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Theory and Practice in Law

On the Magical Role of Legal Technique

Abstract. Law is characterised by a fundamental gap between its social embeddedness and the apparently formal automatism it operates, which gap is basically bridged by the law's ultimate practicality under the guise of its mere logicity. This seeming contradiction is resolved by judicial decisions as responsible and responsive practical actions which are to result from the necessary conceptual transformation(s) of the law's wording in the course of its official application, which does involve a necessary jump in logical derivation. This is to say that on final analysis and in practical terms, law is what gets actualised through the actual uses of it. Black-box effect such as this is helped by the variety—and owing to the magical transforming effects—of legal techniques. Eventually, it is legal culture that provides a medium in which legal techniques can at all be selected and used. On a conceptual plane, one of the filters is offered by legal dogmatics. This very complex includes dialectics as well, for there is no motion without counter-motion, therefore, it is not realistic to pursue any human ambition without some safety valves inserted. Or, regarding, e.g., law, no homogenisation is feasible without some re-heterogenisation at the same time. Paradoxically speaking, while modern formal legal development went in the direction to mechanise the judge, the realisation was also made that law had ever been too serious an undertaking to be just left alone to the logification by some impersonally formalistic apparatus. Therefore, simultaneously with the very first act of formalisation, law has ever built in its scheme the possibility of de-formalisation as well. It is this complex understanding that was implied by Kelsen's successive rewriting his pure theory with changing shifts of emphasis. All could suggest is that the ultimate certainty is eventually nothing else than we ourselves. Or, in addition to the law itself (as conceptualized in the systemicity of a doctrine), social actions and authoritative acts under the label of law are also in a constant competition for defining what will eventually be acknowledged and also practiced as law.

Keywords: legal technique; doctrinal study of law; jump & transformation in law; (legal) homogeneity & (social) heterogeneity; filtering through/within legal culture; law as practical action

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“The *Sollen*, the form of norm of a hypothetical proposition is in most cases therefore not the component of the positivated legal order but the *a priori* normative-logical basic form of it.”

(István Losonczy
A funkcionális fogalomalkotás lehetősége a jogtudományban
 {The availability of functional concept-formation in jurisprudence}
 [Budapest: Királyi Magyar Egyetemi Nyomda 1941], p. 65)

According to its classical understanding, *legal technique* covers the entire process from law-making to law-applying, in contrast with the simplification by some recent literary elaborations that would handle it as an instrumental know-how of legislation only. However, as so called law-making gets actualised through law-applying by gaining a definite meaning and primary significance in it, it is basically still the range of problems connected with law-applying that is at stake here. Or, we might say: there is something that is law, on the one hand, and there is something that is legal policy (denoting the entire mesh of social interconnections within which a country seeks to achieve something), on the other, and legal technique is meant to serve as a bridge between the two.

In our present-day understanding, on the final analysis *law* is a profession in the service of conceptualities framed in given ways and composition as wrapped into a rigidifying formality, characteristic of the law’s modern formal ethos, with logicity and formalistic entrenchment as decisive features by now. That is, formal law builds around itself a system to be treated and referred to with a kind of geometrical ideality, and it demands a model of justification that is usually required only for drawing theoretical conclusions. Notwithstanding all this, in reality the judge is by far not an entity simply reducible to a logical automaton but a being permeated with all qualities and fullness of any human existence. So even if he is covered by the robe particular to his role, he keeps on irrevocably carrying all his further social roles as well. While attempting—in compliance with his professional expectations—to disregard everything falling beyond the competence defined for his profession, he is aware that he takes responsibility for his decision and thereby also for the way he is shaping living law, by putting his ethical ego to the test.

Perceiving the specificity of the function to be filled by law in the gap between the law’s social embeddedness and apparently formal automatism, *George Lukács* described the process in a way that the judge has to face a genuine social conflict, communicated to him as a controversy also in a legal sense, that is, as the logical contradiction of opposing claims, supplied by the parties to the case. However, his profession is made a lawyerly craft or art exactly by his ability to find a sufficiently formulated solution in law that can

refine the controversy to an illusory and transcended conflict, solved in and by the law.¹

And the question of what goes on meanwhile was described by the analytical attempt at reconstruction by *Alexander Peczenik* over the past decades,² summed up in the notions of “transformation” and “jump”. Thereby, his doctrinal explanation turned into a self-contradiction, as in the wake of the classic debate between *Georges Kalinowski* and *Chaim Perelman*, representing the positions of formalism and anti-formalism (which debate ended conclusively for me with the legal relevance and explanatory force of the latter),³ he had opted for formalism, having declared inexorably the need that decisions be deducible, that is, logically unambiguously inferred. In result of his failure in this very issue, eventually he arrived at a self-critical (and in view of formalism, also self-annihilating) self-restriction, which he introduced exactly due to the notions of “transformation” and “jump”, by proving the repeated forced interruption of any logical chain in legal reasoning. Otherwise speaking, that what has become an illusory and transcended conflict in the above sense out of the said controversy was regarded by him as the result of necessary *conceptual transformation(s)* which therefore involves a *jump in the logical derivation*—that is, a categorical evaluation (through reflecting the abstract normative patterns onto the fragmentary but qualified description of the facts of the case, taken out from a compound life situation), at the completion of which the judge may by now declare that the matter has become reassuringly clear for him to reach his

¹ Lukács Gy.: *A társadalmi lét ontológiájáról* I–III [The Ontology of Social Being]. Magvető, Budapest, 1976. as well as, from the author, *The Place of Law in Lukács' World Concept*, Budapest, 1985. 193 pp.

² Peczenik, A.: Non-equivalent Transformation and the Law. In: Peczenik, A.–Uusitalo, J. (eds.): *Reasoning on Legal Reasoning*. Vammala, 1979. 47–64., as well as, from the author: *Theory of the Judicial Process The Establishment of Facts*. Budapest, 1995. 249 pp.

