 'Ought', or 'facts' and 'norms', respectively. Up to the post-modern period, this represented the funda-

mental paradigm of social philosophising on the European continent. Obviously, no argumentation can be relevant in itself for or against such a world-view. Only the proposition of a world-view that provides more complete, more consistent and contradiction-free answers, devoid of the world's conceptual dichotomisation, is capable of transcending this paradigm.

In sum, "another new world" can be mentally construed indeed. We may conclude as a lesson of methodology that, in principle, the world can be described and interpreted in more than one way.

World-description as self-description

(2) A further conclusion can also be drawn: can we be sure that it is the world indeed that we are describing by interpretation? Or, in other words, yet still speaking about the same subject, is it conceivable to describe the world from the same perspective in more than one way, all of them to be true at the same time? Or, should we rather conclude that when describing the world we inevitably describe something else as well? Is it possible that when describing the world we necessarily commit ourselves also to s e l f - d e s c r i p - t i o n , describing how we can at all imagine the description of the world, and, as part of it, also the theory-builder's approach to and understanding of the world? Accordingly, no description is capable of describing the 'world' in exclusivity, since it unavoidably d e s c r i b e s i t s e l f as well. Then, as reflected onto itself and applied to the world, the description projects itself back onto the 'world', presenting it as the actual description of the world.

A system of axioms is perfect only from inside, being incidental from the outside

An essentially new approach derives from these considerations, differing in some of its substantial parts from the EUCLIDean pattern. No matter how axiomatic a system is —furthermore, exactly due to being axiomatic—it is only perfect when viewed from inside, and logically necessary when starting from its own axioms. The axiom itself is n o t of any logical necessity (neither the selection of its underlying proposition nor its positing). From an external point of view, it is just one of the possible worlds and nothing more. Thus the creation of "another new world" is manifest in

the choice between equally eligible incidentalities and the presentation of the selected variant as perfect and logically necessary.

Theory is an imaginary world-creation, a mental experiment

This realisation involves another hidden one as well, which again insinuates a change in paradigms. This concerns conceptualisation, namely the fact that conceptual systems, be they as perfect as possible from an internal point of view or had they the most convincing explanatory force when describing the external world, can merely be regarded as mental experiments. They are nothing but games, which we make use of *faute de mieux*. In absence of anything better, conceptual tools can be used to represent and record our impressions and knowledge (or, in short: experience) of the world. Their ontological status, however, cannot be much different from what is due to imaginary world-creations. Nevertheless, when they have a strong convincing effect and can be successfully applied in human practice, even these imaginary world-creations may grow into actual influential factors, that is, into ontological components of social practice, and thereby parts of the artificially made second nature as irrevocable elements of the human environment.

2.2.3. Einstein's revolution

The truth of already known evidences is a function of unknown factors

Albert Einstein expanded space. He made the truth of already known evidences the function of unidentified, and furthermore, unknown and unformulated realisations. He proved that, in the same way the position of travellers on a train or our place on the Earth is a function of both our motion in relation to one another and the velocity of the train as well as of the distance covered by the celestial body carrying it, there might also be extra dimensions in space that would not only make apparent evidences dependent on the position taken but make them the functions and aspects thereof and of their places occupied in the total world. For instance, curved space alters our previous evidence deriving from classical theories of space (thus transforming them into sheer illusions or hypostatisation) in the same way as new realisations concerning time-space introduce new dimensions into our calculations relying upon the traditional

understanding of time. This is to say that our entire knowledge on the universe—the logical harmony of which[58] he firmly believed and the reflection of which he sought in theory—had all of the sudden become relative.

EINSTEIN's recognition, once its consequences were generalised, suggests a truly revolutionary turn. Since in terms of this recognition, nothing said, realised or posited, not even as a mental experiment, can be valid in and of itself. If this be true, then neither will our previously acquired knowledge be more than an a s p e c t (function and derivative) of individual existence. In the final analysis, whatever we regard as a "universal" truth is the mere function of our respective p o s i t i o n s in the world, of how we perceive and judge our place in the world.[59]

and aspect of our existence and positions in the world

2.3. THE EXAMPLE OF THINKING

The major methods and trends in thinking and world-construction place us again at a crossroads. Even if, according to their subject, they do not deal with law or moral philosophy, they might bear sufficient legal and moral aspects.

With the relationship between mankind and man-made rules in mind, we have two alternatives to choose from, and we will later name these autonomy and heteronomy.

[58] As he wrote to his pupil, ERNST STRAUSS, he was interested in the issue of whether God could have created a different world, as well as in responding to whether the requirement of logical simplicity could allow any sort of variety in the world. Albert Einstein 'Autobiographical Notes' in *Albert Einstein* Philosopher-Scientist, ed. Paul A. Schilp (New York: Tudor 1951), p. 63.

[internal necessity of the world?]

[59] All of this grants environmental and, moreover, personal emphasis to human manifestations due to the position taken. EINSTEIN therefore warns us, by referring to rationalism, providing the common background, that we cannot draw any conclusions whatsoever without falling from the grace of rationality. Albert Einstein *Lettres à Maurice Solovine* (Paris: Gauthier-Villars 1956) xiii + 139 pp. and in particular at p. 129.

Autonomy: internal determination without external constraint

In moral philosophy we call a behaviour a u t o n o m o u s if our actions are (in the last analysis) the exclusive function of our own moral determination and responsibility. Or, in case of rules observed, the function of our understanding of rules and thereby of our realisation of values to be implemented by rules. In such case, no constraint conceived of as external will play a significant role in determining actions.

Heteronomy: we are points of reference for external facts at the most

Opposed to that, a behaviour is called h e t e r o n o m o u s if our apparently moral decision turns out to be based on an independent factor, to which we are simply morally subjected. In such a case, we serve at most as points of reference; and this is mostly only because the decision concerns us. Our decision cannot be anything but heteronomous in the case of orders carved into stone of the Old Testament, for instance. For if MOSES and the order communicated through him are strong enough, we may and can act in no way other than in accordance with what is written in the Ten Commandments—unless we want to take the risk of losing membership in the community, our expulsion from which would completely destroy our social and moral characteristics. Facing the commandments emanating from God, we have simply no other choice. The stone in front of our eyes reminds us that the only thing we need to do is to comply with its orders. This way, our actions will be heteronomous—as opposed to the case in which we have a genuine choice when making decisions freely (within certain bounds) and conscientiously after the moral arguments for and against any alternative courses of action have been considered.[60]

[60] The KANTian concept distinguishes exclusively between control by own law and the law of others [*auto/hetero-nomo*] (e.g., John Hittinger *Modern Philosophy* XI.B.1.3.: »Kennington on Kant's *The Foundations of the Metaphysics of Morals*« <www.icu.catholicity.com/c02111.htm>), while the distinction suggested above applies this as restricted to the ways in which a given text may be intended to confer us normative meaning.

2.3.1. Autonomy

New Testament: discourse with the necessary conclusions drawn

2.3.1.1. New Testament argumentation The first historical example of this for us to treat here is the New Testament,[61] which narrates the life and teachings of JESUS CHRIST. As we know, he was only thirty-three when he died, after having taught in a rabbinical environment with rabbinical socialisation. To put it in lay terms, what we find in the New Testament is that JESUS CHRIST gets involved in different debates in various situations, and at the end draws some conclusions for Himself and his audience, which usually point out the absurdity, or even the untenability, of the given conditions.

as a collection of parables

From the perspective that interests us, the New Testament is an illustration of selected situations, and the moral choices and decisions shaping the world-view underlying them. Doing something in given situations is generally followed by drawing (mostly normative) conclusions of a moral character. Sometimes JESUS CHRIST talks about hypothetical situations that might have occurred or actually did occur with others, which also serve as a basis for moral lessons. He speaks about these as if he were a rhetor, a teacher of his age, a rabbi among his fellows, that is, with the means of impressivity.[62] Put simply, from this perspective the New Testament can be best taken as a collection of p a r a b l e s .

[61] For a first summary of the trends in linguistic and sociological criticism of the New Testament, see *Text and Interpretation* New Approaches in the Criticism of the New Testament, ed. P. J. Hartin & H. Petzer (Leiden, etc.: Brill 1991) viii + 326 p. [New Testament Tools and Studies XV]. For a general philological background, Benjamin Kedar *Biblische Semantik* Eine Einführung (Stuttgart, etc.: Kohlhammer 1981) 214 pp. writes on p. 189 that "Here we have a book with a lot of words, yet, if we think further, »there is a whole book behind every single word« (RÜCKERT)." ["Von uns liegt ein Buch mit vielen Wörtern, aber auch »in jedem Wort, wenn wir's erwägen, liegt ein ganzes Buch« (Rückert)."]

[62] According to, e.g., István Kosztolányi 'Jézus saját szavainak kérdése' [The question of Jesus' own words] *Vigilia* XL (1975) 8 on p. 513, "JESUS' method of teaching might have been similar to that of the rabbies. JESUS formulated what he told first of all to be easily remembered, therefore he used rhythm, opposition, play of words and witty formulation."

The example derives from some doctrine but it is not axiomatised from which

The examples given in them underline an important aspect, namely that the example differs from the t h e s e s themselves proposing or negating in a way generalisable in conceptual schemes and thereby allowing the establishment of their cases through logical subordination, and also from the d o c t r i n e as well, comprising the set of such theses logically organised, in that the example is a narration calling to nothing but meditation. Naturally, it derives from some sort of a set of theses taken as a doctrine, but it is neither obvious nor axiomatically defined from which one. The parables in the New Testament elucidate a situation or an event in which JESUS CHRIST expressed His state related to it, offering lessons that we can draw therefrom as messages for ourselves in our respective situations.[63]

Its textual representation can neither be built into a doctrine, nor treated doctrinally as a formulation of dogmas:

The specifically methodological conclusion we draw from this is that the texts in the New Testament as a collection of parables conceived metaphorically can n e i t h e r be built directly into a doctrine, n o r treated doctrinally as a formulation of dogmas. For a text, to be elaborated as a subject of doctrinal study, must display a minimum axiomatic rigour with defined notions and a set of clearly delimited and also logically mutually related concepts. Only if this minimum requirement is satisfied can the propositions in the text be formulated clearly enough to allow further propositions to be drawn from them as logically necessary conclusions (with the operations of systematisation, classification, conceptual and casual subordination, delimitation, inclusion and exclusion).

it offers lessons to be drawn by us, instead of logical conclusions to be simply derived

From the parables of JESUS CHRIST[64]—more precisely, from everything that happened to Him or was simply

[63] For more details, see, e.g., Nahum Levison *The Parables* Their Background and Local Setting (Edinburgh 1926) xxv + 253 pp.; Dan Otto Via *The Parables* Their Literary and Existential Dimension (Philadelphia: Fortress Press 1967) xii + 217 p.; and Morgens Stiller Kjavgaard *Metaphor and Parable* A Systematic Analysis of the Specific Structure and Cognitive Function of the Synoptic Similes and Parables qua Metaphors (Leiden: Brill 1986) 262 p. [Acta Theologica Danica 20].

[64] E.g., in an early approach of pastoral context, Alexander Balmain Bruce *The Parabolic Teaching of Christ* A Systematic and Critical Study of the

mentioned by Him,[65] and from the conclusions He drew for Himself and for us—the only question that can intelligibly be raised (and is therefore also scholarly defensible and justifiable) is "what l e s s o n can be learned from this?",[66] and not "what c o n c l u s i o n can be drawn from this?". For taking 'conclusion' in the strict (methodological) sense of the word, that is, in a logical sense, the t e a c h i n g s of JESUS CHRIST we have got to know and familiarised by now

Parables of Our Lord, 2nd ed. (London: Hodder and Stoughton 1887) xii + 515 p., William Oscar Emil Osterley *The Gospel Parables* in the Light of their Jewish Background (London: SPCK 1936) viii + 245 pp. and Joachim Jeremias *Parables of Jesus* [Gleichnisse Jesu] rev. ed. & trans. S. H. Hooke (London: SPCK 1963), 248 pp. as well as Kálmán Tóth *A parabolázó Jézus nyomdokain* Jézus példabeszédeinek gyakorlati magyarázata homiliákban [On the footsteps of Jesus speaking in parables: The practical explanation of the parables of Jesus in homilies] (Esztergom: Laiszky János Könyvnyomda 1927) 298 pp.; as well as, in a hermeneutical context, N. Perrin 'The Parables of Jesus as Parables, as Metaphors and as Aesthetic Objects: A Review Article' *The Journal of Religion* 47 (1967), pp. 340–347, Heikki Raisanen *Die Parabeltheorie im Markusevangelium* (Helsinki 1973) 137 p. [Schriften der Finnischen Exegetischen Gesellschaft 26], Warren S. Kissinger *The Parables of Jesus* A History of Interpretation and Bibliography (London: Metuchen 1979) xxiv + 439 pp. [American Theological Association Monograph Series 4], Robert Walter Funk *Parables and Presence* Forms of the New Testament Tradition (Philadelphia: Forress Press 1982) xi + 206 pp., Herman Hendrickx *Parables of Jesus* Then and Now [Manila: Society of St. Paul 1983] (London: Chapman 1986) 304 pp. [Studies in the Synoptic Gospels], *Les parables évangéliques* dir. Jean Delorme (Paris: Cerf 1989) 452 pp. [Lectio divina 135], Brad Yonry *Jesus and his Jewish Parables* Rediscovery of the Roots of Jesus' Teachings (New York: Paulist Press 1989) xv + 365 pp. [Theological Inquiries], and Claus Westermann *The Parables of Jesus in the Light of the Old Testament* trans. Friedemann W. Golka & Arastair H. B. Logan (Edinburgh: T&T Clark 1990) 211 pp.

[65] Their enumeration is given in Paul Ricoeur 'Biblical Hermeneutics' *Semeia* 4 (1975), pp. 27–145.

[66] PAUL RICOEUR writes in his paper above that meaning cannot be exhausted by any explanation, not even by »historical« interpretation. Our interpretation can only relate to our own life-situation, as the original interpretation too relates to the initial situation. Therefore the original meaning with the historical interpretation has a controlling function over re-interpretation in this a n a l o g o u s form. Cf. also R. W. Funk *Language, Hermeneutic, and Word of God* (New York: Harper & Row 1966) xvi + 317 pp., especially at pp. 150–151.

[interpretation as projection onto given situations of life]

do not derive from actual events, their parable-like narrations in the New Testament, but are rooted in His doctrine. Therefore, what CHRISTians call the legacy of CHRISTianity can only be derived from the teachings of JESUS CHRIST in a sense other than that of an axiomatic conclusion. Or, exemplification remains exemplification for the New Testament as well and its message revealed for us can only be derived from the text in a sense other than that of deductive logic. Thus, the relevant question in the New Testament is "what lesson can be l e a r n e d from this?", that is, "what lesson can w e learn from this?". Let us remember some more abstract instances of the New Testament parables. We may read that the speakers and listeners—priests, as well as the Pharisees—are outraged, and that JESUS CHRIST responds by letting us know who has to apply or not apply the message of the parables t o h i m s e l f . He thereby calls our attention to the fact that the message of the parables is always specific, almost personal and context-bound, thus their 'application' can neither be taken as abstractly nor as unlimitedly general. Otherwise speaking, the text itself is not intended for logifying generalisation but for encouraging us to interiorise and assume the very ethos mediated by the parables of JESUS CHRIST by re-considering them in our situations at any time.

"Who should take it personally?" Message through model situations:

Actually, providing messages or setting norms through a parable does not start from the point where JESUS CHRIST or others begin to talk about His story. It starts from the point where certain moral considerations formulated by JESUS CHRIST in exemplary situations are raised, and if their textual development is more comprehensive, it ends in dilemmas of the people of the New Testament, as, for instance: "What lesson can be learned from this?", or: "What is the message in this?", or: "What is the message to me from all of this?", or: "Who should take it personally?" For in the context of the Four Gospels, the Acts of the Apostles, as well as some further texts (acknowledged or attributed), some will have to relate the message to themselves, others not. Furthermore, some are in a position to relate it to themselves to a greater extent than others are. For the message

embodied in the texts attempts to transmit patterns of value and standards through projecting a variety of values and evaluations from m o d e l s i t u a t i o n s to model situations.

instead of mechanical application, its lesson drawn by and to the acting person needs to be formulated

In stating that the message in the New Testament does not lie in anything that would conclude "logically" from the text, we have anticipated a further consequence, namely that not even the lessons we can learn from it transmit a pattern of value or standard in a directly "applicable" way. For the 'a p p l i c a t i o n' of something to something else is only conceivable in the strictly logical sense of necessity. For example, displaying an 'applicable' proposition by projecting it onto any situation it relates to (as onto the general defined logically by the proposition and entailing whatever situation subordinated to it as its case) gives an immediate result. This is the sense in which JESUS CHRIST's teachings, taken as a *praemissa maior* of a strictly deductive syllogism, defy logical 'application'. For parables are flexible in every one of their components, suited exactly to the environment given at any time. They do not tell anything as they are about something—relatable to other situations or events only more or less, in one sense or another and under a given circumstance or another. Yet, the patterns of value and the inherent moral culture in the parables might encourage our introspection and inner debates to follow a given path, by mutually reflecting and weighing the actually or mentally experienced situations and the ones mediated by the parables, to finally arrive at the formulation of o n e ' s p e r s o n a l l e s s o n . In turn, this lesson will tell us whether the parables in question refer to our situations under our own conditions or not, and if they do, how much, in what way, and with what personal message.[67]

[not unlimitedness, but personal self-determination]

[67] We do not intend here or later to participate in any anarchistic nihilism disguised under the veil of deconstructionism, which currently permeates (under the label of 'being methodical') most English–American academic circles, including a considerable number of non-denominational theological faculties. See, regarding a few alarming excesses from the circle of only the latter, John Dominic Crossan's *Cliffs of Fall* Paradox and Polyvalence in the Parables of Jesus (New York: Seabury Press 1980) viii + 120

human manifestation → textual *corpus* → doctrine → scholarship

So, JESUS CHRIST spoke—to His disciples, to us, to all of us. He spoke in a living human language, accompanied by secondary sign-systems as well as gestures of indirect human speech. His immediate disciples may have handed this on in the same way. As the sequence of directness was replaced, after generations, by a textual form, the revelation laid down in the *corpus* of the New Testament as the message of JESUS CHRIST was from now on carried by written language. The searching mind found parables in this as the quintessence of the narration of various events.[68] In order to grasp and interiorise the message of JESUS CHRIST for himself and to be able to transmit it to future generations as well, he attempted to uncover the doctrine supposed behind its exemplarity. The disciples of disciples all took care of this. And when all this took a systematic shape as a conceptualised set of propositions logically arranged and mutually related, it transformed into theology as a human scholarly reconstruction of the transcendent teaching of JESUS CHRIST. And this is a sacred field as it does not aim at formulating variable human experiences but conceptualising the Divine revelation. Yet, as an academic conceptualisation it may scarcely strive for more than a kind of expression attainable through human cognition. And since then it is performing its task as a specific field of scholarship it mediates, influences, guides—by elevating us above our direct perception and contemplations.

(example: the English law of precedents taken as a store of cultural patterns)

As to the methodological characteristics of learning, legal equivalents to such context-bound situational lessons as the

pp. and *In Parables* The Challenge of the Historical Jesus (New York: Harper & Row 1973), xvi + 141 pp. and, for a background, Tibor Fabiny *Szóra bírni az írást* Irodalomkritikai irányok lehetőségei a Biblia értelmezésében [Getting the text to speak: Potential trends in literary criticism of Biblical interpretation] (Budapest: Hermeneutikai Kutatóközpont 1994) 102 pp. [Hermeneutikai füzetek 3], especially point 6, at pp. 53–62.

[68] "Parable: from the Greek word 'parabole' which translates the Hebrew '*mashal*' which means »to be similar, to be comparable«. A parable is an extended metaphor, or simile, frequently becoming a brief narrative, generally used in Biblical times for didactic purposes. (Not to be confused with an allegory.)" *The Interpreter's Dictionary of the Bible* in <http://www.crossmarks.com/parables1/paris1.htm>.

biblical use of parables are can be primarily sought in the way cases gathered throughout legal development are processed in the English law of precedents. For centuries, law has been made from individual judicial decisions, forming an immense body of case law. In their part of deciding upon facts (by qualifying them and ascribing legal consequences to them), p r e c e d e n t s are treataed as enactments valid in and of themselves. As the basis of any culture of judge-made law, they are shaped in view of one another: each procedure concluding in a decision has searched for a justifiably equitable answer to a concrete challenge in a concrete situation, although grounded upon, within the framework of and in continuation of, the underlying social, political, moral and legal cultures of society. For us as actual actors, and for posterity—and also for the doctrinal elaboration and systematisation of the aggregate of individual precedents as messengers of the English legal culture—it is not the individual case or casual decision that represents the normative constraints in an ever-emerging system of law and order. Rather, it is the fact (also inspired by our own normative presuppositions) that every casual decision is the m a n i f e s t a t i o n of the spirit of the underlying culture, running through a long and uninterrupted historical process, and therefore reflecting a certain mentality, thought-pattern and selection of values, taken both in their individual continuity and global unity. The moment of 'truth', characteristic of the given culture, surfaces behind and in all of them. This is the truth raised by PONTIUS PILATE in his dramatic question,[69] and which we, too, must continuously search for, despite not having any hope that we can find it once and for all through any one single act.

Its truth is inherent in our whole culture

Once the question of truth is raised, we may be tempted to think that "truth" is somehow co-extensive with the total set of "teachings". Accordingly, the Truth is perhaps hidden somewhere in the Gospel, or more precisely, in the text of

[69] "What is truth?" John 18:38.

the New Testament, in a way similar to how English law is said to be inherent in the set of precedents.

Both the New Testament and the system of precedents presuppose a relentless search for truth

The use of precedents presupposes a search through and selection from the mass of precedents in order to find an example apt for our purposes, and also relate it to the situation presented by the case. This can result in a flexible and variable jurisprudence. On the other hand, considering that judge-made law is not the coherent construction of a logical system built consequently upon principles, rules, and exceptions to rules, but rather the chaotic amalgamate of historically incidental problems with our responses to them (superimposed on one another and arbitrarily shaped within the boundaries of judicial discretion), it is not to be expected that every individual situation will have a precedent that directly relates to it in an 'applicable' way. Otherwise speaking, the variance and dispersion of conflicts solved by precedents as well as the way they can or cannot be linked to new situations calling also for legal response are equally accidental. One thing is sure, notwithstanding, namely that in our problems we can turn for inspiration only to the set of patterns at our disposal, exemplified by precedents.

The lesson is historically formed

Similarly, it is obvious that in historically changing situations and cultures, and under given conditions, any two theologians, priests or believers may interpret JESUS' teachings—as any two English jurisprudents, judges or politicians may interpret the aggregate of precedents—in at least two concurrent ways. One may suggest that when such and such was the case, JESUS responded this or that, which has this or that consequence for us in our common tradition. The other, without denying some common presuppositions, may contradict him with reference, for instance, to his own personal experience of and sensibility to the underlying question, or to further ethical or social dimensions of the case not yet necessarily reflected in the pattern referred to.[70]

[70] This is one of the reasons—also in the law's formal cultures—for the almost necessary emergence of schisms and conceptual polarisations in an apparent mutual negation (because by raising additional aspects, leading to

(example: »return« as the motive used by reform tendencies in the Church)

In European history, all spiritual renewals and tensions connected with ecclesiastic institutionalisation (e.g., heretic movements, the Reformation, and sects) started with the objective of ideally r e c o n s t r u c t i n g the original teachings and spirituality of JESUS CHRIST. Both JOHANNES CALVIN and MARTIN LUTHER initiated only re-interpretation, with the explicit programme of returning to the message they drew from reading the New Testament, and of identifying and restoring layers that they believed to have been forgotten, damaged or corrupted in time. Let us consider one of the conceptual clashes (which also had institutional consequences) between Catholicism and the Reformist churches: is the task of interpreting the Bible, the Body of the Law, designated to SAINT PETER, the Teaching Church, and ultimately to the priests? Or is it addressed directly to each of us in the community, so we may seek inspiration therefrom without any mediation whatsoever? Are there separate classes of those who teach and those who are taught? Or is the Church simply a Communion of believers of equal rank? The Reformation, in rejecting the Catholic ecclesiastic hierarchy, offered a new response to the dilemma. They professed that the ecclesiastic organisation has to form a single and undifferentiated unity with no privileged or superior status accorded to priests than to any common believer. Consequently, not even the See bequeathed by JESUS CHRIST to SAINT PETER (and, since his martyrdom, to the elected bishop of Rome at any given time) can hold any privilege. For the Bible is destined for every

opposite directions)—as in the case of, e.g., schools in Jewish, Roman, and modern law, rites in Islamic law, in brief: isms—and their battle for temporary exclusivity, sometimes ending in their reconciliation of mutually complementing one another. For their assessment in the perspective of the law's ultimate end, see, by the author, 'Goals and Means in Law' in <http://www.thomasinternational.org/projects/step/conferences/20050712budapest/varga1.htm> & '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 pontificato) a cura di Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75.

one, to be read by any one. As it is translated into the languages of all nations, every individual must read it, and preferably learn from it as well. Priests are just like the rest of us. Maybe they are more skilled and learned, therefore we may give special commissions to them, but still, they cannot replace us either in reading or in drawing personal conclusions.

Its task is cultural: making us meditate about what it suggests us

All this is based on the assumption that no doctrine "derives" from the Bible in a logical sense. For the Bible is meant for something other than drawing deductive conclusions. It is meant for a far more elevated and independent and morally autonomous task, and this is to make us ponder about its teachings. It is meant to make us m e d i t a t e , to deliberate on it in solitude or in communion, at home or out in the field, at night or during the day. We should never stop meditating about its teachings and about the message we may feel it s u g g e s t s here and now.

(A scandal generated by RENAN's reconstruction of the Bible)

Let me refer to a major debate at the end of the 19th and the beginning of the 20th century. For in the middle of the 19th century ERNEST RENAN published his book on the life of JESUS, which he meant to be the first in a series dedicated to New Testament topics, aimed at charming a mass audience.[71] In France, in the upheaval caused by the agitation for the separation of State and Church, he became a leading figure in the anti-ecclesiastic movement, and this caused understandable indignation. This happened concomitant to the period of Faith, Reason, and Unreason,[72] when the Catholic Church issued the doctrine of papal infallibility (1870) and a series of further dogmas. In an anticipated response, by allegedly returning to undamaged CHRISTian roots revealed from original sources and inspirations, RENAN was actually contesting two thousand years of continuity since the Church's foundation.

[71] Ernest Renan *Vie de Jésus* [1863] (Paris: Nelson & Calmann-Lévy n.y.) 282 p. [Les collections Nelson]. For want of a more specialised work, cf., for the evaluation of his work, Richard McClain Chadbourne *Ernest Renan as an Essayist* (Ithaca, N.Y.: Cornell University Press 1957) xxii + 264 p.

[72] An expression by Paul Johnson *A History of Christianity* [1976] (Harmondsworth: Penguin 1980) [Pelikan Books], part VI.

SZIMONIDESZ: the *New Testament*, being inductive, has avoided the trap of narration in dogmas

As a late continuation of the argument in Hungary, LAJOS SZIMONIDESZ had a similar theory. In his treatise, full of a Protestant pastor's reforming intentions at a time when the outrage caused by RENAN was still alive, he formulated and defended inductive theology. He argued that it was high time for a re-interpretation, since throughout the centuries historical Churches might have read the teachings of JESUS CHRIST with unfounded expectations. For biblical texts can be read both from dogmatic and non-dogmatic points of view. Religions also differ from one another in the patterns of thinking they actually help to promote. He thought the most unique, naive and individual moment in the history of CHRISTianity was that of its re-birth exactly through Reformation. This moment of CHRISTianity is nothing but the embodiment of thoughts and considerations formulated in a way so as to resist their transformation into dogmas.[73] This is inherent in the tradition of the New Testament, for JESUS CHRIST's testimony of parables mapped out a path that avoids the trap of narration in dogmas.[74]

[73] Similarly Hans Weder *Metaphor, Parable, Hermeneutics* Three Lectures delivered in Budapest (Budapest: Centre for Hermeneutical Research [1997]) 60 pp. [Zürich–Budapest Hermeneutical Project 1]: "the transformation of a parable into theological theory is to be avoided" and in particular p. 40.

[inductivity offers secure path whilst deductivity can only promise apparent security]

[74] Lajos Szimonidesz *A világ vallásai* [Religions of the world] [Budapest: Dante 1928] (Budapest: Könyvértékesítő 1988) 723 pp., especially in para. II.A.1 at pp. 442–447, concludes (on p. 446) that "The rock on which Jesus builds and on which He wants his listeners to build is this inductive method of thinking, deriving directly non-available truths from well observed and circumspectly gathered data. God has never been seen by anyone. Anyone who does not intend to learn about Him by relying on uncontrollable traditions, but wants to approach Him through His own thoughts, must follow the only secure path of deriving them from the facts of how the world is governed. Jesus followed this path. This method brought Him the recognition that, as a participant in the new godly revelation, He could present God from His most true side, presenting God to mankind through getting close to His heart. The deductive method provides considerably weaker foundations, for as Jewish scribes have also noted in their more sincere moments, it sometimes hangs mountains on a hair, piling explanations and customs on a few laws. For everything depends on the point of reference, and

Σ: The culture of parables may last throughout changing times, whilst thesis is only temporary

Parables are metaphorical expressions, which are (although not by themselves but in their aggregate within a culture) suitable for promoting and developing a culture which is incessantly cared for in tradition, whilst kept alive every day and preserved under changing conditions. In contrast, theses are vulnerable. A thesis may tend to become obsolete as it is self-closed, final, finite, and thereby it may call for questioning, that is, for being re-confirmed or modified. Or, the metaphorical moment inherent in the parable is hardly more than a reference, a reminder of what we experienced collectively, in catharsis. Even if extended to or inculturated in a new medium,[75] this does neither affect its roots nor require its figurative expressions to be re-formulated.

doubting this will cause the whole construction built upon it to collapse. If the premise is not true, the truths derived from it cannot be true either; if the godly revelation is not reality, the laws relying on and sanctioned by its authority are meaningless, too. Deduction, like sand, flows out from under man's feet, but the elements of induction are pieces of rock, which properly put together, stand more securely in and of themselves, than the illusory rocks of deduction." Similarly in Lajos Szimonidesz *Zsidóság és kereszténység* [Judaism and Christianity] (Budapest: Dante n.y.) 318+ pp. at pp. 86–89.

[nature is solid whilst systemicity equals to mere sand]

It should be noticed for the sake of conceptual similarity that in one of the revolutionary preliminaries to the French *Code civil*, CAMBACÉRÈS (1793) wrote with a similar mistrust towards theoretical constructions: "After having marched long enough on the ruins, we have to raise the grand edifice of civil legislation; an edifice simple in its structure yet majestic in its proportions; simple in its structure yet solid to the extent that it is based—instead of the sand of systems—on the firm soil of the laws of nature and on the unbroken soil of the republic." [„Après avoir longtemps marché sur des ruines il faut élever le grand édifice de la législation civile: édifice simple dans sa structure, mais majestueux par ses proportions; grand par sa simplicité même, et d'autant plus solide, que n'étant point bâti sur le sable mouvant des systèmes, il s'élevera sur la terre ferme des lois de la nature, et sur le sol vierge de la république."] Cf., P. A. Fenet *Recueil complet des travaux préparatoires au Code civil* I (Paris: Videcoq 1827), p. 2.

[75] Cf., e.g., László Boda *Inkulturáció, Egyház, Európa* Az Evangélium és a kultúrák átültetése [Inculturation, Church, Europe: Adapting the Gospel, adapting cultures] (Budapest: Mundecon 1994) 192 pp.

> "In terms of C. H. DODD's classic definition, a parable is »a metaphor or simile drawn from nature or common life, arresting the hearer by its vividness or strangeness, and leaving the mind in sufficient doubt about its precise application to tease it into active thought.«[76] Thus a parable is always open-ended, inviting our involvement and response, and creating uncertainty by subverting our conventional ways of thinking and behaving. It offers a chance to experience the world and ourselves in a new way."[77]

Inductivity is open to what is not yet known; deductivity is closing down in what is already thematised

In sum, deductivity tries to arrive, from a starting point available *ad libitum* at a given time, at an outcome that can, as derived from its premise, still be taken as secure, necessary, and in this respect, also universal. In contrast, inductivity as a contemplation starting out from what is only signalled, cares for whether or not there are parts integrating with one another, whether they constitute a unit together, whether anything worthy of pondering arises from them, and what a message this or that will have actually for mankind.

Logic is additional to a revelation's truth

Narration in parables and development of doctrines out of theses are differing channels of communication. They address different audiences and call for different types of mental processing. Although they may have been intimately interrelated in the life and teachings of JESUS CHRIST and may have the same roots in our belief, it is not the inner logic of a text bequeathed to us but the intention of their author received by us as divine that their interconnection stems from.

[76] C. H. Dodd *The Parables of Kingdom* (London: Nisbet & Co. 1935), p. 5 & <http://www.crossmarks.com/parables1/paris2.htm>.

[77] Cserháti Márta 'The Good Samaritan: Parable or Example?' in *The Bible in Literature and Literature in Bible* Proceedings of the Conference "Teaching »Bible and Literature« at Universities", ed. Tibor Fabiny (Budapest Centre for Hermeneutical Research & Zürich: Pano Verlag [1995]) 223 pp. on p. 173.

Convincing through being convinced

2.3.1.2. CICERO's testimony CICERO himself and the rhetoric elaborated by him is of standard value for human thought.[78] He was both a lawyer and an eloquent orator. His oeuvre is imbued by the elementary experience of convincing and being convinced. We are always deeply affected when listening to the reproductions of his performances or reading his writings albeit they were meant just not to offer alternatives to thinking. For CICERO's rhetoric starts in some direction and convinces his audience by proving its rightness despite the fact that he actually does nothing but exclude all other choices or alternative paths by the convincing force of his rhetoric. When we finally reach the shared conclusion we feel fully convinced that the conclusion is cogently derived from his arguments.

with rhetorics and repetitions, calling to shared attitudes to life

A closer logical analysis reveals however that CICERO's writings and art of speech are completely void of strict logical conclusion. That is, his manner of construction is other than that of starting from principles and premises originated in logical presumptions that would allow further propositions to be derived therefrom. What he does is rather reminiscent of the painting-style characteristic of modern impressionism. He identifies himself with some prevalent values and builds an atmosphere pertaining to the given (rhetorical) situation. He articulates certain convictions, experiences and traditions, a l r e a d y present in the given

[78] For CICERO's ideas, see Neal Wood *Cicero's Social and Political Thought* (Berkeley: University of California Press 1988) xiii + 288 pp., for his linguistic means, Charles Causeret *Études sur la langue de la rhétorique et de la critique littéraire dans Cicéron* (Paris: Hachette 1886) 245 pp.; Louis Laurand *Etudes sur le style des Discours de Cicéron* (Paris: Hachette 1907) xxxix + 388 pp; Marin O. Liscu *Etude sur la langue de la philosophie morale chez Cicéron* (Paris: Les Belles Lettres 1930) 308 pp. [Collection d'études anciennes]; V. Paladini '-cuceribe retire e iratire' *Ciceroniana* II (1960) 1–2, pp. 15ff; Walter Ralph Johnson *Luxuriarace and Economy* Cicero and the Alien Style (Berkeley & London: University of California Press 1971) 72 pp. [University of California: Classical Studies 6]; Harold C. Gotoff *Cicero's Elegant Style* An Analysis of the *Pro Archia* (Urbana: University of Illinois Press 1979) xiii + 255 pp.; Carl Joachim Classen *Recht, Rhetorik, Politik* Untersuchungen zu Ciceros rhetorischer Strategie (Darmstadt: Wissenschaftliche Buchgesellschaft 1985) 390 pp.

community as common attitudes to life, then he names them. Free repetition is again reminiscent of impressionism: common life experience, as well as emotional rhetorical elements and the arguments built upon them are all made use of throughout his speeches and writings as many times and in as many variations as expedient. The repetitions and other means of conviction all point in one direction. And only after we have been convinced can we learn that the entire argumentation served only for the rhetorical, emotional (etc.) preparation of CICERO's conclusion, representing also his own personal and political stand.

committing ourselves by other means than the sheer force of logic

What we have in mind here is a shared empathy that emotionally concludes—according to the measure applied, i.e., in every possible way—from everything he said or wrote. There is only one difference that distinguishes them from ordinary conclusions. Namely that neither the structure, nor the reasoning, or ways of conviction, are such as to allow anything logically to derive and be derived from it. On the contrary, they are such that are capable of r e m i n d i n g the audience recurrently and variably of the initial conditions he has depicted and, through their self-multiplying effects, of assisting the audience in being conditioned in the way also shared by him, and eventually make us c o m m i t ourselves to common traditions by acknowledging the roots and foundations of our common existence, namely, considerations and common facts of life to which we have no alternatives anyway.

Making his train of thought accepted through the authenticity of his internal experience:

2.3.1.3. Saint AUGUSTINE Our next example is Saint AUGUSTINE (and we will realise when advancing in the chronological order that, methodologically speaking, he is the representative of the pole opposite to that of Saint THOMAS AQUINAS). It is not by mere chance that his best known work is the *Confessiones*, a combination of essay, poetry, and personal confession. Saint AUGUSTINE presents his ideas in a manner that we classically owe to JEAN-JACQUES ROUSSEAU, and undertakes to let everything out of himself by describing, naming and even conceptualising what is inherent in him (maybe just as a whirl of unidentified

features and qualities), be it noble or ignoble. Both what he will have eventually accepted and what he fights again and again when it arises in him inextirpably. AUGUSTINE exposes his earthly adventure as an honest revelation in his quality of a human and, as regards his book, also for the sake of making himself accepted by the outer world in accordance with his place taken in it. His personality is equivalent to the entirety of his thoughts. This is what he intends to reveal to the outside world[79] and his audience of posteriority.[80] By doing so, the personal existence (internal experience, etc.) is granted ontological significance,[81] along with all ontological consequences of this.

[79] On the AUGUSTINian range of ideas and manner of expression, see Robert Honstetter *Exemplum zwischen Rhetorik und Literatur* Zur gattungsgeschichtlichem Sonderaustellung von Valerius Maximus und Augustinus (Konstanz 1977) 238 pp. [Univ. Diss.] and Tilman Borsche *Was etwas ist* Fragen nach der Wahrheit der Bedeutung bei Platon, Augustin, Nikolaus von Kues und Nietzsche (München: Fink 1990) 336 pp., especially part III; on his social philosophy, Robert Austin Markus *Saeculum* History and Society in the Theology of St. Augustine [1970] (Cambridge: Cambridge University Press 1988), especially at pp. 154–186; on his conception of language, Karl Kuypers *Der Zeichen und Wortbegriff im Denken Augustins* (Amsterdam: Swets & Zeitlinger 1934) 99 pp. and U. Wienbruch '»Signum«, »significatio« und »illuminatio« bei Augustin' in *Der Begriff der Representatio im Mittelalter* Stellvertretung, Symbol, Zeichen, Bild, hrsg. Albert Zimmermann (Berlin & New York: De Gruyter 1971), pp. 76–93; and on his style, Constantin I. Balmus *Étude sur le style de saint Augustin dans les Confessions et la Cité de Dieu* (Paris: Les Belles Lettres 1930) 327 pp. and Robert J. O'Connell *Soundings in St. Augustine's Imagination* (New York: Fordham University Press 1994) x + 309 pp.

[with personal authenticity]

[80] "[A] homogeneous presentation […], whose authenticity is supported by the narrator's authority, the religious fervour and the minute accuracy of details"; "its strength lies in the unbroken dramatic vivacity with pauses increasing the tension and with the artistic combination of biographical and contemplative elements which sustain the unique dynamism of the presentation; with being seemingly undivided making the perspective harmonious." József Balogh 'Bevezetés' [Introduction] in Szent Ágoston *Vallomásai* [Confessions] I [reprint of the ed. 1943] (Budapest: Akadémiai Kiadó & Windsor 1995), pp. xxxv and xxxvii.

[by expressing ontological existence]

[81] William E. Connelly *The Augustinian Imperative* A Reflection on the Politics of Morality (Newbury Park, Ca.: Sage 1993) xxiv + 168 pp. [Modernity and Political Thought 1] examines the ideas of Saint AUGUSTINE in comparison with NIETZSCHE's views; Luigi Alici *Il linguaggio come*

What AUGUSTINE lets us learn is not a line of logical (con)sequences. It is neither a set of propositions for which the inference of saying *A* implies saying *B* as well is valid, as the latter proposition is linked to the former by the partial identity of inclusion, sequence (etc.). Nor is it a kind of context in which we could ignore even the concrete truth contents of the derived proposition, because after all it is sufficient to know that we had sufficient reasons to say *A*, and *B* will necessarily derive from it. For in the realm of formal logic,[82] if one states a truth and does not refute it, then something else as another statement will in and of itself also conclude from it. Here, though, we cannot expect anything of the kind. The truth[83] here is not revolved by some abstract and impersonal necessity of the sequence of propositions, but we ourselves undertake, out of inner conviction, s y m p a t h y for and a f f i n i t y to the life and personal credibility of a man known to have lived a tormented life.

with confession trusted

In this context, Saint AUGUSTINE as a historical personality is identified with the confession of his own path of life. His work exemplifies his life, and his life his work. The

Σ: we believe his confessions, since we share his values

segno e come testimonianza Una rilettura di Agostino (Roma: Studium 1976) 208 pp. [La Cultura 10] sees his work as one of the crucial sources of WITTGENSTEIN's fundamental recognitions, which "as being a personal-ontological, that is, inner dimension, [leads] from the semantic structure to ontological existence" (cover IV).

[82] In sharp contrast to the "logic" of everyday life with practical common sense in the background, where each and every stand taken by us is situational and, therefore, of an incidental purpose and validity, not presupposing coherence in a wider context—beyond confidence in and responsibility for human stands (also situational in practice). As projected onto one of the main tenets of logic, see, by the author 'Az ellentmondás természete' [The nature of contradiction] [1989] in *Útkeresés* Kísérletek – kéziratban [Searching for a path: Unpublished essays] (Budapest: Szent István Társulat 2001), pp. 138–139 [Jogfilozófiák].

[83] "His work is built up with one single move […:] a sphere […], with each surface point of which being regularly connected to the hidden centre" without "any linear progress made", as Servais (Th.) Pinckaers (OP) writes in his *Les sources de la morale chrétienne* Sa méthode, son contenu, son histoire (Fribourg: Éditions Universitaires & Paris: Éditions du Cerf 1993), ch. ix.

authorial message becomes an organic part of the story of the frail human person, that is, of his own intentionally bequeathed conviction:[84] everything he meant to communicate to us results directly from his path of life. The source of our conviction lies in the fact that we identify with his values by b e l i e v i n g his confessions.

as we see ourselves in him

Yet, there is a distinctive element in our identification, namely that we are not expected to identify with everything in a way such that—independently of our intentions, reluctantly subjecting ourselves to some unrelenting logic transcending the human existence—we too start confessing them (left with no other choice), but only inasmuch that we believe he is a trustworthy man with all his virtues and sins. That is to say, everything we find out from and about him speaks of the values experienced and suffered by a real human being. Moreover, it is precisely his path of life that makes him worthy of our interest and makes his path an example: behold, thus evolves the life of a man! It is the same credibility from which our trust derives. Actually, everything we initially thought to have been derived from the text of AUGUSTINE's *Confessiones* proper does in fact derive from the complex intertwinement of our faith, trust and hope.

Tradition is something more than mere irrationality

2.3.1.4. The *Talmud*ic lesson Following our chosen path we can arrive at tradition. Searching for original and trustworthy embodiments primarily among religions, the Jewish historical tradition and the eastern Byzantine orthodoxy is

[As godly creature, natural and simple]

[84] MAGDA SZABÓ—'Az idő doktora: Szent Ágoston' [The doctor of time: Saint Augustine] *Nagyvilág* XXV (1980) 4, pp. 577–590—writes as a personal confession: "Here stands man, dust in AUGUSTINE's magic circle, naked, with God leaning on a more plain, transparent and natural canopy of heaven than ever, and looks down at him, so self-evidently as the sun shines and the birds sing; and the dust man just stands there, and everything he starts, reaches his hand after or actually reaches is just dust, foolishness, vanity, and hardly any of his steps are firm or sound; but he knows that God created him to be just like this, He accepted him and loves him just as he is, and maybe He loves him only because of being like this, because He can love him like this; well, he still dares to look up at Him to these plain and natural and heady heights from the magic circle."

particularly interesting from our perspective of the methodology of thinking. Starting from these grounds we might even arrive at modern traditions.

> Of course, it might also occur that the persistent want for rationalism would lead to the narrowing down of thinking and emotional capacities to such an extent that anything which does not fit into the patterns of conceptual language built upon abstractly defined meanings could be perceived as the breeding ground of irrationalism. GEORGE LUKÁCS[85] also stuffed everything he did not understand, or the involvement with what he rejected, into the pool of irrationalism, thereby bequeathing a noble example to those later labellers who were to come out of his school.

Moral force of debates born from meditation

Taken all the above surveyed, we should notice how the way of thinking characteristic of the New Testament becomes step by step organised into a system. Well, as is known, the people portrayed in the New Testament were doomed to dispersion, launching the Diaspora-epoch in the life of the Jewish community. Needless to say, their religious life continued along the path familiar from various parts of the Bible, thus from the narrations in the Gospels as well. This meant discussions held inside and outside the temples, and with time, the wisdom reflected by debates becomes synthesised into the rabbinical traditions. As we know, the Jewish community did not have its own independent state or a central organisation for over two millennia; therefore, the local rabbis became—*nolens volens*—the actual leaders and cementing moral forces of their respective community, and even the representatives thereof. Interestingly enough, the role they actually filled in the community was after all not so much of a priest's—i.e., of a consecrated personality—, but rather of the sage's. They were the scribes and rhetors who could prove the strongest in debates due to their learned skills and to their life dedicated to meditation.

[85] Georg Lukács *Die Zerstörung der Vernunft* [The Destruction of Reason] (Berlin: Aufbau-Verlag 1954) 692 pp. & (Neuwied am Rhein & Berlin-Spandau: Luchterhand 1962) 757 pp. [Werke 9].

Searching for ponderable considerations, instead of logical derivation

The most particular about the tradition incorporated by the *Talmud* is that neither its setting, nor its message can be ascribed simply to a book of laws, or some collection of precedents.[86] The result is specific in that it cannot prove formal or formalisable because it does not even bear actual decisions. Instead, what it rather includes is philosophies and argumentations, which mostly cannot even be conceived of as genuinely legal in character. Loose interrelations, highly scattered references, perhaps not even understandable at first glance. What we are expected is just to reflect on ponderable aspects: what it meant by what, what it wanted to influence in what direction, if at all. And one begins to guess only after having taken everything into account what its loose reference may have been related to: a point of view, a comparable situation, or, on the contrary, a frightening counterpoint. What can be unravelled from it appears to a reader brought up in a different culture somewhat like a collection of the Jewish *sagesse*, or rather some particular versions of the narratives known from the New Testament: the p a r a b l e s . As to its essence, it is nothing other than the recollection of certain situations, their comparison with other situations, their individual and comparative evaluation, and, finally, their re-confirmation—as contrasted with freshly recalled control-situations.

[the will of God contrasted to a liveable life]

[86] "The source of the Law and of its authority is the will of God as expressed in Scripture. From the standpoint of rabbinism there is no code, and none can exist, which can supersede the Torah." Louis Ginzberg 'The Codification of Jewish Law' in his *On Jewish Law and Lore* Essays (Philadelphia: The Jewish Publication Society of America 1955) 262 pp. on p. 183. The dilemma of law is exactly how to still arrive from such a fixed and unchanged manifestation of will at a practical solution that in addition to implementing the divine intention, would also allow a liveable life. Cf., e.g., D[avid] Daube 'Texts and Interpretation in Roman and Jewish Law' *Jewish Journal of Sociology* 3 (1961) 1, pp. 3–28. As to the practical modification of the unchangeable commandment, see Haim H. Cohn 'The Lesson of Jewish Law for Legal Change' and Norman Solomon 'Extensive and Restrictive Interpretation' in *Jewish Law and Current Legal Problems* ed. Nahum Rakover (Jerusalem: The Library of Jewish Law 1984), pp. 15–28, resp. 37–45.

Availability of some choice among values, with pondering arguments for/against it

A text such as the above may support and guide our thinking inasmuch as it helps us clarify that if we give this or that evaluation of a given situation, which arguments c o u l d be wielded for and against it. And we can also observe the faint outlines of a value-choice in the background. By this we unavoidably come closer to the realisation that, after all, we should rather make a decision in a certain initially given direction, and if we eventually make this decision, what arguments could support our choice.

As tradition and life lived through, alien to any systemicity

Looking for any kind of systemicity in the textual embodiments or summary of such and similar traditions would be in vain. In terms of any logical standard, neither of the 'cases' refer to others; and neither of the 'situations' compare to others. The components are not even as organised as—bringing a distant example—the various types of Hungarian folk tales,[87] or as BÉLA BARTÓK and ZOLTÁN KODÁLY could be in possession of an established thesaurus of Hungarian folk songs to be able to start their systematisation. Returning to the *Talmud*ic example, in such textual environment it is simply not conceivable for anybody to start a reasonable systematisation, if any kind of systematisation is imaginable at all. For the idea of systematisation itself would amount to denaturalising the underlying tradition. Even the mere fact of formulating the idea of system in relation to this tradition is alien to its underlying nature.[88] As soon as systematisation is started, tradition would immediately be deprived of precisely its most distinct character and bloom. By denaturalising it we would peel off everything that makes it traditional, thus the way situations follow one another in r e a l l i f e .

[87] Cf. János Berze Nagy *Magyar népmesetípusok* [Hungarian folk tale types] I–II (Pécs: Baranya Megye Tanácsa 1957).

[88] "It is precisely the wealth of contradictions, of differing views, which is encompassed and unqualifiedly affirmed by tradition." Gershom Scholem 'Revelation and Tradition as Religious Categories in Judaism' in his *Messianic Idea in Judaism* & Other Essays in Jewish Spirituality (London: Allen & Unwin 1971), pp. 282ff.

Talmud as rabbinical tradition:

A scribe may be right when noting that in its practice of interpretation there are numerous *Talmud*s—their number supposedly corresponds to the number of rabbinical communities displaying historically independent features. Over the centuries, these communities could have organised into a loose hierarchy at the most in lack of a central organisation. Behind the loose network of the Jewish community in the Diaspora often stood the bare fact that where there was a rabbi with a stronger personality, his life, fame and professing power induced a spontaneous hierarchisation. Whereas, according to their *corpus*, we can distinguish as many *Talmud*ic traditions as we inherited. Among these a number stand out by their value radiating a universal example, and this is most naturally so. We just ought to remember that rabbis often conferred with each other, and for most of their lives they did nothing but read, contemplate and debate. They were also able to learn from one another, and their most outstanding teachings grew to be known.

There was a political power very influential up to the nearest past (and we ought to understand that it still may have a lot of surprises for the future in the actual role it fills), which provided political support through its own force for the desire of the historical community of orthodox Jews: the law of the State of Israel (or at least some of its layers) to become the embodiment, and to survive as a branch-off, of this classical tradition.[89] It is an open question, however, whether the law of a modern state—with its relevant aspects secularised—could be organised from a deeply religious tradition crystallised in various historical eras and under different conditions. This was questionable already several decades ago and it remained to be so. The arguments may have changed with time, but the dilemma is mostly still the same.[90]

[89] This has already occurred in some areas of family law, in matrimonial law, and, moreover, in their judicial assessment as well. Chaim I. Goldwater 'Religious Tribunals with a Dual Capacity' *Israel Law Review* 12 (1977) 1, pp. 114–119. Cf. also Guido Tedeschi 'On the Choice between Religious and Secular Law in the Legal System of Israel' in his *Studies in Israel Law* (Jerusalem: The Hebrew University Students' Press 1960), pp. 238–288.

[90] Cf., by the author, *Codification…*, p. 202, note 64 as well as *Jogi elméletek, jogi kultúrák* Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [Theories of law, legal cultures: critical essays and reviews in legal philosophy and comparative law] (Budapest: ELTE "Comparative Legal Cultures" Project 1994), pp. 448–450 [Jogfilozófiák].

can it be codified?

At the same time, the Jewish people recognise the rabbinical legal tradition truly as their own. So far, they have firmly resisted even the mere idea of its systematisation. They know that the sacred t r a d i t i o n lies exactly in such apparently chaotic and incidental juxtaposition: namely, tradition itself stands behind the way and into what all of this has evolved. Thus, the question justifiably arises (as it has arisen in English law as well): is it conceivable and feasible at all to credibly codify this tradition into a law (book)—as it happened with the English and American laws? Should we just recall that in the continental legal development of Europe the recording, compilation and finally the re-enactment (as new and independent laws) served for the basic systematisation of the normative legal material, whereas in case of the Anglo–American legal development this job was performed by textbook-writing, that is, an attempt to systematically expound the legal material in the form of a 'textbook'.[91]

It can only remain a tradition until it is not given a new message through systematisation

Again, the source and medium of Jewish law is the tradition within which it has ever developed. Each of the components is part of this tradition in its very given form and no other, even if appearing to be c h a o t i c, and can remain the original part of tradition only as long as it keeps its originally given form. Why is this so? Well, because in the moment when it ceases to be the same as it has originally been—that is, in the moment when its historically evolved random casuality is transcended by some re-enacted systemicity resulting in a new quality[92]—, then e x t r a message would necessarily be added to the *corpus* (and, thereby, also to tradition): something that has never been an inherent part of it. For we know that nothing can be systematised in one single and exclusive way. In terms of logic,

[91] Cf., by the author, *Codification...*, ch. III, para. 3–4, on the one hand, and pp. 164 and 325, on the other.

[92] Maimonides *Mishneh Torah*. Cf., e.g., *The Jewish Law Annual* I (1978), pp. 1–176.

the number of equally conceivable and feasible systematisations is infinite. In consequence, by the fact of embodying tradition (through transforming and thereby also rigidifying it into certain—and not other—notions through re-positing it in a conceptualised way) as classified and organised into notional sets, we also acknowledge that we have already imposed our own points of view—external, conceptual, and logical, i.e., all bound to our own culture—upon it.

Classification would destroy openness

The rabbinical tradition—together with the sum of inherent examples, arguments and paradoxes—can continue to prevail, expand and make itself liveable, providing—its chaotic nature notwithstanding—for its renewal guided by its own spirituality, embodied in and actualised by newer and newer decisions, in the same way that we could learn from the example of English law. On the other hand, in case we systematised tradition into a set of codified concepts—although, for obvious reasons, when searching for the *ratio decidendi*, in each case we can start looking for a point of reference and launch the analogical reasoning only at some given notion—, we would be practically bound all the way through by the conceptual c l a s s i f i c a t i o n we initially adopted when processing tradition through its conceptualising systematisation. In the same way—and this is a recurrent experience of all acts of legal transplantation—, if we implant a codified set of concepts into a community with different conceptual traditions, this will necessarily generate a (somewhat) different and independent jurisprudence, in any case of a deforming effect on the original environment. The bare fact of systematisation somehow precodifies those future situations of which this or that conceptually systematised normative solution can be the case—thereby d e l i m i t i n g our problem-sensitivity from the very beginning to this or that previously codified field. Yet, in principle, each *locus* expressed by diverse linguistic means so much as each concept bears infinite possibilities and potentialities of connection, and by far no systematisation can comprehend them exhaustively simply because of technical limitations. So, if the systematisation introduces a different (conceptual)

tradition, there are serious chances that the tradition will at last prove stronger and break through systemic boundaries.[93]

2.3.1.5. Orthodox CHRIStianity According to its theology, Orthodox CHRISTianity—as to its literary manifestations,[94] may we think either of DOSTOEVSKY (his horrific torments of conscience)[95] or TOLSTOY (his spiritual struggles)[96]

Dramatic uniqueness of life situations at DOSTOEVSKY and TOLSTOY:

[93] However objective it may seem, t a x o n o m y —the systematisation of either real entities (e.g., elements, minerals, flora and fauna) or traditions, human behavioural forms and ideas—always means a creative systematisation. Actually, it does not "find" its subjects but "creates" them—according to interests, conventions and cognitive traditions, external to the subject itself. Cf., e.g., John Dean 'Controversy over Classification: A Case Study from the History of Botany' in *Natural Order* Historical Studies of Scientific Culture, ed. Barry Barnes & Steven Shapin (Beverly Hills, Ca. & London: Sage 1979), pp. 211–230 [Sage Focus] especially at pp. 212 and 226, and, by the author, '*Theatrum legale mundi* avagy a jogrendszerek osztályozása [On the classification of legal systems]' in *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), pp. 219–244 [Jogfilozófiák / Philosophiae Iuris // Bibliotheca Iuridica: Libri amicorum 13]. It is to be noted that at the beginning the projection of statuses defined by social dependence and life conditions served for the formulation of logical relations, especially of hierarchy and various sub- and co-ordinative relations. Cf. Emile Durkheim & Marcel Mauss *Primitive Classification* [1903] trans. Rodney Needham (London: Cohen & West 1963) xlviii + 96 pp. and in particular at pp. 82–84.

[taxonomy does not find but creates its subjects]

[94] For a sensitive treatment from our perspective, see George Steiner *Tolstoy or Dostoevsky* An Essay in Contrast (London: Faber and Faber 1959) 355 + xiv pp. and especially Lev Shestov *Dostoevsky, Tolstoy and Nietzsche* introd. Bernard Martin, trans. S. Roberts (Athens, Ga.: Ohio University Press 1969) xxx + 322 pp.

[95] On DOSTOEVSKY's underlying social philosophy, see Jean Dronilly *La pensée politique et réligieuse de F. M. Dostoievski* (Paris: Librairie des cinq continents 1971) 501 pp. [Etudes russes 2] and Stephen K. Carter *The Political and Social Thought of F. M. Dostoevsky* (New York, etc.: Garland 1991) 300 pp. [Political Theory and Political Philosophy]; for his circle of ideas, Юрий Григоревич Кудрявцев [Yuri G. Kud'ravtsev] *Три Круга Достоевского* Событийное, Социальное, Философское [Dostoevsky's three circles: Mental, social, and philosophical] (Москва: Изд-во МГУ 1979) 342 pp.; on his criticism of the Western life-ideal and on his detachment from the Western way of thinking, Bruce K. Ward *Dostoyevsky's Critique of the West* The Quest for the Earthly Paradise (Waterloo, Ont.: Laurier University

equally—displays a CHRIST and His setting as wrapped into some sort of Slavic features. Taken its best known forms of expression, what happens here is not the logical treatment or reconsideration of some eternal truth or axiomatic principle—its conceptual analysis and logical breaking down—but the continuously recurrent re-asking of an ultimate question, the question of questions: what can I, a hopelessly self-reliant and unique being, do under conditions which always are hopelessly u n i q u e , since not showing resemblance to anything else? And if I have eventually killed a man, can I possibly forgive myself? With such expectations given, the intensity of the drama is afforded by the conscious uniqueness of situations and players.

their unreparability cannot be expressed conceptually

Our most evident example might be DOSTOEVSKY.[97] The situation itself, as always given, is irresolvable[98]—and first

Press 1986) xiv + 202 pp., Barbara Wett *»Neuer Mensch« und »Goldene Mittelmässigkeit«* F. M. Dostoevskijs Kritik am rationalische-utopistischen Menschenbild (München: Sagner 1986) 238 pp. [Slavistische Beiträge 194], Ina Fuchs *»Homo apostate«, die Entfremdung des Menschen* Philosophische Analysen zur Geistmetaphysik F. M. Dostoevskijs (München 1987) 800 pp. [Hochschule für Philosophie Diss.], Wayne Dowler *Dostoevsky, Grigor'ev, and the Native Soil Conservatism* (Toronto & London: University of Toronto Press 1982) 235 pp.; on his two excluding but still complementary ways of elaborating contradictory reality, Geoffrey C. Kabat *Ideology and Imagination* The Image of Society in Dostoevsky (New York Guildford: Columbia University Press 1978) xiii + 201 pp.

[96] On TOLSTOY, see Richard F. Gustafson *Leo Tolstoy* Resident and Stranger: A Study in Fiction and Theology (Princeton, N. J.: Princeton University Press 1986) xvi + 480 pp. [Sources and Translations Series of the Harriman Institute, Columbia University], especially ch. V: »The Ways to Know«, pp. 217ff; Jörg Thaeter *Die Beziehung des Individuums* Zur Unbegrenztheit und zur Gemeinschaft: L. N. Tolstoj als »Seher des Geistes«" (Kiel 1988) 244 pp. [Univ. Diss.], as well as Laura Jepsen *From Achilles to Christ* The Myth of the Hero in Tolstoy's *War and Peace* (Tallahasse, Florida 1978) xii + 179 pp.

[97] For example, "Every statement made is not only in anticipation of another's reply, but of self-contradiction, all of which leads to a highly ambiguous sentence structure and a peculiar style and tone." Irina Kirk *Dostojevskij and Camus* The Themes of Consciousness, Isolation, Freedom and Love (München: Fink 1974), p. iii. On his command of language, see Malcolm V. Jones *Dostoyevsky after Bakhtin* Reading in Dostoyevsky's Fantastic Realism (Cambridge, etc.: Cambridge University Press 1990)

and foremost because DOSTOEVSKY himself does not consider it resolvable, perhaps with one exception: his person. Yet, he (and this special emphasis contributes also to DOSTOEVSKY's prominence) is more pretentious than to try to solve only in normatively general terms the shocking problem, which an absolutely unique (thus neither conceptually delimitable, nor unambiguously solvable) situation represents in a given moral world order. As if he suggested that no approach would be conceivable without the concomitant exclusion of other approaches, although, in principle, these other approaches might be similarly possible as well on the level of the individual case.

"Essayism"

2.3.1.6. Modern "irrationalism" By examining an almost contemporary tradition we can arrive at what we could call, in absence of a more suitable name, essayism. From our perspective, not so much the genre which eventually bears the contents is of particular interest, but rather the underlying thought. Within the European culture prevalent at the end of the 19th and the beginning of the 20th century, it was NIETZSCHE who expressed it in the most clear form. In the Hungarian thinking tradition, BÉLA HAMVAS and NÁNDOR VÁRKONYI, two somewhat great but secluded minds, were the ones who revived and followed this tradition, not necessarily in response to NIETZSCHE, but rather as a reconsideration of the respective roles played by wisdom and knowledge in the development of human civilisation.

xvii + 221 pp., especially at pp. 145 [on »Catharsis«] and 193–199 [on »Authority, Mystery and Miracle in Human Discourse«].

[98] ISTVÁN BENEDEK—'Dosztojevszkij lelkivilága' [Dostoevsky's inner world] *Valóság* VII (1964) 4, pp. 32–46—explains (on p. 40) the self-closure of the situation as a paranoid self-description: "the autistic ideal of freedom, which Raskolnikov attempts to fulfil, the pathologic freedom-ideal characteristic of the schizophrenic […], is a distorted and false freedom as it relies on the rejection of community."

NIETZSCHE's stubborn denying of the time-spirit:

NIETZSCHE's thoughts[99] caused controversy all through his life owing to the fact that he always argued against the prevailing tradition which others considered to be the exclusive. Although he expressed his thoughts in an entirely lyrical form, he seemed to have said foolish and irrational things, moreover, on subjects and in a manner that others may have rightly sensed as annoying or eccentric, exactly because denying so rigidly, vehemently, evidently, convincingly and definitively[100] the true nature of everything any reasonable person could justifiably state at the *fin-de-siècle* under the pressure of the proper time-spirit.

it is our intentions standing behind our language-use

This may also contribute to understanding why NIETZSCHE has become an incredibly provocative and timely author in the eye of today's methodology of sciences, assuming the logical reconstruction of contemporary philosophy of science and cognition. It rather seems that it is some primitive and rudimentary truths in the propositions disguised into typical NIETZSCHEian negations (and coded in his particular language) that are of such fundamental value to today's cognitive sciences. In his book *Willen zur Macht*, he gave voice to the conviction that, in ultimate analysis, no symbol has a definite meaning, as "No path

[99] For a survey of NIETZSCHE's social world-view, see Keith Ansell-Pearson *Nietzsche contra Rousseau* A Study of Nietzsche's Moral and Political Thought (Cambridge: Cambridge University Press 1991) xvii + 284 pp.

[cult of formlessness]

[100] According to József Révay's sensitive formulation—'Immoralizmus (Nietzsche születésének 100. évfordulójára)' [Immoralism (To the 100th anniversary of Nietzsche's birth)] *Athenaeum* [Budapest] XXXI–XXXII (1946), p. 21—, "NIETZSCHE always felt repugnant to closed, definite, complete or rounded ideals [...]; openness, incompleteness and »not-yet-fulfilledness«, we might say formlessness, have a primary role in experiencing the »*Sollen*«. This formlessness, openness or restlessness, as the potentiality and command of development, is the most conspicuous aspect of »*Sollen*«, that is, of morals. This causes morals to drive us eternally, urging without momentary rest, and responds to why morals is a constant state of alert and tension. This tension cannot be resolved durably by any kind of performance or achievement [...]; the realisation or »resolution« of morals would eliminate the *Sollen* itself, thereby putting an end to morals."

leads from the concept into the essence of the things".[101] Or, from another approach, our tradition, life experiences and prejudices are the exclusive ones to give meanings—but only for what they so intend.[102] As is known, the nature of tradition lies in that each generation selects what it will adopt for itself from the legacy of past generations, that is, what it intends to use from the past in the interest of achieving its goals, and how will it do so. It is the mask of our human i n t e n t i o n s and practical commitments that after all hides behind the appearance provided by the conceptually neutral mediation achieved through language[103]—similarly to how the mere projections of our emotions, realisations or intentions may lurk behind our thought patterns, often following scientific ideals.[104]

[101] „Aus dem Begriff führt kein Weg in das Wesen der Dinge." *Nietzsches Werke* IX, hrsg. Elisabeth Förster-Nietzsche & al., 2. Auflage (Leipzig: C. G. Naumann 1901–1913), p. 264.

[102] „Das Kriterium der Wahrheit liegt in der Steigerung des M a c h t g e f ü h l s." Friedrich Nietzsche *Werke* in drei Bänden, hrsg. Karl Schlechta, III (München: Hanser 1956), p. 919. Cf. also Gisela Lück *Nietzsches Kritik der Erkenntnis als Verfestigung* Untersuchung zu Nietzsches Analyse von Philosophie, Sprache und Historie (Köln 1985) iii + 232 pp. [Univ. Diss.], especially ch. I/5, p. 108: "die vollstandige Destruktion der überkommenen Wahrheitbegriffs, die den Platz und Perspektivismus räumt, den gerade NIETZSCHE vertritt, wenn es das subjektive Machtgefühl als Wahrheitskriterium einführt." [the futility of concepts] [truth in function of the feeling of power]

[103] According to NIETZSCHE, notions have only one role to fulfil in language. That is the mediation between other fictions and metaphors. Since no correspondence theories of truth had any convincing force to him, he did not ascribe any descriptive or reflective role to language. "NIETZSCHE […] attempts to provide us with a means, a tool, with which we may take an a c t i v e and creative part in structuring that reality which is of concern to us. To do this he must maximize the plasticity, fluidity, and, of course, the ambiguity of his own language and use his termini not as concepts […] but as s i g n s and m e t a p h o r s, which can have a multitude of meanings." Ruediger Hermann Grimm *Nietzsche's Theory of Knowledge* (Berlin & New York: de Gruyter 1977) xii + 206 pp. [Monographien und Texte zur Nietzsche-Forschung 4], quote on p. 123. For the additional philosophical evaluation of metaphors, cf. *Philosophical Perspectives on Metaphor* ed. Mark Johnson (Minneapolis: University of Minnesota Press 1981) xiii + 361 pp. [use of concepts equals to act]

[104] Cf. also Josef Simon 'Language and the Critique of Language in Nietzsche' and James C. O'Flaherty 'The Intuitive Mode of Reason in

(nihil, but not irrationalism)

At this point we may confess that all this stands for the undertaking of some sort of nihilism—yet, by far not of the kind that was once accused to be. It is especially bizarre to recall the spectacular way GEORGE LUKÁCS turned away from NIETZSCHE, crying heresy. This was a little man's fear from irrationalism, a man's whose identity was shaken, and who later sought refuge in Bolshevism. As to the after-effects of LUKÁCS's response, it could not only result in declaring irrationalism the source of all evil and in trying to eliminate it from his own world with some professorial exorcism, but it could also take shape in that when he was unable to interpret something rationally (because of being panicky, or perhaps due to his hysterical escape, magnified by an internal alienation, he might have seen the only touchpoints in the rational), he immediately qualified it irrational—deceiving even himself, since acting as if he was able thereby to characterise genuinely the complex and contradictory feel for world shared by many of his contemporaries.

(not a conceptual expression)

As we may know from the literature on GEORGE LUKÁCS, but from his own manifestations as well, due to his aggressively constructed intellectualism and self-confident conceptualism, he never gained enough modesty, self-knowledge and self-control to realise (or at least to learn from the few friends he may have kept from his youth) that his sense for quality was a rather limited phenomenon; his responsiveness towards modern art was next to negligible; he remained almost insensitive to the natural limits of cognition; and moreover, he did not have the ear for non-conceptual expressions in general and for the domains of the sensorial, emotional and subconscious, in particular.

(not according to the ideal of science either)

It is even less justifiable or defensible that LUKÁCS, in his panic-stricken run from the brown barbarianism (Nazism), not only ran into the arms of the red barbarianism (Bolshevism) but he was not capable of retiring in this other extreme either, maybe learn silence and calm down within Moscow's special Bolshevik imperial HEGELianism to resist the temptation calling him to renew his own messianic expectations and

Zarathustra' in *Studies in Nietzsche and the Judaeo-Christian Tradition* ed. C. O'Flaherty, Timothy F. Sellner & Robert M. Helm (Chapel Hill & London: The University of North Carolina Press 1985), pp. 252–273 and 274–294, respectively; in a more general sense, also Maudemarie Clark *Nietzsche on Truth and Philosophy* (Cambridge: Cambridge University Press 1990) xiv + 298 pp., particularly ch. 3, para. 2: »Language as Metaphor«, pp. 69–77 [Modern European Philosophy] as well as Peter Poellner *Nietzsche and Metaphysics* (Oxford: Oxford University Press 1995) xi + 320 pp. [Oxford Philosophical Monographs].

ventures and try out the role of a magician's in the philosophy of history, the role of the great teacher and explainer. Returning to the debate of the turn of the century, we seem to grow more confident in our conviction that it was by no means NIETZSCHE's thoughts that were irrational, but rather certain kinds of interpretation of them, namely, the half-blind intellectual behaviour which attempted to push the thought back into non-existence and damnation just because it deviated from the usual, with the childish gesture of crying out *Este procul Satanas!*, as common with MANIcheans. LUKÁCS neglected the fact (and in his *The Destruction of Reason* he seemed to try to construe some peculiar substitute for virtue from his one-sided approach) that science is one of the ways of processing human cognition—namely, the way eventually characterised by the logical ideal of axiomatism. Being unreceptive to anything different from his own approach, he was simply unable to even consider the kind of thinking inherent in NIETZSCHE's work.

Neither could he identify with the kind of mentality that made BÉLA HAMVAS great and unique.

HAMVAS: cognition is not promoted by mere dichotomisation

HAMVAS's way of thinking[105] is not anything reducible to a simple logical formula. He is not from a world in which if one states *A*, a different *B*, concluding from or negating it, can also be stated. He did not walk into the dead-end which, according to his deep conviction, has already destroyed European civilisation at its early germs. In his works, comparable to some poetic vers libres, he depicts his intellectual experience with essayistic tools, while realising and making us realise how unusual his views on the world are. For HAMVAS the established thinking culture of the entire human race must be degenerated inasmuch as it is content with an intellectual performance exhausted in the dicho-

[105] Cf., e.g., for few translations, Béla Hamvas *Silentium* Essays, hrsg. Gerhard Wehr, trans. Jörg Buschmann ([Hannover]: M 1999) 126 pp., *Kierkegaard in Sizilien* Essays, trans. Ákos Doma (Berlin: Matthes & Seitz 2006) 276 pp. and *Die Melancholie der Spätwerke* trans. Ákos Doma (Berlin: Matthes & Seitz 2008) 61 pp., as well as Bela Hamvas *Odabrana dela* I–III (Beograd: Centar 1994), Бела Хамваш *Scientia sacra* (Священное знание) пер. Ю. Гусев (Москва: Три квадрата 2004) 363 pp. [Bibliotheca Hungarica] and Bela Hamvaš & Katalin Kemeň *Svet slike – slika sveta* Apstrakcija in nadrealizam u Mađarskoj, prev. Sava Babić (Beograd: Dereta 2001) 261 pp. [Biblioteka Kontinent Hamvaš Kolo 1].

tomisation of stating either *A* or *non-A* (as its counterpart in a logical negation, or the negation of negation, or synthesis in the HEGELian sense). The world in HAMVAS's eye is an integral whole: a totality which humans approach through all their senses including intuitive contemplation and emotions—and by no means exclusively through a hollow and dry conceptual intellectualism. He thinks that we have long lost the bloom and humbleness in the human approach to the world—perhaps already with THALES, at the beginnings of Greek philosophy.

CAUDWELL: **2.3.1.7. Beyond conceptual strait-jackets** Now let us consider two further thinking traditions of the 20th century, which may also seem particularly pioneering—although from a different methodological perspective.

The first to be mentioned is CHRISTOPHER CAUDWELL, a thinker of exceptional talent and productivity, who passed away tragically early. Having been of a leftist belief, he took part in the Spanish republican battles, fought for the Soviet Union, and, his young age notwithstanding, died as a multiple inventor in the field of aeronautics and as a philosophical talent that remained a promise. His immensely thrilling treatise, published under the title *Illusion and Reality*, testifies that although he was an ardent developer of theoretical MARXism, he still preserved the poet and utopianistic dreamer in him. Aspects that seemed irrational to others following the traditional MARXist manner of discourse could become relevant in his scholarly treatment amidst the upheavals of the 1930s. Nevertheless, his considerations were regarded as heresies in the England of the last years of peace before the Second World War, when his work was first published—already posthumous—, and neither were any followers born three decades later in Hungary when the translation was published.[106]

[106] Christopher Caudwell *Illusion and Reality* A Study of the Sources of Poetry [reprint of the new ed. 1946] (London: Lawrence & Wishart 1966) 342 pp. For a critical overview, cf. H. Gustav Klaus *Caudwell im Kontext* Zu einigen representativen Literaturformen der dreissiger Jahre (Frankfurt am Main: Lang 1978) 301 pp. [Europäische Hochschulschriften 14: Angelsachsische Sprache und Literatur 65].

poetry as cognition

According to CAUDWELL's crucial realisation, poetry as well as other (non-theoretical) forms of linguistic expression may be of equal value to cognition in the intellectual appropriation of the world. Otherwise, the human intellect does not usually appropriate the world in a way as to which at a given moment it, so to say, starts "cognising", and from then on it does nothing but "cognise". A scholars' life (and especially the everyday life) is neither about, so to say, to be scholarly (that is, following scientific model-values) occupied with or committed to the so-called reality. Be it that one composes—thus, writes one's own human (so, among other capacities, also intellectual) encounters with reality in forms of poems, short stories, novels, confessions or utopias—or be it that one uses words according to canons other than those paradigmatically accepted in scholarship—e.g., with the loose ambiguity of everyday speech, up to the concreteness of indication, or with the application of the individual language of personal confession—, in either case it will surely differ from the conceptual language required by the strict axiomatic ideal. The subject will still remain the same in both cases: the human being's encounter with the outside world. CAUDWELL was a rigid LENINist in that he confessed that there exists an objective reality which is independent from our consciousness, and this is reflected by linguistic propositions composed in accordance with conceptual logic. Nevertheless, he was aware of the fact that reality presented and represented by poetic forms is the same reality as anything else.

(LUKÁCS' realism: literary prose taken as the reflection of reality)

It may be relevant here to recall that LUKÁCS fought with the same problem throughout his entire life, and he constructed his theory of the so-called greater realism in the spirit of it. For LUKÁCS it was still theory which filled the role of pattern and measure, and he constructed his ideas on the intellectual appropriation of the world (called cognition)[107] to the analogy of science, rigidly staying within the boundaries of paradigms and criteria set by scholarship. LUKÁCS had no other options but to iden-

[107] E.g., Georg Lukács *Die Eigenart des Ästethischen* I. Halbband (Neuwied am Rhein & Berlin-Spandau: Luchterhand 1963), ch. II.

tify everything he could not fit into this epistemological bed of Procrustes artificially constructed upon the basis of conceptual constructs, be they conventional or merely arbitrary, with irrationalism. Moreover, he even arrived at identifying this irrationalism with what DIMITROV of the *Communism Internationale*[108] labelled as the Soviet doctrine's Fascism—with a gesture of some sort of self-destructive, ironic irrationalism. Driven by his desire for rationalism and literary realism, he even raised the works, for instance, of ZOLA, BALZAC and WALTER SCOTT to the status of universal types and literary patterns. However, he used such criteria (alien to artistic expression and void of any deeply humane message) and arrived at such borderline areas that we can hardly tell at this point now whether he was truly able to appreciate the genuine literature, that is, the literary wonder, especially the catharsis in them, at all. As to fine arts, we actually learned from his old friends that LUKÁCS was the least susceptible to the acceptance of beauty as such, with no involvement of personal interests or theoretical speculations. Perhaps for these reasons, anything that might have been entirely irrelevant or unnoticeable to others could become a criterion in his theorising inasmuch as they happened to match his theoretically construed questions, or his theory of realism, as the case may be. When theorising about them, he might have even declared the aforementioned authors the peaks of absolute and universal literary accomplishment at an ideal level—in a hierarchy of accomplishments established by him, a kind of a canon he theoretically constructed, in which LUKÁCS defined literature as the particular (if not segmented or rudimentary) way of "cognition", and therefore allowed science in the narrow sense to prevail as its sole (albeit ultimate) ideal.

even if elaborated through other ways than scientific propositions

Nevertheless, CAUDWELL, as the witness of the fermenting times after the Great War, suspected that poetry cannot be interpreted according to the usual patterns of scientific epistemology. For a poem is not meant to be elaborated in the same way as scientific propositions and theses are analysed. A poem is not to be understood, and its meaning is not to be construed, in the same way one unfolds the message of a scientific thesis and processes its lessons—having in mind the scholarly expectation that the procedure will offer some

[108] Cf. <http://en.wikipedia.org/wiki/Georgi_Dimitrov>.

new realisations within the prevalent system of paradigms and allow us to learn more about reality and its scientific reflection.

