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## Legal Philosophy, Legal Theory – and the Future of Theoretical Legal Thought

**Abstract.** Surveying the ways—along with the whys and hows—of connecting law and philosophising, as contrasted to the appearances of modern formal law, it is concluded that in the final analysis law is a *façon de parler*—a specific communication, or game carried out in an open scene—, an actual event, if one played by humans practicing whilst simultaneously referencing it. The contemporary outcome of reflection upon its developments is (1) the reduction of legal philosophising to discourse-reconstruction, in terms of which instead of the issue of “what is it?”, “all that notwithstanding: how can it be achieved?” is usually raised; (2) the unresolved enigma of natural law, calling for axiology to define at least some foundational standards as stepping stones (albeit without a claim that any statement has genuinely concluded from them or been subordinated to them, as in the classical era when natural law and positive law were at odds); and (3) positive law without legal positivism, according to which a new synthesis and correlation amongst humans’ natural, societal and intellectual worlds is expected to be reached. At the same time, flourishing at the peripheries, a genuine foundation is coming to the fore, in order to suitably respond to global challenges.

**Keywords:** modern formal law, legal complexity, ontology of law; natural law, legal positivism, globalisation

Providing we had great truths indeed, they are not too many to change over time. In addition, I do believe there were and there are such. Nevertheless, the change of time does not so much concern the truth of something anyway, but rather—just as old recognitions live on in us too, so as to (when confronted to new problems) reveal new colours and connections, foreshadowing a deeper message—the enrichment and inner improvement of such truths, similar to the accumulation of experience in a lifetime (as concentric or nonconcentric circles), leading with new insights to incessantly renewing attempts at a synthesis momentarily taken.

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## 1. Law and Philosophy

It is our comprehension that originates the legal phenomenon. It is our comprehension that locates and presents law in a given form of phenomenon. The same comprehension that lets us perceive law in our social milieu at a given level and in a given way will let us perceive legal philosophy at another level and in another way. This law and this legal philosophy may then enter into communication with one another at levels and in ways according to their relationship.

### *1.1. Connections*

Conceiving the world as the outcome of conscious planning, we may indeed declare (following the Evangelist of the New Testament who expressed it in unique conciseness) that “In the beginning was the Word”.<sup>1</sup> On the other hand, relying on a rationalist explication founded on the mere empiricism of the laity of scholarship, on the basis of everyday experience we can contemplate a constantly renewing process of transforming our environment into increasingly complex structures through a series of self-organising artificial constructions.

In theology, on the one hand, law can from the outset be conceived of in the spirit of the human fulfilment of the work of Divine creation, as its application to human dimensions in implementation of the potentialities ordained by it. Or, we might even say that it is this theological philosophy itself that generates the law, by highlighting the former’s values when defining the various paths that may equally be followed within it.

However, on the other, approaching the issue from the opposite side, viewing it as one of the homogenisations necessarily arising on the terrain of the heterogeneity of our everyday existence, we obviously have to see in the development of legal homogeneity, in its strengthening and achieving social autonomy in more than one respect, some kind of a basically praxis-bound process, within which the piece of knowledge that reveals itself to those involved in general theoretical investigations directed at law is to embody the continuous rationalisation of the practical responses given to timely challenges. In the beginning, this rationalisation is probably only *subsequent* to actual developments at the most. However, after legal homogenisation is accomplished, it is certainly *parallel* to them, and when, with conscious social planning and engineering (in brief: legal voluntarism), it comes to the fore and becomes exclusive, it is of a *determining* force as well.

<sup>1</sup> <<http://scripturetext.com/john/1-1.htm>>.

Ever since humans started philosophising about their world, they have also been reflecting on its order, on the latter's potentialities and limits. In this sense, legal philosophy is of the same age as human societal self-reflection. It by no mere chance that reasoning retrospectively, Greek philology has ever set the task for itself to reconstruct semantically—among others—the signs referring to the presence of some kind of law or legally relevant phenomena in the classical age, and designating them in one way or another, from the textuality of the available body of epic poems and from the mass of scattered linguistic fragments, in order to reconstruct those signs as contextualised by the contemporary worldview and underlying philosophy.<sup>2</sup> And since the time that all human endeavours have been added up to form some kind of formal law—whose archetypes can be encountered back in early legal formalisms (i.e., initiatives in the ancient Middle East and antique Greece and Rome, regarded today as primeval and analysed in modern reconstruction for the first time by *Sir Henry Maine*), albeit it began to achieve the level of its present-day domination from the reception of Roman Law, done first in Bologna, and in its most developed form as methodologically rigidified into doctrines, from the age of the codification of national laws in the 18<sup>th</sup> to 19<sup>th</sup> centuries<sup>3</sup>—, the positivity of the law (coming forward with a demand for acknowledgement of the law's reality as a fact) apparently conceals the underlying circumstance that behind the law as a reified structure functioning, so to speak, with a mechanical automatism, there are real human beings operating it, conditioned by their everyday lives, who have to assume this thoroughly responsible and responsive moral task with the strength of all their faculties and capacities.<sup>4</sup>

