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The Transition from Socialist Law and Resurgence of Traditional Law

(The Case of Slovenia: The (In)adequacy of Legal Positivism)

Abstract. In 1918, Slovenia became a constituent part of Yugoslavia. After the Second World War, Yugoslavia was reconstituted as a socialist state. When the attempts to turn Yugoslavia into a democratic country failed, Slovenia decided to become independent. As it is reflected in its new Constitution (1991), Slovenia is designed as a parliamentary republic, as a unitary state with local self-government and is striving to become a social state. During the transition from socialism, Slovenian law faced numerous challenges like the privatization of economy. The political and legal transition is still taking place. Hopefully, the entry to the European Union will give it new dimensions.

Between the two world wars, Slovenian legal science was especially influenced by Austrian-German legal positivism; although the legal-comparative, sociological and axiological methods were important as well. After the Second World War, in some critical periods an apologetic legal positivism gained the upper hand in certain areas. On the other hand, new legal institutes and departments furthered the development of new sciences (criminology, sociology of law, political economy, public administration). New scientific areas emerged (comparative commercial law, comparative labour law and the law of the European Union). Some legal sciences (like criminal law) have been enriched by additional (sociological, axiological and comparative methods) methods.

Keywords: apologetic and scientific legal positivism, legal dogmatics, science of positive law, socialist and traditional law, constitutional organisation, transition from socialism, political culture

I. Introductory Explanation

This paper is based on an article I wrote on Slovenian legal science in the 20th century.¹ When preparing that article I did not specifically ask myself about the transition from socialist law to traditional law and its resurgence. I was

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¹ See *Marijan Pavčnik: (Ne)vrednost pravoznanstva [The Worth(lessness) of Jurisprudence]*, in: Jančar, D.–Vodopivec, P. (Eds.): *Slovenci v XX. stoletju (Slovenes in the 20th Century)*. Ljubljana, 2001. 77–78.

especially interested in the approach and the nature of the object studied by the sciences of positive law. I was interested in the concepts of law and legal science and tried to cover it completely and to pay attention to the roles we play, either as legal observers or legal participants. It is of special importance that throughout I was centred on a longer period of time than just the period of socialism and that I also dealt with so-called socialist law as just a part of the legal phenomenon. These are the reasons for my belief that an article on Slovenian legal science in the 20th century can also be the basis for observations on the theme I will here deal with.

II. The (In)adequacy of Legal Positivism

1. Introduction

I believe that a good starting point would be von Kirchmann's critical and provocative treatise "The Worthlessness of Jurisprudence as Science",² which was published in the middle of the 19th century. Von Kirchmann maintained that legal science does not deal with the real, that is, intrinsic law (Germ. *das natürliche Recht*).³ Intrinsic law is independent and free and does not bother with whether science exists and whether it is understood by science (p. 7). It is the law that lives amongst people and that is put into effect by each individual in his environment (p. 7). Intrinsic law encompasses the rich institutions of marriage, family, property, contracts, inheritance, status differences, the relationship of the government to the people and the relations between nations (p. 8). Von Kirchmann expressly maintains that people can live without legal science, but certainly cannot live without law (p. 8). It is characteristic of intrinsic law that we are not only aware of it, but also feel it, that it is not only in our heads, but also in our hearts (p. 17). One problem of legal science is that it only deals with intrinsic law within a very limited scope. Nine tenths and even more of its object correspond to positive legislation with its numerous

² von Kirchmann, J. H.: *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*. Berlin, 1848. Reprint: Rudolf Haufe Verlag, Freiburg, Berlin 1990. See also Klenner, H.: Kirchmann oder: Die Provokation als Produktivkraft. In: von Kirchmann, J. H.: *Die Wertlosigkeit der Jurisprudenz als Wissenschaft*. Freiburg–Berlin, 1990. 79–98., and Sprenger, G.: Recht und Werte. Reflexionen über eine philosophische Verlegenheit. In: *Der Staat*, 2000. 1, 1–22.

³ I deliberately translate the German expression as "intrinsic law", which has to be distinguished from "natural law" (Germ. *Naturrecht*).

weaknesses and shortcomings; positive statute is rigid, abstract, it contains gaps, contradictions and unclear points (pp. 20–21). Within this scope, the object of legal science is purely accidental; the accidental positive statute drives out intrinsic law and the legal science dealing with positive statutes is itself accidental as well. “Three legislative changes suffice to turn whole libraries into wastepaper” (p. 23). And also: lawyers have become “little worms living only on rotten wood” (p. 23). In short, what is of permanent existence is only the legal science dealing with intrinsic law, that is, with the law corresponding to the nature of things.