LANGER: speech as personal revelation about the world

The other thinking tradition is related to SUSANNE LANGER. She represented a German emigration at Harvard between the two world wars. She was a pupil of neo-KANTians, and especially of ERNST CASSIRER who sought refuge there from Nazism. First she became his pupil, then his translator. Her own work, published under the title *Philosophy in a New Key*, besides having undertaken a popular summation, was aimed at laying the theoretical foundations of philosophy of arts, at the same time offering also an epistemological and semiotical-semantical synthesis which bore CASSIRER's impact on it.[109] According to her starting point, our speech and our spoken language are basically no other than our personal manifestation, i.e., r e v e l a t i o n , about the world we live in.

(FRANK: the judge searches for just solution, adjusting what and how he does to this)

Around the same period of time, an American appellate court judge—thus making the decision in law after the jury's statement—published a book of wide interest[110] in which he hazarded to express an opinion regarded as heretical at the time. According to his views, the judicial procedure cannot and actually does not purport or venture to establish what "derives" from the law—or from the selected precedents—but it simply seeks the possibilities of a j u s t decision. The problem—as the author explained it by comparing it to the parallel boundness and freedom of musical composing and editing[111]—consists of the possibility of how one can argue

[109] Susanne Langer *Philosophy in a New Key* A Study in the Symbolism of Reason, Rite and Art, 3rd ed. (Cambridge, Mass.: Harvard University Press 1942) xx + 313 pp. For an essayistic overview of her oeuvre, cf. also Susanne K. Langer *Philosophical Sketches* (London: Oxford University Press 1962) 190 pp. For a critical survey, cf. Norah Alison Martin *Hegel and Langer* Investigating the Becoming of Mind (Edinburgh: University of Edinburgh 1989) [Theses].

[110] Jerome Frank *Law and the Modern Mind* [1939] (Garden City: Doubleday 1963) xxxv + 405 pp.

[111] Jerome Frank 'Say It With Music' *Harvard Law Review* LXI (1948) 6, pp. 921–955.

for the individual justness of an individual case upon the basis of available precedents, that is, how a judge can afford enough discretion to be able to make his o w n decision through the due assessment of the case.

Language usage is built on comparison and analogy

At this point, in her reasoning, LANGER reduces the different ways of thinking to one common denominator. Staying within the range of arts, she raises the issue: if we were able to express our message also through the language of music, could we be sure that we would express the same in the same manner as, for instance, we actually did through the language of the available legal precedents? Or, why are the precedents recorded, developed and elaborated in the given (and no other) conceptual language (broken into one given set of concepts, using given conceptual distinctions, and so on)? Is this perhaps due to the effect of the axiomatic language of geometry and is it done to its analogy? Still, no theologist, jurist or moral philosopher can contest that, whatever unique features life conditions may display, their homogenous evaluation, and the moral and legal lessons drawn from them can only build upon the c o m p a r i s o n with and to the a n a l o g y of some 'precedents', that is, upon previous patterns. Thus, the evaluation can only be performed in a way that we first define a p r i n c i p l e, then draw a conclusion from it, declaring that the given lesson derives from the said principle. Well, LANGER raises the next question as well: is it conceivable to transmit a lesson, originally available in the language of precedents, in the language of music? Is it conceivable to express our conditions and dilemmas of decision in a musical form, or even in the one of visual arts? For it is a commonplace to state that music "touches" entirely different parts of the psychological ego than an impressionist or surrealist form of visual expression, yet both of them, similarly to any other human manifestation, speak of the same human totality, torn between conflicting pressures of the same reality. Therefore, it ought not to represent solely by reflecting its subject, and, after all, it needs not to be figurative either. Or, despite that a language other than the scientific can "touch" different parts of the psychological ego, it may still speak about the

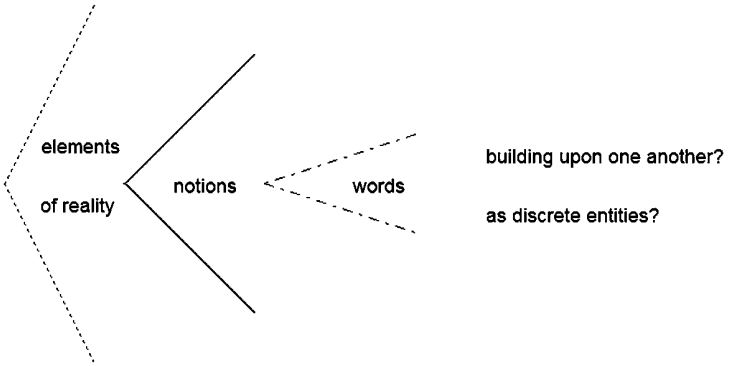
same subject. However, scientific language, as opposed to the former point of view emphasised by the psychology of language use, may presume a semantic embedded more clearly and epistemologically in the ontology of human communication.

Recoursing to language, our thought is broken up in order to fit the rules of language:

This can be explained in part by a widely known circumstance, namely that both spoken and written language follows strict rules. For instance, the sentences that make up language are constructed from subjects and predicates, and it is again largely determined what functional words can be put before, between and after the subjects and the predicates. Certain relative choices are of course always available, but their variety and number are limited. Furthermore, linguistic expression must be broken into discrete units (sentences and series of sentences showing a complex intertwinement of sub-, supra- and co-ordinative relations), that is, into clearly differentiated and differentiating parts. So, when we speak we also give shape to (and greatly determine as well)—f r o m t h e v e r y b e g i n n i n g of the sheer act of using the 'language'—an expressible human thought, doing so in accordance with linguistic demands and potentialities. We must find the proper ways of shaping ideas and thoughts, of linking, comparing and deriving them, only exploiting the potentialities of the structural and conceptual framework of language. We must place the notions into an o r d e r built from elements and states, interrelated and placed into a sequence at any given time. Thus, our thinking—and in fact also our imagination—is dominated by patterns and rules which, at the same time, have nothing to do with the thoughts we want to express through language, nor have they any connections to the reality we attempt to reflect through our thoughts (*Figure 6*).

notionalisation involves limitation by classification // are poetry and formal conceptualism equivalent?

This all leads to the emergence of the possibility of a surprising conclusion. We are neither dominated by the outside world, nor by our thinking on the outside world, but rather by its medium, structure and means of expression, which is language. For all the various situations in which we can conceive of reality, or about which we can have thoughts at all, are i n i t i a l l y s h a p e d b y t h e s t r u c t u r e



(*Figure 6*)

o f l a n g u a g e .[112] In retrospect we must realise that our thinking is far from being free, since we can only think as predetermined by the situations of linguistic expression and the sociological position taken in communication. Taking an elementary example: we may bring forth some words and put them ungrammatically at the phrase's beginning, but we must say the subject and the predicate immediately after them. This will all depend on, among other things, whether we want to compose a sentence in an affirmative, interrogative or imperative mood. So, when we simplifyingly say that "we think", as a matter of fact we operate with notionalised words, creating a structure predetermined by a given scheme and putting the words into a certain orderly sequence, although we have to operate with these as if they were discrete entities, however they are not. At most they can represent certain selected and artificially isolated aspects of the extremely complex correlations of the totality of the world. We are aware that linguistic elements not only serve as, e.g., independent words as bare components of the grammatical and syntactic construct of a text, but also as the

[112] As just one exemplification for the fact that floating understanding of the time may render also its linguistic expression timeless, which, by the same stroke, causes polysemantics in both lexica and syntactics, cf., Pál Miklós 'Idő – kínaiul' [Time – in Chinese] *Liget* IV (1991) 3, pp. 17–30.

conceptual representation of reality. When using a word in a linguistic context we must presume that each word has a somewhat different meaning. In other words, we assume that individual words (at least most of them) are ascribed to and stand for different notions. That is, we use words notionalised to a certain extent. Yet, we thereby also presume that the individual concepts have boundaries as well. Although we should take into consideration that it is not the concepts themselves that have limits, but we are the ones to ascribe d e l i m i t a t i o n s to them—throughout their creation and also in the course of conceptual practice. In the meantime, it is also conceivable that—for instance, turning from the argumentative conceptual exposition to poetic expression—we write hundreds of pages of an epos, or perhaps a never-ending poem (with which we may "exhaust" our universe or our sensation about it by "objectifying" our uniquely individual personality), yet, the entire written oeuvre will not necessarily bear a different message than that described in argumentative prose by one notion: 'love', 'faith', 'religion' or anything we please—the way we personally experience it. What should we choose then: BYRON's hundreds of poetic lines, or the concise entries in the *Encyclopaedia Britannica*? We may choose either of them, but we must do so in the right time and for the right purpose. Perhaps we should choose the former if we long for the infinite horizons of personal experience, and the latter if we are curious about the self-closure of abstract symbolism.[113]

Denomination is through conceptual identification

When we use linguistic-conceptual denominations —continues LANGER—we simply denominate i m p e r f e c t l y. For we can denominate everything we want to express only by linguistic means, that is, through c o n c e p t u a l i d e n t i f i c a t i o n. The parallel drawn between music (or the figurative and non-figurative arts) and language becomes fully understandable only at this point. For as soon as we commit into the conceptual

[113] See, above all, James Boyd White *Heracles's Bow* Essays on the Rhetoric and Poetics of the Law (Madison: University of Wisconsin Press 1985) xviii + 251 pp. [Rhetoric of Human Sciences].

language what a given piece of music or poem "is about", we instantly falsify its meaning. On the other hand, it would be clearly foolish to claim that anything not transmitted in the language of scholarship is necessarily alien to our intellectual cognitive activity appropriating reality also by reacting to it.

within the bounds of the homogeneity of language

In most cases we do not even make conscious enough what options we are facing. For once we resort to language as to a scientific ideal, we become captives of a strait-jacket. We thereby certainly redeem the chance of truly being able to propose anything according to the ideal of scholarship. Whereas if we do not make this choice, then we turn our backs to the entire ideal, at least to the extent of the communication in question, and by choosing the different homogeneous medium of a different ideal we arrive at, for instance, a vers libre. We may also arrive at a form of expression in which the words themselves are not separated. We can express our thoughts by any kind of sequence of symbols after all (even at full discretion, changing from one moment to another), and in such cases it will entirely depend on how the reader will manipulate the letters—symbols and signs—and how he will interpret them.

Posited commands can only be either observed or broken

2.3.1.8. Patterns of thought, patterns of law When in a comparative methodology of the moral and legal mind as the first instance to autonomy we stated that from the words of JESUS CHRIST, recorded in the New Testament, His teachings cannot be "deduced", we meant not to express something shocking, but to confirm an otherwise familiar philosophical realisation. Taking the opposite stance, if we stated that the teachings of JESUS CHRIST could be formulated in terms of "conclusions", and that they could be aligned into a logical sequence of doctrinal propositions with the definitive rigour of geometry, and, moreover, that He even enunciated them with axiomatic pretensions, we would be saying that although the Master expressed himself unequivocally, he did so in a manner that prevents us from acting in an autonomous way. For if we claim that there is a law available for all of us, then the Law—only remembering of the debates

around both the Old and the New Testaments—decides everything in and of itself, thanks to its prevalence; there will no longer be any room for meditation and conscience; and therefore, there will be no room for any autonomous decision-making either. Since—merely applying what is arising from the revelation of the Law—either the breaking of the law or its subservient observation are our only choices: *tertium non datur*. This, however, is not the meaning of the law of JESUS CHRIST.

The pattern set by JESUS CHRIST is an instance and not a proposition: it calls for personal responsibility

On the other hand, what exists and validates itself through our CHRISTianity is the accumulation and superimposition of individual situations generated by the continuity of life at any given time; and we are expected to take an irrevocably personal decision with regard to them. Although we can resort to ample sets of clues to help us with points of reference in our dilemmas, no previous example, case or pattern can afford an excuse to relieve one from the responsibility of taking a p e r s o n a l stand. This is not so because the examples at our disposal were deficient, or because JESUS CHRIST lived a life too short or too perfect to give examples of sufficient variety and subtlety, or even because the Apostles did not perform the job of committing His deeds and teachings into writing with proper faithfulness and completeness. It is simply so—and this is the methodological message—because the parables are not meant for such a purpose.[114] Several times more parables could still not offer such a perspective. For the pattern set by JESUS CHRIST must itself be taken as an i n s t a n c e , and not as a p r o p o s i t i o n . It ensures the a u t o n o m y of man, and it assumes p e r s o n a l r e s p o n s i b i l i t y in return. Should we be exempt from free choice between concurrent alternative decisions personalising the Law, we would feel this construction to be damaging to human dignity.

[114] For an observation from a methodological perspective, see Eliezer Segal 'Law as Allegory: An Unnoticed Literary Device in Talmudic Narratives' *Prooftexts* 8 (1988), pp. 245ff.

KANT's morality / legality: duality of inner self / external accountability

There are cultures in which the freedom of choice and the idea of moral autonomy are so deeply rooted that they cannot allow anything different (especially, external and enforceable regulation of behaviour) to develop. From such a perspective, it is but a natural consequence that what we usually (as lead by own cultural presuppositions) call law proves to be the exact opposite and negation of any autonomous, responsible personal choice, as it is based on h e t e r o n o m y and the b r e a k i n g of the own will (and thereby also on the exclusion of whatever relevance of any own evaluation of situations). We may be aware of it, but are nevertheless deeply socialised to it (not even noticing it by the time we go from the infants' nursery to the kindergarten). Well, in cultures where such external law supported by force forms the basis of social co-existence, we, as its addressees, can have only one thing to do: follow its orders. Moral considerations with own dilemmas in evaluating situations will not matter any longer. Law conceived like this, as KANT makes clear in a classical way,[115] is built upon a duality in which external and internal— m o r a l and l e g a l —are separated. The former is related to matters of conscience, to what derives from our personality, from our internal substance. Society is not concerned with this directly. What mainly concerns the outside world in Western modernity is that we should not hurt our fellow-men, not take their things, take advantage of the community's property, and so on. It is with our exterior that we participate in social commerce: this is what we can help or damage society with. In this perspective, the nature of our interior is by no means a criterion for judgement. Of course, it was clear to KANT that there is a relation between interior and exterior. However, he differentiated between the spheres of morality and legality, knowing that their interaction (its direction or character) is not at all shortcut, immediate or unambiguous. Their co-relation rather reveals a c o m m o n

[115] Immanuel Kant *Die Methaphysik der Sitten* in his *Werke* hrsg. Ernst Cassirer, VII (Berlin: B. Cassirer 1916), p. 14.

t e n d e n c y — which, however, pertains rather to psychology and social ontology, instead of behavioural sciences proper.

The empirehood of China called for organising force capable of self-organisation:

Among the above-mentioned cultures the most remarkable has developed in China. This radiated through Korea to Japan. As is known, China is one of the oldest states in history. Its law is not only developed, but has a long history as well. The Chinese empire can claim an experience even older and more challenging than the Roman Catholic Church. As is also known, China has always been an empire due to both size and machinery. What we could learn much later in Europe as statehood had originally operated in China as empire-hood. Yet, what was used as, and for, law in Europe had never been considered law in China. The empire-hood of China, undisturbed for thousands of years (in any case not shaken by external powers), produced instruments of control original both in shape and action, differing from the ones in Europe.[116]

[the natural character of *li*]

[116] According to Derk Bodde & Clarence Morris *Law in Imperial China* (Cambridge, Mass.: Harvard University Press 1967) xiii + 615 pp. [Harvard Studies in East Asian Law 1] on p. 21, the *li* draws its universal validity from its age-old harmony with human nature and cosmic order. At the same time—as R. P. Peerenboom *Law and Morality in Ancient China* The Silk Manuscripts of Huang-Lao (State University of New York Press 1993) xvi + 380 pp., [SUNY Series in Chinese Philosophy and Culture] especially at p. 126 adds to the above—it is an order in constant forming through varying interpretations under changing conditions.

For the basic notions of Chinese law, see Gray L. Dorsey 'Two Objective Bases for a World-wide Legal Order' in *Ideological Differences and World Order* Studies in the Philosophy and Science of the World's Cultures, ed. F. S. C. Northrop (New Haven, etc.: Yale University Press 1949), pp. 442–474 and Hyung I. Kim *Fundamental Legal Concepts of China and the West* A Comparative Study (Port Washington, New York & London: Kennikat Press [National University Publications] 1981) xiii + 175 p. For its complexity, see L.T. Lee & W.W. Lai 'The Chinese Conceptions of Law: Confucian, Legalist and Buddhist' *Hastings Law Journal* 29 (1978) 6, pp. 1307–1329 as well as Bjarne Melkevik 'Un regard sur la culture juridique chinoise: l'École des légistes, le confucianisme et la philosophie du droit' *Les Cahiers de Droit* 37 (1996) 3, pp. 603–627.

Fa, and the disintegration of rule and of legism

Sometime in the 3rd century BC, only for a short and transitional period, one of the thought trends, legalism [*fajia*] prevailed over the others, supported by one of the reigning groups.[117] It focused on enforcing, as the basis of law, one of the components of the indivisible tradition of Chinese law, the layer of *fa*. The dynasty concerned was soon abolished, and the former viewpoints of CONFUCIUS became prevailing again. Thus, China could organise social co-existence undisturbed—all the more, as the next falter could lead China into temptation only two and a half thousand years later under the Communist rule of MAO TSE-TUNG. In the so-called Great Leap Forward period (also called the "Cultural Revolution") China gave up its modern culture of formal law, adopted by the end of 19th century under European (German and French) imperialist pressure for modernisation, later refurbished through Moscow mediation in order to meet the requirements of power centralisation. Thus, instead of any rule of formal law, in a re-modernisation attempt by MAO, announcing "permanent revolution", China again allowed a non-formal patriarchal agent to prevail which gave free scope for political-social influences (with agitative pressure and direct, "spontaneous" violence) at any given time and which—at least according to Western evaluation—resulted in anarchy, unforeseeability and unreliability, and, for so many, also humiliation, destruction and annihilation. Comparative historico-philosophical analyses have proven that through loosening the framework of formal

[117] E.g., A. F. P. Hulsewé 'The Legalists and the Laws of Ch'in' in *Leyden Studies in Sinology* ed. W. L. Idema (Leiden: Brill 1981), pp. 1–22 and *Thought and Law in Quin and Han China* Studies Dedicated to Anthony Hulsewé on the Occasion of His Eightieth Birthday, ed. W. L. Idema & E. Zürcher (Leiden, New York, København, Köln: Brill 1990) ix + 224 p. [Sinica Leidensia XXIV] as well as A. C. Graham *Disputes of the Tao* Philosophical Arguments in Ancient China [1989] (La Salle, Ill.: Open Court 1991), para. 3: »Legalism: An Amoral Science of Statecraft«, pp. 267–292 and Wang Zhiyong 'Le positivisme juridique dans la Chine ancienne' in *Legal Systems and Legal Science* Proceedings of the 17th World Congress of IVR, VI, ed. Marijan Pavčnik & Gianfrancesco Zanetti (Stuttgart: Steiner 1997), pp. 58–70 [Archiv für Rechts- und Sozialphilosophie, Beiheft 70].

law, China has actually returned to her own cultural antecedents and traditions, but in a distorted form, artificially leading to a forced path, and with a frightful falter indeed.[118]

(the dilemma of *ordo*)

> While the dilemma, without being resolved, is still haunting in new forms. From both historical-philosophical and cultural-anthropological points of view, the question is unanswered of what a human being (honest, morally authentic and serious) and a human community is expected to recognise as law in society. Perhaps the increase in the West of comparative philosophical and cultural-anthropological investigations into old and different solutions can also be attributed to such a troubling uncertainty.[119]

preservation of personal autonomy, instead of the conformity of legality

According to CONFUCIUS, only a measurement capable of giving subtle answers and expressing nuances supports man in his moral capacity. Sharp contrasts and extreme formulations can hardly go with it. For whatever conceptual representation could only force the inimitable uniqueness of personal life into artificially devised cages of categorisation and classification and thereby would necessarily destroy personal particularities by homogenisation. Moreover, conceptuality subordinates personal moral features to others' classificatory judgement which is inhuman. After all, in a community like China, it is assumed that we all represent moral quality, hold internal values, and these all arise

[118] Cf., by the author, *Codification*…, pp. 239–242, especially at note 73. Also cf. James P. Brady *Justice and Politics in People's China* Legal Order or Continuing Revolution? (London, etc.: Academic Press 1982) xiii + 268 pp. [Law, State & Society 8]. For a comparative background—promising much but remaining scarce in theory—see also Werner F. Menski *Comparative Law in a Global Context* The Legal Systems of Africa and Asia 2nd ed. (Cambridge: Cambridge University Press 2006) xx + 674 pp.

[119] Cf., from the literature of the last decades, especially Philippe Nonet & Philip Selznick *Law and Society in Transition* Toward Responsive Law (New York, etc.: Harper & Row 1978) vi + 122 p. {discussed by the present author in his 'Átalakulóban a jog?' [Is the law in transformation?] [1980] in Varga *Jogi elméletek*..., pp. 226–236}, as well as Eugene Kamenka & Alice Erh-Soon Tay 'The Traditions of Justice' *Law and Philosophy* 5 (1986) 3, pp. 281–313.

from within. Therefore, we have to assume to be able to decide what we need to do in various situations. We should act not for others' sake, not for gods' or fellow-men's appreciation, and especially not simply to do good or to meet requirements imposed on us by external norms. The conformity of legality is unknown and mostly rejected as a specimen of hypocrisy in this culture. Instead, it is the fulfilment of moral quality that has to make us act,[120] that is, to live our life in a way so as to, expressed by the Japanese, "not lose face". Anyone forcing a judgement on us would surely cause more damage than the eventual moral disapproval of our environment. That is to say, experiencing our autonomy comes first, and what it may suggest comes only after. This is maybe the optimum way of strategic planning for a huge empiredom.

common search for compromise and peace, avoiding external authority

In various practical situations in the Chinese culture of autonomy, the event which caused the tension is approached carefully, from a distance, and avoiding all formalities. There is no fight with abstract norm formulas, no disputes directed to forced channels, selected from the store of patterns artificially framed and predefining its outcome, or rephrasing them through norms, so that the other party with arguments and aspects rendered irrelevant shall be defeated. Conflicts of the past, or considerations and arguments brought up once in their resolution, are referred to, if at all, as memories only. The discussion is kept among such frames that the partners agree on decisive issues by themselves, without any external constraint. Their approach to merits should neither lead to extreme and repelling formulations, nor harm the other. With no polarised opposition between their respective status, there will be no extreme result either. Not having a plaintiff and a defendant, there will be no winner and loser

[120] To use the almost practical explanation by CONFUCIUS: "[The Master said] »If you govern them with decrees and regulate them with punishments, the people will evade them but will have no sense of shame. If you govern them with virtue and regulate them with the rituals, they will have a sense of shame and flock to you.«" <http://www.island-of-freedom.com/CONFUCIUS.HTM>.

either. The participants debate in merits as equal partners, aware of their common responsibility (rowing "in the same boat") and being doomed to a common fate both as humans and moral beings. They can only achieve their respective goals t o g e t h e r . For the p e a c e of society can only be restored if they have returned to the everyday life while "keeping face".

Resolution of dispute: local responsibility / Ensuring peace: imperial responsibility

The sides in the dispute are expected to know how to reach a resolution by themselves. Their whole community is responsible for it (by no means only indirectly or in a symbolic sense). In order to reach it, a third person, mutually acceptable for their communities, usually takes part in the resolutions. For China was the statehood of an empire of incredible dimensions. The state power relied on winning mutual acceptance for and transmitting the tradition of common values, considered by far more important than the individual life with a narrow personal perspective. The apex value was the empire's life, continuity and survival as a whole under all circumstances. Therefore, there was a need (and not on a village, town, district, or other local level, but on the mandarin-administration level, extending to huge regional units) for building in safety valves to ensure that trivial everyday quarrels were solved from own sources. The Chinese mentality is well characterised by the fact that the only real empire-level regulation was practically born within this circle. For the persons concerned had to know how to solve their disputes, on the one hand. They had to do so within such limits that the dispute should not degenerate. The respective community had to bear direct responsibility for it. Thus, they avoided, with apparent success, the extreme trap of both personal fall and damaging the community.[121]

Fiat iustitia, pereat mundus! unknown in balanced (ancient) cultures

[121] As is known, the rigid followance of the principle *Fiat iustitia, pereat mundus!*, and the obsessed community-deteriorating chase of justice, may equally produce victims. For the classic interpretation of the relentless desire of truth, based on the work of HEINRICH VON KLEIST, see Heinrich Christian Caro *Heinrich von Kleist und das Recht* Zum 100jährigen Todestage Kleist's (Berlin: Puttkammer & Mührbrecht 1911) 51 pp., Adolf Fink 'Michael Kohlhaas – ein noch anhängiger Prozeß: Geschichte und Kritik der bisher ergangenen Urteile' in *Rechtsgeschichte als Kulturgeschichte*

On the other hand, when no resolution was arrived at in the community, the case unavoidably went to the mandarin. Instead of administering justice, his task was to punish those who proved to be unable to find the ways of a just resolution. He proceeded in a manner that the mere fact of turning to him generated a repressive effect, and, next time, the communities would favour prevention of dispute-degeneration by effectively resolving it in merits.

Sharp contrast between informal dispute-resolution and formal conflict-settlement:

The point here is not simply about the opposition of non-formal and formal patterns of conflict-management, but also about a legal-anthropological basic situation.[122] Namely, sometime, somewhere a dispute occurs. This situation is considered injurious by someone. Somebody ascribes it to somebody else, considering him responsible for the situation. Usually, the situation can be solved by those involved. This is the non-formal resolution of dispute, avoiding a formal decision which would declare one party the winner and the other the loser. In consequence, the dispute and the underlying conflict will vanish completely. Even the memory that a difference had once occurred soon disappears in the mist of the past. In the European culture of the formal settlement of conflict, however, one turns to an outsider to reach a decision. The decision-maker, as formal authority, will polarise the disputed terms into one of the exclusive alternatives of "he is right" and "he is not right", artificially putting an end to the conflict and formally naming one winner and one loser.

Festschrift für Adalbert Erler zum 70. Geburtstag, hrsg. Hans-Jürgen Becker & al. (Aalen: Scientia 1976), pp. 37–108, Horst Sendler *Über Michael Kohlhaas – damals und heute* (Berlin: de Gruyter 1985) 45 p. [Schriftenreihe der Juristischen Gesellschaft zu Berlin, Heft 92], J. Hillis Miller 'Laying down the Law in Literature: The Example of Kleist' *Cardozo Law Review* 11 (1989–1990) 5–6, pp. 1491–1514 as well as *Recht und Gerechtigkeit bein Heinrich von Kleist* hrsg. Peter Ensberg (Stuttgart: Akademie-Verlag 2002) 204 pp. [Frankfurter Kleist-Kolloquium].

[122] For an overview, see *Law and Anthropology* ed. Peter Sack (Aldershot, etc.: Dartmouth 1992) xxx + 527 p. [The International Library of Essays in Law & Legal Theory: Legal Cultures 3].

its failure can lead to a feud

Let us continue the intellectual journey through the so-called primitive tribal practice of Papua New Guinea. When an injury occurs and cannot be solved by those involved, it will become a case of the community. If not solved promptly, it will affect a widening group among the tribe in question. If no solution is presented by the tribe, ultimately the tribes (communities) concerned will drift into conflict. Under so-called primitive conditions, without institutionalised courts and formal fora of decision-making available, this can lead to a feud. One of the sides, not tolerating the unresolvedness any longer, openly announces breaking off, a process that will irrevocably generate violence and cause damage.[123]

this is why *shalom* is the supreme value

What is broken in such a case is called *shalom*.[124] It means p e a c e , the maintenance of which is the cardinal issue in a

[123] E.g., *Law and Warfare* Studies in the Anthropology of Conflict, ed. Paul Bohannan (Garden City, New York: The Natural History Press 1967) xiv + 441 pp. [American Museum Sourcebooks in Anthropology] and, by Leopold Pospísil, *The Anthropology of Law* A Comparative Theory (New Haven HRAF 1974) xiii + 385 pp. and in particular at p. 2 as well as *Kapauku Papuans and Their Law* (New Haven: Yale University Department of Anthropology 1958) 296 pp. [Publications in Anthropology 54].

[124] For the sources of Jewish law, see Elliott N. Dorff & Arthur Rosett *A Living Tree* The Roots and Growth of Jewish Law (Albany, New York: State University of New York Press 1988) xv + 602 p., George Horowitz *The Spirit of Jewish Law* (New York: Central Book Co. 1963) xl + 812 o., titles I–III: »Torah« / »Talmud« / »Codes«, pp. 8–67 and Harry C. Schimmel *The Oral Law* A Study of the Rabbinic Contribution to Torah She-be-al-peh (Jerusalem & New York: Feldheim 1971) 170 pp.; for its cultural (religious and philosophical) environment, Ze'ev W. Falk *Law and Religion* The Jewish Experience (Jerusalem: Mesharim 1981) 238 pp. and Bernard S. Jackson 'Ideas of Law and Legal Administration: A Semiotic Approach' in *The World of Israel* Sociological, Anthropological and Political Perspectives, ed. R. E. Clements (Cambridge: Cambridge University Press 1989), pp. 185–202; for its moral determination, Moshe Silberg 'Law and Morals in Jewish Jurisprudence' *Harvard Law Review* 75 (1961) 2, pp. 306–331; for the traditions of making it liveable in a state environment, see Moshe Silberg *Talmudic Law and the Modern State* [1961] trans. Ben Zion Bokser (New York: The Burning Bush Press 1973) xiii + 224 pp, ch. VIII: »At the Crossroads«, pp. 131–153, as well as—in connection with the conflict between modern secular town-planning and the continued need for a so-called "Jewish telegraph" {once "the poles crossing the roads on the outskirts of villages with their wires leading from nowhere to nowhere which made a courtyard out of the whole village to practically release the prohibition of

Jewish community,[125] for being an indispensable prerequisite to its survival. A community drifted into war for whatever reason has the chance that its future existence will become questioned or undermined. Hostility would even exclude the mere chance of future resolution. It would eventually declare one of the parties victorious, and the other defeated. Breaking of the equilibrium and the intention to balance it out can easily lead to the community's moral or physical annihilation. Then the *shalom* is over, at least for an extended period of time. As a natural consequence, brute victory can easily incite revenge, back strike, and renew the struggle.

imperial law is devised to retaliate unrest

Hostility endangers the whole community, threatening its future on the whole, therefore it must be blocked and prevented at all costs if possible. Mandarin justice comes into sight under such conditions. The mandarin, as the emperor's representative, can only apply imperial laws. This is the emperor's law. It is not meant to provide just and equitable patterns for individuals of the population (constituted by groups of various order and rank), as opposed to the Roman-rooted procedural pattern with an individualist life-ideal that does this in Europe. The imperial law is not meant for taking a decision for the individual directly concerned. In a situation when the *shalom* is the prerequisite for peace, and peace for the survival of the community, the emperor's law must opt for communal existence, instead of caring about justice or equity for the individual person. For the subjects

»carrying in the street« on Saturday", in the author's reviewing Arthur Linksz' memories in 'Egy élet a századelőn' [A life at the beginning of the century] *Valóság* XXIX (1981) 3, pp. 114–116}—Davina Cooper 'Talmudic Territory? Space, Law, and Modernist Discourse' *Journal of Law and Society* 23 (1996) 4, pp. 529–548; and for the Jewish orientation towards duties instead of rights, Suzanne Last Stone 'In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory' *Harvard Law Review* 106 (1993) 4, pp. 813–894; lastly, for its contradictory nature, Bernard S. Jackson 'Jewish Law or Jewish Laws' *Jewish Law Annual* 8 (1989), pp. 15ff, especially at 19–23.

[125] E.g., László Márton Pákozdy 'Törvény és igazságszolgáltatás a Bibliában' [Law and administration of justice in the Bible] in *A Biblia világa* [The Bible's world] ed. László Rapcsányi (Budapest: MRT Minerva 1972), p. 145.

themselves and their communities have already had plenty of time and opportunity to do this. If they could not, the consequences would fall upon them, too. The very fact of either having turned to the mandarin or their helplessness having compelled the mandarin to take measures proves that their sense of balance had been upset and they, pushing their truth or personal interest into the foreground in a selfish way, endangering their whole community, undertake the threatening state of u n r e s t . So the final goal is that the ones involved in the conflict resolve it from the very beginning, putting all their power into scale, and by no means stretching the strings by increasing tensions in the hope that the stronger, more aggressive and persistent will end by winning or getting more.

Sense of proportion and own responsibility in so-called primitive communities:

It is an incredible warning to modesty for us that this culture, usually called primitive, was so much thought-through and consistent exactly in preserving the basic tissues of societal life, proving great wisdom in self-restraint and trust in strategic perspectives. Only prejudice may qualify this law to have been underdeveloped. Yet, in almost every tribal community one can find the realisation that there is an optimum, and the resolution of conflict has to be done within it. It is the most personal responsibility of every one to find a resolution in their own case. If the sides in the dispute cannot reach it, then their community—through the mediation of the local sage, priest or teacher—must take the case over, so that the situation causing the conflict will be reconsidered, and the dispute resolved.[126]

individual justice to be pursued within bounds of collective peace

In every conflict-resolution arrangement there is a point which defines how far the dispute or eventually its degener-

[126] It is remarkable that the "law of the jungle", formulated in Rudyard Kipling's poem *The Second Jungle Book*, is built upon the "judicious mixture of individualism and collectivism" within social co-operation, and not on the unlimited and merciless pursuit of individual concerns. See J. L. Mackie 'The Law of the Jungle: Moral Alternatives and Principles of Evolution' *Philosophy* 53 (October 1978), No. 206, pp. 455–464.

[even "law of the jungle" is balanced in favour of the collectivity]

ation into hostility can go.[127] If therefore the events transcend this very point, the whole judgement may easily t u r n o v e r . Beyond this point the one who might have been right at the time when the injury was still hidden and the dispute latent will not be right. Neither will the one with whom the search for truth degenerated into coarse shapes. The blame has to be taken by the one who, by over-claiming and relentless desire for truth, did not promote acceptable ending still equitable for everyone. Responsible will be the one who pushed his personal affair up to an extent threatening the community's existence, ignored *prudentia*, and proved to be incapable of reaching a compromise at the right time.

Li / fa: heteronomy will not break autonomy but retaliate unsuitability to living it

The ideal of CONFUCIUS in China was the *li*. According to its conception, we were all born to be sovereign, autonomous moral beings. All of us must know what we deserve, and what is equitable in a given situation. Therefore, the *li* encourages us to resolve any dispute directly as inspired by our human i n s i d e , paying attention to the dignity and moral integrity of our fellow-men as well. Our moral order is autonomous, as it was born with us, and its actualisation depends on us. As opposed to it, the imperial law—the *fa*—has only the task to maintain imperial existence, the security and peace of the e m p i r e . The moral autonomy presupposed by the *li* is not simply an opposite of the heteronomy represented by the *fa*. Neither is the latter calibrated to administer or ponder justice between quarrelling individuals. It can only be used according to its purpose, so that the disapproval of the parties in failing to compromise is expressed. Therefore, in brief, the *fa* was to deter and punish—in and for itself. Its ultimate goal was not to be taken advantage of, and anyone who experienced it should not wish it happen again. Anyone once getting involved, even as a witness, with the mandarin's *fa* was surely crushed. It was repressive since the one who forced external authority to remedy the own injury has already "lost face". It had a social preventing force, because the poor soul who

[127] E.g., Simon Roberts *Order and Dispute* An Introduction to Legal Anthropology (Harmondsworth: Penguin 1979), pp. 117ff [Pelican Books].

was just summoned in front of the imperial official as a witness could be thrown in jail and his properties could be confiscated, even though he was only a witness, and if questioned, most likely told the truth.

by punishing for the rejection of performing the own autonomy

It is remarkable that in the Far-Eastern culture of the autonomous ideal of personality and social settlement, heteronomy, reserved as a final guarantee, puts an end to disputes and prevents them from aggravating, yet it does not break autonomy; it only punishes rejection of accepting and performing autonomy.

The empire cares for the integrity of the whole, and not for the sensitivity of self-asserting individuals

Thus, the *fa* is designated for the empire, and not to set imperial machinery in motion in petty affairs. Conflicts must be solved when and where they occur, without risking aggravation, causing trouble beyond their own sphere, and plunging imperial peace into danger. For even the most personal and insignificant affairs can degenerate into hostility of imperial extensions if the principle of *fiat iustitia, pereat mundus!* is inconsiderately and selfishly followed.

Responsible co-operation requires no concept of right

It is not by chance that neither in China and Japan, nor in tribal cultures has the notion of right and righteousness even been invented.[128] After all, what is r i g h t ? The legal theory of MARXism, from its own positivist point of view, denied the notional independence of *ius* [the right; '*subjektives Recht*'], and only recognised the notion of objective law, the *lex* [the law; '*objektives, gesetztes Recht*'], as an independent component. It considered the former to be only a derivative (projection and consequence) of the latter. Without taking a stand,[129] we can realise that talking intelligibly about right

[128] E.g., Karl Bünger 'Entstehen und Wandel des Rechts in China' in *Entstehung und Wandel rechtlicher Traditionen* ed. Wolfgang Fikentscher, Herbert Franke & Oskar Köhler (Freiburg & München: Alber 1980), pp. 465ff [Veröffentlichungen des Instituts für historische Anthropologie E.V., Band 2].

[129] Cf., e.g., as a monographic summary, Carl Wellman *A Theory of Rights* Persons under Laws, Institutions and Morals (Totowa, New Jersey: Rowman and Allanheld 1985) 225 pp., and in the mirror of studies covering the field, *Rights* ed. Carlos Nino (Aldershot etc.: Dartmouth 1992) xxxiv + 466 pp. [The International Library of Essays in Law & Legal Theory: Schools 8].

presumes a l a w that serves as a basis, be it enacted or only mentally anticipated. For positive order can be assumed as being enacted by the free will and absolutism of man, and also as being derived from godly order. This is n a t u r a l l a w , according to the western world concept.[130]

Still Chinese law is law, as it builds community from the co-operation of autonomous persons

Well, one can question whether there was legal order in China at all. For Chinese traditional culture was built on the harmony and mutual functioning of morally autonomous beings to an extent almost equivalent to denying any (western) concept of law. At the same time, the *li* presupposes that we are independent islands in the sea of one common moral order, creating our laws for ourselves. These laws exist only in ourselves. Yet,

(1) what originates from us and what is to be formulated by us has to express that what is inherent in the order of nature;
(2) for this reason, our existence is a constant struggle, balancing between our various roles in experiencing our real life and the different moral impulses from our inside in the succession of situations we face;
(3) this presupposes continuous receptivity, empathy and mutual readiness for compromise towards all similar initiative of our fellow men towards us;
(4) the success of which can only be ensured by a resolution in progressing co-operation.

That is, in the practice of our own personal existence, our autonomy has to be embodied by a sequence of (seemingly sovereign) decisions so as that all this, in total sum and overall effect, promotes peace and order in and for the whole c o m m u n i t y . Failing to do so, we would have to turn to the procedure of the *fa*, anticipating our own crush and moral breakdown, so that the autonomous order of the community could reach its equilibrium again.

[130] Cf., e.g., in the light of selected papers, *Natural Law* ed. John Finnis (Aldershot etc.: Dartmouth 1991) xxiii + 354 pp. [The International Library of Essays in Law & Legal Theory: Schools 1, 1–2]. Its naturalistic social bases are revealed by Ernst-Joachim Lampe in *Grenzen des Rechtspositivismus* Eine rechtsanthropologische Untersuchung (Berlin: Duncker & Humblot 1988) 227 pp. [Schriften zur Rechtstheorie 128].

In Japan there exists the *giri* morality,[131] which in relation to law is the equivalent of the Chinese *li*.[132] It is omnipresent, indestructible and resistant. Japanese culture and language are embedded in its idea so much that moral dilemmas in limiting conditions, characteristic to the western push for notionalisation and systematisation, cannot even be formulated in them.[133] For instance, moral schematism with axiomatic pretensions would be unimaginable in Japan,

Giri in Japan: only signalling moods in language & achieving *catharsis* in want of schematism

[131] E.g., Yosiyuki Noda *Introduction au droit japonais* (Paris: Dalloz 1966) 287 pp. [Les systèmes de droit contemporains XIX], title IV, chapter III, pp. 191–200.

[132] E.g., Guntram Rahn 'Recht und Rechtsverständnis in Japan' in *Entstehung und Wandel rechtlicher Traditionen*, pp. 486–487 as well as Karl Bünger 'Entstehen und Wandel des Rechts in China' in *ibidem.*, p. 460. Cf. also John O. Haley 'Sheating the Sword of Justice in Japan: An Essay on Law Without Sanctions' in *Journal of Japanese Studies* 8 (1980) 2, pp. 265–281. For a summary, see Joy Hendry *Understanding Japanese Society* (London, New York & Sydney: Croom Helm 1987) 218 pp. [The Nissan Institute / Croom Helm Japanese Studies Series], especially ch. 12 on »The Legal System and Social Control«, pp. 185–201 and Ezra F. Vogel *Japan as Number One* Lessons for America (Cambridge, Mass. & London: Harvard University Press 1979) xiii + 272 pp., especially ch. 9 on »Crime Control: Enforcement and Public Control«, pp. 204–222.

[133] "In the English manner of writing, the meaning becomes clear, but at the same time it becomes limited and shallow. […] We do not make such useless effort, but use those words which allow sufficient leeway to suggest various things, and supplement the rest with sensible elements such as tones, appearance of letters, rhythms, etc. […] of the sentence […], whereas the sentence of the Westerners tries to restrict its meaning as narrowly and detailedly as possible and does not allow the smallest shadow, so that there is no room at all for the imagination of the reader." The novelist TANIZAKI JUNICHIRO as quoted by Kawashima Takeyoshi in his 'The Status of the Individual in the Notion of Law, Right, and Social Order in Japan' in *The Japanese Mind* Essentials of Japanese Philosophy and Culture [1967] ed. Charles A. Moore (Honolulu: University of Hawaii Press 1987) x + 357 pp. on p. 263. About the notion of change resulting from thought cycles and not from logical evolution, see Lily Abegg *The Mind of East Asia* (London & New York: Thames and Hudson n.y.) vii + 344 pp., especially ch. II [on »Thought without Logic«], pp. 23–68. In a strong critical approach, cf. Peter N. Dale *The Myth of Japanese Uniqueness* (London & Sydney: Croom Helm & Oxford: University of Oxford Nissan Institute for Japanese Studies 1986) 233 pp. [The Nissan Institute / Croom Helm Japanese Studies], ch. 7 on »Silence and Elusion«, pp. 100–115.

[Japanese culture is founded on imagination; and Western culture, on conceptual thematisation]

which—as the prototype of confession handbooks with entire catalogues of moral sins—*ab ovo* classifies the taxonomy of our falling into sin. Thereby it could only trivialise its occurrence into the mere actualisation of a series of previously notionalised, expressed and systematised eventualities, as t h e case of the finite realisation of situations of infinite variability. This is why such a schematism could be inconceivable in Japan, as it unwillingly suggests that it is not enough that I have sinned; it is not enough that I have given account for my sinful deed; it is not enough that I do penance for my sin; furthermore, I must also attach a taxonomic classification to it (indeed: just as if I were approaching the living world as CARL VON LINNÉ did, or the elements of nature as DMITRI IVANOVICH MENDELEEV did), so that we can be assured of what subcase and variety or exception to the case I have committed. In such a schematism it is not likely that we will be able to achieve the complete catalogue of human sins. It is not likely that we will give way to catharsis at the end. It is not likely that finally we will focus the rest of our attention on the reparation of its irremediable consequences. For, in the ultimate analysis, every circumstance we can think of will be conceived as the case of a closed and somewhat rigid classification scheme.

In the West, we name everything as mentally anticipated, depersonalised and neutralised

A Japanese never talks about emotions or moral things. As for us, westerners, however, we are used to communicating about our moral wretchedness, fears and anxieties, and digging deeply into the subconscious remindingly of a vivisection, we all are infected—and inasmuch corrupted—by the idea of notional strictness. For we n a m e everything, and conceptualise everything. We even notionalise things that are morally unimaginable, even that which derives from schemes of notional combinations merely as a logical possibility. Through this we almost challenge the horror—under the pretext of the neutrality of logical examples—to become true as self-fulfilling. We make an advance of everything, at least in mental anticipation. At the same time, we depersonalise our most personal things, as we tame our most intimate fears we are even afraid to overthink, and our most hidden bad dreams, only to transform them into a case of previously

formed conceptual schemes and classes. After all, ever since notional culture has developed, we seize things not in their fallible existence, but break them into a sequence of prefabricated schemes built on previous judgements while providing them a taxonomically value-free description.

Communication in the Far East is simply not meant to confer on man's personal matters, morals and parables. The Japanese go out into the woods, amongst the flowers, watch the stone-garden or the holy mountain, and contemplate. The ornamental garden of stones, the majesty of the Fuji-jama, or the cherry-blooming: all of these bear more messages to them (as they make them realise more) than any abstract reasoning. The Japanese reason not with casual partners in a smoky café, rather they talk to the holy place or favourite flowers amidst nature. It is not by mere chance that in Japan the stone-gardens, taken care of as representatives of human values and natural harmony, have been the workshops of spiritual recharging for hundreds of years.

Cultures are built on contemplation & meditation in the Far East:

> We might remember that GEORGE LUKÁCS, in his youthly yearn to be somewhere else—in Florence—wanted to become a FRANCIScan monk. He longed for the completeness of human realisation. He looked for the dogma-free practicality, the pureness not suffering from the distorting mediation of society, and, last but not least, the naturality of their belief, just as Saint FRANCIS and the other order-founding fathers could talk to birds, and live the life of nature. He longed for frames not shaped artificially by man, and free of alienation—paradoxically, only a few years before he joined the Communist party, being lead by the hatred for his own society, which ensured him a life like a lord's, and maybe even created the possibility of wishing to get away from his man-of-the-world medium.

(longing for unmediatedness in the West)

Thus, taxonomic naming and axiomatic conceptualisation cannot be part of the Far Eastern world concept, because they would exclude subtle thinking. Therefore, many things resist to be discussed at all thoroughly. In Japan, modernising effects were intensified by the American influence which, through the measures of after-WWII occupation, also introduced modern formal law, such as:

with subtlety to be preserved

constitution, laws, contracts, collective agreements, compensation, formal suing and courts. Will the new pattern prevail? Society is actually left cold by the issue: what is hidden in its means and what possibilities do they bear? Working place identification and other attachments are incorporated into a moral and emotional ambience of solidarity, bearing more importance to them than anything else their money could buy. At working places—be it small or large—disputes are not characteristic at all, not even trade union fights. Bosses direct mainly not by orders or manifestations of authority, but rather by setting examples.

Globalism: challenge and danger

Human organisation has strange varieties.[134] Our examples above might seem miraculous—if we are unable to make them accepted as natural by explaining their circumstances. It is another question that relying on the storehouse of different traditions, who and with what prospects can step into the 21st century, the roots of which might seem European yet are—more and more visibly—dominated by American ideas. It is a further issue whether, for the rest of the world, it is feasible—and especially: worthwhile—to follow this end-of-century and beginning-of-the-new-millennium western pattern. We can only remember that the ending of history[135] has always proved to be a Utopia, and the wish to preserve different human and civilisational patterns is not an anthropologically romantic vision of getting away, or a mere fantasy about the past.[136]

[134] For a cultural comparative-historical approach, see, e.g., Reinhard May *Law & Society East and West* Dharma, Li, and Nomos: Their Contribution to Thought and to Life (Wiesbaden: Steiner 1985) 251 pp. [Beiträge zur Südasienforschung {Südasien-Institut, Universität Heidelberg} 105], especially at pp. 118–200.

[135] Newly, under a liberal disguise, see Francis Fukuyama *The End of History and the Last Man* (London: Penguin 1992) xxiii + 418 pp.

[136] As an influential stimulation, cf. René David 'Deux conceptions de l'ordre social' in *Ius Privatum Gentium* Festschrift für Max Rheinstein, I (Tübingen: Mohr 1969), pp. 53–66 and René Dekkers 'Justice bantu' in *Revue roumaine des Sciences sociales: Série de Sciences juridiques* XII (1968) 1, pp. 56ff. Recent literature seems to reassure reasonable doubt and openness towards different cultures. See, first of all, Peter Sack '*Bobotoi* and *Sulu*—Melanesian Law: Normative Order or Way of Life?' *Journal de la Société des*

2.3.2. Heteronomy

2.3.2.1. Saint Thomas Aquinas A new approach with a previously unknown consequentiality appears in the work of the first, and maybe the most prominent, representative of the alternate major way of thinking, and this is Saint Thomas Aquinas.[137] We know what an important achievement it was on his part to revive Greek traditions, especially Aristotle's ideas. We also know how Aquinas re-formulated the concept of God, and into what order he arranged his proofs for it. Yet, only one point of view will be of interest from the perspective of our present analysis, namely the startling methodological turn which the European thought took during the centuries between Saint Augustine and Saint Thomas Aquinas. It prepared the ground for an exceptionally important paradigmatic change,[138] and, at the same time, it appeared as completed in its full armour.

Change of epochs between Augustinus and Aquinas

Océanistes XLI (Juin 1985), No. 80, pp. 15–23 and 'Melanesian Jurisprudence: A »Southern« Alternative' *Archiv für Rechts- und Sozialphilosophie* Supplementa II (1988), pp. 91–101.

[137] On the way of thinking of Saint Thomas Aquinas, see Johannes A. Aersten *Nature and Creature* Thomas Aquinas' Way of Thought (Leiden: Brill 1988) ix + 413 pp. [Studien und Texte zur Geistesgeschichte des Mittelalters 21]; Norbert Bathen *Thomistische Ontologie und Sprachanalyse* (Freiburg, etc.: Alber 1988) 236 pp. [Symposion 85]; Rudolf Teuwsen *Familieähnlichkeit und Analogie* Zur Semantik generellen Termini bei Wittgenstein und Thomas von Aquin (Freiburg, etc.: Alber 1988) 234 pp. [Symposion 84]; Gudrun Schulz *Veritas est adaequatio intellectus et rei* Untersuchung zur Wahrheitslehre des Thomas von Aquin und zur Kritik Kants an einem überlieferten Wahrheitsbegriff (Leiden: Brill 1993) vi + 192 pp. [Studien und Texte zur Geistesgeschichte des Mittelalters 36].

[138] "In [Saint Augustine] one does not encounter the same antitheses between knowledge and faith that was to characterize much of later Western Christian thought. […] These syntheses [of Saint Bonaventure, Saint Thomas, and Duns Scotus], especially the Thomistic one, tended to become overrationalistic in imprisoning intuitions of a metaphysical order in syllogistic categories which were to hide, more than reveal, their properly speaking intellectual rather than purely rational character. […] These theologies, therefore, although belonging in a certain sense to the sapiential dimension of the Christian tradition, characterize the crucial intermediate stages of the process whereby knowledge became desacralized and philosophy gradually divorced from wisdom". Seyyed Hossein Nasr *Knowledge and the Sacred* The Gifford Lectures, 1981 (Edinburgh: Edinburgh University Press 1981), pp. 19 and 22–23.

[separation of knowledge and faith]

The conclusive (irrefutable) strength of a conceptual system:

As we have pointed out at an earlier stage, the most striking feature in Saint AUGUSTINE's thought is his authenticity. We are able to know who he was because he had an authentic life revealed in confessions, and therefore we can trust his answers. From this also derives that everything he said or thought may bear a message for us. Well, to approach the counter-example, with Saint THOMAS AQUINAS it is exactly this circumstance (the subjective side with the personal involvement and authenticity) that becomes irrelevant, almost to an absurd extent—not due to his person but the methodology he choose, consequently also as a message of his oeuvre. In his case it is irrelevant, next to intimacy, that for most of his life he talked about God. The strength of his personal belief in God was not so much relevant either when he discussed faith in God or the proofs for it. The exclusive message of Saint THOMAS's work is that he mentally created a system, the axiomatic set of God-proofs, which itself represented a totality, from the existence, organisation and logical closure of which the existence of something else, of God, as the case may be, derives directly—as we know from Geometry: because of the axiomatism of the thought-representations which are valid in and of themselves.

there is no categoricity of logical derivation in personal testimony

Therefore, it is not at all a sign of cynicism if we wonder —let us repeat it again: only from the perspective of methodology and of the message embodied exclusively by a text— whether the question relating to any personal confidence or authenticity, thus, for instance, Saint THOMAS' most intimate belief in God, can be relevant here. For in his work, built from syllogisms and logical proofs as a legacy externalised for posterity, no statement concerning the existence of God can bear the character of a personal testimony. Consequently, when weighing the conclusive strength of his assertions on the existence of God, it is again irrelevant whether he supports their truth in his own authentic personality.[139]

[while the real personality of Saint THOMAS is also contemplative]

[139] A number of contemporaries confess, with deep affection, his deep faith, his commitment in his exemplary monastic service, and on the unity of emotion, passion and knowledge both in his person and in his faith in God. Cf. *The Life of Saint Thomas Aquinas* Biographical Documents, ed. & trans. Kenelm Foster, O.P. (London: Longmans & Baltimore: Helicon n.y.)

Since, from the very moment one faces the THOMIStic God-proofs, one must unavoidably confront with his certainty in God's existence, because these proofs themselves, as elements of a closed system of thought, already anticipate the final result. Therefore, on the grounds of AQUINAS' system of proofs, stating the result will not say anything new, since as a consequence this will be nothing more or else than a pure logical regularity and necessity. (It is another question, of course, that his firm conviction of being sensible and reasonable enough to build up a logified conceptual system on the existence of God is based on his personal belief on *adequatio rei et intellectus*.)

therefore its logic takes a firm stand on its own, independently of personal faith

Hence, God must exist. Everything we can assert as a thesis in the system of axioms will derive directly from the existence of the axioms and their interrelation. Our personal relationship to the theses will not be relevant here, nor will anyone be interested in whether we can or want to believe them. Our participation in the entire process is incidental anyway, and our personal beliefs, convictions and underlying motives will make a difference strictly from a personal perspective. For instance, maybe some day one can be proud of having been at the well of such noble thoughts. Similarly, the question of what THOMAS AQUINAS believed in when he sank into himself can only be a contribution to his biography because his God-proofs stand by themselves: they neither require nor tolerate any addition. Consequently, due to the fact that the existence of God is no longer a function of

xii + 172 pp. "Is there a single word or phrase that might indicate the kind of person AQUINAS was, as our sources reveal him? I suggest »a Christian seer« as perhaps the least inadequate, provided the adjective be given enough force to include sanctity. »Saint« alone is too general a term, »sage« is too secular, »prophet« too ambiguous, »theologian« too narrow. »Contemplative« might do, except that this term hardly conveys the immense e f f o r t towards vision that marked the vocation of St. THOMAS, and except that this was an effort also to render i n t e l l i g i b l e , in terms of human rational discourse, all such vision as could be gained; and so to communicate it to others, according to the ideal of the Order of Preachers, *contemplata aliis tradere*." (p. 23).

personal belief but of the systematic set of proofs he happened to be the first to formulate, our personal attitude (belief or will to believe) is also bound to lose importance.

The system is valid and gapless on its own: it responds to what its case is

It is the same logic from which derives that there are no more or less interesting or serious (etc.) issues in THOMAS AQUINAS' system. The *corpus* of the *Summa Theologiae* raises quite a few questions some of which might seem bizarre at first for our days' reader, at least in the way they are circumscribed and analysed by AQUINAS. For instance, he raises the question: "*Utrum plures angeli possunt simul esse in eodem loco*",[140] that is, how many angels can fit into one place?[141] Looking for today's practical reason behind such formulations would be rather inadequate and useless. For we are dealing with a system of thought which is irreplaceable, complete, coherent and indivisible. In other words, it is valid and gapless in and of itself. For this reason it offers perfectly complete answers to the questions that can be raised as a case of the system. And, cases of the system cannot be questioned—even if they seem strange to us, external observers, who live in another era and share a somewhat differentiated outlook on the world. Neither can our perspective and consideration be relevant since it is external, thus alien to the system—our way of raising questions, inspired by our everyday common sense, obviously not being a case of the system, whereas the question about the

[140] Thomas Aquinas *Summa Theologica* I 52, 3 ["Can several angels be in the same place?"].

[141] As Scholasticism has been mocked since VOLTAIRE as one dealing with issues in a finicky manner, for instance, contemplating about the number of angels that are able to dance on the point of a needle. However, as Charles Ess remarks in his 'Notes on David Peat, *Einstein's Moon: Bell's Theorem and the Curious Quest for Quantum Reality*' *History and Philosophy of Science* (Fall 1997) in <www.drury.edu/ess/philsci/bell.html>, "there is apparently no record of any medieval discussion of how many angels could sit/dance on the head of a pin/needle. This is apparently modernist propoganda intended to denigrate the ways of knowing of an earlier time in the effort to demonstrate the superiority of »modern« ways of knowing, i.e., natural science." Nevertheless, as to the question proper, "[t]his is at least as important issue from a scientific perspective as, for instance: what happens when two beams of light collide."

angels can be a case of the system inasmuch as AQUINAS conceptualised it once. By looking at the axioms and theorems of the system we can easily tell what is inside and what is outside the system. The fact that one proves a particular question to be a case of the system implies that the system has an answer to it and this answer is complete. THOMAS AQUINAS was aware of this and also broke it down in logic. This is t h e a n s w e r of the system—be it expressed in principles or as quantified, for example, in the eventual number of the angels that can fit into one place.

Our presence is incidental, but the system is necessary

Nothing is incidental or random in a system of thought like this. It is only our personal existence that falls outside of it, hence being incidental. In the same way it is incidental that we happened to come in touch with it. In consequence, the opinion we form about the system is also incidental—our way of thinking and perspective being external to the system. All these questions are independent of the system, which bears its validity in itself.[142]

Mos geometricus

The theological idea of the system is in fact the application of the strict EUCLIDean, i.e., axiomatic, conceptual system to matters of societal life and transcendence as well. This approach establishes itself in European scholarship with the beginning of the modern era, up to the end of the 18th century, as being called *mos geometricus*.[143] The geometrical way of thinking remained the leading paradigm of European scholarly life until the end of the Enlightenment.

[142] It is exactly this that becomes worth reconsidering in our days' moral theological reconstruction. For this thousand-year-old systemic thought used to axiomatise (i.e., posit and derive), yet it thereby also transformed everything into rules as a set of obligations and prohibitions, shifting the emphasis from its overall foundation, resisting logification yet of cardinal importance, i.e., the active—CHRISTian—love permeating everything. For by having become an issue of commandments and prohibitions first of all, the nominalism emphasised the notions of law and obligation in moral as against inner spontaneity and impulse, which are the concepts characteristic of love. Pinckaers, chs. VII and IX.

[143] Firstly in Baruch Spinoza's *Ethica ordine geometrico demonstrata* [around 1670–1674] ed. J. van Vloten & J.P.N. Land in Benedicti di Spinoza *Opera quotquot reperta sunt* Tom. I, Ed. 2, 3rd ed. (Den Haag: Nijhoff 1890).

It was not always followed but was respected at all times as an ideal pattern:[144] as the standard for how to structurate our thinking, argumentation and world-view so that scientific methodology can prevail in it.

GROTIUS is only to represent what natural law is, axiomatically broken down

2.3.2.2. GROTIUS HUGO GROTIUS was not only a natural lawyer but a committed adherent to the geometrical idea as well.[145] His magisterial work *De iure belli ac pacis* is regarded today as the aggregate of the tenets of natural law broken down and applied *more geometrico* to a given field. From the perspective of our methodological inquiry this means that if we recognise some theses and fundamental ideas as axioms of natural law, then the whole system—including its application to war and peace—derives from it out of logical necessity. This intellectual venture suggests self-referentially that it is entirely irrelevant who has actually created it. The novelty in this respect is only that it is the system itself to

[144] As a reconstruction of the history of ideas in the field of law, cf., e.g., Gerhard Otte 'Der sogenannte *mos geometricus* in der Jurisprudenz' *Quaderni fiorentini per la storia del pensioero giuridico moderno* 8 (1979), pp. 179–196 and, in the context of its feasibility and essential inaccessibility, Eike von Savigny 'Zur Rolle der deduktiv-axiomatischen Methode in der Rechtswissenschaft' in *Rechtstheorie* Beiträge zur Grundlagendiskussion, ed. Günther Jahr & Werner Maihofer (Frankfurt am Main: Klostermann 1971), pp. 315–351. As a background, see also Dieter von Stephanitz *Exakte Wissenschaft und Recht* Der Einfluß von Naturwissenschaft und Mathematik auf Rechtsdenken und Rechtswissenschaft in zweieinhalb Jahrtausenden (Ein historischer Grundbegriff) (Berlin: De Gruyter 1970) xii + 273 pp. [Münsterische Beiträge zur Rechts- und Staatswissenschaft 15] especially at pp. 72ff. See also, by the author, as a summation of researches carried on as early as in 1972, 'Heuristic Value of the Axiomatic Model in Law' in *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. Raimund Jakob, Lothar Philipps, Erich Schweighofer & Csaba Varga (Münster, etc.: Lit Verlag 2009), pp. 127–134 and '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/>.

[145] For the intellectual environment, see *The World of Hugo Grotius* (1583–1645) Proceedings of the International Colloque organized by the Grotius Committee of the Royal Netherlands Academy of Arts and Sciences (Amsterdam, etc.: Holland University Press 1984) vii + 214 pp.

state it as a categorical point of principle. (Naturally, GROTIUS' pride is merely a sign of self-esteem, as he happened to be the first to give birth to such a thought, the validity of which is grounded in itself.)

System closed as valid in itself: systemically it does not even presuppose the existence of God or man:

At the same time, axiomatism offers GROTIUS a self-revealing thesis on natural law. As he expresses it: natural law is valid in itself—so much that if we presumed (which, as he wisely adds, would be hardly possible without committing the deadly sin of blasphemy) that God does not exist, the propositions of natural law in a system like GROTIUS' would still retain their validity. Moreover, they would attain an absolutely binding force. Natural law thereby announces its claim for validity, taken and founded in and of itself. Since, once it comes to existence, it is valid, and its v a l i d i t y is founded i n a n d o f i t s e l f. Once it is created, not even God himself can change it any more. To make it clear, GROTIUS neither gives expression to, nor assume that the creator of natural law, God, does not exist. Instead, he claims that his natural law would exist and be valid even if one assumed that there was no God or that He was not concerned with human matters or that humans did not exist[146]—this being a paradoxical statement typically from within the system, for this would obviously be absurd outside of it, as only the existence of the society of humans can make it intelligible to talk about natural law.[147]

it is the world that becomes incidental as compared to systemic validity

Thus, a pattern of thought was thereby born in which the relationship between the underlying idea and its elements became independent, so much that the entire (outside) w o r l d seemed i n c i d e n t a l when compared to it. The outside world was thereby shaken, the world which, as we could learn from both GEORGE LUKÁCS's ontology of the social being and the experience of mankind, is built also from human practice (the same human practice lying at the foundation of the fact that we have raised the question at all).

[146] Hugo Grotius *De jure belli ac pacis* Prolegomena, sect. xi.

[147] See, e.g., Ernst Cassirer *The Philosophy of the Enlightenment* [1932] (Princeton, N. J.: Princeton University Press 1968) xiii + 366 pp., pp. 239ff.

LEIBNIZ

2.3.2.3. LEIBNIZ A few centuries after GROTIUS we can arrive at one of the most prominent thinkers of the 18th century, regarded today as the precursor to modern thinking. And this is GOTTFRIED WILHELM LEIBNIZ,[148] who corresponded with reigning princes in French (mostly about imperial affairs, as well as on moral, political, legal and especially international and diplomatic issues); as a private person he spoke in German; and recorded everything that qualified as science in Latin: mathematics, including geometry, logic, language and jurisprudence.

Law is a conceptual science: a series of operations with formulas

For LEIBNIZ, jurisprudence is a conceptual science. Its language, Latin, bears the infinite variability and flexibility of a classical vocabulary (with the exceptionally polished potentialities of construction offered by its well-developed grammar), at the same time being the standard language of the entire cultural community of Europe. This particular circumstance granted ground and prospect, permanence and continuity, renewal and universality also for law and thinking about law. For LEIBNIZ, thinking meant a well-arranged series of conceptual operations; a sequence which could be unquestionably reduced to a set of given Latin formulas.[149] According to LEIBNIZ, scholarship as a science is

[148] On LEIBNIZ's way of thinking, see Benson Mates *The Philosophy of Leibniz* Metaphysics and Language (New York, etc.: Oxford University Press 1986) xi + 271 pp.; Marcelo Dascal *Leibniz* Language, Signs and Thought: A Collection of Essays (Amsterdam & Philadelphia: John Benjamins Publishing Company 1987) xi + 203 pp. [Foundations of Semiotics 10]; Olga Pombo *Leibniz and the Problem of Universal Language* (Münster: Nodus 1987) 321 pp. [Materialien zur Geschichte der Sprachwissenschaft und der Semiotik 3].

[finding the truth is nothing else than operation with characters]

[149] "For our intellect, in view of its weakness, must be directed by a certain mechanical thread; in this connection, recall that, with regard to thoughts which represent things that do not fall under the imagination, only the characters are available. Furthermore, all the demonstrative sciences deal with nothing but equivalences or substitutions of thoughts, and show, in fact, that in some necessary propositions the predicate may safely replace the subject, and that in any convertible proposition the subject may also replace the predicate and that in demonstrations a proposition formerly called a 'conclusion' may safely replace any of the truths now called 'premises'. Hence, it is evident that truths themselves would appear successively on paper through the mere analysis of c h a r a c t e r s , that is,

ideally the mere logical interconnection of Latin formulas. His inclination towards formal reduction led him to the early dream of what the world today knows as the computer. (As is known, the mental reconstruction of elementary natural systems was the one to lead in our century to the formulation of the primitive idea of cybernetics.[150])

Thoughts as logical reconstructions of conceptual relationships:

According to LEIBNIZ, all thoughts and recognitions are nothing but the logical reconstructions of conceptual relationships. This forms the basis of scientific problems as well. Their solution is a function of the logical configuration of concepts. Thus, problem-solving can be reduced to elementary operations: the connections into which we place the concepts and the relations we establish between them. At the time, Europe considered the Latin language a godly gift, forming the basis of human culture, and being of a nature that is so universal that genuine human quality could hardly do and develop without it. They considered the Latin language as the natural medium for the existence of mankind, which can serve as a basis both for our communication with God and for the cognition of reality. Since Latin offers language structures ready-to-take which allow us to approach the outside world, by speaking about it and also by understanding its motion and connections.

linking a predicate to a subject: judgement- & invention-machines

The edition of LEIBNIZ's texts is still not complete. In each of his works—presenting an abundance of problems, and a strictness and discipline in conclusion—he treats the problem to be solved as an issue of how to link a logical predicate to a logical subject. In order to simplify the process of responding, LEIBNIZ invented concept-calculators: gadgets that originated in a mathematician's conceptual Utopia, later describing these calculators in the most minute details. The first machine of this kind was the

through orderly and uninterrupted substitution." Gottfried Wilhelm Leibniz '[Fragments on the Analysis of Langauge]' [September 11, 1678, C. 351–354] in Dascal, p. 161.

[150] Cf., e.g., Charles Francois *History and Philosophy of the Systems Sciences* (2000), passim <www.uniklu.ac.at/~gossimit/ifsr/francois/papers/history_and_philosophy.pdf>.

judgement-machine, a mechanical construct (of a wooden sliding structure) serving the co-ordination of logical predicates to logical subjects. His second machine was the invention-machine, but with this creation the greatest thinker of the Western world of the time became the captive of his own thought-trap. He intended to rely upon the following assumption: if the world is such as we grow to know it and what we mentally reproduce by co-ordinating certain predicate(s) to certain subject(s), then we can cognise cognition itself by attempting to decide what predicates to co-ordinate with what subjects so that this leads to a true judgement, and what other predicate(s) to other subject(s) so that this results in a false statement.

co-ordination-machine as the inventory of judgements for filtering out false judgements

It did not even occur to him that inasmuch as we could ascertain all these, the oeuvre of human cognition would be completed once and for all. These problems arise throughout his scientific work, and he even invented a co-ordination-machine to perform the sequence of mechanical operations necessary to provide the solution. He had the following presumption: we know the Latin language and its thesaurus, thus, we also know what notions can be used as subjects and what notions as predicates. This way a complete inventory of judgements can be made by constructing all feasible judgements. When done, there will be only one task left, that is, to get the entire *corpus* of verifiable knowledge, by filtering the false judgements out, through these means.[151]

Calculemus!

The same pattern of thought asserted itself in the *Calculemus!* way of thought. LEIBNIZ reasoned that if all human dilemmas are reducible to conceptual operations, then human meditation, be it on existential or moral matters, will again be nothing more than the conceptualisation of a calculational operation with notions. Thus,

[we surely have truth but we cannot know in what and when]

[151] The inference of modern philosophy of science is built upon a similar paradox realisation: "The truth is an end we can attain but we cannot know when we have attained it." Ilkka Niiniluoto 'Fallibilismista' *Sosiologia* Journal of the Westermarck Society XI (1974), Nos. 5–6, pp. 274–286 on pp. 275f [summarised on p. 316].

anything we ponder about can be reduced to c a l c u l a t i o n . From this derives the fact that a contradiction can only be the result of a mistake in thought, which we make when facing a complex logical problem too complicated to be thought through in all its ramifications. Therefore, he describes his ideal in a classical subtleness: here we have two men in a dispute but without being able to reach a decision. They take out their slates, then picking up their chalks, they cry out: "Now, let us calculate!" And, they start calculating, instead of arguing without method, like fools do. LEIBNIZ has actually professed with a deep conviction that by following his advice all dilemmas can be resolved once and for all—be they moral affairs or matters of exact sciences.

2.3.3. The dilemma of the evolution of thought

World created as a logical entity, built and operated like a clockwork

As shown by the developments discussed in the present book, here we will present the basic concepts, patterns and ways—declared redeeming—of human thought. We may realise that the dichotomy between deductivism and inductivism actually runs all through the European (furthermore, in part also through non-European) history of human civilisation. It is another realisation that the variant we were eventually born into and got accustomed to in the course of our education and socialisation is neither a necessity in itself, nor one without historical alternatives. Our entire thought-culture, including the legal culture of argumentation we developed, is built upon the ideal of deductive logic, backed by the Utopia of final axiomatism.[152] Both THOMAS AQUINAS and GOTTFRIED WILHELM LEIBNIZ are representatives of this idea, which is the prevalent thought-trend

[152] For a wider overview, see, for example, José Ortega y Gasset *L'évolution de la théorie déductive* L'idée de principe chez Leibniz (Paris: Gallimard 1970) 342 pp. [Bibliothèque des Idées]. Concerning the foundations in principles, cf., from the classics, Blaise Pascal 'De l'esprit géométrique' in his *Oeuvres complètes* III, ed. Jean Mernard (Paris: Desclée de Brouwer 1991), pp. 360–437 [Bibliothèque Européenne].

throughout the development of European civilisation.[153] In the form of expression of its early ideology, the world itself becomes one enormous clockwork. It is a creation of God, the clockmaster, and since He has already built in all the necessary rules of operation, once started, it operates smoothly. Nature, living creatures and society, all have their places assigned. And the Creator may withdraw and watch both its operation and our efforts at trying to find our own place within the earthly scheme, from the distance and with a serenity of absolute certainty.[154] Such an allegorical image

[clock as a metaphor]

[153] From the perspective of the history of science, see Anneliese Maier 'Die Mechanisierung des Weltbilds im 17. Jahrhundert' [1938] in her *Zwei Untersuchungen zur nachscholastischen Philosophie* 2. Auflage (Roma: Edizioni di Storia e Letteratura 1968), pp. 13–67 [Storia e Letteratura 112], Marie Boas [Hall] 'The Establishment of the Mechanical Philosophy' *Osiris* 10 (1952), pp. 412–541 {as synthetised, see his *The Mechanical Philosophy* (New York: Arno Press 1981) 541 pp. [The Development of Science]} and E[duard] J[an] Dijksterhuis *The Mechanization of the World Picture* [1950] trans. C. Dikshoorn (Oxford: Clarendon 1961) viii + 539 pp.; for the role of mathematicians, J. A. Bennett 'The Mechanics' Philosophy and the Mechanical Philosophy' *History of Science* 24 (1986), pp. 1–28; and finally, on the role played by the capitalist stimulation in the "mathematical-mechanical world-view", Richard W. Hadden *On the Shoulders of Merchants* Exchange and the Mathematical Conception of Nature in Early Modern Europe (Albany: State University of New York Press 1994) xviii + 191 pp [SUNY Series in Chinese Philosophy and Culture]. In a historico-sociological interpretation, see also Steven Shapin *The Scientific Revolution* (Chicago & London: The University of Chicago Press 1996) xiv + 218 pp.

[154] European thought originates the image of the universe as a clock—in which the Creator God appears as the Clock-Creator—from The Wisdom of SOLOMON: "[God] has disposed all things by measure and number and weight." *The Wisdom of Solomon* (11:20) in *The Holy Bible*. "For if someone should construct a material clock would he not make all the motions and wheels as nearly commensurable as possible? How much more [then] ought we to think [in this way] about that architect who, it is said, has made all things in number, weight, and measure?" Nicole Oresme *Tractatus de commensurabilitate vel incommensurabilitate mutuum celi* [around 1350] ed. Edward Grant (Madison, Wisconsin 1971), pp. 292–295. "[T]he situation is much like that of a man making a clock and letting it run and continue its own motion by itself. In this manner did God allow the heavens to be moved continually according to the proportions of the motive powers to the resistances and according to the established order [of regularity]." Nicole Oresme *Le Livre du ciel et du monde* [1377] ed. A. D. Menut & A. K. Deverny,

has not only shaped our endeavours towards methodology, adjusting them to strict requirements and discipline, but still provides the cornerstones for our drawing of conceptual analogies and comparisons up to this day.[155] Even if it has never been truly challenged and shaken, we ought to know that neither has it been the exclusive view, nor has it displayed the full scale of its inherent potentialities.

as an exclusive pattern

Every feature that is instrumental within the given frame, and what we could implement also in our legal culture, is built upon this axiomatic ideal. Obviously, it defines the essential boundaries and perspectives of our thinking-culture as well. One of its properties is the exclusivity of our thought. This is testified, above all, by the evidence of how

trans. A. D. Menut (Madison, Wisconsin 1968), p. 289. "So that the world being but, as it were, a great piece of clockwork, the naturalist, as such, is but a mechanician: however the parts of the engine, he considers, be some of them much larger, and some of them much minuter, than those of clock or watches." Robert Boyle 'The Excellency of Theology Compared with Natural Philosophy' [1665] in *The Works of the Honorable Robert Boyle* ed. Thomas Birch, IV (London: J. and F. Rivington 1772), p. 49. All the above quotes are from Otto Mayr *Authority, Liberty and Automatic Machinery in Early Modern Europe* (Baltimore & London: Johns Hopkins University Press 1986) xviii + 265 pp. [Johns Hopkins Studies in the History of Technology] on pp. 56, 38–39 and 56, respectively. Cf. also Lynn White, Jr. *Medieval Technology and Social Change* (London, etc.: Oxford University Press 1962) xi + 194 + 10 pp., and, in a wider context, John Henry *The Scientific Revolution and the Origins of Modern Science* (Houndmills, Hampshire and London: Macmillan & New York: St. Martin's Press 1997) x + 137 pp. [Studies in European History], especially at pp. 90–92. It is also worthy of mention that the mechanical world-view inherent in the clock-metaphor was at its peek during the absolutistic era in Europe. This explains why the fundamental idea of feed-back already presented by HERO OF ALEXANDRIA in his *Pneumatics* (*fl*. 1st century AD) was only taken over in modern England—originating the terms of 'balance', 'checks and balances', as well as 'supply and demand' (paradigmatic in our modern world-concept)—despite that HERO's work was published in Europe as early as in 1575.

[155] See, e.g., for the relationship between the terms *ordo naturae* and *ordo rationis* (and, within the latter, *ordo intellectuum* and *ordo cognitionis*) and, as the basis for these, for the distinction between *ordo* and *malum*, Hermann Krings *Ordo* Philosophisch-historische Grundlegung einer abendländischen Idee [1941], 2., durchgesehene Auflage (Hamburg: Meiner 1982) xiv + 129 pp.

[*ordo naturae & ordo rationis*]

much we have become accustomed to considering everything we have achieved through a methodical process to be an exclusive issue of our intellectual development and a result without alternatives.[156]

But: extended to all fields? do we really think like that?