At the same time, a more or less regular “maintenance” is needed to make this everyday operation possible, which includes the law's cleaning (of useless parts and waste) and improvement (according to operational concepts and the

<sup>2</sup> Cf., by the author: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999, 9 et seq.

<sup>3</sup> Cf., by the author: *Codification as a Socio-historical Phenomenon*. Budapest, 1991.

<sup>4</sup> In an own explication, spanning between the two end-poles of the evolvement of my personal line of thought from problem perception to a systematic explanation, cf., by the author. *Chose juridique et réification en droit: contribution à la théorie marxiste sur la base de l'Ontologie de Lukács*. In *Archives de Philosophie du Droit*, 25. Paris, 1980, 385–411, on the one hand, and *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999, on the other. See also, in an American context starting from leftist critical deconstructionism of the Critical Legal Studies, by Conklin, V. A.: *Human Rights, Language and Law: A Survey of Semiotics and Phenomenology*. *Ottawa Law Review*, 27 (1995–1996) 129 and *The Phenomenology of Modern Legal Discourse The Judicial Production and the Disclosure of Suffering*. Aldershot, 1998.

need to prevent its degeneration into social dysfunction), and also the constant clarification of the foundations required for its long term strategic further development. It is in the fulfilment of this latter function that the theoretical thought directed to law becomes visible to us again.

### *1.2. Appearances of Modern Formal Law*

Regulation by law always takes place with the aim of pre-defining an unspecified and unforeseeable future and, thus, in view of granting itself an eternal validity. We know, nevertheless, that the routine arising from this is always temporary: after a certain period of time, the rules will inevitably be surrounded by a divergence from the rules (in form of exceptions), which sooner or later results in the formulation of new, more detailed rules. Behind the relative permanence of the legal form, there are opposing interests pressing against each other, to be squeezed into, while being solved in, it. They continuously address—while questioning—the given form. Meanwhile, they render it liveable, by re-assessing its contents through its practical interpretation—extending, narrowing, or just re-shifting its scope. Or, jurists must reason in terms of alternativity, searching for a suitable form, while the due form eventually found, crystallised as adjusted to the given task, becomes itself a *donné* for the next challenge, to be further formed and, thereby, also to be transcended, albeit at the same time it remains the basic assurance of the continuation of the same cultural framework for legal problem-solving, that is, of the continued respect for traditions in patterning and being patterned alike.

We might say that, firstly, positive *regulation*, secondly, the *Rechtsdogmatik* (elaborating conceptual contexts based on the generalisation of past practice and, thereby, demarcating its ways open towards the future) as well as, thirdly, *doctrine* (laying the theoretical foundations of the given branches of regulation) collectively constitute only a few fundamentals for legal practice. Of course, all this is scarcely visible in those thoroughly technicised and profoundly reified cultures in which law is rigidified into routines (as enclosed in) to the extent of becoming alienated itself; where a mass of juridified relationships, procedures and activities may require the intervention of professional management by legal technicians on a mass scale; and when our whole lives are almost entirely surrounded and mediated by various agencies of enterprise, trade and traffic, with standards reproduced in mass proportions. Well, such cultures are permeated with a constantly growing mass of formulas and thesauruses that have been generated, which then come to be broken down to procedural *modus*es, and subsequently generalised into blocks of schemes, only to be ultimately overfilled by interpretations interpreted and comments incessantly commented

upon. As is well known, all this takes place in view of the advancement of standardisation, implying extension to new fields, expansion in depth and details, as well as both application to relations altered in the meantime and, as a feed-back, re-consideration of the *ratio* underlying the given regulation. In our modern formal culture, it is all this that constitutes the medium of law-application, providing its standard framework and serving as its unceasing renewal, that is, a constant *Aufhebung* [transcendence in preservation] of this unbroken process.<sup>5</sup>

These reified structures suggest an approach in terms of language use and communication, that is, an autotelism and a self-propelling mechanism that, in a constantly broadening way, reproduce earlier well-devised potentialities and paths covered as practices, or forms, of human activity, definitely specified. For their phenomenal form—namely, the *conceptualisation* of their culture—does conceal the creativity of human intellect, while still, nevertheless, operating in it, that is, the practical aspiration to respond to new challenges at any time and, thereby, of course, also the need for a humane coverage behind the human response and the irrevocable responsibility to be borne for the consequences as well.