³ Namely, it was the purely theoretical philosopher *Perelman* who expressed as his astonishing opinion that it was enough of legal philosophers and it was also good time for lawyers to come and explain the process—just like the centipede of the story when he was asked how he could walk with hundred legs (and afterwards he could not take one single step just pondered how he could nevertheless walk)—, and we ourselves had to finally reconstruct from the lawyers' narratives what went on actually and how. At the end of all such reconstructions, legal technique would turn out to be capable of the world's most genuinely creative achievements. And finally, it was on such a basis that he could state that our European continental legal ideals were not just outdated but had nothing indeed to do with reality, as they only constituted the mere facade of a professional ideology with extremely creative acts going on behind the scene. In more details, cf., from the author: *On the Socially Determined Nature of Legal Reasoning*, *Logique et Analyse* (1973), Nos. 61–62, 21–78. and in: *Perelman, C. (ed.): Études de logique juridique* V, Bruxelles, 1973. 21–78.

judicial conviction so that he can already decide in the given way by rejecting any other alternative(s). Of course, from now on it is also visible that this endpoint does not any longer presume a creative act in a logical sense. Therefore, once the jump has taken place in the transformation, that what—so to speak—follows will from then on also derive obviously with logical formality and necessity.

The paradigmatic basis of such a multiple professional attitude is provided by the recognition that in both *language* and law, everything is ambivalent and nothing is compelling by itself. This is just the antipode of the foundational idea of *Imre Szabó's* work on *The Interpretation of Legal Rules*,⁴ written half a century ago as an emblematic epitome of socialist jurisprudence, according to which the law is given with a definite meaning from the outset and it is only in relation to this that interpretation may approve, extend or restrict a proposed meaning. But if everything is given from the beginning for those who apply it at any subsequent time, then legal technique, described as above, would generate something differing from what has been originally given. That is, within the perspective of normativism, the judge will necessarily misuse his authority if he extends or confines the law's vigour beyond or within its originally defined scope. On the other hand, in the theoretical perspective outlined above with a focus on legal technique, in reality there is nothing that could be given. It is only a materialisation, actualisation and implementation ongoing constantly that we can perceive. After all, there is nothing but *judicial event* in the course of which a decision is taken and something will be actualised by this decision.⁵ Or, things get actualised through the *actual uses* of the law. And in this respect, legal technique indeed seems to be an all-embracing concept, used as good almost for all that may stand the judicial test through reconsiderations in appeal, until sealed by the legal force. If we ponder repeatedly, for instance, classical legal principles, then our interpretation can indeed so to speak freely be expanded or narrowed in function of the particular circumstances involved in the establishable facts of the case and therefore in a way

⁴ From Szabó, I.: *A jogszabályok értelmezése* [Interpretation of Legal Rules]. Budapest, 1960. 618 pp. and *Interpretare a normelor juridice*. București, 1964. 439 pp. and *Die theoretischen Fragen der Auslegung der Rechtsnormen*. Berlin, 1963. 20.

⁵ This is what *Wróblewski* commented upon by stating that interpretation is either of a static or of a dynamic ideal. That is, the interpreter either constructs a conceptual world, by claiming that it testifies to the original meaning and then all we have to do is try to reconstruct it by all means, or we conceive of the responsible judicial profession as free, and formulate a task of adaptation for ourselves within it. Cf. *Wróblewski, J.: The Problem of the Meaning of the Legal Norm. Österreichische Zeitschrift für öffentliches Recht* 14 (1964) 3–4, especially 265 et seq.

scarcely influenced by abstract conceptual limitations but only judgeable exclusively on the plane of the actual and the concrete. In view of this, *Kálmán Kulcsár* had once good reason to assert in his legal sociology decades ago⁶ that there is at all time an individual (albeit sociologically generalisable) *situation of law application*: we have to decide at any time within the boundaries of an in-itself complete and unlimited situation of legal argumentation and reasoning, in which also our moral, our idea of man and of course even our concept of the Divine may have a role—in addition to all other considerations. For it is an *open* situation at least in a sociological sense, in which thoughts and alternatives of solution are formed while finally, as represented by the individual judge (and in function of his sociologically describable hierarchical dependence and further circumstances) and eventually an entire lawyerly community will have something accepted or rejected (within the confines of the prevailing legal culture and its institutional operation).

In contrast to the view represented by, e.g., *Szabó* above or to the reifying conception of usual simplifications, in legal technique (operating law while actualising a meaning to it) there is no before or after. For that what is given from earlier cannot be but sheer potentiality [*dynamei*] as it can exclusively become something of an ontological existence in a *Lukácsian* sense through practical legal operation, that is, as operated by the applied legal technique. Consequently, it is from the outset two different media (and, through them, the intertwining of heterogeneous aspects) that are at stake and in play in law. There is a concentrated *form*, on the one hand, and a *practical action*, inseparable from everyday existence and driven by practical considerations, on the other—and these two media are being continuously amalgamated. That what will in its own way emerge out of this as the message of the law arises at any time exactly from this amalgamation.

It was *François Gény*, having revealed the moment of enchantment in specific legal operation with techniques that may render available almost anything and its opposite, who did the most for the description of the actually ongoing process in law at the turn of the 19th to 20th centuries. *Jean Dabin* was the first one of all to reconsider the issue in the subsequent decades.⁷ *Dabin* had already raised awareness of the fact that there is some kind of a magical process taking

⁶ Kulcsár K.: A szituáció jelentősége a jogalkalmazás folyamatában [The significance of the situation in the process of law-application]. *Állam- és Jogtudomány* XI (1968) 545–570.

⁷ Gény, F.: *Science et Technique en droit privé positif* I–II. Paris, 1913–1930 and Dabin, J.: *La technique de l'élaboration du droit positif* spécialement du droit privé. Bruxelles–Paris, 1935.

place in law. For in fact, law is hardly more than a kind of an *open-ended mediation by pondering*. In such a complex, there is a properly formulated form we usually call 'law' but this is far from being the end-point. This is something that will have to transform into any given and definite message through the practical life of (the) law.