Today's analyses conducted in the fields of the philosophy of science, linguistic philosophy and cognitive sciences have all proven how false this exclusivity is. No doubt, the *more geometrico* way of thinking is one of the most promising potentialities within the history of human thought.[157] At the same time, we have reasons to believe that this is an over-simplified construction: something that can exclusively be applied in an adequate way and with adequate results to the description of pre-defined conditions on strictly limited areas, exclusively as one of the equally feasible conceptual constructions which openly undertakes the burden of abstract conceptualisation to an extreme extent in view of achieving a complete formalisation.[158] This very consideration may however raise doubts as to whether we are truly capable of axiomatic thinking, and whether thinking this way is possible in a manner worthy of a human being and adequate to human conditions. We are familiar with the dialectics of anthropomorphism and d y s anthropomorphism—notably that we gain most of our notional constructions edifying our scientific world-concept from the abstracting projection and over-generalising extrapolation of our human relations, cutting them from their original

[156] Richard J. Bernstein *Beyond Objectivism and Relativism* Science, Hermeneutics, and Praxis (Oxford: Blackwell 1983) xix + 284 pp. calls, on pp. 16–20, this limitedness 'CARTESian anxiety' which concludes, with objectivism shattered or becoming unprovable, only to chaos and nihilism.

[157] On deductive presentation and system-construction, see *Deduktionssysteme* Automatisierung des logischen Denkens, 2. überarb. Aufl., ed. K. H. Bläsin & al. (München: Oldenbourg 1992) viii + 291 pp.

[158] To some extent—and especially in its underlying methodological motive—the situation is the same with the trust in numbers, where quantification (depersonalised, by a form apparently objective) takes the sharpness of a decision. Cf. Theodore M. Porter *Trust in Numbers* The Pursuit of Objectivity in Science and Public Life, (Princeton: Princeton University Press 1995) xv + 310 pp. and especially at p. 8.

roots—, among others, from GEORGE LUKÁCS' late ontology of the social being,[159] describing institutionalised fields like religion, politics, economics, law, or scholarship, patterned by the ideal of their homogenising medium, in order to be able to serve the heterogeneous demands of social totality with own, particularly adequate means. Yet, contemporary philosophy of science has an expressly critical view on the above issue. For instance and above all, extreme simplification is seen in our attempts at axiomatic thinking on matters of society (i.e., policy, social pragmatism and morality), presupposing and apparently also performing ideals pertaining otherwise to mathematics (clearness, purity, sharpness, and categorical simplicity), moreover, being led by a childish hope that we can thereby provide a complete and final solution to the underlying queries without leaving any dilemmas or doubts behind.

Axiomatism has no relevance in reality

As the exact opposite, today's realisations in philosophy of science point at the substantial boundaries of artificial human constructs (thus, primarily, at the structural limitations of axiomatically constructed mental systems and their suitability to generate second reality, as well as of their adequacy and cognitive strength in mental reconstruction). For philosophies of science argue against the claim for such artificial constructs to be used as universal patterns, whereby it reveals that no presuppositions substantiating such a claim have any equivalents or relevance in reality.

Creative uncertainty *versus* axiomatism

We may also contemplate how mankind's greatest works and thought creations in human matters were born. Undertaking the odium of over-simplification and reducing the alternatives at our disposal to two, we may ask further: which kind of thinking proved to be more productive, the one led by the axiomatic ideal or the one embedded in c r e a t i v e u n c e r t a i n t y? Let us exemplify these, even if only superficially, with the greatest mentors of humanity in

[159] Lukács *Die Eigenart des Ästethischen* I, ch. II and György Lukács *A társadalmi lét ontológiájáról* [Zur Ontologie des gesellschaftlichen Seins] I–III (Budapest: Magvető 1976), particularly I: »Die wichtigste Problemkomplexe«, passim.

matters of religion and morals. Well, regardless of personal affiliation, we may think of the line of prophets from the Old Testament or of JESUS CHRIST from the New Testament, in either case we will encounter unambiguous indications for a justifiable response. One could also recall the founders of religions and builders of moral systems of various non-European cultures, like BUDDHA, CONFUCIUS or MOHAMMED. The fact that the most prominent ancestors and religion-founders of mankind on the globe thought the way they did cannot be traced back to personal traits or to mere co-incidence. As far as their way of thinking is concerned, BUDDHA, CONFUCIUS and MOHAMMED adhered to the same tradition as the Old Testament prophets and JESUS CHRIST did. Continuing the line, we may of course arrive at the medieval and modern eras, spiritually mastered by Saint AUGUSTINE, and MARTIN LUTHER and JOHANNES CALVIN, respectively.

(example: the *Grundgesetz* of Bonn

Let us turn to another field and have a look at the potentialities in law as they are embodied, for instance, by the Preamble of the German Constitution (Basic Law or *Grundgesetz*).[160] This text, comprising hardly a hundred words, sounds like a moral teaching, as if it were a passage from the New Testament or from some other transcendental message. It is rather poetry than anything else. Political pamphlets and brochures on law issued in the once German Democratic Republic and the occupant Soviet Union used to brand this very Preamble simply as the "precursor of fascism". The principal STALINist objection, proclaimed from the conceptual heights of "socialist legality", claimed that law is expected to operate with exact formulations. This very text, however, consists of an exceptionally rich variety of moral and historico-philosophical considerations which withstand strict conceptualisation and, therefore, might give way to different interpretations under differing conditions, and the ones who apply it may actually use it when and wherefore

[160] For the preamble of the German Constitution, see Willi Geiger 'Zur Genesis der Präambel des Grundgesetzes' *Europäische Grundrechts-Zeitschrift* 13 (1986) 3, pp. 121–126 and Dietrich Zais *Rechtsnatur und Rechtsgehalt der Präambel des Grundgesetzes für die Bundesrepublik Deutschland vom 23. Mai 1949* (Tübingen: [Univ. Diss.] 1973) 241 pp.

they please and motivate in merit. Obviously, as the argument could be continued, a firm stand in specific issues is by far not excluded, and if it is eventually the case of law, then it is meant for telling us precisely how to act, for instance, as judges obliged to make a decision. As an instance from the other pole, the conceptual clearness of STALIN's Soviet Constitution (1936) might also be assessed from such a perspective. Indeed, the ideal of the legal culture of Civil Law systems in Europe is linguistic representation with axiomatic pretensions and striving for exhaustive conceptual description. There is no contradiction in that the Germans could not praise enough the Preamble of their Constitution, first of all by referring to its inherent ability to provide instructions and encouragement in various constitutional contexts and processes even under unforeseeable conditions. It has this ability because by formulating the ethos and historical efforts of the German statehood on the level of principles it actually responds to the most diverse questions, and, after all, provides a guiding basis for further action without the least necessity to be amended when political re-evaluation is due under changed conditions.

setting a direction without being specific)

The Preamble of the *Grundgesetz* selects values from such a wide range and in such a broad social context that it becomes capable of fulfilling the task of setting the direction without the slightest need for itself to undertake the decision and the concrete evaluation of future situations. From our own perspective, we can say that it can do so because it does not bear any axiomatic stand or deduction whatsoever in regard to the hierarchy of values and the instrumentalisations through which they are to be fulfilled. That is, at any given time, it leaves the decision to the prevailing political and institutional system as to whether under new conditions the reunification of Germany should or should not be evoked, or the challenge of re-armament be undertaken, and so on.

(example: the divergent paths LUTHER and CALVIN took)

Perhaps it is not by mere chance that we arrive at LUTHER and CALVIN when continuing the above line of thought. Well, it is more than interesting that MARTIN LUTHER exerted a fertilising influence both in his life and after. Witch-burning, intolerance on the level of principles did not derive from the

Reformation in Germany in the same way they did in Switzerland. It is hard to prove how great a role any individual may have had in the historical separation of real situations following parallel starting points, and how great the one of the accumulation of conditioning differences, intertwined (yet diverging) may have been.[161] Thus, we cannot say whether the personality, way of communication, rigourism of principles or inclination towards exhaustive normative regulation characteristic of JOHANNES CALVIN played a role in the divergence of directions or not. With regard to the theological foundations, however, these two main streams of Protestantism did not differ so much to determine their fates in posteriority. Yet, the same basic idea of Protestantism actually led to the birth of entirely different accomplishments in both style and the hard facts of the time.[162]

[161] For another crucial period of European history, this is the endeavour of JOHN LUKÁCS, solving the enigma in his *The Duel* Hitler *vs.* Churchill, 10 May–31 July, 1940 (London: Bodley Head 1990) 276 pp.

[CALVIN's merciless logic]

[162] Cf., e.g., Euan Cameron *The European Reformation* (Oxford: Clarendon Press 1991) xv + 564 pp. According to GEORG HUNSTON WILLIAMS' summary—*The Radical Reformation* 3rd ed. (Kirksville, Miss.: Sixteenth Century Journal Publishers 1992) xlvi + 1513 pp. [Sixteenth Century Essays and Studies]—, CALVIN excelled especially in his iconoclastic violence, dogmatism, self-centred rigourism and in the unnecessary generation of martyrdoms (p. 1187), "who in several ways was closer to the radicals than LUTHER in his resolution to cleanse both doctrine and polity of all traditional elements that were not expressly mandated by Scripture and in his great interest in sanctification and church discipline, was with respect to the state much closer to the papal Church in seeking to ground political authority and competence in revelation, desirous wherever possible to work for a regenerate magistracy under the tutelage of the reformed Church." (p. 1282) Or, such is "CALVIN with the pitiless logic so characteristic of the French temper, so unassainable in his conclusions when his premises are granted." R. H. Murray *The Political Consequences of the Reformation* Studies in Sixteenth-century Political Thought (London: Benn 1926) 301 pp. [The Library of European Political Thought] on p. 81. – In practice this corresponded to a system of interlocking control, infiltrating even in private life, to the drive to denouncement, the mutual generation of fear, hatred and enmity, as well as to the intensification of the psychological stress, through the internalisation of guilt, a harsh regime of child-rearing and through the merciless suppression of rituals to regulate

In science: school-generating thought → applications → generation of isms: rigidifying thought into doctrinarism instead of liberating it

Being led by the ideals interiorised during our "scientific" upbringing, we are only allowed to think that the axiomatic pattern, and no other, is the one which corresponds to the standards of science. Although, if only recalling the outstanding examples, what we can see at all times is that (*a*) at some point in history a school-generating oeuvre is born and (*b*) this—through a number of more or less servile copying—is continued in the so-called a p p l i c a t i o n s , soon followed by (*c*) the assertion of competing trends, and finally (*d*) the whole movement wears out, fades and extinguishes; we may say: it dries up. This is the fate of the "i s m s ": MARXism, FREUDism and structuralism equally shared it. It can be observed everywhere that under all of the so-called applications the expectations underlying the initial thought (with the components thereof) are made absolute without any creativity or additional insight. Since we are still not dealing with an axiomatically operating system, incoherence (otherwise insignificant or insensible) between parts and elements, applied categorically and exclusively with axiomatic pretensions, or sometimes even mere inaccuracies in expression, may lead to contradictions which, *nolens volens*, will mercilessly break up the whole system into a series of trends, ultimately causing its disintegration. As a matter of fact, each oeuvre—KARL MARX's and SIGMUND

emotions. "[O]ne central aim of the reformers was to bring popular piety under professional clerical control, for they claimed alone to know the difference between true religion and false superstitions. After the Reformation, the confessionalization of society thus implied competition by contending elite groups to control and restrict the expression of sanctity in social life. Moreover, the very fact of confessional competition itself hastened desacralization." R. Po-Chia Hsia *Social Discipline in the Reformation* Central Europe, 1550–1750 (London & New York: Routledge 1989) vi + 218 pp. [Christianity and Society in the Modern World], quote on p. 193, and especially at pp. 35, 136–137 and 164–183. For the CALVINian notion of "social disciplining", see Gerhard Oestreich *Neostoicism and the Early Modern State* (Cambridge 1982) viii + 280 pp. [Cambridge Studies in Early Modern History]. Cf. also I. John Hesselink *Calvin's Concept of Law* (Allison Park, Pa.: Pickwick 1992) xii + 311 pp. [Princeton Theological Monograph Series 30].

FREUD's alike—will generate as many trends, "isms" or schools, as many people there are who attempt to apply it in a quasi-axiomatic manner. As soon as they turn into an "ism", the initial thought itself is already doomed to death. Instead of having liberating effects, "isms" rather close the original idea and force the thinking processes into ready-made form(ula)s. In absence of the ethos inspiring the original recognitions the only thing left behind will be dry doctrinarism. The once creative idea is thus made incapable of renewal, of being able to adjust the emphases in its points of view to the changing conditions.

Ambiguity, able to fertilise, *versus*

On the other hand, the most conspicuous feature of the patterns of thought capable of avoiding the trap of axiomatism is that they continuously f e r t i l i s e thinking precisely by their unavoidable a m b i g u i t i e s with openness to both flexibility and further creative interpretations.

axiomatism, strong enough to standardise

It would be hard to tell which of the alternatives did more good for humanity. It may not be easy to formulate such an answer—as it would contradict our entire socialisation—, but one of the choices at our disposal is the fertilising ambiguity. However, it would not in the least be easy to show why and in what particular domains of truly human matters the axiomatic pattern of thought has undoubtedly excelled—except for the area of standardisation.

Undeterminedness and unclosedness presupposing autonomy

This very fertilising ambiguity—u n d e t e r m i n e d n e s s a n d u n c l o s e d n e s s—presumes and encourages some sort of autonomy against moral philosophical heteronomy. By no means does it just praise the lack of strict methodical discipline (of rambling, inconsistency, or even the lack of principles), but it leaves it up to our personal decision to select and balance among—when pondering upon—the values. Preference is always given to alternative solutions. Being ambiguous itself it gives free scope to our personal responsibility to develop our own i n t e r n a l discipline in order to allow us to become, also in our thinking, followers of genuine traditional values and thereby generators of new values ourselves (*Figure 7*).

Axiomatism everything is predetermined, closed, unambiguous and exclusively necessary; therefore the thinking process has no chances: through the application of ready-made elements, all of its components serve its subordination into the prevalent system	**Fertilising ambiguity** the totality and its parts are both undetermined and open, possibly ambiguous and bearing alternative choices; therefore the thinking process begins with open chances: it serves new starts and creative re-consideration
Heteronomy directed by ready-made patterns, therefore the thinking process is reconstructive and restitutive; thus individual human beings are relieved of creative choices; all in all, being free of responsibility, the given outcome simply happens to them	**Autonomy** man himself shapes his own world without being subjected to any kind of automatism, therefore he himself makes the choices by his acts at any given moment, consequently he is responsible by contributing to the creation of the successive states of the process
Rigid changes only through change of systems (by means of r e v o l u t i o n : abolishing the old and institutionalising the new); inflexible: offers answer only within the system, while undertaking any new approach; perspective and evaluation are defined exclusively from within its own established system	**Flexible** freely shapable (by means of e v o l u t i o n : any new initiative being re-launchable in any direction) responsive: the answers it provides shape its framework, undertakes every kind of renewal, increasing its ability to provide more adequate answers from any given perspective
Underlying mechanical world-view causal-mechanical laws prevail allowing no exceptions, externally determined once and for all; symbol: clockwork, created and started by the Creator resting after this point, and looking from distant serenity at His oeuvre in operation	**Underlying autopoietical world-view** the rule of stochastic necessity with mere statistical probability, in which the future can be predicted mostly in directions; symbol: BROWNian motion, the prevailing order being formed from the apparent chaos at any given time

Law is objectified through positivation, with the ideal of codification, excluding any kind of ambiguity, and placed above society; wherein legal consequences are drawn exclusively by logical necessity as formal responses, by means of deduction reminiscent of the logic of justification	**Law is open** as practical realisation of principles or rules followed like examples; embedded in society as an assumable choice resulting from public consent, arising in absence of anything better as the fruit of dialectic debates in the community; answer is done in merits, built by means of inductive reasoning conforming to the logic of problem-solving
Gaps in law there are, since the system of classification can never be complete: they stand for criticism with dramatic effect; therefore auxiliary techniques circumventing them have born to resolve them	**Gaps in law** there are not and cannot be any, since tradition comprises everything: order is re-established by re-asserting principles and re-actualising the meaning of rules, undertaking the past only as an antecedent

(*Figure 7*)

"The starry heavens above me and the moral law within me"

After World War II, JEAN-PAUL SARTRE happened to give voice to major moral dilemmas modern times were facing, in form of a philosophical pamphlet which has finally become one of the symbols of European spiritual renewal.[163] As is known, a number of trends from Catholic moral theology to MARXist ethics thought they could afford an answer to the question "When am I allowed to kill?"—perhaps approaching the issue from opposite directions, but with justifiable basis. SARTRE's response was more modest and sceptical but not unfounded, boiling down to saying "I don't know!" One of the cardinal points in his argument was that everything we require to make a decision is available in our culture: codes of law, moral parables, and so on. All of these

[163] Jean-Paul Sartre *L'existentialisme est un humanisme* (Paris: Nagel 1946) 141 pp. [Collection Pensées]. For the entire range of problems, see George C. Kerner *Three Philosophical Moralists* Mill, Kant, and Sartre: An Introduction to Ethics (Oxford: Clarendon Press 1990) xii + 204 pp.

are also within us, as we incessantly interiorise them through our cultural socialisation. Thus, apparently, everything that might be required is at hand and we would no longer need to make a creative, personal decision. Yet, when we truly have to identify what is obvious and reach a decision, we are bound to realise that the only thing we know is that we cannot make a decision. As SARTRE expressed it, following IMMANUEL KANT,[164] the stars may be above us and the moral law inside of us, but if the stars (symbolising KANT's categorical imperative) are so high and the moral order silent when we actually need them, well, in such a case we cannot make a decision either with or without them, while, naturally, nobody can exempt us from the necessity of making it and from the responsibility we must bear for it.

Axiomatism: hope of a safe refuge

A x i o m a t i s m leaves the faith (or at least hope) with us that there must be a world of concepts somewhere which gives us safe refuge. After all, it does provide some help because it makes the decision on behalf of us—only leaving the job of concrete application and refining conclusion arising therefrom behind. It would be too simplistic to ask whether this is good or bad for us. What we can say, however, is that both types of thinking embody some sort of tradition, continuously fighting their battle inside of us.[165]

[164] "[T]he starry heavens above me and the moral law within me". Immanuel Kant *Critique of Practical Reason* 3rd ed., trans. Lewis White Back (New York: Macmillan 1993), p. 169.

[systems will not generate order in real life]

[165] Sándor Márai—*Egy polgár vallomásai* II [Confessions of a citizen] 3rd ed. (Budapest: Révai n.y.), p. 103—characterises one of his one-time friends by describing that "His life, his oeuvre was one single effort at realising his great clear ideal, the longing for order. But wherever he went all he found was only system and not order. His mind was preoccupied all the time with the most sublime ideals: monumental systems, perfect forms of life. He used to glorify everything that was »great«, he used to live in the spell of quantity. But in small things where decisions have to be made at once, on the surface where the whole man still reveals himself with all its consequences, he was just problematising and hesitant. He wanted a »form« for everything and was desperate to realise that life does not tolerate forms: it overflows everything as one single formless chaos, enframed by some indefinite mourning border, only by death."

Henceforth: the promise of a synoptic unity

We may even add that due to our founded doubts, the refuge provided by axiomatic construction is merely a *fata morgana* as it only seeks points of reference projected merely by us, extrapolated out of us, to conceal our uncertainty. This ambiguity appears already in the earliest applications of axiomatism. Just to present one or another thought-provoking (but affecting) example: the oeuvre of SAINT THOMAS AQUINAS—who lived his entire life in a special state of grace, continuously polishing and building his oeuvre—ends with the visions subsiding him into silence.[166] Also the reading of SPINOZA's *Ethica* becomes ambiguous due exactly to being geometrically expounded.[167] Therefore, we can only conclude that theoretical construction based on the ideal of geometry—as the most methodical way of organisation and expression in absence of anything better—bears its initial ambiguity in itself. For this very reason, it is not by mere chance that the major cultures of mankind, both in the East and in the West, in their myths and under the spell of some synoptic visions, all have formulated with some similarity the desire of integrating the Great Resolution, that

[THOMAS AQUINAS' envisioned sudden silence]

[166] "[W]hile brother THOMAS was saying his Mass one morning, in the chapel of St. Nicholas at Naples, something happened which profoundly affected and altered him. After Mass he refused to write or dictate; indeed he put away his writing materials. He was in the third part of the *Summa theologiae*." To the repeated questioning by brother REGINALD, his secretary, he finally responded: "All that I have written seems to me like a straw compared with what has now been revealed to me." *First Canonisation Inquiry* [Naples, 1319], para. LXXIX. "Reginald, my son, I will tell you a secret which you must not repeat to anyone while I remain alive. All my writing is now at an end; for such things have been revealed to me that all I have taught and written seems quite trivial to me now. The only thing I want now is that as God has put an end to my writing, He may quickly end my life also." Bernard Gui *Life of St. Thomas Aquinas* [1318–1330], para. 27. Both quotes by Foster, pp. 46 and 109–110, as well as note 63 on p. 73.

[SPINOZA's thoughts concealed by his systematism]

[167] For instance, according to the definitive opinion of Edwin M. Curley *Behind the Geometrical Method* A Reading of Spinoza's Ethics (Princeton, N.J.: Princeton University Press 1988) xii + 175 pp., p. xi, as well as pp. 51–52, all that is about "a dialog the geometric presentation [of which] served to conceal, and was, perhaps, partly designed to conceal."

is, major diverging paths and mutually excluding great alternatives, into one common view.[168; 169; 170]

[168] After the death of Saint THOMAS AQUINAS, ALBERT OF BRESCIA had a vision—according to the testimony of the Dominican brother ANTHONY from Brescia—and he saw SS. THOMAS and AUGUSTINE together in glory, and the appearing person told him the following: "I am AUGUSTINE, Doctor of the Church; I am sent to declare to you the doctrine and glory of THOMAS OF AQUINO, here at my side. For he is my son indeed, who faithfully followed the apostolic teaching and my own, and so illuminated the Church […]. He is my equal in glory, except that in the splendour of virginity he is greater than I." *First Canonisation Inquiry*, para. LXVI, in Foster, p. 104, as well as note 95 on p. 79. Moral theology shares this conviction in as much as it considers the two great fundamental oeuvres to be the two great expressions of CHRIST's inexhaustibly rich mystery. Pinckaers, ch. ix.

[a vision that represented AUGUSTINE and THOMAS AQUINAS to be complementary]

[169] "Rabbi ABBA stated in the name of SAMUEL: For three years there was a dispute between BETH SHAMMAI and BETH HILLEL, the former asserting: »The *halachah* is in agreement with our views« and the latter contending: »The *halachah* is in agreement with our views«. Then a *bath kol* [(Lit. 'daughter of a voice') a voice descending from heaven to offer guidance in human affairs, and regarded as a lower grade of prophecy] issues announcing: »[The utterance of] both are the words of the living God, but the *halachah* is in agreement with the rulings of BETH HILLEL«. Since, however, »both are the words of the living God« what was it that entitles BETH HILLEL to have the *halachah* fixed in agreement with their rulings. Because they were kindly and modest, they studied their own rulings and those of BETH SHAMMAI, and were even so [humble] as to mention the actions of BETH SHAMMAI before theirs. […] This teaches you that him who humbles himself the Holy One, blessed be He, raises up, and him who exalts himself the Holy One, blessed be He, humbles; from him who seeks greatness, greatness flees but him who flees from greatness greatness follows; he who forces time is forced back by time but he who yields to time finds time standing at his side." *The Babylonian Talmud* Seder Mo'ed III: 'Erubin, trans. Israel W. Slotki (London: The Soncino Press 1938), 13*b*, pp. 85–86, the explanation of *bath kol* from the glossary of the appendix, p. 737.

["liveable" law as the unified truth of a dispute between SHAMMAI and HILLEL]

HILLEL, also called the Elder, '*Zaken*', was a leading authority among the scribes and Pharisees during the reign of King HEROD (38–34 BC). He was the head of *Sanhedrin* with a sound sense of the practical. "HILLEL's greatest contribution to the *Halakah*, however, was his formulation of broad general rules of interpretation by means of which new *halakot* could be developed and deduced logically out of Scripture. These rules put into the hands of the Rabbis the '*organon*', the tool by means of which Scripture might be made to yield new rules and new truths, and by means of which its commands could be harmonized with the ever changing conditions of Jewish life." George Horowitz *The Spirit of Jewish Law* A Brief

Autopoiesis: self-reproduction through self-definition

How do we think in Europe today? In the last few decades, macrosociology has renewed social theoretical thought through the so-called autopoietical systems theory. By the methodological application of *autopoiesis*, initially formulated on the basis of the description of the self-reproduction of living cells, it proved that the functioning of society can eventually be described as a kind of s e l f - r e p r o d u c - t i o n . For we can only be sure of one thing: reproduction of any given time will surely be completed, although not within a previously set framework, but in a way that the actually working net of reproduction is going in one or another way to d e t e r m i n e

(a) the framework and timing, as well as

(b) the laws

Account of Biblical and Rabbinic Jurisprudence [1953] (New York: Central Book Co. 1963) xi + 812 pp. at p. 30.

Their story speaks about the battle between determinant styles: "[T]here is a story about a Gentile who came to SHAMMAI and said, »You may convert me if you can teach me the whole *Torah* while I stand on one foot«, but he drove him away […]. The Gentile came before HILLEL who converted him by saying, »Do not to your fellow what you hate to have done to you. This is the whole *Torah* entire, the rest is explanation. Go and learn.«" *Sabbath* 31*a*, in *ibid.*, p. 29.

The continuation of the above quote speaks again about the way of thinking inherent in the *Talmud*: "Our Rabbis taught: For two and a half years were BETH SHAMMAI and BETH HILLEL in dispute, the former asserting that it were better for man not to have been created than to have been created, and the latter maintaining that it is better for man to have been created than not to have been created. They finally took a vote and decided that it were better for man not to have been created than to have been created, but now that he has been created, let him investigate his past deeds or, as others say, let him examine his future actions." *Ibid.*, 13*b*, pp. 86–87.

[an ultimate wisdom?]

[170] A certain ADOLPH TANQUEREY is remembered for having, as a young man, written a seven-volume *Summa* which he then, summarising into a five-volume *Digest*, abridged to a three-volume *Compendium*, further condensing it into one single volume called *Manual,* ultimately completed as a thin *Medulla Theologiae Moralis*. When he was asked in his old age about the CHRISTian moral teaching, all he quoted from AUGUSTINE was: "*Ama, et fac quod vis*" [Love and do whatever you want]. Albert R. Jonsen & Stephen Toulmin *The Abuse of Casuistry* A History of Moral Reasoning (Berkeley, Los Angeles, London: The University of California Press 1988) ix + 420 pp. at p. 342.

of self-reproduction during the process of reproduction.[171] Well, the gist of the message is hardly more than an apparent tautology, namely that the self-reproduction of society is insured inasmuch as society actually reproduces itself. We know that the devil always hides in the details. Obviously, the genuine question here is also how this happens, and what actually goes on in the process.

Law, realised through judicial acts by the legal profession:

The essence of a theoretical answer in regard to law lies exactly in the recognition that the way in which the process will proceed depends on all of us, that is, on everyday participants and on practitioners of the legal profession.[172]

with responsibility for our fate

Returning to the example of law: concerning the methodological explanation of its functioning, the thought-pattern of the legal scholarship in present-day Europe is dominated by argumentation theory.[173] On the American continent,

[171] See especially, by Niklas Luhmann, 'The Unity of the Legal System' and 'Closure and Openness: On Reality in the World of Law' in *Autopoietic Law* A New Approach to Law and Society, ed. Gunther Teubner (Berlin & New York: de Gruyter 1988), pp. 12–35 and 335–348 [European University Institute, Series A, 8] and 'The Self-reproduction of Law and Its Limits' in *Dilemmas of Law in the Welfare State* ed. Gunther Teubner (Berlin & New York: de Gruyter 1986), pp. 110–127 [European University Institute, Series A, 3]. For a specified context, cf., from the present author, 'On Judicial Ascertainment of Facts' *Ratio Juris* 4 (1991) 1, pp. 61–71.

[172] In a similar sense, the US Chief Justice has once recalled that we usually build our safety on static blocks of identity—"as an illusion of safety in a Maginot Line"—whereas security can only be achieved through constant change and in flexibility that is ready to adapt. Justice William O. Douglas 'Foreword' in *Essays on Jurisprudence* from the Columbia Law Review (New York & London 1963), p. 18.

[173] By Aulis Aarnio, *On Legal Reasoning* (Turku: Turkun Yliopisto 1977) xiii + 355 pp. [Turun Yliopiston Julkaisuja, Sarja B, Osa 144] and *The Rational As Reasonable* A Treatise on Legal Justification (Dordrecht, etc.: Reidel 1987) xix + 276 pp. [Law and Philosophy] as well as Robert Alexy *A Theory of Legal Argumentation* The Theory of Rational Discourse as Theory of Legal Justification [*Theorie der justischen Argumentation* Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung (Frankfurt am Main: Suhrkamp 1978) 397 pp.] trans. Ruth Adler & Neil MacCormick (Oxford: Clarendon Press 1989) xv + 323 pp. and Aleksander Peczenik *Grundlagen der juristischen Argumentation* (Wien & New York: Springer 1983) xiii + 266 pp. [Forschungen aus Staat und Recht 64].

constitutional interpretation[174] and the movement of Law and Literature[175] are the ones seeking an actual logic of quasi-logical conclusion, drawn within the normative system by the judiciary in decision-making process and asserted in the judicial decision and its subsequent justification. This means a search for the actual determination in the process, for a way more complex than it officially appears to be, which takes place behind the facade of professional communication. (For the task of the legal profession is to filter and then to justify within the law's homogeneous medium those practical steps and measures that we and/or our clients take in result of heterogeneous inspirations.) All these contemporary theories are based on the recognition that certain fundamental value-choices were already made by our ancestors in our respective culture. On final account, these are to determine our decisions, at least by setting the framework for argumentation (reasoning and justification) which actually leads to these decisions. Accordingly, their theoretical message is only a warning to us: as we mostly are masters of

[174] Ronald Dworkin *Taking Rights Seriously* New Impression with a Reply to Critics (London: Duckworth 1978) xv + 371 pp. as well as 'Interpretation Symposium' in *Southwestern California Law Review* 58 (January 1985) 1, ii + 725 pp.

[175] See, by James Boyd White, *The Legal Imagination* Studies in the Nature of Legal Thought and Expression (Boston & Toronto: Little, Brown & Co. 1973) xxv + 986 pp., *When Words Lose their Meaning* Constitutions and Reconstitutions of Language, Character, and Community (Chicago & London: The University of Chicago Press 1984) xv + 377 pp. and *Heracles' Bow* Essays on the Rhetoric and Poetics of the Law (Madison: The University of Wisconsin Press 1985) xviii + 251 pp. [Rhetoric of the Human Sciences]; by Stanley Fish, *Is There a Text in This Class?* The Authority of Interpretive Communities (Cambridge, Mass. & London: Harvard University Press 1980) viii + 394 pp. and *Doing What Comes Naturally* Change and Rhetoric of Theory in Literary and Legal Studies (Durham & London: Duke University Press 1989) x + 613 pp. For a critical treatise, cf. also 'Law and Literature Issue' in *Texas Law Review* 60 (1982) 3, pp. 371–586 as well as Robert Weisberg 'The Law-Literature Enterprise' and Robin West 'Communities, Texts, and Law: Reflections on the Law and Literature Movement' *Yale Journal of Law & the Humanities* 1 (1988) 1, pp. 1–77 and 129–156.

ourselves, we must bear responsibility for our fate.[176] Considering the fact that it is mainly our previous decisions and alternative choices (made by us or by our ancestors) transformed into tradition that stand behind our senses and sensibilities, affections and restrictions, we are expected to learn to handle this tradition in a wise, disciplined, and effective way.

to arrive by arguing at a personal decision

Human knowledge does not lie in that, for instance, we possess a book which already includes all concepts and propositions in an adequate number, variety and differentiation, required for the mastering of the world, elaborated to be used as axioms or theses to actually take the decisions on behalf of us, telling us definitely what is and what ought to be. Our historical and moral knowledge suggests the exact opposite—the one we attempted to formulate when mentioning the teachings of JESUS CHRIST. That is, nothing "concludes" from anything. If something still does, it can be no other than a common sense realisation: insofar as we do not intend to starve like BURIDAN's[177] donkey (the animal of the monk in the medieval parable having been unable, in want of rational justifiability, to choose from two bunches of hay placed at an equal distance from its nose to the left and to the right), or to get lost in a way exemplified by SARTRE's existentialist dilemma (by waiting in vain for inspiration from the starry night above all us and from the insecurity of the moral order inside each of us), that is, to take control of our own choices on our own fates, we must learn how to

[176] This dilemma was already formulated at the dawn of human philosophising by EPICURUS warning his friend that it is better to follow the myths on gods than to fall prisoners to the fate preached by natural philosophers, since the former leaves the hope that gods can be mollified by manifestations of nature, but the latter declares unquestionable necessity. 'Epicurus to Menoeceus, greeting' in Diogenes Laërtius *De vitis dogmatibus, et apophtegmatibus eorum qui in philosophia claruerunt* in http://en.wikisource.org/wiki/Lives_of_the_Eminent_Philosophers/Book_X, book X, 133–134.

[resolution *vs.* subjection to fate]

[177] The example once served for mocking the Parisian philosopher JEAN BURIDAN (first half of the 14th century).

argue. We have to learn how to arrive at p e r s o n a l d e c i s i o n s starting from the considerations in parables and from moral stimuli, decisions that we can undertake without being ashamed of them later on: decisions which we can therefore trust as we have undertaken to walk the road that eventually takes us to our decisions, by acknowledging both the result and the normative-argumentative path leading to it as our own.

in continuous dialogue

In the field of law, our task is to resolve and settle various conflicts (as judges, lawyers, or parties in the trial) by confronting everything rational in a rational discourse (embracing also what seems not to be rational), that is, each relevant point of view with manifest or tacit value-choices. I believe that only this way can we control our social existence. Only this way can we ensure prospect and future for our thinking.[178]

*

Behavioural patterns prescribed from the outside / arising from the inside

So far we have considered two major blocks of the types of thinking in the evolution of human thought. They correspond to two styles of decision-making, autonomous and heteronomous, in a sense developed from the one usual in moral philosophy . In one of them, patterns of behaviour are prescribed by an external agent and merely applied externally for the addressee acknowledging this passively. In the other, patterns are shaped from within, by a mediation on and insight into which ways and following what patterns one should act.

In axiomatism, human participation is random and negligible

THOMAS AQUINAS was the greatest in Europe to promote the axiomatic ideal for society. In his philosophy he developed a system of thought valid in and by itself. With him, axiomatism as a self-validating mental creation reached its

[178] Cf., e.g., Adolf Schwarz *Die Controversen der Schammaiten und Hilleliten* I: Die Erleichterungen der Schammaiten und die Erschwerungen der Hilleliten: Ein Beitrag zur Entwicklungsgeschichte der Halachah (Karlsruhe 1893) 109 pp.

climax so that with the chance of a personal decision excluded, the human actor eventually becomes incapable of doing anything: deprived of an acting capacity because of being freed from the burden of active choice. The axioms have acquired validity which is independent of human determination, so it is rather the existence of man that may become incidental from the perspective of axioms. With THOMAS AQUINAS we encounter the potential in human thinking, according to which the thinker is no more than a pure recipient, almost an external observer of his own internal events, thereby becoming a necessary but random medium in the process of cognition. Human recognitions acquire validity independently of the subject of recognition. The logical connections between axioms and theorems become self-representing and self-validating to the extent that the creative human contribution gets reduced to pure abstraction of some *quantité négligeable*.

It is this type of thinking that became the scientific ideal and paradigmatic pattern in Europe, and its reign is still unchallenged to this day. European civilisation has been constantly shaped by it, and its underlying ideas have for long prevailed in the philosophies of history and in the realm of law as well.

however, it gives account of the world only to a limited extent

Here and now, it is enough for us to know that this type of thinking, although it seems to be paradigmatically prevalent and unquestionable since long, has its strict boundaries. It is enough to be aware that it speaks of reality in a modelling manner, that is, as a representation constructing its own "reality" by "copying"—and thereby adjusting to the frameworks and demands of—the outside world. It is enough to keep in mind that actual states and motions are always more complex, and we are to select from among their truly prevalent (inter)connections only the ones about which we can intelligibly speak.[179] What exists and happens

[179] It is no mere chance that a neurologist may remind us that even what is mere empirical generalisation based on vague foundations (perhaps also coloured by independent motives) may nowadays appear under the cover of scholarship, and disciples are mostly offered the vision of causal deduction

[complex interconnections simplified]

is always deeper, richer in context and more inexhaustible regarding its potentialities, than of what we can ever give account by recoursing to the limited means of expression of our finite language.[180]

even where they could learn the reasoning resulting in diagnosis and therapy, optimal for the patient, by following the way of thinking of a master scarcely delimited by rules, i.e., by recognising some correlations among unknown variables of an endless number. Imre Szirmai *Valami ideg* [Something of a nerve] (N. p.: Lift Coeur n.y.) 192 pp.

[while rendering the world itself incidental]

[180] The recently deceased Russian science-philosopher warns us: "A single minor fact, unimportant to the statistical conception of reality, macroscopically indetectable and therefore apparently lacking physical existence, alters the world like of the whole; it becomes definable by virtue of the alteration, and therefore appears as real and essential for the whole." Boris Kuznetsov *Einstein and Dostoyevsky* trans. Vladimir Talmy (London: Hutchinson Educational 1972), p. 97.

3. SCIENCE-THEORETICAL QUESTIONS RAISED BY THE PHILOSOPHY OF HISTORY

Freedom = necessity understood

What we usually term as philosophy of history is by no means a natural formation, although it may seem so at the first glance.[1] We ought merely to recall the degree to which, during the times of regurgitating the parlance of MARXism, we became accustomed to the thesis formulated by FRIEDRICH ENGELS in *Anti-Dühring*, claiming that freedom is nothing but recognised necessity.[2] As is known, this state-

[1] For a general overview of the topic of the philosophy of history, see Georg G. Iggers *The German Conception of History* The National Tradition of Historical Thought from Herder to the Present (Middletown, Conn.: Wesleyan University Press 1968) xvi + 388 pp.; *Deutsche Geschichtsphilosophie in dem kurzen 20. Jahrhundert* Ausgewählte Abhandlungen hrsg. Zoltán Kalmár (Veszprém: Veszprémi Egyetem Társadalomtudományi Tanszéke 1996) 604 pp.; *Philosophy of History and Action* ed. Yirmiahu Yovel (Dordrecht: Reidel & Jerusalem: The Magness Press [of the] Hebrew University 1978) xi + 243 pp. [Philosophical Studies Series in Philosophy 11], especially part II dedicated to the philosophy of history and part IV dedicated to the debate launched by Raymond Polin's 'Farewell to the Philosophy of History?'; as well as—for a partial treatise—Robert Vincent Daniels 'Fate and Will in the Marxian Philosophy of History' *Journal of the History of Ideas* XX (1960), pp. 538–552 and Bernard Moss 'Marx and Engels on French Social Democracy: Historians or Revolutionaries?' *Journal of the History of Ideas* XLVI (1985) 4, pp. 539–557.

[2] Quoting HEGEL on that "Necessity is blind only in so far as it is not understood." (*Encyclopedia of Philosophical Sciences*, para. 147, addendum), he concluded by stating that "Freedom therefore consists in the control of ourselves and over external nature, a control founded on knowledge of natural necessity; it is therefore necessarily a product of historical development." (Engels *Anti-Dühring*, pp. 140–141.) Cf. Andrzej Walicki *Marxism and the Leap to the Kingdom of Freedom* The Rise and Fall of the Communist Utopia (Stanford: Stanford University Press 1995) xii + 641 pp., para. 2.5. »Freedom as 'Necessity Understood'«, pp. 167–179, quotes on p. 172.

ment leads us back through historico-philosophical traditions to BARUCH SPINOZA, famous for, among other things, having been one of the characteristic representatives of the *more geometrico* type of axiomatic thinking.

History forges its own trans-historicity in the history of philosophy: freeing the humans results in their subjection to laws

There is something peculiar about the fact that all across Europe, philosophising on history became fashionable in the 18th century along the waves of Enlightenment, formulating theses on human evolution and the secluded reason thereof, the significance of history, its beginning and ending; and what it messaged it formulated as absolutely valid. Thereby, eventually, history itself has forged its own t r a n s - h i s t o r i c i t y. In the same way, THOMAS AQUINAS raised his theorising to ontological heights by the force of his God-proofs, thereby elevating theory to a position of a subject to and part of human existence itself. AQUINAS' axioms, as known, are valid and they perform their function in and of themselves; and behind the eschatological history they summon our real history is breathing—while, strangely enough, we are barely expected to do anything else than listen to its messages. Thus, among other events, the story of our salvation with the strenuous development of parting good from bad simply happens to us, our only job in this dramatic course of events being to opt for a role. The brave baron Münchausen's deed is repeated in the history of thought—the baron's who lifted himself up by his hair in want of anything better. Yet we face a paradoxical situation in the philosophy of history, for the Enlightenment which intended to free humans from the oppressive effects of feudalism, actually resulted in the subordination of man by subjecting him to pre-selected abstract and speculative schemes, called laws of history.

History conceived in abstract collectivity leaves humans passive and irresponsive

Since no theory based on the recognition of predeterminations drawn from historico-philosophical presumptions can appreciate, in adequate depth, actual human achievement and its formative role, let me recall that with MARXism, the basic feeling of complete human helplessness has resurfaced again, claiming that it is solely history that has meaning, evolution and purpose—although h i s t o r y as such is always something of an abstract collectivity, and we,

fallible humans, are just individuals. And personally, by having entered the earthly scene by chance from the perspective of history, we either fit into such an overall plan that history is itself, or not. As we could see: freedom for MARXism is nothing but recognised necessity. Therefore, the more we learn about reality and the more we control it, the more obvious it becomes that reality is something to which we, as random actors on the stage of history, may adjust at most, but still cannot interfere with the performance on the stage. We are thus left with nothing to do at all.

Idea of development and progess in the Enlightenment:

The idea that development and progress allow no alternatives for human decision, as it evolved in the rationalising movement of the Enlightenment, is especially interesting in the context of the methodology of thinking as there is another component playing a part in it, and of this we have yet to speak. It is the influence of RENÉ DESCARTES and so-called CARTESianism. By analysing thought-processes, human observation, as well as laws and regularities deducible from observation, DESCARTES contributed to laying the methodological foundations of empirical sciences, thereby also offering a framework for thinking that can already be characterised by methodological certainty. He concluded that humanity might have developed certain methods and by adhering to those we ought to arrive at certainties, independently of the inherent incidentalities.

rule of logic, of reason and rationality

DESCARTES' achievement is particularly landmarking for the European culture since the entirety of our modern understanding of science and our trust in the methodological certainty of what can be acquired by cognition are built upon his magisterial views. The concept of reason also took definite shape with him. The modern ideals of logic, reason and rationality also entered Western civilisation with DESCARTES' discourses. Logic, reason and rationality: these are factors, considerations and disciplinary filters that henceforth rule human intellectual activity. Thereby DESCARTES was also a precursor to the ideal of *Calculemus!*, expressly formulated later by GOTTFRIED WILHELM LEIBNIZ, who claimed that even disputes on

humane matters could be resolved by reducing them to logico-mathematical calculations, whereby we would arrive at certainties.

Is every decision that cannot convince others, an error?

For example, even four decades ago—until CHAÏM PERELMAN's relevant work was published[3]—the simple question of how to interpret the activity of a collegial body like the Supreme Court of the United States was still theoretically unanswered. A corporate decision is either unanimous or not. The unanimous decision does not raise any particular problems. But, what happens when the decision is reached in the ratio of 6:3, or even 5:4, which happens in most cases? For example, if the majority vote is provided by five and four others stand for a dissenting counter-opinion, how will all of this be relevant from the perspective of the CARTESian methodological certainty? May we state that at least one part of the justices was surely wrong—either when choosing the premise, or when drawing the conclusion? Or, should we rather follow LEIBNIZ's inspiration and claim that all of them were necessarily wrong? Were they wrong collectively, even when some—majority or minority—happened to be right? Since, LEIBNIZ would add, if they had been truly right, they themselves should have realised it and convinced all the others as well.

Does our methodological certainty bear any relevance only within a limited terrain from the outset?

CHAÏM PERELMAN was the philosopher who searched for the resolution of disputes and conflicts by methodologically analysing the possible ways of solving the case. He won his fame by re-discovering rhetoric through describing the role

[3] Chaïm Perelman's first work, *Justice et raison* (Bruxelles: Presses Universités de Bruxelles 1963) 256 pp. [Université Libre de Bruxelles: Travaux de la Faculté de Philosophie et Lettres XXV], was reviewed by the present author in *Állam- és Jogtudomány* X (1967) 3, and his collection dedicated to the above dilemma, *Droit, morale et philosophie* (Paris: Librairie Générale de Droit et de Jurisprudence 1968) 149 pp. [Bibliothèque de Philosophie du Droit VIII], in *Állam- és Jogtudomány* XIII (1970) 3. For a reprint, cf. Csaba Varga *Jogi elméletek, jogi kultúrák* Kritikák, ismertetések a jogfilozófia és az összehasonlító jog köréből [Theories of law and legal cultures: Critical essays and reviews in legal philosophy and comparative law] (Budapest: ELTE "Comparative Legal Cultures" Project 1994) xix + 503 pp. [Jogfilozófiák], on pp. 7–70.

reasoning and argumentation played in founding any kind of theorising, exactly by recognising how much our theoretical models, logics and certainties in cognition became detached from our everyday practice, and how uncertain is the basis in itself onto which (with reassuring confirmation in collective discourses) we place our crucial choices in our real lives. For exactly this reason, he saw law as an area in which these problems emerge in a most condensed way, so, as an experiment, he elaborated the various domains and aspects of legal reasoning and argumentation in a series of case-studies, with a possible clarification in view. He raised a question rather startling for the time: how far does the validity of DESCARTES' claim extend? How far is it feasible and conceivable for us to reason within the range of methodological certainties? Where are the limits beyond which we can already state that the CARTESian formulation of methodological certainty no longer bears any relevance? Or, more precisely: if we had not drawn the limits for relevance initially, would we be the ones to unjustifiably expand the area of relevance to terrains where there are no such certainties, or moreover, where they cannot be expected to be at all?[4] Before PERELMAN's methodological question was raised, it had been the axiomatic way of thinking to provide the exclusive and incontestable ideal and pattern for human thinking.

It was the same axiomatic way of thinking that assisted, mainly in the age of Enlightenment, the formation of the ideological current later called 'philosophy of history'.

The tradition of the philosophy of history

The tradition of the philosophy of history is by and large made up from such and similar theses:

(1) there is human progress, and
(2) it has meaning. This deeper meaning draws a progressive line which
(3) delimits certain sections, and the individual sections

[4] For a general overview of his oeuvre, cf. *Practical Reasoning in Human Affairs* Studies in Honor of Chaïm Perelman, ed. James L. Golden & Joseph F. Pilotta (Dordrecht, etc.: Reidel 1986) x + 404 pp. [Synthese Library 183].

(4) follow one another forming unelusive steps, according to
(5) a linear progression.
Consequently,
(6) all phases of development must necessarily be traversed
(7) in and exclusively within a given sequence.

The MARXism' determinism:

Some five to six decades ago we might have sensed it strange or thought it to have been sheer fatalism that, for instance, JOSSIF VISSARIONOVICH STALIN—in relation to the modes of production—reduced human history to a set of eras, the Asian, slave-holder, feudal and capitalist formations, all of which must be traversed in order to arrive at the ultimate era: communism; without the possibility of skipping any of these formations (which have to be artificially erected first, hadn't they existed in the given—e.g., Afro–Asian—history). Today we are aware of that basically the so-called Enlightened ideas, dating back mainly to the 18th century, were to stand behind such re-activated revolutionising thoughts. Figuratively speaking, we may even add that the deviant was not STALIN himself but the fertilising inspiration drawn from the Enlightenment. STALIN's share was only to proclaim outworn ideas and ways of thinking to enforce their implementation with a cruel Asiatic impatience, professing them as dogmas of modernisation with a vehemence almost in substitution to a state religion.

(historical periodisation)

It is a similar atavism and intellectual retard that may explain why western scholarship simply cannot react to numerous presuppositions to which MARXism in Central and Eastern Europe has got used to living with intellectually. Thus, 'slavery', for instance, does not say much for the West, or says something basically different. They may sound to it as familiar from literature, from the history of society and economy, and from MARXism itself, of course, but such and similar categories are not applied for basic periodisation in historical sciences—all the more since Western humanities hold a devastating opinion of the MARXist concept on socio-economic formations, considering it more as an activist's invention, a simplifying thought-jacket projected back onto the past, than a descriptive tool, helping cognition. The same stands for 'feudalism' as

well. It is either not used, or used in plural, not pondering about the desire to use it for periodisation. SPINOZA already knew that definition—and periodisation is a kind of generalising definition—is dangerous from the beginning [*definitio periculosa est*]. And we must see the survival of axiomatism in how MARXism has formulated the need to firstly periodise, then afterwards to take its own p e r i o d i s a t i o n seriously so much as—just as if it were the fate of history to manifest itself by leaving further abstract speculations to us concluded therefrom in legacy—to actually adapt its investigations in practice to predefined schemes of such a periodisation by breaking the results into them subsequently.

HEGEL + eschatology = MARX

The philosophy of history's distinct way of thinking may be of interest not only because for a considerable part of the 20th century it represented the official basis for contemplation on social affairs through repeating KARL MARX' and FRIEDRICH ENGELS' theses, but also because its foundations had been laid by the most outstanding traditions and classical minds of German philosophy. For tradition led from the Enlightenment to GEORG WILHELM FRIEDRICH HEGEL who, by adding an eschatological dimension (with roots in the Old Testament that might be freely adapted later on), provided inspiration for MARX. The enlightened tradition of the 18th century could thus be transmitted to and perpetuated in posterity over many centuries.

Teleology hypostasised in history

In the development of human civilisation, each new insight had the scope to free the human intellect in order to comprehend increasingly wider spheres of human knowledge by finding explanation with accentuating force to various correlations through the use of the indispensable minimum of the principles of explanation. In the given historical moment, the movement of Enlightenment has surely contributed actively and successfully to the freeing of human intellect. Certain tacit presuppositions have firmly built into our thinking, suggesting that

(1) something called 'philosophy of history' exists, and
(2) mankind has some kind of mission, reason and purpose in history. We have thereby necessarily admitted that
(3) some sort of teleology is also inherent in history.

This is a primary goal towards the fulfilment of which we constantly advance. Well, in the secularised theology of the philosophy of history all such similar presuppositions have their roots in the 18th century. By the end of the 20th century, the English, American and Western European social sciences have mostly taken off their similar garments and thinking-crutches, and the 'philosophy of history', with an earthly theological devotion and rigour and with a hint of predestination, has become preponderantly a name for a past discipline.[5]

Subordination of instruments to predestined goals may lead to totalitarianism

If we presume that humanity as such has both a g o a l and a particular and exclusive p a t h upon which it traverses within its era, awaiting realisation, then we obviously must by all means develop the i n s t r u m e n t a l i t y that would help its realisation. Therefore, we need an instrumentality that stands above all, and its use ought to be assured under any conditions, so that mankind can arrive at the point where history-philosophical speculations say it should arrive. By setting such a goal and by subordinating all other considerations and instrumentalities to it, we have

[neoliberalism as a historico-philosophical Utopia]

[5] Mainly in the United States, but also spreading quickly on the European continent, the universalisation and expansion of the neoliberal credo as a trans-historically valid idea may have originally aimed at some generally conceived historico-philosophical negation but arrived ultimately at a particular restoration of the philosophy of history. For a juristic and legal philosophical perspective, see, by the author, 'Radical Change and Unbalance in Law in a Central Europe under the Rule of Myths, not of Law' in his *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008), pp. 9–25 [PoLíSz Series 7] & 'Post-modernity in Politico-legal Transitions: Tempted for Radical Changes with Tradition Left Behind' *Central European Political Science Review* 9 (2008), No. 33, pp. 87–103 and 'Legal Scholarship at the Threshold of a New Millennium (For Transition to Rule of Law in the Central and Eastern European Region)' *Acta Juridica Hungarica* 42 (2001) 3–4, pp. 181–201 & <http://www.ingentaconnect.com/content/klu/ajuh/2001/00000042/F0020003/00400027> & 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.

already come to one of the intellectual roots of modern totalitarianisms.[6]

It is still extremely difficult to draw conclusions at this point. We may know from various faulty explanations of history that conceptual reconstructions or social distinctions built upon the moral dichotomy of "good" and "bad" are seldom sufficient. As one conclusion from this panorama of the philosophy of history, we may realise that communist existence still has one meaning—making it pathologic, non-viable and not only depressing but also embittering others' lives—what THOMAS MANN already described when characterising FREDERICK THE GREAT's

with a missionary obsession indulging itself in some alien subject

[6] May I mention my discussions in 1987, somewhere around the Arctic Circle, on the way to Japan through Alaska. On grounds of old friendship, I took the liberty of talking to one of the country's eminent men, an influential representative of science-policy, as though to one sharing the same tasks, since we were rowing in the same boat. I desperately tried to convince him that the then reformist government in Hungary lacked not so much good will, as the admission that all of them were communists in mentality. It may be true that beginning with the modern ages, parts of Europe fell behind the development of the Western hemisphere and therefore wanted to find and use ways to pick up the pace. KÁLMÁN KULCSÁR, Deputy Secretary General of the Hungarian Academy of Sciences at the time, responded by sketching a dramatic picture of how the reforms have slowed down and how many obstacles the curing intentions have to face, including the chance of having everything turn backwards. As to my reaction, I attacked the ethos of socialist reformism, trying to convince my partner of this never-ending night that had we a moral court for indicting human deviances and destructive behaviours, the communist approach would occupy a distinguished place among them. Of course, not because it eventually does evil or too little good—in short, not because of evil deeds—but because of its *Weltanschauung*. As it assumes visions on the meaning and necessary progress of human existence, it constantly drives to recurrently and authoritatively foreseeing the future of mankind, and in order to direct 'progress'—i.e., the lives of others—towards the "right" path, it suggests the recourse to intervention. For its enthusiasm makes it so blindly self-confident that as soon as a communist discovers any force in society capable of self-organisation (i.e., success without external—ideological—help), he interferes with it suddenly, as if getting the wind. Since for a communist anything on earth not taken from or through the ideas and ultimate goal-projections of MARXism can only be suspicious from the beginning. This is why the communist movement is by definition of a JACOBine nature. Therefore it is historically doomed to fail, unless behaviours more patient, dignified, and trusting in the self-regulation of social processes can replace it.

[self-organisation being suspicious in both JACOBinism and socialism]

personality and style of reign as pathological, as an obsession indulging itself in some alien subject—by constantly interfering with others' business.

(The roots of MARXism)

From a historical perspective, MARXism is a school of social sciences which, as to its roots, can not have had anything to do (especially because its formation was completed by mid-19th-century, a key era for the development of modern scholarship) with those new approaches and methodologies helping around the birth of contemporary social thought, such as anthropology, psychology, and sociology. It is worthy of our attention that FRIEDRICH ENGELS' sole cultural anthropological work (*The Origin of the Family, the Private Property and the State*) relies on and makes exclusive reference to LEWIS HENRY MORGAN who, on his turn, was the last player of merits in the history of anthropology before anthropology proper was actually born. (So, it is again not by mere chance perhaps that today MORGAN is respected less for his scholarly views than for having been a pioneering humanist *dilettante,* one of the first Americans who took the civilisations of coloured peoples—notably, of Indians—seriously.) Psychology just started to develop by the time MARXism had already taken its final shape. In France, AUGUSTE COMTE's positivism was the heroic era for sociology, taking shape around the 1840s, one step ahead in time of MARXism—although not dialogising with one another, but rather existing side by side in a division-of-labour type rivalisation.

Evolutionism / linearity

As is known, the last great representatives of evolutionism[7] were LAMARCK[8] and CHARLES DARWIN[9]. In exact sciences only the rear-guards[10] were to come, but in biological anthropology no one could really take seriously that their presuppositions might be right. Actually, DARWIN

[7] For an overview of the evolutionist theory, cf. Jules Delvaille *Essais sur l'histoire de l'idée de progrès* jusqu'à la fin du XVIIIe siècle (Paris: Alcan 1910) xii + 761 pp; J[ohn] B[aguell] Bury *The Idea of Progress* An Inquiry into its Origin and Growth [1920] [New York: Macmillan 1932 {reprint}] introd. Charles A. Beard (Westport, Conn.: Greenwood 1982) xl + 357 pp.; Verne Grant *The Evolutionary Process* A Critical Review of Evolutionary Thought (New York: Columbia University Press 1985) xii + 499 pp.; Roger West *Philosophy and Evolution* The Evolution of Philosophy and the Philosophy of Evolution (Chalfont St. Giles: Summerhouse Press 1986) 390 pp.; Andreas Cesana *Geschichte als Entwicklung?* Zur Kritik des geschichtsphilosophischen Entwicklungsdenkens (Berlin & New York: de Gruyter 1988) xi + 405

was rather appreciated as a genius forerunner.[11] Beginning with DARWIN's times, the evolution of living creatures was seen considerably more complex and, accordingly, more complex explanations began to be formulated on it. These unambiguously excluded the hypothesis that the human race has developed along a l i n e a r line of evolution.

Thus, we are again back to our basic question: what can axiomatism truly offer when it does not summarise but rigidify; when it does not systematise prolific ideas any

Danger for theoretical considerations getting sheerly "applied" onto philosophies of history

pp. [Quellen und Studien zur Philosophie 22], as well as David L. Hull *Science as a Process* An Evolutionary Account of the Social and Conceptual Development of Science (Chicago: University of Chicago Press 1991) xiii + 586 pp. [Science and Its Conceptual Foundations]. Cf. also Georges Sorel *Les illusions du progrès* 4th ed. (Paris: Rivière 1927) 390 pp. [Etudes sur le devenir social I] and André Lalande *Les illusions évolutionnistes* (Paris: Alcan 1930) xi + 464 pp. [Bibliothèque de philosophie contemporaine]. For the beginnings of the evolutionist idea, see Eric R[obertson] Dodds *The Ancient Concept of Progress* And Other Essays in Greek Literature and Belief (Oxford: Clarendon Press 1973) vi + 218 pp., especially at pp. 1–25.

[8] Primarily for the various off-springs of LAMARCKism, see Peter J. Bowler *Evolution* The History of an Idea (Berkeley, etc.: University of California Press 1989) xvi + 432 pp., passim, and focusing upon the idea of "planning" and "education controlled by the state", on pp. 222–228.

[9] On DARWIN and DARWINism from a historical approach, cf. *Foundations of Scientific Method* The Nineteenth Century, ed. Ronald D. Giere & Richards S. Westfall (Bloomington & London: Indiana University Press 1973) ix + 306 pp., especially para. 5, pp. 115–132; in a contemporary context, *Darwin, Marx, and Freud* Their Influence on Moral Theory, ed. Arthur L. Caplan & Bruce Jennings (New York & London: Plenum Press 1984) xxvii + 230 pp. [The Hastings Center Series in Ethics], particularly part I, as well as John C. Green *Science, Ideology, and World View* Essays in the History of Evolutionary Ideal (Berkeley: University of California Press 1981) x + 202 pp., primarily chs. 5–6.

[10] Involving HAECKEL as well, cf. Jürgen Sandmann *Das Bruch mit der humanitären Tradition* Die Biologisierung der Ethik bei Ernst Haeckel und anderen Darwinisten seiner Zeit (Stuttgart: Fischer 1990) 218 pp.

[11] For the DARWINist roots of MARXism, see Ralph Colp [Jr.] 'The Contacts between Karl Marx and Charles Darwin' *Journal of the History of Ideas* XXXV (1974) 2, pp. 329–338 and Margaret A. Jay 'Did Marx Offer to Dedicate *Capital* to Darwin? A Reassessment' *Journal of the History of Ideas* XXXIX (1978) 1, pp. 133–146.

longer but—being primarily concerned with its further self-extension—only tether? For as soon as the frenzy of "I have created another, new world out of nothing"-type of ethos disappears and the emphasis falls upon the further development of the intellectual revolution generated by the original creative thought, the system of thoughts, which once helped to break through old dogmas, might easily prove to be the strait-jacket for and barrier of any further development of ideas and generate the danger of a destructive and doctrinaire "application"—instead of the initially creative inspiration of ideas.

(MARXism as an example)

So, do we have to doom MARXism only for being outdated? Or, was it perhaps just that its propositions could not stand the trial by today's scholarly verification? Well, most probably, such questions cannot be answered negatively. It would be highly misleading, however, if our responses were formulated as simplifications reminiscent of the original formulation of questions. Therefore, we can only state: philosophy of history, and especially its MARXist variant, became problematic and uncontinuable primarily because it was built upon presuppositions preceding the formation of modern scholarship, on the one hand, and unjustifiable, lacking any established scientific background, on the other, furthermore, because—and this is in continuation of our line of arguments—the conditions of "applying" MARXism as a coherent system of thoughts has been exhausted without generating further relevance for now.

4. PARADIGMS OF THINKING

4.1. THE PARADIGM OF PARADIGMS

Before discussing problems related to facts, concepts, logic and thinking, we will clarify three basic notions.

4.1.1. Conventionality

Convention

What do we consider a convention? To put it simply, we can approach social matters in two ways. We either take everything that surrounds us in our social existence as naturally given and perfect, or start searching for explanatory principles which allow us to expound what (and how it) composes social existence. C o n v e n t i o n is one to offer a resolution—perhaps most appropriate at the present level of the development of science—to this issue.

(example: social contract / JESUS CHRIST, as basic to our socialisation)

All of this is reminiscent of how contractual theories have explained the origins of the state and constitutional arrangements. Assuming the factuality of social contracts is obviously an ahistorical approach, since it lacks any realistic foundations whatsoever. Yet, the circumstance that we only presume their past conclusion—without identifying, for example, the historical fact to which JEAN-JACQUES ROUSSEAU's *contrat social* may have referred[1]—is just as irrelevant

[historical certainty as achieveable exclusively through some conceivable hypothesis]

[1] Franz Oppenheimer, for example, argues in the supplementary comments to his classical work *Der Staat* (1908) of 1929—*The State* (New York: Free Life Editions 1957), Introduction, para. a: »Theories of the State«, p. 8—that "As there is no method of obtaining historical proof to the contrary, since the beginnings of human history are unknown, we should arrive at a verdict of »not proven,« were it not that, deductively, there is the absolute certainty that the State, as history shows it […], could not have come about except through […]."

from the perspective of whether we can accept the validity of such contracts as an explanatory principle to consecutive historical developments, as it would certainly not alter our faith and knowledge if we eventually found out that there are no historically conclusive archaeological proofs available for the life and deeds of a person named JESUS CHRIST. Our response here could again be only that faith in JESUS CHRIST and therewith in the entire European and universal culture built on it is not in the least the function of historical evidence concerning His life in terms of what archaeology may currently accept as proven. For once we are convinced of the moral credibility of His teachings, we can transmit His testimony also by narrating the teachings as put in a historical scheme, as the story of the life of a young man who grew up in Galilee and was named such and such. Similarly to those fixed points in the case of social contract, as regards our belief or moral world order, after a certain point, it is no longer the historical wells of the original thought that matter. The transmitted narrations of the story of origins with a strong envisioning force can make it self-evident for generations that man can become worthy of being called a human being only if living in a society built upon moral grounds and capable of resolving the arisen disputes, otherwise he becomes the cannibal of himself. In the same way construct conventions the tacit grounds and presuppositions that provide the indispensable framework for everyday communication and theoretical explanation. We p r e s u m e these grounds and presuppositions and also s o c i a l i s e them through communication—yet most of the time we do not strive to identify or describe their actual story or factual occurrence.[2]

Institution as conventionalised tradition

As AESOP's fables present the moral lesson for humans within an allegoric setting, in the same way do narration, fiction, and exemplifying recollection of the past convince us, usually by referring to shareable elements born in lessons of common tradition. When explaining profoundly humane

[2] This is the reason why in theology, for example, biblical archaeology is treated as an auxiliary discipline.

matters, convention and conventional reference are the most common tools we use.[3] For we know that what we sense in society is of interest not simply because of their physical existence. It is neither their objectivity nor their reified aspects, embodiments or appearances that make them societal but the fact that they establish an i n s t i t u t i o n . Evidently, at this point we could start raising questions traceable to previous questions, as is common with obstinate children. For example, if the objectivity of physically tangible things in society is not of interest but their institutional nature, then what is an institution? We may respond: the institution is a conventionalised human product. But, what does the conventionalised human product mean? We may reply: when two persons form an alliance within society, they may agree, for instance, that if one of them utters "I promise", then they will understand an actual promise as defined in dictionaries. Thus, the utterance of "I promise" means that when one of them claims it, he does not simply say it, but takes it seriously enough that the consequence ascribed to the realisation of the institution concerned will derive from this promise for their entire future relationship. Therefore, in a physically described micro-situation one may perhaps utter "Yes!" in a somewhat articulated way, while in its social sense one has agreed thereby to 'contract a marriage', confirming one's resolution for a lifetime.

Conventionality as the basis for social community + social thought

Conventionality is one of the key components of societal existence, to an extent that the most personal and vital manifestations would not be interpretable without it. Our thinking process implies applying, making and re-making notions. Yet, where can we find these notions? Are they present as are rocks in a mountain which have weight and physical volume? Are they present as something we can simply kick into, hurting our feet at most? Will they remain in the same place they have been even if we humans will no longer exist?

[3] See, e.g., Eerik Lagerspetz *A Conventionalist Theory of Institutions* (Helsinki: Societas Philosophica Fennica 1989) 166 pp. [Acta Philosophica Fennica 44].

4.1.2. Cultural dependence

Dependence on linguistic communication

The above questions are connected to our intellectual activities and can be raised reasonably only within such a medium. But, what does intellectual activity mean? Could it be performed in the middle of the desert or in the jungle without having ever been socialised by any (other) civilisation? Our answer is rather exploratory: it seems that intellectual activity cannot result from an isolated Robinsonian life. It is more the outcome of some sort of communication and of the exchange of meanings within communication, in other words, it is the result of cognitive and comprehensive processes tested and re-tested in an endless feedback by communitarian practice. Hence, what we come to be is largely due to our ability of linguistic c o m m u n i c a t i o n . But a further question arises: what is language? Does it have physical existence, and if it does, what does that consist of? Is it language if we produce paper from fibres of wood and then spot it with lead through a procedure called printing?

Cognition does involve the reflexion of the own relationship onto the subject

In the development of natural sciences, the recognition that the possibilities of further development are not infinite and natural sciences cannot step beyond their own internal limits came to maturity around the end of the 19th century. Mathematics was the first to realise that it is impossible to build even its own system entirely on axiomatic grounds. As against earlier presuppositions, beliefs and convictions, it was proven that building merely on axioms would necessarily lead to sheer redundancy and/or contradictions. Step by step, other areas of science—with the lead of thermodynamics and nuclear physics—have also come to the recognition of their own boundaries. This is the realisation which VLADIMIR ILYICH LENIN greatly misunderstood when criticising it as the subjectivisation of human cognition, as its arbitrariness blocking cognitive access to the world, in his *Materialism and Empiriocriticism*. LENIN overlooked the genuine message with the sharp indifference of semi-cultured doctrinaires, declaring the intuition scandalous according to which the observer himself plays an active role in the observation, eventually shaping the very subject of

observation by his act of observation. LENIN was frightened by the conclusion—hesitatingly drawn by some as a pioneering realisation—that thinking cannot be independent of the actual thinker. Our ultimate conclusion nevertheless holds that cognition reflects both its alleged subject and also our relationship to the respective subject.

in dependence of own cultural presuppositions

In a more general reformulation, whatever we may speak of—be it legal or moral philosophy, or the explanation of human matters—, the propositions and theses that science departs from and arrives at are insufficient for explanation by themselves. However large a logical apparatus we may use to elaborate what the law is and why the court decides in a given way (whatever we intend to process through logic, that is, expound with the utmost consistency), we must still realise that the formalised propositions serving logical deduction, which we have posited as premises of conclusion, are insufficient. As advancing within the logical reconstruction of thinking, it will be revealed step by step, slowly diminishing our doubts, that all of our presuppositions are furnished by the underlying c u l t u r e . Since if it were not so, we would have to recognise as necessary that, for example, from the currently known legal premises we ought to arrive at currently known conclusions—but not only in the present but anywhere and at any time in the past as well (even in Atlantis millennia ago), that is, independently of the boundaries set by space and time, independently of cultural conditions, socialisations, sensibilities and skills.

PERELMAN: nothing but discontinuation and novation may need justification

This is obviously an absurd requirement. In every process of human deduction, beside the consciously formulated and undertaken premises, an often neglected (although fundamentally determinant and setting our path from the beginning) c u l t u r a l d e p e n d e n c e prevails as well. For our culture is built upon p r e s u p p o s i t i o n s which we do not even name, moreover, which are not needed to be made conscious either, due to the fact that moral considerations and intellectual dilemmas are always shaped within and as part of a given culture. CHAÏM PERELMAN once explained it when responding to the question of why a hypothetical *auditoire universel* (standing for humanity conceived

as an abstract entity) is the sole and ultimate controller of our argumentation and tacit agreements.[4] Well, he claimed that only novel initiatives, that is, divergence from tradition and not its continuation, are the ones that require justification. Accordingly, what we all share (uncontested because of being involved ourselves), that is, what we ourselves are, needs not to be named as this would make no sense at all.

Rebuilding and reception are not possible without some community of cultural presuppositions

However natural it may seem to think in one way or another, it is still not self-evident. Despite it possibly being evident to us, it is only so because we are already within the range of a given culture, hence we do not contest its presuppositions. As soon as we have to build a culture anew in absence of any antecedents whatsoever (rebuild it under some distant constellation, transplant it into Ethiopia, or re-erect it after the Flood of the myth is over), we must instantly realise that the genuine issue is not so much the transfer of knowledge incorporated in textbooks but the acculturation of the cultural presuppositions underlying it. For the transplantation of culture in all cases presumes a cultural unity: it can only be transplanted as a whole (or in large segments, through consistent borrowing) to have, for instance, a successful legal transplant.

(transfer of law / rejection if inorganic)

For this reason, it would be extremely hard to answer the question of how much we should rely on the transfer of laws in programmes and processes of social modernisation by means of law—i.e., social reform through the enactment of laws. Although reception (or *octroi*, when constraint is involved) promises radical change free of compromises, but it still builds on previous practices, skills and traditions without ever becoming an organic component of them. Their organicity can be hoped for at most, but the potential risks of failure cannot fully be eliminated. For example, where foreign institutions are forced to recourse to the transplantation of laws, its effects cannot reach any farther than the force

[4] Chaïm Perelman 'Cinq leçons sur la justice' [1966] in his *Droit, morale et philosophie* (Paris: Librairie Générale de Droit et de Jurisprudence 1968), vii + 147 pp. [Bibliothèque de Philosophie du Droit VIII], especially at pp. 52–57. I am to note self-critically that I missed indeed the point when in my contemporary review—*Állam- és Jogtudomány* XIII (1970) 3, pp. 621–622—I saw nothing but sheerly "utopianistic false objectivity" in it.

does regardless of how much of a nation-wide programme is made out of it.[5] When one merely attempts to export texts (under the guise of an all-curing panacea) within the framework of a so-called enlightened civilising programme, texts which are completely unknown in the given area and which require an organic medium that could otherwise be formed as a result of centuries-long consolidating practice following a successful change of laws, well, the failure is practically unavoidable, and these "fantasy laws" will sooner or later be doomed to expulsion from actual legal life.[6] If society is exposed for long to such effects extinguishing its capabilities of defence but still not interiorising the new pattern, the ensuing social disorganicity may lead to various dysfunctions, easily aggravating, or even degenerating the underlying conditions. Moreover, it may even turn into anarchistic and self-destructive bran-

[5] See, e.g., as the most evident example, the long-run failures of the American attempts at legal transplantation after WWII in Germany and Japan. Cf., for a less succesful part, 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. [American export of laws after WWII]

[6] For a complex yet convincing example, see the successful establishment, primarily in urban grounds, of the reception of the Swiss codes of law in Turkey. Cf. June Starr *Dispute and Settlement in Rural Turkey* An Ethnography of Law (Leiden: Brill 1978) xvi + 304 pp. [Social, Economic and Political Studies of the Middle East XXIII]. Islam still remained dominant in the rural areas, especially concerning the family status: half of the marriages are still not contracted according to formal law [H. Timur 'Civil Marriage in Turkey: Difficulties, Causes and Remedies' *International Social Science Bulletin* IX (1957), pp. 34–36], and the exceptional divorce cases undoubtedly reveal the unaltered binding force of tradition [Paul Stirling *Turkish Village* (London: Weidenfeld and Nicolson 1965) 316 pp. and particularly at pp. 210–220 {Nature of Human Societies}]. In other regions where the determination was rather one-sided, that is, taken politically but unprepared socially—for instance, in Ethiopia or Iran—, the outrage of the society may even render the attempt at introducing foreign or invented law impossible. Cf. Jacques Vanderlinden *Introduction au droit de l'Éthiopie moderne* (Paris: Librairie Générale de Droit et de Jurisprudence 1971) 386 pp. [Bibliothèque africaine et malgache 10], especially on pp. 212ff; Heinrich Scholler & Paul Brietzke *Ethiopia* Revolution, Law and Politics (München: Weltforum-Verlag 1976) 216 pp. [Afrika-Studien 92], especially on pp. 80ff; *Transplants Innovation and Legal Tradition in the Horn of Africa* Modelli autoctoni e modelli d'importazione nei sistemi giuridici del Corno d'Africa, ed. Elisabetta Grande (Torino: L'Harmattan Italia 1995) 403 pp. [Non Solo Occidente – Studies on Legal Pluralism 1]. [Turkey / Ethiopia]

dishing.[7] Partial legal innovations reforming subtle details delude with some success only when long-lasting and consistent conditioning and conventionalisation—with a growing ethos of change in society accompanied by a wide social and professional consensus concerning the procedural ways to follow—lead to actual reception of legal patterns.[8]

4.1.3. The nature of paradigms

The role of paradigms in preserving old frameworks and the boom into new paradigms

THOMAS KUHN, in *The Structure of Scientific Revolutions*, investigated the issue of what the actual reasons could have been for turns in the development of thought that have eventually befallen, as, for example, in case of COPERNICUS. How necessary were they? What effects did they generate? As a response we may learn from him that our thinking follows certain p a t t e r n s given in a f r a m e w o r k recognised as self-evident by the community.[9] Hence, our disputes in a given community take place within this very framework, trying its boundaries, since all questions and answers, and even unresolved contradictions, are necessarily put into it (as conceptualised, contextualised, and even lacks of under-

[Egypt] [7] It is an open question what deeper explanation there may be to the terroristic rebellion against aliens in Egypt which arose after the allegedly successful French-type modernisation of local law, and which does not decrease despite strong repercussions. For the background, cf., e.g., Marc David Turetzky 'Egypt, Mubarak, and the Rise of Islamic Fundamentalist Terrorism, 1981–1994: An Empirical Analysis of the Mubarak Regime's Punitive Counter-terrorist Policy' *Michigan Journal of Policial Science* (2002), Nr. 24 in <www.umich.edu/~mjps/archives/issue24/turetzky24.html>.

[8] As a summary, see, by the author, 'The Law and its Limits' *Acta Juridica Academiae Scientiarum Hungaricae* 34 (1992) 1–2, pp. 49–56 & in Csaba Varga *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE Project on "Comparative Legal Cultures" 1994), pp. 91–96 [Philosophiae Iuris].

[paradigm] [9] Thomas Samuel Kuhn *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press 1962) xv + 172 pp. [International Encyclopedia of Unified Science II:2] "divides scientific history into periods of steady development within one set of accepted concepts, called a paradigm, and periods of revolutionary change when the reigning paradigm is replaced by another in a way that he likens to a *gestalt* switch. In these periods the paradigms compete with each other […]. KUHN denies that

standing expressed within it). If for whatever reason this is no longer feasible, a boom will follow and a new paradigm will be born. Well, KUHN's efforts were aimed at the inspection of such developments, to trace down their causes and courses. According to his conclusion, even fame, prestige and the kind—in fact completely secondary circumstances (as we shall see later on, resuming the consideration of ALAN WATSON, how sometimes quite trivial ways or courses legal development was to take when, for example, in a given moment only the text of the Dutch or Portuguese law on land-estate was available in the library of the ministry of justice of New-Zealand for a bill to draft[10])—can be decisive in the acclimatisation of a new world-view. So, it is by far not the truth and the merits of a new realisation (underlying, e.g., COPERNICUS' thesis) that may have played the sole and key role in the process, since all of them notwithstanding, the old truth could have still happily outlived the new one. (For, after all, the turn itself generated by COPERNICUS was just the consummation of a development of several centuries. At the same time, the scientific turn was also uneven as the old world-view prevailed for long after it, incorporating and even adapting the paradigms of the new one.)

(MARXism ← HEGELianism ← Enlightenment)

Interestingly, when we speak of MARXism in Central and Eastern Europe it shortly comes to light that we actually mean the HEGELian tradition. A closer look at the HEGELian tradition, however, soon reveals that it is eventually not the HEGELian tradition that we have in mind but some of its achievements surrounded by nostalgia, dating back to the time of the Enlightenment, which have survived in the region, despite being questioned and apparently abandoned long ago in the European and especially Anglo–American civilisation.

science progresses cumulatively, on the ground that successive paradigms are irreconcilable, and yet claims that their periodical replacement constitutes a developing process of increasing sophistication." *The Fontana Dictionary of Modern Thinkers* ed. Alan Bullock & R. B. Woodings (London: Fontana Paperback 1983), p. 413.

[10] Cf., in depth, para. 4.2.