The object of theoretical jurisprudence seems to have become invisible meanwhile, in this enchantment. But it is certainly there, in a three-fold sense at least. Firstly, it presents itself *evidently* in strategic planning and decision-making, when we search the future or change this conceptualised culture as a result of new situations or modified recognitions. For intellectual constructions as considerations behind the formalistic pillars maintaining the appearance of routine need to be re-activated when, due to actual imperfections in regulation (even if with the appearance of formalistic automatism preserved), an original evaluation is taken in the form of a decision—either so gaps can be filled in law or in the classical cases of discretion. Secondly, germs of theoretical thinking are actuated *non-evidently* in everyday routine when we conceal our consequence-oriented practical reasoning by seemingly un-problematic sequences of derivation in legal decision-making, leaving the job to a subsequent analytical reconstruction that reveals that nothing but a choice between alternatives was actually to take place. And thirdly, *naturally*, we cultivate theoretical jurisprudence and use its results when, applying it to our situation, we offer a scholarly explanation of our societal world.

<sup>5</sup> Cf., by the author: *Doctrine and Technique in Law. Iustum Aequum Salutare*, 4 (2008) 23. & <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>>.

### 1.3. Differentiation in Complexity

The natural, societal and intellectual worlds of man constitute a kind of unity and continuity. Our natural environment is given even if we have altered it. The societal milieu around us has been brought about by the endless series of conventionalisations through generations (so we are, in fact, socialised to it as to something readily given, even if we constantly re-form it by our reconventionalising contributions). At an intellectual level, we approach these at a critical distance but with our specific judgement added. In the final analysis, there are tendential correlations prevailing in the triad of humanity's natural, societal and intellectual worlds, as the most varied impulses and recognitions, creative efforts and practical feedbacks that flow incessantly, are to bring about a state of equilibrium in any society, if viewed from a historical perspective. Anything that can be formed will eventually be formed in fact. This applies equally to our natural world and our concept of it,<sup>6</sup> the way our social institutionalisation works by fulfilling its function, and also to our intellectuality in all of this, forming them and being formed by our experience day to day. Neither a value judgement nor any approval is involved, only that a fact is established if we ascertain now that the complexity of our social existence has brought about a compound, internally so articulated in historical time, also that a process of the *Ausdifferenzierung des Rechts*<sup>7</sup> has taken place in it, in the major part of civilisations and cultures at least. Our social objects, reified practices and alienated products are all embodied by objectivations that we have to consider—volens, volens—as part of our societal world, to be treated as independent subjects of cognition.

Law? This is something prevailing and operating, with a place firmly demarcated by universally shared social conventions in our everyday life. Apparently, it separates from anything else solidly like a rock, and only a theoretically deconstructive reconstruction can prove after the fact that, in the ultimate analysis, law is hardly more than a manner of speech, specific communication or a game collectively played. This is all that can be taken as real—

<sup>6</sup> John Lukács mentions a noteworthy example in his *At the End of an Age* [2002] (in Hungarian translation *Egy nagy korszak végén*. Budapest, 2005, 128, note 80), related to the change of the cultural landscape of the Swiss mountains, describing how it developed from bleakness too dreary for life to a serene charm of prosperity, which the author attributes to the change in human understanding in the meantime and to their human habitation, based first of all on societal adaptation to the milieu.

<sup>7</sup> Cf. Niklas Luhmann *Ausdifferenzierung des Rechts* Beiträge zur Rechtssoziologie und Rechtstheorie. Frankfurt am Main, 1981.

inasmuch as it is actually used as a basis of reference.<sup>8</sup> However, according to the law's own rules of the game, such a specific (legal) communication presupposes from the outset that such references are actually made at every major crossroads and at each new start. And the extent to which such references can be made at all is delimited by so-called validity in that order of speech. And validity covers the field generated according to this very rule of the game.<sup>9</sup>

## 2. Conclusions

First of all, two substantial conclusions ensue from all this. Both might have already been obvious decades ago. However, they are elucidated with proper sharpness only because our age involves so many dangers and threats. Finally, a third conclusion can also be drawn from these, based on some tendencies already visible in our present.