The conjecture and the figurative message of the circumstance that the law is not something to arrive at but something *wherefrom* the overall specific move starts (a "path" that "channels" argumentation and reasoning in law) denote just the beginning of the recognition that, in this case as well, there may also exist something as legal culture, as a perhaps even more comprehensive and decisive notion than legal technique is. For it is *legal culture* that provides for the medium in which legal techniques can at all be selected. For instance, two early decisions of the Hungarian Constitutional Court on compensation for the damages caused by the Communist regime and on facing the crimes of the totalitarian past dealt with basic dilemmas of (to be addressed in merit as a *sine qua non* prerequisite to) any genuine transition from Communist dictatorship. Yet, with its formalistic decision *a limine* rejecting those bills, actually the Court annihilated the original claims themselves, instead of contributing to their solution. One of the characteristics of such and similar decisions, practically eliminating the very chances of a fundamental socio-political transformation, was precisely that, by having been squeezed into the sublime robe of "constitutionality" with some formal allusions to the Constitution's wording on equality before the law in a Republic being based on the democratic rule of law, in fact the Court even declined to face the underlying social problem that should have been solved. Therefore, if and in so far as the activism of the Constitutional Court, relying on the in-advance awareness of the legal force of all those acts which it may have arrived at its free discretion without a compelling legal basis, was a fiasco in Hungarian history, we have to consider it the failure of the entire legal culture behind the applied legal techniques. Namely, our legal profession in general and our lawyerly elite in particular rejected indeed to assume those tasks of legal interpretation and legal technical operation (placing—by making use of legal principles, as the case might be—the law's formal regulation into deeper and broader contexts), which the legal professions of other nations, more sensitive towards their nations' fate and at least morally more responsible and responsive (e.g., in Germany or the Czech Republic), did in fact assume.⁸

⁸ Cf., e.g., Varga, Cs. (ed.): *Coming to Terms with the Past under the Rule of Law* (The German and the Czech Models). Budapest, 1994. The obstinate sterility of the survival of the skills and work-patterns reminiscent of the age of socialist legality, that is,

As it became clear for me during the completion of one of my earlier papers (struggling with the dilemma of whether or not the law is reducible to a system of enactments⁹), *legal change* may have at least a dual path: it may take place either by a direct modification of the provisions concerned (this is classical legislation) or by re-shaping the hermeneutic medium of interpretation behind the rule. Or, legal change may be *direct* and *indirect*. In the latter case, reconditioning and altering the law's field of meaning, that is, the social conventionalisation that gives it a meaning, will bring about a practical modification of the message of the law. Of course, such a duality of feasible strategies may entail interactions, including crossing effects as well. For instance, the impact may be rather questionable when the acceptance of a regulation (to the reception of which the given society is by far not ready) is only due to force or a plot, lobbying or political blackmailing. In case of inflicting a regulation aimed at (e.g.) protecting national minorities merely by (external or internal) pressurising on an otherwise intolerant community, no success can be guaranteed by itself. A lasting change can scarcely be implemented in a legal culture once pushed into a difficult situation, if the whole society with its legal professionals will continue blocking any tolerance in the future. Meanwhile, reconsidering the range of problems underlying the present paper, a new feature can be added. Notably, an intention at strategically changing the message of the law (e.g., in the frame of modernisation through the law) may be provoked also by the long-term re-selection of legal techniques applied, without either formal modification of the rules or informal re-shifting of the social conventionalisation behind those rules. Accordingly, there is another indirect mode of changing or reforming the so-called living law.

To emphasise the decisive extent to which legal technique may shape the law's practical purport,¹⁰ let me refer to *René Dekkers* who in his time arrived

the practical ignorance of legal principles and the aversion to undertake democratic decision-making, responsible indeed—in brief, the lack of familiarity with, and of genuinely participatory experience in, the jurisprudential style developed since the end of WWII in Western Europe—,with the threat posed by this to the European Union through our EU-accession, is analysed by Kühn, Z.: *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement. The American Journal of Comparative Law* LII (2004) 531–567.

⁹ From the author: *Is Law A System of Enactments?* In: Peczenik, A.–Lindahl, L.–van Roermund, B. (eds.): *Theory of Legal Science*. Boston–Reidel, 1984. 175–182. and *Acta Juridica Academiae Scientiarum Hungaricae* 26 (1984) 413–416.

¹⁰ See, e.g., from the author: *Technique and Doctrine in Law. Iustum, Aequum, Salutare II* (2006) 3–4 {in print} & < www.univie.ac.at/RI/IRIS2004/Arbeitspapieren/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc >.

at the conclusion that, properly speaking and on the final analysis, *legal conceivability* is mostly not a function of the law itself. For finding a solution conceivable in law or ensuring a path promising to lead to a given result in law scarcely means anything else than whether we are able rationally, through applying given legal techniques, to defend a certain standpoint better than others would another (or, in case of some pressing interests, we can defend it at all), with the logical demand for perfection which is usual in the given legal culture. Or, on the final analysis, what is at stake here is just justifying a given solution—with the exclusion of its rejection from the outset. Referring to historical examples, partial analyses in the multitude of various Western European and Anglo–American (etc.) practices (known to be used to setting legally high and sophisticated standards by the way) show such a diversity that we have to conclude: the least that legal conceivability demands is the limiting condition not to admit openly and with explicit textual formulation to be running against the text interpreted. And therewith the developments by *Hans Kelsen* on discretion and the moment of the legal force¹¹ present themselves in a new setting—namely, instead of logical consequence, the lack of procedural rejection, and, as a final criterion, instead of the positive statement of logical inclusivity, the negative inertial force of the fact that the decision in question has not been actually annulled or overruled, by being expelled from the circle of the accepted regime of law and order in the legal process.

As can be seen, the arsenal of legal techniques definitely grants lawyers discretionary power to conclude—precisely due to the inherent ambivalence of any text—that, on the final account and in bordering situations, that what the basic social conventions of a nation’s culture consider important and vital enough to form a foundational component of its survival strategy will not be inconceivable *ab ovo* in most of the cases. This is what can be strikingly observed especially in times of crisis and above all in countries and epochs where and when a high-standard background culture of *self-defence* with the powerful representation of national interests has developed and is being persistently cared for; in particular contrast to the fatigue and the enervation, living aimlessly from day to day with no perspective and ability to do one’s utmost for good causes, a condition that can unfortunately be seen in the life of our nation, exhausted by the after-1956 repression and the strange transition therefrom. For the examples of vital impulse with a determination to survive are numerous from the Czech Republic to Romania and to Ireland, or from

¹¹ Cf., e.g., from the author: A bécsi iskola [The school of Vienna]. In: Varga, Cs. (ed.): *Jogbölcselet XIX–XX. század: Előadások* [Lectures on legal philosophy in the 19th to 20th centuries]. Budapest, 1999. 24–32.