(historicity *vs.* ahistoricity)

"Progress"?—this notion is meaningless overseas, as if being some incorrigible nonsense. If only recalling some personal memories, in 1989, top political scientists at Yale workshops in law received the freshly made reform-plans from Moscow and Kabul as if they were elaborated in the neighbourly New England or California. They had them translated into their own language, read and discussed them by drawing comparisons with their own end-of-century ideals. When the conventionalised American version met their refined tastes, they burst out in enthusiastic hoorays. They saw the triumph of universalism in it, while they could not comprehend why I was still concerned with the differences in historical past, legacy, inclinations and experience, i.e., with the differing Eastern-European or Byzantine hermeneutical contextualisation with own roots. They were offended by my reasoning that on Russian soil the formation of the institutional network characteristic of 19th-century Western Europe was still not completed. For the Russians neither the commitment of the law into writing, nor the respect for its autonomy and genuinely mediating role is yet a self-evident need arising organically from within, moreover, this legacy is not troubling them either. It was not even noticed overseas that the culture of modern formal law has not yet penetrated the territories once belonging to the Tsar and the actual Byzantine region in general.[11] Consequently, possible verbal parallelism, captivating exclusively naive American minds, is not necessarily of a message value, since weak good will and sheer rhetoric can equally stand in its background. The fate of reformist legal enactments, bound by local traditions and ordinary conditions, is known not to be so much dependent on textual subtleties. Well, as soon as I referred to the living experience in the proper East-European region by pointing out some particular and distinctive features of the development (as described by comparative studies on European history in the region),[12] their reaction

[11] For an overall assessment based on its Hungarian implementation following its Muscovite imposition, cf., 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.

[12] On the civilisational divides known as millenium-old historical regions of Europe—Western, Eastern and, in-between, Central—, cf. István Bibó *Democracy, Revolution, Self-determination* Selected Writings, ed. Károly Nagy, trans. András Boros-Kazai (Highland Lakes: Atlantic Research and

was merely disconcertment. A professor of law terminated my objections in a short way by asking with a crushing overtone whether I was a historical determinist. In their enlightened intellectual circles this label stands for pathologically deviant atavism, as well as for an attitude rejecting the liberal legacy, running against as an express violation of the very minimum of political correctness.

(Unproved/improvable presuppositions dominating scholarly & practical debates)

It is our paradigms that pre-select what issues we debate while defining the foundations we may start thinking from. For instance, presuming the existence of God used to be a criterion in determining the framework for scientific realisations in Europe at an earlier epoch. Paradigms may have changed since then but we still rely on presuppositions without making them conscious. For instance, following THOMAS HOBBES, BERNARD MANDEVILLE, JEAN-JACQUES ROUSSEAU and others, when laying the foundations of political philosophy, social policy, healthcare, national defence, criminal policy and so on, we all presuppose in the modern European and Atlantic world now that humans are equal by birth, shapeable through education and susceptible to democracy, thus being subjects to rights. This is to say that individuality and freedom provide enough grounds for shaping their future. Under extreme conditions we may also sense how far cultural presuppositions rule our thinking. The demand for proof or the raise of doubts can be regarded as

Publications 1991) xiii + 570 p. [East European Monographs CCCXVII / Atlantic Studies on Society in Change 69] and Jenő Szűcs 'The Three Historical Regions of Europe: An Outline' *Acta Historica Academiae Scientiarum Hungaricae* 29 (1983) 2–4, pp. 131–184. For its reconsideration from a timely legal point of view, cf., by the author, 'On Vitality in the Region' in Csaba Varga *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] on pp. 10–18. Of course, this bewilderment and naivety had lasted only until their own scholarly authority arrived at the same realisation. Cf. Samuel P. Huntington 'The Clash of Civilizations?' *Foreign Affairs* 72 (Summer 1993) 3, pp. 22–49. However, again, they did not recognise in this overall legacy the cohesive force of solidification, the mutual influence by and whirling of the variety of cultural traditions (in due course of arriving at temporary synthesises and thereby also generating new forms). Instead, they replaced their so far monolithic worldview by one which considers more factors as given, only statically amending their previous construction.

open rejection of commonly shared civilisational values because they violate the tacit conventions of "political correctness".[13]

(respecting traditions *vs.* self-assertion in denial of traditions)

Indeed, today we meet different sides in the world concerning apparently self-evident considerations, taken on the plane of everyday reason. The adherents to one side paradigmatically believe in the presence of reason in human history, in that there are some inherent entities which bear meaning, and from which something must evolve. The adherents to the other side believe in the liberal concept of equal opportunity, ultimately leading to the denial of traditions whereby they exclude the possibility of learning lessons even from events and experiences of their own past. Accordingly, the ethos is embodied in superiority of church, state, class, party, or action group in one of them, and in well-intentioned neutrality or even cynical indifference (on behalf of and toward every institution) in the other. All in all, one of them accepts historical fate under any conditions while the other preaches the unvarnishedly self-revealing and, therefore, unlimited personality (and personalness).[14]

Change of paradigms if tension can no longer be managed from inside

Returning to THOMAS KUHN and the issue of paradigms, we can hardly say more than that we may eventually think either way. We may think in accordance with the philosophy of history, enlarging it to a tradition which may still not be hopelessly outdated a hundred years from now since mankind always builds upon and starts from ready-to-take facilities available there and then. Obviously, even the perspective provided by the philosophy of history can serve as a jump-board when one wants to answer the straining problems of changing times. Even forced paths allow certain freedom of movement, and if supported by strong

[13] 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 [Mankind adrift: on the work of Nándor Várkonyi »The Fifth Man«], ed. Katalin Mezey (Budapest: Széphalom Könyvműhely 2000), pp. 61–93.

[14] For perceiving the loss of balance and roots, and also isolation, as pathologic symptoms of our age, see Robert A. Nisbet *The Quest for Community* A Study in the Ethics of Order and Freedom (New York: Oxford University Press 1953) 303 pp.

intentions, there will always be ways to afford sensible responses. In other words, change is not necessary in and of itself. KUHN had a further realisation as well. Although we usually deny that there was a scientific world-view prior to COPERNICUS, therefore times could not have been lived well, KUHN proved that, except for exceptional moments when the change of paradigms becomes imminent, the important thing is to remain w i t h i n the paradigm, i.e., the debates and antinomies should not fully break the frames yet, even if already stressing their boundaries. This is to say that contemporaries of COPERNICUS—including the leading minds in natural sciences—could live well with the old world-view without being disturbed and essentially limited in reconsideration. What is more, it could have been some ephemeral, perhaps even trivial incidence owing to which a thinker named COPERNICUS had the opportunity to generate a turn right then and right there, and had it eventually accepted by the scientific community. In principle, it may as well have happened that he was born in vain from such a perspective—regardless of the talents he was given and of what an outstanding historical personality he grew to be.

Our notion of scholarship, too, depends on paradigms

Obviously, there is no paradigm in and of itself. Paradigmatic features emerge when we have presuppositions—for instance, that there are things on earth that have weight and volume, and so forth. Thus, following KUHN's thoughts to their ultimate consequences: nothing will be obvious any longer. Not even the question of whether or not something like science exists and if it does what its substance can be. As the sole actors on the stage of history, we humans are the ones to form a picture of 'science' for ourselves. We call some of our fellowmen 'scientists', these mostly earn their living from 'science' by, so to say, cultivating it, and 'science' manifests itself through them. This is an issue of the community, but also an issue defined by the elite of a narrow profession, which assumes the job exclusively for itself. Well, judgements are formed by this profession to become just as irrevocably established as any human convention.

(paradigms pre-select what can at all be raised as an issue for scienctific treatment)

Such a paradigmatically erected world-view may support incontestable convictions whether or not a plant breeder can contribute in merits to the curing of cancer, and in legal scholarship only certain approaches are appropriate (or "politically correct", as American intellectual pressure-groups would phrase), while others cannot even be thought through in practice because they would qualify as inconceivable from the beginning. These mostly do not even depend on issues of merit, but simply on paradigmatic stereotypes, namely, on certain views that comply with the conventionalised criteria of scholarship of a given time while others do not.[15] After all, scholarly opinions are eventually formed on the basis of similar considerations also within research centres and academies. It might happen that to certain questions we cannot explain in a rationally expanded and provable way (from fireballs to the possibilities of telepathy) we provide routine answers, originally specific to bygone centuries. For we do not approach phenomena with an innocent curiosity, but in a manner that results from the discipline of so-called methodological thinking. In other words, we select—pre-select indeed—the problems that can at all be raised in science arbitrarily, without regard to the merits of the issue. Whatever this issue—from the possibility of extra-terrestrial life to the enigma of the Bermuda-triangle—, we can predict that those for the treatment of which scientific methodology has not been developed (yet) cannot be subjects to scientific inquiry either.

Paradigm equals to a prejudice selecting / rejecting from the outset

In every culture there is a prevailing set of presuppositions, called paradigm, which pre-selects the information feasible to become subject of human thinking, accepting only what is in accordance with it. The restrictive effects of paradigms assert themselves—as socially conditioned—by the force of human p r e j u d i c e s . As long as a system of paradigms prevails, despite that we may stress its frames or chase it into contradictions, it will always have some effects; hence it will always resist certain temptations.

[15] For the ideology-led aversion to police race-profiling making a prosecutor declare all results notwithstanding that "If I could push a button and make this technology disappear, I would.", see Melba Newsome 'A New DNA Test can ID a Suspect's Race, but Police won't touch it' [12.20.07] *Wired Magazine* in <http://www.wired.com/politics/law/magazine/16-01/ps_dna>.

4.2. THE BASIC NOTIONS OF "FACT", "CONCEPT", "LOGIC" AND "THINKING"

4.2.1. The need for a change of paradigms

Objectivism / subjectivism / search for a compromise

In the following we will give a short overview of some major traditions of thinking in relation to given notions. The system of co-ordinates which reflects the potentialities of understanding these notions brings up three blocks of thinking-tradition. The first is called o b j e c t i v i s m , the second s u b j e c t i v i s m . The third block represents some rational s e a r c h f o r c o m p r o m i s e somewhere between the extreme values and solutions of the former two. This is the concept mainly spread on Anglo–American scientific areas, and is the most justifiable from the perspective of philosophy of science and of the so-called cognitive sciences.

The survey of the aforementioned thinking traditions strengthens and also extends over new territories the picture we have so far displayed on the methodological foundations of and potentialities in human thinking.

Science-philosophy and linguistic philosophy predefining scholarship

First and foremost we should think of problems that arise from the fact that the ideal of thinking in Europe so far has been embodied almost exclusively by the axiomatic method. The official introduction of MARXism as a substitute for religion contributed to some of the worst initiatives to become true for the last half-century, thus, for example, in that heavily atavistic ways of thinking could survive in the Central and Eastern European region. This was mainly due to the fact that for long MARXism (at least in its primitive Muscovite form) could hinder the break-through in the philosophy of sciences and language—on the western hemisphere already accomplished by the turn of the 19th and 20th centuries—and the challenge (through criticism) of the neo-KANTian philosophy of sciences, which prevailed in Central and Eastern Europe and especially in Hungary, up to the mid-20th century. As a result, even leading social scientists in the region believed that philosophy of sciences, philosophy of language and cognitive sciences are no more than fields of specialisation like philosophy of law is. Or, they are specimens maybe

not so useless but still somewhat a superfluous preoccupation. As if nobody noticed that our entire legal culture, including its education and scholarly cultivation, is rather outdated, as still being based on Enlightenment traditions, in part because the re-consideration of how we actually think and how we should think in science is yet to be done.

(the results of the turn of the 19th to 20th centuries)

The drama of Central European destiny was coloured also by the fact that the expansionist military power with imperial ambitions which set itself up in the region brought in MARXism—a scholarly movement of primarily methodological-critical interests, born and rigidified already in its primitive German form as a kind of naive realism—as its official philosophy at a time when the various disciplines, crucial from the perspective of our new methodological world-view (theory of science, philosophy of language and methodology of sciences), were in the making yet. In the debate between politicians and scientists, figures like FRIEDRICH ENGELS[16] and VLADIMIR ILYICH LENIN[17] could become giants of MARXism, while the epoch-making scholarly endeavours of EUGEN DÜHRING[18], ERNST MACH[19] and RICHARD AVENARIUS[20] were noticed only

[16] Friedrich Engels *Herrn Eugen Dührings Umwälzung der Wissenschaft* (Anti-Dühring) [1878].

[17] V. I. Lenin *Materialism and Empiriocriticism* [1909].

[18] Cf., e.g., John Passmore *A Hundred Years of Philosophy* (Harmondsworth: Penguin 1968) 639 pp., especially at p. 45.

[MACH] [19] See, e.g., Robert S. Cohen 'Ernst Mach: Physics, Perception, and Philosophy of Science' *Synthèse* XVIII (1968) 2–3, pp. 132–170 and Gerald Holton 'Mach, Einstein, and the Search for Reality' *Daedalus* XCVII (1968), pp. 636–673. "Seldom has a scientist exerted such an influence upon his culture as had ERNST MACH. […] In the twenties, the prominent Austrian social scientist OTTO NEURATH founded the *Ernst Mach Verein*, a forerunner of the Vienna Circle. From poetry to philosophy of law, from physics to social theory, MACH's influence was all-pervasive in Austria and elsewhere. […] Above all, ERNST MACH was to be the godfather of logical positivism, if not its chief progenitor". Allan Janik & Stephen Toulmin *Wittgenstein's Vienna* (New York: Simon and Schuster 1973) 314 pp. [Touchstone: Philosophy – History], quotes on pp. 133 & 212. In the light of an evaluation given in a necrologue, see, e.g., Hugó Szántó 'Ernst Mach' *Huszadik Század* [Twentieth century] XVII [33] (1916) 4, pp. 289–294.

[20] See, for example, Friedrich Carstanjen 'Richard Avenarius and his General Theory of Knowledge: Empiriocriticism' *Mind* VI (1897), pp. 449–475 and Norman Smith 'Avenarius' Philosophy of Pure Experience' *Mind* XV (1906), pp. 13–31 and 149–160.

as far as the former practised their "ideological annihilation" in "amateurish effusion" upon them.[21]

At the same time, on the western hemisphere, non-mechanical (stochastic and statistic) causality grew into basic knowledge along with the recognition of necessary consequentiality of the total functioning, when individual components and causal chains of processes are no longer identifiable by scientific means. In such a case, although the result is guaranteed, we are still not able to claim more than that achieved by the force of the t o t a l w h o l e in its i n t e g r i t y. Quantum-mechanics and microphysics have in the meantime become common methodological experiences, transmitting (despite all the initial consternation) that when a cogniser cognises, he in part provides *nolens volens* the s e l f - d e s c r i p t i o n of his own observant behaviour. Last but not least, in mathematics, which is the master example for axiomatic ideal and methodology, it had to be realised that even allegedly exact knowledge may be contradictory, moreover, provided that methodology is taken seriously, it may even resist reconstruction of consistent rigour. GEORGE EDWARD MOORE's *Principia Ethica* (1903), BERTRAND RUSSELL's *Principia Mathematica* (1903–1913) and ALFRED WHITEHEAD's *Process and Reality* (1929) were published around the same

(some law in the total whole / as stochastic probability / in a self-describing discipline without axiomatic re-fundability / with human model as a law)

[21] Anthony, Lord Quinton in *The Fontana Dictionary of Modern Thinkers*, p. 469. "As philosophy it is crude an amateurish, based on vulgar »common-sense« arguments eked by quotations from ENGELS (only two sentences by MARX are quoted in the whole book) and unbridled abuse of LENIN's opponents. It shows complete failure to understand their point of view, and reluctance to make the efforts to do so. It adds hardly anything to what is contained in the passages quoted from ENGELS and PLEKHANOV, the main difference being that ENGELS has a sense of humour and LENIN none. He makes up for it with cheap mockery and invective, decrying his adversaries as reactionary madmen and lackeys of the clergy. ENGELS' arguments are vulgarized and sterned into cut-and-dried cathechetical forms: sensations are 'copies' or 'mirror-reflections' of things, philosophical schools become 'parties', etc. The exasperation which pervades the book is typical of the primitive thinker who cannot understand how anyone of sound mind can seriously maintain (as LENIN supposes) that by the power of his own imagination he has created the earth, the stars, and the whole physical universe, or that the objects he is looking at are in his head when any child can see that they are not." Leszek Kolakowski *Main Currents of Marxism* II: The Golden Age (Oxford: Clarendon Press 1978), p. 457. Cf. also Kevin Anderson *Lenin, Hegel, and Western Marxism* A Critical Study (Urbana: University of Illionis Press 1995) xvii + 311 pp.

[LENIN'S detachment from scholarship proper]

period of time. They generated the Vienna-school of logical positivism (RUDOLF CARNAP's *Der logische Aufbau der Welt* [Berlin 1928] and MORITZ SCHLICK's *Allgemeine Erkenntnislehre* [Berlin 1918]), the English analytical science of cognition (ALFRED JULES AYER), and LUDWIG WITTGENSTEIN's oeuvre, serving with pioneering realisations for various fields from physics to the philosophy of language, exposed by repeated questions suitable to get reduced to basic situations. It has thereby been revealed that laws in science are nothing but man-made frail models:[22] we do not know what speaks in nature through them;[23] sometimes we do project our own lack of understanding onto them;[24] yet in each case we express our own cultural (and deeply ideologically founded) convictions through them.[25]

(backwardness of Socialism)

The cultural gap between Western Europe and the Sovietised Central Europe is indeed conspicuous. A visitor of American colleges can discover in the libraries, syllabi or in hidden bookshops of small campuses, apparently cut off from the rest of the world, writings that were re-published in translation over and over as classics indispensable for the foundation of modern world-view, and these writings might still not be available in our Central and Eastern European region, perhaps

[22] E.g., introduction by Vilmos Csányi to Arthur Koestler *Alvajárók* [The Sleepwalkers (London: Hutchinson 1959)] (Budapest: Európa 1996), p. 15.

[23] Since DAVID HUME, it has occurred several times in the 20th century that again and again, the concept of regularity turned out to be insecure to the credit of the concept of necessity. E.g., Norman Swartz *The Concept of Physical Law* (Cambridge, etc.: Cambridge University Press 1985) xi + 220 pp.

[24] According to Nancy Cartwright *How the Laws of Physics Lie* (Oxford: Clarendon Press & New York: Oxford University Press 1983) 221 pp. at p. 18, a number of connections (etc.), conceptualised as regularity, merely play contextualising roles among the laws expressed necessarily imperfectly, in the way as, for instance, "many abstract concepts in physics play merely an organizing role and do not seem to represent genuine properties."

[25] For example, French grand theories are even nowadays expressed in mathematical formulas of a great depth with a narrow but all-comprehensive elegance, as against the minute English practice of theory formulation of a meagre demand for abstraction, although formulated broadly. Cf., e.g., Pierre Duham *The Aim and Structure of Physical Theory* trans. Philip P. Wiener (New York: Atheneum 1962) xxii + 344 pp. [Athenaum Paperbacks 13] on p. 19.

not even in special collections, until the regime as such came to collapse. Collections of fundamental texts, mandatory for the freshman students, including hundred-year-old ones born and published in the region, here in Hungary or some hundred kilometres away in Austria or Moravia, were nevertheless not available—and not even monographically treated—in their home-region.[26]

(in contrast to western development)

For a spicy counterpoint, in our region we can come across—especially in the mind of teachers, from village schools to universities—those texts in local languages (from ENGELS' *Anti-Dühring* to LENIN's *Materialism and Empiriocriticism*) which were conceived only to eliminate these revolutionary achievements even from the professional cultures. It marks the absurdity of the intellectual conditions in the once Sovietised Central Europe that EUGEN DÜHRING is usually remembered as one who provoked ENGELS to write his ingenious treatise full of angry fits. In Western Europe, on the other hand, at most apostles of the left may have heard of ENGELS, yet DÜHRING is read by each New England liberal college freshman, because he made a genuine contribution to the philosophy of science, thought-provoking even today. LENIN's main philosophical work—*Materialism and Empiriocriticism*—builds upon MACH's theses, elaborated in the Austro-Hungarian Monarchy, but still valid to this day, and upon the oeuvre of AVENARIUS. Well, the late Hungarian could learn only in a New England library that these two scholars were the first among methodical thinkers—at a time when in the wave of re-axiomatisation, mathematics found its own limits and thereby necessarily arrived at paradoxes—who attempted to take the same route in the field of physics.

Science re-considers its subject:

All in all, at the beginning of the 20th century the creation of systems with strict consistency and axiomatic rigour was launched also in exact sciences. AVENARIUS was concerned with what consequence it may have if our suspicion comes true, namely that in our modern age we reach such a subtlety of measuring when one can no longer perform an observation with known devices without interfering with the

[26] E.g., *Philosophy of Science* ed. Arthur Danto & Sidney Morgenbesser (New York: The New American Library 1960) 477 pp. [Meridian: Philosophy, Science].

observed process. Well, what do we eventually observe? Do we observe ourselves or the so-called reality? Or, perhaps, both?

the world is an abstraction of processes, which are modelled through their naming

As a consequence, our initial suspicions came to be confirmed, suggesting that (1) there are no things but p r o c e s s e s ; (2) the 'thing' cannot be other than an aspect or snapshot a b s t r a c t i o n of the process; hence (3) cognition is nothing but the function of n a m i n g , and this holds for self-cognition as well; therefore (4) description has to be regarded more as intellectual m o d e l l i n g (or presentation) than ontological reflection or duplication (that is, reproduction).

4.2.2. The false alternative of objectivism and subjectivism

Naive realism

We could characterise o b j e c t i v i s m briefly as n a i v e r e a l i s m . This understanding largely remained prevalent in the cultures of Central Europe. Naive realism derives directly from the form of MARXism cultivated in the Soviet Union, which did not tolerate any different approaches. Thus, what fell outside the range of its view was rejected as subjectivism. Scholarship in Central and Eastern Europe acknowledged this as the *sine qua non* of methodical thinking: a point of reference the acceptance of which enables us to start thinking in a scholarly manner.

Subjectivism:

Its opposite, s u b j e c t i v i s m , is in fact a barely delimitable scholarly trend. Subjectivism may be often characteristic of the so called subjective idealisms which, on their turn, are not typical of 20th century thinking. Let us recall FRIEDRICH NIETZSCHE who played such a serious role in shaking the foundations of the ideal of western rationalism, but nevertheless remained the captive of our common European culture having its roots in ancient Greece and Rome. Well, what we consider subjectivism in the above context rather means the negation of objectivism: it is a counter-trend.

from NIETZSCHE to modern deconstructionism

Aside from NIETZSCHE, some further directions of thinking can also be revoked here, these being known under the name of modern deconstructionism (MICHEL

FOUCAULT and JACQUES DERRIDA can be considered in this regard). Cognitive sciences

The so-called modern conception is again not some well-defined trend but an intermediate consideration, avoiding the trap of extreme interpretation and attempting to build itself into a system through generalising provable partial results. Therefore, it is more based on interdisciplinarity drawing from experiential/experimental sources, reminiscent of natural sciences. Following its line of thoughts, we can arrive at considerations which, for instance, the cognitive sciences—psychology, linguistics, philosophy and biology, as applied to the topic—seek to form in the United States.[27] For example, if the question is how neurones (identifiable by means of neuroanatomy) participate in human thinking, the model we can find will be a computer, in which both lack of information and the combination of individual in-put units of information will eventually be composed of pieces of information transmitted by individual neurones, that is, the endless sequence of binary codes of physical-chemical stimuli or the lacks thereof.

We can summarise the various points of view and the characteristic stances of the respective trends[28] in the table below (*Figure 8*).

[27] For example, Allen Newell *Unified Theories of Cognition* (Cambridge, Mass. & London: Harvard University Press 1990) xvii + 549 pp. [The William James Lectures 1987].

[28] See, e.g., George Lakoff *Cognitive Science and the Law* [manuscript] [(New Haven, Conn.): Yale Law School Legal Theory Workshop 1989 (April 27)] 49 pp.

	objectivism	subjectivism	modern conception
fact	'objective reality': the thing itself	arbitrary social construct	cognitive relationship selected by man and supported by his interest
system of concepts	reflection of reality	reflection of itself	covered by realistic features of reality, but concomitantly shaped by man's interests towards reality
	objectively corresponds with reality	relies on arbitrary social convention	its openness in a given direction can only be closed down artificially
	neutral and objective, providing true perspectives on reality	built upon the reconventionalisation of conventions	never detachable from the prevailing world-view, tradition and cultural presuppositions
logic	the thing itself: the course, interconnection and sequence of things; aspects and necessity thereof	an external web, applicable or non-applicable at discretion	the mathematics of descriptive propositions: claims that insofar as we make propositions within the same context and in the same time, and link these propositions conceptually, then, once a premise or conclusion is accepted as true or false, we thereby establish a deductive relationship between their truth or falsity
thinking	builds upon the paradigm of distinguishing between the essence and the phenomenon	everything is arbitrary	there is no metaphysics of things: only the practical relationship of man to things selects and names the things
	value-indifferent, objective, which relies on rules of logic	builds upon personal conviction	
	progresses from the general to the concrete	its direction is arbitrary	

(Figure 8)

The elements and various interconnections of all these approaches can be caught in action in case of almost any intellectual endeavour. For instance, if we tried to periodise human history, we would realise that however we tried to do it, finally we would still need to opt for a pattern. And we ought to know, at least in regard to law, that whatever our choice it will involve direct and definite consequences for all consecutive operations and for the entire functioning of the legal profession.

We can only choose either of them as an explanatory principle

4.2.3. What are facts?

According to our conceptual traditions, we are supposed to speak about 'fact' as congruent with "objective reality".

Fact = objective reality?

This conceptual congruence implies that when speaking of "fact" we speak of reality proper. For in this context it is presumed that the sole thing out of consideration is that it happened to be us to establish this fact, thus being somehow personally involved as part of the process. A NIETZSCHEan view, on the other hand, would suggest that facts as such are not to be found in reality at all. What we may still find there, considering them facts, are purely arbitrary human constructs at most. They are rather the extrapolations of our will aimed at power [*Willen zur Macht*], not more than some sort of artificial social constructs. From this perspective of the social process, at first, we invent something, then, as a result, we so to say populate the world with "facts". Yet, this is extrapolation proper, coming from our inner self and spiritual resources.

NIETZSCHE: fact is the extrapolation of our will aimed at power

However, contemporary concepts from Western Europe and the Anglo–American world are attempting to make the scholar believe that "objective reality" is not inherent in facts, and neither is our existence given separately. So, facts are ultimately nothing other than r e l a t i o n a l concepts, which are recording—in the so-called process of "establishing facts"—that in our personal existence we relate to certain aspects of reality in given ways. Thus, the establishment of facts purports that we have selected some part—for practical reasons, e.g., to serve our so-called "cognition"—from some relative whole that we call "reality". By this we

Linguistic philosophy: fact is the construct of our cognitive approach to selected aspects of reality

concomitantly give expression to the realisation that we are somehow personally involved in the process of claiming something to be a fact. Accordingly, when we say "fact" we declare our cognitive approach to some aspects of reality selected from the total whole regarded as reality.[29]

Naive realism: fact is something previously given, without human connection

According to the epistemological view that perceives the world as an aggregate of facts (this being the so-called naive realism), the world around us is composed of nothing but facts. Facts are present in our environment—being parts of nature—as atoms are in a child's world-view. They are like some tiny stones or berries which we may find, if we are attentive enough, among the grass or gravel when walking in nature, and then we can pick them up, put them in a bag, and take them home. Thus, facts simply exist. They are given. In consequence, we may be blind enough to walk by them. Although, being inattentive or attentive (picking them up, starting to ponder about their existence, contexts, origin, fate and effect) does not alter the bare existence of facts. It is only our business, luck or misfortune how we proceed in the given case. Our personal concern related to facts is not more than to observe what discloses itself as a fact. Still, various aspects of reality are present, exist and prevail our reaction notwithstanding. It is also independent of the prevalence of various aspects of reality whether we do or do not establish a cognitive relationship with them at any given time. This depends on our personal interests at most. It is our problem if the tiny atoms lie in the mould and we do not notice them or pick them up. This, however, does not challenge the fact that they are there. We might become somewhat poorer, since we were in their proximity but still walked by them ignorantly. Otherwise, it is by no means the precondition of their existence to be noticed by humans.

FRANK: fact is a function, and product, of human initiative

JEROME FRANK—who disseminated SIGMUND FREUD's ideas overseas and laid the foundations of the psycho-analyt-

[29] Cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp., especially ch. 2, pp. 25–55.

ical trend of so called legal realism, relying on his experience as a justice of the Federal Appellate Court (deriving from the factual positions taken by the jury)—once made a startling yet straight-forward remark: "For court purposes, what the court thinks about the facts is all that matters. For actual events […] happened in the past. They do not walk into the court."[30] What does this mean? Well, it may mean that we can speak of law and human cognition alike, although they still do not enable us to establish a living relationship with the facts themselves. In order to truly cognise, the initiative must always come from our inner selves. Only an i n i t i a t i v e to cognition can result in the establishment of some relationship with the facts themselves. This is the only initiative that can conclude with the establishment of facts. So, the "world of facts" stands in vain by itself, because it does not constitute a part of cognition, moreover, it never will, unless we intentionally link the two. It would again be in vain to cry out: "Hey, people! Some fellows are killing each other here!" What could underlie such a cry can become a fact only through the process of cognition and through the naming done within cognition. That is, we commit ourselves to action insofar as we take the aspects of reality out of the world, blind and mute in itself, and we, so to say, "establish" that they are, so to say, "facts", but of course at the proper time, in the proper form and way (for instance, by taking them to court) in due procedure. Thus, "facts" in and of themselves are not parts of any trial, unless we—only provided that we are parties to a trial at all—take them there in the proper way and form.

Facts do not "exist" but we may make statements about their prevalence, in a cognitive relationship, by establishing them as facts

Needless to say, FRANK's expression also involves that facts do not "exist" in the sense that we might ascertain whether they prevail or not by simply observing their existence. Hence, facts do not "exist". However, we can make s t a t e m e n t s about facts, in relation to facts, on their prevalence as facts, and so on. Therefore, from statements

[30] Jerome Frank *Courts on Trial* Myth and Reality in American Justice (Princeton: Princeton University Press 1949) xii + 441 pp. on p. 15.

like "it has been established as a fact that […]" we can definitely learn that (1) there is something with which we have entered a cognitive relationship, and (2) we have posited it as an element of cognition. For instance, we can establish it as a fact that "atoms exist"; "Jack the Ripper has murdered his victim", and so on. In the meantime we must also notice that the facts here are not that atoms exist, or Jack has committed a murder. The mere fact in it is that we make (or made) statements about them. More precisely, the fact lies exclusively in the way and by the force of which we establish this.

What is 'fact' in all this at all?

So, the factuality of a fact does not lie in the reality of the thing stated as existent, or in the actual accomplishment of an event stated to have been accomplished. Obviously, we must also add that neither is it us who are the facts, when establishing the existence of a thing or the accomplishment of an event as a fact. Facts are a r e s u l t by the force of which we can establish that we have entered into a (e.g., cognitive) relationship with the existence of a thing, or with the accomplishment of an event—that is, with something the accomplishment of which is not in the least necessary. For the thing or an event in question still exists, occurs, prevails or had happened without regard to whether such a (or other) relationship has ever been established. In our case, this has eventually been established. Furthermore, it was done in a way that as a consequence we can establish its existence or occurrence as a fact. We may realise that the case here involves something more than the usual communication-chain, according to which: someone has heard something; I have heard that he has heard; others have heard that I have heard; and so on. In the situation concerned here we have entered a relationship with an otherwise prevailing thing or event having taken place, owing to which we can declare about its prevalence or its having taken place to be a "fact". This is c o g n i t i v e r e l a t i o n s h i p proper. It is so much present in our social commerce, and our awareness of its occurrence is so reliable, that we can start communicating about it by claiming that "its prevalence (having taken place) is a fact".

What are facts anyway? That what is established? Or the way it is established? Or is it simply the everyday contact of humans with things and events?

Searching for beauty: in things & configurations thereof

Let me remark at this point that in philosophical thinking similar questions have already been raised with regard to aesthetic quality. Some old views insisted that beauty as aesthetic quality is inherent in the thing itself. STENDHAL taught us that theories of natural sciences have also dealt with what kind of crystals and what arrangements thereof can lead to an aesthetic experience.[31] Structuralism made a fashion out of the linguistic-statistic analyses aimed at examining that, for example, in the literary accomplishments of geniuses like WILLIAM SHAKESPEARE or the Hungarian poet SÁNDOR PETŐFI, what vocabulary and with what frequency of occurrence of words organises into or characterises what we otherwise know as SHAKESPEARE's or PETŐFI's oeuvre. All in all, according to some aesthetic theories, what we can later discover as aesthetic quality is already inherent in the thing itself.

regardless of having encountered experience by humans or not

Each presupposition predefines certain consequences as well. In our case, we have to accept for now that material carriers bear aesthetic quality regardless of the fact that they might not have encountered human perception or evaluation. For example, crystals in the womb of the earth do not come near to humans until they are mined or their "beauty" is noticed. Or, a pioneering exhibition—I encountered when I arrived at the other half of the world, in the meringue-like edifice of the Australian Academy of Science—also included in their collection of the "images" of the natural archetypes of our human culture, photographs of nature taken by both electron-microscopic and astronomic devices. As a result, "artistic" forms were presented to the viewers, forms that have been inherent in nature since the act of Creation, but which were somehow reminiscent of the forms and styles representative of the late 18th century taste of the transition

[31] Stendhal *De l'amour* (Paris: Calman-Lévy 1887) xxiii + 371 pp.

to secession.[32] Such configurations were revealed and became perceptible to humans only after magnification by a hundred-thousand times or after the first galactic observation was possible. No one could imagine or experience anything of the kind before except when dreaming about it.

standing on its own

Thus, according to the opinion above, aesthetic quality is initially inherent in its carrier, independently of whether it had been subjected to human judgement or not.

Searching for beauty: in ourselves, as the source of catharsis, that is, in what can psychically lead to it

There is another view which holds that only human perception and experience are relevant. That is, aesthetic quality is a cathartic experience for humans. But, insofar as the source of beauty is an exclusively emotional event, we must arrive at the conclusion (shared by all subjectivisms) that sees the "cause" of the experience not so much in what leads us to it but merely in our own selves. This actually demeans aesthetic quality to next to nothing, while granting it unlimited dimensions. For we cannot provide any preliminary or general definition for what will eventually be capable of generating such an experience in every one of us. Conversely, our answer to the above question can be absolutely random: sometimes anything, sometimes nothing.

Σ: aesthetic quality = aspect of some objectivity + suitability to invoke it while perceiving it:

Nevertheless, we may also regard aesthetic quality as a special relation. In such a case, aesthetic quality will be something pertaining to an object (e.g., SHAKESPEARE's manner of text-composition, crystalline structures and configurations, etc.) but not inherent in it. Its source lies precisely in the relationship between a particular aspect of reality and its perceiver, brought to being by the contact we have established with it. This c o n t a c t proper is to generate an experience in us, while the contact itself is obviously underlain by the respective object (SHAKESPEARE's way of composing, crystalline structure or configuration, etc.) that bears some special characteristics. Aesthetic quality as such is still not this characteristic, nor our experience related

[32] See, e.g., Bede Morris *Images* Illusion and Reality (Canberra: Australian Academy of Science 1986) 184 pp., particularly 'Photomicroscopy and the Universe of the Living Cell', pp. 134–161 and 'Photographying the Stars and the Science and Art of Astronomical Photography', pp. 162–175.

to it. Aesthetic quality covers the full process of establishing the contact—namely that the characteristic in question has i n v o k e d the given experience in us.

a relationship between object + subject

This is a relational concept similar to what we have called fact above. Hence, to be able to talk about facts presupposes the existence and prevalence of our establishing a cognitive relationship with them. One of the further preconditions is to posit them as the subject of our cognition. Thus, when we speak of facts, we speak of something purely o b j e c t i v e as well as of our s u b j e c t i v e r e l a t i o n s h i p to it. Properly speaking, establishing a relationship between the two actually leads to the stating of its prevalence as a fact.

Existence of the world → naming aspects of it → by creating analogies → according to our practical interests

What is the meaning of the extensive and intensive infinity of the world as termed by the philosophy of nature? The idea surveyed above suggests the following option: the totality is one total entity. That is, the totality is totally interrelated and the separation of 'construction' from 'operation' within this totality can only be artificial, a purposefully invented purely mental construct. No such duality exists in "reality", their discretely distinct qualities being merely human hypostases. Such a distinction can be made only on analytical grounds, for the sake and within the framework of our own explanation.[33] In reality conceived like this—be it natural or artificial—, the number and configurations of aspects, relations and potentialities (etc.) are infinite. Well, insofar as we provide this very answer, it will seem true in this particular form, yet wrong according to its formulation. This response will neither be complete nor exhaustive, since its approach is made from a purely human (thus artificial) perspective, operating exclusively with mentally constructed categories. For the underlying fundamental fact is precisely that material reality does not have any "aspects" whatsoever. "Things" of the world, that is, objects, simply exist and prevail. They do not depend on any of us, because human existence is not a precondition to their existence. Accordingly, it is merely an additional aspect, external and contingent on their existence, that we humans eventually exist and occasionally

[33] Cf., by the author, *Theory of the Judicial Process*…, pp. 93, 113 and 152.

establish some relationship with certain things. However, in order to establish a cognitive relationship with things—i.e., in order to be able to name them and speak about them—, we must endow them with certain characteristics and aspects. That is, we must pick out a characteristic only selected by us from the total context of the total whole, isolate it as an independent bearer of some feature(s), and then name it as such. For two things (like two stones) in themselves—thus, without our interest extended to them, consequently, without "naming" some of their "aspects" by tearing them artificially out from the total whole—do not (and cannot) "resemble" each other. In order to be able to "reasonably" relate to two stones we must create some kind of "analogy" between them by means of abstraction. Seeking such analogies is not fictitious in the sense that the characteristics or aspects serving as bases to an analogy are indeed to be prevalent regardless of our actions. But it is man-made and artificial in the sense that the characteristic concerned is identified by a creative human initiative through isolating those objects from the total whole, shedding light on and naming them. The number of feasible relations between the two stones in the world is infinite, and so is the number of possibly relevant aspects. And as is known, humans approach things—their own selves, things, relationships, partners—exclusively in practical situations as led by practical interests. Sometimes because they want to learn about these. Other times because they want to do something with them. In general: what humans establish a relationship with, they thereby also posit something—by "seeing" it in the thing—that conforms to their p r a c t i c a l relationship to it. All in all, what we select from among the real aspects of reality is entirely a function of our practical interests and relations to it—while keeping all other equally real aspects in obscurity and unnamed.

(example: cultural presuppositions in how to understand sexual reproduction or homicide)

Social conventions, presuppositions and paradigms undoubtedly play a role in the processes of appropriating reality. For example, let us take an elementary situation: what can a human do to his partner? Within the European civilisation we deal with such questions on the grounds of

the world-view offered by natural sciences—as we were and are socialised within and into it, and the entire process of interpretation, classification and establishment of relation manifest in the elementary acts of perception are determined by it. We believe that there is no magic in this any more, and even the description of nature can be achieved, to the extent possible, through its "own" terms (not presuming the existence and intervention of God and the act of world-creation, at least in the case of primary and direct explanations). Thus, for instance, we understand sexual reproduction as the issue of the contact between certain bodily organs in the form of chemical reactions provoked. The world becomes "reasonable" due to these—and not other—presuppositions and paradigms. Hence, possibilities are also limited when attempting to answer, for instance, what one person can do to another when they meet in order to extinguish his life. What can he/she do to invoke a change in the other? Already our cultural presuppositions define the feasible alternatives of whether one can kill his/her partner exclusively in a barbarian manner by shooting him/her with a poisoned arrow, or can one perhaps do it with a stab into his/her object-representation of magical-symbolic importance? Can it be done with sheer physical penetration, or eventually also with chemical impacts or nuclear radiation? The Hungarian culture has encountered some paradigmatic situations—the dramatic history between the two World Wars and after World War II provided quite an exuberant number of tragic examples of this—when sensitive fellows were thrust into suicide, with their moral self broken, or their psychological balance crushed.[34] Yet, there are an immense

[34] In the vacuum of morality and normative guidance left behind the Soviet-type socialism, we must also face the issue of a n o m y. Under present circumstances, the fulfilment of momentary needs does not by far bring forth satisfaction and resignation but increases the otherwise prevailing frustration. This is due to the fact that for wide social strata the only value is the growth of their own wealth which they usually achieve by cleverly evading the rules, while their advance remains unmeasurable and unassessable even for themselves, because they cannot be praised, nor can [*anomy*]

number of things we simply cannot do. Not because we are not "allowed" to do this or that, but because, due to paradigmatic bounds, doing certain things is simply out of consideration in our culture.

(example: the rightfulness of protection against evil eye in tribal cultures)

The primary consequence of this is that we at least feel comfortable somewhere and this is in our own culture. When in contact with another culture (for instance, with one in the conception of sexuality of which reproduction is linked to certain events which are entirely unknown to us in such a context), we necessarily lose the thread of interpretation and

their achievement be satisfactory as there are always others, more unscrupulous and thus more successful. The circle closes here and the social disintegration turns into self-destructive action. The concept of '*anomy*' ['lack of order'] was first used by ÉMILE DURKHEIM in the early 20th century—see by him, collected, 'On Anomie' in *Images of Man* ed. C. W. Mills (New York: Braziller 1961), pp. 449–485—as one of the main factors of social pathology: "one does not advance when one proceeds toward no goal, or—which is the same thing—when the goal is infinity. To pursue a goal which is by definition unattainable is to condemn oneself to a state of perpetual unhappiness". "Man is the more vulnerable to self-destruction the more he is detached from any collectivity, that is to say, the more he lives as an egoist." [*Suicide* resp. *Moral Education,* p. 113 in Emile Durkheim *Selected Writings* ed. Anthony Giddens (London: Cambridge University Press 1972). Cf. also Snell Putney & Russel Middleton 'Ethical Relativism and Anomia' *The American Journal of Sociology* 62 (1962) 4, pp. 430–438. All this can indicate the level of the viability of a society, as "depression and loss of control lead, provably even in animal experiments, to cardiac arrest, ulcers and the most diverse kinds of health problems. We have therefore examined what is in the background of depression, and we found first of all the characteristics of anomy"—Mária Kopp writes in her 'A magyar társadalom egészségi állapota' [The state of health of Hungarian society] *Magyar Szemle* VIII (October, 1999) 9–10. Cf., also by her, 'Public Health Burden of Chronic Stress in a Transforming Society' *Psychological Topics* 2007/2, pp. 297–310 and [with Csilla T. Csoboth & János Réthelyi] 'Psycho-social Determinants of Premature Health Deterioration in a Changing Society: The Case of Hungary' *Journal of Health Psychology* 9 (2004) 1, pp. 99–109. – Of course, once the suspicion arises that anything may stand above the momentary personal tastes, American scholarship—e.g., *Dictionary of Critical Sociology* in <www.public.iastate.edu/~rmazur/dictionary/a.html>—blows the alarm at once as if DURKHEIM denied that prevailing social norms and community interaction correlate with one another.

the bases of understanding.[35] For example, in a culture of magic the actors must deal with entirely different conditions. In such a culture, harming our fellowmen cannot simply be reduced to the problem of the evil eye. For example, in the British Commonwealth it caused brutal tensions that former colonisers, who often exercised their alleged cultural superiority with a missionary's enthusiasm, were able to meet plenty of situations in the tribal cultures ruled by the principles of English law, when the natives realised that an evil eye was cast upon them and they were bound to defend themselves. Since the evil eye is deadly, its threat must be just as deadly. So, it is not by mere chance that the defence wielded against these threats was not a light one: occasionally it might cause the injury of those casting the evil eye, perhaps even (and justifiably) their death. However, the natives had to defend themselves because if they had not done so, they would have endangered not only their lives but the chances of their after-lives as well. From the perspective of our own culture these world-views are extremely hard to conceive. On their turn, the British regarded such similar considerations as blank superstition, which they considered to be against the minimum conditions of civilisation, and since it qualified as a threat to life it deserved unconditioned

[35] Still staying with the example of medicine, under the conditions of the standardisation of health procedures globalised, the feasibility of a culture-specific interpretation has as well to appear as a scientific problem. E.g., see, as preliminary questions, Cornel West *Race Matters* (Boston: Beacon Books 1993) xi + 105 pp. and J. J. Scheurich & M. D. Young, M.D. 'Coloring Epistemologies: Are our Research Epistemologies Racially Biased?' *Educational Researcher* 26 (1997) 4, pp. 4–16, and, in a medical application, *Culture, Disease, and Healing* Studies in Medical Anthropology, ed. David Landy (New York: Macmillan 1977) xv + 559 pp., *Disease, Medicine, and Empire* Perspectives on Western Medicine and the Experience of Colonial Expansion, ed. Roy MacLeod & Lewis Milton (London: Routledge 1988) xii + 339 pp., Jennifer Green *Death with Dignity* Meeting the Needs of Patients in a Multi-Cultural Society (London: Nursing Times 1993) vii + 15 pp. as well as 'The Socially Constructed Nature of Race, Culture, and Disability' *Research Exchange* [National Center for the Dissemination of Disability Research] 4 (1999) 1 in <http://www.ncddr.org/du/researchexchange/v04n01/concepts.html>.

punishment.[36] Well, summarising the above we may realise that it is our cultural dependence which selects the c o n c e i v a b l e aspects of fundamental human relations, thus, among other things, what "can" qualify as facts.

(deliverance from an evil spirit)

During World War Two, an Italian soldier of the occupying forces in Abyssinia wrote down his peculiar memories on his travels through the desert. He was driving through the dunes of sand, occasionally meeting one or two other vehicles that drove by. He noticed from the distance that somebody was standing motionless at the side of the road. He began watching more attentively, but the only thing he could see was that the other person was also watching, without wanting anything more. Thus, he would have driven peacefully by when the native, who just stood there before, all of the sudden jumped across the road in front of the moving vehicle. Our driver stopped tremblingly: what could the native want anyway? To die? Well, as he could later find out, the case was the exact opposite: he wanted to stay alive. As he later reconstructed it, the story went the following way: the native was tortured by an evil spirit. He felt that death got hopelessly closer and closer, and it would have come forth unless he found a way to get rid of his torturer. So, he thought he would take the risk, and, by gathering all his strength, jump in the last second, and the evil spirit torturing him will surely be run down by the car.

Blow-up: previous knowledge → focussing → proving

MICHELANGELO ANTONIONI's film *Blow-up*[37] may help us give a general form to this question.[38] Let us suppose that we

[36] Robert B. Seidman 'Mens Rea and the Reasonable African: The Prescientific World-view and Mistake of Fact' *The International and Comparative Law Quarterly* 15 (1966) 4, pp. 1137–1156. Cf. also Michael Saltman *The Demise of the »Reasonable Man«* A Cross-cultural Study for a Legal Concept (New Brunswick & London: Transaction 1991) 168 pp.

[means of proving proves to be the obstacle of proving]

[37] Michelangelo Antonioni *Blow-Up* A Film [1967] trans. John Mathews (London: Lorrimer 1984) 115 pp. [Classic Film Scripts].

[38] According to ANTONIONI's confession: "I wish to recreate reality in an abstract form. I'm really questioning the nature of reality [...]. One of the chief themes [of the film] is »to see or not see properly the true value of things«." [*Cahiers de Cinéma*, janvier 1967] in *Focus on Blow-Up* ed. Roy Huss (Englewood Cliffs, N.S.: Prentice-Hall 1971) xiii + 371 pp. at p. 8. The aesthetical analysis of the final art-product just refines the original question: "Questioning reality via the channels of perception, using a

do not hold any knowledge on man. For instance, we have arrived from an alien civilisation but have excellent cameras and video equipment. Well, what can we do with these earthly people? Should we observe them? And if we observe them, how should we do it? How can we learn, for example, why and how far is a human human? Well, we may choose observation, but before we start using our gadgets we have to calibrate them and decide (which is usually a routine in the everyday use of the same equipment) on what to focus the camera, that is, to decide w h a t exactly we intend to record. Thus, we ought to decide beforehand—continuing the questions rose by *Blow-up*—whether we want to make a nature film on a trembling bush or acquire proofs of a committed murder. We can only be sure of one fact: the possibilities of perception, both by creations of nature and artificial devices, are unlimited. And when we are not approaching from within a familiar culture and when there are no points of reference available, we will not be able to decide what to zoom our camera exactly on.

Change of paradigms: through a new approach

The same is true for the research in case of natural sciences. It is the level of cultural development which predefines how given professions—chemists, pharmacists, anatomists (etc.)—approach things. For they could approach them in some other way as well, and different

predominantly visual medium to this, required from ANTONIONI a complex and compelling use of metaphor. The photographer's camera, the leitmotif of *Blow-up*, is not simply his tool, it is also his weapon in an aggressive assault toward the world of appearances. However, the photographer lapses into a gratuitous form of assaulting this world, relinquishing his own personal perspective, replacing it with a mechanical means of recording isolated images and not continuous events. The result is that the camera becomes a barrier, a recurrent metaphor. […] The distance that Thomas, the photographer, assumes in order to »get his shots« renders him not only a doubling Thomas, but also a Peeping Tom. ANTONIONI orchestrates all of the elements of his medium to demonstrate the pitfalls of believing too firmly in one's percepts of the world and the events which we see but that are not truly our own." Ned Rifkin *Antonioni's Visual Language* (Ann Arbor: UMI Research Press 1993) at p. 20 [Doctoral Thesis].

cultures differ indeed in their approaches.[39] As we may know from the changes of paradigms that occurred throughout the evolution of science: blast-like revolutions in science come about mostly when doubts of the past are finally taken seriously, and by organising past tensions and insufficiencies into a new ideal systemic arrangement, things begin to be approached in a different way.

Analogic selection of factual aspects from the infiniteness of "facts"

As we have mentioned before: the world is extensively and intensively infinite. So, deciding what can qualify as a fact does not derive directly from the world itself. Any type or quantity of facts can be "produced" at leisure from the world. Let us just recall the example of GOTTFRIED WILHELM LEIBNIZ who constructed a judgement-machine to generate all "possibly existent" judgements—by linking all conceivable subjects to all conceivable predicates.[40] LEIBNIZ thereby suggested that the number of facts that can be stated within our culture is somehow limited. Yet, his belief did not derive from the world itself, but from the cultural dependence prevailing at the time. Conclusively, deciding what can qualify as a fact in our world is not determined by the world itself but by human cognition, more precisely, by the manner in which we relate to the world in the process of cognition. Naturally, humans wish to cognise reasonably. They want to search reasonably for the points of reference (more precisely, the relevant factual aspects) in the world, and relying on these they may link new perceptions and realisations to the already known factual aspects by

[39] Cf., e.g., Marshall H. Segall, Gonald T. Campbell & Melville J. Herskovits *The Influence of Culture on Visual Perception* (Indianapolis & New York: Bobbs-Merrill 1966) xvii + 268 pp.; moreover, as applicable for expressly scientific fields (in our case: clinical epidemiology), too, e.g., Warren Newton 'Rationalism and Empiricism in Modern Medicine' and, mainly, William M. O'Barr 'Culture and Causality: Non-Western Systems of Explanation' *Law & Contemporary Problems* 64 (2001) 4, pp. 299–316 as well as pp. 317–323.

[40] 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] & in Varga *Law and Philosophy*…, pp. 219–232.

drawing analogies. This is the only way to build a mental edifice: by starting from the foundations and gradually constructing factual statements reasonable in a given systemic framework within the human world of cognition.

A total set of chances, out of the total interrelation

Inasmuch as the world is infinite both extensively and intensively, the total whole is also wholly c o r r e l a t e d at any given time. Totality is totally one, that is, t o t a l l y interrelated. Internal infinity thus becomes the infinity of something. For this reason, the way we explain the construction and operation of the world, and what elements we can use and in what configuration within it, will, in principle, be of infinite variety. In any kind of representation and reproduction, the variability of elements as well as the sets of arrangements and the configurations thereof will also be infinite. It is our practical interests towards and our practical relationship to the world that will select what we elevate (isolate, identify and name) from among these.

Tâlethes : truth = selected problem-solving

The Greek concept of 'truth' involves precisely such a connection. *Tâlethes* in the original sense means that we elevate, pick up and hold something to the light.[41] This already presumes some relationship. We can only elevate, pick up and hold something to the light if leaving everything

[41] "According to purpose, features showing differences and similarities between discrete items will be selected and typified by a process of generalization […]. In typifying things, an ideation of the actual takes place and description oscillates between these poles of experience. To describe ideations, metaphors are needed. These link the particularities of a percept to a taxonomy of types." "In observing something, our glance focuses on it. […] [I]t detaches itself from its background. […] [C]asting light on something involves obscuring something else." "Finding the relevant is the first step in linking the problematic to the familiar." "The Greek expression denotes the uncovering of a thing which is veiled or otherwise hidden from view. 'Relevance' in its original meaning denotes the lifting up of a thing, to bring it to prominence, so that it can be seen better. As it is frequently the case, the translation of *tâlethes* as 'the truth' fails to exhibit all the semantic implications of the original. What is obscured is the problem solving character of a behaviour designed to gain information on a range of probabilities." George H. Kendal *Facts* (Toronto: Butterworths 1980) x + 106 pp. with quotes on pp. 2, 3, 12 and 21–22. Cf., from the author, *Theory of the Judicial Process*…, pp. 34 and 101.

else in its environment in the shadow. By pronouncing *tâlethes* we confess that there is an agent in operation, and this is us, subjects who want to cognise by elevating something and shedding light on it. This agent draws something into the range of its inquiry, but by doing so overshadows everything else. Thus, the classical Greek understanding of the truth already implies, at least on an intuitive level, the recognition that truth is based on s e l e c t i o n . By declaring something to be the truth we deny the truth (taken in the same sense) of everything else. That is to say, numerous other considerations could also be regarded as truths, but we selected exactly the one we needed in the given context. Obviously, the story here is not at all about us being hopelessly subjective. Conversely, what it speaks about is that humans create their social world through their practice, and they do so in a manner continuously fed back by the results of the same practice.

Language-use: constitutive generation of subjects based upon practical existence

We have thereby arrived at a further realisation. In the 1970s, JOACHIM ISRAEL, a sociologist in Lund, was investigating language games as they are applied in human communication. His essential realisation[42] was that—and this seemed next to incredible at the time when I became acquainted with his research during my guest-professorship at his department—language (also) has a d i a l e c t i c s which is rooted in the underlying dialectics of p r a c t i c a l

[weak normativity]

[42] On the language games revealed in relation to the paradigmatic social presupposition of language use—"social scientific theories […] are based on pretheoretical suppositions. […] They are normative assumptions about the nature of man, the nature of society, and the relationship between man and society." Joachim Israel 'Remarks Concerning Epistemological Problems of Objectivity in the Social Sciences' in *Research in Sociology of Knowledge, Sciences and Art* I, ed. Robert Allen Jones (Greenwich, Conn.: Jai Press 1978), pp. 63–80—, see, by Joachim Israel, 'Stipulations and Construction in the Social Sciences Chapter' in *The Context of Social Psychology* A Critical Assessment, ed. J. Israel & H. Tajfel (London: Academic Press 1972), pp. 123–211; 'Is a Non-normative Social Science Possible?' *Acta Sociologica* 15 (1972) 1, pp. 69–87; *The Language of Dialectics and the Dialectics of Language* (Copenhagen: Munksgaard 1978) xvi + 262 [+4] pp.; 'Relativisme culturel et logique du langage' *Diogène* (Janvier–Mars 1981), No. 113, pp. 121–143.

human existence. When expounding this argument in terms of sociological theory, he also proved that human action through language is constitutive in the weak sense from the very beginning. That is, it generates its own subject that could not even exist without the creative contribution of language-use and the practice of communication. Accordingly, naming is in and of itself already a creative act through which we bring into social existence something that did not exist prior to this.

Language-use is weakly constitutive also in case of rules

It is to be noted, however, that constitutivity in the weak sense applies not only to the results of language-use. The rules of language are weakly constitutive themselves. For they allow variability to an extent that allows us to claim: language-use at any given time not only reproduces but produces its own rules. By selecting its rules of use from the available store of rules, it establishes the personal style characteristic of each individual language-user, none of them being ready-made or merely borrowable from a codified series, but is shaped individually through one's own practice. (Had we duly subtle means and procedures of analysis, they would surely enable us to demonstrate also that uses of language in situations that may seem common or average are nevertheless unique, and not simply originated from a pre-codified set of patterns. So, again, they are constitutive in a weak sense.)

The interest implied by cognition is also constitutive

Claiming something to be the product of a creative act obviously does not imply that its existence is self-evident or initially given. We started our explanations from the claim that the world is infinite in its internal variability. Hence, any event or thing bears an infinite number of potential aspects indefinable beforehand. Cognition of the world begins with the *tâlethes*, that is, at the point when something is lifted up and put in a context, this being what makes it construable. (At the same time, we are aware of course that things do not elevate by themselves. So, without the constitutive act of cognition the aspect in question could not become more perceivable than either of the others.)

Σ: fact = an aspect of reality asserted as real for us

In sum: facts are the outcome of our communicative and cognitive relationship to reality. They are born from our conceptualisation of certain aspects of reality whereby we make them subjects of communication. In factual statements we state it as fact that we h a v e strong r e a s o n s to express our recognition related to the respective aspects of reality as facts. We thereby claim that the relevant aspect of reality stated as a fact is real, therefore its prevalence and/or existence is also a fact to our understanding. And t h i s is the fact.

(example: water)

In consequence, what we regard as self-evident in a given context also depends on our cultural presuppositions. We think that water, for example, is no doubt indispensable for any form of life. As to its composition, H_2O, it is composed of two units of hydrogen and one unit of oxygen. Although, closer analysis may reveal that in practice (in our practical relationship to water) we know as many kinds of water as there are various cultural uses for it. So 'water' does not depend on its concept (supposed as natural) and chemical composition, (etc.) but on its practical uses and recognised human utility as sea-water, river-water, lake-water, brook-water, rain-water, the water from melted ice, or the humidity gained from collecting morning dew (etc.)—otherwise containing intermixtures and polluting substances. In other words, it is the social interpretation of vital (geographical, meteorological, etc.) conditions that determines the types of water we distinguish and name in language. Some languages apply dozens of distinctions to specify what the clouds, rain, snow and ice are like, or what the water is like in a ditch or a brook. Hence, we can by no means state that 'water' just "exists". For it is not the so-called 'water' that exists with such self-evident unambiguity, but the aggregate of culturally defined relations within the frameworks of which water is perceived by us, actors, who share its curses and blessings in our practice.[43]

[43] In a general approach, see W. H. Balekjian 'The Concept of Fact in the Physical Sciences and in Law' in *Theory of Legal Science* ed. Aleksander Peczenik, Lars Lindahl, Bert van Roermund (Dordrecht, Boston, Lancaster: Reidel 1984), pp. 183–188 [Synthese Library 176].

4.2.4. What are notions?

Objectivism / subjectivism

The objectivist trend claims about notions that they (1) reflect reality, (2) have clear-cut boundaries, and (3) "objectively" correspond with reality, (4) providing a neutral, objective and true perspective on reality. The subjectivist trend, born as an anti-thesis to the former, claims that notions (1) can only reflect themselves, (2) are arbitrary, (3) rely on historically incidental social conventionalisation, and (4) build on the continued actualisation of the respective social practice through conventions re-conventionalised.

Naive realism:

Let us have a look at what the so-called naive realism says on the tenets of the objectivist trend.

reflection

Ad (1): Is the notion a reflection? For a naive realist it may seem obvious that the process of notion-formation reflects reality. Accordingly, we have reality on the one hand, and our thinking capacity on the other, and we reflect the former on the latter, while mentally processing the former through the instrumentality of language. Needless to say, we make use of our thinking capacity through language in order to mentally reconstruct reality—for the sake of our own use and interests. We reflect it, or at least model it, even if somewhat transforming its form. Patterns, however, always differ from the patterned to some extent, but are still the same concerning certain relevant and determinant features. They are not mechanical or photographic mirrors, but something to which we have also contributed in the process of their selection and creation. So, for a naive realist, the existence, reason and limits of notions are all provided by the fact that he obtains the reflection of reality in and through them. It is neither we nor our cognitive culture that is reflected in them but reality.

discrete, having clear-cut boundaries

Ad (2): Do notions have clear-cut boundaries? For a naive realist, notions are reflections of reality with boundaries defined by nature. True, we may not exactly know these boundaries, but this is only due to our defective cognition. By means of rational reconstruction, science must strive to draw the boundaries of notions as accurately as possible. Since the boundaries of notions are provided by reality (in

the reflection of reality), their conceptual delimitation will only reveal what these boundaries have always been. So, what we achieve through cognition is the reflection of what has already been inherent in the thing.

objectively corresponding with reality

Ad (3): Do notions "objectively" correspond with reality? Everything conceptually cognised draws, in one way or another, from the so-called objective reality. We only model it through cognition, that is, pattern the construction, organisation and stratification of reality on a conceptual plane, and, accordingly, our notions on reality will be nothing other than the reflections of the structure of reality.

in a true perspective on reality

Ad (4): Do notions provide a neutral, objective and true perspective on reality? This requirement seems to be rather impossible. For it is built upon the presumption that we ought to be determined enough: once we have made up our minds, cultural dependencies on mental constructions imbued with our human and social existence can simply be left behind. Or, in accordance with this, we would have to assume the possibility of a neutral perspective on reality, from the point of view of which cognising man could truly become an external observer, not playing an active role in the process of cognition with his personality and by his act of observation. This assumption suggests we would apparently be able to cognise without having our existence (human and social perspectives) reflected in the process of cognition in one way or another.

Subjectivism:

What does subjectivism suggest from the opposite positions though? And, how can the contradiction between the two extreme views be converged into one synthetic cognitive view?

naming projections of our inner selves to be reality

Ad (1): In philosophy, FRIEDRICH NIETZSCHE was the one to start arguing with a strong envisioning force that man—*nolens volens*—always speaks of himself, projecting his own desires onto theses of cosmic dimensions even when engaged in theory-construction. Or, the world of notions according to him is comparable to spitting all over in the air: incidental, arbitrary, random. Although we may be able to reveal some agreement-like congruencies between people, these still do not reflect reality but our most intimate desires

at most, which might eventually display some common features. Does this perhaps mean the continuous re-conventionalisation of conventions? Well, indeed, even our supposedly most objective cognition cannot be more than that we (firstly) project our inner-selves on reality then (afterwards) agree to name reality according to this projection.

LUKÁCS: mental representation is reasonable only provided that it is in tendential unity with the outer world

However bizarre it may seem at first, this apparent extremism of subjectivism does not lack all truth, as far as its critical directions are concerned. GEORGE LUKÁCS, in his *Ontology of the Social Being*, once used a rather appropriate expression when—assessing the ontological correspondences of cognitive images of reality—he referred to "t e n d e n t i a l u n i t y".[44] He was contemplating the chances of that regardless of the largeness of the incongruity, detachment or even the arbitrariness between the subject of reflection and the reflected image, certain b a s i c m e s s a g e - v a l u e still persists and bridges the two. Current Anglo–American cognitive sciences emphasise precisely what we used to express by KARL MARX's favourite aphorism: the proof is in the pudding. Accordingly, in the course of human practice various modes of contacting reality always come into being in one way or another. We may individually hold diverse opinions on reality, but they must always be tested—like tasting the food we are cooking. Thus, when projected back onto social practice it ought to prove r e a s o n a b l e .

Knowledge is not sure but we may make reasonable statements notwithstanding

After the conclusion of our analysis we will easily understand all of this, and it should certainly be enough to repel the temptation of subjective idealism. It is true, however, that we hold hardly any knowledge of reality. Nevertheless, this should not keep us from making reasonable statements

[44] "In one way or another, these subjects are from the beginning confronted (eventually: short of perishing) with the scope of action given to them in the total process at any time. Accordingly, a certain tendential unity will assert itself on every domain, without lending a kind of absolute unity to the process (in the sense of the old materialism or as a logical consequence following from HEGEL's logic)." György Lukács *A társadalmi lét ontológiájáról* [Zur Ontologie des gesellschaftlichen Seins] III (Budapest: Magvető 1971), p. 296, and also II, p. 217. Cf., by the author, *Theory of the Judicial Process*…, pp. 162–163. [tendential unity]

about reality, by testing them against the historical experience we hold on the same reality. Naturally, being able to reasonably dispute, by trying the fruit of our thinking against others' is not excluded either. So, there are enough preconditions given to establish a social practice which does not exclude the building of reasonable relations with reality with proper feed back that stands the trial of practice as well.

Language: metaphorical, fictitious

There is a flourishing school of language philosophy today, originated in California, the fundamental principle of which claims that language is of m e t a p h o r i c a l origin and nature, its functioning and ability of communication both being determined by force of metaphorical expression.[45] Naturally this does not lack antecedents in scholarship. From among the pioneering opinions, we may recall HANS VAIHINGER's doctrine of f i c t i o n s, formulated within neo-KANTianism in Germany.[46] VAIHINGER claimed that we always act in a way as if doing something else: for instance, when we refer to a norm we actually pattern the desirable order of reality. The above mentioned language-

[45] George Lakoff & Mark Johnson *Metaphors We Live By* (Chicago: University of Chicago Press 1980) xii + 242 pp. On the characteristics of metaphoric expression, also see Sergio Cotta 'Remarques sur le symbolisme politique' *Archivio di Filosofia* II (1980), 157–168 and Giuseppa Saccaro-Battisti 'Changing Metaphors of Political Structures' *Journal of the History of Ideas* XLIV (1983) 1, pp. 31–54. On metaphors in general, see *Metaphor and Symbol* ed. L. C. Knights & Basil Cottle (London: Butterworths 1960) xi + 150 pp. [Colston Papers 12], especially D. G. James 'Metaphor and Symbol', pp. 95–103; Ehud Rahat *Metaphor Through an Evolutionary Perspective on Meaning* [Thesis] (Edinburgh: University of Edinburgh 1990); *Metaphor and Thought* ed. Andrew Ortony (Cambridge: Cambridge University Press 1993) xvi + 678 pp.; as well as *Conceptual Structure, Discourse and Language* ed. Adele E. Goldberg (Stanford, Ca.: Center for the Study of Language and Information Publications 1996) xi + 503 pp.

[46] Hans Vaihinger *Die Philosophie des Als-Ob* System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund eines idealistischen Positivismus (Berlin: Reuther & Reichard 1911) xxxv + 804 pp. {*The Philosophy of »as if«* A System of the Theoretical, Practical and Religious Fictions of Mankind, trans. C. K. Ogden (London: K. Paul, Trench, Trubner & New York: Barcourt, Brace 1925) xlviii + 370 pp. [International Library of Psychology, Philosophy, and Scientific Method]}.

metaphorical version of the doctrine on fictions essentially suggests the same considerations from which we started earlier ourselves. Accordingly, we do not (and cannot) know what reality is, but we nevertheless make certain kind(s) of propositions(s) about it. It is plainly enough for us to make it conscious that we thereby do not (and maybe cannot) communicate substantively representable knowledge of reality, but we merely give expression to our belief that it would be satisfactory if reality were like this, because it will be enough for the successful continuation of our practice to posit only this much about reality.

developed from infantile basic coordinates

The Californian school of language philosophy went further and made use of the results of research in evolutionary psychology. Notably, it learned from this research that the formation of certain primary notions is specifically linked to man's learning process of locomotion co-ordination and to its accompanying socialisation.[47] We may find out from such analyses that all fundamental notions of mankind are special metaphorical extensions (and representations) of a primitive, infantile biological existence. To put it generally, they are the functions of how man expresses his world organising it around what basic co-ordinates.[48] Thus, it revealed how the infantile world-view populates his world, how the relationships between things are named according to the

[47] George Lakoff *Woman, Fire, and Dangerous Things* What Categories Reveal about the Mind (Chicago & London: The University of Chicago Press 1987) xvii + 614 pp. This recognition is not new in scholarship, so much so that Ernst Mach—*Space and Geometry* In the Light of Physiological, Psychological, and Physical Inquiry, trans. Thomas J. McCormack (La Salle, Ill.: Open Court 1906) 148 pp.—pointed out a century ago that "The source of our geometric concepts has been found to be experience." (p. 142), because "Our notions of space are rooted in our p h y s i o l o g i c a l organism. Geometric concepts are the product of the idealization of p h y s i c a l experiences of space. Systems of geometry, finally, originate in the l o g i c a l classification of the conceptual materials so obtained." (p. 94).

[geometry itself is rooted in human experience]

[48] As is known, when learning a language the chief task after we have reached an elementary level is to be capable of expressing easily what we intend to communicate. In the Hungarian language, for example, we treat inanimate things as animate. Hence we regularly use such verbs with them that are not intelligible in the English language, not even in a figurative sense.

[influence of linguistic structure upon thinking]

patterns provided by his fundamental motions, attempts and acts of establishing relations, and how all of these will lead to the language of the adult world, including, among others, our thinking on reality.

Our conceptual world, too, projects our basic relations

It is undoubtedly necessary that everything we state about reality in a conceptual language to essentially cover, at least "tendentially", its features and aspects perceived and interpreted by us. This only can make our venture of creating notions of reality reasonable. The most important in all the above might still be the connection (correspondence, etc.) of which we have already spoken. Namely, the question of what aspects of reality we sense and name as facts fully depends on our culture and on our practical relationship to reality within our culture. Hence, our system of concepts is by no means a mechanical mirror linked to certain aspects of reality either arbitrarily or exhaustively, but an image which is concomitantly an a s p e c t and conceptual projection of our h u m a n r e l a t i o n s upon reality.

Assuming it to be discrete only serves the reasonable communication:

Ad (2): We may regard the complex and interrelated boundaries of notions as sharp outlines reminiscent of lines on a map or ones used in geometry. But, what proofs are there or could there be for these? The above outlined language-philosophical investigations revealed exactly that since notions cannot be found in reality proper—they are actually established through the rationalising practice of humans with the main purpose of being able to reasonably communicate about reality by using notions as representatives—, it is ourselves who treat the realm of notions as if they had (could have) any boundaries at all.[49]

notions are discrete, as bound to ends

Obviously, a notion without boundaries would make no sense at all. Yet, let us recall for a moment the previous state-

[nature-concept / culture-concept]

[49] This is exclusively the need of scientific notions. "The 'reality' which we apprehend in perception and direct intuition presents itself to us as a whole in which there are no abrupt separations." Ernst Cassirer *The Logic of the Humanities* [Logik der Kulturwissenschaften] trans. Clarence Smith Howe (New Haven: Yale University Press 1961) 217 pp. on p. 141. In relation to HEINRICH WÖLFFLIN's classic work— *Kunstgeschichtliche Grundbegriffe* Das Problem der Stilentwicklung in der Neueren Kunst (München: Hugo Bruckmann Verlag 1915) xv + 255 pp.—, he separates c u l t u r e -

ment we made when speaking of presuppositions in general. We mentioned that when humans perform an action they usually do not elucidate all the presuppositions of their action and their connections. Over the eras and cultures man could act relatively perfectly, rationally and effectively without making the slightest efforts to clarify the presuppositions of his action. The process of making these presuppositions conscious and to codify them started (again) in the 20th century after our enlightened rationalism and the mathematical-physical world-order relying on its world-view became questioned.

yet, with what delimitations?

To assume that notions do not have any boundaries whatsoever would actually mean that all notions are the same. This would obviously make no sense at all. Although, it is questionable whether by simply denying such a presumption we substantiate another presumption of the opposite sense, which would suggest that if notions have boundaries at all, then these can be nothing other than clear-cut, unambiguous and evident.

Depending on practice: (example: national tradition) / (example: affirmation *vs.* discrimination) (And where comes well-intentioned disinterest in conceptual dichotomisation from?)

Let us summarise here: humans in their social activity do not elucidate the presuppositions of their practice. Actually, they have never clarified them, and could not clarify them completely either, since every notion refers to and builds upon another, therefore the demand for complete clarification would lead to some sort of *reductio ad absurdum*. On the other hand, we may ascertain that in the same way our universe of notions depends on our practice of communication, discourse, and so on, and that the boundaries of notions also depend on this same practice. Let us recourse to repetition again: all of this by no means implies that our notions lack boundaries or limitations. It only means that when we debate and eventually misunderstand each other,

concepts from nature-concepts, claiming that "Such expressions do indeed characterize but they do not determine; for the particulars which they comprehend cannot be deduced from them." Ibid., p. 140. This is what logic has concluded already, by separating so-called class-concepts deciding on inclusion from so-called order-concepts suitable only for characterisation. Cf. Carl G. Hempel & Paul Oppenheim *Der Typusbegriff im Licht der neuen Logik* (Leiden: Sijthoff 1936) vii + 130 pp.

one of the reasons for this may be that we use notions in different ways. In such a case, we must clarify with ourselves and between each other that we can only continue our debate reasonably insofar as we conceptually distinguish these differently understood notions. For instance—and this might be the case of conflicting cultural dependencies, moreover, the clash of civilisations, resulting in entirely different understandings of notions regardless of the use of allegedly identical conceptual marks—, it is quite imaginable that one of us is convinced of the cohesive force of national traditions exerted on the social entity as a solid background capable of inspiring common action, while the other may refuse such a non-universalist perspective, regarding it as tribal atavism narrowed down to one group's limited range of vision. So, as another case may be, one of us formulates a (positive or negative) value-judgement in a given situation, context, or with a given justification, and the sensitive other, by complaining about impatience, will respond with counter-impatience or counter-exclusion as a reaction to the exclusion he has sensed. In an empathetic discussion the parties will halt at this point for a moment to make at least clear what this or that notion means. For both sides are aware of the fact that they can step further in their discussion reasonably only provided that both notions—clearly separated (and perhaps also conceptually distinguished) by this time—equally allow the message of both parties to be expressed and understood. In such cases it may easily turn out that there are certain intermediate steps between the positive affirmation and the negative refusal. (At least, law seems to be unambiguous enough: equality of rights is violated by both positive and negative discrimination amongst ones supposed to be otherwise equal. The intervention of legal policy narrowing the equality of otherwise equal parties may in such cases weaken the principles of the legal order through its practical constraints, to fundamentalise it so as to become chaotic.[50]) That is, in such a case

[50] Cf., by the author, 'Önmagát felemelő ember?' [note 13], pp. 61–93.

tertium datur. Since between the two extreme values—i.e., the conceptually divided and unconditional self-identifying affirmation, on the one hand, and the unconditional refusing negation (as, for instance, affirmative action and negative discrimination, standing for inclusion and exclusion, respectively)—both neutrality and well-intentioned indifference may be wedged in, and so may also the intermediate values of more closely defined empathy, sympathy, or, simply, affinity than inspired by the extremes (and not exclusively as logical classes but as more practical mass attitudes than any kind of extreme). Thus, if we happen to come across stubborn misunderstandings, these are likely to be fed by the extreme impatience drawing from the initial sensitivity or hypersensitivity. For it must be clear from the above methodological suggestions that patriotism, for example, is not equal to chauvinism, and the reluctance towards the unconditioned undertaking of filo-types of sentiments cannot be identical with the unconditioned rejection of anti-sentiments taken in the strict sense of the word. That is to say, we may have to face misunderstandings in social and moral matters alike. Insofar as these result from a difference in the use of notions—as often happens in a tense atmosphere, in the case of a low culture of debate, or even when the pretence of misunderstanding is provoked intentionally (this apparent unclearness sometimes generating even social hysteria)—, then, for the sake and within the framework of discourse, we can (and must) arrive at drawing bordering lines. After the methodological job is completed, we would really sense, apparently with reason, as if these bordering lines would have been drawn from the beginning.

Drawing the boundaries of notions cannot do the job once and for all

Let us continue by providing some examples. Our presupposition that usually follows such a clarification suggests that the boundaries of notions have now been truly set by definitions given this way or by some tacit means. So from now on it appears as if notions had boundaries indeed. Yet, the history of human discourse proves the exact opposite, and this is one decisive lesson of linguistic reconstruction: questions of boundaries arise again and again, the more unclear the notional relations which describe things, the more often.

The final outcome is even more troublesome. As we may know from historical experience, social and moral issues cannot be settled once and for all. And this is so not because humans cannot recall past events due to their feebleness or because being natural-born trouble-makers so that they even destroy their own past as if driven by bad instincts. On the contrary: it is a basic fact of socio-ontological importance that in historical dimensions and in an overall social context man never does anything in vain, and whatever he ends up doing he does because he feels that he must—on the basis of his usual deliberations, sober reflexion and responsible choice.

(example: WATSON on adaptation as a neglected factor of legal development)

Let us elucidate the issue with an example from legal history. ALAN WATSON, the Scottish historian of private law, after completing his investigations on the driving forces of Roman legal development (trying to identify its whys and hows), launched another comparative inquiry. Advancing from case to case, he arrived at more and more surprising conclusions which he published in a series of magisterial papers.[51] Putting it in black and white, he proved that we can hardly speak of legal development proper. Man is one of the ugliest and laziest creatures on planet Earth: he does not create anything unless bare necessity forces him to. And if he finally ventures anything, he does it with minimum effort. So, if there is any chance, he follows beaten paths, works with ready tools, and always uses—by adapting—the ones at hand. Therefore, he invents something only when there is no idea or thing available in his environment to shape further or re-adapt. So necessity urges him to be creative, to consider making his own move, or even to invent something.