### 2.1. *Legal Philosophising Reduced to Discourse-reconstruction*

As can be seen, legal theorising starts above all by rendering problematic that which may appear unproblematic in everyday life, that is, when we question the seemingly self-evident, notably, the why and wherefore of the judicial routine's alleged rule-conformism—with proper impoliteness and irreverent disrespect of tradition. Well, it is this—namely, the systematic cultivation of heretical incredulity that may in principle arise in any participant of the so-called judicial event, if organised into a grand-theory—that goes on nowadays mostly under the aegis of professional legal theorising. What I have in mind here is a kind of contrast. For, just a few decades ago, we inquired—solemnly and seriously—into the “epistemology and methodology of law”, the “theory of jural relations” and the law's voluntary nature, as well as all kinds of other labels and features attributed or related to law; just as, first, the biophysicist, then, the biochemist approach the (animal/human) body, only to hand over their symbolic lancet to the anatomist, and finally to the pathologist, enabling

<sup>8</sup> As known, Scandinavian legal realism did the most for having this realised. Cf., e.g., Visegrády, A. (ed.): *Scandinavian Legal Realism*. Budapest, 2003 and, as a background, by the author: Skandináv jogi realizmus [Scandinavian legal realism] in: Varga Cs. (ed.): *Jogbölcselet XIX–XX. század: Előadások* [Lectures on 19<sup>th</sup> to 20<sup>th</sup> century philosophy of law]. Budapest, 1999, 81.

<sup>9</sup> Cf., by the author: Validity. *Acta Juridica Hungarica*, 41 (2000) 155 & [http://www.situation.ru/app/j\\_art\\_724.htm](http://www.situation.ru/app/j_art_724.htm) & <http://www.ingentaconnect.com/content/klu/ajuh/2000/00000041/F0020003/00383612>.

each of them to cut out what they need—with the presumption that all we had thought about it also had to be seen in both the living and the dead. In such a corporeal view of law, muscles may have creaked and sinews and bones rubbed at the most; still the body as such could function. Well, in contrast to the forceful articulation of such a splendid simple-mindedness—*sancta simplicitas*—, what we do today is at the most to break forms and differentiate according to qualities related or ascribed to law in our speech acts. For what we do here is analysis: we operate concept with concept and lift it (as latter-day followers of baron *Munchausen*) out of what is itself, in order to finally place it back into what is again just itself. Instead of the old-fashioned, static dissection of the law's allegedly discrete (i.e., separately examinable) composing parts, we now make a theory out of what we once were prudently reluctant even to notice. As a somewhat bizarre example, this is as if, in athletics (and due to some strange motive), we suddenly started to concentrate—instead of on efforts or the implied aesthetics—on the body's urinary output or perspiration curves, that is, on the so-far concealed problem of how the judge can proceed by means of steadily manifesting the appearance of being logical when the inference that is practical anyway is anything but logical.

This change in character shows clearly that we are more fashion-conscious than we had thought ourselves to be, at least in one sense of the word. Notably, our interest in any given subject (including the underlying selection made) is also promoted by the trends of the age. Today, the question is raised not in terms of “*what?*” but in terms of “in spite of all that: *in what way?*” For, we do not see a naturally given *donné* in the subject but a virtual construction to be deconstructed. In reality, we cut pieces from our subconscious under the microscope. We boast of being quite detached in scholarship while we have become narcissistic self-dissectors in practice. The spirit of our age focuses as to contemporary theoretical jurisprudence not only on the issue of “*how?*” but has, all of a sudden, created a human reflex or conceptual relation out of yesterday's interconnection of independent entities. So, we do search for phrases and frequency in linguistic practice (i.e., the preliminaries supposed to be sensible of a seemingly sensible statement) in the law—instead of inquiring as to its “*reality*” earlier believed to exist.<sup>10</sup>

All this is not turning grey but is a projection of, or mental reaction to, the change of the very subject of cognition as a socially generated objectivation.

<sup>10</sup> As a background, cf., by the author: Theory and Practice in Law: On the Magical Role of Legal Technique. *Acta Juridica Hungarica*, 47 (2006) 351 & <<http://www.akademiai.com/content/j4k2u58xk7rj6541/fulltext.pdf>>.