the State of Israel to the United States of America. To be clear, it is the use of techniques and the ability to react by adequately responding to challenges what I mean here and now, rather than whatever emotional relation, sympathy, or identification. After all, all this does not necessarily imply more than the issue whether a social substrate has ever developed, a substrate that is able to decide (without debates generating discord internally and the very impossibility of performance externally) what the nation wants at all, at least in strategic directions and on the most sensitive fields; whether a kind of mechanism has evolved to facilitate that basic expectations, even if unsaid, can be tacitly agreed upon; whether the societal background is structured in a way that some dominant will can be formulated at least on given fields, and if necessary, also asserted to prevail—even if through most diverse paths and by roundabout means but, all things considered, even defying obstacles if needed.¹² Based on the analysis of cases and from a certain historical perspective, all this is relevant as—in want of any other point of reference—we have to see that if properly significant interests are at stake as represented at proper levels, practically anything and also its opposite may have a chance of passing through the institutional test of legality in practice. And referring again to *Kelsen's* wisdom in his theoretical reconstruction, this can be achieved by no means necessarily through any spectacularly flagrant defying of the law but just by building up those bridges of reasoning (based on scholarly comparative-historical analyses in depth and the lawyerly talent in analysis, argumentation and inventiveness) that may render the solution in question conceivable in the given culture under given circumstances.¹³

The primary lesson of all this may be summarised in that no matter how exciting and flexible our language is, in itself and as a mediator, it is not suitable for definition. By *legal technique*, in fact, we mean the standardised set of instruments of how to handle a certain language lawyerly. Rules may involve norms (norms themselves being nothing but projections of logic, logifying denominations). Whether we act as philosophers or as linguists or lawyers, we have to apply categories in distinction, in order to enter into an intelligible

¹² I attempted to clarify the components of such a favourable or unfavourable disposition through a comprehensive analysis in my opening lecture [‘»Worthy of the fate, qualified for the challenge«: On the state of our intellect and scholarship’ (in manuscript)] of a seminar for Hungarian history teachers in the Carpathian Basin, organised by the Rákóczi Association in the Benedictine Abbey of Pannonhalma during the summer of 2004.

¹³ Which may have even led, e.g., to collective responsibility instituted with reference to a law having lost its effect yet still allegedly surviving, in heritage of an earlier mandate rule. See note 10.

communication at all. Looking methodologically behind what we commonly call law, we can scarcely claim more than: in the world of the intellectual construct called 'law', so-called norms, mediated by conceptualities defined in rules, offer certain sets with paths of, and menu-references in, procedures within the institutional process generated by the same law—together with all the ambivalences inherent in its linguistic mediation. But this is just the recognition that *Lukács* once thematised in his social ontology as the trap of mediation, witnessing to the *basic unity* that prevails nevertheless, despite the world's artificial fragmentation through its human intellectual representation. For language is a medium incessantly formed—with the law's and lawyers' language, too—, being unceasingly re-conditioned by each and every actor of the law's community in general and its dedicated professionals in particular, who actualise it while processing cases through its filter at any time.

According to our starting point, we all *speak a language* and *language does not label itself*. Any of us can say, for example, that now he enters the terrain of scholarship, by incorporating new conceptualities into this scholarship. Well, such an allegation may prove true (or verifiable) and false (or refutable) alike, as any of us may at any time expound in a meta-level reconstruction that the sequence of deduction has been false or that nothing but passions, uncontrollably visceral affections/aversions have been expressed in the guise of conceptuality, i.e., in a basically not conceptual language-use. Or, one can at all times identify a meta-system superior to all our linguistic communications, based on which new explanations may be formed about what has been told.

The language's not labelling itself does also involve the perspective of that, according to official expectations at least, the more differentiated the society we live in, the less the law-applier's distinctively individual personality will have a share in making his decision, and this is exactly the most decisive factor in the judge's performing his function—whether he still wears his powdered wig visibly or it is present only hidden in his professionally socialised subconscious. Within himself, the judge has to distinguish between his *individuality* and his *function defined for his legal quality*. Yet no matter how unambiguous this is at the level of theory or formalised ideology, we have to reckon with the fact that any such official expectation is hardly more than a normative *desideratum*, that is, the law's internal rule for its own game to be played (apart from the underlying social requirement which does not inevitably enforce itself). The duality inherent in this apparent antinomy is verified by sociological reality. Because insofar as the law is seen as a field of giving meanings, in shaping of which we all play a role (especially via our professionally competent lawyers), then whether we want it or not, the said field will necessarily be actually shaped by individual human beings through the filter of their own personalities. All

this entails the secondary effect (also described by *Lukács*) that shifts of emphasis and changes of context, maybe invisible in themselves, will inevitably emerge in the ontological process of our social actions, which may eventually add up to some decisive shift(s) of direction in the long run. That is, our professionalism, with our lawyerly ideology and skills in legal operation, will distinguish and homogenise us according to the requirements of the legal complex and to our understanding of the roles suited to it, on the one hand, but nevertheless, the unity and the individual expression of all these in our personalities and fullness of being are ontologically still inseparably all together present, on the other; and therefore, we can only try to separate *aspects differing in homogeneity* within the heterogeneity of such an *ontological unity of existence* for the sake of and within analytical purposes exclusively. The point under discussion may remind one of the stand taken by *Lukács* who, having pondered the tension between the sought-for unambiguity and actual ambiguity of language, characterised the development of civilisation and scientific thought over thousands of years as an implied fight for making language unambiguous, while basic objectives in practice are often realised in a hyperbolic way at the most. Notably, we usually set a goal and approach it as we can, yet, meanwhile, new divergences are inevitably getting introduced into the process—and the same is what happens to the judge as well.

Or, the judge's personality, his individual character, together with linguistic ambivalences pervading mediation in all its forms—all these leave their marks on every operation. What we claim here is that in every artificial human construction there is some kind of homogenisation which at the same time carries its counterpoint to it. For example, in our civilisatory efforts, we place the law and the range of social problems to be addressed as legal into a well-separated and thoroughly homogenised sphere, to which the legality of the law's domain can be directly applied already. Nevertheless, we still cannot tear the whole process from the heterogeneity of its human carrier, which will inevitably lead to its *overall definition by overall life conditions*, that is, by all the particularity of the historically given *hic et nunc*.