(example: goring of an ox & the irradiation of JUSTINIAN's accidental selection)

WATSON's historical justification steps from a trivial example. Namely, on the territory of the Fertile Crescent (in ancient Mesopotamia), the goring of an ox proved to be a deadly danger. It happened very often, so the question of who was liable for the damage and what compensation was due had to be regulated by law. Well, from the author's

[51] Alan Watson *Legal Transplants* An Approach to Comparative Law (Edinburgh: Scottish Academic Press 1974) xiv + 106 pp.

research it is clear that in this civilisation extending over an immense territory, all the autochtonously evolving cultures used the same construct, the normative wording of which (although in different local languages) was even the same.[52] Looking for further proof, WATSON found a similar example in JUSTINIAN's codification. As is known, the conceptual distinctions and classification applied in JUSTINIAN's *Institutiones*—its structure and breaking down not being self-evident or even the sole alternative in the context of the late Roman historical development—have become the standard pattern for internal systematisation especially of the civil law on the European continent (as well as in Scotland). Accordingly, our entire legal culture seems to rely on inveterate conceptual incidentalities, random improvisations, findings, moreover, sometimes even gross errors and misunderstandings. For we are accustomed to taking every ready or half-ready tool and conceptual initiative from the treasury of the past and simply re-adapting it if we so need, often without any genuine critical reconsideration, unless some strange and rather exceptional reason forces us to act differently.

(example: speculative theological foundation of criminal wilfulness)

Through this historical exemplification, WATSON reminded his readers that even in present-day English criminal law, for instance, the states of mind marking the various levels of wilfulness and negligence are distinguished and termed according to the conceptual differentiation established two centuries ago—prior to the development of

[52] Cf., e.g., Albrecht Goetze 'Mesopotamian Laws and the Historian' *Journal of the American Oriental Society* 69 (1949), pp. 115–119, reprinted in *Folk Law* Essays in the Theory and Practice of *Lex Non Scripta*, ed. Alison Dundes Renteln & Alan Dundes (New York & London: Garland 1994), pp. 485–494; A. Van Selms 'The Goring Ox in Babylonian and Biblical Law' *Archiv Orientální* [Prague] 18 (1950), pp. 321–330; Reuven Yaron 'The Goring Ox in Near Eastern Laws' *Israel Law Review* 1 (1966) 3, pp. 396–406; J. J. Finkelstein 'The Goring Ox' *Temple Law Review* 46 (1973) 2, pp. 169–290 {also reprinted in *Transactions of the American Philosophical Society* 71 (1981) 2]; Bernard S. Jackson 'The Goring Ox again' *Journal of Juristic Papyrology* 18 (1974) 1, pp. 55–93.

psychology (and the formation of modern experimental psychology in particular)—, as the component of a speculative, theologically inspired systematisation. (In comparison, on the European continent the distinction between the various forms of wilfulness and negligence are considerably younger: they date back to the last decades of the 19th century when a certain level of modern scholarship and methodological cognition was already reflected in conceptualisation.) In England, this early *ancilla theologiae* was obviously still based on the separation of body and soul. This is why the considerations motivating conceptualisation were left behind by the science of psychology (taking shape in the mid-19th century), and were gradually forgotten, since their archaic metaphysical presuppositions were completely useless in scientific description. However—and here we can see the difference justifying the priority of practice over purely theoretical considerations—, there was no reason for the law to forget them. It eventually bore certain distinctions which proved suitable and workable enough in its practical effect for the purposes of criminal jurisdiction—namely, to draw relevant, proper, and moreover, appropriate distinctions between the different states of mind characterising criminal behaviour from the perspective of their practical consequences. All in all, law was consistently treated as a practical instrument in the somewhat standardising resolution of problems, something that should not be confused with scholarship which was organised along other types of considerations. Hence, there was no reason for law to become, paradoxically speaking, the *ancilla psychologiae*.

Cognition: reflective + constructive

So, man does not invent anything unless he is forced to. At the same time, we are aware that all phenomena, situations and events are of infinite variety. Human interest approaches them in various ways, differentiating and naming almost randomly selected correlations from among them as aspects, to build them back later into the phenomenon, situation or event in question in the course of their theoretical reconstruction. This is the reason why we claim that

human cognition is reflective and constructive at the same time.

The boundaries of notions are in function of the discourse:

As we have seen above, in the final analysis, boundaries of notions are in function of the discourse (or, as we may also claim: situation or context) to a certain extent. Every discourse, that is, each new discourse questions and challenges these boundaries recurrently, because each discourse is in principle a n e w discourse: it differs from the previous one as it requests an answer for a situation somewhat modified since then in some of its aspects. In the same way, in English law, the hundreds, thousands or even millions of cases embodied in and by the body of precedents accumulated do not add up to an exhaustive system, for it is by far not necessary that the new situations emerging at any given time require an answer along the same path taken once by a past individual decision. The judge may recourse to novation in any phase of the procedure, by presenting—with reference to equity, justice, or to other pleas and exceptions, as well as measures and steps to take—the decision he suggests as providing a relatively new answer (as compared to the decisional pattern incorporated by previous precedents) to an entirely or partially new situation, or to newly conceptualised facts that may constitute a case in law, that is, a different answer reacting more sensitively and suitably to the issue, in followance from the deliberation of those principles that may come into account. Of course, in this respect, the judicial procedure does not differ essentially from similar issues that arise in everyday conversation. For every human discourse that breaks through the established boundaries of notions or questions them can and does exactly do so because it approaches the respective notion through a new perspective, in a new context.

these are open, because their closure is casual at the most

This does not mean, however, that notions have no boundaries. In the same way, the circumstance that these boundaries depend on the discourse does not necessarily imply that the approach applied here is a subjectivist one. One can formulate as a general theoretical conclusion that, in principle, notions are o p e n because their closure

cannot be but casual: done artificially, exclusively in given direction(s) and context(s), with validity for the given discourse(s) only. The availability of a notion in and of itself, with boundaries marked within and for the given discourse, never anticipates future boundaries. Each discourse has to face a new situation with new contextual potentialities, therefore it has a chance to resolve or question any kind of earlier closure by modifying and re-actualising these notional boundaries (with the prospect of reconventionalisation).

In cognition: maximisation of justification and minimisation of falsification are needed

This is the framework within which we can raise the question of whether notions can "objectively correspond" with reality at all. Certain guidelines for response may be found in what we have said about paradigms in general. Accordingly, within our conventional world-view, we usually prefer those sets of notions which display more potential in justifiability and less in falsifiability. We want to maximise justification and minimise falsification at the same time. We are also bound to realise that we can only justify or falsify a theory by means of another theory, since we do not have any direct media or instruments of control (means of physical identification, or—referring to our above example—eating the pudding) at our disposal.

with theoretical rivalry according to chosen methodicalness

Within a given world-view and set of underlying paradigms, one accepts that theory as true, proven or at least provable, which corresponds the most to given methodical principles of the scientific methodology accepted by the community (by scholarship and in general) at a given time. OCKHAM's razor is a methodological principle of this kind. It inspires us not to presume (or posit) more basic facts, entities or relations as axiomatic fundamentals of composition than absolutely indispensable by the force of *sine qua non* to substantiate our sufficient explanation. In sum, only that theory must be accepted and preferred to other feasible alternatives, which displays the strongest explanatory force with the least exposition to attack.

4.3. THE NATURE OF NORMS

After the turn of the 19th to the 20th century, parallel to the birth of modern cognitive sciences and inspired by a neo-KANTian renewal in the methodology of sciences, new realisations were formulated concerning norms.

SAUSSURE: 'construction' / 'functioning'
RYLE: 'body' / 'soul
Existence: ontologically prevails and exists but does not "function"

Language philosophy was the first to face the challenge of defining its own subject.[53] Following the conceptualisation introduced by FERDINAND DE SAUSSURE in his lectures,[54] the conclusion gradually took shape—finally breaking with both the trap of naive realism and the false duality of objectivism and subjectivism—, according to which language does not have separate 'c o n s t r u c t i o n' and 'f u n c t i o n i n g' which could be interpreted, defined or assessed in and of themselves. These are purely correlative concepts mutually supporting one another that can only be interpreted in their relative opposition within a unity. Consequently, both of them can only be treated analytically: presuming one of them is the precondition to positing the

[53] On the problems of linguistic norms, see Oswald Hanfling 'Does Language Need Rules?' *The Philosophical Quarterly* 30 (July 1980), No. 120, pp. 193–205, as well as Renate Bartsch *Sprachnormen* Theorie und Praxis (Tübingen: Niemeyer 1985) ix + 341 pp., especially ch. III, pp. 84–140, which—mainly based on H. L. A. HART's és JOSEPH RAZ' arguments—attempts to apply the lessons of legal philosophy to linguistics as well. As a pioneering venture, see Ildikó Villó 'A nyelvi norma meghatározásáról' [On the definition of the linguistic norm] in *Normatudat – nyelvi norma* [Norm consciousness – linguistic norms] ed. Gábor Kemény (Budapest: MTA Nyelvtudományi Intézete 1992), pp. 7–22 [Linguistica, Series A, Studia et dissertationes 8], and, for a practical case-study, Ilona Kassai 'Nyelvi norma és nyelvhasználat viszonyáról az -e kérdőszó mondatbeli helye(i) kapcsán' [On the relationship between linguistic norms and language use in relation to the place(s) taken by the interrogative particle '-e'] *Magyar Nyelv* 90 (1994) 1, pp. 42–48.

[54] SAUSSURE's importance is analysed in a wider context by Roy Harris *Reading Saussure* A Critical Commentary on the *Course de linguistique générale* (London: Duckworth 1987) xvii + 248 pp.; David Holdcroft *Saussure* Signs, System, and Arbitrariness (Cambridge: Cambridge University Press 1991) x + 180 pp. [Modern European Philosophy]; Roy Harris *Language, Saussure and Wittgenstein* How to Play Games with Words (London: Routledge 1988) xv + 136 pp. [Routledge History of Linguistic Thought].

other. We might recall GILBERT RYLE's figurative expression, according to which things have no independent "souls" that, as some sort of external force, could make the existing "body" function. On the one hand, for its intellectual representation, the phenomenon is fully brought to life by 'construction'. The thing is thereby completed, since its 'functioning' is rooted in the very existence of the phenomenon understood as a thing. In fact, and in retrospect, however, it is precisely the 'construction' that qualifies as a randomly complementary function of something else, namely, the 'functioning', since it cannot be torn off what—in one way or another—actually 'functions'. On the other hand, we cannot state that the existence (e.g., the social being) conceived as a process 'functions'; it exclusively e x i s t s (happens or occurs), i.e., ontologically prevails.

Only repetitions construed within a structure can be characterised as 'functioning'

Thus, with the help and as the result of scholarly analysis, we just give expression to continuous repetitions and relative consistency in the very process by means of notions. We have to notionalise in order to distinguish and detach the process in question as a phenomenon from its 'environment', in order to be able to describe it in its distinctive and discrete form as potential 'appearance' or 'state' of the same 'essence'. In other words, we may say that what we do is merely to construe a notional structure through scientific description. And this we only do to allow us to characterise the functioning we constantly observe as the f u n c t i o n i n g o f s o m e t h i n g, broken down into the sequence of discrete elements.

Norm: separation of 'right' from 'wrong' in this repetition

From the above derives the position that presuming the existence of a norm is nothing other than an additional aspect to the above abstractions. For we must presuppose the existence of a norm to be able to analyse it as a given set of 'functionings' and then propose further conceptual distinctions for the analysis of such functioning. In consequence, the hypostatisation of its existence is not only a precondition to being able to define the main direction(s) of its observable functioning and differentiate its constant features from its peripheral parts and additional incidental components. It is also a precondition to being able to sepa-

rate 'right' procedures from 'wrong' ones in the course of a generalising abstract operation based on the differentiation of the 'norm-conform' uses of the hypostatised norm from what we will later label as 'norm-breaking'.

KELSEN: is there an 'order' created by norms?

The same fundamental point is raised by HANS KELSEN's *Pure Theory of Law* as his theory is built on the self-description of law in a conceptual reconstruction of its construction and functioning. Well, accordingly—shortly and simply—, what construction and functioning are needed to justifiably speak of law at all? Or, in more professional terms: into what mentally construed order (which, once established, is capable of self-definition, and through its functioning, also of incessant self-assertion and self-determination) are we expected to place the norm in order to be justified to speak about it as part and constituent of the law?

validity derived / the contingence of what will be eventually enforced

KELSEN, despite the far-reaching changes of emphases in his gigantic oeuvre, bearing, however, a consistent basic message (notwithstanding the sometimes inconsistent or simply contradictory conclusions he drew therefrom), answered the question without ambiguity. Namely, validity, as the specific quality of what is distinctively legal,[55] is transferred by legal functioning through a statically built hierarchy, advancing act by act from top to bottom, while all other forms of generating validity at equal levels at any given time are also conceivable when there is procedural action and it is actually taken. Validity becomes unchallengeable when the chance of taking an otherwise available procedural action is not effectuated or is procedurally excluded, whereby the validity becomes final by the legal force (*Figure 9*).

[55] This term originates from its use by Philip Selznick 'The Sociology of Law' in *International Encyclopedia of the Social Sciences* 9, ed. David L. Sills (New York, etc.: MacMillan & The Free Press 1968), pp. 51 et seq.

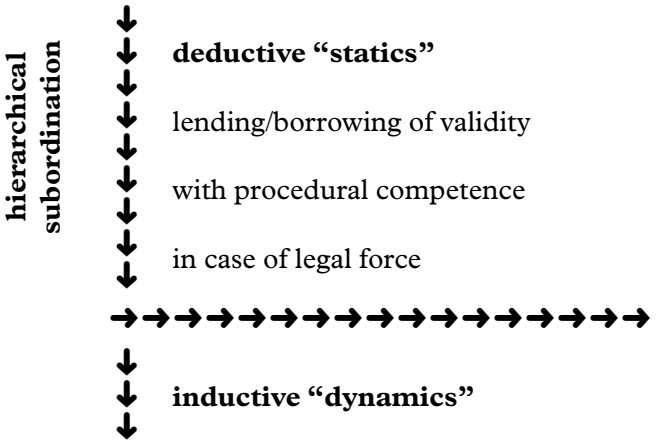


Figure 9.

We still have not answered the question: do norms exist at all?[56]

Does law consist solely of norms? Customs / parables / moral considerations / *dikaion* as jump-board:

In law we usually think of their existence as obvious although they are only paradigmatic in modern formal legal arrangements. We may recall that in ancient cultures (pertaining to the Old Testament, Northern Europe or even Albania) the task of the *lag saga* meant the annual recitation of the law.[57] The reason for this was that law was considered to live in and through customs. The law's only task was to provide a framework for action and its only quality was to be considered "just", but only in as much as it was acknowledged and proven by the community to be formed along what was recognised as "tradition". As we may recall, *Talmud*ic justice relied on parables, golden rules and eternal

[56] For the most recent summary, see Edna Ullmann-Largalit *The Emergence of Norms* (Oxford: Clarendon Press 1977) xiii + 206 pp. [Clarendon Library of Logic and Philosophy].

[57] For the *lagsaga* [or *lögsögumaður*], cf., e.g., Sigurður Líndal 'Law and Legislation in the Icelandic Commonwealth' *Scandinavian Studies in Law* 37 (Stockholm: Jurisförlaget 1993), pp. 55–92 as well as, as a note, in <http://www.icelandreview.com/icelandrevies/search/news/Default.asp?ew_0_a_id=302657>.

truths, and it strove to find the individually concrete justice when solving or resolving a particular case. The circumstance that the very cases were projected onto a mentally erected plane, woven of norms and referred to within a normative framework, served only as the rationalising justification of the given solution. – As is known, China followed a different line of developing tradition. The codified, written and recorded Chinese *fa* only served as a framework of the last resort, keeping in mind those rather extraordinary situations when the central, imperial order ought to be kept and enforced in cases where the *li* living in moral teachings did not prove capable of fulfilling its task (to bring about mutual social calm through own initiatives), due to the stubbornness of the parties. Although in average cases and according to average moral expectations, consideration and careful leading should provide sufficient points of reference within the realm of CONFUCIan morals. – Finally, according to another tradition, the law built upon the ancient Greek–Roman ideal of *dikaion* was regarded as a jumpboard, starting from which any judge or layman could arrive at the just solution of the case to be decided.

regulation: prealable: comprehensively exhaustive *vs.* posterior: when the legal status is questioned

Thus, the question arises: what kind of norm-setting and positing characterises "law" in modern formal legal arrangements? Does it have a principle according to which e v e r y t h i n g t h a t c a n b e s a i d s h o u l d b e s a i d ? Or, just the contrary, its underlying principle is e v e r y t h i n g c a n b e s a i d t h a t s h o u l d b e s a i d ? The former reflects the ideal of comprehensively exhaustive regulation. It expresses the demand for legal homogenisation along the lines of relevance, as well as for gapless norm-setting. On the other hand, the latter is somewhat freer. By means of formal norm-setting it actually tries to define normatively only the contents the legal status of which is questionable or contradictory, that is, those crying for direct and open regulation for practical purposes.

(example: English law: the judge follows his inductively developed rule of decision)

The first one is familiar from Civil Law traditions. The second is nonetheless known, although not in continental Europe. Its variants are displayed by the legal lives characteristic of so-called primitive societies and of Anglo–

American Common Law arrangements. In early legal cultures, "the law" was pronounced by the high priests or magicians of the community but only at exceptional and festive occasions. In average situations when disputes or conflicts occurred, the tradition consecrated by customs was most often revoked. Accordingly, legal reasoning is considerably loose in everyday life: it appears a s t h o u g h it were going around something. Yet, one cannot state or revoke as factual knowledge whether there are norms at all, and providing that there are, what they say. Anglo–American law may have statutory provisions for ordinary situations, but the question of what they actually provide for a case to be decided can (and will) only be answered by the proceeding court—purely on grounds of a somewhat predictably consolidating judicial practice. In the amalgamate of precedents, accepted as guidelines for and by judicial practice, it is not so much the position finally taken by any one actual decision that will provide genuine directions, but those reasons, considerations, principles and arguments [in its technical language: *ratio decidendi*] that served as the channelling framework, both spring-board and cogent reason alike, for the judges proceeding in the case to make their decisions. The *ratio decidendi* is formulated within the context of and for the facts established in the case, while the *obiter dictum* relates to other comparable (actual or imaginary) cases. Posteriorly, and basically in every situation, it is the reason given in the case, i.e., the *ratio decidendi*, that is of binding force for the judge at any later time, unless he proves (making use of his "art of distinguishing") that despite all appearances, it is not the considerations in the previous precedent(s) that provide guidelines for his case due to the fact that there are distinctive factual differences and these are so weighty that they justify another principle to be followed. The selection of arguments for distinguishing is given free scope and is purely the pragmatism and self-discipline (and, of course, the desire to get the approval of higher judicial fora) that bind the judge in complying with the tradition of ancestors when making his own decision, or, as the

case may be, attempting to beat new paths, to be justified especially carefully and conclusively. After all, in principle, no matter whether he complies with or diverges from the past, he always follows his o w n rule of decision which he shapes inductively, unless he follows, as usual, his own past decision by claiming it covers the case again.

Order presupposes the existence of a norm if related to the issue as a mediator

So, are there norms at all? When pondering the question again we must arrive at the conclusion that o r d e r is conceivable even if norms are set individually by and for each person separately. In consequence, ordering through formal norm-setting cannot be regarded as sufficiently complete in perfecting the job in and of itself, that is, as some sort of t o t a l e v e r y t h i n g stepping in place of n o t h i n g, in the literal sense of the words. Implanting norms only introduces a further factor into social discourses on and within the established and acknowledged order. It does so emphatically, and with elementary force, in cultures where the construction and preservation of order is expected to derive from the sole gesture of elevating some external signs into a kind of fetish (and we may recall here the stele with HAMMURABI's laws or the engraving of the Ten Commandments onto a table of stone) and not (yet) from the democratic culture of discourse. However, we thereby do not intend to suggest that norms are nothing more than showy clothes. It may sound paradoxical, but norms may be transformed into objects of adornment mostly in the hands of those who expect them to display the magical force of being capable of solving everything—in and of themselves. So, in the hands of those who ignore the fact that stelae or stones (in brief: objectivations) do not have a restrictive force i n a n d o f t h e m s e l v e s, neither do they command respect. The sheer fact that they stand does not prevent anyone from spitting on them, or from evading or going around them. When characterising the basic situation we may even increase the paradoxity of the expression: norms become genuinely valuable and purposeful instruments only in the hands of those with whom a f o r m a l c u l t u r e, too, is developed, requiring the norms themselves to be

transformed into actual mediators in the process of social mediation into which they are built—that is, into useful and at the same time merely m e d i a t i n g standards, and so much into the signs, symbols and fortifiers of a by and large efficaciously prevailing order.[58]

The source of certainty is the faith in reliability

In the final analysis, we can only state that the source of c e r t a i n t i e s in our everyday life, individual and communitarian alike, can hardly be identified from within the "things" themselves. They can only be founded upon the continuity of human practice and the r e l i a b i l i t y of our faith in such continuity.

[order is impossible without practical feedback]

[58] "Jurisprudence regards a legal norm as valid only if it belongs to a legal order that is by and large efficacious; that is, if the individuals whose conduct is regulated by the legal order in the main actually do conduct themselves as they should according to the legal order." Hans Kelsen 'The Pure Theory of Law and Analytical Jurisprudence' [*Harvard Law Review* LV (1941) 1, pp. 44–70] in his *What is Justice?* Justice, Law, and Politics in the Mirror of Science: Collected Essays (Berkeley & Los Angeles: University of California Press 1960), p. 268.

5. DILEMMAS OF MEANING

Do symbols of language bear a meaning? In what way?

The question we will raise repeatedly all along the reasoning below will be about what meaning is. Our previous reflections were, of course, also on language, on how we think with the help of the instrumentality of language. Now we intend to make this question more specific, and investigate how the symbols of language (or any other sign the textual sequence of which can transmit a message) bear the meaning that we can sense and decypher. How do the symbols of language address us in a way that—according to our perception—the texts themselves seem to start addressing us?

an issue of linguistics &

> These are just small fractions from the immense store of problems ever raised by linguistic theories. First and foremost because there is the science of signs (semiotics) and numerous other specialised fields of investigation from phonology to phraseology, syntax and praxeology, all which deal with one problem, naturally, each in its own way. Namely, how can we construct reasonable (i.e., meaningful) units from symbols, organise the various sets of signs into sentences, or build a particular style with additional messages from individual sentences, and so on?

of language-philosophy

The reflections that follow are all based on a tradition of semantics originated by LUDWIG WITTGENSTEIN in his theory of meaning interpreted in a language-philosophical sense.

5.1. THEORIES OF MEANING

Theories of meaning building upon one another

In the following we will survey the main trends of semantics in a language-philosophical sense by raising a question fundamental from the perspective of understanding law and

the construction of the underlying thinking culture. Namely: what is meaning?[1] The questions specific to the respective trends and the ways they are answered are also built upon one another, for they represent certain stages in the long process of the development of semantical thought, at the same time arriving at increasingly complex and comprehensive solutions. We will thus survey the lexical, contextual, hermeneutical, open-texture-based, as well as the so-called deconstructionist concepts of meaning.

5.1.1. Lexicality

Sign → meaning → designated

The lexical approach is the last in semantics to display direct connections to classical language theory, so also to FERDINAND DE SAUSSURE's linguistic theory.[2] According to the lexical theory of meaning, a sign is a s i g n once we assign a m e a n i n g to it. And signs are those physically perceivable things (or whatever else, like, for instance, the human voice perceivable as oscillation of air, or radio waves receivable by receiving sets) that are accessible to others. Obviously, something else is needed, too: what is being signalled, what is thereby d e s i g n a t e d. Physical phenomena and mental constructs can both be designated. The connection between the signs and the designated is established by meaning. From the infinite variety of our natural environment and artificial world, only that will become a sign to which a meaning is attached (*Figure 10*).

Figure 10.

[1] For a summary, see, e.g., Roy Harris & Talbot J. Taylor *Landmarks in Linguistic Thought* The Western Tradition from Socrates to Saussure (London & New York: Routledge 1989) xviii + 199 pp. [Routledge History of Linguistic Thought], for a 20th century classical summary, C. K. Ogden & I. A. Richard *The Meaning of Meaning* A Study of the Influence of Language upon Thought and the Science of Symbolism [1923] (London, Boston & Henley: Ark Paperbooks 1985) xviii + 301 pp.

[2] Ferdinand de Saussure *Cours de linguistique générale* publ. Charles Bally & Albert Sechehaye [1915] (Paris: Payot 1916) 336 pp.

taken as a predefined and unchangeable relation

According to the lexical theory of meaning, the sign and the designated will be connected lastingly and unambiguously only by the definition of meaning. Thereby it tacitly acknowledges that the thus created link is predefined, that is, both d e t e r m i n e d and u n c h a n g e a b l e . Taking a mathematical or logical definition as an example: when we state that '*A*' means this or that, we must know (even when we are not certain about our knowledge) that our knowledge is limited, since the definition, in the particular setting it was worded, is to be taken as complete—*per definitionem*, i.e., by force of definition. For '*A*' becomes a mathematical or logical proposition precisely because a quantitative or logical domain has been ascribed to it. The lexical definition of meaning is also unchangeable. This particular characteristic is presumably also an indirect legacy of the axiomatic way of thinking, for we can speak of a mathematical system—i.e., '*A*' can remain '*A*'—exclusively as long as the meaning in question is ascribed to it. Once somebody stands up and claims: "I have my own '*A*' because I have ascribed something different to it", he will have thereby announced that he has created a different system by defining '*A*' in a different way. At this point, it is already an issue of linguistic conventions and professional tradition whether the community will consider it an abuse that the new meaning bears the '*A*' sign unmarkedly as if it were the old one.

Change of meaning presupposes a new sign

One distinctive feature of the lexical theory of meaning is that it conceives of the predetermined and immutable nature of meaning as an axiom, that is, with unquestionable rigour. In addition, it does so with a fervour reminiscent of the mechanical world-view, and this will sooner or later lead to a paradox. Even when the original meaning is abandoned (as, for example, KARL MARX degraded the notion of 'religion' into one of a pejorative meaning, regarding it as "the opium of the masses",[3] thereby making 'religion' a

[3] "Die Religion [...] ist das Opium des Volkes." Karl Marx 'Draft Introduction to a Contribution to the Critique of Hegel's Philosophy of Right' [in *Deutsch–Französiche Jahrbücher* (February 1844)] <www.marxists.org/archive/marx/works/1843/critique=hpr/intro.htm>.

synonym for obscurantism, generating a language use in which anything non-desirable or simply stupid can be transferred into the extension of 'religion'), positing the new meaning will in point of principle be validated with axiomatic rigour.

Even the possible undefinedness is taken as defined thereby

All in all, according to the lexical theory of meaning, one can freely dispose of, and even modify, meaning provided that it is done in a definitive manner, with the demand of definiteness within the definition's sphere of validity. If we loosen up the meaning, that is, we intend to change its determinedness and definiteness into a new determinedness and definiteness, we are free to do it but only by the force of a new definition. For example, if to '*A*' as a mathematical proposition a different mathematical quantity is ascribed, it can be done only by transforming or re-positing the system. We seem to have reached a paradox here, although it is still important to note that the force of definition is to be understood in a way to include also LUKÁCS's term, "the well-defined undefinedness".[4] We thereby mean to express that we must regard our definition as defined in a lexical-semantical sense even if it would actually result in an entirely undefined (and exactly t h u s defined) definition. In theoretical reconstruction, definition can only qualify as undefined according to a given definition, because we have intended to define it just as such according to another definition (less strict and exclusive in the given context). That is to say, within the given domain or understanding of meaning, everything will qualify, in principle, as defined—with the proper volume and extension of definedness ascribed to it.

ANTAL: anything can be a sign with rules of use ascribed to it:

This semantic concept, still prevalent in our day, was wide-spread in the past decades especially in the Communist world, and it was particularly rigidly followed in Hungary. One of its prominent preachers in Hungary from this era,

[4] Georg Lukács *Die Eigenart des Ästhetischen* I (Berlin & Weimar: Aufbau-Verlag 1981), ch. 9, para. 11: »Die unbestimmte Gegenständlichkeit«, pp. 683–704.

LÁSZLÓ ANTAL,[5] had excelled (before he left the country decades ago) by his impatience with more modern and complex Western answers and with the differing views within Soviet-type MARXism. As he expounded it, linguistic signs are nothing more than linguistic signs and the rules of use ascribed to them. They are signs precisely because rules of use were definitely and unchangeably ascribed to them.

do 'construction' / 'functioning' still separate?

If we take this seriously, extreme consequences will immediately follow, and they may be of particular interest in relation to SAUSSURE's norm-conception. Inasmuch as the sign and the ascribed rule of use combined result in what we can regard as a linguistic sign (defining meaning), this will necessarily mean that social institutions themselves (as generated by linguistic acts) consist of two distinguishable aspects: 'construction' and 'functioning'.[6]

yes, but only providing that 'construction' is hypostatised without 'functioning'

In such a case we can construct a language by putting the whole series of signs on the table claiming: "This is the language, these and these are its units, since we have ascribed rules of use (and meanings) to each sign." However, language has never functioned the way described above, neither does it function like this, moreover, we cannot even be sure that at any time in the future it will have something to do with any functioning. For, according to this model, functioning will be the outcome of making the constructed phenomenon operate. Namely, if the set of signs and rules of use in and of themselves can be accepted as

[5] See, by László Antal, 'Sign, Meaning, Context' *Lingua* X (1961) 2, pp. 211–219; *Questions of Meaning* (The Hague: Mouton 1963) 95 pp.; *Content, Meaning and Understanding* (The Hague: Mouton 1964) 63 pp. [Janua lingarum, Series minor 31]; 'Jegyzetek az igazságról, a jelentésről és a szinonímiáról' [Notes on truth, meaning and synomyms] in *Általános nyelvészeti tanulmányok* [Studies in general linguistics] III (Budapest: Akadémiai Kiadó 1965), pp. 9–19; *A jelentés világa* [The world of meaning] (Budapest: Magvető 1978) 173 pp. [Gyorsuló idő]. For a contemporary discussion, see, e.g., Herman József in *Általános nyelvészeti tanulmányok* III (Budapest: Akadémiai Kiadó), pp. 242–258.

[6] On the false separation of 'construction' and 'functioning', cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 149 pp. and especially at p. 113.

linguistic meanings and their definitions, then what truly concludes from this is that functioning is not a precondition to construction. That is to say, we are able to build phenomena without truly operating them. We can create our own Esperanto or secret language without trying it out, or even attempting to use it. We put it down in a book (the same way children record their special languages or secret writing, creating the sequence of signs and assigning meanings to them) whereby the work is completed: here we have our own exclusive language.

in operation: 'conformity to rules' / 'inconformity to rules'

On the other hand, if construction and operation are regarded as two separate entities, then operation (as the case may be: language-use) will be characterised *eo ipso* (by the force of distinction) by the possibility of being used properly or badly, correctly or incorrectly. Establishing the "correctness" or "incorrectness" of the usage will qualify—furthermore, selectively qualify—the operation in practice; namely, it will determine whether or not the usage in question c o n f o r m s t o t h e r u l e s . (Similarly, the basis for distinguishing a "good" theory from the "bad" one can be the evaluation of whether we have formed reasonable thoughts, that is, of whether we have used the language for the purpose we initially meant to.) (*Figure 11.*)

construction	**functioning**
sign + rule of use	good/bad, correct/incorrect use

Figure 11.

but, then, 'construction' and 'functioning' are separated

The above distinction has one further consequence. If we draw a dividing line between construction and operation, the practical use of what we have constructed will be fully secondary, and, moreover, arbitrary. For the existence of language as constructed is complete and perfectly done even without anybody attempting to test or apply it.

In sum, according to the lexical theory, meaning is inherent in the sign and must be unravelled and disclosed from it. All of this implies a metaphysical presupposition concerning its philosophical foundations. Namely, we can hence presume an entity which is not operated or does not operate. We pre-dispose of the idea of establishing institutions (e.g., language) by human conventionalisation, and the constructed institution will prevail and "exist" without actual functioning. Since we have tacitly accepted by our previous definitions that operation is complementary, casual, and therefore it may join the institutions consecutively but not necessarily, accompanying them with ephemeral incidentality at the most.

and 'functioning' becomes incidental and secondary

We call this conception lexical because it conceives of the meaning—any meaning of a sign—as present in a dictionary. As to its argumentation: what else can the meaning be if not the one a dictionary ascribes to it? Or, the other way around: if we realise that the given meaning apparently ascribed to the sign is not among the definitions of our dictionary, but later it is still proven that we could successfully communicate by using the respective sign, then our conclusion can be either that we have abused the language which carries the given sign or that our dictionary is deficient from the outset. Therefore, whenever we say 'table', thereby being able to mean something that cannot be found in the dictionary, there are two available explanations we can choose from: we have either made innovations in the language, or the dictionary was deficient from the beginning. But our conclusion must be the same in both cases: the dictionary must be amended. The case is either this or that, and whatever the case may be, *tertium non datur*.

Lexical meaning = as defined by a dictionary

Until the elaboration of more complex and dynamic theories of meaning with proper language philosophical foundations, the lexical conception was considered the prevalent theory world-wide, the theory of meaning of a model-value for linguistic sciences. It was therefore out of necessity that until the very last decades (and until recent years in our region) this represented the paradigmatic theory

Traditional basis of legal thinking:

in legal sciences as well. Conception of law, judicial practice, as well as legal education were built upon its truths. It is a well-known fact that legal scholarship generally takes a traditionally conservative stance, preserving and continuing old values and attitudes especially on the European continent, due to codification and its consolidating effects on statutory positivism. Instead of answering the newest issues, the innovative and deconstructive drives of social sciences, it adopted old and tested patterns unchangedly, those originating from solutions consecrated by tradition. Hence, a specific legal theory or any initiative to reform was not needed for the legal arrangements and their environment to inspire such a concept of meaning to the legal profession, either practitioners or scholars of law. Already in our cradles (beginning with our socialisation in childhood) and until the ends of our lives we could meet only such kinds of inspirations that were built upon paradigms rooted in the lexical conception of meaning.

law = text + interpretation (as an external addition)

In law, all of this suggested an impression that we are given a t e x t (since within Civil Law systems we have been told that law is nothing other than a kind of text, or aggregate of texts at most) and we must learn that only this—and nothing but this—is the law for us. Customs, or anything else we can experience in practice but are not written bodies, thus disappear from the scene as elements of empty (or irrespective) conceptual classes. On the other hand, this culture also presupposes that the text in question is activated. With an analogy: just as we associate the medical profession with stethoscopes, lances, pharmaceuticals and bandages, we conceive of the legal profession as a specific craft of objectification, and primarily as an art of i n t e r p r e t a t i o n, i.e., the "manipulation" of texts. Furthermore, aspirin is available to anyone these days, but its chemical composition, or how it works and reacts in what combination to what problems needs not be known. Similarly, anyone may pick up a tool, but it is mostly the mechanic who will know where to hit with it in order to eliminate a problem, which an outsider may find impossible to solve, in a few seconds. Well, interpretation is a very similar professional procedure. The

task of the lawyer is to bring the text to life. Taken that the text embodies the law, its meaning must therefore become foreseeable for the client and must provide him orientation whatever his case, and it must also be able to provide (justifying or disproving) motivation for asserting the given case at court. The outcome will be qualified by the degree of success with which we could bring the text to life: useful from the client's perspective and truly self-concludent from the one of the procedure followed by the judge.

The latter is the lawyers' art (= *ars*)

According to the fundamental presupposition of the lexical theory, we have two entities different by nature at our disposal. On the one hand, it is the text. In the continental European culture we understand this as the text being the carrier of law. By this we have elevated legal quality—juridicity—into a metaphysical entity, standing in and of itself, since we have absolutised the text by reducing the law to the text. Whereas we also claim that there is some sort of special professional knowledge, too—*ars* in Latin, *art* in English (i.e., 'art' and 'craft' at the same time)—, which is interpretation. It comprises the knowledge of how we must proceed with the text in order to generate practical effects through and starting from it. In result, a new but secondary social reality is born—eventually not from anything real, since this new reality after all originates from the implementation of a purely professional opinion, from the proceeding judge's decision—and this decision consists of nothing more than the declaration that some qualifying conceptualisation derives from a text of the law (with the stamp of legal validity).

The meaning is inherent in the sign

So, the lexical conception holds that the sign is after all an independent entity, as the meaning is thought to be somehow metaphysically inherent in its understanding. The meaning is inherent in the sign either because it is so asserted by a metaphysical truth, or because the criterion is proclaimed that the sign—be it any kind of oscillation of air or a branch lying across the road—can qualify as a sign only if defined as a rule of use and its meaning is also ascribed to it. Therefore, there is not and cannot be any room for controversy or ambiguity. Each sign-user is assumed therefore to

be conscious in knowledge of all rules of use with regard to all signs and to use the language by mobilising the entire store of signs.

derivatively, like extraction in chemistry

Accordingly, the final result can be deduced from the text itself, be it lawyer's advice, judicial decision or whatever else. The metaphysical pressuppositions of this conception of the process of understanding are characterised by the fact that the basically d e r i v a t i v e manner of thinking here is reminiscent of a chemical process of e x t r a c t i o n . Since, in the procedure called interpretation the result will be gained f r o m the text. That is, we had something in hand, and in the process of derivation we elevated something from it as though in an extraction process. Let us put, for instance, the question: what is water composed of? Well, according to our scholarly response: its composition is H_2O. However, if it were this simple, then we could bring one molecule of water to the lab-table, and could bring another tool with which we could break up the molecule of water. Then we could extract, if we so please, one component of the water (for example, the two units of hydrogen), and finally do whatever we wish with the remaining one unit of oxygen. Well, we have just used a conceptual description that appears to be comparable to what we can do with language as well. Moreover, our present knowledge assures us that even things like oxygen, hydrogen and molecular structure truly exist. Would it therefore be conceivable that such particles exist separately in language as well? Properly speaking, does the mere fact that a text exists imply that things like signs exist in language, signs which (*per definitionem* and by the force of their existence) embody and define something which we can posteriorly identify as their meaning?

Method of interpretation: grammatical + logical + systematic + historical

In the legal culture of the European continent, we have a textual framework, the *corpus*, given. The legal profession is also given, and therewith the professional knowledge of a profession, by practising which profession we select a meaning, claimed to be given in the text. As is well-known, the key-chapter in studying processes of law-application [*Rechtsanwendung*; *application du droit*] within the realm of Civil Law is the theory of interpretation. This treats various

established methods as if they—combined or separately, maybe in a given sequence, but in each case due to and resulting from our determination of will—could be freely made to operate. It is also known that in the theory of interpretation of Civil Law systems—regarding its methods—interpretation can be grammatical, logical, systematic and historical. This has been taught at universities for centuries as individually applicable methods, inspite of the fact that they evolved consecutively in history and are built upon one another in the practical process of interpretation.[7] Thus, teaching is aimed at how to interpret grammatically, logically, systematically and historically. Logical interpretation already includes the grammatical one. Accordingly, grammatical interpretation is the starting point in approaching a text. The logical, systematic and historical interpretations comprise more complex methods. Naturally, we must always start with the most simple. All of this is based upon wisdom, knowledge and experience accumulated through the millennia, with the germs already present in primitive forms in the late Roman legal culture. In consequence, the paradigmatic roots of the lexical theory of meaning date back to this time.

+ teleological?

Given the above, we may question whether teleological interpretation (relying on the clarification of the purpose of regulation) can be added to them as a separate method. If the answer is positive then it can hardly qualify as something other than the abuse of the lexical theory of interpretation. IMRE SZABÓ, preaching the once "socialist normativism", but later criticising it within MARXism, argued in the same way in his magisterial work on *The Inter-*

[7] E.g., <http://de.wikipedia.org/wiki/Auslegung_%28Recht%29>. Cf. also, 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.

pretation of Statutory Rules,[8] published during the years of severe dictatorship. According to him, teleological interpretation is just dodging, a technique developed by bourgeois lawyers at the end of the 19th century to meet timely needs, since legal conclusions can only be drawn from the actual wording of the law, that is, the meaning can be defined exclusively from and through the normative text. Obviously, the position taken by SZABÓ along the traditions of the Civil Law thinking presumed that grammatical, logical, systematic and historical interpretation add nothing to the text from without. They merely assist the text to disclose its meaning for us—and this is a result previously unknown to us, albeit encoded in the text from the very beginning; it is only that we did not know about it as we were not interested in it earlier.

it already points beyond the text

The issue of teleological interpretation becomes decisive at this point. For this interpretational method is no longer concerned with simply relying on (when drawing meaning from) the text but with openly undertaking the circumstances that cried for law-application. So, instead of applying the normative text itself we from now on take into consideration, in an emphatic manner or exclusively, the (social, political, etc.) goals to be achieved by the act of law-application. And insofar as we take into consideration the goals to be achieved by recoursing to teleological interpretation, we no longer treat the text as the exclusive source from which a meaning is ultimately extracted (although the text should be the sole determinant for us: the exclusive basis for learning the law's message, otherwise we unavoidably run against the law—we act, to a lesser or greater extent, but differently by all means).

[8] Imre Szabó *A jogszabályok értelmezése* [The interpretation of statutory rules] (Budapest: Közgazdasági és Jogi Könyvkiadó 1960) 618 pp. in ch. II, especially at pp. 104ff. Cf., for his summary in his *Die theoretische 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].

Result of interpretation: affirmative / restrictive / extensive

As to the results of interpretation, the same kinds of problems are faced by the lexical theory of interpretation. The positivist conception claims that this can exclusively be affirmative, restrictive, or extensive. IMRE SZABÓ, for instance, in his entire work, used an image that suggested the existence of discretely separated entities of meaning, given in and of themselves, their modifications resulting from volatile processes only. He furnished explanation in the following terms: before interpretation we believed the meaning to have been such and such, but after concluding the process we have arrived at a meaning that differs from the initial one.[9] Well, this argumentation does not make any sense in this quoted form, unless we conceive of it as confirming the paradigm of the lexical concept of meaning. Again, this position involves the message that we can believe in anything as we please, but when a text is given we can only derive the meaning from the text, and only that meaning which was already inherent in it. Thus, the so-called "restrictive interpretation" will result in a narrower, and the "extensive interpretation" in a broader meaning as compared to what we initially thought to have been inherent in the text. Whereas a truly "restrictive" or "extensive" interpretation is not conceivable, since the once asserted "socialist legality" would have qualified it as an abuse if anyone assigned a meaning to the text that was not inherent in it—for it had not been in it, therefore it could not be in it.

[9] Szabó, p. 290. It is to be noted that while this theoretical formulation relied on paradigms unjustifiable from the perspective of philosophy, it could still be beneficial from the one of legal policy. Since, in case of "socialist legality", it emphasised the formal restrictions deriving from statutory settlement, while accusing the "bourgeois" practice with the loosening of meaning—thereby tacitly confirming that Soviet-type arrangements belong to the culture of modern formal law, with the only difference that it unbrokenly preserves its traditions as adapted it to its own (socio-political) needs, without becoming captive of the processes of the "increasing slackening and crisis of legality" (as usually formulated at the time) which took place in Western Europe in the age of "imperialism" (from the last third of the 19th century).

WRÓBLEWSKI × SZABÓ: static / dynamic approaches

In Poland, JERZY WRÓBLEWSKI's criticism, backed by their own, more flexible traditions, had already been professing for decades that the criterion used by traditional positivism is obsolete and wrongly put. He proved it through linguistic and logical analyses that in every legal culture (Civil Law standing for code-law, Common Law for case-law, as well as in traditions differing from the European ones) s t a t i c and d y n a m i c concepts, trends and elements prevail simultaneously in endless competition with each other. Therefore, more static or more dynamic stages of development can be distinguished, alternating with or transforming into one another in the long run.[10] We can encounter an ethos, force or pressure that assert static conservation in every legal order. A static point of view allows either affirmative or restrictive judicial interpretation. It is paradigmatically revealing how IMRE SZABÓ, with his doctrinaire MARXism in the background (rigidified in its conceptual horizons at a phase preceding the formation of modern cognitive sciences), rejected—and, of course, misunderstood—JERZY WRÓBLEWSKI, exactly because the latter launched his theory from the grounds of a paradigm inconceivable, unacceptable, furthermore, damnable (as being the messenger of subversion and chaos) from the former's perspective. It is to be noted that SZABÓ considered WRÓBLEWSKI as betraying the only true faith, particularly because the latter acknowledged the principle that the theoretical dilemma here concerns directions in legal development and not the mere denial or limitation of "legality" (i.e., the latter's confrontation with pure "a l e g a l i t y " or "i l l e g a l i t y ").

Dynamic interpretation: text + interpreter (example: MAGNAUD *The good judge*

True, there can be dynamic stages in the development of law when results are indeed restricted or extended—in the sense of the lexical theory of meaning. Therefore, insofar as

[10] Cf., by Jerzy Wróblewski, 'The Problem of the Meaning of the Legal Norm' *Österreichische Zeitschrift für öffentliches Recht* XIV (1964) 3–4, pp. 253–266 and especially at p. 265 and 'L'interprétation en droit: théorie et idéologie' in *Archives de Philosophie du Droit* XVII: L'interprétation dans le droit (Paris: Sirey 1972), pp. 51–69 and in particular at pp. 65ff.

we accept—still within the limits of the lexical theory of meaning—that interpretation cannot be other than "affirmative" even conceptually, then in cases of the actual restriction or extension of meaning we must presume that it is not the same text of law that came to be interpreted. WRÓBLEWSKI offered a solution to this dilemma by claiming that t h i s is dynamic interpretation proper. In the case of dynamic interpretation we have the text of the law, on the one hand, and the judge, aware of his professionalised social responsibility, on the other. With a historical example, PAUL MAGNAUD, *The Good Judge*,[11] tried truly to measure the different perspectives pointing to antagonistic directions and the interests involved when a new conflict arose, instead of attempting to answer these challenges simply by following the easiest path or the previous judicial routine. For he met bread-stealing children among those starving, drifted to the periphery of society. And in order to be able to reach a judgement in accordance with his morally coloured legal world-order, he distinguished criminal behaviour from the desperate efforts of a starving human being at satisfying his hunger. He thought that in the case when a miserable human did everything he could to ease his misery and he did not do a greater damage by his deed than was absolutely necessary to satisfy this sole need arising from hunger, then he should not necessarily be treated as a criminal when his deed is judged.

extracts meaning from the text of the law alone?)

Nevertheless, provided that we still consider the lexical theory of meaning relevant, we are entitled to and also ought to put the question: did MAGNAUD indeed apply the same provision(s) of the same French *Code pénal*? For if he did, we might get entangled in some irresolvable contradiction. What is more, we may even arrive at the conclusion the

[11] Paul Magnaud [1848–1926]: *Les jugements du président Magnaud, réunis et commentés par Henry Leyret* (Paris: V. Stock 1900) xlviii + 346 pp. [Recherches sociales 4]. Cf. Roland Weyl & Monique Picard Weyl 'Socialisme et justice dans la France de 1896: Le »Bon juge« Magnaud" in *Quaderni fiorentini per la storia del pensiero guiridico moderno* I (1974–1975) 3–4, pp. 367–382 et Jacques Foucart-Borville *Le Bon juge de Château-Thierry* (Amiens: Bibliothèque municipale 2000) 286 pp. [Eklitra 84].

logical reconstruction of which will reveal nothing else but that MAGNAUD actually interpreted another provision (eventually not existent in the textual body of the *Code pénal* as not being enacted in it) as if it had been the interpretation of a provision in the *Code pénal*. And he had no right to do this, no matter how much we may like him and his procedure. He could have said that in his argumentation he interpreted the facts that constitute the particular case of theft in the French penal code in force only insofar as he had the entitlement to do so. Moreover, what MAGNAUD did is actually inconceivable within the lexical conception, as it can be described by a baron-Münchhausen-type of gesture at the most. Namely, the meaning he extracted from the statutory text is a meaning that eventually had never been in it.

5.1.2. Contextuality

Origination of the contextual from the lexical

Born as a reaction to the lexical conception, the contextual approach attempted to surpass some obvious deficiencies and limits of the former. The truly paradigmatic nature of the lexical doctrine is proven by the fact that this new trend, born to replace it, eventually could not detach from it, and, as a final result, it provided a less rigid, improved version, more open to compromise solutions. This is the contextual conception.

HART: core + penumbra

HERBERT LIONEL ADOLPHUS HART was the first to introduce and formulate, in the middle of the 20th century, the contextual approach in his treatise, a classic by now, on *The Concept of Law*. HART simply thought that both statutes and judicial precedents are carriers of meaning having two layers: the c o r e and its p e n u m b r a .[12] For example, let us suppose that we light up a field with a reflector. We will

[12] For the first formulation of the 'core' and 'penumbra', see H. L. A. Hart 'Positivism and the Separation of Law and Morals' *Harvard Law Review* 71 (February 1958) 4, pp. 593–629 [in his *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon 1983), pp. 63–72]. Cf. also Ronald Dworkin *Law's Empire* (London: Fontana & Cambridge, Mass.: Belknap Press of Harvard University Press 1986) xiii + 470 pp. and especially at pp. 39–42.

find that there are strongly lighted areas with clear lines, but we also notice bordering zones on the periphery which despite their not being in the beam of light are still not dark. They can be noticed and seen, but they still do not have such unambiguous outlines; they are rather dominated by some sort of an all-merging greyness. Well, HART suggested that in most cases legal practice in the hands of judges is nothing other than a simple and problem-free, easily and routinishly decidable e a s y c a s e . Accordingly, no dilemmas can arise when the normative text of legal provisions is applied, since no one questions its meaning. This is why they are easy cases.[13]

"Dogs are not allowed into the park." We may easily comment on this prohibition and claim that the 'dog' is a dog and the 'park' a park; we may even point at both. So there is no doubt about how we can and must apply this prohibition in any given case. Still, the novelty of HART's conception, as opposed to all previous paradigms, started at the point where he admitted the bare chance of the existence of a penumbra of meaning. He admitted it by making a distinction between the easy cases and, as opposed to their average, the hard cases. H a r d c a s e s are those problematic—therefore mostly exceptional—issues in relation to which it is not clear what text to apply in practice, or whether the text itself (the application of which seems to be relevant in the easy cases, since in these the rule is held unambiguous, and appears as not requiring interpretation) applies or not for the situation in question. According to HART, in a hard case normative texts—regardless of how strictly they are formulated—can transmit meaning only in a penumbra-like way. This is why contextuality comes into sight: to allow us to still choose meanings from the aggregate of uncertainties (partially uncertain at least in this or that sense).

easy case / hard case

[13] On the dilemma of easy case and hard case, see Dworkin *Law's Empire*, passim, especially at pp. 265–266 and 353–354, as well as David Lyons *Ethics and the Rule of Law* (Cambridge, etc.: Cambridge University Press 1984) x + 229 pp. and especially at pp. 87ff.

Border situations are inevitable

Our question is the following: if meaning is defined only in a certain sense and just as an indication—and not unambiguously—and it can be detected exclusively in the penumbra, what could help us make it more precise? As to the response furnished by the theory here: it is exclusively contextuality that can do it. We may start contemplating the characteristics of 'dog', or the issue that if we eventually had a cat, then, what would its similarities be to a dog, if any, and to what extent would these apply. Accordingly, when leaving the core of meaning and entering the penumbra, it is only the context that can be of help. That is, primarily the textual environment and context of the norm. Whereas the question of what will qualify as relevant from this environment and context will be defined exclusively by the given case's actual environment and context, calling for regulation in the given situation.

but can be responded in practical cases

Various contexts can inform us on such and similar conditions: What was the intention of the rule-maker when he launched and drafted the regulation? Of what relevance is it that the rule-maker has already made a rule under some past conditions which provided for the prohibition of taking dogs into the park? Well, the only thing we know is that " 'Dogs' 'are' 'not' 'allowed' 'into' 'the' 'park'." We may ponder various conditions such as, for instance, whether a city-decree applies to railway-parks, military training grounds or episcopal gardens. If this prohibition applies to areas of restricted access, then would it be allowed—in lack of specific regulation—to take dogs into public places, for example, on city buses, tramways or trains? Does the prohibition apply to cats and other pets as well?

Are hard cases exceptional indeed?

These questions are justified. However, we must be aware of the fact that not even proven contextual correlation or similarity can be of help in reaching an unambiguous decision—for the rule specifically names the dog and the park after all, yet we are to decide about different things. All of this notwithstanding, contextuality still has something to suggest. For we know that the dilemmas of whether a cat can be considered a dog, or an episcopal garden a park arose in a somewhat similar context and textual environment.

Insofar as these narrower and broader contexts and environments are clear, their similarity or dissimilarity will obviously help us make a decision whereby we will undertake to consider a cat a dog, and an episcopal garden a park under the stated conditions. In consequence, we may claim that under this rule cats are not allowed into the park, and practically no pets can be taken on board of a public transportation vehicle or into a room meant for public use.

Such a solution is supported by the presupposition that average cases are problem-free and are in no need of any interpretation whatsoever, since the meaning of the relevant text is almost self-evident. On the other hand, hard cases cannot be but exceptional.

Are hard cases to be taken as an abuse? prevented by law-application as problem-free?

After all, *nolens volens*, the contextual theory of meaning thereby follows the lexical one by strengthening its basic idea, foreseeing only one kind of exception. For contextual theory, too, the message defined as the core is lexically given initially, and any definition of meaning depending mostly or exclusively on the textual environment can only be an exception when, realising the insufficiency of the core definition of meaning, one must leave the core and step into the penumbra of the peripheries.

Reaction: lexicality is, however, valid

From the perspective of the lexical conception, such a distinction can only be used to provide reasons for rejecting the problem itself. In terms of lexical orthodoxy, LÁSZLÓ ANTAL could ask with a captivating logic: what can the question be in this at all? If the question of a penumbra in meaning arises at all, then one of the following two alternatives will have to prevail. In the first case

- the linguistic sign or expression bears an additional meaning. In such a case we can rightly conclude that our previous definitions were deficient or bad, full of gaps. (This conclusion refers back to the situation discussed earlier when we said that if a meaning could be assigned to a word previously not defined in our dictionary, then it was either us who found a wrong meaning or the dictionary was bad.) In any case, the dictionary must be amended. As to the second case, it may happen that

· the judge takes advantage of this position. If the 'dog' is a dog, and the 'dog' truly remains a dog and nothing else independently of any further consideration, then we simply cannot ponder that the law may apply to cats as well. The judge, however, is the master of himself in such matters so he can say many things. He could say that the rule applies to cats as well. But if this is true, well, the notion of 'dog' applies to the cat not because the 'dog' is supposed to be a cat, but only because the judge wants the notion to apply to the cat, and he is in a position to enforce his will. What is the use of all this? The least we can say is that he consciously departs from (or amends) what the law-maker orders—otherwise unambiguously. It is the legal profession's competence (not that of the linguist, or of philosophical-methodological reconstruction) to decide how this will qualify. Is it sheer unlawfulness? That is, some sort of abuse? Or, on the contrary: is it just a case of responsible and responsive law-application? Or, is it the truly creative enforcement of the legislator's will aimed at regulation? Whatever the answer, according to the tenets of the lexical conception, no doubt can arise here with regard to the problems of meaning.

admitting that nothing is perfect in this world

In a paradoxical way it was precisely this challenge, the emergence of a penumbra conceptualised within the field of meaning, that gave impetus for the followers of the lexical conception to rigidify in their beliefs. They thought that it is exactly these and similar situations which cast light upon the fact that, in principle, the meaning cannot be other than precodified. Naturally, they did not claim it with pretensions making the linguists able to guarantee all dictionaries to be perfect. We all know that dictionaries are not any different from average matters of the world: they are just as good or bad as anything else—because, symbolically speaking, ever since our ancestors fell we have all been in a state of imperfection. Although the circumstance that our dictionaries cannot be perfect does not alter the definitional relationship between sign and meaning. Moreover, it ought not to change

our basic human stances either—i.e., the fact that in any of our human roles we all act as though we were perfect, although we are aware of our feebleness: we take advantage of our positions, tyrannise others, fake security—in want of anything better, only for our own reassurance—and so on. Well, with all the above said the situation is basically the same.

These issues are not settled for good to this day. Interestingly enough, most recent publications still profess that there are easy cases and hard cases. It is not our task to argue about these here and now. Instead, our present question should be whether there is any difference between the two? Should we not rather say that every case is, or may turn out to be, a hard case in principle? Moreover, from the mass of cases, easy cases will only be the ones the solution of which is already routinised in practice, so, due to a refinement of standing practice, they no longer raise uncertainties (apparently and exclusively from a practical—momentary—point of view). So, if we finally subject the ways of thinking in action here to scrutiny, we must realise that paradigmatic definedness prevails already in the formulation of the question. If we assume the existence of easy cases—as distinguished from hard cases—, we thereby indirectly confirm the fundamental tenets of the lexical conception. The paradigmatic nature of this consists in the fact that in the meantime the genuine problem may still lie in something else and the above distinction just hides the real difference. It may be the case, for instance, that the distinction itself turns out to be nothing more than a kind of theoretic position, which can only be regarded as reasonable at most on grounds of the tradition developed by the lexical theory of meaning.

In principle, there are exclusively *hard cases*, and *easy cases* are the ones to have been routinised

Anyway, would it be truly a reasonable venture to make a distinction between the two kinds of cases? We ought to recall from our previous analyses that if we deny the reason of distinction, we thereby not only claim that easy cases and hard cases are one and the same category but, as a consequence, we also lose the criterion of distinguishing, for

(example: normal × pathologic)

instance, healthy functioning from the pathological one. In other words, we may hazard to identify normal functioning with what we have just characterised as abuse or at least as the case of over-use at the edge of misuse. From such a perspective, however, to state that easy cases are reasonably distinguishable from hard cases means in the ultimate analysis nothing other than that there is n o r m a l functioning and it derives from the structure and internal definition of the given phenomenon (therefore, allowing everyday routine to freely prevail in it), on the one hand, and there is such functioning in the case of which for whatever reason (e.g., over-use at the edge of misuse, abuse, or any a t y p i c a l consideration excluding the usual routine) we deviate from normality, transforming the whole process into a p a t h o l o g i c a l one. Well, there are eventually two logical alternatives for theoretic description and explanation. Namely, we either

- introduce something new without admitting it, or we openly admit that
- the previous definition was not complete (or was not accepted as such)—independently of the further question (only indicated here) of whether it could in principle be complete or not.

FOUCAULT, SZÁSZ: deviance is a function of human conventionalisation

For easier understanding let us recall MICHEL FOUCAULT and the contemporary Western deconstructionist movement. As an off-spring of a rather wide-spread intellectual stance that ideologically has already led to, among others, the 1968 leftist-anarchist student uprisings in the USA, France and Germany, the destructive criticism has successfully challenged the world-view established by the intellectual reconstruction following WWII. And, as an outstanding and radiating by-product of such ambivalent uncertainties which relativised previously established axiomatic cornerstones of all convictions and beliefs, let us recall that ever since the revelating developments starting with THOMAS SZÁSZ's oeuvre, we are not able to know with the old certainty who is and who is not mentally ill among us, because the difference—as proven by history—is not

apprehensible as a criterion[14] but depends more on social conventions.[15] Thus, we may see that the great revolution of psychoanalysis and of the areas that can be taken into consideration from the perspective of neuroses and mental hygiene (professed by SIGMUND FREUD and his school), as well as the revolutionary changes in our social view of the world (as to the methodological foundations, generated by FOUCAULT and others elaborating the European history of ideas and views with respect to the evaluation of social deviances[16]), well, these are all concerned with the one issue: why and how to distinguish the healthy from the unhealthy, the normal from the abnormal or deviant. From this point forward it became truly obvious for the Atlantic world that any conceptual absolutisation which attempts to distinguish

[14] It is worthwhile to recall that at the beginning of scholarly thinking, the relations within the cosmos, the acts of gods and the connection between health and illness were equally conceived of as derived from the pattern of legal order—cf., e.g., G. Vlastos 'Equality and Justice in Early Greek Cosmologies' *Classical Philosophy* XLII (1947), pp. 156–178—as "a balanced relationship, even a contract, between equal opposed forces". G. E. R. Lloyd *Magic, Reason and Experience* Studies in the Origins and Development of Greek Science (Cambridge, etc.: Cambridge University Press 1979) xii + 335 pp. at p. 248.

[15] From his oeuvre concerning the relative nature of "normality", primarily see Thomas S. Szasz *The Myth of Pschychotherapy* Mental Healing as Religion, Rhetoric, and Repression (Oxford: Oxford University Press 1979) xviii + 238 pp., for the background, his *Psychiatric Slavery* (New York: The Free Press 1977) xiv + 159 pp. and *Schizophrenia* The Sacred Symbol of Psychiatry (Oxford: Oxford University Press 1979) xiv + 237 pp.; and for a comprehensive evaluation, Richard E. Vatz & Lee S. Weinberg *Thomas Szasz* Primary Values and Major Contentions (Buttaly, N.Y.: Prometheus Berks 1983) 253 pp.

[16] By Michel Foucault, see, first and foremost, *Folie et déraison* Histoire de la folie (Paris 1961) [*Madness and Civilization* A History of Insanity in the Age of Reason, trans. Richard Howard (New York: Pantheon Books Random House 1965 & London: Tavistock 1967) xiii + 299 pp.]; *Les Mots et les choses* (Paris 1966) [*The Order of Things* An Archeology of the Human Science, trans. A. Sheridan (New York: Pantheon Books & London: Tavistock 1971) xxiv + 387 pp.]; *L'Archéologie du Savoir* (Paris: Gallimard 1969) [*The Archeology of Knowledge* (New York, Hagerstown, San Francisco, London: Harper & Row 1972) 245 pp. {Harper Torchbooks}].

with universal pretensions (leaving time and space co-ordinates out of consideration) the "normal" from the "deviant" with regard to mental states is false and unjustifiable. Distinctions are not made along some *per se* criteria, but we c h o o s e on the basis of our o w n e v a l u a t i o n, human and social alike. We do not disclose and make visible the features already inherent in the matter, but we judge and are judged according to our most particular social points of view (and the acculturations, conventions and interests involved). Whatever is considered undesirable is judged in a way to make the judgement unquestionable by thrusting the attitude, behaviour or event concerned, to the negative pole of a conceptually constructed classification scheme. With an ultimate simplification, we can indeed say that someone is mentally ill, abnormal or deviant, if he differs from us in aspects relevant for us.

with the conclusion that, in principle, normality could replace, or be built on, "abnormality" as well

Obviously, the question here is not whether any kind of illness can be relativised or not. We do not ask whether the limits set by social conventions can be made absolute or not. Our question is not whether or not some or most mental illnesses seem to be just as, and in the same sense, dysfunctional (that is, resulting from disturbed functioning as compared to the previous and/or the average) as any so-called common illness. Of course, THOMAS SZÁSZ's intellectual experiment was not aimed at proving this. Yet, it was successful in what it was aimed at. He discovered that part of the states which are not only present in the various states of mind, but are also pathologically identifiable in forms of physically provable degenerations, are stigmatised on occasion into psychiatric cases eventually by the value-judgement of a historical era. That is, the particular characteristic that made it a psychiatric case in the public eye is rather its expression as a social deviance. Needless to say, such a statement assumes the acceptance of a further conclusion. Namely, the hypostasis—at least as a mental hypothesis—of the following issue: if the mental illness in question did not qualify as a mental illness, then an actually functioning society could still be constructed and operated

on this basis, that is, on some sort of societal order in which normality were perhaps represented by the mentally ill person proper.

Social conventionalisation as the basis

THOMAS SZÁSZ exerted influence mainly on the Anglo–American and Nordic thought, whereas in Europe the accepted view was that of MICHEL FOUCAULT. The starting point of his analyses was the threat with confinement of social deviances. Speaking of historical driving forces, he described a similar process and motivation. Accordingly, society labels intolerable conducts as pathological at first, then it metes out punishments on them. Is this perhaps to mean that both normality and pathology are randomly created by common persons? And if so, by what means do they create them? As to FOUCAULT's response: the social common creates paradigms through his habits, thus through conventionalising habits and general everyday attitudes. He has it accepted as conventional, as the basis for normative selection in a way that the habitual order incorporates normality from then on, and whatever falls outside this circle he will condemn it as deviant from the normal.

what can be described and explained but not verified unconditionally

Somewhat taking advantage of our position, we may outcast everybody who is not like we are; our procedure, however—at least in the epistemological sense of cognition—, cannot be described as proposition. Obviously, everything we do and everything that surrounds us can be described, and even explained, by social theory (putting the situations of any given time into various contexts, thereby ideologising them), we can still not "verify" them with pretensions of "truth" and "unconditionality".

(example: death / blood pressure)

> Today's scientific opinion rejects that we are able to properly define, for instance, what life is, what death is, and what the intermediate phases are. It is a well-known fact that death has legal, biological, physiological, cerebral and other definitions—all of which may, in addition, depend on the given culture. All of them differ in their criteria, even if this difference can only be measured perhaps in microseconds with regard to the course

and sequence of events of the concrete state.[17] All we know for sure is that no difference can be ascertained between normal and pathologic functioning in itself as regards its contents, because no norm can be set up scientifically to serve as a basis of comparison. For we cannot actually find out anything from examining several entities simultaneously, only perhaps from examining one single entity at various times.[18] Similarly, we do not hold any solid, unitary concept on health either. For instance, in recent years, medical researchers have proposed and accepted dozens of definitions for hypertension, all of them significantly differing from the others. Their complexity is characterised by the fact that all of them somehow refer to certain conceptions of life, by offering explanations

[17] Cf., e.g., *The Definition of Death* Contemporary Controversies, ed. Stuart J. Youngner, Robert M. Arnold & Renie Schapiro (Johns Hopkins University Press J45) 368 pp.; Robert Streiffer 'Definition of Death' (March 9, 2000) <www.philosophy.wisc.edu/streiffer/HOM558S00Folder/000309/Definition_of_Death>; David Hershenov 'The Problematic Role of »Irreversibility« in the Definition of Death' *Bioethics* 17 (2003) 1, pp. 89 et seq. & in <www.blackwell-synergy.com/links/doi/10.1111/1467-8519.00323>. Its cultural religious contextures are directly shown by *The Medical Definition of Death* A Symposium Held in Kuwait (17–19 December 1996) <www.islamset.com/bioethics/death/state.html>. For one contrasting example—as Masahiro Morioka writes in his 'Bioethics and Japanese Culture: Brain Death, Patients' Rights, and Cultural Factors' *Eubios Journal of Asian and International Bioethics* 5 (1995), pp. 87–90 & in <www.lifestudies.org/japanese.html>—, "Americans think of organs as replaceable parts, and [...] this way of thinking is based on traditional Western notions of mind–body dualism. The idea of brain death and transplantation thus matches the Western way of thinking. Contrasting with this, YONEMOTO noted that Japanese tend to find in every part of a deceased person's body a fragment of the deceased's mind and spirit." S. Yonemoto *Baioeshikkusu* [Bioethics] (Tokyo: Kodan Sha, Gendai Shinsho 1985) on p. 200. According to the Prime Minister's counsellor—Takeshi Umehara 'Opposition to the Idea of Brain Death: A Philosopher's Point of View' in his ed. *Brain Death and Transplantation* (Tokyo: Asahi Shimbun Sha 1992), pp. 207–236 {for an English translation, cf. <www.npq.org/issues/v111/p25.html>}—life lasts as long as blood circulates in the warm body, and animism (attributing souls to animals, trees and even mountains) is in contrast with the notions of mere brain death, based on the separation of spirit and body rooted in the tradition of CARTESIanism and free transplantability.

[18] Georges Canguilhem 'Essai sur quelques problèmes concernant le normal et le pathologique' [1943] in his *Le normal et le pathologique* (Paris: Presses Universitaires de France 1966) 224 pp. [Quadrige], quote on pp. 118–119 and 156.

> and proposing certain conventions within the given concept of life. All of them can surely be useful from a pragmatic point of view, alternating with each other and being actually accepted in the hope of a greater and more predictable social profit (explanation, prevention and curing) than their antecedents. At the same time we can be sure of not having such problems of distinction in everyday life: health and unhealth are clearly separated on the plane of everyday evidences.

Is the pathologic the same functioning made unlimited?

In our simplified and ego-centric world-view, normality appears as something standing in itself, defining itself through its inherent nature. Accordingly, do we have to regard the pathological as a reaction to something else? Is it merely about the fact that what we consider pathologic expresses certain tendencies arising from the structure of the underlying system and/or inherent in its operation more openly, emphatically and visibly, or maybe even more unlimitedly and unscrupulously than the comparable other examples? Going further in simplification, does it make more evident what was already existent and present but less noticeable due to its hidden manifestations?

illness: normality in a version quantified differently (example: fever & cancer)

All science tells, cautiously, that illness is nothing else than "the simple quantitative version of physiological phenomena defining the relevant functioning in a normal state".[19]

Let me remind you here of a particular parallelism in thought. According to certain physiological theories, fever is not explainable in and of itself, moreover, it does not represent a problem in and of itself, and cannot be considered an illness in and by itself. Symbolically speaking, our organism is apparently programmed with certain parameters to help through positive feedback that what we will then qualify by the force of our logic, externally and posteriorly, to the programming as a healthy state, and when the actual functioning diverges from this, then, to react with some meaningful sign, thus, for instance, with fever, as a negative feedback. The parameters of functioning naturally change at

[19] "une simple variation quantitative des phénomènes physiologiques qui définissent l'état normal de la fonction correspondante" *Ibid.*, p. 155.

such occasions. The otherwise normal reactions of the organism intensify, and certain commands are built into our organism—as we may conclude from the results—so that if the given parameters change in a given way then the temperature and/or transpiration of our body (etc.) to rise/increase, that is, to induce a systemic reaction. Advancing gradually along such an explanation, we might arrive at an interpretation which claims that, from our above perspective, pathological functioning is nothing but the intensified state of normal functioning, hence the reaction that an illness triggers in a functioning organism is not a different but a stronger one than the average and usual. Well, this parallel becomes dramatic and eerie when considering the fact that our knowledge of cancer points in the same direction. Cancer today can be reconstructed in the following way: it is essentially a pathologically excessive, uncontrollable, and unendable cellular proliferation while we also know that our biological existence as such is owed to cellular proliferation, since both our biological reproduction and self-reproduction relies on the (self-)reproduction of cells.

Σ: "pathological" = normal, having become unregulated

In ultimate conclusion we may therefore realise that the n o r m a l turns into p a t h o l o g i c a l whenever the otherwise auto-regulated processes lose their capability to balance themselves on a proper level within due limits.

[example: cylinder in the steam-engine]

> Isn't this process reminiscent of a situation when the cylinder breaks down, or we take it out of the steam-engine and the boiler soon blows up? Yet, we all know well that steam-engines are mechanisms operating according to the laws of physics, therefore the fact that the boiler of a steam-engine blows up sooner or later if its cylinder is taken out is a natural outcome. Well, from this perspective, what can no longer be natural is to have a steam-engine which operates without a cylinder.

The easy case too is just an instance of the hard case

Returning to our initial question, is it conceivable that in principle there is no difference whatsoever between the easy case and the hard case? Is it feasible that only some secondary practical consideration enlarged into a selecting criterion makes us state a difference at all? Well, even if this is true it can mean at most that there is something with the

easy case that takes place in a r o u t i n i s h way, something that should not occur with the hard case. Although, paradigmatically, there is nothing substantially different between the two.

conventionalised in practical routine

If we are predisposed to accept the conclusion according to which meaning is basically a continuum gained within the framework of social processes (as a function of social practice), then we have to arrive at the conclusion that the notions of 'easy case' and 'hard case' are nothing but r e l a t i o n a l concepts themselves and, as such, functions of a conventionalised social routine. The "easiness" reflected by the term 'easy case' is easy indeed (in contrast to the 'hard case', thought to be hard, complicated and allowing only ambiguous solutions to be derived) owing to the fact that in the average routine of 'easy case', the entire process from the formulation of problems to finding a solution has already taken place many times in social practice. Hence, if we can precisely tell what a 'dog' is, and what 'allowed' 'into' 'the' 'park' (and so on) stands for, then we will be disposed to associate the notion of 'dog' with a barking, four-legged, hairy animal with a characteristic face, weight and behaviour (etc.). In such contexts, the "hard" implied by the term 'hard case' will only mean that we have come across certain conditions which challenge the previously established and conventionalised routine we were socialised into, so much that the question of whether we may or may not 'allow' an 'animal' 'into the park' can no longer be answered by the previously encountered decidedness and unambiguity of the provisions on the 'dog'. Therefore, we are expected to ponder at least about the issue and weigh the numerous circumstances (including the reconstructible purpose of regulation) so that we can deliver the decision: does this animal in question mean the 'dog' or not.

5.1.3. Hermeneutics

SCHLEIERMACHER: the Holy Scripture taken as the exclusive source to draw from

A third tradition, called hermeneutics, may take us closer to a solution. FRIEDRICH SCHELEIERMACHER launched this trend of thinking two centuries ago as an interpretational approach necessary for investigation into Old Testament

theology,[20] and he named it hermeneutics.[21] Classical philology, biblical sciences and other sciences of religion were the first to embrace it, mainly in order to study religions, in cases of which there is mostly one holy *corpus* of texts serving as a basis for theoretical development and argumentation. That is, where the foundation of theological construction is defined by one holy book, regarded as the incorporation of godly revelation, therefore unchangeable and unchallengeable at the same time. So one book provides the exclusive reference for orientation, a *corpus* on which the belief of entire communities is built and on which we can and must base all human certainties as well as the knowledge cultivated as science, called theology.

The one and single embodiment of godly revelation

Inasmuch as this is a holy text relying on revelation, everything inherent in God—more precisely, everything God intended to transmit to us humans—has to be encoded in t h i s v e r y t e x t. So, the question necessarily arises: how can we unravel the meaning from (as hidden in) the text? How can we justify this meaning as the exclusive message of the text? For we know that in law we can receive orientation from numerous sources and in various directions, whereas in theology this text is the exclusive source from which the reconstruction of the godly message can begin. Archaeological findings, bones and stones can be of no help here any longer. It is merely a few canonised texts (acknowledged as the exclusively authentic sources) and

[20] „Das Geschäft der Hermeneutik darf nicht erst da anfangen, wo das Verständniß unsicher wird, sondern vom ersten Anfang des Unternehmens an, eine Rede verstehen zu wollen. Denn das Verständniß wird gewöhnlich erst unsicher, weil es schon früher vernachlässigt worden." Friedrich Schleiermacher *Allgemeine Hermeneutik* von 1809/10, p. 1272, quoted from <http://de.wikipedia.org/wiki/Hermeneutik>, note 32.

[21] For an overview, see, e.g., Manfred Frank *Das individuelle Allgemeine* Textstrukturierung und Textinterpretation nach Schleiermacher (Frankfurt am Main: Suhrkamp 1977) 382 pp.; Paul Ricoeur *Essays on Biblical Interpretation* ed. Lewis S. Mudge (Philadelphia: Fortress Press 1980) ix + 182 pp.; for a comprehensive summary, see Werner Jeanrond *Theological Hermeneutics* Development and Significance (London & New York: Macmillan & Crossroad 1991) xv + 220 pp.

some further fragments (records, references and contemporary documents of questionable authenticity treated as apocrypha) that we can rely on.

What can explain the historically varying interpretation of old corpuses?

For twenty centuries from CHRIST's era onward, scholars —Old Testament readers imbued with philosophico-theological interests, classical philologists with theoretical veins and others—have been contemplating the question of whether it is our world that is changing, or, as the case may be, classical texts like the Old Testament, Greek and Roman texts, or even SHAKESPEARE's[22] (i.e., oeuvres and inscriptions) are changing over time. That is, what explains that our interpretations, born in different periods of time, are based on the same texts, but nevertheless change from one era to another as if reflecting their own era instead of (or besides) their subjects? Or, questions are raised and answered one by one, questions that can be best formulated on grounds of the hermeneutical tradition. For instance, whether variability can be compatible with what is, by definition, unchanged and unchangeable in and of itself, and how it can be so.

truth × falsity? or a result of the age?

> Let us suppose that the student of the Bible, SCHLEIERMACHER, surpasses the results achieved by another Old Testament scholar. Well, is he entitled for this reason to tell his predecessor: "Sir, you were wrong"? And what if SCHLEIERMACHER is really in the position to prove the sustainability of his opinion? Will this necessarily imply that the previous opinions were wrong? The question is thought-provoking indeed. Inasmuch as the earlier opinion proves to be wrong, this will tacitly imply that also our own relationship to the text cannot be other than an error based on a previous error. However, we may propose an alternative path of argumentation as well, which differs in direction, yet is nonetheless challenging from a methodological point of view. Hence we may ask: is it feasible that the meaning is not solely and exclusively drawn from the text? Is it conceivable that the relationship between the text and *its* meaning is by far not as absolute and exclusive as it was expected to have been before? Are there maybe rules of use of the signs not hidden and

[22] Cf., e.g., *Shakespeare in a Changing World* Essays, ed. Arnold Kettle (London & New York: International Publishers 1964) 269 pp.

certainly not unambiguously reconstructible from the text? Or, more precisely, can it be the case that those rules may be inherent in the text but concomitantly also in the era and cultural environment into which we happened to be born, and especially in which and into which we were socialised? Is it therefore ultimately the culture into which all we are socialised in our own time and era, which is organised by, and organises incessantly from, the mass of conventions making this culture live and liveable, that is, also helping us explain signs and sign-carriers in a given way?