## 2.2. *The Query for Natural Law Unresolved*

The other conclusion relates to the prerequisite of such a practice, to the question of whether or not the law has the exclusive criterion of a *validity* exhausted by formal proceduralism (preconditioned by some factually empirical and quantifiable *efficiency*), and whether or not any other factor (aspect or feature) can have any similar criterion-setting role. Providing that the law of our modernity has indeed developed in this way (i.e., in autonomous disconnection from other factors of social complexity, resulting in the law's separation from its framework environment basically defined by *theologicum* and *ethicum*, permeating and eventually also dominating all forms of human attitude within the *ordo* of our social milieu), then obviously the social complexity's qualities and *imperativum*, having once constituted the *sine qua non* condition of their minimum contents, also will vanish from what can by now be rightly called *modern formal law*.<sup>11</sup> In this case, what is left of the feasibility of an axiological approach to law? It would be too little comfort to say that value-dependent approaches are unchangingly given free scope in legal policy [*Rechtspolitik*] and the theory of legislation [*Gesetzgebungslehre*] as well as in the doctrine of law-application [*Rechtsanwendungslehre*], re-arranging the alternative options (implying the moment of an independent *decisio*) into a unidirectional logical sequence of inference both verbally and culturally (as the latter does not necessarily raise awareness of the discretionary power that is made to work there by decision-makers anyway).

Regarding the, so-to-speak, permanent conflict between *natural law* and *legal positivism*,<sup>12</sup> we can only ascertain that the former is increasingly losing ground up to the point that we cannot now think of this opposition otherwise than as the symbolic expression of the challenge since classical times (from ancient Greeks, via Romans and the Medievalists, to early modernity) to break away from the one-time role of *ancilla theologiae* to achieve the *renaissance* of human quality, practically transplanted onto our earthly order as well. Otherwise speaking, the respect for human interests (with sheer utility in focus) in *praxis* has found a most promising terrain in the meantime. And irrespective

<sup>11</sup> Cf., by the author: *Moderne Staatlichkeit und modernes formales Recht. Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 235 and *The Basic Settings of Modern Formal Law* in: Gessner, W.–Hoeland, A.–Varga, Cs. (ed.): *European Legal Cultures*. Aldershot–Brookfield USA–Singapore–Sydney, 1996, 89.

<sup>12</sup> See, e.g., Szabó, M. (ed.): *Natura iuris* Természetjogtan & jogpozitivizmus & magyar jogelmélet [Natural law & legal positivism & Hungarian legal philosophy]. Miskolc, 2002.

of whether there is still monarchy or representative democracy has already been invented, the law itself has finally become optional, scarcely differing from the characterisation set out in the *Communist Manifesto* one and a half centuries ago: a will made dominant through having been wrapped into state-controlled formalities.<sup>13</sup> And, thereby, the desirability of linking the quality of *right* with *the right*<sup>14</sup> is smoothly transferred into an issue of mere intellectuality and only for highbrows' use. In other words, having arrived at modernity, our societal world has also separated from our intellectual world. For, in a criterion-like way, the law itself has become value-free (or, properly speaking, value-neutral), not followed (or only hesitatingly followed) due to lawyers' professional ideology itself having become value-free or even cynical.<sup>15</sup>

We know from the research of a Hungarian-American Benedictine friar science historian<sup>16</sup> that the history of science can explain the separation of Christianity and Islam (with the evolutionary ability of the very idea of *scientia* emerging exclusively from the former's culture) by the fact that theological debates after the turn of the First Millennium had already declared the chance of our fallibility on earth, that is, that our Earth has indeed been made our possession, and our actual life our eventual fate, as Divine Providence is not to interfere with either the laws created in our world or our irrevocable choices between good and bad. Or, neither genuine ontology nor human anthropology (with the chance of humanity's fall into sin) is excluded by far as true scholarly fields. Thereby, it is possible to formulate repetitive regularities as laws, and human striving for their cognition and honest actions within their terms are not faint-heartedness but rather the fulfilment of an assignment from the Creator. On the other hand, this awareness, born in Europe around the 11<sup>th</sup> to 13<sup>th</sup> centuries and which allowed us to live happily in our world and ensured the subsequent *renaissance*—that is, the relative separation of the spiritual from the natural world—has not been repeated so obviously in societal and intellectual aspects.

<sup>13</sup> Cf., e.g., by the author: *Marxizmus in Jogbölcselet* [note 6], 24.

<sup>14</sup> See Sebastião Cruz *Ius. Directum (Directum)* Derecho (derecho, diritto, droit, direito, Recht, right, etc.) 7.<sup>a</sup> ed. Coimbra, 1986, and Lalinde Abadía, J.: *Las culturas represivas de la humanidad* (H. 1945) I–II. Zaragoza, 1992, as well as Kovács, F.: *A magyar jogi terminológia kialakulása* [The evolution of Hungarian legal terminology]. Budapest, 1964.