As we have seen, language does not label itself, and it would downright be unfit for it. And yet we all speak a language, apparently the same language in the same community. The legislator is to write (after having read), and the law-applier is to read (and then, also to write). More than a thousand years ago, in Iceland, the law was announced by the *lagsaga* [or *lögsögumaður*], reciting it standing on a rock. This may have been a practical gesture in itself, yet our present-day reconstruction may rightly regard it as something more: objectification, externalisation, rendering its factuality an independent act. It is such an objectification upon which, in our present-day complexity of modern formal

law, we have built a new professional aspiration, the so-called *doctrinal study of law* [*Rechtsdogmatik*], aimed at having a conceptual system formed out of what was told by the legislator and interpreted in authoritative practice. All this having been incorporated in our culture, today we presume almost by habit that, after the law was drafted by one of us as a governmental specialist, voted for by others of us as members of the parliament, commented on by yet another one of us as a jurist, taken into account in legal transactions by others of us and, in the end, applied by the last of us as a judge in a conflict still arising between some former ones; well, we indisputably presume in our culture that all of us use conceptual instruments and, accordingly, understand texts and messages just in the way as conventionalised in our culture. Therefore, if any of us says “purposefulness”, this has to mean what our commentary and standing practice understand as ‘purposefulness’. Of course, the exchange in communication of social understandings and feedbacks is not coded in the text, and the speaker is mostly unaware of the complexity of layers behind a textual meaning, as he only spoke a language. Yet the meta-system of the language of conceptual reconstructions, superimposed upon language as used by us in our everyday life, asserts itself even in roundabout ways, assuming an in-depth and in-volume more comprehensive concept behind the actual language usage. It is this role in which the doctrinal study of law proves to be an unexcludable mediator.¹⁴ And it is this context within the perspective of which we can state that legal technique, too, is unexcludably present anywhere where there is law with a practical use.

No need to add that the *doctrinal study of law* has its own *technique(s)*, too, of course. *Rudolf Jhering* and *Carl von Savigny* described already in the second half of 19th century that this technique suggests a basically theoretical model—like what is customarily used, for example, in theological dogmatics and similar fields of scholarship—, where exclusively the logical instruments of conceptual analysis (starting out from given texts) and conceptualisable evidences or axioms are utilised. Consequently, the analytical apparatus of the doctrinal study of law applies mostly classical types of logical operation,

¹⁴ *Marx* and *Engels* may have rightly written in *The German Ideology* in the above sense that the Germans have once drowned their misery into scholarship, and what they failed to achieve through revolution they finally built up in theoretical doctrine. It is worth mentioning that a similar duality prevails in Anglo–American culture as well, but there this role is played by the judge’s conscience. Therefore the genuine issue is to whom to allocate the power of the doctrine. For that what is a scholarly-made doctrinal study of law for us in the European continental (German) pattern is the practical construction from case to case for the Common Law. Cf., e.g., *Atiyah, P. S.: Pragmatism and Theory in English Law*. London, 1987.

including, above all, conceptual division and classification and, of course as assigned to these, deduction and induction. Notwithstanding this, that what has been told about the *magical transforming effect* of legal technique is built not on the primacy of logifying instruments but sees in law basically a technique of argumentation. According to this, the various forms of argumentation (with the help of which the judge, by considering various presumably feasible positions more or less relevant in one sense or another, gets closer to answering the dilemma of the applicability of various rules) appear as elements of the legal technique applied by him.

It was in an explication written on the function of law and its correlation to the function of codification three decades ago¹⁵ that I came to realise that in socialism, the acknowledgement of rights only in function of their “proper” exercise as spirited by the Civil code had the same function as categorising a deed’s being dangerous to society as the criterion of criminal offence had in the Penal code. However, my initial political indignation calmed down to silent melancholy later on, when I also realised that this is nothing more than quite commonly the jurisprudence based upon so called *clauses*, which is in fact the same age as legal culture. It is precisely the *Lukácsian* symptom already mentioned in connection with linguistic ambiguity that re-emerges here. Notably, in our civilisatory development, we are trying to limit discretion by the means of law, in order to prevent the judge’s personality—along with included irrational factors as well as with factors ensuing from differing rationalities—from affecting the judicial discernment. At the same time, we incorporate clauses of immense generality into the system so that the judicial assessment, bound this way, can nevertheless be freed and the otherwise relevant legal provision put aside, if needed, in any unforeseeable border situation at any time. It is precisely this issue that *Ronald Dworkin* thoroughly discussed in his famous essay—“Is Law a System of Rules?”¹⁶—, having risen by today to be the paradigmatic cornerstone of Anglo–American legal thought. In his opinion, the challenge of creativity begins exactly when the judge, stepping out from his self-comforting everyday routine, finds that the judgeability of his case is hard and problematic and, as such, requires re-consideration. This is the culmination of the complex socio-legal determination of the judicial process, when the law-applier may identify a legal principle out from either the Roman law’s common

¹⁵ Cf., from the author: *The Function of Law and Codification*. In: *Anuario de Filosofía del Derecho* 7 Madrid, 1973–1974. 493–501. and *Acta Juridica Academiae Scientiarum Hungaricae* 16 (1974) 269–275.

¹⁶ Dworkin, R. M.: *Is Law a System of Rules?* [1967], reprinted in his *The Philosophy of Law*. Oxford, 1979. 38–65.

heritage or domestic jurisprudential precedents, and once the latter's relevance is established, he will forbear from applying minutely elaborated sets of rules.¹⁷ Of course, we may have distressing memories about the socialist use of the clause on the proper exercise of rights, for instance, when the political police was hard on retaliating upon the sociable gatherings of the banned elderly monks as an abuse of the right of assembly. However, it must not be forgotten that the simultaneous cult of clauses had, on principle, the same aim in Western Europe, namely, to foresee the unforeseeable. Otherwise speaking, there is neither legislator nor living legal culture without incorporating clauses according, of course, to the prevailing cultural patterns. Such were, for instance, the concepts of "common good", "public order" (etc.),¹⁸ used in fields ranging from public administration to civil and criminal law in the West, which seem to have since the last decades lost their primacy unfortunately, on account of some false liberalisation and individualistic anarchism.¹⁹

Providing that we consider such resolutions problematic, we have to inevitably presume an ontology in which unidirectional definition is available on the field of social action. In comparison to such simplicism, *Lukács* himself proved to be far more differentiated. His explication into the opposite direction was built exactly on the presumption that there is no motion without *counter-motion*, therefore it is not realistic to pursue any human ambition without some *safety valves* inserted. Moreover, no *homogenisation* is feasible without some re-heterogenisation at the same time. Paradoxically speaking, while modern formal legal development went in the direction to mechanise the judge, the realisation was also made that law with its irrevocably ethical colour had ever been too serious an undertaking to be just left alone to logifying highbrows who would, as it were, process it with their impersonally formalistic apparatus. Therefore law has ever built in the scheme, simultaneously with the very first act of *formalisation*, the possibility of *de-formalisation* as well.