The text gets its interpretation in the tradition

The hermeneutical tradition is essentially the way of thinking relying on the analysis of texts of the biblical heritage and, in general, of testimonies of the cultural past in a classical philological sense. The recognition at its basis is the following: even our apparently most abstract abstractions cannot be interpreted in and of themselves. Regardless of how one intends to act, he will still follow paths and move within the boundaries of his own traditions (or, we might hazard to say: of paradigms). For whatever one does, he will perceive, sense and interpret mainly these traditions, will depart from and arrive at them, pursuing only the endless following of his own traditions. Thus, tradition is a key concept for hermeneutics.[23] It is a generic term for what bridges and links the text to the human being who decyphers the text. Meaning, what we, so to say, unravel from the text, is at all times gained from the interpretation of a text within the context established by the underlying tradition. Therefore

[23] For the relationship of tradition to culture, cf., by the author, 'Legal Traditions? In Search for Families and Cultures of Law' in *Legal Theory / Teoría del derecho* Legal Positivism and Conceptual Analysis / Postivismo jurídico y análisis conceptual: Proceedings of the 22nd IVR World Congress Granada 2005, I, ed. José Juan Moreso (Stuttgart: Steiner 2007), pp. 181–193 [ARSP Beiheft 106] & [as a national report presented at the World Congress of the Académie internationale de Droit comparé] in <http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf> & *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 & <http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf>.

tradition has a dual significance. It is important for the contemporaries in their efforts to gain meaning, but it also gives a key for cases that occur in subsequent times when the predecessors' understanding of a given text has to be reconstructed and justified. Nonetheless, this involves the following consequence: the same text, if placed into the context of different traditions, will allow different meanings to be unraveled from (and, ultimately, ascribed to) it. Tradition thereby gives a key for later generations as well as for different cultures to reveal and understand the textual interpretation of their predecessors or contemporaries.

with neither neutral language, nor neutral point of reference available

So, we have practically arrived at the dilemma marked by the symbolic instance of the *Missionaries in the Boat*.[24] This involves the realisation that human knowledge—i.e., all knowledge related to human activity and human culture (practically everything that does not pertain to nature, until finally natural sciences too are proven to be cultural sciences themselves, even if more indirectly)—with all of its concepts included, must be regarded as culturally saturated, bound and dependent. This is where the image inspiring the above title derives from: various missionaries are sitting in a boat, trying to form an image on the world

[*Missionaries in the Boat*]

[24] According to its original formulation, "In this model, the missionary, the trader, the labor recruiter or the government official arrives with the bible, the mumu, tobacco, steel axes or other items of Western domination on an island whose society and culture are rocking along the never never land of structural-functionalism, and with the onslaught of the new, the social structure, values and life-way of the »happy« natives crumble. The anthropologist follows in the wake of the impacts caused by the Western agents of change, and then tries to recover what might have been." Bernard S. Cohn 'Anthropology and History: The State of the Play' *Comparative Studies in Society and History* 22 (1980) 2, pp. 198–221 on p. 199. Cf. also Hans Medick 'Missionaries in the Rowboat? Ethnological Ways of Knowing as a Challenge to Social History' *Comparative Studies in Society and History* 29 (1987) 1, pp. 76–98 & in *The History of Everyday Life* Reconstructing Historical Experiences and Ways of Life, ed. Alf Ludtke (Princeton, New Jersey: Princeton University Press 1995), pp. 41–71 [Princeton Studies in Culture/Power/History].

that surrounds them. Yet, their situation is paradoxical from the beginning, as the entire environment around them, the "facts" and "artifacts" among which they are placed—boat, water, and so on—and they themselves relate to one another from the first moment as the potential messangers of different cultures. So, they have neither a neutral language, nor a point of reference which could be outside of all what they themselves are or what they can at all sense with their own culture, wanting to learn about it.

with the observer adding to observation inevitably

Notwithstanding that we are now meditating within the sphere of cultural anthropology, neither ALBERT EINSTEIN's view used when explaining physical relativism, nor the one of particle physics and quantum mechanics on the inevitable interference by the instruments of human experimentation (proving how rudimentary formations theories are as compared to the experimented subject, and yet it is them by the help of which we have to break in upon the subject, interfering with its natural medium, if we are to gain information on it at all) differs much from this. Consequently, although observation can only be performed through the use of an instrument, it will still be a kind of observation equalling to the intervention into the on-going processes.

EINSTEIN: parameters can only be drawn from respective positions and interconnections

As opposed to the prevalent thought of previous eras which could take certain more or less firm positions on the basis of which entities and aspects of the world could be safely reconstructed and arranged, EINSTEIN had to realise that there are no fixed points of reference but only relations between entitites in constant motion. We may posit anything we please, but we can relate our parameters exclusively to positional situations and their interconnections. Everything we can formulate about substances, ourselves and the various dimensions and parameters, is interpretable only in the above terms and as their function. Moreover, this only makes sense when placed into a contextual framework—at least we can only interpret it within a context—in which our own position toward the position of anything else is, in principle, also inherent. In addition, everything else is, too, in constant motion. So, our knowledge speaks about the relationship

of such non-fixed points in incessant motion, and we can make statements on anything only within the range and context of the relations between these entities in move, ultimately even when we intend to formulate scientific theses on things that appear undoubtedly solid at the first sight (e.g., substance).[25]

Σ: "your culture as interpreted by mine"

Returning to the problems symbolised by the metaphor of the *Missionaries in the Boat*, it turns out that whenever we come into contact with another culture and try to reason on its perceived aspects, it is eventually our own cultural traditions, scientific presuppositions and ways of thinking that are projected onto the given culture—simply to be able to speak about it. It ultimately derives from this that such gaps (and jumps to bridge them) are perhaps not exclusive for the relation bridging the "missionary" background cultures under observation. What is to be observed, due to being unknown, can be the possible representation of a different and thus utterly independent culture. However, not being capable to step outside the spell of our own culture, we can only understand a different culture by projecting ours onto it ("y o u r c u l t u r e i n t e r p r e t e d b y m i n e") and attempt to draw some conclusions from this intercultural encounter. Obviously, these should not be conclusions which involve our own culture only, but which truly—more precisely: to the possible extent—describe and explain the relevant aspects of the observed culture.

as an empathetic tune-in instead of 'cognition'

Following such an argumentation coherently might disclose that we Hungarians think differently than, for instance, the Dutch do, although we all have our roots in the European culture. We may even arrive at the extreme realisation that each person is a unique and matchless individual, so to say, and that every manifestation of human thinking is the carrier of itself, building its own traditions. So, following

[25] See also, e.g., Karl Brinkman 'Physikalischer und juristischer Positivismus: Ein Versuch über Einstein und Kelsen' *Philosophia Naturalis* 23 (1986) 4, pp. 511–546.

this line of thought up to the absurd, we can state that from the variability of social cultures we may even arrive at constructing gaps between the individual sets of human existence, and formulate the need for them to be bridged, claiming that human commerce and communication implies cultural transformation and the reflection of one culture by the other. Or, in a more precise formulation, instead of cognising a culture we can only set the more humble goal of interpreting this culture through our own. This is nothing more than a process of approximation which is never complete, and when an optimum result is accomplished, this still does not generate congruence but an empathetic tune-in or intellectual participation at most. Regardless of the acceptance or rejection of this conceptual duality, it still remains a fact that we have no other means of penetrating the other culture—to have an insight into it or to establish a cognitive relationship with it—than to recourse to such an empathetic approximation.

(example: can legal borrowing be completed without simultaneous cultural transplantation?)

When drawing even superficial conclusions for law, our first question is: what truly happens when we import a law? How can we intellectually reconstruct the wide-spread reception of the Roman law, the historical cases of legal transplantation, with the introduction of the Swiss civil code to Turkey to replace local Muslim institutions and traditions, or the silent but long-lasting impacts of the various French and German codes in Japan?[26] For it immediately strikes the eye that whenever we deal with social institutions and institutionalisations like the l a w 's, representing mostly a c u l t u r e, and along with it, an i n s t i t u t i o n a l i s a t i o n and i n t e r i o r i s a t o n o f m e a n i n g s (manifest in texts of norm-structures enacted through legislation as in Civil Law systems, or actualised in

[26] Cf., by the author, e.g., *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991), part one, especially ch. 5, para. 4, as well as 'Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező' [Legal transplantation or borrowing as a universal factor of legal development] *Állam- és Jogtudomány* XXIII (1980) 2, pp. 286–298.

judicial decisions as in Common Law systems and other arrangements in which the law is embodied by authoritative declarations—made in the name of law—of what is considered to have ever been the law), the issue of legal transplantation becomes rather interesting. Namely, how can we exert an influence on one culture through the instrumentalities of another culture? Since, as we know, everything we can transplant or accept as the reception of Roman law—namely, the text—is not culture but its manifestation, for culture is t r a d i t i o n proper.

Transfer of law is only partial, reduced to the technical level

Well, it becomes evident from this context that tradition itself consists merely of cultural paradigms and presuppositions, skills and sensibilities, mental and emotional attitudes and responses. So, it is the total of socialisations which on their turn originate typical conventions. For instance, what is given? What is the *donné* in it, and what is the *construit*? Or, what do we mean by meaning? All in all, everything considered, what we usually call legal transplantation can in the final analysis be nothing more substantial than a mere technicality, in the course of which texts with norm-structures, conceptual connections and shifts of context are offered for technical combination and utilisation. Furthermore, transplantation can only be partial and exclusively unique.

(example: not even law-making is capable of renewal without new traditions originated)

Continuing our query: what is the case with law-making? When limiting the dilemma of the *Missionaries in the Boat* to micro-conditions, it turns out that the legislator (insofar as the law-giver is one identifiable person or a group of identifiable persons, or a corporation presentable as a person) represents and acts within one given culture, although we humans, conceived as individuals, bear different cultures in ourselves. So, it may occur that, after all, we are addressed in vain, because the features that distinguish us (or make us feel different) from others keep us untouched and uninvolved. Anyway, investigating the possibilities of influencing by law, and generating social change through the law within a sociological perspective (facing the issue how law and society can be addressed and incited to change through legislation) reveals that the legislator can realise extremely minor, moreover, dubious accomplishments merely by the act of

enacting a text.[27] The decisive factor is still hermeneutical: is there an effective and proper tradition available? Can proper tradition develop on the grounds of certain antecedents, including the enacted text? As is known, there are no ways for a legislator to originate tradition, and very limited chances to influence tradition. He does not dispose of any specific, necessary or duly effective means in the same way as we just talk without grounds when we state that we have learned another culture through our own.

through mere projection

All of us have a certain culture, and by making reference to it, either of us can claim: "I interpret your culture through mine". This is more justifiable as an expression. For we do not claim by this that we learned what is different and distinct from our culture, but, more modestly, we claim that we make efforts at interpreting the other culture by p r o j e c t i n g our own culture on it in order to gain relevant information on it—for ourselves, for our purposes, for own use. The legislator's goal can be this at the most. He issues a text; announces that he issued such text; then he can largely hope (and encourage by the help of instruments of mediation at his disposal, as well as of the governmental machinery, media, etc. within the social system, making us involved by threatening us or by promising advantages) that we, addressees, will understand his text the same way he did. But, after all, at the intersection of our respective cultures (the culture of the legislator at any given time, and ours, the current addressees), both the legislator and we are not able to generate more than a mere i n t e r p r e t a t i o n a l s i t u a t i o n . In other words, there is no direct means of, or

[27] Cf., above all, Antony Allott *The Limits of Law* (London: Butterworths 1980) xx + 322 pp. and especially at pp. 5–16 as well as, by the author, 'The Law and its Limits' *Acta Juridica Academiae Scientiarum Hungaricae* 34 (1992) 1–2, pp. 49–56 & in Csaba Varga *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE Project on "Comparative Legal Cultures" 1994), pp. 91–96 [Philosophiae Iuris], reprinted in *Indian Socio-Legal Journal* An International Journal of Legal Philosophy, Law and Society [Jaipur: Indian Institute of Comparative Law] 25 (1999) 1–2, pp. 129–134.

access to, shaping either the interpretational tradition of the addressees or the contextuality of the texts at the legislator's disposal. Tradition prevails due to our everyday thinking, commerce and communicational practice that maintains it. As in social matters, reproduction of the social being is also complemented here by incessant re-adaptation through re-actualisation. Thus neither of us can master tradition in a direct way, and tradition as such stands beyond the reach of our intentions and influence. Neither is the legislator able to do more than any of us can: shape and form a text. In professional terms: he drafts and enacts a norm, then promulgates it as law. He thereby attaches legal validity to a text, and orders a potentially coercive apparatus within the executive and judicial branches of the state power to "apply" the text—its obligatory application being a specific duty within the spheres of their respective competence.

(example: tradition being inaccessible, law-maker addresses the external behaviour)

In a long-term perspective, the aim of the legislator cannot be other than to influence the traditions of each of us, changing the traditions of the entire circle of addressees step by step. Since tradition is after all something interior, and what can be influenced from without is our exterior. This is to say that both the legislator and his coercive apparatus can only react if we acted in a way externally manifest, otherwise not. This is why only externally manifest conduct, describable and identifiable through external features, can be subjected to normative regulation in law, and this is why conducts qualified by law are always defined by those externally identifiable features that constitute a case in law.[28]

in a hermeneutical situation

This is exactly what the hermeneutical conception suggests, and it is justifiable. Our cognition is intercultural, whereas human interest in human matters is not merely intercultural but also assumes interpretation, projection on,

[28] Those "facts that constitute a case in law" is the conceptual product of abstraction, an issue of late 19th century German criminal law doctrine [*Tatbestand*]. It presumes the qualifiability of any behaviour (etc.) through criteria defined by describing normatively what facts do constitute a case in law.

and reflection by, the culture. The same holds for law. Law has only one possibility of action, and that is to operate with texts, for it does not dispose of other means to alter tradition.

(example: breaking tradition may fail despite successful law-enforcement)

Further consequences may derive from this. It might occur that the normative requirement is entirely fulfilled but we still cannot exert direct influence upon tradition. So, it may occur that the state enforces the law all through, but the underlying purpose that initially made the legislator perform the legislative act will remain out of the reach of law, and the tradition of the initial sphere of addresses will remain socially inaccessible. Shortly, the law was enforced inspite of all the efforts that led to its drafting and enforcement having proved unsuccessful.[29]

Lexicality may render anything a sign or meaning

According to the lexical conception, something becomes a sign by attaching a meaning to it. Anything perceptible—oscillation of air or electric impulse—becomes a sign if it designates something, that is, a meaning is attached to the designator (that is, by the normative definition of designation) leading to the designated (for instance, by pointing at the designated object), re-asserting the convention: this is a sign inasmuch as it designates that. Well, this is what makes the sign a sign, and it cannot be a sign without it. In consequence, this is what makes the text become a text. A piece of paper bears a text because there are signs on it, and not just some meaningless scribble (generated by, e.g., chance).

May artistic production also become random expression?

If we blow on dust and the specks of dust arrange themselves into a given configuration: can we take this as a generator of message at all? Should we consider a sound uttered by a new-born child a text? As is well-known,[30] in the wave of prevailing deconstructionism, it is a serious issue in art today whether the random outcome of the random operation of a paint-sprayer, or the setting of a computer to schematically programmed probabilities can or cannot result in art. After all, the question may also arise whether it is art if someone doodles on a piece of paper in his boredom. We may regard certain tacitly accepted or apparently conventional limits as established. Accordingly, for instance, whenever the artist does not have any personal influence upon the outcome then the product (coming out from his

hands, from his devices or studio, etc.) should eventually not be taken as art, or maybe as minimal art at most, that is: it will be considered art in the exclusive sense that it happened to be the artist in question who invented the procedure of generation, or, after all, launched the unreproducible (and, in this sense, artistically unique) process.

What happens if with signs unchanged the culture of meaning changes?

As a reverse case, we should think of a dramatic social turn—for example, the formation of a Nazi or Bolshevist, or simply a dictatorial type of totalitarian social influence—when maybe no formal change is effectuated in the wording of legal texts which would cause the respective change in the law's meaning, but such changes are forced through (by means of propaganda, by hammering the opinion of some as the mainstream to encourage conformism, by simple deceit,[31] intimidation or eventually brute force) in the social traditions conventionalising the meaning that the text itself will from then on be understood differently. In such a case (by far not hypothetical or imaginary, but acutely actual as experienced throughout the 20th century history in Central and Eastern Europe) we can positively state: despite the text being formally identical with itself, it is no longer the same with regard to its meaning.

(example: STALIN's Constitution of1936)

Thus we may arrive at the analysis of what variants and layers of meaning STALIN's 1936 Constitution had, for instance. Today it is but an addition to GEORGE LUKÁCS' communist intellectual career to realise how far he went (from a philosopher's pedestal and with inerrancy of

[31] See, e.g., the dishonestly irresponsible political manipulation with the concept of "civil disobedience" as well as the subsequent attempts at justifying the disturbances when a 'taxi-drivers' blockade' was generated in Hungary in autumn 1991. Cf., by the author, 'Civil Disobedience: Pattern with no Standard?' in his *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995), pp. 111–118 [Philosophiae Iuris] and 'At the Crossroads of Civil Obedience and Disobedience' in his *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008), pp. 262–271 [PoLíSz series 7] & 'At the Crossroads of Civil Obedience and Disobedience (A Case Study of a Moment of Constitutional Impotence in Hungary)' *Central European Political Science Review* 9 (2008), No. 31, pp. 68–77.

principle) with his euphonic praise of the greatness of the work accomplished by the Soviet leader.[32] And, initiating the rest of the world into his professional enthusiasm, he publicly admired the extent of human freedom and the completion of this new type of democracy STALIN ensured. We may undoubtedly accept it as a fact, on the one hand, that the text—in German translation—might have messaged exactly this for him. On the other hand, however, there must have been something else as well (for instance, a deep personal identification, or a fear-driven intellectual search for physical survival) which made him able to profess this in the given form, being aware of the conditions in Soviet Russia in which he himself opted to live. How should the text proper and its meaning be assessed? What does it actually mean? For it could have meant something for GEORGE LUKÁCS as the satisfaction gained from his almost religious belief in the eschatological perspective taught him by his Bolshevik understanding of the philosophy of history, and could have meant something else to commoners with less intellectually driven traditions: it could have meant, for example, the ideology covering the harsh reality which the Soviet practice had actually brought for the hundreds of millions of miserables at its mercy, dehumanising both victims and butchers.

Law: text in the tradition

Provided the hermeneutical tradition is methodologically defensible, its underlying conception will allow to surface what could not surface from the lexical conception—where the strict separation of "construction" from "functioning" might have suggested that the work of shaping the law is completed at some point in time: the law is ready to be applied by the mere fact of having been enacted; for it is complete as a textual embodiment of meanings, therefore it is another question of how the outcome will be operated, which obviously can be done well or badly alike—, namely: the work of the l a w is no other than of a t e x t w i t h i n t r a d i t i o n: placed into tradition, conventionalised within and through tradition. In consequence, the law can no longer be identified with a text, not even conceptually.

[32] Georg Lukács 'Zum Verfassungsentwurf der U.S.S.R.: Die neue Verfassung der U.S.S.R. und das Problem der Persönlichkeit' *Internationale Literatur* [Moscow] (1936) 9, pp. 50–53.

Obviously, if we transcend the problem of calling the text a "source of law", it will be just as metaphysical as asking: what is the existence and essence of a source of law? Of course, it is another situation when whatever the law states of itself is taken for granted, that is, when the doctrine the law help formulating for its official ideology is uncritically taken over by legal scholarship into the framework of theoretical reconstruction. On the other hand, when the concept of law gained from the hermeneutical approach is tested against social practice, practically the concept of the source of law will again have to be torn to pieces, as it is so heavily loaded with so many meanings that it ultimately becomes perfectly emptied even from a metaphysical perspective. Anyway, the survey above is not meant to criticise the various concepts of law, since they seem to be reasonable and useful notional tools after all, for any kind of legal game on the European continent.

because the law is also co-existent with a given social environment

From the perspective of the hermeneutical tradition, the l e g a l p h e n o m e n o n is a complex formation. Its conceptual sphere and its reality manifested in societal existence includes the law's s o c i a l e n v i r o n m e n t as well, thus, among other things, the community with all features presumed and posited by it. Accordingly, the legal phenomenon is by no means a simple t e x t, neither is it some pure objectivation. In the light of a hermeneutically grounded conception we may realise that even the notion of social r o u t i n e (which we applied when dealing with questions of contextual meaning) is eventually the consequence projected upon everyday practice that we have confirmed the tradition under average circumstances and with routinish recurrence, that is, in mass and as free of doubts.

Meaning is neither free of doubts nor unalterably identical with itself: changing the meaning also changes the law

Obviously, in the same way that, in principle, there is no meaning free of doubts, there is no meaning unalterably identical with itself either. Of course, it may happen that in typical social situations tradition is continuously confirmed in routine ways, therefore it is not a problem that relevant meanings may also seem unambigous from time to time. It goes without saying that unambiguity is a pragmatic concept

too, tailored to fit the demands and conditions of social practice. It is unambiguous f o r u s only when no doubts arise whether its operation may cause any problems. Preserving the meaning's identity—at least in case of lasting processes—is the function of preserving the tradition's identity. Hence the long-lasting identity and unambiguity of the meaning can only result from the routine-like confirmation of tradition. On the other hand, it will also be conspicuous that the change of meaning does not derive exclusively from a textual change. More precisely, changing the signs is only one of the possible alternatives to change meanings. That is, change of meaning can also be effectuated through the change of its conventionalising environment. In other words, c h a n g i n g t h e l a w i t s e l f is not without alternatives, this being only one of the possibilities of l e g a l c h a n g e.[33]

(alternative strategies for changing the law itself or for provoking legal change)

"[I]f law as a working system is composed of formal enactment and its social contexts making it interpretable and setting it in function a n d if a change of any of its components may cause a change of the law as a working whole, there is offered a perspective for an a l t e r n a t i v e s t r a t e g y. I mean thereby that a struggle for the law can be fought through a struggle for confirming / reforming / revoking its formal enactment and through a struggle for strengthening / reshaping / loosening its social contexts as well, and that any of these alternatives can eventually lead to the same goal as set."[34]

[33] For the background, cf., from the author, 'Law as History?' in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994), pp. 475–484 [Philosophiae Iuris].

[34] Csaba Varga 'Is Law a System of Enactments?' [1984] in his *Law and Philosophy...*, para 4.3, pp. 396–397. "It is also their existence as a continuum that makes it possible to understand why their historical nature is so important from the point of view of practical action as well. For their being a continuum in constant motion and change is also a function of their environment, in the interaction with which they are shaped. Or, the way they transcend themselves and by which their reproduction through their continued reinterpretation is achieved is not only a function of them but of the general culture and (political, legal, etc.) cultures of specialised fields as

In a hermeneutical sense, the text itself as a carrier of meanings changes when the underlying tradition undergoes a change. For a subsequent receiver the meaning will again be different. Needless to say, from the perspective of any realistic conception of law, only that law can be truly regarded as law which is experienced as law in the everyday practice of implementation and enforcement, issuing from its everyday (official and spontaneous) interpretation.

Eventually, law is what is practised in the name of it

Finally, there is only one question left open within the present framework—provided we accept the message of the hermeneutical tradition as justified. Can there be cognition and linguistic communication unaffected by the aforesaid?

In sum, we must note: the world-wide recognition of the hermeneutical tradition invoked a breakthrough which seems definite and irreversible for the development of the theories of meaning. The justifiability of the perspectives it offered is no longer questioned. The lexical theory of meaning has dominated the field unaltered for centuries as the epistemological precondition and methodological paradigm of our thinking; the contextual theory of meaning has rather played a walking-on part with its importance exhausted mostly in shaking the absolutism of lexicality; hermeneutics, however, now heralds a complete break-off, a change of paradigms in its wake. All subsequent formulations and trends have excelled by more comprehensive reformulations, or by new partial recognitions (as we will see in the next case of open texture), their driving forces being perhaps the strive for further theoretical universalisation or

Hermeneutics launched a breakthrough in the theory of meaning

well. It is so to such an extent that even the fight for them may have alternative actions to take. Namely, an action directed at them may aim at their shaping in a direct way (as, in the case of law, directed at its enacted text), as well as in an indirect way, through the cultural context in the interaction with which they are shaped (as, in the case of law, with the mediation of legal policies and legal culture, made to be strong enough to be able to have a genuine role to play)." Csaba Varga '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' [1988] in *Law and Philosophy*…, para. 18, pp. 422–423.

an *ad absurdum* reaching of the extreme limits of theoretically conceivable possibilities (as in the case of the after-next deconstructionism).

5.1.4. Open texture

Designation: a practical task practically performed, according to the typicality furnished by the routine

The recognition of the open-textured field of meaning is again rooted in the common realisations of the theories of meaning presented so far. Accordingly, it acknowledges the sign—be it taken as a mere term or as a concept—to bear a designation, it however starts from the pragmatic realisation (later proven also by philosophical analyses) that it can meet its end—just as any end can be met by any means—only in part and with definite restrictions. That is to say, the practical task of designation can only be accomplished in a p r a c t i c a l way. As is known, practical routine in everyday life is distinguished from situations that require creative solutions. So, whenever the sign is used to designate, it can only be done so in some particular direction. In everyday routine, typical situations receive routinish answers, and in order to routinise and justify these solutions, we furnish the proper terminological and conceptual identifications and delimitations. The issue of what qualifies typical in everyday life will be fully decided and responded to in a practical way, hence it is by no means the direct function of the ontological or epistemological recognition of metaphysical connections. Its only relevant aspect is a practical realisation. Accordingly, designation can exclusively point to one given direction, leaving any other directions open, because what is not designated cannot be taken as designated at all.

Wedging in intermediate phases will increase uncertainty

Let us recall the deeply philosophical, conceptual and methodological dilemma, most delicate and constantly recurring in legal evaluation: how can we notionally delimit things that do not delimit themselves from one another in reality? How can we distinguish entities or states in continuous juxtaposition, overlapping and interchanging? How can we separate the young from the old, day from the night, winter from the summer, life from death, snow from water, or even the horse's tail from the continuation of his aitch-

bone?[35] It goes without saying that notions in a line of graduation can still be distinguished from one another along the grades. Although methodological attempts at more precise delimitation in these issues of d e g r e e reveal as recurrent experience that wedging in intermediate phases (e.g., 'twilight', 'spring', 'autumn', 'thawing') weakens our uncertainty in the direction concerned underlying the delimitation, but leaves it untouched in all other directions. Moreover, by wedging in further intermediate partition lines, it eventually enhances the sources and factors of uncertainty.[36]

"Open texture" in language

Well, the same can be said of the various attempts at correction (through improvement or closure). New specific closures we may attempt to accomplish can close themselves at most, that is, can close the given direction, while allowing new kinds and directions of undefinedness to emerge. This generates an unavoidable duality in language use: uses of notions are defined by given practical interests, yet our efforts at (in principle) exhaustively asserting previous determinations in and through language—that is, close directions, fields, etc. which point beyond the range determined by the respective use of notions—cannot be accomplished, not even from a structural perspective. FRIEDRICH WAISMANN termed this structural undeterminedness of language "open texture".[37]

[35] "Courts of Justice ought not to be puzzled by such old scholastic questions as to where the horse's tail begins and where it ceases. You are obliged to say, 'This is a horse's tail', at some time." Justice Chitty in *Lavery v. Pursell* 39 Ch. D. (1888) 508, p. 517, quoted by Glainville Williams 'Language and the Law: II' *Law Quarterly Review* 61 (1945) 2, pp. 179ff on p. 184.

[after all, the judge's task is to make decision]

[36] Cf., by the author, *Theory of the Judicial Process*..., pp. 116–117.

[37] Friedrich Waismann 'Verifiability' [*Proceedings of the Aristotelian Society* 19 (1949)] in *Essays on Logic and Language* ed. Antony Flew (Oxford: Blackwell 1951), pp. 117–144.

(example: book & car)

Once the open texture of linguistic meaning is accepted in principle,[38] various (actual or imaginary) questions may be raised, moreover, they can even be answered within the limits of practicality. For instance, what does the notion of 'book' mean? We could set various conceptual criteria referring, for example, to its production through printing, to the minimum number of pages it must bear, or even to the applied binding procedure. Such definitions may prove useful in average cases or as library standards, nevertheless, questions to be decided in practical situations will still not be eliminated. Let us take some examples. From what extent of largeness (or smallness) is it still (and already) worthwhile to speak about books at all? Can a simple colligation of printed documents or posters, (re)paginated posteriorly, qualify as a book? Or, can newspapers or prints originally published at various places and times bound under a single cover be

[WITTGENSTEIN: the use of words is defined by situations, not by mere rules]

[38] "We introduce a concept and limit it in s o m e directions […]. This suffices for our present needs […]. We tend to o v e r l o o k the fact that there are always other directions in which the concept has not been defined." Waismann, p. 120. It is HART—H. L. A. Hart 'Jhering's Heaven of Concepts and Modern Analytical Jurisprudence' {in *Jherings Erbe* Göttinger Symposium zur 150. Wiederkehr des Geburtstags von Rudolph von Jhering, ed. F. Wieacker & Chr. Wollschläger (Berlin: Vandenhoeck & Ruprecht 1970)} in his *Essays in Jurisprudence and Philosphy* (Oxford: Clarendon Press 1953), pp. 274–275—who calls our attention upon the close relationship between WAISMANN's idea and the conceptual reconstruction by his contemporary, LUDWIG WITTGENSTEIN, who exposes in one of his late writings—Ludwig Wittgenstein *Philosophische Untersuchungen / Philosophical Investigations* trans. G. E. M. Anscombe (Oxford: Blackwell 1953), para. 68, 80 and 84]—that "[D]er Umfang des Begriffs nicht durch eine Grenze abgeschlossen ist. […] Es ist nicht überall von Regeln begrenzt. / [T]he extension of the concept is not closed by a frontier. […] It is not everywhere circumscribed by rules." "[W]ir nicht für alle Möglichkeiten seiner Anwendung mit Regeln ausgerüstet sind? / [W]e are not equipped with rules for every possible application of it?" "Ich sagte von der Anwendung eines Wortes: sie sei nich überall von Regeln begrenzt. / I said that the application of a word is not everywhere bounded by rules."

considered a book? And if it turns out that a collection of pages of braille results in a book, then can the same be gained from binding floppy-disks together? Similarly, we appear to know quite well what to think of when we say "car". Yet, can a toy qualify as car if it is so small that it fits into our hand, or if the construction of its engine allows it to go only at a snail's pace on the floor of the room? Or, if we created for some special purpose a gigantic monster, big as a few-storey house—for example, a residential edifice on a marshland; a structure of the size of a small town, moving on immense wheels or an oil-searching or fishing base on the shallow see—would it qualify as a car? Or, does an air-plane turn into a car if it has already landed and only the engines putting its wheels into motion are in operation? Or, would a caisson turn into a car if wheels are put on it so that a motor can help it move on the bottom of the sea? We can realise that the question itself is mere hair-splitting if not put with a specific purpose. We may also realise that no reasonable answer can be hoped for unless the underlying practical considerations are clarified.

5.1.5. Deconstructionism

A movement with relentless consequentiality

Deconstructionism was able to form a uniform doctrine from all theories of meaning surveyed above—from their prospective core problems, methodological considerations, theoretical message, generalisations and over-generalisations. The deconstructionist theory soon transformed into one of the leading movements in the humanities, posing as a general theory of cognition with some properties usually typical of ontological theories, while—despite its propositions being of syntactically affirmative forms—it has actually never been more than a loosely arranged compilation of relentlessly bold and logically outstanding criticisms and refutations. Its novelty was provided by its almost limitless doctrinairism: pushing rigorously and consistently through all the merely theoretically positable statements, which—precisely due to their polarising inclinations, moreover, to their ultimate connotations leading to the absurd—the traditional conceptions of science (still preserving some

connections to reality) could no longer share; and it did this even if being at fault for an own explanation.[39]

Whether or not tradition is followed depends, too, upon interpretation

The main thesis of deconstructionism is the realisation (reaching to its ultimate consequences) according to which there are no situations into which one could enter without own interpretation. Even deciding what qualifies as the observance of a tradition can be based only on interpretation. Our memory is at stake in which past and tradition can survive at all; therefore in our collectivity we have absolute authority—controlled only by each other and the best interpretability of the already formed subjects—over everything transcended by time. Since the integration of such interpretations into tradition can only be controlled by means of interpretation resting upon tradition (the quality of these interpretations observing a tradition themselves is again the issue of a subsequent interpretation), all these interpretations can differ from one another (even run against one another), and can also display a considerable amount of confusion and random channelling and shifting of directions in their processes taking place in time and space.

At some moment a decision must be taken

An old truth of organisational theory holds that issues may be argued for and against to infinity. At some moment, however, a decision must be taken. Then, beyond a certain point, it will be the conclusion of the debate in an undis-

[39] With the logical refutation of statements serving as explanation in debates, with the gesture of contradiction, that is, by declaring unprovability and non-consequence, deconstructionisms may serve as the indispensable means of scientific self-control, the fact notwithstanding that they do provide no explanations by themselves and particularly not exclusive ones. It was at the Yale Law School in 1988 after a scholarly debate that I enthused to one of the living classics of legal realism about the animating force of a fashionable trend, mainstream there and then. Having listened all along, he finally turned to me, in the silent serenity of settled wisdom, with a couple of questions. Have I ever thought of all this being anything more than parasitism, because its message has a meaning only together with what it tries to negate? That is, a negation can have a meaning only in function of a previous statement? And that no theory proper ever was born out of sheer negation? And what our world became if there were no constructive suggestions on solutions but doubts and criticisms exclusively?

puted and undisputable manner that will matter as a criterion and not the ways and merits of how this is eventually done. In law, as well as in the mechanisms of executive (governmental) decision-making, formalised issues belong mostly to such a category. Various opinions can be wielded in society on constitutional, legal and other topical issues on the part of politicians, professionals, public figures, partisans of omitted causes, affected and unaffected citizens alike. Although, in order for the constitutionality, legality or rightfulness of the relevant claims to be ascertainable, moreover, not in an arbitrary manner but in forms of a valid authoritative ascertainment with irrevocable legal consequences ascribed to them, the authority with competence to proceed on has to decide firstly about the constitutionality, legality or rightfulness of the claim concerned. The rules providing for such competence, creating authority and procedure may be improper, nevertheless somebody somewhere sometime has to reach a decision, and this first and foremost requires (even if improper) competence, authority and procedure.

KELSEN: validity originated in a static way

It was HANS KELSEN who primarily dealt with this problem. His theory on the theoretical significance of the legal force of the final judgement [*res judicata*], formulated in his later years, represented a novelty in that it sought ways of reconstructing such a procedure consistently, originating the validity of the procedure's outcome from the propositions of the law by hierarchically breaking them down. HANS KELSEN's entire oeuvre—spanning more than half a century, from the pioneering initiative of the *Hauptprobleme der Staatsrechtslehre* (1911)[40] to the final version of the *Reine Rechtslehre*, approved at the evening of his life (1965)[41]—relied basically on the statical

[40] Hans Kelsen *Hauptprobleme der Staatsrechtslehre* entwickelt aus der Lehre vom Rechtssatze (Tübingen: Mohr 1911) xxvii + 709 pp.

[41] Ruth Erne 'Eine letzte authentische Revision der Reinen Rechtslehre' in *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* ed. Werner Krawietz & Helmut Schelsky (Berlin: Duncker & Humblot 1984), pp. 35–62 [Rechtstheorie, Beiheft 5].

d e r i v a t i o n of v a l i d i t y.[42] According to his theory, advancing from the general norm-setting of the Constitution (or, in absence of a formal constitution, the hypothetical basic norm [*Grundnorm*]) toward the individual concreteness of the act of law-enforcement, each normative level of the law is to be conceived of as the concretising b r e a k i n g d o w n of the nearest more general (upper) level's validity—a validity which itself is originated from an upper, more general level. Or, approaching the bottom from the hierarchical top, the whole process amounts to a sequential and gradual "application" of the law.

step by step and grade to grade in law

In light of examples this means that—from the *Grundnorm* downward—national legislation is nothing other than one possible way of filling the general and abstract normative framework drawn by the Constituion. Continuing the line of hierarchy, the government's authorisation to issue its own sources of the law means the enactment of decrees within the framework set by legislation, and the one of local government to enact local decrees, within the framework set by governmental decrees. The courts are authorised to make decisions in application of the law within the above frameworks, and, finally, law-enforcement agencies are authorised to concretise and individualise the orders set by judicial decisions: what, as addressed to whom, when and how is to be meted out as sanction.

involving the moment of dynamism as well

This theory of the hierarchical breaking down and derivation of validity,[43] abstractly constructed with gapless consistency, involves beside its basic statism a moment of d y n a m i s m as well. For each level can be extended in space and time, giving free scope for acts and motions in various directions, but mainly for overlaps and contra-

[42] See, e.g., Letizia Gianformaggio 'Hans Kelsen sulla deduzione della validità' in *Da Democrito a Collingwood* Studi di storia della filosofia, ed. Alfonso Ingegno (Firenze: Olschki 1991), pp. 117–147.

[43] Cf., e.g., Robert Walter 'Die Lehre vom Stufenbau der Rechtsordnung' *Archivum Iuridicum Cracoviense* XIII (1980), pp. 5–16. For a critical reconstruction, also see Werner Krawietz 'Die Lehre vom Stufenbau des Rechts – eine säkularisierte politische Theologie?' in *Rechtssystem und gesellschaftliche Basis*, pp. 255–272.

dictions in practical events of jurisdiction in standing competition. Dynamism may appear not only when judicial reference is made to the constitutional text as a historical document but also in the sequence of consecutive amendments to the Constitution or with reference to them. In governmental decreeing one may encounter parallelism and even rivalry between ministries and agencies (because of structural differences and diverging interests), whereas in local administration and the judiciary, collateralities and competition may emerge deriving from local autonomies, and so on.[44]

closed down eventually by the legal force

Still, this apparently perfect intellectual construct, static yet properly loosened by dynamism, has eventually become captive of the trap of the legal force.[45] As we have seen, the legislator can only enact laws within the framework set by

[44] The directly deductive inference and local diversity of validity is moderated by its foundation in practice, when equally feasible but not exclusive solutions are generalised at one level to lean on one another, and also by its vertical building in the opposite direction, when the underlying sources of the law are re-interpreted at a higher level to make the practice thusly established a pattern. Cf. Torstein Eckhoff 'Feedback in Legal Reasoning and Rule Systems' in *Scandinavian Studies in Law* 22 [1976] (Stockholm: Almqvist & Wiksell 1978), pp. 39–51.

The variety of legality may get distorted sometimes to a comic level. For example, when the public order regulation of prostitution on roads varies from county to county today, reminiscent of the complaint once having led to the Revolution in France, whereas "There are, it is said, one hundred and forty-four customs in France which possess the force of law. These laws are almost all different in different places. A man that travels in this country changes his law almost as often as he changes his horses." <http://oll.libertyfund.org/ToC/0370.php> [„Il y a, dit-on, cent quarante-quatre coutumes en France qui ont force de loi; ces lois sont presque toutes différentes. Un homme qui voyage dans ce pays change de loi presque autant de fois qu'il change de chevaux de poste." Voltaire 'Coutume' in his *Dictionnaire philosophique*, vol. VII of his *Oeuvres complètes* (Paris: Firmin-Didot 1876), p. 384 & <http://www.voltaire-integral.com/Html/18/coutumes.htm>.

[45] In details, see, by the author, 'Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions' *Acta Juridica Hungarica* 36 (1994) 1–2, pp. 3–27 {& in his *Theory of the Judicial Process*..., pp. 165–201} or 'Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven' *Archiv für Rechts- und Sozialphilosophie* LXXVI (1990) 3, pp. 348–366.

the Constitution, with the purpose to break it down in enforcement; the government can only wield executive powers conferred by the Constitution and within the limits of the law (issuing decrees only for the sake of and within execution), and so forth. However, if, for whatever reason, this happens in another way, that is, whatever the ruling formulates either through law-making or through law-application by the proper agent following the proper procedure, this will instantly become an unerasable element of the legal order once it will have entered into force. For it is well-known that the outcome of a competent procedure done by a competent organ becomes effective—that is, f i n a l and d e f i n i t e within the given legal order, or, otherwise speaking, non-appealable, therefore incontestable and irrevocable—inasmuch as there is no further access to appeal in the given procedural system, or this has not been recoursed to by those allowed to do so.

Σ: static theory ← with normative *desiderata;* legal force ← with prevalence of random factuality

On ultimate analysis, we must conclude that the static theory of the derivation of validity formulates sheer *desiderata*, i.e., nothing more than normative criteria. Turning this static and formal theoretical construction into a dynamic one by the acknowledgement of the legal force may, however, add a further consideration to all this. Accordingly—and this is a rather elementary realisation—law does not have any means to interfere directly, for its available chances are merely procedural, operating with the opening or closing of institutionalised formal paths to be entitled to do or enforce anything. In practice this means that the given (or attempted) ways of the legally valid breaking down of a higher legal validity cannot be challenged otherwise than by the exclusive fora identified by the law in the course and within the limits of a legally institutionalised procedure. Whenever such opportunity is not guaranteed by the law for some reason, or those authorised by the law to do so did not take the opportunity or took it unsuccessfully for some consideration, then the particular form and way of the given (or attempted) breaking down transforms into the law's ultimate and definitive stance—even if it is a common-sense knowledge shared by politicians,

members of the legal profession, public opinion and the media, as well as affected and unaffected citizens, that the breaking down in this given form was either unfounded or expressly relied on abuse.

So, we may be able to give plenty of good advice and afford further ideological and normative channelling helpers for the ideal of "rule-observation" to be accomplished, yet the means at the law's disposal to enforce it in borderline situations are in practice rather limited.

Deconstructionism: escalation of relativising what can serve as a measure

Therefore it is not by chance that decades after the completion of KELSEN's oeuvre (and the change of paradigms incurred in the meantime), the theoretical reconsideration achieved by deconstructionism did not return eventually to the fixed points of an alleged and merely pre-posited certitude (which had already proven a bare and transient ideology)[46] but to the beaten path of some comforting uncertainty, moreover, of the relativisation of measure and measurement alike (already recognised and even tacitly approved by KELSEN).

The various theoretical formulations and achievements of deconstructionism, born consecutive to one another, lead to the increasing escalations and extensions of such a sequence of derivation. For the sake of exemplification, let us survey three of its variants.

DWORKIN: chain-writing

Firstly, according to RONALD DWORKIN,[47] the law is nothing but c h a i n - w r i t i n g . It is something like when in a gathering somebody starts writing a story—as a game—then somebody else continues it by adding the next row (sentence, paragraph or page). Well, every such continued writing forms, in principle, a gradually narrowing chain of thoughts. Since everyone who gets involved with the continuation of the story somehow always responds to what the person before him said, or to what happened in the story

[46] Cf., for the criticism in an epistemological sense of the "lawyerly world-view" and for its disciplining and limiting effect by its ontic (ontological) role, by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985), ch. VI, para. 4.

[47] Dworkin *Law's Empire* [note 12] passim and particularly on pp. 228–232.

before his turn, somehow starting always from the underlying conditions and the previously set characteristics of the story, thus—in one way or another, even if choosing silence or pause—he will at all times continue the commenced story. However, the question justifiably arises: is it the commenced story indeed which he continues even if being aware of the antecedents? Or is the taking of this one time opportunity perhaps his self-fulfilment? So, isn't all this perhaps about the fact that, inspite of the wagging of whichever tail(s) at any point in time being allowed by certain antecedents, the decision made by whom is the last link in the chain of how and for what reason the given tail wags will depend on the own determination of the chain-writer? Consequently, won't the last link in the chain of any given time, about whom we have just said that he "continues" the story, think instead that all those whom he, so to say, "continues", simply gave him the opportunity to write? According to his ultimate conclusion, DWORKIN—living in a social environment still somewhat influenced by normative structures[48]—might have felt that inasmuch as this game was aimed at continuing the story, then some of the intentions have a chance to be still executed: the parties will probably attempt to undertake this at least.

FISH: by continuing we launch a new start indeed

The representative of the second variant, STANLEY FISH is more radical, yet more pessimistic with respect to the previous presupposition.[49] He puts the question as follows: why would the partners attempt to "continue" the story at

[building a theory on sheer convention]

[48] We have to see the Western world's self-conceit in both its quasi-religious belief in having become complete, perfect and universal (as shown by FRANCIS FUKUYAMA's *End of History* utopia on the final victory of liberalism) and the way RONALD DWORKIN's ideas were received as an established philosophy—despite resembling more an exposition of legal argumentation with universalising abstract and doctrinaire liberalism in the background, shared by some metropolitan audiences in the U.S.A. so restrictively that in another environment it could easily prove to be deprived from genuine relevancy.

[49] Stanley Fish *Doing What Comes Naturally* Change and the Rhetoric of Theory in Literary and Legal Studies (Durham & London: Duke University Press 1989) x + 613 pp. [Post-contemporary interventions] especially at pp. 87–119.

all, unless the s i t u a t i o n s ensuing one another in time result also in p r o c e s s - d e f i n i t i o n s following one another in a chain-like succession? Since, he rightly points it out, every situation is, in principle, unique and defined primarily by its own medium. Although it is also evident that each new situation conceals the cosmos of new opportunities, and in so much it presumes restarts and branch-offs starting out from and suited to all the conditions of its particular singularity alike. Notwithstanding that the succession's relationship to its origins prevails among them, this is not a generic one, therefore it will not narrow down the cosmos of potential possibilities. Hence, where the chain-writer as the "continuer" at any given time starts from will only serve as a historical p r e t e x t for writing.

YABLON: undefinedness in principle, with human decision re-contextualised

Finally, the third representative, CHARLES YABLON draws with relentless unambiguity the conclusions that offer themselves in the deconstructionist approach out of necessity:[50] both in societal life and in communication everything is a function of conventions. Since our communicational practice is characterised precisely by that each step not only provides feedback but conventionalises again, and the actualisation of conventions involves (even in the case of approval or confirmation) a potential shift in emphasis, maybe not visible or perceptible in and of itself, but truly capable of resulting in a new start due to cumulation, thereby representing a new definition. For this reason we ought to regard, at least in principle, the whole process (everything and at all times) as undefined. Needless to say, u n d e f i n e d n e s s i n p r i n c i p l e does not necessarily presume chaos or anarchy. What it means is only that in the realm of social understanding and transfer of tradition, that is, in actual social processes, mechanical links and quasi-causal definitions no longer prevail. In man's social world, environmental—that is, contextual, and, in this sense, hermeneutical—influences are the exclusive ones that can

[50] Charles M. Yablon 'Law and Metaphysics' *The Yale Law Journal* 96 (1987) 3, pp. 613–636 and especially at pp. 625–635.

result in a reliability manifest in social continuity. These are limitations that urge each of us as receptors to undertake and respond to what we have received—through communication with our fellowmen or as inherited from ancestors—apparently ready-to-take from preceding generations.

5.2. SOCIAL CONSTRUCTION OF MEANING

Meaning as continuum:

We must finally ask: what is meaning after all? Without repeating the considerations drawn from theories of meaning presented above, our response is rather laconic: meaning is some kind of social practice that transfers the understandings of social actors who take part in the practice of communication from one act of comprehension (communication) to another, reproducing in the meantime the process of communication itself concomitant with the re-establishment of the understanding born by the process, which it continuously attempts to mediate. For meaning is a process and not a 'thing' that could be given once and for all. More precisely, it is some sort of a continuum. In other words, it is a c o n t i n u i t y with limits and guiding principles inherent in the social practice and in the latter's continuous re-conventionalisation. This is why meaning, as regards its true nature, hardly differs from other social formalisations. That is to say, the existence of and the role played by language is not very different from that of a branch lying across the road, or of a knot tied in a handkerchief. The elementary act of communication ends precisely with the feedback signalling comprehension. So, the individual act of communication, due to its transformation into a process of communication, reconstructs and regenerates the meaning born by communication—thereby re-institutionalising meaning—, but it does so exclusively as a function of re-conventionalising re-interpretation.

roles performed through co-operation

For this reason we raise the question again: what does this social character of meaning stand for? And what is society composed of? Well, there is a self-evident answer to this last

question: society is composed of institutions. Yet, we can continue the line of questions: what is an institution composed of? Our exploratory answer will be more sophisticated this time: it is composed of roles performed by mutually co-operating persons. But a further question arises: what is co-operation composed of? Who and how, and especially with what contents will draw up its framework? We can advance one element of the response for now: 'co-operation' and 'roles performed' are complementary notions. One derives from the other, and they mutually determine each other. So, where do these role spring from?

5.2.1. Speech-acts

Linguistic communication: self-reproduction through active social self-regulation

The so-called theory of speech-acts emerged some decades ago, especially in the Anglo–American literature on the analysis of language. Following the path set by LUDWIG WITTGENSTEIN's scepticism, his relentless inquiries and analytical reductions to elementary situations, the theory of speech-acts has torn linguistic communication (as part of social communication) from its traditional epistemological framework, elevating it to an act of social ontological importance, to an active and creative agent of social action. The previous absolutism of the logical approach and explanation was also challenged, having been replaced by a concept of active social self-regulation, which, on its turn, is a part and an aspect of the process of social self-reproduction.

Speech → acting through speech → performation → institutionalisation (example: how much is my "weight"?]

In JOHN AUSTIN's perspective[51]—who realised that through language we can achieve more than the sheer reproductive reflection of either facts or interrelations of the external world; moreover, we can only act through construing our own world (that is, when speaking about the "world", we necessarily construct our own)—the important thing was the distinction between speech and acting

[51] By John L. Austin, *How to Do Things with Words* [1955] 2nd ed. J. O. Urmson & Mariana Sbisá (London, Oxford & New York: Oxford University Press 1976) x + 169 pp. and 'Performative Utterances' in his *Philosophical Papers* (Oxford: Clarendon Press 1961), pp. 220–239.

t h r o u g h s p e e c h (the so-called performative act). Within the range of these ideas, we call something p e r f o r m a t i v e that allows us to add something to reality, something that would (and could) not exist in it without the act of speech.[52] And—as already seen—this is what i n s t i t u t i o n a l i s a t i o n means.[53] With one good example: when I state how much my 'weight' is, that is, how many pounds I 'weigh', I give an account of an apparently mere physical relationship concerning my place taken in the world of gravity. However, the only 'brute' fact in this statement is that our concrete existence creates something otherwise described by physics as the force of gravity, and this is truly independent of the concreteness of our individual existence, because anything else could generate either the same or a quantitatively smaller or greater variant of it. Nevertheless, it will be entirely conventional—i.e., it will depend on the acknowledged social institutions—whether we eventually measure the above relation in pounds (and not in, e.g., poods), and that we happen to communicate about it using the above words ('weight', 'weigh').[54]

(example: "it's raining" × "I promise")

On the basis of all the above, taking a step further does not require more than to examine the essential difference between two typical forms of statement—for example, "it is raining" and "I promise"—relying on the above distinction.

[52] Cf., e.g., Austin 'Performative Utterances' and Alexander Sesonske 'Performatives' *The Journal of Philosophy* 62 (1965), pp. 459–468. From the rich literature concerning its legal aspects, cf., e.g., Dennis Kurzon *It Is Hereby Performed...* Explorations in Legal Speech Acts (Amsterdam & Philadelphia: John Benjamis Publishing Co. 1986) 81 pp. [Pragmatics & Beyond: An Interdisciplinary Series of Language Studies VII:6].

[53] Cf., e.g., G. E. M. Anscombe 'On Brute Facts' *Analysis* 18 (1958) 4, pp. 69–72 and John R. Searle *Speech Acts* An Essay in the Philosophy of Language (London: Cambridge University Press 1970) vi + 203 pp.

[54] "Brute facts, such as, e.g., the fact that I weigh 160 pounds, of course require certain conventions of measuring weight and also require certain linguistic institutions in order to be stated on a language, but the fact stated is nonetheless a brute fact, as opposed to the fact that it was stated, which is an institutional fact.' Searle, p. 51, note 1.

What is constative can be verified

Our initial foreknowledge on the first seems obvious. Thus, the statement of "it is raining" truly describes something given that exists and happens anyway, regardless of the act of description. In consequence, our statement merely makes the otherwise existent conscious. Accordingly, it may as well happen that we are mistaken. The issue of whether we are right or wrong here and now can be clarified by scrutinising the truth-value in the epistemological sense of our statement, 'verifying' or 'falsifying' it.

What establishes an institution brings about a framework of convention(s)

The second example, the utterance of "I promise", appears artificial indeed, because it establishes an institution and in so much generates some sort of reality. Hence, as opposed to propositions of an epistemological value, here we ought to state that

- what it is about is (and can only be) established by a s p e e c h - a c t , being unable to prevail without it;
- what is brought about by the speech-act cannot be formed in isolation but only within some kind of c o m m u n i t y . (Of course, the question instantly arises: what is the case when we make the promise in a prayer whispered to ourselves? The scholarly response will presumably point at the symbolic role of the prayer, and will argue that regardless of how much the act of praying is performed in isolation, praying basically means the initiation of a dialogue with whom the prayer is addressed to. In consequence, the promise made while praying will be a common one, albeit distinct in nature and importance with regard to the addressed being);
- the meaning and significance of what we 'promise' can only be conceived and construed within an institutionalised framework, a s t h e c a s e o f s o m e t h i n g , as one of the classified cases of an institution called 'promise';
- the institution, on the other hand, of which our manifestation (or the concrete institutionalisation resulting from it) is a case, can be brought about exclusively a s t h e p r o d u c t o f c o n s t i t u t i v e r u l e s which establish the institution concerned; consequently

· we have to proceed in accordance with previously established rules (and must carry the rule-framed procedure through) for the concrete institutionalisation (constitutable according to the constitutive rules) to incur, for that the institution will 'materialise' and 'come into being'.[55]

5.2.2. Social institutionalisation

Institutionalisation as socialisation:

Recognising the nature of speech-acts has at least two consequences when generalised for the overall social dimensions. On the one hand, the process of institutionalisation is irreversible. For any institutionalisation will give birth to further institutionalisation (at most, but necessarily in the case of perfection), and each institutional characteristic displayed in a set of relations will unavoidably confer institutionality on the entire set of relations taken as a total whole. In other words, the set of relations of any institution and the network of its components become themselves institutional out of necessity. On the other hand, as deriving from this process (or, quoting GEORGE LUKÁCS's term, in the irreversible progress of the process of "socialisation"[56]), the separation of 'institutional' features from 'non-institutional' ones (for instance, in the case of facts, the separation of 'brute' facts from 'institutional' ones) is gradually becoming—due to the irreversible progress of the process of socialisation—a function of comparison, that is, fully relative. Prospectively, institutionalisation is endless. In the final

[terminological games may ensue in function of constitutivity]

[55] This may also assert itself the other way round. As, for example, in the United States a 'war' can set in exclusive result of a Congress declaration, the military actions in Korea in the 1950s were, in want of such declaration, referred to as 'Korean conflict' or 'UN Police Action' only. And the explanation is simple: "Since the phenomenon did not satisfy the *X* term for imposing the status-function, the *Y* term »war« was not applied". John R. Searle *The Construction of Social Reality* (London: Penguin 1996) 256 pp. [Penguin Philosophy] on p. 89.

[56] György Lukács *A társadalmi lét ontológiájáról* I–III [Zur Ontologie des gesellschaftlichen Seins] (Budapest: Magvető 1976). Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1998]), passim, especially at para. 5.1.2.

analysis, there will hardly be more left from 'brute' facts than what we declare to be such by abstraction.

it is abstraction produced by constitutive rules & realised in fluctuation

Yet, the institution is also a product of constitutive rules. Therefore, it is by no means independent of norms and of meeting the criteria set by them. So, the very fact of speaking of 'institutions' is itself a pure abstraction. Since, as we have seen, an institution requires for its being brought about a rule defining that institution, an act complying with the criteria set by the rule, as well as the institution-creating (actualising) intention of at least one of the parties to the institution according to the rule in question—in so far as this can, under the rule, be activated also one-sidedly (e.g., 'providing food' for an inert old person); or of the joint declaration of will by the parties—in case the institution is built not only to some external behaviour to be manifested (e.g., uttering the 'yes' consenting to 'marriage') but to a consensus involved as well (distinguishing the contracting of a marriage both from the learning of how to contract a marriage and from its being acted out on the stage). At the same time, what we usually think to be an institution (e.g., 'practice of parental right' in the natural connection with the child, or natural human communication within the field of the 'practice of the freedom of speech' but without entering the field of 'defamation') can only exist in form of an infinite number of individual 'embodiments', that is, in the form of the most varied kinds of attempts at materialisation and, of course, its accomplishments as well. In consequence, its existence can be nothing other than continuous f l u c t u a t i o n (passive and active) by, in the course and as a result of, which a given institution is s t r e n g t h e n e d , l e f t u n t o u c h e d , or eventually w e a k e n e d in its quality of an institution. The majority of acts we can isolate for further analysis (by tearing them out of social practice) are barely of an intermediate nature. For however much a given institution is strengthened, left untouched or weakened by such acts, the same act will still necessarily refer, affect and exert a determining influence on other institutional networks—approaching them, distancing from them, or simply coming to a reflectable relationship with them.

with identification achieved also as a process in dependce on practice

When analysing the dilemmas of understanding the norm,[57] the turning point in our reasoning was provided by the possibilities of formulating criteria for normality and order. The issue at this point will be the criterion-like formulation of institutional character and framework (the "constitution"). In terms of methodology, however, we are facing exactly the same dilemma: how can something be unchangeably identical with itself if it does not emerge and is not identifiable in unchanged identity with its self but only in a certain way, sense, respect, and hypostatised tendency?[58]

through re-conventionalising conventions

The theoretical significance of the problem is defined by that the sole medium of linguistic manifestation—speech, on the one hand, and acts carried out through speech, on the other—means the uninterrupted process of the societal p r a c t i c e o f c o m m u n i c a t i o n (mediating the meanings by making them comprehensible to the partners, as a rule). Communicational practice is, on its turn, the continuous preservation, re-confirmation and actualisation of its underlying conventions, that is—*nolens volens*—the r e - c o n v e n t i o n a l i s a t i o n of already existent conventions by the series of individual acts of communication.

Communication is dependent on praxis: meaning + institutional practice

Can there be anything else that could generate society? Is there anything else we could rely on? And, what could be our point of reference at all? As we have just seen, nothing else is left for us but

- the m e a n i n g that can be confirmed and transmitted to our partners in communication through communicational feedback, therefore being itself conventional; and

[example: 'promise']

[57] Cf. para. 4.3.1.

[58] To the question of what 'promise' actually is we might find an answer in the definitions provided by dictionaries or textbooks, but this kind of definition will by no means be a substitute for the 'promise' proper. As known, in reality not even a "type" or "average" occurrence of 'promise' can occur. What can actually be perceived is a mass of events that can be put into a variety of different conceptual networks and sets of relations, providing almost infinite opportunities for conceptualisation, from among which we may name some 'promises' in the practice of communication serving our own interests and displaying a certain consistency.

- the institutional practice established by a large mass of communicational acts, which may show constant fluctuation when viewed from a given (institutional) level, but on a higher selective (institutional) level it is already defined—by us, participants at social communication—as a (given) institutional materialisation, that is, as the case of an institution taken as known and received as given.[59]

Σ: institutional character is referred to linguistic reconventionalisation

We have thus arrived back to the relative identity and mutual interdependence of linguistic communication and institutional existence. From the perspective of philosophy, we are back at the statement that language and institutional character are merely the mutually projected aspects of one another. For institutional existence can only be characterised as one that

- can be construed exclusively as performed (by language or by proper, indicative behaviour), and
- can be actualised exclusively as a process similarly to the way in which the re-conventionalisation of (linguistic) meaning is obtained.

5.3. AUTOPOIESIS AND SYSTEMIC RESPONSE

"Black box": a process transforming in-put into out-put

Two natural scientists from Chile, FRANCISCO J. VARELA and HUMBERTO R. MATURANA, after long years of research conducted in cellular reproduction, discovered a methodological idea prevalent within molecular cytobiology. They sought to comprehend what happens inside a cell during its reproduction. Since from a mass of data at their disposal they could clearly conclude that the process behaves like a system already at the level of individual cells. The answer

[59] When acting in everyday civil or professional life, we usually "make the promise" instead of just contemplating the conceptual contents and extension of a 'promise'. On the level of analysis, however, if our action requires closer control or even external (moral, professional or legal) evaluation for whatever reason, the promise will then be classified as the realisation of the conceptual class of 'promise'.

always slipped out of their hands independently of whether they attempted to explain this phenomenon by describing it as a c l o s e d system, within which the reproduction of cells takes place at any time according to a certain code without alteration, or whether they conceived it as an o p e n system, in which it was the environment that shaped the process of renewal. A solution was finally brought forth by a new conception of systemicity. Taking the initial situation (input) and the final outcome (output) into account, they described the process in terms of the statistical-methodological analysis of what the process generated and from what it originated (*Figure 12*).

Figure 12.

Reproduction is secure, on the basis of self-regulation

MATURANA and VARELA found—and this is what the formula above suggests—that the c o m p l e t i o n o f r e p r o d u c t i o n is the sole thing that can be considered as a secure point of reference. Whatever happens inside the process is wholly s e l f - g o v e r n i n g , s e l f - c r e a t i n g , r e f e r r i n g a n d r e f e r r e d t o i t s o w n s e l f , because—and this was the conclusion of their research in cellular biology—the medium, boundaries, inner laws and ways of reproduction are all defined by the system itself by and during its operation. For the system keeps continuous contact with the outside world, in the course of which it produces the conditions of its own reproduction, re-establishes the limits of its range of motion, and eventually it reproduces itself together with all of its components. The genuine methodological novelty in this realisation was that self-creation, functioning in a black-box-like way, does by no means give evidence of some epistemological deficiency or gap, vacuum or chasm. Nonetheless, as it was pointed out, neither is it a mistake that we had no previous knowledge of

its regularities; nor does it mean the admittance of agnosticism (i.e., the impossibility of knowledge and cognisability) if we feel—justifiably—that we could not have known about it earlier. The novelty lies exactly in that priorly there was nothing to know about because everything that occurs during reproduction (including its limits, inner laws and ways as well) is created by the system itself from case to case, from step to step.[60]

Autopoiesis: self-generation, generating its regularities, too, by and during the process

This is autopoiesis proper, a 'self-creation', since the system organises its present in the process, as well as the framework, limits and ways for its future self-reproduction, furthermore, it produces (selects, organises and operates) all the components to be later reproduced, thereby necessarily reproducing its self-identity in the process of self-creation.[61]

Society is also self-organising self-regulation

As usually happens when a new creative thought is formulated, trends and schools are soon to follow to generalise the original idea philosophically, by exploiting its potential socio-theoretical readings and consequences. Accordingly, as a by-product, the once liberating effects have led to doctrinaire debates and schematisations, sometimes carried

[60] For a classical summary, see Humberto R. Maturana & Francisco J. Varela *Autopoiesis and Cognition* The Realization of the Living [De Máquinas y Seres Vivos (Santiago de Chile: Editorial Universitaria 1972)] (Dordrecht, Boston & London: Reidel 1980) xxx + 141 pp. [Boston Studies in the Philosophy of Science 42]; Francisco J. Varela *Principles of Biological Autonomy* (New York: North Holland Elsevier 1979) xx + 306 pp. [The North Holland Series in General Systems Research 2]; and Humberto R. Maturana 'Autopoiesis' in *Autopoiesis* A Theory of Living Organization, ed. Milan Zeleny (New York & Oxford: North Holland 1981) xviii + 314 pp. [The North Holland Series in General Systems Research 3].

[61] For a philosophical summary, see Humberto R. Maturana 'Man and Society' in *Autopoiesis, Communication, and Society* The Theory of Autopoietic Systems in the Social Sciences, ed. Frank Benseler, Peter M. Hejl & Wolfram K. Köck (Frankfurt am Main & New York: Campus 1980) 229 pp. and especially at p. 29, admitting that all of this is just a late reformulation of the original realisation by CLAUDE BERNARD, father of experimental medicine, which he outlined in his *Introduction à l'étude de la médicine expérimentale* (Paris & New York: Baillière 1864) 400 pp.

through with an almost Prussian rigour.[62] In the understanding of human cognition and social action—giving and gaining meanings[63]—, the idea of autopoiesis may inspire a methodological renewal. All it suggests is that in the long run we can trust social processes that appear to be free from in-built laws and rigid paths, moreover, these processes do set frameworks and boundaries in their motion, which allow us eventually to distinguish the autopoietic system-regeneration—i.e., the system's constantly renewing rebuilding (through self-preferential, self-organising, self-governing, and, ultimately, self-producing processes)—clearly from anarchical libertarianism and limitlessness.

LUHMANN: normative closedness within the openness of receiving information in the processes of social *Ausdifferenzierung*

The recently deceased German sociologist, NIKLAS LUHMANN presents autopoiesis in his macro-sociological theory[64] as the duality inherent in any social (sub)system under the parallel restraint of (normative) closedness and (cognitive) openness. Accordingly, closedness offers self-identity for the given (sub)system's (re)productive processes, whereas openness enables the (sub)system to function adequately within the social totality by communicating with other (sub)systems through interaction with them. So, the (cognitive) openness of systemic organisation of any given time gives meaning to its existence, while the (normative) closedness provides the framework for its exis-

[62] For the best collection of papers before the movement had come to exhaustion, see *Autopoietic Law* A New Approach to Law and Society, ed. Gunther Teubner (Berlin & New York: de Gruyter 1988) viii + 380 pp. [European University Institute, Series A, 8]. For an early professional stand, cf. Agostino Carrino 'Autopoiesi dell'ordinamento dinamico diritto e sociologia in Kelsen' *Sociologia del diritto* XVII (1991) 2, pp. 13–42.

[63] For the term, see Ch[aïm] Perelman 'Avoir un sens et donner un sens' *Logique et Analyse* (1962), No. 5, pp. 235–250.

[64] Cf., by Niklas Luhmann, *Die Wissenschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp 1990) 732 pp., 'Legal Argumentation: An Analysis of Its Form' *The Modern Law Review* 59 (1995) 3, pp. 285–298, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp 1997) 598 pp. [Suhrkamp Taschenbuch Wissenschaft 1183] as well as, in a synthesis, *Essays on Self-reference* (New York: Columbia University Press 1990) 245 pp.

tence, by decomposing [LUHMANN marks it with the term '*Ausdifferenzierung*'] social totality into sets of social (sub)systems, which are functionally separated but still co-operating (identifiable in retrospect, from the perspective of the outcome of processes).

feedback through sub-systemic competition

Thinking the bases and consequences of similar developments through may convince us that the recognition in the autopoietic concept of a system may purport more than what other concepts do. Accordingly, autopoiesis does not rigidify the internal complexity of social totality, but generates c o m p e t i n g p a t h s within it. Thus, (sub)systems themselves, by internally closing the motions that start from within, not so much rigidify but rather make them f e d b a c k by the actual processes, that is, they confer the ways of how the criteria of closure evolve onto functions of various motions competing to determine the system's reproduction. Hence, what appears to be closedness in a static logical description is the actual functioning from the perspective of the process' dynamics, in which closure can be seen by an external, observing analyst at most. For this reason, everything said so far about the recent re-interpretation of "fact", "notion", "logic" and "thinking" in the latest developments of cognitive sciences[65] may find its view and reference (rooted in the real world) in the autopoiesis of self-creating processes (and thereby in the self-closure subjected to logical reconstruction).

Σ: instead of the statism of the subject + object, a process creating environment by acquiring it, human practice is self-productive itself, with "check & balance" feedback

All earlier conceptions presented both humans and the outside world as the sequence of independent entities. Accordingly, in this "objective reality which is independent of consciousness", certain regularities work and prevail with the force of mechanical necessity, directing our casual encounters with the outside world when we, as "cognising" subjects, penetrate the subject "to be cognised" in order to disclose its regularities by means of our own regularities, or at least, to reflect them in us, in our "consciousness". As opposed to such simplistic conceptions (reminiscent of the occasional romance of skittle-balls), present-day cognitive

[65] Cf. para. 4.2.

sciences suggest a more complex view. As if having learned from autopoiesis, they truly construe the events as p r o c e s s e s . Instead of postulating false or sham dualisms (e.g., placing the one who is "cognising" and what is "cognised" into the sequence of active subject and passive subject), it rather sees a complexity of events in which those acting do not simply cognise in interaction with their environment but also c r e a t e t h e i r e n v i r o n m e n t b y a c q u i r i n g it. Social reality is a human product, and facts, notions, logic and thinking are merely parts of this artificially constructed human world. Among other things, man construes his own language, through which he elevates the environment into a part of his world. As to the minor details, it may as well happen that we are just groping about in the dark. Nevertheless, it is usually enough to trust the processes with the f e e d - b a c k and s e l f - p r o d u c t i v e f o r c e o f h u m a n p r a c t i c e . In the same way, we know that our body is constantly re-organising as long as we live, as our cells reproduce independently of our intentions. The functions of "check & balance" and control are fulfilled also by the process of reproduction within the framework of autopoietic self-definition. This is similar to how priests, physicians, lawyers and police officers in the enormous human-built machinery of check and control watch the protection of the limits of tolerable human deviance, so that social reproduction should not exceed the limits regarded as normal.

So, cells reproduce. And in retrospect we may be sure at any given time that the self-regulation of the path that led to the process' end-point has definitely taken place. It offers a fixed point especially by convincing us that falling into the trap of opposite extremes can be avoided, particularly those of naive realism and subjectivism.

Therefore, it is to be considered in what the liberating effects of the autopoietic view consist, and where its emphases should be put. For it is far from being merely incidental that all these problems are being discussed here and now when questions of meaning are involved. We have to avoid the traps here as well and must sense the double clasp

of the Scylla and Charybdis between the mechanical character of lexical conception and the unrestricted licentiousness of deconstructionism. Here we can only rely on the process, feedback and long-term stability of human commerce, taking into account all the available arguments and considerations, even if they appear to be pushing us towards uncertainty. For we know that giving a meaning is not done by mere chance but is limited by internal balances and interpretation is always performed in a practical context; and any partial truth—at least in a systemic context and in the long run—can be asserted only with regard to the total whole. As we have seen it before, it is similar to how the chasing of individual justice cannot outgrow proportions that would threaten community existence and survival,[66] the playground for conventions and confirmations of meaning is not boundless either, since it can prevail only within the limits still tolerable by the community. It is the community that sets the measures at all times, while we can become deviants at an individual level only. More freedom is just an illusion, because by being our own masters we are more likely to become servants of our own affairs. The easiness of external conformism is thus replaced by an internal undertaking of responsibility, and we have awoken to the consciousness that instead of being the puppets of deities we are, all at an individual level, the repositories of our common fate.

with the properties of closedness and openness at the same time

It is just one of the features of NIKLAS LUHMANN's autopoietical theory that he originates the differentiation of society into sub-systems from the point where the system closes itself. He hit the bull's eye when he sought the master-example of autopoietic self-organising processes in the law's functioning. LUHMANN was right, since the most conspicuous with law is strainedness in reality of the relationship between normative closedness and openness to information. For law is a formalised culture, hence normative closedness is its *sine qua non* precondition. On the other hand, the openness to informa-

[66] Cf., para. 2.3.1.8.

tion provides reason for functioning. Since law is expected to solve conflicts of interests in a manner that over and above the unconditional primacy of strictly formal relevance it should not push moral and other substantive considerations into the background—at least not beyond the proper limits and degree drawn by necessary differentiation.

"System of fulfilment" in law

Let us have a closer look at what we understand by normative closure in law. Previously we have made it clear that law is composed of n o r m a t i v e e x p e c t a t i o n s, and its formal requirements are asserted through the law's o w n s y s t e m o f f u l f i l m e n t. Formalisation and logification may create an axiomatic framework for formal logic through deductive syllogism and normative subordination, its victory, however, will remain Pyrrhic—ephemer, moreover, necessarily turning backwards at a later time—, because the old tensions, thought to have been suppressed, between normative expectations and the social needs and moral considerations (etc.) concerning the merits of the case will again return in forms of processes called discrepancies of the so-called law-application. And what could have been formulated in the dilemma's own terms within a non-formalised medium, now takes the shape of logic, and will be conceptualised as the "problem" of "subordination". Although, as a theoretical description, this will be nothing more pretentious than pure false consciousness, since from an ontological perspective, logical conclusion is one of the necessary [or, as GEORGE LUKÁCS termed it in his social ontology: '*seinhaftige*'] components of modern formal legal arrangements.[67]

according to conventionalisation

Having in mind the doubt-raising effects of what the arbitrariness of legal force means for a strictly logical pattern on the plane of "construction", and what the strongly autopoietical nature of gaining the meaning on the plane of "functioning" means, we may realise that "normative closedness" is concomitantly normative openness, since "closure from within" can be a figurative expression at most, which, if taken as an ontological statement, is necessarily

[67] In greater detail, see para. 6.2.

plainly false consciousness. Knowing that the meaning is contextualised, it is of an open texture and defined hermeneutically as (deconstructively) conventionalised by the productive continuity of social processes, well, all things considered, we can only conclude that the social complexity of meaning may introduce further fields of (conceptual) play into legal processes without the chance of closing them through formal definition.

Dependence of social quality on qualification

The ultimate message of autopoiesis may suggest that whatever the contents or form, s o c i a l e v e n t s are still the t r a n s p o s i t i o n or p r e s e r v a t i o n of social q u a l i t i e s as "social" by means of non-refuted (or nullified) reference aimed at the "social".[68]

[68] Cf., from the author, 'Judicial Reproduction of the Law in an Autopoietical System?' in *Technischer Imperativ und Legitimationskrise des Rechts* ed. Werner Krawietz & Antonio A. Martino & Kenneth I. Winston (Berlin: Duncker & Humblot 1991), pp. 305–313 [Rechtstheorie, Beiheft 11] & *Acta Juridica Academiae Scientiarum Hungaricae* XXXII (1990) 1–2, pp. 144–151; 'European Integration and the Uniqueness of National Legal Cultures' [1992] in *The Common Law of Europe and the Future of Legal Education / Le droit commun de l'Europe et l'avenir de l'enseignement juridique* ed. Bruno De Witte & Caroline Forder (Deventer: Kluwer Law and Taxation Publishers 1992), pp. 721–733 [METRO], reprinted in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994), pp. 399–411, as well as—and especially —*Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995), para. 5.4, pp. 157–164.

6. PARADIGMS OF LEGAL THINKING

6.1. THE NATURE OF LAW

We usually think of law in a rather simplifying manner, and this holds for common people, professionals and scholars alike.

Law: an aggregate of rules of behaviour with the coercive force of the state

According to its most common definition, law is the aggregate of rules of behaviour, with the coercive force of the state ultimately standing behind them. It is an issue of underlying pre-understanding to decide whether such definition should be confirmed unconditionally or objections should be emphasised concerning certain elements of this definition. All this is also a matter of expectations. When we regard the definition as one allowing us to accentuate some of its presumably most important elements, we can probably confirm the above definition. Whereas when we treat the definition as expressing the notion of *genus* that serves for common foundations in a strict logical sense [*genus proximus*] with those distinguishing features within this concept of *genus* that specify the law [*differentia specifica*] for a denotation applicable as a criterion, we are likely to give free reign to our doubts. For example, can it qualify as a rule of behaviour that has not yet been formulated, or that is only existent as a culturally relative normative expectation, or as the mere derivative of an otherwise recognised principle? Can we regard something as supported by the coercive power of the state if the state has no factual knowledge of it—either because there is no state (then and there), or because the state could exclusively learn about it passively and, what is more, posteriorly (e.g., only after a certain procedure becomes customised and also acknowledged as a custom is

the state bound to recognise it as its own norm)? Well, inasmuch as such a definition is merely a sign of the way we think and of how we approach notional dilemmas, the above questions will become irrelevant. That is due to the fact that the definition itself can just as well be interpreted metaphorically, its contents serving as mere signs and guiding principles in the absence of anything better. In the reverse case, however, if we treat the definition as conceptual demarcation excluding any other occurrence (*omnis definitio negatio est*), then, and especially in borderline cases, we must make a choice: do we rather agree to approve the conceptual direction, laid down by the definition, or, instead, do we appreciate the consequences of its criterion-generating significance unavoidably excluding all different formations (e.g., pre-state or extra-state norm-systems) from the sphere of the notion?

"On the basis of the comparative study of legal cultures and allowing for purely social considerations, I propose concluding:

Law: global phenomenon embracing society as a whole

(1) Law is a global phenomenon embracing society as a whole. Accordingly, criminal gangs (mafia, *Cosa Nostra*), economic associations (guilds), secret societies (religious and/or political as early CHRISTians, GARIBALDIsts), as well as other club- and party-like organisations fall outside the domain of law in so far as society is territorially organised and those groups are closed, involving only so-called members. If social organisation is still personal, the ground of separation between law and non-law is whether the given organisation is exclusive and, if so, it theoretically involves all in compliance with its personal categories. The next consideration I propose is:

to settle fundamental conflicts of interests

(2) Law is a phenomenon able to settle conflicts of interests that emerge in social practice as fundamental. In society law is supposed to be the prime check and control performing this function. Law is to regulate relations sufficiently fundamental so that it can create society (by drawing structure of and boundaries to it). In European urban development, some guilds settled conflicts of interests fundamental to society as a whole. If conflict-settlement is restricted to partial relations (e.g., life within the guild, order of external relationship relevant to guild activity), it can at the most be regarded as a set of rules integrated into the law or parallel with it, but in any case as one of a

different kind. Or, in situations of transition (e.g., in times of the dissolution of state-organised power machinery), political parties can assume a role amounting to function as the main controlling factor of society, filling in the vacuum that has arisen. Lastly, in religious communities having sect-like claims of exclusiveness and aiming at the assertion of their own commands in all fields of common life, it may occur that, organising themselves as self-supporting communities, they make use of their own set of rules as a legal system. This was attempted, for example, by Quaker communities withdrawing from civilisation (18–19th century British emigrants) or separating within civilisation (19–20th century settlers in America). And finally:

prevailing as the supreme controlling factor

(3) Law is a phenomenon prevailing as the supreme controlling factor in society. Should several systems of norms assert themselves in society, the law's set-up is the one whose procedure can, in a situation of conflict, be successfully resorted to in order to implement and enforce ultimate solution.