<sup>15</sup> For its ontological and epistemological interrelations, see, by the author. *The Place of Law in Lukács' World Concept*. Budapest, 1985.

<sup>16</sup> Jáki, Sz.: *A természettudomány eredete* [Lecture on the origin of natural science]. Győr, 1993 and Jáki, S. L.: *The Origin of Science and the Science of its Origin*. Edinburgh, 1978, & *The Road of Science and the Ways of God*. Edinburgh, 1978, as well as his *Jesus, Islam, Science*. Pinckney, Mich., 2001.

Just to refer to some great decisive events: for example, the great classical periods of *natural law* became, as it moved towards modernity, replaced by new constructs. However, the long-standing requirement of justification by natural law, on the one hand, and the frightening desolateness of the gap left after it was ousted from the proper terrain of law (with its space filled only by legal voluntarism), on the other, prevented the issue from being closed down entirely forever.<sup>17</sup>

The lack of a theoretical response re-appeared in a new light when, within the critical perspective of the *Social Doctrine of the Church* in the immediate present, the classical spiritual power raised its voice at last and started to speak up against the dehumanising dysfunctionality of the social and economic arrangements of the Western world. For it is obvious that the Gospel does have a message in general, but the question of what the indubitability of natural law (to the extent it can be so characterised) really means for positive law has not been answered reassuringly ever since the age of *Saint Thomas Aquinas*. Anyway, the commitment of our life on Earth does not allow us to handle ourselves, our societal surroundings or the order to be made on earth with the indifference characteristic of laws built into physicality and with a demand for total autonomy. As is well known, the social teaching of the Church obviously derives its arguments from the Gospel, but it does so through interpretation embedded into theological hermeneutics of the ages given at any time, combined with a striving to give a temporal answer adjusted to the situation *hic et nunc*, i.e., with a kind of optimisation of the expectations (conceived of as best) of the society and culture behind the actual teaching.<sup>18</sup>

Finally, the barbarity of the last century, then the debasement of person against person followed by the technocratic emptying of our future, accompanied by the unlimited exploitation of our planet's reserves, that is, the *ideocracy of socialism* being replaced by the all-covering *pragmatic homogenisation through globalism*—

<sup>17</sup> In his oeuvre, Michel Villey analysed the process repeatedly in his *Leçons d'histoire de la philosophie du droit* nouv. éd. [1957]. Paris, 1962, *Seize essais de philosophie du droit dont un sur la crise universitaire*. Paris, 1969 and *Critique de la pensée juridique moderne*. Paris, 1976, as well as in his magisterial lecture notes on *La formation de la pensée juridique moderne* rév. Stéphane Rials, Paris, 2003.

<sup>18</sup> The author referred to in the previous note struggled with the issue recurrently. He concluded that *Saint Thomas Aquinas* had already considered the very notion of practice-bound secular laws as something separate, considering the fact that neither the Gospel nor any conception of natural law would be capable (or competent) to cover it throughout and directly. See Michel Villey *Questions de Saint Thomas sur le droit et la politique* ou le bon usage des dialogues (Paris) 1987, as well as, as fragments from him, éd. Frison-Roche, M.-A.–Christoph, J.: *Les Carnets Réflexions sur la philosophie et le droit* (Paris) 1995.

along with the general mood of some ultimate scenario of *finita la commedia!*<sup>19</sup>—have since World War II repeatedly raised the query of how to render the law autonomous. Well, the legal accountability for Nazi-type depravity (the so-called *Radbruch*-formula), the possibility to rebuild civil conditions in relative freedom from codal restrictions (“*die Natur der Sache*”), then, most pressingly nowadays, the unsolved issue of Latin American and other disintegrating failed societies, the squandering of our Planet’s resources using up humankind’s future, the anti-human usability of the possibility of immeasurable manipulation generated by the newest technologies, the ultimate degradation of the Western world through an internal moral split of dual standards, enforced by diverging interests, and last but not least, the destructive dysfunctions arising from the universalisation of the Atlantic legal mind and US state-craft (as extended especially to the Eastern European regions and so-called developing societies, exposed to the imperialism of the American movements of Law & Modernisation and Law & Development)—all these call for some kind of external objective measure.<sup>20</sup>

Albeit we have to know that a revival of natural law in our day cannot target more than the expansion of sensitivities and the extension of the range of topics and aspects of investigation, with their re-integration into our culture. Otherwise speaking, it cannot claim a new deduction [*Ableitung*] or subordination [*subordinatio*], as this would lead back again to a pre-scientism. Therefore, the question is partly open, waiting for both a response and a foundation in theory.