Well, *legal technique* is in itself quite an omnipotent and universal instrument which can be used by anyone for any purpose in any direction, on the one

¹⁷ In this sense, we might as well say that the gap is in us at the most, that is, any problem that there may be is attributable to the applier of the law, because the legal order is perfect in the form it is done available to us. That is, the cause of problems may be that until now we have failed to activate it in the sufficient depth, exploiting its classical theoretical foundations.

¹⁸ Cf., above all, Bolgár, V.: The Public Interest: A Jurisprudential and Comparative Overview of the Symposium on Fundamental Concepts of Public Law. *Journal of Public Law* 12 (1963) 13–52.

¹⁹ Cf., e.g., from the author: Rule of Law—At the Crossroads of Challenges. *Iustum, Aequum, Salutare* [Budapest] I (2005) 73–88.

hand, yet, one that can exclusively be operated in (and according to feasibility criteria set by) a given legal culture, on the other. Consequently, there is one given *legal culture* inevitably destined for us to build that what will define the frames within which we can at all move, by offering us those paths in practice which will decide on the final account from what we may—by being encouraged to—conclude to what in fact. As to its genuine root-components, legal culture is, on the final analysis, an incessantly re-actualised progressing network of social conventions, within the womb of which certain skills, selected from among the huge many skills spread in the various civilisations, are utilised with a given intellectuality and according to a given ethos and a given goal-rationality. For instance, there is a logico-analytical culture—the cult of conceptual analysis spread over from Oxford as taken over from the field of philosophico-ethical investigations to law—in which our actions depend on one single formalistic consideration, in conclusion of some previously posited assumption, according to which even options of whether I may express a feeling of sympathy or when I am authorised to kill my foetus, my mother, and so on, will possibly be definable with a dry logic. Nonetheless, I hope it is still thinkable that we, as sound souls and worthily of our human quality, do not wish to rely in our actions on the logic of abstract conceptual extrapolations as substitutes for individual moral responsibility. For so many issues were thought to be proven on paper as inferred from theories throughout history, yet in sober societies and communities we do not act expectedly as automatons, exactly because we think in a more complex way, trusting our numerous human faculties and the many talents bestowed on us. And with all this we presuppose, at least as a potentiality, that our backgrounding human culture may also develop the arsenal of further finely chiselled instruments as well.

In addition, in a last analysis it is also obvious that it is the same legal culture having already produced the most strictly formulated rules to be applied on a mass scale that has also made rights a function of the proper exercise of rights and categorised the fact of being actually dangerous to society as one of the criteria for a deed to be qualified as a crime. Hence, unlawful acts were not due to clauses themselves provided for in socialism, either. For it is the same ruthless dictatorship that subordinated everything in every field, every way and under any circumstances to the political purposes of that central or local despotism (dominated basically by the personal intentions of individual party potentates) which also brutally totalised society. All things considered, it is exactly the use of so-called clauses as a legal technique that is accidental; but it is clearly inevitable on the level of social totality that where a homogenised sphere is built up also a safety valve has to be wedged in in order to ensure social heterogeneity to prevail, even if most exceptionally, in the very last

resort. Comparing societies and epochs, often a close parallel can be observed between a given *legal culture* and the use of some adequate culture of *legal technicalities*. Within this, it is of course tradition and the inherent urge of skills already practised that are to decide which particular instruments of legal technique will be finally resorted to.

Almost this same duality (or jump into the opposite) manifests itself in our example referred to earlier, namely, in the Constitutional Court's decisions on compensation and facing with the criminal past of socialism during the political transformation in Hungary. For there is no—and has never been any—expressed constitutional provision²⁰ on the basis of which their adjudication would have not allowed a much more moderate decision or eventually even abstention from, or just the opposite of, the extreme decisions that were actually made. Remarkably enough, when the justices were giving official reasons, their justification was limited to sheer formalism. In doing so, they were drawing on the so-called “invisible constitution”, that is, on one exclusively posited in their imagination. However, on expiry of their mandate—i.e., of the exclusively enforceable limit of their activity—, when they may have felt that the memory of their past activity and its assessment by the posterity were already at stake, their subsequent attempt at justification proved rather material. This is what we call acting by *double standards*. And so also was that when they declared to adopt the jurisprudence of the Strasbourg European Court for ruling henceforth (of course, again, without any authorisation, i.e., purely out of their own decision), our lawyerly community welcomed the news once “materially” and with enthusiastic applause, while at another time the same community only murmured that this was nothing but discretionary goal-rationality, that is, legally speaking, plain arbitrariness.²¹ At times, therefore, it seems that we get

²⁰ Unless we think of the constitutional description of the Republic of Hungary defined as a “democratic state under the rule of law” (Article 2/1), where the *definiendum* can only indicate cultural ethos rather than codified ways and conditions. See, e.g., for the nature and variety of understandings of the key term, Fallon, R. H., Jr.: »The Rule of Law« as a Concept in Constitutional Discourse. *Columbia Law Review* 97 (1997) 1–56.

²¹ I find it somewhat similarly frivolous to say now, for instance, that the Constitutional Court's past activism in its first decade may have been adequate to the conditions then but it would be no longer timely if it went on similarly later on. For the Constitution has not changed meanwhile, consequently the Constitutional Court's statutory mandate to adjudicate constitutionality has been the same from the beginning. And the mere fact that the Constitutional Court has no forum to be appealed against, wherefore each of its actions in procedure has from the outset had the seal of constitutional force on it, must not have entitled it to any acts at will. That is, we need to clarify also theoretically if an activism legally so unfounded by the wordings of the Constitution (but having so far-reaching social

enticed to adopt blind positivistic attitudes only to suddenly switch over into the charismatic contentuality of self-liberation.