It is to be noted, however, that procedural efficacy never asserts itself in pure form. For instance, is the legal character of Estonian or Texas law to be derived from a further source when Soviet or American federal law has been superimposed on them, respectively? How is the supremacy of the own procedure to be interpreted if there is a direct recourse to international legal authorities in minority or human rights affairs? How to assess criminal gangs, secret societies, political or religious organisations attempting to win acceptance for their claims by coercively preventing (through assassinations, etc.) their conflicts from being presented to external authorities? These social considerations are conceived of as mutually reinforcing each other within a cluster. The more completely they are manifested, the more probably one may talk about the presence of law in a sociological-anthropological sense."[1]

(example: bordering issues of state-frameworks)

What to regard as other formations, as pre-state or extra-state normative systems, is a separate issue.[2] Twentieth

[1] Csaba Varga 'Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures' [1985] in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994), pp. 451–452 [Philosophiae Iuris].

[2] For one segment of it, cf., by the author, 'From Legal Customs to Legal Folkways' *Acta Juridica Academiae Scientiarum Hungaricae* 25 (1983) 3–4, pp. 454–459 & *Tidskrift för Rättssociologi* [Lund] 2 (1985) 1, pp. 39–48

century East-European history has, for example, generated the multitude of such entangled situations in which it could occur, for instance, that a new statehood establishing itself in the wake of foreign occupation would be condemned and retaliated against by the successor returning to the *status quo ante*, declaring the former's institutional arrangement and the legal effects of its administration null and void and never even to have existed. In addition, this successor state may have stigmatised and punished posteriorly any past contact (indispensable for leading everyday life) on the part of the civilian population under occupation with such statehood declared never existent by the successor state, as if life under occupation and the bare fact of having survived were done for and within the framework of open collaboration with the enemy.[3]

(example: military occupation)

From the former Soviet Union, the Baltic states and the larger part of the Ukraine were the first in World War II to fall under German occupation in the East. Firstly a partisan movement of nationalist drive was formed, wanting to be freed by any means from Soviet occupation, followed by a pro-Soviet movement, especially in the hardly controllable swampy areas. The prevalence of local administration erected by the German occupants (undisturbed sometimes only in daylight) was soon challenged by the rising influence of (national and/or Soviet) partisans (whose wishes and demands grew stronger and stronger with their ability to get enforced during the nights). At the same time, other occupant military administrations (the Hungarian one, among others), balancing between the former two, tried to impose a counter-balance; insuring itself, despite being in alliance with the Germans, by helping the local population to survive and at times simply to live, and concomitantly maintaining a reasonable relationship with the partisans, acknowledging

as well as 'Theory of Law – Legal Ethnography, Or the Theoretical Fruits of Inquiries into Folkways' *Sociologia del Diritto* [Milano], XXXVII (2010) 1, pp. 82–101 {abstract pp. 222–223} & in <http://www.francoangeli.it/riviste/Scheda_Riviste.asp?IDArticolo=39637&Tipo=Articolo%20PDF&lingua=it>.

[3] After-WWII Yugoslavia of TITO is the prime example.

their factual presence as a brute reality. All local efforts notwithstanding, the Soviet power, once re-imposed after the war, immediately declared every "politik-real" a treason when screening the local survivors, and stigmatised entire populations of territories which had ever fallen under German occupation as unreliable, excluding them for this reason even from the Soviet-type of advancement (eligibility for positions of confidence, including both foreign service and travel to the West).[4]

(example: renewal in partisan movements)

In the former Yugoslavia, after the dismemberment of the Kingdom and the German occupation of the decomposing state, various partisan movements with different national inclinations and networks of political connections were born and began to control the territories next to their base with varying chances and continuity. By the end of the war, one of the existing dozen partisan movements rose above the others. This movement one-sidedly announced all the others traitors and the entire law prevailing under the occupation to have never existed according to its own right as well as all relations and cases that developed and occurred during the war between the subjected population and local administrations and jurisdictions legally to be non-instituted and therefore *ex tunc* null and void so far as their legal consequences were concerned, and branded personal relations as collaboration with the enemy.

Anglo–American judicial declaration of the law & continental rule-positivism equally covered

Confusion, unilaterality, simplification and conceptual narrowing in the conception of law were, however, primarily caused by the fact that legal ideologies determining the motility within law and the particular way of professional argumentation characteristic of individual legal cultures, stepped beyond their own sphere, thus dominating the general (everyday and scholarly) approach to law as well. In the English–American legal culture (Common Law), for instance, in the realm of precedents, the above definition could be accepted since their practice (according to which establishing what the law actually is is ultimately performed by the judge proceeding in the name of the law and under the authorising seal of the state) was compatible with the conceptual sphere of the prevalent ideologies. This practice regarded anything else (statutory instruments, administra-

[4] Exemplary of the biass of local feeling, either Ukrainian or Hungarian, no published report is available on its details to date.

tive decrees and local governmental acts, as well as the previous jurisprudence of courts) as the mere antecedents of the judicial function of actual decision-making, to which precedents may afford a brute medium requiring actualisation at the most. However, the legal cultures of continental Europe (Civil Law) could accept the same definition as well, for they disposed of proper grounds to understand it as meeting their requirements, for their underlying concept was one of tracing back the law to the textual manifestation of some previously established rules. From our methodological perspective, it is worthy of attention above all that such an allegedly concise and unambiguous definition could provide the background for such almost antagonistic conceptions as well.[5]

Statutory positivism: the law is originated by positivation

Beyond this, legal positivism, solely prevalent (especially in Europe) from the end of the 19th century on, and particularly its most narrow off-spring, the so-called s t a t u t o r y positivism (recognising statutes as the only forms of law), did the most for our conception of law to have a reified and static phenomenon suggested for law. Actually, all cultures that recognise law exclusively in the form of previously enacted statutes utterly dissolve the *ius* into (by deducing it from) the concept of the *lex*. (A definition of this kind is one which conceives of law as an exclusive aggregate of rules created through a procedure recognised, and in the way prescribed, by the law—if and insofar as "recognised" procedure and "prescribed" way are to be interpreted as the operation of a formal institution defined by a constitutive

[5] Cf., by the author, 'Varieties of Law and the Rule of Law' *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1, pp. 61–72 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, Doris Liebwald, Silvia Angeneder & Thomas Menzel (Stuttgart, München, Hannover, Berlin, Weimar & Dresden: Richard Boorberg Verlag 2005), pp. 58–65 & '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>.

regulation, e.g., written constitution—as a criterion. However, if and insfar as this "recognition" can also be merely factual as arising from a posterior sociological description of the actual functioning regarding the effects, we are to return to the conceptual duality or ambivalence inherent in any self-generating mental construction with a sociological backing like law.[6])

As is known, legal positivism builds primarily on the lexical theory of meaning to substantiate interpretation. Accordingly, the *lex*, comprising its meaning in a codified, immutable and exhaustive manner, is identical with the textual appearance of the statute. So, it is r e a d y - m a d e , as an objectification c o m p l e t e d , which stands in and by itself. Thus, it is not a conceptual precondition to, or element of, its very existence but eventual complement at most that the *lex* may come to be applied at some later time. This may prove good or bad, suitable or unsuitable, feasible or unfeasible, regardless of the value of the *lex* itself. The European culture of legal positivism still considers law a static and self-sufficient entity, completed once and for all, given and ready-to-take, the only thing we are expected to do with which is to sense its existence and use it for legal patterning whenever it is applicable.

Deontology: formed by the ideology of the legal profession

The theoretical experience drawn from such a reasoning drives us toward reconsideration. Science-philosophical and methodological, cognitive and semantic considerations encourage us to draw a more complex picture of the nature of law. These considerations do not refute earlier truths, although they still allow a more differentiated understanding of the specificity of the law's existence. They urge us to transcend the reified and static view of law without denying

[6] For the positivist and sociological concept-formation in and on law, in the perspective of their feasible synthesis, cf., by the author, 'Quelques questions méthodologiques de la formation des concepts en sciences juridique' *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), pp. 215–241 & *Algunas cuestiones metodológicas de la formación de los conceptos en ciencias jurídicas* trad. Hortensia Adrianza de Casas (Maracaibo: Instituto de Filosofia del Derecho LUZ 1982) 38 pp. [Cuaderno de trabajo 32].

those ontologically significant elements that determine legal functioning in the respective legal cultures, i.e., legal ideologies working in actual practice, which stand for the d e o n t o l o g y of the legal profession.

Common features

In the following we will give an overview of some aspects of the existence, nature and ontological character of law, despite the fact that they only contribute marginally at best to our understanding of the nature of law. They are neither definitions, nor are they intended to substitute definition. If thus far we have attempted to provide instances of how we can interpret a usual definition according to usually acknowledged old paradigms that seem to stand all trials, henceforth we shall investigate how the same definition can be interpreted in the same valid and right way according to a reconsidered view, to be formed on the nature of law and the very paradigms underlying it.

6.1.1. Law as process

Process

By definition and in accordance with its ontological standing, law is a process-like phenomenon.

Legal positivation affords just a potentiality that may be actualised through legal processes:

Given that we must regard the textual body of the law as sheer historical reference, as an open potentiality within a given framework in order to be able to establish its meaning through a posterior operation called judicial interpretation, it will become obvious that this textual objectification itself is nothing more than mere chance, which can become truly law through actualisation. This actualisation takes place in various social processes officially labelled and widely recognised as legal.

the law is not outcome of some materiality

This, however, goes against all former conceptions, since it builds upon the recognition that law cannot be identified with any material manifestation or objectification of a *per se* dead subject. Therefore, as a more developed version of our previous definition we can claim: only the social mediation of the actual meaning of a rule of behaviour can serve for law inasmuch as it is ultimately backed by the coercive force of the state. Yet the social mediation of any kind of meaning not only presupposes the existence of an alleged sign, but the definition of its meaning(s) as well. For there are no mean-

ings in general. They are ascertainable only in concrete situations as defined by a concrete context. And some forum must establish the meaning in a concrete situation and context at some time.

Law: an actualised process-like continuum

In varying situations and contexts the same textual body may suggest variations of meaning intermediate to some extent—and so far continuously changing in space and time. One consequence, however, is the following: since law is not a textual body in itself, neither is it some sort of mere referential practice, but precisely the juncture of these two—namely, the sequence of actualisations at any time of a textual body by and through a practice making reference to it—, so law should rather be conceived as a process-like dynamic continuum, instead of being reducible to a static reified entity. Law is obviously an aspect generated by social processes that make use of it by referring to it. Thus, when the coercive force of the state stands behind such a social process, we ought to presume the existence of law as well.

6.1.2. Law as a multifactoral phenomenon

Several process-like factors defining it:

By definition and in accordance with its ontological standing, law is a multifactoral process, that is, all of its components are themselves processes.

practice + rule + decision

The question of what components can generate law is defined through the history of society and the evolvement of its culture. We may draw a conclusion from our known history (and from the cultural and anthropological generalisation of the result of sociological examinations),[7] according to which law may—by eventually being backed by the threat of the coercive force of the state—result from (a) the pressure of customary social practice, as

[7] On the specific nature of Canon Law (with regard to both the organisation of the Church as a special subject and the congregation as a particular circle of addressees), see, e.g., Péter Erdő *Teología del derecho canónico* Una aproximación histórico-institucional (Torino: Giappichelli 1996) xiii + 215 pp. [Collana di studi di diritto canonico ed ecclesiastico: Sezione canonistica 17].

well as from (b) so-called 'law-making' (including, above all, legislation) and (c) so-called 'law-application' (including, above all, adjudication, i.e., the activity of jurisdiction, being successively and compoundly made up of legally binding statements), differentiating in time into separate functions within the division of power as part of the institutionalisation developing along with the birth of the state (*Figure 13*).

as having a legal quality more or less

"Thus, as regards its ontological existence, law is a complex phenomenon comprising the interaction, interpenetration and temporary separation, i.e., the complex motion, of at least three factors, namely: rule, authority's decision, and actual behaviour. Anyway, law is not a phenomenon homogeneously or statically identical with itself. Its quality of law may be reinforced or weakened, rendered more or less legal by the intertwining and/or separation of its components, since ontologically a phenomenon supported not only by its enacted nature but also by a state practice of coercive measures taken in the name of the law and made accepted as such by society by and large is obviously »more legal«. That is, the more completely it comprises its three components, the more completely it will display the features of law. At the same time, law is a dynamic factor of reality; its components respond to external challenges in an ever renewing manner and this brings about internal shifts of emphasis. Here is the reason why law is not and cannot be identical with itself. It is in a ceaseless and endless motion of internal change, oscillating between the qualities of more or less legal between the extreme points of becoming legal and ceasing to be legal. This approach, on the one hand, avoids the danger of replacing one simplification with another: the reduction to rules with the reduction to conflict. On the other hand, it tries to make it clear that rule is not simply an incidental element of law. Not so much its presence as its part played in the whole complex is bound to change."[8]

[8] Varga 'Anthropological Jurisprudence?', pp. 443–445.

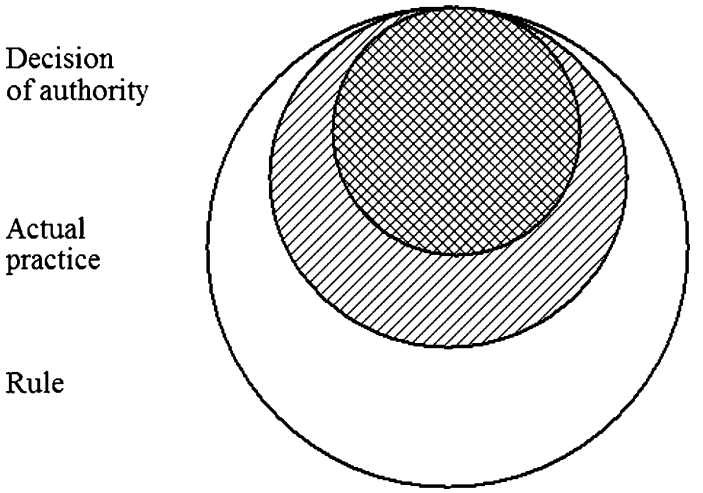


Figure 13.

in origination of validity & in its recognition as valid

All components of this approach have one common characteristic. Namely, they count with the nature of legal processes from the beginning. Notably, certain social processes declare themselves to be of legal character, and as it may turn out, none of the other components of law deny this but most probably, just to the contrary, they accept it and confirm it as such. Parallel to such a formal, hierarchical and deductive origination of validity, "lending/borrowing" the validity by breaking down the legal system from its normative top serving as the basic norm, a counter-running motion begins to consolidate itself as well. This, relying on the self-qualification of the actual processes declaring themselves legal, building from bottom to the top and also along a horizontal plane, supports the legal self-assertion done at all levels of mutual connection. Thus, the formal origination of validity (advancing from the top down) is complemented by an informal ascertainment of validity (advancing from bottom to top and horizontally), providing support by recognising validity. So there may be an ideal scheme set up by the law's self-positivation and also ideologised as the normativism of statutory positivism

in the deontology of the legal profession, in which the pre-established rule is all-inclusive and makes validity to be drawn according to the KELSENian theory of gradation, and the actual motion joins—or complements or challenges, or, under limiting conditions, even replaces—it by strengthening or weakening it, or eventually running on a path parallel with it.[9]

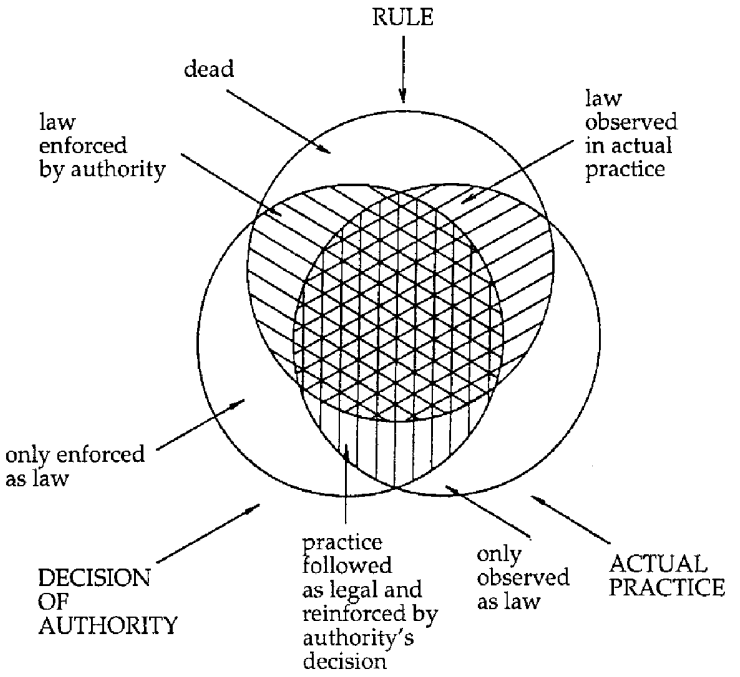


Figure 14.

[9] As to early forms of exemplifying the division of law into "droit régulièrement émis, ne se réalisant pas / droit se réalisant sans être régulièrement émis / et droit régulièrement émis et se réalisant", and, in consequence, the distinction between "pratique de la création du droit comme objet de l'approche dogmatique" and "pratique de l'application du droit comme objet de l'approche sociologique", cf., by the author, 'Quelques questions méthodologiques...', in particular pp. 226–229.

in circularity and horizontality

Let us repeat that this holds for all components: the recognition and enforcement as "legal" (i.e., as the implementation of "the law") of (a) the customary social practice, (b) the acts 'creating' norms, as well as (c) the acts 'applying' norms. All these take place through a double justification: through their origination by hierarchical breaking down of legal validity according to the theory of gradation, on the one hand, and through the self-qualification by and within given institutional procedures, on the other. During such a process, the self-assertion of (a) customary social practice, as well as the official (b) law-making and (c) law-application may equally present themselves as distinctively legal, while other procedures claiming to be also legal themselves may not refute this claim. In case of no counter-running motion encountered or in case of a judicial decision gaining legal force [*res iudicata*], this will build itself into the given legal order. According to this picture, the actual driving force of any one-way formal origination of validity as a theoretical basis for reference is afforded in such mutual supports by circular lending/borrowing of validity and horizontal confirmation of validity as well.[10]

with internal self-description of the law: its actual paths can be varying / through competing / with simultaneous parallelity / in mutual influence

This statement involves an important recognition concerning the very nature and understanding of law, namely that (1) it treats both the ideology and the deontology of the legal profession (thus, e.g., doctrines of law-positivism and rule-positivism in Civil and Common Law systems)[11] merely as the

[10] Werner Krawietz 'Die Lehre vom Stufenbau des Rechts – eine säkularisierte politische Theologie?' in *Rechtssystem und gesellschaftliche Basis bei Hans Kelsen* ed. Werner Krawietz & Helmut Schelsky (Berlin: Duncker & Humblot 1984), pp. 255–272 [Rechtstheorie, Beiheft 5].

(An ideological concept of law)

[11] "In my opinion, in the case of communities identifying law with rules, an ideological concept of law can be put forward which conceives of the boundaries of law as those covered by legal regulation, and of the areas covered by actual behaviours and authority decisions in »realisation« of the law as domains within itself. As it is a matter of the ideology of an institutional system as well as of a profession called to its functioning, an ideal is reflected in it. Theoretically, the realisation of that ideal is not impos-

internal self-description of law. This it does independently of whether it sets criteria for the so-called official and recognised ways and chances of the generation of law as well as whether it is open to whatever form and manifestation of law, including ones that can only be enforced through long-term practices even if they are not accepted by the officially recognised prevailing ones. It is another important step to realise that (2) breaking with the narrowly unifactoral and reified view of law, as well as with the definitions afforded by normative conventionalisations of the acceptable ways of generating the law, eventually it recognises that the catalogue of acceptable ways of generating law cannot be previously codified as withstanding the dynamism inherent in socio-legal schemes for once and all, for example, as against the practices solidified in law enforcement. Therefore, the opportunity to re-activate (re-test by the prospect of re-conventionalisation) it, geographically and historically varying paths are equally feasible and welcome to competition in principle. Taken all these, in theory (3) it refuses to absolutise any pattern rigidified as the exclusively sole, primary or distinguished way(s) of the formation of law. Instead, it leaves it up to history, that is, to the self-assertive practice of society to select and decide which of the competing ways of generating and forming phenomena to be accepted as legal (and how and how much persistently) will come out as the exclusive, primary, distinguished, recognised, or simply tolerated one(s). In consequence, (4) it takes cognisance of the fact that a variety of ways of generating and forming law may concomitantly prevail and assert themselves in the practice of society—of course, with varying impact, effectiveness and persistence. On the final analysis, it is a function of social self-regulation and feedback whether one or more of these can become selected as dominant or

sible but in practice, due to the complex definitions prevailing in life, mostly its approximations are to materialise. Thus, in communities identifying law with rules, norms established and fixed in a given way are the preponderate media and mediators of legal normativity." Varga 'Anthropological Jurisprudence?', pp. 442–443.

"official" ways of the law's formation—letting the rest freely prevail, or maybe just tolerating, or attempting to exclude or even ban either each and every of the rest, or at least some of them. Simultaneously, however, (5) independent of how we think of either of these ways of law formation, none of them can prevail in isolation from the others: they function in m u t u a l i n f l u e n c e upon all the others—strengthening or weakening, or parallel to, one another.

Multifactorality is prevalent in each of its components

As to its fundamental nature, law is a multifactoral phenomenon. Its specificity is provided precisely by the fact that, in principle, its multifactorality can be identified, and caught indeed, in any of its components. Multifactorality is not simply a characteristic expressing consecutive (imaginary or actual) phases, but is a characteristic truly prevailing (pervasively and permeatingly) in every moment. For one can reveal each and every legal phenomenon's coming into being in the originally dominant way, on the one hand, somewhat coloured (strengthened, weakened, or providing extra backing) by the parallelity with, or opposition to, other paths and ways of generating law, on the other.

Σ: law is: dynamic / composed of various motions / in this/that sense / being more/less legal or transforming into / withdrawing from the law

When defining the fundamental nature of law, we ought to keep in mind the following considerations: (1) law is homogeneous an entity that cannot be taken to be unchangeably (and in a static and reifying manner) identical with itself, but is rather a changing and d y n a m i c concept expressing the continuous process of social practice. Therefore, (2) we cannot think of law as though it were some unity or solid entity, because it is composed of v a r i o u s m o t i o n s that support or weaken, or even neutralise (or extinguish) one another by their parallelity or opposite direction. Consequently, in this constant motion (3) we cannot from the very beginning make categorical statements about either of the components and whether they embody the 'legal' or 'non-legal'. Rather we ought to formulate the following in a more subtle manner: it qualifies (or may qualify) as 'legal' or 'non-legal' in t h i s o r t h a t recognised or truly prevalent s e n s e of how law originates, and, respectively, it qualifies (or may qualify) as ' m o r e l e g a l ' or ' l e s s l e g a l ' in either of the above senses. Finally, (4) as law is

an uninterrupted process, we cannot conceive of its totality ("law taken in general") at any given time as uniform and complete and unchangeably identical with itself. Being a phenomenon resulting (as woven together) from various incessantly running and counter-running motions, it always displays different sides, components and ways of legal formation (with the potential of temporary conflicts and one momentarily final outcome) at any moment in time. In consequence, in every such and similar, recognised or truly prevalent sense of the emergence of law, it continuously features up and englobes the motions and measurable states of transforming into and withdrawing from the law (always just in a relative and time-depending sense, because it is measured to the aforementioned levels of 'more legal' and 'less legal').

6.1.3. Law as building from acts

Actualised in a sequence of acts

By definition and according to its ontological standing, law is a multifactoral process composed of the sum of actualisations made in the sequence of various consecutive and historically overlapping acts.

of decision by the authority

We may probably claim that this is some *condition générale*. That is, it is a pervasive characteristic of legal development at all times, although only in the most recent times did it become conspicuously criterion-like for the very description of the nature of law. This shows that our social life is becoming more and more controlled by law and pushed to juridified channels: legal mediation and especially socially widespread confidence (both popular and professional) in relying upon the power of judicial decision-making have just moved into the limelight primarily in more developed countries with a more complex and differentiated structure of institutional building. Or, in more philosophical terms: increasing socialisation and accentuating legal mediation in social processes confer a stronger emphasis on selecting the established ways of how law is originated upon the settlement of conflicts by means of authoritative decisions and upon the concrete official actualisation of the latent and potential abstract messages of the law.

In sequence of customary practice → regulation → decisions

Utilising symbolic images that might seem rather bizarre at the first sight: (a) legal enforcement of the customary social practice may be reminiscent of the roll of a stream, (b) '*legis latio*' as a sequence of discrete motions may remind us of the advancement of a huge walking excavator, and finally, (c) '*juris dictio*'—with the immense number of authoritative (administrative, judicial and other) decisions, accumulated consecutively in time—makes us think of the juice uninterruptedly pouring out from the machine-line in a canning factory. The demand for regulation has incredibly increased in our days.[12] Numerous situations require prompt decisions, and this induces an incessant flow of actualisations through the generation of laws.

within tradition encountering novation

At the same time, today's cognitive sciences ascertain for us that—according to in-depth analyses—events of everyday life, minor and major alike, are composed of nothing but acts. Acts are performed within a conventionalised framework. In a changing context, they undergo shifts of emphasis and changes of meaning—maybe unnoticeable and also unimportant in and of themselves—that can nevertheless add up to changes in direction in the longer run. Accordingly, tradition and innovation, routine and creation, fertilised by deep roots, on the one hand, and being lost in ever reasserted *tabula rasa* limitlessness, on the other, can intermingle in these processes into one organic evolvement.

& culminating in judicial events

English–American and Scandinavian legal realisms as well as existentialist legal philosophies always put the emphasis on the judicial event as the key for testing the law in action, and this realisation may gain added meaning in the light of what was said above. If the socialisation ['*Sozialisierung*' in GEORGE LUKÁCS' social ontology] of societal life

[12] Cf., by the author, 'Joguralom? Jogmánia? Ésszerűség és anarchia határmezsgyéjén Amerikában' [Rule of law? Mania of law? Rationality verging on anarchy in America] *Valóság* XLV (2002) 9, pp. 1–10 & <http://www.valosagonline.hu/index.php?oldal=cikk&cazon=326&lap=0> {reprinted in *Az év esszéi* [The essays of the year] 2003, szerk. Molnár Krisztina (Budapest: Magyar Napló 2003), pp. 99–114.

arrives at a stage where the actualised law is increasingly becoming the sole variant of the law to bear genuine legal meaning, then—independently of how we think of our life under either precedential law or the traditions of legal realism or existentialism—the 'judicial event' will be more likely to truly create law and carry its actualised (if there is any) message. (And, in turn, this may influence the theoretical explanations through which we may reconstruct the other ways of generating the law, that is, the specific integration, conferring legal validity, into the formal domain of law of either the customary social practice or the law-making significance of 'legislation', that is, the official positing of abstract rules as the final source of the law.)

6.2. THE NATURE OF LEGAL THINKING

All the ways of human thinking are also found in law:

On the basis of the scientific pattern of thinking and of the legal profession's thought patterns, it is extremely difficult—if not almost impossible—to draw conclusions utilisable in form of generalisable statements. The particular and distinctive features of law almost get lost in the cavalcade of various attemptable ways of mental operations in law, for everything that human kind has developed over more than six thousand years of recorded history—from induction to deduction, from the temptation to mediation resolving conceptuality to rigorous axiomatism, from fictions, metaphors, symbols and various sorts of substitutions to narrations through proverbs, precepts, allegories and parables—can also be encountered within the domain of law.[13] What is typical of

[13] As also known in mathematics, it is the entire personality at all times that takes part (by utilising all its psychical abilities and human *facultas*es) in most of actual problem-solving, irrespective of the specific form and homogenisation that will be required by subsequent justification. Cf. Jacques Hadamard *The Mathematician's Mind* The Psychology of Invention in the Mathematical Field [1945] (Princeton: Princeton University Press 1973) xix + 143 pp. [Princeton Science Library]. The philosophical thought is from the outset also a matter of temperament—Thomas Nagel *The View from Nowhere* (New York: Oxford University Press 1986) xi + 244

law among these—in relation to which it can be told that learning law does in fact amount to adopting a mode of thought[14]—is mainly treated academically within the framework of comparative studies on law by fields specialised on comparative legal cultures and the comparative judicial mind.[15]

all of conceptual definitions & operations

Therefore, our most trivial conclusion can hardly be more within the present methodological perspective than stating that any kind of c o n c e p t u a l d e f i n i t i o n can become law (at least to some extent) and, consequently, any c o n c e p t u a l o p e r a t i o n can become the subject of legal thought (at least to some extent). Accordingly, the doctrinal study of law [*Rechtsdogmatik*] is not necessarily more or less than the strict conceptual elaboration for legal purposes (at least to some extent) of any kind of conceptual definitions—by means of definition, classification and systematisation.[16]

with definite legal culture in derivation of validity & with definite legal ideology in the background

So, we can hardly say anything more, because the conditions of what the ways and means of legal reasoning

pp. and particularly at p. 10—as well as of practical experience and imagination. See Jeffrie G. Murphy & Jean Hampton *Forgiveness and Mercy* (Cambridge & New York: Cambridge University Press 1988) xii + 194 pp. [Cambridge Studies in Philosophy and Law] and especially at p. 186.

[14] It is symptomatic that recent endeavours—as shown by Geoffrey Samuel *Epistemology and Method in Law* (Aldershot & Burlington, V.T.: Dartmouth 2003) xxvi + 384 pp. [Applied Legal Philosophy] and Gary P. Bagnall *Law as Art* (Aldershot: Dartmouth) xii + 221 pp. [Applied Legal Philosophy 7]—aim at proving that just as opera is not simply musical score, law is not just the text of rules either, but professional performance dedicated to reaching a given effect, in fact, a mode of thought.

[15] Cf., e.g., *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] especially Part IV and Volkmar Gessner, Armin Hoeland & Csaba Varga *European Legal Cultures* (Aldershot, Brookfield, Singapore, Sydney: Dartmouth 1995) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures], particularly Part II, pp. 87–166.

[16] 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/g352w44h21258427/fulltext.pdf>.

are—i.e., of how to originate validity and of how to draw conclusions in a way acknowledgeable and also made acknowledged in a given legal order—will be defined by the legal order itself on grounds of potentialities inherent in the underlying legal culture and ideology (taken as a professional deontology) that would help converting these into professional practice. What was revealed indeed by the above survey is that neither law, nor legal thinking can stand in and by itself: any formal carrier of (and process of carrying) signs can only be interpreted in a meaningful way within its own informal context and medium. This environment provides the framework called legal culture which, in turn, is rooted in the general culture of society. Among others, legal culture is composed of the ethos and values of the legal profession, its problem-sensitivity towards law and its conceptualisation, the conceptual and referential framework available in law (with judicial and administrative skills and practices implied), as well as the moral expectations toward the legal profession. Legal ideology, on the other hand, is mainly composed of the image to be formed in the legal order on how to 'construct' and 'operate' the law, that is, on the law's nature, sources, and criteria of validity, and on the conditions of how a conclusion can be drawn in law and what consequences that would imply.

Σ: legal thinking is: self-constituting / formal / dichotomic / logically concluding with a closed system of fulfilment / open to information at the same time

Accordingly, the most general characteristic of law (present also in legal thinking) is that (1) law itself creates the features of its own constitution with limits and criteria given thereby, (2) by strictly defining, with no dialectics or compromise solutions involved, the features of those formal facts that may constitute a case in law. In consequence, (3) law must select from the alternatives defined by its binary code[17] regarding its construction, operation, and form of manifestation, namely, that something is either inside or

[17] Niklas Luhmann's expression. Cf. also, by the author, 'On Judicial Ascertainment of Facts' *Ratio Juris* 4 (1991) 1, pp. 61–71.

outside the law, and it qualifies as either legal or non-legal.[18] (4) The conditions of making this selection are also established by the law itself through its own "system of fulfilment".[19] Therefore, (5) law is normatively closed while being open to new information. Notably, anything and, indeed, everything can be run through its filter to receive the qualification of and by the law (as, qualifiedly, 'compulsory', 'forbidden', 'permitted' or 'indifferent'), yet (6) this very qualification can only be gained by means of logical deduction as the one previously codified (feasible or right) answer of the law.

(qualification is not dialectical)

[18] "Qualification necessarily amounts to alternative exclusivity and to the declaration of certain duality, since the subsumption of facts under some defined notion(s) and the more or less automatic drawing of more or less narrowly defined legal consequences therefrom can only be performed unconditionally in exclusive totality, without any inclusion of the idea of alternativity, division, decomposition, or reservation in regard of some further potential qualification(s), of the qualification and the drawn legal consequences. Therefore, providing that given facts have been duly qualified, all provisions of the law relevant to the qualification of the facts in question and the consequences issuing therefrom are to be cogently and properly applied, while, on the other hand, the relevancy of any other provision is automatically excluded by the bare fact that the given qualification in question is made—at least in the same respect: within the same system and branch of the law and at the same point in time." Csaba Varga '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].

(subsumption is a mere phenomenal form)

[19] "Subsumption will get a particular shape owing to the fact that some teleological project (the law) is destined to produce another teleological project (its application), and thus the already mentioned dialectic, the conflict of class interests that springs from this becomes the ultimate determining factor, and the logical subsumption is based on this only as a phenomenal form." György Lukács *A társadalmi lét ontológiájáról* II [Zur Ontologie des gesellschaftlichen Seins: Die wichtigsten Problemkomplexe] (Budapest: Magvető 1976), p. 220 [for the manuscript in German, see Lukács Archives and Library (Budapest) M/120, p. 124]. Cf. also, by the author, *The Place of Law in Lukács' World Concept* trans. Judit Petrányi & Sándor Eszenyi (Budapest: Akadémiai Kiadó 1985 [reprint 1998]) 198 pp. on p. 145, note 300.

Conflicts of interest → conflicts within the law → legal response

process of transformation / through tensions

What can still be said at this point for a generalisable conclusion? Well, there is at least one common characteristic of the various legal ideologies, namely, the requirement that law should contribute to the resolution of social conflicts by transforming (through refining and stylising) real conflicts of interest firstly into apparent conflicts within the law, just for those actually administering justice to be able to formulate—on basis of values, principles, considerations, references and perspectives recognised as referable objects in law, that is, as based on the law and on the conclusions drawn therefrom—their own response in the name of the law. Such responses will in turn be presented as the sole and exclusive responses of the law, strictly derived from the very propositions of the law. This is a process of transformation which formal analyses have for long attempted to formulate as the particular (yet theoretically and also formally inexplicable) casual resolution of irresolvable conflicts (as gaps of "*non consequitur*") between law and logic, on the one hand, and fact and norm, on the other.[20] This duality stretches between two

(with manipulation)

[20] "As far as law-application is concerned, those conflicts require judicial decision which themselves are socially real together with their economic, political and moral implications. But in order to formulate conflicts in his reasoning, the judge first has to convert them into conflicts within the law. Then, in the first phase of manipulation, the selection and clarification of the facts of the case take place in conformity with the choice and interpretation of the corresponding ('relevant') norms of the legal system. The phenomenon which neo-KANTian legal philosophy used to call the conflict between the abstract wording of the law and the concrete facts constituting a case, takes place in this phase. It may also be revealed at this time that there is a gap in the law or even a 'critical gap' (when a 'legally relevant' norm is available but one that would have a socially undesirable result), which the Anglo–American literature usually describes simply as 'hard cases'. In the second phase of manipulation, the conflict thus converted into a conflict within the law is dissolved, i.e., reduced to a false conflict in legal reasoning. This is when the facts 'constituting the case', already qualified from a juristic point of view, and the correspondingly interpreted 'provisions of the law' are formulated, i.e., manipulated, so that they make possible the presentation of the desirable decision as also a logical result deriving from the 'facts constituting the case' as well as from the law based on »legal reasoning«." Varga *The Place of Law*, pp.

poles—the own network of traditions, normatively recorded propositions, recognised techniques and procedures of argumentation, as well as referential practices within the law, on the one hand, and the practical nature of the issue to be decided and the demand for practicality of solutions, on the other[21]—, the concrete resolution of which, i.e., the intensification of their tension through repeated confrontation, followed by taking them to a point of rest, will be done in a solely hermeneutically constructible situation and through such a process.[22]

146–147. Cf. also, by the author [with 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] as well as '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/2008sz/02.pdf>.

(hermeneutics)

[21] It is precisely the hermeneutics of our explanation on the concept of God that provides such characterisation of law (considered a parallel field, therefore worthy of examination): "It is a task of understanding that derives from the relationship between the sources of law and the tasks of jurisdiction, in a way that traditionalised sources of the law can set the path leading to present-time jurisdiction by becoming the source of understanding, throwing light on problems of the present case in law […]. It is expected that in encountering the present-day concrete case, the traditionalised text can serve as enlightening, explanatory and guiding word, becoming the source of legal interpretation and thereby also the source of jurisdiction." Gerhard Ebeling 'Wort Gottes und Hermeneutik' *Zeitschrift für Theologie und Kirche* 56 (1959) 2, pp. 224–251.

(with pressure & turning point)

[22] As we have already characterised it before, "[t]his is FIKENTSCHER's theory of the case norm, in which the hermeneutic pressure »pushes the hermeneutic process to turning point«, which, at a time when »with the given yardsticks of the object and the justice, neither the further specification of the norm nor the further breaking down of the notions of the facts that constitute a legal case is not possible any longer«—Wolfgang Fikentscher *Methoden des Rechts* IV: Dogmatischer Teil (Tübingen: Mohr 1977) on pp. 100 & 198—will be reached." Csaba Varga *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp on p. 115.

7. CONCLUDING THOUGHTS

(Reliance upon continuity of social practice)

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 which 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.

Law being inside of us, in our culture

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.

in ever-green current dilemmas

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.

with all us as actors with responsibility to be borne

However, we have found an invitation for elaboration of 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.

APPENDIX I.

LAW AND ITS APPROACH AS A SYSTEM*

1. TENDENCIES OF FORMAL RATIONALISATION IN LEGAL DEVELOPMENT

The category of f o r m a l r a t i o n a l i t y is the product of bourgeois development. In the focal point of formal rationality there is a demand for c a l c u l a b i l i t y, a demand which in its elementary forms manifested itself in the organisation of the economy, relying on double-entry book-keeping and, later, on the rational calculation of the use of capital. It was MAX WEBER who made it clear that the whole organisation of bourgeois society consisted of a set of formally rationalised structures. Beyond economic organisation he discovered this type of structure in the administrative, judicial, military, ecclesiastic, and party organisations as well. He revealed that i m p e r s o n a l i t y and d e t e r m i n e d n e s s by a system of pre-established rules prevailing in the functioning of these structures had laid the foundations of bureaucratic rule and created the bureaucratic complexity of bourgeois society.[1] Thus, in the light of the WEBERian exposition of bureaucratic organisation the demand for formal rationality has become the stigmatic sign of capitalist society.

As GEORGE LUKÁCS has made clear, with reference to TAYLORism, this most characteristic, though extreme, potentiality of the capitalist division of labour, formal rationality is but the dissolution, i.e., the cutting up, of organically united processes, on the ground of the cognition of the interrelation of their components, into a series of artificially interconnected partial processes.[2]

* Chapters 2 and 3 of the paper under the same title, first published in *Acta Juridica Academiae Scientiarum Hungaricae* XX (1979) 3–4, pp. 295–319 & [re-print] *Informatica e Diritto* [Firenze] VII (1981) 2–3, pp. 177–199.

[1] By Max Weber, *Wirtschaft und Gesellschaft* (Tübingen: Mohr 1922), passim, in particular at pp. 44ff and 467ff, and *Staatssoziologie* 2nd ed. (Berlin: Duncker & Humblot 1966), pp. 99ff.

[2] Georg Lukács 'Die Verdinglichung und das Bewusstsein des Proletariats' in his *Geschichte und Klassenbewusstsein* (Berlin: Malik 1923), pp. 99ff.

It is this structure that in feudal absolutism, advanced by the interests of the enlightened absolute monarch as backed by the growing bourgeoisie, became institutionalised as a consequence of the development of state finances, state army, and of the state bureaucracy, which was created for the former's uniform operation—the fact notwithstanding that the structure in question gained its decisive, typical and autonomous existence only in capitalist society.

Hence, formal rationality is a historically defined phenomenon, on the one hand, but is by no means void of antecedents, on the other. Formal rationality as a principle tending towards calculability is a characteristic product of bourgeois civilisation, although it already appears in its germs at an early stage of social development. As far as legal regulation is concerned, formal rationality was the product of the coming into power of the bourgeoisie as brought to fruition by feudal absolutism. In a wider sense, in its elementary manifestations, formal rationality is, however, an indispensable property, the *sine qua non* precondition of any conscious, planned, willed and controlled, social influence.

As is known, there was a first and decisive change in the formal development of law when law broke off from the body of customary laws forming a unity with everyday social practice, and as written law became objectified as something distinct and externalised from customary law. It was then that the norm-structure of law also developed, i.e., the structure which turned the behaviour originally set as a goal and assigned as instrumental to the result to be achieved, into something independent. Abstracted from the result to be achieved, it set the behaviour itself as an autonomous objective before the addressee. By defining both the behaviour to be observed and the consequences of its observance or non-observance in a formal way segregated from the factuality of social practice, law has given a mentally pre-constructed normative pattern to social behaviour.

In order to see what points may have been decisive in the universal development of formal rationality in law, we have to recall some of the most important teachings afforded by legal history as outlined in some of my previous papers.[3] To begin at the beginning we have to note that for MARXism the formal-technological metamorphosis of law, likewise with any change in its contents, is by no means a random unmotivated act: processes

[3] Assembled in a monograph by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp., passim.

of both formal and informal change supervene in dependence on the change of social-economic relations forming the real context of it.

As regards the first stage, I have in mind Mesopotamia before and subsequent to the second millennium B.C., this historically unique situation when parallel to the transition to the wooden plough and the progress made in metal-working, this favourably sited region of a fair climate embarked on unprecedented development. The want of prime materials encouraged trade, the construction of a system of irrigation and other public works prompted to wars for territorial conquest and for capture of war prisoners to become the slaves of their conquerors. All this, on the one hand, brought about a proliferating bureaucracy, and, on the other, a rapidly spreading empire, where the conscious establishment and empire-wide unification of the laws, i.e., their recording in written form and so the very chance of their uniform enforcement, had become the pre-condition of survival. In the ensemble of rules known as the *Code of Hammurabi* norm-structures appeared in an already mature, almost perfect form, presenting even their system-like organisation in their objective consolidation and, partly, casuistic succession.

Be the role of Roman law and its consolidation by JUSTINIAN in view of subsequent development ever so significant, in the technological formation of law this had primarily a function in the conceptualisation of law, as well as in its transformation into a phenomenon expressly established and enacted by the profane, personal and, in principle, arbitrary will of the ruler. Development meant thereby·the transformation of rites of law into a craft relying on overtly practical rational considerations and manipulations.

Medieval development did not favour either central legislation or its rationalisation. The Germanic principalities springing up on the ruins of the Roman Empire took trouble with the primary task of their organisation into an independent statehood and of putting into writing the mostly barbarous primitive law they brought with them. Centuries later, dismemberment and permanent unsettled feuding between ruler and his feoffers threw obstacles into the way of codification, and what anticipated subsequent development had to pass off in towns. These were the early workshops of bourgeois civilisation. It was there where Roman legal tradition got "denationalised" which, for want of other more applicable norms, meant the glossation of the classic surviving texts, i.e., their conceptual systematisation by their coherent system-like organisation as adapted to the needs of trade relations. This is what, at a later stage, became associated with the mathematical, axiomatic, system-centred approach of

rationalism, a development which again gave expression to the calculatory exigencies of the bourgeoisie; then later with natural law, an ideological expression of the anti-feudal struggle of the rising bourgeoisie, which on its turn led to the formation of ideal systems of law constructed artificially in a quasi-axiomatic way.

Feudal development led from necessity to the transcendence of particularism. Enlightened absolute rulers got the upperhand of particularism at first. As the means of their struggle they began to take into their own hand the finances, to organise a regular army, to patronise industry and trade, etc. The discharge of such functions called for a professionally trained bureaucracy and, in order to channel its activity in a uniform way, also for an unequivocal, comprehensive set of rules, formulated with due regard to its bureaucratic mass use. At this juncture both the ruler and his bureaucracy demanded an enormous increase of the number of rules: the extension of legal regulation to several new domains and, consequently and in view of the calculatory needs, its re-establishment in a form that was easy to handle. The old method of quantitative consolidation was inadequate for the purpose. It was FREDERICK THE GREAT who made the first comprehensive attempt to achieve any quasi-axiomatic trans-structuralistion of law. He meant formal law rationalisation, as well as bureaucratic-military organisation, to become his personal supports in raising his country to be a great European power. Heated by the tyrannical passion of interference in everything and foresight of everything, the Prussian *Landrecht*, however, resulted in a logically coherent yet impracticably redundant and confused series of casuistic rules, rather than in a system of norms of a truly rationalising effect, suitable to pave a path forward.

The break-through took place with the rise of the bourgeoisie to power, i.e., with the advent of the French Revolution. This was a consistently carried out revolution in which, by abolishing the old law, a new one had been institutionalised. The formation of a legal system as embodied by the *Code civil*, the compound of a series of consistent sequences from more general to ever more particular rules, sub-rules and exceptions to rules as a formally rationalised optimum hierarchisation, took place in one single act, heralding both national unification and a new, revolutionary start of law.

Formal rationalisation seems to be a companion, with a continually growing impact, of legal development. Albeit a historical product of bourgeois development, formal rationalisation as a moment of any actual social influence has a by far more universal role.

Law is the unity of two social functions, historically defined concretely at any time. Its main function is to regulate social relations while being a tool of, as integrated into, the exercise of power by the ruling classes. Obviously—as the jurisprudence of Soviet MARXism noted at its time—even if the law's class function withered away (as planned by the last two Congresses of the Communist Party of KHRUSHCHEV's Soviet Union as an imminent development), the regulatory function would also insist on rationalisation.

Or, to take some examples from history, it is characteristic that even when political structure (in feudal particularism) or legal tradition (in the countries of Common Law) precluded codification, social and economic development could nevertheless enforce a minimum of formal rationalisation through the forced fulfilment of certain code-substituting functions. A rationalisation of that kind was the practical use, as sources of law, of both the collections of *formulae* compiled for didactic purposes and the compilations of regional customs intending to be but mnemonic aids, as well as the rejected or failed codes (as WERBŐCZY's *Tripartitum* in Hungary) and the ones drafted as private law-books in feudal development. Similarly, a rationalisation of that kind has been targeted by textbook-writing (arranging case-law as a system of principles) and the codification of a mere persuasive value (e.g., the Restatement of the Law) in Anglo–American development. Moreover, such is the role of the official or unofficial collection of customary laws, and of the doctrinal systematisation in the Afro–Asiatic territories where there has been a reluctance to use codification or where the development (or replacement) of the Islamic or tribal laws has simply been sought by roundabout ways.

As shown by legal development, the tendency of formal rationalisation stands for a codificational (or quasi-codificational) solution. Formal rationality comes to fruition in the highest degree when all its parts are organised into a system. In the realm of law, the path of codification is the one which lends itself most adequately for organisation as a system.

2. HISTORICAL DEVELOPMENT OF THE APPROACH TO LAW AS A SYSTEM

From a survey of the most important stages of codificational development it stands out clearly that formal rationalisation of law was not the product of inner development: it was brought about by actual economic exigencies in

conformity with already dominant ideological and methodological tendencies.

As is known, the 17th century was the age of definitive victory for the scientific concept of the Universe over the scholastic thought characteristic of the Middle Ages. It was the age which announced the victory of human reason as an intellectual victory of bourgeoisie. By the way, the scientific concept of the Universe appeared as the adequate expression of middle-class economic interests.

The approach from the side of economic components will reveal that the impact of both rationalism and the idea of *mathesis universalis* was the organisation of partial systems belonging to various structures as the elements of an all-comprehensive coherent system (by subordinating such elements to regulating principles), that would render both their interrelations and the response to questions put in respect of any of such elements foreseeable and calculable, with the force of formal logical necessity. "All logic is derived from the pattern of the economic decision or [...] the economic pattern is the matrix of logic", writes an economist on analysing the ideological projections of capitalist economic development,[4] whereas what corresponds to rational economic decision is the system-idea translating philosophic rationalism into the language of logic, conditioning an axiomatic-deductive world concept as well. It was therefore not solely the domain of natural sciences where efforts were made for an axiomatic exposition. Treatises on politics, ethics, and law (by HOBBES, SPINOZA, GROTIUS, etc.) were equally built up *more geometrico*, in the axiomatic method of EUCLIDean geometry with its notional coherence and certainty of reasoning—or at least by having recourse to it as an ideal pattern. From this it followed that intellectually constructed natural laws, born as tools in the bourgeois struggle against feudalism but ideologically conceived as the eternal laws of reason equivalent to nature, also took on an axiomatic form. Moreover, this triumphant world concept led, in the enthusiastic exposition by LEIBNIZ, to the birth of the idea that, in the course of continued development, a stage would be reached where social and legal problems would in the safest way be solved by the method of "*Calculemus!*".[5]

[4] Joseph A. Schumpeter *Capitalism, Socialism, and Democracy* (London: Allen & Unwin 1943), p. 122.

[5] Cf. Ernst Cassirer *Die Philosophie der Aufklärung* (Tübingen: Mohr 1932) and Wolfgang Röd *Geometrischer Geist und Naturrecht* Methodengeschichtliche Untersuchungen zur Staatsphilosophie im 17. und 18. Jahrhundert (München: Bayerische Akademie der Wissenschaften

The idea of system was that which manifested itself, ostensibly on the JUSTINIANian pattern, in a variety of absolutistic legislations of wholly different social media and ideological conditions, before all in the administration and judicature of Prussia, characterised by its unrelenting attempt at reducing anything of *ius* to the *lex*. In its pure form, this meant the limitation of any and all law to the enacted, statutory form; the demand for a system of norms bringing under regulation and foreseeing all, even in its most minute details; a system which apart from the law-giver did not even tolerate any interpretation, and authorised those responsible for its application only to make decisions within the unconditioned servile and quasi-mechanical dependency of a paragraph-automaton like a machine of deduction.

Beyond the extremities of the patriarchal-despotic style of enlightened absolutistic ruling, it was the idea of system which, with a by far more lasting historical validity, made its appearance in the codificational work of the French Revolution, giving consolidated expression to the calculatory exigencies of the bourgeoisie. As regards its feature, I think of the specific dialectics guaranteeing sufficient free action in both directions, namely dialectics embodied by a system of rules logically rendering it closed while at the same time keeping it open. Sure, the process of codification was not a sudden breakthrough caused by the flood of the Revolution. It was the mature product of numerous experimentations reflecting the many waves, political tendencies and phases of the Revolution, advancing its consolidation. Although in a manner bringing about a compromise, a chance was thus offered to bring into prominence the practical feature of codification without the illusions and excesses innate of necessity in the intrinsic logic of revolutions.

With the dialectic unity of closedness and openness, codifiers were understood to perform the extremely difficult task of objectifying law as a system of higher degree.

1970) 246 pp. [Bayerische Akademie der Wissenschaften, Philosophisch-historische Klasse, Abhandlungen 70]; as well as, by the author, 'Leibniz und die Frage der rechtlichen Systembildung' [1973] 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] {reprinted in Csaba Varga *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE Comparative Legal Cultures Project 1994), pp. 219–232 [Philosophiae Iuris]}.

The Code could not, however, escape its fate: in the course of its practical implementation it passed through a variety of its most extreme potentialities. As regards the first phase, the Code seemed to be the perfect expression of the needs of a liberal economy to the extent that, reinforced by the psychic components of the French *gloire*, it was before long conceived of as an almost sacred text, the sole and exclusive expression of the French civil law. Its appraisal as definitive and completed went together with the quite natural claim to have its provisions applied in their immediateness in judicial practice. In this manner at the beginning of the 19th century its exceptionally high adequacy with prevailing social conditions and the socially defined (yet epistemologically false) consciousness of its exaggerated valuation provided the social-economic foundations of its exegetic application which, though in a different manner and under different conditions, still structurally similar to the Prussian solution, aimed at confining the judge to a deductive machine within the system of administration of justice. Although the exegetic method corresponded most directly to the axiomatic ideal and coincided with the demands of philosophical positivism becoming the dominant world-concept of the age, it could obviously only satisfy social development temporarily, up to the limits of its inner adequacy. That is to say, the exegetic trend of code-application seemed to embody a possible alternative which in the fight against arbitrariness implied by feudal particularism and feudal privileges, formulated the bourgeois claim for security and a genuine law and order in the field of administration of justice. As a matter of fact it served as an optimum pattern of law-application adequate for liberal capitalism, gaining admission throughout Europe.[6] However, it was unable to meet the exigencies of the inevitable development to monopolisation.

To meet the imperatives of the monopolistic transformation of the economy it presupposed a far-reaching loosening of the whole—fixed—framework of law. This was the period of internal crisis characterised by the startling realisation that "*la légalité nous tue!*", the period of the torturing dilemma offering the alternative of either preserving revolutionary achievements or undertaking their jettison in order to go on in the name of further progress. As a matter of course, it was economic interest that succeeded by

[6] See, e.g., Zdenek Krystufek *Historické základy právniho pozitivismu* [Historical Foundations of Lega1 Positivism] (Prague: Academia 1967).

initiating, in the name of free law-finding [*freie Rechtsfindung*; *libre recherche scientifique*], the loosening of enacted law. From a historical perspective, however, it was eventually not a case of crisis of the rule of law principle itself that amounted in Europe to the temporary swinging over from the one extreme to the other, but it was the adaptation of the liberal capitalistic law to the conditions of monopolisation that performed this function. In the first decades of the 20th century, the ardour of the free law movement slowly subsided, and although the adaptation of the law took place overwhelmingly by way of judicial re-interpretation instead of codification, before long a more solid bourgeois rule of law principle reborn, a principle performing somewhat of a mediating role between the two extremes.

From the viewpoint of the system approach, this transformation can be described as the replacement of the exaggerated conception of the closedness, characteristic of code-system (in the case of exegetic law-application), by the one of its openness (in that of the free law movement). This process happened to go on until the flashover between the two extremes reached a relative point of rest.

In this connection, however, we are interested in the historically conditioned nature of the system approach rather than in capitalist development. As a matter of fact, the s y s t e m a p p r o a c h , considered in its ideological and methodological foundations, is but the product of the 17th century r a t i o n a l i s m and of the c l a s s i c a l i d e a o f c o d i f i c a t i o n with its demand for exegetic code-application. Of course, this is by far not to be understood as if after this period, law objectification in the framework of a system was void of any significance or failed to meet more universal needs. It means merely that it was then that the system-character of law reached its accomplished form. It was then that the objectification of law within the framework of its systemic ideal had been established in its purest, most theoretical and even doctrinaire form.

Still it is an ambivalent, Janus-faced situation we have to render account of. Namely, the treatment of law as a system was born in an extreme form, following the a x i o m a t i c p a t t e r n of geometry *ad absurdum*, i.e., in a wholly impracticable way. It was therefore inevitable that subsequent development should repudiate the results so achieved as truly illusory ones. Nevertheless, all that had been institutionalised, continued to treat legal axiomatism as some sort of an i d e a l . It conceived of axiomatism as an ideal which, on the one hand, it tried to approximate as much as could be done, while, on the other, it was aware of the fact that law as a decisively practical system could not meet the exigencies of such an ideal.

It is the axiomatic ideal which to a by no means negligible degree shapes the physiognomy of the ideology of law-application, generally prevailing even today, and conceiving of the processes of motion, characteristic of law, as bi-polarised ones, that is, as processes of two factors embodying opposite functions. Namely, l e g i s l a t i o n which merely creates general norms, whereas the a p p l i c a t i o n o f l a w relates them to individual cases.

This pattern of the law-applying processes may in the best way be characterised by the terms which MAX WEBER originally formulated as postulates of the exegesis adequate for the conditions of the 19th century free-trade capitalism:

> "(1) Any concrete legal decision can only be the 'application' of some abstract provision of the law to a concrete factual issue. (2) From the abstract provisions of the law in force, a decision has to be derived for each concrete factual issue with the means of legal logic. (3) The positive law in force has to be a 'gapless' system of legal provisions, overtly it has to incorporate such a system or, at least for its application, it has to be considered as doing so. (4) Anything that cannot be 'constructed' legally and rationally cannot be legally relevant. And, generally, (5) man's social activity has to be conceived of as either the 'application' and 'enforcement' or, alternatively, as a 'violation', of the provisions of the law".[7]

This idealised and mostly fictitious concept is of an ambivalent nature owing to the circumstance that the epistemologically distorted structures are not necessarily ontologically distorted in the case of various objectifications called to life by social development. As GEORGE LUKÁCS developed the interconnection in his posthumous Ontology, the mediating partial

[7] Max Weber *Rechtssoziologie* (Neuwied: Luchterhand 1960) [Soziologische Texte], p. 103: „(1) daß jede konkrete Rechtsentscheidung 'Anwendung' eines abstrakten Rechtssatzes auf einen konkreten 'Tatbestand' sei, – (2) daß für jeden konkreten Tatbestand mit den Mitteln der Rechtslogik eine Entscheidung aus den geltenden abstrakten Rechtssätzen zu gewinnen sein müsse, – (3) daß also das geltende objektive Recht ein 'lückenloses' System von Rechtssätzen darstellen oder latent in sich enthalten oder doch als ein solches für die Zwecke der Rechtsanwendung behandelt werden müsse, – (4) daß das, was sich juristisch nicht rational 'konstruieren' lasse, auch rechtlich nicht relevant sei, – (5) daß das Gemeinschaftshandeln der Menschen durchweg als 'Anwendung' oder 'Ausführung' von Rechtssätzen oder umgekehrt 'Verstoß' gegen Rechtssätzen gedeutet werden müsse." English translation is taken from Varga *Codification*…, p. 294.

complexes (language and law) can discharge their functions the better the more independently they develop their specific particularity within the total complex. If such complexes of mediation are formations adequate to their social and economic conditions, even their possible fictitiousness will accurately correspond to the just-so-being of the society where they are to function.[8] Or, it is exactly their total social determination that in their apparent self-definition may find an eventually and tendentially adequate expression.

[8] György Lukács *A társadalmi lét ontológiájáról* [Zur Ontologie des gesellschaftlichen Seins] II: Szisztematikus fejezetek [Systematic Chapters] (Budapest: Magvetõ 1976), ch. 11. As to its jurisprudential interpretation, cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1988 [reprint 1998]) 193 pp., passim.

APPENDIX II.

IS LAW A SYSTEM OF ENACTMENTS?*

Law follows two models: one being ideological and the other actual. The former represents the professional ideology, characteristic of modern formal law. Nevertheless, according to the latter, formal enactment can gain social meaning only through its social context in a semantic sense (when the total law is termed as s y s t e m o f l a w), and social existence through its social context in a socio-ontological sense (termed as l e g a l s y s t e m). Theoretical field is characterised by a jurisprudential approach. The socio-ontological approach promises, however, deeper theoretical perspectives. Notably, the latter suggests that law is (1) a historical continuum, (2) an open system, (3) a complex phenomenon that can be shaped either by its actual interpretation or by its differing contexts alternatively, and (4) an irreversible process. All in all, law is more than a set of rules and even more than a set of enactments: by its very definition it is exactly at the borderline where legal research and social science are expected to meet.

1. THE WORKING MODELS OF LAW

According to its i d e o l o g i c a l m o d e l, law is the product of competent state institutions following established rules of procedure. Consequently, only and exclusively what is enacted by given institutions in given ways is to be considered law, independently of its actual contents, formal coherence, foreseeable realisability, factual realisation, and so on. This model has some definite deficiencies. Firstly, the qualification of an institution as competent and the establishment of a rule of procedure are both the function of legal enactment. It means that law is defined by the law

* First published in *Theory of Legal Science* ed. Aleksander Peczenik, Lars Lindahl & Bert van Roermund (Dordrecht, Boston, Lancaster: Reidel 1984), pp. 175–182 [Synthese Library 176] and *Acta Juridica Academiae Scientiarum Hungaricae* XXXIX (1984) 9, pp. 483–486.

itself or, in other words, that the definition of the preconditions to the existence of any law is offered by its own self-qualification. Secondly, this model has in view solely the law in books, without having any regard to its conceivable or completed action.[1] Thirdly, this model is not an image of reality. It is the outcome of a definite type of wishful thinking, that is, the projection of normative requirements. Nevertheless, in the legal cultures of the western world in general and in professional practice in particular,[2] the ideologically working model has a primary role in identifying what ought to be regarded in theory and treated in practice as distinctively legal.[3] The model as such holds as reasserted even if it proves to be imbued with clearly utopianistic elements.

According to the a c t u a l m o d e l of law, the meeting of these normative requirements results, in practice, in an outcome which will necessarily be more or less what the ideological model has suggested, and which will differ in one or another feature from it. As outlined elsewhere,[4] the self-qualification of law as law seems in any case to remain the final criterion even if a rigid distinction between the spheres "within the law" and "outside the law" is no longer accepted; even if law is taken and treated as a continuum in an unbroken motion; and/or even if the self-qualification of law will only be understood within the boundaries of its actual social acceptance. Consequently, it is f o r m a l e n a c t m e n t (*FE*) that will serve as a touchstone and also as a series of cornerstones in delimiting what is considered and what is to be considered law. In the same way, it is again

[1] For the distinction between "law in books" and "law in action", see Roscoe Pound 'Law in Books and Law in Action' *American Law Review* 44 (1910) l.

[2] For the theoretical analysis of some common characteristics from a historico-comparative point of view, cf., by the author, 'Moderne Staatlichkeit und modernes formales Recht' *Acta Juridica Academiae Scientiarum Hungaricae* XXIV (1982) 3–4, pp. 413–417 and 'Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives' in *Legal Development and Comparative Law* Évolution du droit et droit comparé, ed. Zoltán Péteri & Vanda Lamm (Budapest: Akadémiai Kiadó 1981), pp. 45–76.

[3] For the first use of the term, see Philipp Selznick 'The Sociology of Law' in *International Encyclopedia of the Social Sciences* ed. D.L. Sills (New York, etc.: MacMillan & The Free Press 1968), pp. 51ff.

[4] Cf., by the author, 'Macrosociological Theories of Law: From the »Lawyer's World Concept« to a Social Science Conception of Law' in *Soziologische Jurisprudenz und realistische Thesien des Rechts* ed Eugene Kamenka, Robert S. Summers & William Twining (Berlin: Duncker & Humblot 1986), pp. 197–215 [Rechtstheorie, Beiheft 9], in particular ch. l, or, in more details, his 'Domaine »externe« et domaine »interne« en droit' *Revue Interdisciplinaire d'Etudes Juridiques* (1985), No. 14, pp. 25–43.

formal enactment that offers itself to be used and commands its own solely decisive use as a starting point and also as a series of turning points in any argumentation within a genuinely legal process. However, formal enactment is not sufficient in itself at all for delimiting the realm of the law or for channelling the process of legal argumentation. In other words, formal enactment is not in a position to circumscribe the province of what is considered and what is to be considered distinctively legal or to characterise the law's general trend, goal-orientation, value-commitment, etc., i.e., to define in an operative manner—sharply and unambiguously—the formal and doctrinal qualities (e.g. conceptual system, logical coherence) of the law or its social potentialities and realities without taking into account its social context as well.

2. THE SENSES OF CONTEXTUALITY IN LAW

In connection with law, contextuality has two main fields of action.

According to contextuality in a semantic sense, a system of law (*SL*) conceived of as a definite set of norms[5] is formed partly by that part of formal enactments which can be socially relevant and by the social context (*SC1*) in which the formal enactments are embedded. It is the social context in question that defines the paradigmatic quality of the formal enactments by giving their text a truly social existence. By social context in a semantic sense I mean here all those presuppositions, preconceptions, value choices, non-formal propositions and enactments, etc. which have a major influence in a given society and which are, consequently, instrumental in making formal enactments meaningful in a socially concrete way and, thereby, interpretable and applicable in given (and not other) ways in practice. Hence,

$$SL = FE + SC1$$

According to contextuality in a socio-ontological sense, no bare factuality, or the pure declaration or verbal reassertion thereof, can stand for the totality (i.e., the inner potentialities, henceforth, the real significance) of any phenomenon. For instance, in the last resort both power and

[5] For the differentiation between "system of law" and "legal system", see Kálmán Kulcsár 'Historical Development of the Law-applying Functions: Social Conditions and Legal Evolution' in *Droit hongrois — Droit comparé* ed. Zoltán Péteri (Budapest: Akadémiai Kiadó 1970).

law are backed by coercion, by the potentiality of making use of force, by the guaranteed alternative to resort to "men with peaked helmets", as MAX WEBER specified it symbolically.[6] However, it is neither the factual presence nor the concrete actuality of coercion that is needed in ordinary cases. It is rather the continuously renewed threat of coercion that matters. It is the immanent possibility of resorting to it (a possibility which is imminent at any time as backed by a whole normative, institutional and ideological apparatus) that will be good enough to achieve a general compliance with law in average cases. Or, returning to law: the question of whether or not there is any legal possibility to turn anything ideal into real is a function of the system of law concerned, i.e., of the socially accepted meaning of the law's formal enactments. Yet, the question of what and how much of this possibility is to be and becomes eventually transformed into (as implemented in) social reality (with the issue, with what result and by-effect and in what manner will all this be done) is a function of the law's s o c i a l c o n t e x t (*SC2*), turning the system of law into a socially functioning complex, mediating among social complexes. By social context in a socio-ontological sense I mean here all those social considerations, political forces, power conditions, etc. which have a major influence in a given society and, consequently, are instrumental in making the expediency (inevitability of the practical implementation of socially evident formal enactments) tolerated. These then act as the driving force of and the responsible agent for the actual functioning of the system of law in question. It is this actual functioning that is termed l e g a l s y s t e m (*LS*) and conceived of as the sum of activities carried out in the name (and which are socially accepted/tolerated as being within the boundaries) of what is called distinctively legal. Hence,

$$LS = SL + SC2$$

3. JURISPRUDENTIAL APPROACH AND SOCIO-ONTOLOGICAL APPROACH

It is well known how much the allegedly self-evident question Professor DWORKIN raised some decades ago, "*Is Law a System of Rules?*",[7] was of liber-

[6] MaxWeber *Gesammelte Aufsätze zur Wissenschaftslehre* (Tübingen: Mohr 1922), p. 403, etc.

[7] Ronald Dworkin 'The Model of Rules' *University of Chicago Law Review* 35 (1967), pp. 17ff, reprinted in *The Philosophy of Law* ed. Ronald M. Dworkin (Oxford: University Press 1977). For the whole range of problems concerned, see Ronald Dworkin *Taking Rights Seriously* (London: Duckworth 1977).

ating effect to western legal thought in general, and how much it has become one of the most challenging and promising theoretical reformulations of our time. Though the assertion it has formulated seems to be a simple one: law must be more than a set of rules (with other linguistic expressions of normative contents considered, too) in order to fill the gap between the rules enacted and the judicial decisions reached. My question is not a reconsideration of DWORKIN's which, in the wave of repeated discussions, seems to gain more and more strength and a reassertion of its foundations. I think that my question is rather a continuation but with a change in underlying assumptions. For DWORKIN's question is fairly a jurisprudential one conforming to the basic assumptions of the ideal type of modern formal law as shaped in various ways by Common Law and Continental Law development. By j u r i s p r u d e n t i a l a p p r o a c h I mean here the one which starts from and arrives at the following assumptions: (1) law is something identical with itself, consequently it is something defined and/or definable in and by itself; hence (2) it has some definite boundaries making a clear-cut distinction between the spheres "within the law" and "outside the law"; therefore (3) the only question to be answered is how to enlarge the very concept and/or texts of the law in order to be able to bridge the gap between the officially fed in-put and the practically realised out-put of a legal process. In addition to this but also confronted (at another level) with it, I argue for a socio-ontological approach which reveals the purely postulated nature of the basic assumptions of the ideal type of modern formal law and, while treating them as components of the juristic professional ideology with a real function in the law's proper (ontological) existence, tries at the same time to reconstruct the whole societal context they are embedded in and which makes them function. Should some issues and tendencies of my earlier investigations[8] be confirmed, a socio-ontological approach concludes to the following: (1) law is but a historical continuum defined through its actual social practice; hence (2) in want of *a priori* given demarcation lines only an *a posteriori* description of interactions (e.g. "differentiation" and "unification", "core" and "marginalia") among the diverse homogeneous and

[8] Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1998]) 193 pp., part 11, and, for the first concise formulations, 'The Concept of Law in Lukács' Ontology' *Rechtstheorie* 10 (1979) 2, pp. 321–337, 'Towards a Sociological Concept of Law: An Analysis of Lukács' Ontology' *International Journal of the Sociology of Law* 9 (1981) 2, pp. 157–176 and 'Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács' Ontology)' *Rivista Internazionale di Filosofia del Diritto* LX (1983) 1, pp. 127–142.

heterogeneous impulses is feasible; therefore (3) the claim for control through logical demonstration is replaced by a socio-ontological reconstruction of all the factors which had a role to play, not negating but constraining the one played by logical control.

Having in mind the manifold social conditioning of law, i.e., the fact that both its objectification (system of law) and its use as a practical means (legal system) can acquire social meaning only in their concrete social context, allows us to state, by transforming the former definitions, that

$$LS = (FE + SC1) + SC2$$

It goes without further explanation that an exclusively socio-ontological approach can be instrumental in coping with dilemmas that have remained insoluble, untouched, or simply ungrounded within the framework of a jurisprudential analysis. To take but a few instances: How is *la jurisprudence* to be explained with its well implemented structures and institutions if it has been made up from a consequential judicial practice on the sole basis of some general clauses and principles of the law? (*Ad 4.1.*) How is the past development in the formative era of the European law to be reconstructed if fairly diverging national systems of law have grown up through the alleged reception of the same body of classical and post-classical Roman law? (*Ad 4.2.*) How are the contradictory claims and trends of the various human rights movements to be assessed today? Notably, how are cases to be qualified when legal regulation seems to be perfected but meets no appreciable fulfilment, and how are cases to be qualified when no declaration is made in the law but practice proves to be as fulfilling as possible? (*Ad 4.3.*) And, lastly, how are the limits of a change in the law to be drawn imposing even on the power and arbitrariness of the law-maker with the effect that the formal change he enacts cannot touch upon past achievements? (*Ad 4.4.*)

4. CONCLUSIONS

In the final analysis, from all the above at least four conclusions can be drawn.

4.1. Law as a historical continuum

Law is a historical continuum in an unbroken process of formation. Because it has no social existence of its own without the context

making it interpretable (*SC1*) and setting it in function (*SC2*), it changes—or may change—its social contents and impact incessantly even if there is no change in its formal enactment.

4.2. Law as an open system

Consequently, law is an o p e n s y s t e m . It can only be treated as closed in the interest of its historical reconstruction. The aim of such a reconstruction is merely to reveal which kinds of laws "in the books" and "outside the books" may have been in play so as to make the reality of law in action "deducible" therefrom or "traced back" thereto in the most consistent way.

4.3. Law as a complex phenomenon with alternative strategies

Law as a bipartite phenomenon organised from two distinct sources raises the question of the character and composite nature of its instrumentality. Namely, if law as a working system is composed of formal enactments and social contexts making it interpretable (*SC1*) and setting it in function (*SC2*), and if a change of any of its components may cause a change of the law as a working whole, there is a perspective for a l t e r n a t i v e s t r a t e g i e s offered to any actor involved. I thereby mean that a struggle for the law can be fought through a struggle for confirming, reforming or revoking its formal enactment and through a struggle for strengthening, reshaping or loosening its social contexts as well, and that any of these alternatives can eventually lead to the same goal by serving the same final end.

4.4. Law as an irreversible process

The social existence of law is to be seen as an irreversibly progressing process. It is i r r e v e r s i b l e because any enactment may easily be revoked, but formal enactment is so thoroughly combined with and filtered through its social contexts that something from the latter will undoubtedly be left. Or, in other words, law cannot be manipulated in all its components to the same depth.

4.5. The genuinely societal character of law

All these conclusions seem to suggest that law is something more than a set of rules and it is even more than a set of enactments. By its very definition, law is just at the borderline where legal research and social science are expected to meet.

APPENDIX III.

INSTITUTIONS AS SYSTEMS*
Notes on the closed sets, open vistas of development, and transcendence of institutions and their conceptual representations†

1. A LOGIC OF SYSTEMS

1. Both institutions and their components are conceptually represented as organised into some sorts of systems. This is the obvious outcome of the c l a s s i f i c a t o r y nature of the use of concepts and conceptual representations.

At the same time, human practice often abuses conceptualisation. Namely, it often overgeneralises the reason why a choice is made, in order to oversubstantiate the underlying claim. To reach such an oversubstantiation, it puts the claims into a more general context than what is actually justified.

Systems in operation, by and through which we live and manage our daily or professional social practices, are c o n t i n g e n t and c a s u a l in their basic character. Of course, this is not to say that the selection of their

* First published in *Acta Juridica Hungarica* 33 (1991) 3–4, pp. 167–178.

† The draft version of the paper was presented as an invited commentary on the working paper by Fabio Konder Comparato on 'The Institution System of Liberalism and the New Function of the Modern State' at the Latin American Regional Institute of the American Council of Learned Societies' Comparative Constitutionalism Project, held at Punta del Este (Uruguay) between October 31 and November 4, 1988. It is based upon earlier methodological papers of the author, including his 'Quelques questions méthodologiques de la formations des concepts en sciences juridiques' *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), pp. 205–241, 'La séparation des pouvoirs: idéologie et utopie dans la pensée politique' *Acta Juridica Academiae Scientiarum Hungariae* XXVII (1985) 1–2, pp. 243–250, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1998]) 193 pp., [with József Szájer] 'Presumptions and Fiction: Means of Legal Technique' *Archiv für Rechts- und Sozialphilosophie* LXXIV (1988) 2, pp. 168–184 and 'Law as History?' in *Philosophy of Law in the History of Human Thought* ed. Stavros Panou et al., II (Stuttgart: Steiner 1988), pp. 191–198 [Archiv für Rechts- und Sozialphilosophie, Supplementa 2].

elements and the way of their organisation is a gratuitous action within an empty space, to be filled only by the wish and might of the day. For instance, there is some connection between their taking shape, on the one hand, and the factors that have been instrumental in shaping them, on the other—although the presence of these factors as well as their actual impact may be quite incidental from the point of view of the existence, and, moreover, from the point of view of the emergence, of those systems as systems.

The constitutional system of liberalism as historically established is, for instance, o n e of the several possible materialisations it could have had. It is one of the possible outcomes of human efforts through centuries to overcome contemporary misery by setting new framework for human action in its relationship to law and the state.

2. At all steps, there is a close interconnection between the shaping of ideas, on the one hand, and the available store of instruments and their reconsideration at any time, on the other. Even the contents, directions and limits of human imagination are a function of such an interaction. For in total social process, each step and contributing component has a variety of meanings, faces and links and developmental alternatives, and only later will the effected events and connections decide which of them is to be actualised. Or, this is a multi-faceted and multi-directional process with several competitive chances; something that could only be broken down by a finalist reductionism (believing that an ultimate breaking down will be reached) in order to be traced back to a single, straightforward line of development.

In any case, to state that there has been some necessity in the course of actions to take shape and reach a conclusion is by far not to state that there has been a pre-existing universal idea that was to materialise in that way. Even the ontological reconstruction of the factors in play in the social conditioning of the course of events is a reconstruction of the road run by, and the links bridging, the individual chain of that course of events, and not a statement about the universal idea as having necessarily been materialised in this or that historically concrete realisation.

3. To be more precise: when speaking of systems of institutions and their conceptual representations, we have in mind at least four types, or levels, of such systems. Notably, f i r s t , the actually existing concrete system, which is a unit that functions as it is (e.g., the constitutional system of liberalism as practised in a given area at a given time, e.g., in the United States nowadays) (*type 1*); s e c o n d , the historically developed concrete system

which is a unit that functions as it has been (e.g., the constitutional system of liberalism as practised in a given area at a given period, e.g., in the United States since the time it developed) (*type 2*); third, the generalisation of the historically concrete systems as developed in our civilisation (e.g., the constitutional system of liberalism as known and practised in our civilisation) (*type 3*); and fourth, the core idea of the functioning underlying all kinds of generalisation (e.g., the abstract universal formulation of the ultimate principles of operation, of which the constitutional system of liberalism is but one of the theoretically possible forms of realisation) (*type 4*). As to the origins of such an abstract-universal formulation, it may be either gained by theoretical reconstruction or formulated as a preconceived idea, in order to offer a basis for deducing justification of the historical realisation(s) from them.

As it can be seen, types 3 and 4 are not units functioning as they are or have been. Type 4 is an idea(l) in which "laws" (i.e., effects, interconnections) of functioning may be observed in abstract generality on ideal conditions. Type 3 is one of the former's applications to, or materialisation under, historically particular conditions.

4. All systems, ideas and realisations form an endless continuum. Type 1 to 4 are nothing but meaningfully definable stages of this continuum but by far not its limiting points. This is the reason why almost all of them may display almost all the properties that can characterise them at all.

abstractness	internal coherence and consequentiality
ideal	

IDEAL TYPE

ideal of functioning
[*type 4*]

HISTORICAL TYPES

historically particular formulation
of the ideal of functioning
[*type 3*]

EMPIRICAL TYPES

historically particular
generalisation of the
developmentally defined sets of
concrete actual functioning
[*type 2*]

concrete actual functioning
[*type 1*]

real

concreteness contingency

Abstractness, internal coherence and consequentiality, as well as ideality, are decreasingly, while concreteness and contingency, as well as reality, are increasingly present in the line between the ideal and the actual functioning.