### 2.3. *Positive Law – Without Legal Positivism?*

As was pointed out earlier, things are mostly interconnected, and it is only due to a lack of perspective if we cannot perceive latent correlations for the time being. Well, our earlier thesis on the change of focus of theoretical legal thinking in the past few decades was largely due to the metamorphosis of our world-view in the philosophy of science, a circumstance that may explain the tendency of law to have become increasingly immaterial, to be taken as hardly more

<sup>19</sup> “The show’s over.”

<sup>20</sup> Some cardinal aspects are analysed in a pathbreaking concise overview by the present pope, then Cardinal Joseph Ratzinger, in his *Crises of Law* [an address delivered on the occasion of being conferred the degree of Doctor *Honoris Causa* by the LUMSA Faculty of Jurisprudence in Rome on November 10, 1999 in <[http://www.ratzinger.it/conferenze/crisideldiritto\\_eng.htm](http://www.ratzinger.it/conferenze/crisideldiritto_eng.htm)>. As to actualities in the region, cf., by the author: *Transition to Rule of Law On the Democratic Transformation in Hungary* (Budapest) 1995. and *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe*. Pomáz, 2008.

than a discursive process within the frame of specific communication<sup>21</sup>—such a thesis by no means supplies a sufficient (let alone exhaustive) explanation. It has been discernible in both the description of the Western European and Atlantic legal world<sup>22</sup> and the design of the common codification of private substantive and procedural law in the European Union<sup>23</sup> (requiring Hungarian participation as well from now on) that—starting from the era of Western rebuilding after the Second World War<sup>24</sup>—it is the resolution of the exclusivity of the law's positivity (or being posited) that has been increasingly reckoned with. All this is palliated with fashionable liberal catch-words, labelled as democratisation, participation, or multi-factorialisation of the legal process. If, and insofar as, this resolution becomes dominant (as prognosticated by American macro-sociological grand-theories for decades now<sup>25</sup>), it will also obviously increasingly eliminate the alienating effect of the special modes of speech and culture of communication that may still have made the impression of being self-propelled in law and that have successfully ousted both pragmatic and evaluative reasoning from routine procedures, reducing them to mere pattern-following.

Accordingly, philosophical reflection on law with expectations of theory-building is anything but a memory of the past. It is by far more an agenda addressing the future. Legal philosophising is going to become part of such a legal culture in constant formation.<sup>26</sup> That is, what we will then call law will

<sup>21</sup> See para. 2.1.

<sup>22</sup> E.g., by the author: Meeting Points between the Traditions of English–American Common Law and Continental–French Civil Law (Developments and Experience of Postmodernity in Canada) *Acta Juridica Hungarica*, 44 (2003) 21.

<sup>23</sup> E.g., by the author: La Codification à l'aube du troisième millénaire. In: *Mélanges Paul Amselek* org. Cohen-Jonathan, G.–Gaudemet, Y.–Hertzog, R.–Wachsmann, P.–Waline, J.: Bruxelles, 2004, 779 & Codification at the Threshold of the Third Millennium. *Acta Juridica Hungarica*, 47 (2006) 89. & <<http://www.akademiai.com/content/cv56191505t7k36q/fulltext.pdf>>.

<sup>24</sup> In an edifying comparison with Central and Eastern European peripheries, see, above all, Kühn, Z.: Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement. *The American Journal of Comparative Law*, 52 (2004) 531.

<sup>25</sup> First of all, e.g., Nonet, P.–Selznick, P.: *Law and Society in Transition*. Toward Responsive Law. New York, etc., 1978. and Mangabeira Unger, R.: *Law in Modern Society*. Toward a Criticism of Social Theory. New York, 1976. As a contemporary reflection on these, see, by the author: Átalakulóban a jog? [Law in transition?] *Állam- és Jogtudomány*, 23 (1980) 670.