We might add that, at the same time, all this involves the availability of a strategic change of law as mediated by modifying either the context and/or the legal technique as well. Because whether or not this was consciously foreplanned by the Constitutional Court's consideration, eventually the path actually taken had proven to be the strategically safest one, with an effect irreversible and irrevocable, as the Constitutional Court, by the same token, also accomplished the job of doctrinal conceptualisation when it formulated (in a way rather sophisticated) the grounds for its decisions in question. For, as known, the "*invisible constitution*" (if this may signify a sensible term at all) indicates a conceptually elaborated system behind the Constitution's textual wording, a kind of dogmatics rendered by constitutional force under the Constitutional Court's seal.²² And it does so with an effect that, even if one or

consequences at the same time) is just one of the feasible materialisations of the free discretion that can be resorted to optionally or, otherwise speaking, discretion is not verging on abuse only provided that it will not have reached to acting as legislative or even constituent power. Because exclusively the elimination of "unconstitutionality" can be understood by the test—or adjudication—of "constitutionality" in a literal sense, that is, according to the Constitution's provision in force at its execution. When Lord Acton summed up the experience of several millennia—saying that "power tends to corrupt and absolute power corrupts absolutely"—, he himself did not mean anything more than that law, especially in issues of a dramatic impact for the public, is by far not the automatic result of the possible lack of further formalistically posited delimitations.

For he was of the opinion that "Historic responsibility has to make up for the want of legal responsibility. Power tends to corrupt and absolute power corrupts absolutely. Great men are almost always bad men, even when they exercise influence and not authority: still more when you superadd the tendency or the certainty of corruption by authority. There is no worse heresy than that the office sanctifies the holder of it." Lord Acton's letter to Bishop Mandell Creighton on April 5, 1887, in his—Fears R. J. (ed.)—*Selected Writings* Essays in the Study and Writing History. Indianapolis, 1986. 383.

²² As the president's concurrent opinion to the decision 23 of 31 October, 1990 holds, "the starting point is the totality of the Constitution. The Constitutional Court has to continue determining in its interpretations the principled bases of the Constitution and the rights laid down thereby and establishing a coherent system by means of its judgments, which as an »invisible Constitution« serves as a standard benchmark of constitutionality above the Constitution which is nowadays being amended in everyday political interest". Cf. Sólyom, L.: Introduction to the Decisions of the Constitutional Court of the Republic of Hungary. In: Sólyom, L.—Brunner, G. (eds.): *Constitutional Judiciary in a New Democracy* The Hungarian Constitutional Court. Ann Arbor, 2000. 41 et seq. Cf. also Sajó, A.: Reading the Invisible Constitution: Judicial Review in Hungary. *Oxford Legal Studies* 15

two decisions may be circumvented singularly in one way or another, surely a whole conceptually elaborated system cannot, because with such a step we would inevitably lose the guiding principle in any of our prospective interpretations.

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If we claim that in the realm of classical positivism, law is a reified entity with a completely ready-made set-up and with boundaries given from the outset for the outside world, and this (along with the appropriate lawyerly culture and professional deontology) also involves the expectation that the law can be applied deductively as processed through our lawyerly logic; but if, in the guise of theory, now we also declare that all this is nothing but a mode of parlance until it becomes actually present and applicable for the jurist exclusively through an established meaning assigned to it—well, then we do not necessarily tell more than what *Kelsen* did once. For this tempting intellectual dead-end was foreseen by his philosophical reconstruction already (and with a tension induced by its internal contradiction) when in the second half of his life he concluded that in a legal sense, there is no “murder” (and, consequently, no “lawfulness”, no “constitutionality” and “unconstitutionality”, that is, no whatever legal qualification) in and by itself. There are nothing but *procedural positions* within the realm of law. And if, by the force of any of these, the judge declares now that you are a murderer or a woman, then it will be completely indifferent in a legal sense what you actually did or what your gender is in reality. What will matter for law is exclusively the decision arrived at procedurally by the authority, which once will be sealed by the legal force, will from then on also be utterly indisputable—as long as the given legal order prevails. Well, my above explanation relieves somewhat the austerity of normativity. Namely, although in terms of this explanation, reification in law is only an appearance in epistemology, as exclusively *exchanges of meanings and attitudes conformed* to the latter are traceable in society ontologically; however, the latter still constitute a kind of continuum constantly moving and changing, shifted and re-shifted again in their tendencies with changing contexts, yet with elements built upon each other reliably; and thereby, they also will build into a kind of uninterrupted sequence of progress (irrespective of the fact that the law may suffer, as the case may be, no change in its objectified, textual form).

Simplifyingly expressed, traditional legal positivism is a position against natural law, emphasising that there is a worldly identifiable maker of the law,

(1995) 253–267. and Füzér, K.: The Invisible Constitution: The Construction of Constitutional Reality in Hungary. *International Journal of Sociology* 26 (1997) 48–65.

as opposed to the classical natural law's stand that traces validity back to a source transcending this law. In the light of such a duality, my point is on the borderland, as it doubtlessly (and maybe also astonishingly) proclaims a kind of invisible democratisation. After all, although law has both a particular maker and a definite circle of addressees in the light of what has been said above, yet inevitably and incontestably *we are all there in the work of law*—that is, all we in society, even if represented, for the most part, by jurists (justices and lawyers) who practically apply the law. I would even add that it was rather ironical for me to expound this just during socialism in Hungary, as such an allegation does involve that there are limits even to despotism, for each and every addressee of the law actually takes part in one way or another in the processes of giving meanings to law and thereby making it—again: in one way or another—reconventionalised.