At the same time and to a decreasing degree, types 1, 2 and 3 are historical ones; and types 1 and 2 are concomitantly empirical ones as well. Obviously, it goes without saying that there would be no sense in projecting any ideal of functioning into a vacuum with no empirical background whatsoever. Consequently and at the same time, even empirical types may be used as ideal ones. And, obviously again, neither abstractness nor concreteness have end-points. For the question of whether or not I can define types more abstract or more concrete than they actually are is one of expediency in the determination of the levels of analysis.

5. Historically considered, only types 1, 2 and 3 do exist, representing historically characteristic typical configurations. They are at the same time needed for theoretical description, as they hold the name of what is to be conceptualised as existing. Ontologically, the existence of each of them can be established. Albeit type 4 claims to be over and beyond history, the social existence of the ideal representation it embodies can also be delimited historically.

6. Human action is teleological by definition. *Thelos* as a model is at all times working in it in order to direct it. However, it does not turn practice into mere implementation. The ideal remains ideal, the practical practical. Both the motive force and the criterion of practice are what is considered p r a c -

t i c a l . Of course, consideration of what is practical may also set the implementation of something ideal as target. But motive force and criterion remain unchangedly that what is considered practical. Attributes of ideal, no matter of what kind and weight they are, can only exert an influence when filtered through the consideration of what is practical.

2. IDEAL TYPES AND HISTORICALLY CONCRETE MANIFESTATIONS

7. A notional distinction among the l e v e l s of systems, ideas and formulations is a methodological requirement. Since the same l a b e l is often assigned to differing levels and corresponding concepts, it is not exceptional that they are treated in an undifferentiatedly unified manner, which is a common cause of confusion.

For instance, as to the doctrine of the division of powers, the only realistic references are those historical manifestations which are commonly characterised as realisations more or less distorted or imperfect (*type 1*). Those imperfect realisations are seen as variations to a historical descriptive type (*type 2*), which is in turn the implementation of a historical ideal type (*type 3*). In such a way, all practical measures taken in a historically concrete situation are in the final analysis traced back to a broad, well-defined socio-historical context which, in this case, includes an immense variety of things, from the fight for constitutionalism in England, via the way in which MONTESQUIEU was to overcome absolutism in France by (mis)interpreting English constitutionalism, to the achievement of the fathers founding the Constitution of the United States, including the way in which they (mis)understood both England, MONTESQUIEU and their own perspectives, and also including the (mis)understanding, by all historical actors, of the richness of the store of means available in principle. But is it really so that the idea(l) of functioning underlying the doctrine of the division of powers gets reduced to it? Obviously, without universalising the actually particular, in theory I cannot respond affirmatively to this question. If I still do so, which occurs too often in practice, it implies from the outset that I have opted also for some methodological consequences. Let us see three of them.

7.1. U n i v e r s a l i s a t i o n can only be done through assuming notional dichotomies between complementary concepts, *C* and non-*C*, which, albeit antagonistic to one another, wholly cover the field. Thereby I erect an artificially rigid two-poled scheme or bipolarity, only to exclude dialectics and historical sensitivity.

For instance, it is a rather general pattern for contemporary political philosophies to regard the "Third Road"-type searches for a way out from continued crises in Central and Eastern Europe as by-products themselves of the same crises, fallen into irrationality. Well, this critique is an assumption of Capitalism and Socialism, offering in their historically developed forms the only potentialities of the paradigm "capitalism/socialism" and, thereby, also exclusive alternatives. Consequently, the universalistic assumption in work here excludes questions like "Is it this and only this that is capitalism/socialism?" "Is there indeed no choice in between these poor kinds of representation?" "And no choice beyond them either?"

7.2 As to the second consequence, my approach will be prejudiced from the very beginning if I can only count with the individual features of a concrete historical manifestation (*type 1*) as distortions of some underlying principle(s). If this is the case, it assumes the existence of something of which such features are nothing but the individual realisation. Well, this is also an assumption justifiable only by a finalist approach.

7.3 Finally, universalisation of the particular dispenses with the search for identifying last principles (*type 4*). If there are no ultimate principles, then what remains can only reflect historical types upon one another, which has very limited profit, not transcending even the level of historiography. In contrast, theory starts by reconstructing the basic function (*type 4*) which makes it already possible to approach the historically particular formulation (*type 3*) as an intermediary concretisation.

For instance, the classical doctrine of the division of powers is not an empirical theory of development. MONTESQUIEU never claimed that power came to being at any place or time as divided in a tripartite way. He simply contrasted a positive Utopia to the negative one he had already had. Notwithstanding this, his positive Utopia is usually treated as the final formulation touching upon the topic. If this is so, no theory based on the concentration of powers should ever be reconcilable with his doctrine of the division of powers.

Well, the Bolshevik theory of the state has since long professed to be antagonistic to western democratic traditions. But ideological claims, e.g. for complete disruptcy and discontinuity, are not to be taken as a substitute to theoretical analysis. In order to assess what the whole dispute is about, even a historical reference may be revealing. In fact, Bolshevik theory was launched as a revolutionary program of why and how to seize power, and the Bolshevik criticism of MONTESQUIEU theorised about power at a time when it was at the threshold of actually seizing it. In response to that confronta-

tion, it too misinterpreted MONTESQUIEU, not to recognise anything from his teaching but an antirevolutionary program of resigning, once and for all, of the seizure of power.

Or, in sum, all this means that both adherents and critics have instrumentalised MONTESQUIEU's positive Utopia by transforming his statements into ideology. Western tradition has developed universalised terms which can however be valid in their proper context exclusively, as opposed to the Russian revolutionaries who have narrowed them only to mean the negation of their very dreams.

The genuine problem is that, in fact, none of them has realised that what they actually did was to intermingle different levels of analysis, and this is the reason why they had to become mutually antagonistic. To be sure, none of them stated something different on the same subject, but they launched differing statements on differing subjects.

At the same time, it is to be noted that, in fact, a "division of labour" type doctrine as applied to the power machinery was finally developed by the Bolsheviks, pushed to offer (no matter how much imperfect it was, but, after all, a kind of) an alternative to the western conception of the division of powers. Presumably, the ensuing principle of the unity of powers with only a hazy and weak "division of labour" within it will remain in force with them, so long as a one-party-rule can impose itself upon society. On the other hand, even a system of "division of labour" in the power machinery can develop further with some—even if rather limited—potentialities.

As to the relationship of these conflicting approaches, mutual exculpation qualifies itself as bare ideology. Theoretically both are levelled at type 3.

3. IDEAL TYPE AS A NORMATIVE IDEOLOGY

8. All the systems, conceptual representations and operations we have surveyed thus far are of a descriptive character and function, called into being as instruments to grasp conceptually what institutionally exists. In short, they qualify as theoretical representations.

As it is known, theoretical activity is a specific terrain of homogenising human activities, distinguished from both other domains of a homogenising effect (e.g., custom, convention, such as speech, law, politics), on the one hand, and the vast field of the heterogeneity of everyday life, on the other. Still, it does not require that the various forms of objectification in one area can not be made use of in other areas as well. Ontological investigation

suggests that all kinds of ideal representation and objectification—no matter whether they are of a theoretical or practical character—can turn into ideology. All this can be done by putting them into another context and making use of them specifically.

This is to say that (1) everything theoretical can be made a factor of practical action by putting it into a practical context; and (2) everything in a given homogeneous field can be taken out from it and either lifted in another homogeneous field (e.g., the linguistic, semantic or rhetorical aspects of law, or the law's political use) or merged into the heterogeneity of everyday life (e.g., the uses of social conventions, language, law or politics in a way annihilating their particularities)—well, in both cases with prior determinations suspended, in order to let them act as adapted to their new environment.

9. Being adapted to a new environment is a change of memberships in/of the relevant systems. In case of conceptual representations, a positive value-judgement and/or a deontic operator attached to them can effectuate this change. For a theoretical statement becoming a standard for practical action is already an ideological use. It involves its transformation into normative ideology.

10. Systems may be used as normative patterns in three situations: (l) in case of conflict with the systems' idea in question, to modify the underlying system in the given direction; (2) in case of an internal contradiction within the underlying system, to resolve it in the given direction; and (3) with no external or internal conflict provided, to prescribe it the change as needed or to define the direction and substance of its further development when and in the way it is needed.

11. One of the fields for normative ideologies to provoke change by defining who is to act—and when, on what, and why and how—is the so-called filling of gaps. In such a sense and use, "gap" is a normative concept, being the function of a normative framework (a) to qualify any establishment within the system as a gap; in order to be able (b) to fill it (c) in a given way, (d) with a substance taken from within the system to the effect that (e) at least ideologically, the filling of such gaps will not implement any genuine modification in/of the system, although it strengthens its individual position within and as a member of the system, as made to be more conforming to the system.

Filling the gaps is one of the most important factors to enhance the practicability of the systems, as it makes it possible to them to preserve their identity while making them keep in pace with timely changing needs. Or, there have always been two basic means of sublated innovation in institutions: t r a n s p l a n t a t i o n (i.e., injecting something not previously known in the system which is said to have already been implied by, as one of the potentials of, the underlying system) and f i c t i o n (i.e., claiming that what is in point of fact new in the system is nothing else but an implicit extension as made in and to the system).

(In the field of law, it seems to be a commonplace that in addition to fiction proper, as the earliest and most common and lasting instrument to provoke and, at the same time, veil change, almost ninety-five percent of the four thousands years of recorded legal history was dominated by innovative legislation, ideologically embellished as bare restitution of what the "good old custom" of the country had been, in usage already in HAMMURABI's Prologue to his Law Book and surviving till the enacting clauses used as a formula up to the last French king.)

And the reason for its success is easy to see: it has been a conveniently flexible means, suited to meet two basic requirements contradicting one another, that is, to e f f e c t u a t e c h a n g e as needed (i.e., to function as re-adapted to the changing needs) while preserving t h e s y s t e m ' s i d e n t i t y (i.e., to reproduce its basic continuity over all the series of actual discontinuities) within an apparent intellectual and conceptual harmony.

12. In principle, each and every one of types l to 4 can be used as normative ideology if reflected onto all the other ones of the same types. Even the conceptual representation of the concrete actual functioning (*type 1*) can be made a normative ideology by reflecting it on the conceptual representation of its posterior functioning.

(Taking into consideration the open texture of concepts and the inherent fuzziness of argumentation, we have to realise that there is a large room for transcendence both among the undifferentiated concepts we use and among the undifferentiated systems we refer to. To avoid transcendence is a question of the formulation of premises, an operation that has nothing to do with reflection of one concept onto another in their normative usage.)

13. The normative use of ideal systems and conceptual representations is the explanation why and how these systems and representations can be, or may turn to be, a decisive factor of social processes, even if for a long period of time they could at most be qualified as empty classes. Since they are normative (or normatively treated) from the beginning, and expectations about them do not disqualify them, even if not met with success. Or, what is more, even dead systems and representations can finally exert a decisive influence in their way to overcome the inertia by pushing a process forward or turning it backwards.

For instance in Hungary, the wish for implementing the Soviet-patterned Constitution of 1949 into practice seemed for long an aborted idea from the very outset. In the 1980s, the ever growing gap between words and facts induced some constitutionalists to demand realism instead of illusionism, i.e., the adaptation of its wording to prevailing practice, to the hard fact of the one-party-rule. Luckily enough, this proposal failed by the fear that thereby the only thing that remained, that is, the bare possibility of fighting for more or truer parliamentarism through referring to a text enacted by the Communists themselves, would also be lost.

4. OBJECTIVITY AND CONTINGENCY OF SYSTEMS

14. For a given historical actor in a concrete situation an immense amount of social objectivations, conventions, institutions, etc. are given. They form to him what we call t r a d i t i o n . All the components of tradition serve to him as an objectively given framework, in respect to which he may have only alternatives of following it or departing from it, but in any case he will not be in a position to dispose of it quite freely.

Escaping from social bounds contradicts the very notion of social activity; and, paradoxically, in modern society even the first attempt at escaping from them is itself only conceivable through conventionalised social practices. In short, socialisation—i.e., a very specific learning process—is the exclusively available pattern for the individual in his relationship to social totality in modern society.

At the same time, the individual is certainly not in isolation but is a component part of the prevailing social totality. What seems to be objectively given to him in individual situations has in fact no existence of its own, independent of the total set of individual social practices in the same totality. What social tradition is, is in the last analysis a function of the total sum of

social practices, reproducing the tradition through practising it. Consequently, reproduction of a given tradition is a continued learning process, in which taking its cognisance will amount to re-adapting it, and its interpretation, to reinterpreting it as part of social practices. In other words, every human act establishing what we call h o m o g e n e o u s can only be performed within the boundaries (and upon the basis and for the sake) of (and, in the final resort, as subordinated to) what we call the h e t e r o g e n e o u s. In the same way: every human consideration to what we call e p i s t e m i c can only take place within the boundaries (on the basis and for the sake) of (and, in the final resort, as subordinated to) what we call o n t i c.

15. In the light of an ontological description, the search for a practical solution is *nolens volens* a model-patterned reaction to a given situation—independently of the agent's subjective intention. At the same time and also independently of any intention, that which is to come objectively out of this will be something m o r e o r l e s s, or, in any case, o t h e r, than what the original intention was. It will necessarily be a practical answer to a practical challenge as it was sensed and interpreted by the acting agent. Thus, it will necessarily be an imprint of all the moments that have been present in the situation, contingent from the point of view of the social totality.

There is a particular dialectic at play here. For the reaction—no matter to what extent and how intentionally it is model-patterned—will be the issue of practical considerations in a practical context. Even what is manifested as non-practical is made so by practical consideration. And this applies to everything. Anything claimed to be eternal is a function of practical interest to project it as a fetishised issue. It is ideology that is at work in such and other cases of overgeneralised interests.

To qualify a statement as i d e o l o g y is an ontological statement upon actual use, and not a judgement upon foundation or value. As is known, ideology is a form of consciousness called into being to influence practical human (re)action. In contrast, t h e o r y is a form of consciousness called into being to reconstruct the interconnections of any process, including its ideology.

16. The theoretical reconstruction I have in mind can be nothing but o n t o l o g i c a l. For the resultant e p i s t e m o l o g i c a l reconstruction arrived at may at most be a negative one, demonstrating, e.g., the false conclusion reached by false inference from false premises—that is, its own

incompetence for thorough reconstruction. It is only ontological reconstruction that can answer why the relevancy of epistemology is limited, why it is so that forms of false consciousness can also be instrumental, and even socially needed on occasion—i.e., offering as the sole alternative.

It is only ontological reconstruction that can offer an explanation of the paradox of interpretation amounting to reinterpretation or misinterpretation, and of reproduction amounting to production or misproduction.

17. Systems are located in a c o n t i n u u m of a constant motion and change. This is a continuum in light of both the way they are structured hierarchically and their self-reproduction, in a continued process in social totality.

To be more precise, to exist as placed in a continuum may have two senses. O n t o l o g i c a l l y, it is a form of existence through constant self-reproduction in an endless series of reinterpretation. (Reinterpretation here is an ontic sequence of purposeful practical reactions, and not a critical attitude, which is epistemic.) E p i s t e m o l o g i c a l l y, it denotes an ideal existence necessarily having nothing but fuzzy conceptual boundaries.

These features are common to objects of social ontology. Nevertheless, I wish to emphasise the considerable extent to which the links are epistemologically loose among sequences in both the systems' lines of development and their hierarchic structures. The systems in question are historically developed sets, in which all may have had alternatives to those actually established (even if they did not). It is most plausible to realise it in limiting cases at both the micro- (*type 1*) and macro- (*type 4*) level.

As, for instance, to the micro-level, each concrete, actually functioning system of constitutional liberalism bears the imprint of the place and time of its formation, i.e., characteristics that are only explainable in the context of their actual shaping. As to the macro-level, the connection of ideality and actuality is only explainable by their development exclusively. Let us assume that I should have to invent the constitutional system of liberalism now. As a matter of fact, I can by no means take it for granted that I would lay its foundations by the same philosophical, anthropological, etc. assumptions as it was done several centuries ago. And the same holds true vice versa as well. I cannot be sure that any concrete system of constitutional liberalism that has ever existed could be inferred from or justified by the assumptions suggested by human inventiveness now. And we have to add that theoretical variations are, in contrast to actual occurrences, endless in practice.

The same loose contacts can also be characteristic of actual operating systems. Theoretical reflection often groups systems of autonomous development (e.g., ones in England or in the United States) together; the past of which may count more centuries than the one of others—due to recent transplantation or imposition (e.g., in the Federal Republic of Germany or Japan)—may count in decades.

It is precisely due to such features that they may turn into genuinely h i s t o r i c a l phenomena, both marking and being made by history. For otherwise, if they were units unchangedly identical with themselves, their history could only be quasi-history at the most, with mere alternation of blocks in a mechanical world, that is, of entities of a complex made up of discrete motions of discrete elements. To put it another way: the c o n t i n u u m the systems embody is the outcome of their dialectic character. Their dialectic is one of sublation, that is, of unceasing preservation and change.

18. It is also their existence as a continuum that makes it possible to understand why their historical nature is so important from the point of view of practical action as well. For their being a continuum in constant motion and change is also a function of their environment, of their interaction within a given environment they are shaped with. Or, the way they transcend themselves and by which their reproduction through their continued reinterpretation is achieved is not only a function of them but of the general culture and (political, legal, etc.) cultures of specialised fields as well. It is so to such an extent that even the fight for them may have alternative actions to take. Namely, an action directed at them may aim at their shaping in a direct way (as, in the case of law, directed at its enacted text), as well as in an indirect way, through the cultural context in the interaction with which they may be shaped (as, in the case of law, with the mediation of or intervention through legal policies and legal culture, made to be strong enough to be able to have a genuine role to play).

5. LIMITS AND BONDS, CONSEQUENTIALITY AND PRACTICABILITY OF A SYSTEM

19. The question of what properties, features and traits a system may develop or take over by transplantation from another system is quite open an issue, having no restriction from the point of view of social totality. It is not even

a system-related issue. It can only be raised as a question of the limits of law, politics, etc. with a final resort for the ontological contexture: what can be practicable, i.e., fulfilling a genuine function, in a social system?

On the level of abstract generality, the answer is rather vague. For, in point of principle, there is no limit predetermining what can turn into instrumental or practicable in a social context, as, indeed, anything whatever can do so.

It means that the possibility of systems coming into being as mixed is, so to speak, endless. One could even state that only mixed systems are practicable in practice, or that non-mixed systems are, without exception, intellectual projections issued from or extrapolations gained with a theoretical reduction.

20. Is there any precondition to the point that systems are identifiable as such just because they have some definite elements organised into a system? The question is directed at their own determination from within. Or, is there any limit set by the systems, defining their own identity by minimum contents as necessary and sufficient conditions for their existence? Or, is there any self-imposing limit of the system which might of course be ignored, but only with the consequence of placing itself out of the system?

This is a topical issue, with enriching debates in the western hemisphere focusing upon them. Only to mention but few: expropriation versus privatisation; planning versus invisible hand; leftism versus rightism in the same system, etc. This is a key issue of the contemporary crises of currently existing Socialisms as well. Only to name but few: economic reform and rigidified STALINist superstructure; bankruptcies of sham liberalisation; the one-party's crave for legitimacy without offering anything in return for legitimation, etc. The case of (now past) allegedly Socialist Hungary is a novel proof for the hard bonds of a system. For economists claimed in the final decades of the regime that partial reform, softened and extended over time with no breakthrough in the political field, meant planning failure taken for granted; and again, they were right. Later on, the same dilemma became hardened: was the tabooing of party-rule by one party simply setting framework for a reform, or was it a touchstone of the left for attempting to reform from within, too much well-deserved?

21. To learn that, defying human imagination, the systems mankind has established are only storehouses of contradictions yet they still function well—well, this realisation is a shocking experience for the human mind to

accept. Otherwise expressed, to expect that systems have developed with maximum cohesion, consequentiality and freedom from contradictions is a mere theoretical requirement, reflecting more the subject than the object, which, due to the logical ideal of thinking, is limited in imagination. And theory reflects, in addition to external world, its own homogenising principles, too.

In fact, systems function according to their own homogeneities, which are far from the ideal of logic. As p r a c t i c a l systems, they are to cope with practical problems resulting in c o m p r o m i s e s o l u t i o n s to the detriment of the principles of cohesion, consequentiality and coherence, that is, to the detriment of logic.

At the same time, contradictoriness with tensions in actual operation is a basic fact of ontology. Instead of standing for the temporariness and deficiency of anything humane after the first sin has been committed with its actors ousted, it stands for a character present everywhere and at every time, a character that may grow to be a burden but, in most cases of balanced development, serves rather as one of the most powerful reserves for the internal renewal of any system. Internal renewal is a way of making optimal use of the systems' own potentialities, in order to allow it to keep pace (through its continuous re-adaptation through continued re-adjustments) with overall development. This is the reason why systems process outer conflicts into inner ones by forwarding competitive arguments in order to solve them. This is the reason why systems develop conflicts through series of temporary solutions, and this is the reason why stand-still is just a name for the theoretical division line to be drawn between situations of conflicts, in succession of one another.

APPENDIX IV.

LEGAL TECHNIQUE*

1. LEGAL TECHNIQUE

The term 'legal technique' first appeared in the vocabulary of legislative theory in the 19th century, SAVIGNY[1] being probably the very first one in our age to distinguish the '*technische Element*' from the '*politische Element*' of legislation. The further elaboration of the term and the underlying concept was connected with the emerging ideology of modern formal law. Scholars in Germany (particularly JHERING) laid down the theoretical foundations of '*juristische Technik*' in the late 19th century. By legal technique, they meant the whole set of professional skills, methods and means of elaboration, adaptation and modification of the law. In the 20th century, French scholars (particularly GÉNY) had the prominent role in contributing to a theory of '*la technique juridique*'.

The meaning of the term has remained rather ambiguous.[2] Not even the notion can be found in most legal dictionaries and encyclopaedias. Some consider the term itself unfit.[3]

* First published, as co-authored with József Szájer, in an earlier version in *Rechtskultur — Denkkultur* Ergebnisse des ungarisch-österreichischen Symposiums der Internationale Vereiningung für Rechts- und Sozialphilosophie 1987, hrsg. Erhard Mock & Csaba Varga (Stuttgart: Steiner 1989), pp. 136–147 [Archiv für Rechts- und Sozialphilosophie, Beiheft 35].

[1] Karl Friedrich von Savigny *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* [1814] 3. Aufl. (Heidelberg: Mohr 1840), p. 12.

[2] „La notion reste imprécise, non seulement chez auteurs qui l'utilisent en passant, mais même parfois chez ceux qui ont entrepris d'en faire la théorie." Jean Dabin *La technique de l'élaboration du droit positif* Spécialement du droit privé (Bruxelles: Bruylant & Paris: Sirey 1935), p. 2.

[3] „Le vocable de technique doit être réservé à certains procédés de métier, mais […] le droit n'est pas une pure pratique." Maurice Hauriou *Précis de droit Constitutionnel* (Paris: Sirey 1929), pp. 61–62. Or, „Pour désigner cette tâche, l'expression 'technique' est mal choisie." Jean Dabin *Theorie générale du droit* 2e éd. (Bruxelles: Bruylant 1953), pp. 234–235.

1.1. In a broader sense, legal technique is a complex phenomenon, composed of all the methods, procedures, ways, skills and means that make the functioning of law possible. It has a wide domain in which to assert itself. GÉNY attributed to it „une telle place qu'elle absorbe à elle seule, ou peu s'en faut, tout le domaine du droit".[4]

As to its history, SAVIGNY was „le premier qui semble avoir décrit d'une façon claire le rôle de la technique juridique".[5] SAVIGNY's distinction between the conscious technicalities used to elaborate a legal system and the spontaneous designing of the law derived from his concept of '*Volksgeist*'.[6] For the elaboration of a legal system „ist auf jeden Fall ganz technisch und fällt als Solche den Juristen anheim"; therefore, all this „Geschäft zur juristischen Technik gehört".[7]

JHERING's conception was rooted in SAVIGNY's formulation. For JHERING, '*juristische Technik*' was a legal methodology. He distinguished between matter and form of law; legal technique targets the latter as its subject. The form of law is expected to be adequate for its matter, that is, for the inclinations of evolving popular feeling, i.e., the people's spirit. Legal technique as methodology has two sides, the theoretical and the practical.[8]

According to DABIN, for JHERING,

> „l'idée de practicabilité […] n'est nullement pour suggérer que le souci de cette practicabilité devrait paralyser tout effort vers l'idéal théorique, qui est la rêgle conforme au bien public selon les possibilités du milieu."[9]

[4] Léon Duguit *Traité de droit constitutionnel* 1: La règle de droit – le problème de l'Etat, 3e éd. (Paris: E. de Boccard 1927), p. 105.

[5] Alexandre Angelesco *La technique législative en matière de codification civile* (Paris: E. de Boccard 1930), p. 5.

[6] Savigny *Vom Beruf*…, p. 12.

[7] SAVIGNY, cf. Walther Hug 'Gesetzesflut und Rechtssetzungslehre' in *Gesetzgebungstheorie, juristische Logik, Zivil- und Prozeßrecht* Gedächtnisschrift für Jürgen Rödig, hrsg. U. Klug, Th. Ramm et al. (Berlin, Heidelberg & New York: Springer 1978), p. 8.

[8] „Die gesamte Tätigkeit der juristischen Technik läßt sich auf zwei Hauptrichtungen oder Hauptzwecke zurückführen […] 1. die möglichste Erleichterung der subjektiven Beherrschung des Rechts — das Mittel dazu ist die quantitative und qualitative Vereinfachung des Rechts — 2. die mögliche Erleichterung der Operation der Anwendung desselben (Praktikabilität des Rechts)." Rudolf von Jhering *Geist des römischen Rechts* auf den verschiedenen Stufen seiner Entwicklung, 2. Teil (Leipzig: Breitkopf und Härtel 1858), p. 340.

[9] Dabin *Theorie générale*…, p. 233.

The operations that are characteristic of legal technique are the following: '*juristische Analyse*', '*logische Konzentration*', and '*juristische Konstruktion*'.[10] All three are necessary to serve the optimum practicability of law.

GÉNY's concept of legal technique sought to cover the whole field of law. Its philosophical foundations are provided by postulating a distinction between '*le donné*' and '*le construit*', the subject of legal technique being '*la construction légale*'.[11] The substance of the former, "the given", is at any given time expected to be adequate for the previously given '*donné de l'ordre juridique*'. Consequently, „un ensemble de procédés ou de moyens pratiques apparaît nécessaire, qui représente la part spécifique de l'art ou du métier dans le Droit et qu'on peut appeller sa technique".[12] The elementary mechanisms of this technique are formalism and publicity, legal categories and legal construction, fiction, presumption, and legal language.

DABIN reconsidered some of the propositions GÉNY formulated. His concept is socially more sensitive, and it covers both the technique of positive law and law conceived of as a social technique, by realising that „en même temps, que le droit a une technique il est une technique".[13] For him, technique and law were to be considered in a wider socio-philosophical context. He considered it too narrow if appreciation of differing kinds of activities is reduced to their practicability. He proposed a distinction between two types of techniques instead: on the one hand, the social or political technique „qui fournit la matière des règles" and, on the other hand, the legal technique proper which is „proprement réglementaire mettant la matière en forme de règle positive".[14] For, while the former item is

[10] Jhering *Geist des römischen Rechts*…, pp. 358–384.

[11] „[L]a technique représente, dans ensemble du droit positif, la ferme opposée à la matière, et cette forme reste essentiellement une construction largement artificielle du donné." François Gény *Science et technique en droit privé positif* Nouvelle contribution à la critique de la méthode juridique, III (Paris: Sirey 1923–1930), p. 23.

[12] François Gény, 'La technique législative dans la Codification civile moderne: A propos du Centenaire du Code Civil' in *Le Code Civil 1804-1904*, Livre du Centenaire, 2 (Paris: A. Rousseau 1904), p. 991.

[13] Dabin *La technique*…, p. 7.

[14] *Ibid.*, p. 36.

„de nature sociale et politique, – de nature s o c i a l e , parce que le droit a pour matière et vise à ordonner les rapports sociaux entre les Etats; de nature p o l i t i q u e , parce que cette ordonnance doit avoir lieu sous l'inspiration et dans le cadre de la politique, interne et internationale,"[15]

the latter, „la technique juridique proprement dite […] ne concerne que la mise en forme praticable".[16]

RUSSO also found it „indispensible de distinguer deux sens du mot technique: l'un qualifiant le caractère du moyen employé".[17] During the same period, DABIN enlarged the concept. According to him, „tout, dans la règle juridique, quelle qu'en soit la source, y compris la coutume, est construction et en ce sens oeuvre de technique".[18]

For contemporary authors, legal technique is an expression of social experiences as well. According to a Hungarian definition, for instance, "the technical elements of law represent definite social contents crystallised into methods of technical solutions".[19]

1.2. In l e g a l p r a c t i c e , legal technique is identified with all kinds of practical activities that aim to adapt legal norms to actual social needs. In this sense, legal technique is nothing other than a socially oriented practical operation with legal norms. This sort of functional approach concentrates mostly upon the technical features of law-application. For instance, EHRLICH spoke about „die juristische Technik, die Gesetz auf Fälle anwendbar machen will, für die es keine Vorschrift enthält".[20] Or, legal technique is conceived of as a practice ensuring the realisation of positive law, which is by no means finished in its enacted form.[21] Consequently, the motivational power of legal technique is not pure logic; it is social interests [*Lebensinteressen*], for

[15] *Ibid.*, p. 234.

[16] *Ibid.*, p. 235.

[17] François Russo *Réalité juridique et réalité sociale* Étude sur les rapports entre le droit et la sociologie et sur le rle du droit dans la vie sociale (Paris: Sirey 1942), p. 61.

[18] Dabin *La technique*…, p. 234.

[19] Kálmán Kulcsár *Politikai és jogszociológia* [Political and Legal Sociology] (Budapest: Közgazdasági és Jogi Kiadó 1981), p. 186.

[20] Eugen Ehrlich *Freie Rechtsfindung und freie Rechtswissenschaft* (Leipzig: Rotschild 1903), p. 19.

[21] „Die Rechtstechnik hat wie jede Technik auch der Unvollkommenheit und Unvollständigkeit des Materials abzuhelfen." Josef Kohler *Lehrbuch der Rechtsphilosophie* 2. Aufl. (Berlin & Leipzig: Breitkopf und Härtel 1917), p. 89.

> „Die Beziehungen zwischen einzelnen Sätzen und dem Leben durchaus nicht durch feste Logik gegeben sind […]. Die Rechtstechnik hat sich also nach der Richtung des Interessenschutzes in der Interessenabwägung zu gestalten."[22]

Or, in another formulation, „(m)it der wirklichen Logik hat die juristische Logik nichts gemein als den Namen. Sie ist überhaupt keine Logik, sondern eine Technik".[23]

This is to say that legal technique is to be defined as „l'art de concilier les intérèts avec des mesures plus exactement adaptées au but", its task being „d'adapter le droit aux circonstances imprévues de la vie".[24] It involves a function to

> „agrandir la sphère d'application des règles édictées par le législateur pour un cas particulier […] puis en utilisant les principes ainsi découverts pour la solution des cas nouveaux que fait naître la pratique."[25]

Or, it may also be said that its function is simply „la plus complète réalisation du droit".[26]

1.3. In legal scholarship, legal technique is defined as a logical operation with legal norms, in order to achieve the elaboration of a coherent system of legal notions, frameworked in and by a legal doctrine. This version of the concept was formulated with respect to the doctrinal study of law.[27] The subject of such an operation is positive law; its user is jurisprudence, although it may also be of help for legislation. Legal technique is used in order to make out of the body of law a conceptual unity, consistent and coherent, by re-establishing it in its notional context and framework. HOLTZENDORFF separates '*Rechtsphilosophie*' from '*Wissenschaft der Technik*

[22] *Ibid.*

[23] Eugen Ehrlich *Die juristische Logik* (Tübingen: Mohr 1918), p. 299.

[24] R. Demogue *Les notions fondamentales du droit* (Paris: A. Roussseau 1911), p. 39.

[25] Edouard Cuq *Les institutions juridiques des Romains* Envisagées dans leur rapports avec l'état social et avec les progrès de la jurisprudence: L'ancien Droit (Paris: Plon 1891), p. 717.

[26] Istrate Micesco *La personnalité morale et l'indivision, comme constructions juridiques* Thèse (Paris: Impr. de Bonvalot-Joure 1907), cf. Angelesco *La technique législative*…, p. 3.

[27] „Das Recht […] ist einer selbständigen wissenschaftlichen Bearbeitung fähig. Die Vollführung dieser Aufgabe ist Sache der technischen Jurisprudenz." Rudolf Stammler *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung* Eine sozialphilosophische Untersuchung, 3. Aufl. (Leipzig: Veit 1914), p. 155.

des Rechts', the latter being destined for the systematic elaboration of the notions of law.[28] For „die Begrifflichkeit des Systems und das logische Ideal des rechtswissenschaftlichen Positivismus" had a primary role to play in 19th century German jurisprudence; without it not even the doctrinal preparation for codifying the *Bürgerliches Gesetzbuch* would have been conceivable.[29]

For STAMMLER, legal technique is a skill useful to shape law as a formal expression: it is „die Art und Weise, in der rechtliches Wollen nach Außen hin auftritt".[30] On the other hand, it is used to give the law a shape is made by and for, and through, definite social considerations. It is "the creation of logical structure that will enable the rules of the law to be so interrelated and so effectively and concisely stated that they may be more easily grasped, applied, and developed".[31] As all this implies that law is expected to serve social interests through the systematic elaboration of the positive law. Its effects are to be realised

> „dans les résultats de détermination, de concentration, de systématisation logique des règles, aboutissant à une double simplification du droit; qualitative pour le contenu des règles, quantitative pour leur nombre."[32]

1.4. The broadest concept of legal technique equalises it with law conceived of as a special technique. According to this view, legal technique is described as a means of influencing human behaviour. Its most extreme variant is KELSEN's identification of law with 'special legal technique'.[33] Or, if law itself is regarded as a technique, legal technique will be nothing else than law itself, considered in its practical working. Generally speaking, "law is a social technique which consists in bringing about the desired social conduct of men through threat of coercion for contrary

[28] Franz von Holtzendorff *Enzyklopädie der Rechtswissenschaft in sysematischer Bearbeitung* 1, 7. Aufl., hrsg. Josef Kohler (München, Leipzig & Berlin: Duncker & Humblot 1913), p. 16.

[29] Hug 'Gesetzesflut…', p. 10.

[30] Rudolf Stammler *Theorie der Rechtswissenschaft* (Halle: Waisenhaus 1911), p. 563.

[31] George Whitecross Paton *A Text-book of Jurisprudence* 3rd ed. D. P. Perham (Oxford: Clarendon Press 1964), p. 235.

[32] Dabin *La technique*…, p. 231.

[33] "The specific technique of the law […] consists in the very fact that it attaches certain measures as consequences to certain conditions." Hans Kelsen 'The Law as Specific Social Technique' in his *What is Justice?* Justice, Law, and Politics in the Mirror of Science, Collected Essays (Berkeley, Los Angeles & London: University of California Press 1971), p. 244.

conduct".[34] On the other hand, the technique of law is an aggregate of special techniques.

> "The penal technique makes conduct the condition of sanctions to the delinquent. The administrative technique stipulates that coercive measures should be taken […] without any particular conduct by the person against whom the measures are applied being laid down as a condition. The civil technique stipulates as the conditions of coercive measures both the conduct of delinquent and the decision of some party to sue."[35]

2. ON LEGAL TECHNIQUE

2.1. Definition and function

As to its most significant characteristics, legal technique is a historical product, closely related to the law's level of development at any given time. It is the innermost component of the legal arrangement of a given society, characterising both its range of instruments and professional culture. Legal technique is in itself a complex phenomenon. It is an aggregate of skills, methods, ways and procedures, organised into one functioning unity. It is an instrumental phenomenon, established in order to make the law's operation possible in a way that is considered socially desirable, by properly shaping both the understanding of its norms and their practical implementation. Since proper functioning of the law presupposes formal rationalisation and logical arrangement—to a certain degree—of both legal enactments and the terms and concepts used in them, one of the tasks of legal technique is to make a legal system out of the body of laws.

Or, we can formulate this position by saying that legal technique is an intermediary link between legal policy and the law. For legal policy defines what is to be done; legal technique provides the specification of how it can and should actually be done, and the law offers the instrumentality through and with reference to which the whole action is operated. Since in our culture of modern formal law the law is regarded as identical with texts, i.e., with meaningful linguistic signs carrying norm-structures, legal technique is nothing more or less than a technique of conceptualisation, that is, a tech-

[34] *Ibid.*, p. 235.
[35] James William Harris *Legal Philosophies* (London: Butterworths 1980), p. 61.

nique of making and operating, in a conceptual way, the texts that make up the law.

One can even make a generalisation by stating that at each stage of development, law is a product of legal technique. Or, formulated in another way, legal technique is also a factor of, and a medium for, the law's dynamics. For legal technique is the medium for filtering all impetuses, theoretical or practical, cognitive, evaluational or volitive, that may exert an influence on the law's development. As a consequence, legal technique is the prime factor of the law's practical existence (that is, of its implementation, formation and transformation) in the short run as well as in the long run. Retrospectively, legal technique and law cannot be separated from one another as the contribution of the former is continuously built into the latter as its product. Prospectively, however, the game is open with alternatives to compete. At each stage, new filtering media can be added externally to the process of interaction. If we consider all factors, favourable traditions in, and operations with, the means of legal technique can 'improve' even 'bad' laws, transubstantiating them into reliably inspiring sources, whilst even 'good' laws can be kept from touching upon actual practice sensitively, if treated and processed through by unfavourable ones. In sum, legal technique is the medium of processing legal norms, both in practice and in doctrine. Although its end-product at any given time can only be justified in terms of logic, by using logic as the theoretically exclusive relevant standard to assess it, both practical operation with, and doctrinal processing of, legal norms are practice-bound. Hence, the problem of contradictions between the strict observance of the law's own provisions and the optimum fulfilment of social expectations does emerge.

This is so because

> „la technique juridique elle-même peut constituer une aide ou un obstacle au développement. Cette technique juridique exerce son influence sur tous les aspects de la vie sociale; les modalités de l'organisation judiciaire, les formes de la procédure, la nature des institutions juridiques agissent sur l'organisation des entreprises, facilitent ou entravent les échanges, immobilisent les structures sociales ou en accélèrent les transformations."[36]

[36] Edouard Lambert 'Introduction' in his *La fonction du droit civil comparé* I (Paris: V. Giard & E. Brière 1903), p. 179.

Or, to formulate it in another way, formal enactment is so thoroughly combined with, and filtered through, its social contexts that something from the latter inevitably will be left. This is why a text standing alone is only a dead component. Phrased in the logic of juridical process,

> "law is not a logical corollary of the law but something being made repeatedly at all times from, and through the instrumentality of, the law. […] The law has a social existence exclusively due to its meaning which, in its turn, can manifest itself in a linguistic, as well as social, context."[37]

It is legal technique that creates an opportunity to resolve recurring conflicts between the need to meet social expectations in practice and the demand to fulfil the law. For any mediation through the law is hardly anything other than the continued realisation of (by implementing) a formal system of fulfilment. As WEBER defines it, the task of the legal specialist is „die Feststellung, was an einem in typischer Art verlaufenden Gemeinschafts- oder Einverständnishandeln r e c h t l i c h geordnet, also als ein Rechtsverhältnis, zu denken seien",[38] that is, a task to be met only when unbroken adaptive manipulation is the case.[39] It is why LAMBERT states: „la technique juridique est nécessairement conservatrice parce qu'elle doit opérer des transactions entre les besoins contradictoires du changement et de la sécurité".[40]

2.2. Legal technique and legal cultures

Analysis of the function of legal technique may contribute to substantiation of a statement about legal culture, determining—with final impact upon—the whole practical life of law. For legal culture is a function of the set of means (patterns, etc.) of legal technique characteristic of the culture in question; a primary role can be played by legal technique both in developing and in reasserting the given tradition.

[37] By the author, 'Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives' in *Legal Development and Comparative Law* ed. Zoltán Péteri & Vanda Lamm (Budapest: Akadémiai Kiadó 1982) pp. 45–76 on p. 63.

[38] Max Weber *Rechtssoziologie* hrsg. Johannes Winckelmann (Neuwied: Luchterhand 1960), p. 101 [Soziologische Texte].

[39] It is to be noted that 'mediation', 'system of fulfilment' as well as 'manipulation' are terms used in the ontological characterisation of law by George Lukács' *Zur Ontologie des gesellschaftlichen Seins*, cf. note 44, passim.

[40] Lambert 'Introduction', p. 179.

Legal technique is at the same time bound to actual praxis. Systems of legal technique differ from each other according to place and time; subsystems of legal technique are developed within any particular system of law, while also diverging from one another according to the branches of the law. Legal culture provides the basic unit within which legal technique can be defined in a reasonable way at all. Legal culture is compounded by positive law and the legal profession responsible for making the law function, as well as by legal technique handled by the profession in question. The available means of legal technique primarily define, among others, flexibility, sensitivity and responsiveness of a legal norm-system. This is why the quality of any given legal culture is the function of its legal technique to a considerable extent. General features of any particular legal technique may by and large characterise a whole legal culture. For example, taking just two instances, Roman law is „der Begrifflichkeit eigen und der Gedanke eines sachlichen Normensystems zunächst fremd"[41] while Asian laws are of the nature to guide orientation rather than to rule behaviour.

Legal technique, as a characteristic of a given legal system, is at any given time the product of historical development. Such factors as the patterns of thought prevailing in society, the practical experience gained by the legal profession or the patterns received from the past and/or the outside world can be decisive in the forming and everyday shaping of legal technique. However, one must take into account the fact that instrumental phenomena are multifunctional. As a consequence, whichever variations of procedure or form manifested in the history of civilisation are explored, it immediately becomes clear that, under different conditions, any of them could successfully serve to fulfil any social function that the law has ever been able to serve. This means that formation of any legal technique is the result of a process of historical (self-)determination upon which all factors, including the incidental and contingent, may have had their impact.

Legal technique may have an infinite number of components and variants. At the same time, no specific legal technique is established forever. As an aspect of the social phenomenon and human venture called 'law', it is in constant formation, shaping and reshaping. As a function of the endlessly renewed needs and challenges of practice, legal technique will inevitably throw some of its elements into prominence by transforming them into institutions proper, independent and/or decisive, while other elements may

[41] Niklas Luhmann *Rechtssoziologie* 2. Aufl. (Opladen: Westdeutscher Verlag 1983), p. 179.

wither away or simply be tolerated as implied alternatives, with these shifts of emphasis resulting—after all, necessarily—in a change in the character of legal technique, and also of legal culture itself, in the long run. Or, due to the circumstance that social (self-)determination is a process of becoming mutually determined through an endless series of interactions in social existence, self-reproduction gives rise to a concrete unity of identity and non-identity in social practice; in response to challenges, various elements of the system can become active (or activated) to a varying extent. In the process of self-reproduction, this will necessarily bring about shifts or modifications. In its turn, any shift or modification will either be levelled up to preserve and reassert the prevailing tendency of development or cumulated with other impacts so as to change the direction through the continued accumulation of all the motions in one direction. As a matter of fact, as products of mere legal technique with no legal institution contributing to them (moreover, with no established institution suitable to contribute to them), such shifts of emphasis may provoke genuine changes in the law, activated as a new, genuine source of the law. This may be so in the case, for instance, of re-interpreting a political evaluation (enacted, e.g., in the Preamble to the German *Grundgesetz*), the jurisprudence of clauses (developed, e.g., with reference to the German *Bürgerliches Gesetzbuch*), or, on the pretence of constitutionality, a practical revision of substantial provisions from general provisions (e.g., constitutional ones) in want of detailed regulation.

The variety of legal technique is almost unlimited, efficiency of operation being its only standard. And one must reckon with the fact that responsiveness and sensitivity of the entire legal arrangement are to a great extent functions of legal technique. As a consequence, legal technique is in a position both to offer and to block paths of further development. For the potentialities of development of individual legal systems are by no means boundless. As a practical matter, each individual system has its own choice taken from and suggested by the stock of those means of legal technique that are historically by and large established, having already stood the test of practice and been incorporated by the system in question. Attempts at renewal are selected and tested both by expediency and tradition.

The character (suitability, universality, etc.) of the means of legal technique of any individual legal system can be a decisive factor in the development and historical destiny of the legal system concerned. Therefore, it is by no means unimportant to what extent the means of legal technique can exercise a catalytic effect. In general, „la technique offre souvent une g r a n d e u t i l i t é pour le plein développement et l'exacte

application du droit".[42] In another formulation, "legal technique leaves its mark upon the life of the community, for the law operates through its concepts".[43] For instance, it is due to the legal technique of ancient Rome that its legal system could develop on an incomparably high level by realising the ideal that could at all be met by law, that is,

> "to arrange, define, systematise, etc., the socially vital conflicts in a system which can guarantee the relative optimum for the solution of the conflicts in question in line with the current level of development of the given formation."[44]

And, again,

> „[c]'est parce que le droit romain a découvert et merveilleusement appliqué ces instruments de précision, ou plutôt de transposition, juridique, cette façon par conséquent de transposer les faits dans le domain du droit."[45]

In each legal system and in all instances of its development, alternatives are offered. It is an open question to decide—among competing alternatives—what established part will be activated as an impetus for change from the body of tradition, what means of legal technique will be made use of from its stock to channel the change as a legal change through the instrumentality of law and, consequently, what formal change will eventually be brought about in the law. Of course, nothing occurs by pure chance. It is well-defined social challenges, expectations and needs that stand behind apparent alternatives. However, from the moment when one of the alternatives becomes realised, it will, by the force of its new quality having become a constituent part of the body of tradition, turn into one of the factors, and, at the same time, the indicators, of further development. The transformation of what has been determined into a factor that is determining is particularly striking in the case of changes of direction in the development of legal technique that, later on, prove to have been water-

[42] Gény *Science et technique*… IV, p. 29.

[43] J. Walter Jones *Historical Introduction to the Theory of Law* 2nd ed. (Oxford: Clarendon Press 1965), p. 266.

[44] György Lukács *A társadalmi lét ontológiájáról* [Towards the Ontology of Social Being] 2: Szisztematikus fejezetek [Systematic Chapters] (Budapest: Gondolat 1976), p. 484, cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 [reprint 1999]) 193 pp. at p. 131.

[45] Raymond Saleilles 'La réforme de la licence en droit' *Revue internationale de l'Enseignement* 47 (1904), pp. 230ff, especially at p. 231.

sheds. We have in mind changes of direction that have been determinant of the diversification of law in the course of its regrouping into so-called families of legal systems. As it is well-known that the conceptualisation of law was completed for the first time in post-republican Rome, making the law formalised so that it could serve as a basis of inference and/or reference. As to the change through shifts of a long-lasting legal-historical importance, the famous disputes between the SABINians and PROCULians in Roman jurisprudence and between SHAMAI and HILLEL in the *Talmud*ic practice of the *Synhedrion* provide examples. The first, in Rome, concerned understanding law either in terms of its being embodied in *aequitas*, or natural justice, and, hence, of a merely orientative role in resolving social conflicts, or, as its exact opposite, which regarded the law's conception as a rational system of strict concepts and rules, taken as the sole normative basis, standard and justification for settling those conflicts, with the law reduced to a mere enactment as an instrument that can be freely operated by the state, that is, *ius*, to *lex*.[46] The second, in ancient Israel, had the historical task to decide whether laws were to be interpreted strictly and restrictively, or whether the social interests that made the law liveable could also be considered when interpreting laws. With HILLEL's point prevailing, flexible interpretation and the ensuing alternative nature of decisions were accepted, but this was not a winning situation for anything in practice. For, despite the open conflict between the diverging views, both kinds of legal technique, proper to the antagonistic approaches, remained practicable components of the same *Talmud*ic tradition.[47]

2.3. Postulates of legal technique in the cultures of modern formal law

The legal policy of a particular legal order is instrumental if it proves to be an effective tool to realise commonly shared values through the instrumentality of law. As legal technique functions wedged between legal policy and the legal text, its criteria of evaluation are also deducible from those of legal policy. That is to say, legal technique is in the service of legal policy through the instrumentality of the law. The boundaries of what is meant by 'through the instrumentality of the law' are mostly defined by the positive law. At the same time, this definition is supplemented by tacit presuppositions taken and practised as given in the relevant culture, by presumptions that can only

[46] Tony Honoré *Gaius* (Oxford: Clarendon Press 1962), p. 39.

[47] Chaïm Perelman 'Désaccord et rationalité des décisions' in his *Droit, morale et philosophie* (Paris: Libraire Générale de Droit et de Jurisprudence 1968), pp. 105–106.

be articulated through their logical reconstruction within the doctrinal study of law,[48] and by other presuppositions rooted in the legal culture and in the underlying ideology of the legal profession, gained from experience accumulated in legal practice. All these postulates and presuppositions are recurrently reasserted and re-established in the course of the self-reproduction of that culture. It is an exceptional occurrence only when they need to be, or are actually, positively articulated by the law or formally defined by its doctrine.

Legal technique, characteristic of the cultures of modern formal law, has at least four basic postulates closely related to each other, which are the following:

a) The principle of consequentiality In the cultures of modern formal law, the judicial and administrative decision-making process is conceived by the ideology of the legal profession to be a logical operation, in the course of which the case in question is subsumed under some general norm(s) taken from the aggregate of the previously enacted texts of valid law, while the decision to be made is inferred from these norms. Accordingly, a legal decision is held simply to be deduced (or derived) from the positive law. Notwithstanding this, the logical principle of consequentiality is inevitably broken in practice. Nevertheless, whatever compromise is actually to be reached, the principle has—as a basis of reference, of legitimation and/or justification in the decision-making process—a definite role to play both in channelling legal practice and in delimiting the directions and paths which it is to take along its development.

b) The principle of coherency One of the specific functions of the procedures operated by the means of legal technique is to harmonise the law's aspiration to relative completeness, closedness and coherence with the fulfilment of the practical needs that recurrently break this harmony, in order to institutionalise their casual fulfilment through re-establishment of the inner harmony, completeness, closedness and coherence of the system, sublated (i.e., preserved while transcending it) at any given time over and over again. Of course, from the point of view of theoretical reconstruction, systems of the law cannot be considered closed systems. Still, the legal specialist can

[48] Leszek Nowak 'De la rationalité du législateur comme élément de l'interprétation juridique' in *Etudes de logique juridique* III: Contributions polonaises à la théorie du droit et de l'interpretation juridique, publ. Chaïm Perelman (Brussels: Bruylant 1969), pp. 65ff.

only operate them by treating them as if they were relatively complete and closed systems; both interpretation of the norms and establishment of gaps among the norms are functions of such an artificially made presumption. At the same time, there is quite a pragmatic need for formal rationalisation. For, an unambiguous, manageable and predictable operation with, and indeed the very administration of, the law is only conceivable when the principle of coherence prevails, no matter how much it suffers from the compromise solutions in fact needed. And the jurist can undertake a practical elaboration and processing of the large amount of legal texts, accumulated in time and confused in sense again, only provided that the system of positive law is gradually and continually organised into a system of interrelated concepts and norm-propositions.

c) The principle of conceptual economy Conceptual economy is needed to prevent the component parts of legal regulation from being broken into too many pieces. According to this principle, basic structures are to be elaborated both in legal regulation (in its formal shaping and doctrinal arrangement) and in its judicial actualisation and continuous development as well. If there is but one chance, then any further structure is to be built on (as related to, as a branching off of, an exception to, or an analogy, fiction, etc., of) such basic structures. Conceptual economy presupposes unambiguous and concise wording in regulations, with well-arranged and clear-cut construction (accompanied by a series of references, allusions and definitions) in the law's formulation.

d) The principle of non-redundancy Redundancy is the lack of conceptual economy with regard to several texts carrying the same message. Modern law is formal in so far as it is the enacted text that is exclusively regarded as carrying the law's validity. As to its normative contents, the law's function as enacted is to define (by substantiating) any legal action. As to its normative form (wording), its enacted text is the only justification for any such action. As a consequence, any redundancy creates room for diversification in interpretation and concretising actualisation, be it a case of duplication of text (e.g., in a preamble in addition to the Act) or of overlapping with it (e.g., in another Act). Taking into consideration the diverging contexts, repetition of one and the same text (word, etc.) may risk grounding differing interpretations.

In the cultures of modern formal law, the particular function of legal technique is to mediate between legal policy and legal text. Legal policy, legal

technique and the law can equally prove to have been poorly adapted to meeting actually felt social needs. If this is the case, either fulfilment will be blocked or timely needs will force their way through, even by overriding the law. The most frequent response to such a challenge is that compromise solutions will make use of legal technique so as to pretend to be legitimised by the law—while they actually misuse such legitimation without any strict observance of the law. In practice, half-way compromises happen more frequently than desirable or justifiable on principle. In case of such practical misuses, legal technique has the primary role of integrating all components into one still functioning unity in the most consequential, coherent, conceptually economic and non-redundant way available. However, we must also take into consideration the fact that legal technique can isolate partial damage on these principles, but repeated substantial damage may eventually disorganise the established aggregate of legal technique and, thereby, undermine the quality of the entire legal culture that has so far prevailed.

⋆

As a final conclusion, it can be established that the specific function of legal technique is to ensure that the realisation of any legally relevant substantive and material target will be effected through the law's instrumentality. That is, it is to ensure that basic goals will be reached by implementing all additional values and effects that can be gained through their distinctively l e g a l m e d i a t i o n .[49]

[49] Cf. also, by the author, 'Moderne Staatlichkeit und modernes formales Recht' *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 1–2, pp. 235–241 and [with József Szájer] 'Presumption and Fiction: Means of Legal Technique' *Archiv für Rechts- und Sozialphilosophie* LXXIV (1988) 2, pp. 168–184 {reprint of both in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994), pp. 201–207 and 169–185 [Philosophiae Iuris]}.

APPENDIX V.

THE INHERENT AMBIVALENCE OF A RATIONAL APPROACH*
(Is the human fullness of being to be destroyed as a price of progress?)†

Presuppositions, previously formed judgements, beliefs and convictions treated as self-evident in themselves, routines and ways and habits—these are the background handholds with which we achieve our progress in thinking anyway. What is more, an even more radical statement could well be made: from the outset, only that which seems hidden in us and that which we have acknowledged at an earlier past can arrive as acceptable to us. For this is what is embraced within the frames and in the channels of our previous knowledge, in the world-outlook presumed by our f o r e - k n o w l e d g e , and in the very conceivability of what can only be formed in this way.

In those cultures of argumentation, judgement and conclusion (the prime example of which is put forward by law), which are built on f o r m a l r e f e r e n c i n g within formal thought processes by requiring formal

* First published—in a longer version—in Békés Imre ünnepi kötet *A jogtudomány és a büntetőjog dogmatikája, filozófiája* Tanulmányok Békés Imre születésének 70. évfordulójára, ed. Béla Busch, Ervin Belovics & Dóra Tóth (Budapest: [Osiris] 2000), pp. 270–277 [A Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Karának könyvei 2].

† My first revelative experience on the final insecurity of rational constructions was encountered two decades ago when, as a guest of the University of Edinburgh Institute for Advanced Studies in the Humanities trying to understand what eventual anchorage human understanding and certainty might have, I could only meet 'epistemology', 'logic', and 'scientific methodology'—i.e., pure theories armed with conceptualities constructed as models for an artificially erected imaginary world never existed and practiced—for that such and similar notional extrapolations might then provide pridefully clear and logically consequent explanations. By chance, I found in its library the work of Seyyed Hossein Nasr, once lecturing there—*Knowledge and Sacred* The Gifford Lectures, 1981 (Edinburgh: Edinburgh University Press 1981) ix + 341 pp.—, which offered an account of the self-narrowing of human comprehension by resigning from the fullness of human being, which had once prevailed at least in human imagination, as a result of the development of exact sciences.

justification and/or motivation of their conclusions,[1] we have to reckon from the very start with the operation of some special "system of fulfilment".[2] That is, this scheme of thought development presupposes an alienating homogeneous/homogenised medium (the opposite of the heterogeneous complexity of everyday life), in which even the most apt, expedient and/or adequate mental operations can only be justified in so far as (and in the respect with which) they meet the normative criteria of legal operation, defined by a set of compulsory formal provisions—without paying any attention to further circumstances and/or considerations.

In the middle of the 19th century, once the cult of such a manner of thinking had imbued the (exegetic) application of the great Civil Law codes of the European continent, its limitations—namely, the reduction of any scholarly treatment to conceptual jurisprudence [*Begriffsjurisprudenz*], the artificial separation undertaken under the guise of professional deontology and the hypostatisation of a "conceptual paradise" [*Begriffshimmel*] in promising the law's "completion by itself", and, thereby, risking alienation from reality—excluded both the law and its scholarly study from the fora of social thought. It is not by historical chance if such and similar formalised cultures for long time nurtured a deepening distrust on behalf of the normality of the social majority (not initiated to the rituals of their consecrated clerics),[3] who dreamed all along about a Utopian return to the lost normality.[4] Moreover, renewed efforts were even made to shake off such shackles (e.g., via the free law movement [*freie Rechtsfindung*]) by finding a compass able to control the law's contingency (e.g., by again referring to natural law or naturalness). Additionally, efforts were also made to resolve strict adherence to mere conceptual patterns by building elements of rela-

[1] Cf., e.g., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

[2] '*Erfüllungssysem*' in George Lukács *Zur Ontologie des gesellschaftlichen Seins*. Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985) 193 pp.

[3] See the general tone in which the lawyerly activity was appreciated by, e.g., Martin Luther *The Table-Talk* [Tischgespräche, 1546], paras. DCCLXXXV–CCCLXXXVIII in <http://www.reformed.org/master/index.html?mainframe=/documents/Table_talk/table_talk.html>.

[4] It is enough to refer just to the cult of simplicity and unmediatedness, targeted again by both Bolshevist and National-Socialist ideologies in the past century. Cf., among others, by the author, 'Utopias of Rationality in the Development of the Idea of Codification' *Rivista Internazionale di Filosofia del Diritto* LV (1978) l, pp. 21–38 {& in *Law and the Future of Society* ed. F. C. Hutley, Eugene Kamenka & Alice Erh–Soon Tay (Wiesbaden: Franz Steiner Verlag 1979), pp. 27–41 [Archiv für Rechts- und Sozialphilosophie, Beiheft 11]}.

tive resolution into the system itself (e.g., through clauses in terms of which the application of relevant provisions is preconditioned by the previous weighing of underlying principles).

As a result of our progress in revealing the basic structure of thinking by way of theoretical reconstruction, all that we could hitherto believe to be the specific homogeneity of an alienated sphere has slowly changed into a capital order, which has resulted in revealing the preconditioned nature of thought processes themselves.

Is it otherwise possible to appreciate the recent turn in cognitive sciences at all? Half a century ago, when general systems theory was drafted,[5] all this was considered a mere hypothesis. A quarter of a century ago, when closed and open systems were differentiated in the sweeping methodological advance generated by the birth of cybernetics in systems theory, all this still stood for a conceptual game in reconstructive hypostatisation. An actual breakthrough became imminent later on, when a viable form of systemicity was recognised in both the structure of the world and the way in which we humans do function, with simultaneously open and closed features. After the framework and built-in regularities of cell operation (in the self-reproduction of living organisms) had been described,[6] researchers realised that more was indeed at stake here: the tentative formulation of a methodological pattern, potentially of a path-breaking significance. What is the new realisation here? It is of a system, self-organising and self-reproducing at the same time. This is an operation called autopoiesis, which defines its own regularities in the course of its actual operation. Extended to the social sciences, this system has been used to characterise the law's operation as

[5] Ludwig von Bertalanffy *General System Theory* Foundations, Developments, Applications (New York: Braziller 1968) xxiv + 295 pp.

[6] Humberto R. Maturana & Francisco J. Varela *Autopoiesis and Cognition* The Realization of the Living (Dordrecht, Boston, London: Reidel 1972) xxx + 141 pp. [Boston Studies in the Philosophy of Science 42] and Humberto R. Maturana 'Autopoiesis' in *Autopoiesis* A Theory of Living Organization, ed. Milan Zeleny (New York & Oxfort: North Holland 1981), pp. 21–33 [General Systems Research 3], especially on p. 21.

[7] By Niklas Luhmann, 'The Self-reproduction of Law and its Limits' in *Dilemmas of Law in the Welfare State* ed. Gunther Teubner (Berlin & New York: de Gruyter 1986), pp. 110–127 [European University Institute A3] and 'The Unity of the Legal System' in *Autopoietic Law* A New Approach to Law and Society, ed. Gunther Teubner (Berlin & New York: de Gruyter 1988), pp. 12–35 [European University Institute A8]; and by Gunther Teubner, *Recht als autopoietisches System* (Frankfurt am Main: Suhrkamp 1989) 227 pp.

well.[7] Then, extended again, it has served as a methodological principle explaining society in terms of communication.[8] According to the underlying principle of autopoiesis, the system is open to information but closed in every other respect, that is, in the way its (information) input is interiorised and the (decision) output is reached. Accordingly, legal operation is effected through the successive series of opening and closing within a given system. Moreover, the self-definition and self-reproduction of societal (sub)systems are carried out through such a series of opening and closing—from religion to language, to money, to science.

As to p e r c e p t i o n , in its elementary acts marks that are formless in themselves are featured as having a form themselves, once there is a framework of interpretation available, within which such marks are processed as one of the variations of some previously known and definitely arranged form that the observer's memory can easily activate. In short, perception presumes something of an analogy to anything previously perceived. As is well known, *Gestaltpsychologie* already realised in the interwar period that instead of elementary components, it is always a whole form as a relative total that is perceived. After a *gestalt* as a relative total, reminding the perceiver of something already recorded and identified, it will be split into elements that can only be analytically differentiated. Then, perception will end with scrutiny of these elements one by one, as variations within the given analogy.

Indeed, a similar previous filter is operated in c o n c e p t u a l i s a t i o n as well. Nearly all the basic co-ordinating concepts of humankind can be related to one another (at a certain level and to a certain depth, of course), independent of the variety of the underlying cultures. According to cognitive sciences, linguistic signs are to be taken at most as metaphors, created by humans so that they can represent reality in a symbolic way, using the mental instruments within humanity's reach. Mental representation can be seen as a fictive act with symbolic character and significance,[9] which is meant to stand for some reality, actual or imaginary. And all this is done by humans using what they have biologically inherited and into which they

[8] Niklas Luhmann *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp 1995) 597 pp. [Suhrkamp Taschenbuch Wissenschaft 1183].

[9] Hans Vaihinger *Die Philosophie des als ob* System der theoretischen, praktischen und religiösen Fiktionen der Menschheit auf Grund eines idealistichen Positivismus (Berlin: Reuther & Reichard 1911) xxxv + 804 pp.

have been socialised within a given culture. Accordingly, the basic co-ordinates of human thinking are similar (at a certain level and to a certain depth, of course) in that they follow some common basic trends. These express the order lived by humankind, in both their generic nature [*Gattungswesen*] and individual development. They all can be traced back to the basic experience that lays the foundations for our individual development, gained from the time during when we grew from helpless babies to adults, who are already able to control themselves as well as their environment. In short, conceptualisation is, through its basic units, built upon the co-ordinates lived through elementarily in the childhood experience of how to orient ourselves in the world.[10]

Or, the personal experience of how to orient ourselves in the world is based on the gradually extended awareness of our biological setup and the co-ordinates of our bodily available elementary moves, while embracing step by step acceptance of our environment, including other humans as well. In this sense, life is just an unbroken process in which humans learn the modalities of how to co-exist with the given social environment. As a consequence, properly speaking it is neither brute facts nor the hypostatisation of some freely fillable *tabula rasa* that our language and conceptual world are being built on. Instead, we are becoming "socialised" in the course of *Sozialisierung*, as an irreversibly progressive process.[11] Consequently, our thinking can only develop in our social existence and within its total context. It is based on social presuppositions. Rephrased in terms of today's science-methodological reconstruction, we may claim that even at an elemental level, the acts and mental products of human thought cannot qualify as merely descriptive: they are weakly normative.[12]

[10] Joachim Israel 'Stipulations and Construction in the Social Sciences' in *The Context of Social Psychology* A Critical Assessment, ed. J[oachim] Israel & H[enri] Tajfel (London & New York: Academic Press 1972), pp. 123–211 [European Monographs in Social Psychology 2] and George Lakoff *Cognitive Sciences and the Law* [a paper presented at the Yale Law School Legal Theory Workshop on April 27, 1989] [ms] 49 pp.

[11] Cf. note 2.

[12] See, by Joachim Israel, 'Is a Non-normative Social Science Possible?' *Acta Sociologica* [Copenhagen] 15 (1972) 1, pp. 69–87 and 'Remarks Concerning Epistemological Problems of Objectivity in the Social Sciences' in *Research in Sociology of Knowledge, Sciences and Art* I, ed. Robert Allen Jones (Greenwich, Conn.: The Jai Press 1978), pp. 63–80.

As a result of this, the social (re)production of reality[13]— often portrayed as the result of linguistic acts supporting the emergence or maintenance of social institutions[14] or, simply, as the mere product of linguistic games[15]—has become one of the main functions of language. This is truly expressed when we say that by the very fact of representing reality we do produce reality. Through the instrument with which we represent reality we do—*nolens, volens*—interfere with the picture already formed of reality and, thereby, we also actively shape reality, effectively and creatively.

All this eventually concludes in the realisation of the relativity of any conceptual foundation, due to the fact that logifying derivations may form a castle in the air, that is, that the usual arrogance of intellectuality may prove barren. Otherwise speaking, reason fed back by a sober assessment of the facts of human practice can still serve as a reliable guidance in the basic issues of life, even if it cannot provide a firm and exclusive basis by itself.

Where is *ratio* located in the very richness of our manifold human *facultas*es and abilities? Does it have the potential to represent the fullness of the human being or can it —serving merely as an instrument—exclusively touch and interfere with what it can reach and process through its specific filter? Going further: is it true that filtering is synonymous with homogenisation, and homogenisation, in turn, with impoverishment, vaporising both the fullness of being and the ontological undiscreteness and uninterrupted total interconnection? That is, is filtering synonymous with a distortion, reducing anything to the capacities and requirements of our instruments, which have in fact been invented/developed just to mirror the outer world?

[13] Peter L. Berger & Thomas Luckman *The Social Construction of Reality* A Treatise in the Sociology of Knowledge (New York: Irvington 1966) vii + 203 pp.

[14] John Austin *How to Do Things with Words* 2nd ed. J. O. Urmson & Marina Sbisá (London, Oxford, New York: Oxford University Press 1976) x + 169 pp. as well as, by John R. Searle, *Speech Acts* An Essay in the Philosophy of Language (London: Cambridge University Press 1969) vi + 203 pp. and *The Constructon of Social Reality* (London: Penguin Books 1996) xiii + 241 pp.

[15] Joachim Israel *The Language of Dialectics and the Dialectis of Language* (Copenhagen: Munksgaard 1979) xii + 263 pp.

Is it realistic to conclude that through expressing the indiscretely total interconnection of the world using a finite series of "regularities", we have just happened to create an operational repetition of some impoverished artificiality, reducible to some simplified "laws", out of this admirable unity of the total existence? Is it conceivable to realise that, perhaps, we may have become dominated as well as surpassed by those instruments we are accustomed to apply with success in partial analyses? Is it acceptable that, after a while, we become accustomed to thinking in terms of means exclusively, which turn out to become over-dimensioned thereby?

The message of the past may easily prove to be in a position to inspire a more nuanced and completed picture as compared to the self-confident but unifactoral present mainstream. Methodological investigations into past habits and experience may, therefore, perhaps promise a more complex and far-sighted perspective.

INDEX

INDEX OF NORMATIVE MATERIALS

INDEX OF NAMES

PHILOSOPHIAE IURIS
redigit
CSABA VARGA

Csaba VARGA *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994) xv + 530 & <http://drcsabavarga.wordpress.com/2010/10/25/varga-law-and-philosophy-%E2%80%93-papers-in-legal-theory-1994/>

Csaba VARGA *Études en philosophie du droit / Estudios de filosofia del derecho* (Budapest: ELTE "Comparative Legal Cultures" Project 1994) xii + 332 & <http://drcsabavarga.wordpress.com/2010/10/24/varga-etudes-en-philosophie-du-droit-estudios-en-filosofia-del-derecho-1994/>

Csaba VARGA *Rechtsphilosophische Aufsätze* (Budapest: ELTE "Comparative Legal Cultures" Project 1994) x + 292 & <http://drcsabavarga.wordpress.com/2010/10/24/varga-rechtsphilosophische-aufsaetze-1994/>

Csaba VARGA *Право* Теория и философия [Law: theory and philosophy] (Budapest: ELTE "Comparative Legal Cultures" Project 1994) xv +281 & <http://drcsabavarga.wordpress.com/2010/10/24/varga-pravo-teoriya-i-filosofiya-1994/>

Csaba VARGA *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 & <http://drcsabavarga.wordpress.com/2010/10/24/transition-to-ruleof-law-on-the-democratic-transformation-in-hungary-1995>

Csaba VARGA *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279; *The Paradigms of Legal Thinking* 2nd enlarged ed. (Budapest: Szent István Társulat 2011) {forthcoming}

Ferenc HÖRCHER *Prudentia iuris* Towards a Pragmatic Theory of Natural Law (Budapest: Akadémiai Kiadó 2000) 176

Historical Jurisprudence / Történeti jogtudomány ed. József SZABADFALVI (Budapest: [Osiris] 2000) 303

Scandinavian Legal Realism / Skandináv jogi realizmus ed. Antal VISEGRÁDY (Budapest: [Szent István Társulat] 2003) xxxviii + 159

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) 585

Theatrvm legale mvndi Symbola Cs. Varga oblata, ed. Péter CSERNE et al. (Budapest: Societas Sancta Stephani 2007) xv + 674 [also in: Bibliotheca Ivridica: Libri amicorvm 24]

Csaba VARGA Comparative Legal Cultures On Traditions Classified, their Rapprochement & Transfer, and the Anarchy of Hyper-rationalism (Budapest: Szent István Társulat 2011) {forthcoming}

Csaba VARGA *Theory of Law* Norm, Logic, System, Doctrine & Technique in Legal Processes, or Codifying versus Jurisprudentialising Law, with Appendix on European Law (Budapest: Szent István Társulat 2011) {forthcoming}

Contemporary Legal Philosophising Schmitt, Kelsen, Hart, & Law and Literature, with Marxism's Dark Legacy in Central Europe (Budapest: Szent István Társulat 2011) {forthcoming}

[EXCERPTA HISTORICA PHILOSOPHIAE HUNGARICAE IURIS]

Aus dem Nachlass von Julius MOÓR Gyula hagyatékából hrsg. Csaba Varga (Budapest: ELTE "Comparative Legal Cultures" Project 1995) xvi + 158 & <http://philosophyoflaw.wordpress.com/>

Felix SOMLÓ *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Akadémiai Kiadó 1999) xx + 114

István LOSONCZY *Abriß eines realistischen rechtsphilosophischen Systems* hrsg. Csaba Varga (Budapest: Szent István Társulat 2002) 144

Die Schule von Szeged Rechtsphilosophische Aufsätze von István BIBÓ, József SZABÓ und Tibor VAS, hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) 246

Barna HORVÁTH *The Bases of Law* / *A jog alapjai* [1948] ed. Csaba Varga (Budapest: Szent István Társulat 2006) liii + 94

Julius MOÓR *Schriften zur Rechtsphilosophie* hrsg. Csaba Varga (Budapest: Szent István Társulat 2006) xxii + 485 [also in: Bibliotheca Iuridica: Opera Classica 3] & <http://philosophyoflaw.wordpress.com/>

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 2012) {forthcoming}

Also
by
Csaba Varga

Authored

The Place of Law in Lukács' World Concept (Budapest: Akadémiai Kiadó 1985, reprint 1998) 193 & <http://drcsabavarga.wordpress.com/2010/10/25/varga-the-place-of-law-in-lukacs%E2%80%99-world-concept-1985/>; 2nd reprint with a postscript (Budapest: Szent István Társulat 2011) {forthcoming}

Codification as a Socio-historical Phenomenon (Budapest: Akadémiai Kiadó 1991) viii + 391 & <http://drcsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>; reprint with an annex & postscript (Budapest: Szent István Társulat 2011) {forthcoming}

A Theory of the Judicial Process The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 & <http://drcsabavarga.wordpress.com/2010/10/24/theory-of-the-judicial-process-the-establishment-of-facts-1995/>; reprint with a postscript (Budapest: Szent István Társulat 2011) {forthcoming}

Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008) 292 [PoLíSz Series 7] & <http://drcsabavarga.wordpress.com/2010/10/25/varga-transition-to-rule-of-law-%E2%80%93-constitutionalism-and-transitional-justice-challenged-in-central-and-eastern-europe-2008/>

Edited

Tradition and Progress in Modern Legal Cultures / *Tradition und Forschritt in der modernen Rechtskulturen* Proceedings of the 11th World Congress in Philosophy of Law and Social Philosophy in Helsinki, 1983 [hrsg. mit Stig Jörgensen & Yuha Pöyhönen] (Stuttgart: Franz Steiner Verlag Wiesbaden 1985) 258 [Archiv für Rechts- und Sozialphilosophie, Beiheft 23]

Rechtsgeltung Ergebnisse des Ungarisch–österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1985

[hrsg. mit Ota Weinberger] (Stuttgart: Franz Steiner Verlag Wiesbaden 1986) 136 [Archiv für Rechts- und Sozialphilosophie, Beiheft 27]

Rechtskultur – Denkkultur Ergebnisse des Ungarisch–österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1987 [hrsg. mit Erhard Mock] (Stuttgart: Franz Steiner Verlag Wiesbaden 1989) 175 [Archiv für Rechts- und Sozialphilosophie, Beiheft 35]

Biotechnologie, Ethik und Recht im wissenschaftlichen Zeitalter Proceedings of the World Congress in Philosophy of Law and Social Philosophy in Kobe, 1987 [hrsg. mit Tom D. Campbell, Robert C. L. Moffat & Setsuko Sato] (Stuttgart: Franz Steiner Verlag Wiesbaden 1991) 180 [Archiv für Rechts- und Sozialphilosophie, Beiheft 39]

Theoretische Grundlagen der Rechtspolitik Ungarisch–österreichisches Symposium der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1990 [hrsg. mit Peter Koller & Ota Weinberger] (Stuttgart: Franz Steiner Verlag Wiesbaden 1992) 185 [Archiv für Rechts- und Sozialphilosophie, Beiheft 54]

Comparative Legal Cultures (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: New York University Press 1992) xxiv + 614 [The International Library of Essays in Law & Legal Theory: Legal Cultures 1]

Marxian Legal Theory (Aldershot, Hong Kong, Singapore & Sydney: Dartmouth & New York: New York University Press 1993) xxvii + 530 [The International Library of Essays in Law & Legal Theory: Schools 9]

Coming to Terms with the Past under the Rule of Law The German and the Czech Models (Budapest 1994) xxvii + 176 [Windsor Klub]

European Legal Cultures [ed. with Volkmar Gessner & Armin Höland] (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1995) xviii + 567 [TEMPUS Textbooks Series on European Law and European Legal Cultures I]

On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe [ed. with Werner Krawietz] (Berlin: Duncker & Humblot [2003]) xi + 139–531 [*Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn]

Auf dem Weg zur Idee der Gerechtigkeit Gedenkschrift für Ilmar Tammelo [hrsg. mit Raimund Jakob, Lothar Philipps & Erich Schweighofer] (Münster, etc.: Lit Verlag 2009) 321 [Austria Forschung und Wissenschaft: Rechtswissenschaft 3]

The author introduces the reader to reasoning in law through the possibilities, boundaries and traps of assuming personal responsibility and impersonal pattern adoption that have arisen in the history of human thought and in the various legal cultures. He discloses actual processes hidden by the veil of patterns followed in thinking, processes that we encounter both in our conceptual-logical quests for certainties and in the undertaking of fertilising ambiguity. When trying to identify definitions lurking behind the human construct of facts, notions, norms, logic, and thinking, or behind the practice of giving meanings, he discovers tradition in our presuppositions, and our world-view and moral stance in our tacit agreements. Recognising the importance of the role communication plays in shaping society, he describes our existence and institutions as self-regulating processes. Since law is a wholly social venture, we not only take part in its oeuvre with our entire personality, but are also collectively responsible for its destiny.

In the final analysis, anything can be qualified as 'legal' or 'non-legal' in one or another recognised sense in which law can originate, but, as a relative totality, it can only be qualified as 'more legal' or 'less legal' in any combination of the above senses. Being formed in an uninterrupted process, neither the totality nor particular pieces of law can be taken as complete or unchangeably identical with itself. Therefore law can only be identified through its motions and computable states of 'transforming into' or 'withdrawing from' the distinctive domain of the law. Thereby both society at large and its legal professionals actually contribute to—by shaping incessantly—what presents itself as ready-to-take, according to the law's official ideology. For our initiation, play, role-undertaking and human responsibility lurk behind the law's formal mask in the backstage. Or, this equals to realise that all we have become subjects from mere objects, actors from mere addressees. And despite the variety of civilisational overcoats, the entire culture of law is still exclusively inherent in us who experience it day to day. We bear it and shape it. Everything conventional in it is conventionalised by us. It has no further existence or effect beyond this. And with its existence inherent in us, we cannot convey the responsibility to be born 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.

Csaba Varga — <http://drcsabavarga.wordpress.com> — is Professor of the Pázmány Péter Catholic University, Founding Director of its Institute for Legal Philosophy (H–1428 Budapest 8, POB 6 / varga@jak.ppke.hu) and Scientific Adviser at the Institute for Legal Studies of the Hungarian Academy of Sciences (H–1250 Budapest, POB 25 / varga@jog.mta.hu)