<sup>26</sup> Albeit “cultural lags” are too well known here as well. Cf., e.g., by the author: What is to Come after Legal Positivism is Over? Debates Revolving around the Topic of ‘The Judicial Establishment of Facts’. In: Atienza, M.–Pattaro, E.–Schulte, M.–Topornin, B.–

define or demarcate its object together with what we think of it with good reason and conclusive force. We shall presumably remember legal philosophy up to the end of the 20<sup>th</sup> century as an interesting but mostly dated preliminary that undertook the task of founding (at a mega-level of science philosophy and science methodology) the *science of the law* that, in addition to positive analyses of a *Rechtsdogmatik*, dissected the law into parts—as a researcher examines an insect on his table or liquids in retorts, to be able to inspect each of its methodically separated components individually. It is conceivable that—as usual—primarily those moments from this philosophising that might have contributed to the precise transcendence of this all will survive memorably for posterity.

The triad of the *Hegelian* thesis / antithesis / synthesis may prove to be rather too attractive. All that notwithstanding, I cannot ignore, by formulating my suspicion, that it will be a kind of repeated encounter, moreover, a reunification of the *societal* and the *intellectual* (referred to already several times) that will again re-occur in the legal philosophy of the near future. The aforementioned catch-words of the resolution (or dissolution) of the law's positivistic self-definition themselves seem to refer to something like this. The realm of values behind the law, demanding their re-integration in transcendence, also suggests something similar. Man is to return to himself (as I formulated somewhat lyrically in conclusion to my treatment of the law's paradigms twenty years ago<sup>27</sup>), and theoretical thinking built on philosophical reflections may be the most adequate avenue to bring this about.

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Wyduckel, D. (Hrsg.): *Theorie des Rechts und der Gesellschaft*. Festschrift für Werner Krawietz zum 70. Geburtstag, Berlin, 2003, 657.

<sup>27</sup> “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. What we have discovered about law is that it has always been inside of us, although we thought it to have been outside. We bear it in our culture despite our repeated and hasty attempts at linking it to materialities. We have identified ancient dilemmas as existent in our current debates as well. We have found long abandoned patterns again. We have discovered the realisations of common recognitions in those potentialities and directions in law which we believed to have been conceptually marked off once and for all. / However, we have found an invitation for elaboration in what has revealed itself as ready-to-take. Behind the mask, and in the backstage, the demand for our own initiation, play, role-undertaking and human responsibility has presented itself. We have become subjects from objects, indispensable actors from mere addressees. And, we can be convinced that despite having a variety of civilisational overcoats, the culture of law is

We live in a dangerous age. These dangers include the saturation of our environment with poisons, both in nature and in our societal world, as much as in our intellectuality—freed of standards, endangering mental survival itself. Forces ready to act are nowadays making experiments by erecting a new and idea-controlled brave new world, and our perennial cultural diversity, homogenised in a global village, is being visualised by some as already accomplished.<sup>28</sup> In one of the richest (yet in many respects most innocent) parts of the world, the future is feared as bringing with it commercialisation of legal education and scholarship, with the results of legal research being ordered in advance as ready clichés to justify whatever policies are desired. Such a resignation to predestination by fashionable global policies may emerge that finally we shall sink into, dragging like superannuated spinsters, a wretched life, drawing on what it may have left.<sup>29</sup>

There are several signs indicating that situations are always double-faceted. Now we cannot conclude more from such a threat than that it can also be beneficial to be a local on the peripheries.

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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.” Varga: *Lectures...* [note 2 {first Hungarian ed. in 1997}], ch. 7, p. 219.

<sup>28</sup> C.f., e.g., in representation of two poles, *Zum 80. Geburtstag von Hermann Klenner*. Berlin, 2006. [Joachim Herrmann, Gerhard Sprenger & Hermann Klenner, 1–55], on the one hand, and *The Governance of Globalisation*. The Proceedings of the Ninth Plenary Session of the Pontifical Academy of Social Sciences (2–6 May 2003). Vatican City, 2004.

<sup>29</sup> For example, according to the cry for help by an author not inclined to pessimism otherwise, “L’enseignement sera une marchandise.” There may scarcely be other chance than “se vendre pour rester des facultés de droit dignes de ce nom, ou refuser de se vendre et vieillir comme des vierges stériles.” (16) “[L]e travail scriptuaire universitaire [...sera...] se concrétiser comme »fournisseur de prémisses« justifiant toujours une quelconque politique ou une orientation idéologique” (17). The perspective therefore is hardly more than “l’exploitation de la recherche [...] pour obtenir une légitimation, une justification des politiques étatiques ou de l’industrie.” (18) Melkevik, B. Scolies sur le futur des facultés de droit. *Le verdict Audi alteram partem. Journal de la Faculté de Droit de l’Université Laval*, Québec, 4 (2005) 14.