Nevertheless, our established culture of developing meanings in law may derive itself only from norms authoritatively issued. And this necessarily embodies the ontic process, sociologically describable as a fact, in terms of which society as a circle of addressees conventionalises it while acquiring it. The question arises whether this can be anything else or more than a kind of *Kelsen*-re-interpretation. Well, although *Kelsen's* aim might have been quite the opposite,²³ by the further elaboration of his *Pure Theory of Law* he had actually relativised all the law's components, thrusting us back into a kind of uncertainty and sheer accidentality. Because he built up, with endless austerity, a pyramid-like theory of gradation [*Stufenbau*], offering a logified picture on the structure and operation of the whole set-up of law with inexorable consistency, excluding any contingency, on the one hand.²⁴ However, with the American publication in 1946 of the re-formulation of his work²⁵—in which he elevated the moment of the legal force into a criterion set—, he had rendered all this relative, on the other. This way it has become clear that within the field of

²³ Because—as István Losonczy himself once noted it—, according to the law's “dogmas” [*A mulasztás I: A mulasztási bűncselekmények okozatossága* {The default, I: The causality of crimes of default} Pécs, 1937. 70], *Kelsen* built up “the doctrine of legal forms” [*A funkcionális fogalomalkotás lehetősége a jogtudományban* {The availability of functional concept formation in jurisprudence} (Királyi Magyar Egyetemi Nyomda, Budapest, 1941), p. 90], wherein he used the concept as “a law of sequence building”, as a “sequence of functions propounded within a definite law” [*ibid.*, pp. 25 & 81, meaning by ‘law’ here the regularity established by sciences], albeit the “syncreteness of [legal] law is nothing but [...] the result of the particularity of such [scientific] laws that constitute the [legal] law” [*A mulasztás*, p. 73].

²⁴ Kelsen, H.: *Reine Rechtslehre*. Wien, 1934.

²⁵ Kelsen, H.: *General Theory of Law and State*. Cambridge, Mass., 1946.

discretion in which such a simultaneous application and making of the law takes place, in fact everything and also its opposite may occur. This is all the more so because the very question of what is application—i.e., what is that can be regarded, from a normatively higher level in hierarchy, as pre-defined for the lower level—can be exclusively answered from a procedural position entitled to official reconsideration or revision (as anything else can only be taken as a private opinion), and thus, any optional element or consideration, even if outside the law, may, in case it becomes legally final by the seal of a *res iudicata*, get incorporated forever into the law, despite its eventually random contents. Well, on the final account, it seems as if *Kelsen's* entire oeuvre accentuated nothing but this: although the law has a logifiedly solid framework, built up laboriously and at the cost of great efforts, yet if anyone really wanted to take it into his hands, the structure would suddenly crash and just slip away like grains of sand.

In the spirit of the above, we usually say that, all things considered, law *defines itself*. However, this, examined closer, may turn out to be misleading, because we can exclusively speak of its (being incessantly in the course of) *getting defined*. For this is a process of self-generation in which a normative factor is given, with reference to which we may attempt to define its meaning for ourselves (in our positions as judges, attorneys, lawyers, etc.); at the same time our version of meaning is confronted with that of others, which communication of meanings eventually adds up to continuous re-conventionalisation. This understanding of the law is, on the final analysis, nothing but a social—institutional—*praxis* theory. It suggests that the ultimate certainty, starting out from which *Kelsen* would have tried to intellectually reconstruct the world of law with its structure and operation out of some elementary stones as experienced, is eventually nothing else than we ourselves.

As a matter of course, it was by the end of his life that *Kelsen* actually could arrive at what could serve for me already as a starting point. Namely, when as explanatory principles he introduced the moments of both legal force and efficacy (i.e., the factual acceptance of that it is exclusively an order by and large being already enforced about the validity of which we may speak sensibly at all), he actually already *concluded backwards from a social end-result* as a total result, and obtained by reduction that what he can now build up the law from. So, from the moment I started re-considering *Kelsen's* theory of law-application,²⁶ I could recognise only this path as acceptable.

²⁶ From the author: *Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions. Acta Juridica Hungarica* 36 (1994) 3–27.

Accordingly, the *closed-open system* that characterises the relation of what is inside and what is outside the law (with the movement inside the law) is itself nothing else but a *continuum*, displaying features of a particular autonomy only from an analytic point of view. We can define its foundation, outlines and contents basically only from the facts of practice as from the last empirical *donné* [‘what is given’, as once formulated by *Gény*] that we can reconstruct at all. It is this wherein the sense of excluding the availability of normative logical conclusions from law lies, as thereby we resolve all this in a feasible reconstruction from actual practice. For practice testifies both continuity and reliability. For jurisprudence as the living practice of law, characteristic of a country or of an epoch, can by and large certainly be described as a *sequence of consecutive steps* in harmonisation with and conformity to each other in the light of posterior reconstruction.²⁷

If we asked again whether law defines itself and whether this is true in all respects both inside and outside the law, we might perhaps respond to the above by referring to the ideal picture of three intertwining circles.²⁸ According to this, there is a constant movement going on objectively in the total societal work of shaping the law. The components taking part in this movement, pressing against each other, are (1) the legally relevant attitudes in society, (2) the actual judicial decision-making practice, as well as (3) the posited law (with the law’s doctrinal aspiration to define itself in *Rechtsdogmatik*). In the incessant whirl of the subsequent actions by the various actors in (1) social action, (2) legal action, and (3) the law, we can be assured of one circumstance at least: at last, it can always be described—at least posteriorly—which of them will prevail (if at all) in their struggle. In addition and on the last analysis, one of them may become predominant irrespectively of which specific legal doctrine is being enforced in the given society at a given time. That is, the process of their being pressed against one another with one of them becoming (relatively or absolutely) predominant is bound to take place anyway. And our repeated statement on that law eventually defines itself and that, in this *self-determination of getting defined* in the given situation, only the given (and not another) status (or qualification in and by the law) could arise as a result of the process, becomes understandable in this context.

²⁷ That is, with a given—subsequently certainly reconstructible—failure rate, the extent and pretensions of which are of course again indicative of the quality of the legal culture in question.

²⁸ First applied by the paper in note 3, as well as, also from the author: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999. 279. especially in para 6.1 on pp. 203 et seq.

The final conclusion, too, will conclude from this statement above, namely that an integration (with ensuring unification within the European Union or elsewhere) will not be effectuated in terms of cultures but in ones of rules and instruments—in case such a process will go on at all. And this is not a pious wishful agenda of legal policy but a value-free statement on probabilities based on the foregoing. Just as I cannot grasp law as such, only its meaning(s) as getting asserted in practice, in the same way we cannot do anything with legal culture at wish either (e.g., by targetedly shaping or integrating it with something else), because, as we have seen, legal culture, too, can only manifest itself in nothing but continuous givings of meaning, that is, in the actuality and succession of conventionalised meanings. Consequently, all we can integrate through human intervention (and with politics by deploying artificial instruments) is nothing else than kinds of objectivation we may have symbolically erected, in want of better means—for example, texts with their direct logical consequences involved.