Von Kirchmann certainly provokes and exaggerates. Legal science cannot avoid positive legislation; it has to analyse, systemize and interpret it. Intrinsic law does not suffice unless it is supplemented and elaborated by positive legislation. This was the case already in von Kirchmann’s times, even more so in the 20th century and still more nowadays. And, last but not least, it is simply not true that positive legislation as a whole is porous, inconsistent, and unclear. Let us just think of the great codes (such as the Austrian General Civil Code of 1811) that are still valid today.

On the other hand, von Kirchmann’s criticism is also creative. The basic question is what the science of positive law should concentrate on and what its attitude to its object of research should be. If the results of scientific work quickly turn into wastepaper, it is evident that the object and the manner of research were badly chosen and realized. In Slovenia, the constitutional system of socialist self-management, the laws on associated labour, social property, the association of labour and means, labour law, self-management law, etc., were certainly examples of the ephemeral results of legal research.

2. Legal Dogmatics, its Objects and its Limits

The science of positive law cannot avoid the valid (positive) legislation. One of its tasks is also to dogmatically study positive law, to analyse it concerning its meaning and to systemize it. One cannot speak of good law if it is not accompanied by qualified and even finely finished legal dogmatics.

The object of legal dogmatics is given and is not created by legal science. None of its aims is to declare itself for or against its object from the points of view of values and legal politics. Legal dogmatics is based on scientific and specialist traditions (e.g. those of civil, criminal or administrative law) and, on this basis, it studies the valid law. First comes the so-called lower jurisprudence of concepts, which interprets the statute, establishes its content and removes any unclear points and contradictions contained therein. Then comes the higher jurisprudence of concepts, which logically and systematically

analyses legal concepts and institutions and combines them into a suitable system.

Such legal dogmatics is a typical representative of scientific positivism, which presupposes that the content of positive law is legitimate. A problem arises when the object of study is not legitimate or when it begins to lose legitimacy partly or completely. The worst solution is for legal science to “overlook” this circumstance and to behave as if everything were in the best of order. This is already apologetic positivism, which identifies with the valid system and—whether willing or unwilling—justifies it.

Apologetic legal positivism was—at least to a certain extent—characteristic of the socialist period of the 20th century. It was especially emphasized in the areas that wanted to radically differ from the traditional Roman-Germanic legal family covering the continental part of non-socialist European law. I have already enumerated the areas of constitutional law, associated labour law and self-management law.

Also in the so-called “new” legal areas, responsible theoreticians remained true to the scientific character of their basic science, restrained and sometimes very critical. As examples, the following deserve mention: Šmidovnik’s research of the communal system,⁴ Bučar’s treatment of public administration and his criticism of self-managing communities of interest⁵ and Cigoj’s insistence on traditional civil law.⁶ Finžgar’s work on social property is a special case; the astute expert on civil law did not reject it, but constantly illuminated and analysed it with the instruments of civil law and especially property law. The final result is well-known: social property law is no longer valid law, yet Finžgar’s theory remains and it can also explain how social property should be transformed into other forms of property.⁷

⁴ Šmidovnik, J.: *Koncepcija jugoslovanske občine* (The Concept of Yugoslavian Municipality). Ljubljana, 1970.

⁵ Bučar, F.: *Uvod v javno upravo* (Introduction to Public Administration). Ljubljana, 1969.

⁶ Cigoj, S.: *Obligacije – sistem obligacijskega prava v teoriji, sodstvu in primerjalnem pravu* (Obligations—the System of the General Law of Obligations in Theory, Jurisdiction and Comparative Law). Ljubljana, 1976.

⁷ Finžgar, A.: *Preoblikovanje družbene lastnine v drugo obliko lastnine* (The Transformation of Social Property into Other Forms of Property). In: *Zbornik znanstvenih razprav*, 1992. 5–16.

3. Apologetic and Scientific Legal Positivism

The dividing line between apologetic and scientific legal positivism is not clearly drawn; it is in the nature of any legal positivism to reject a metaphysical approach to the treatment of law and thus sharply separate positive law from any value criterion which would be a criterion of law concerning its content. The legitimacy of legal positivism can only be judged by someone who tries to give meaning to what he does and who is at the same time aware of the fact that legal dogmatics is not and cannot be self-sufficient. It is in the nature of law that it is a normative phenomenon which in the name of some value presupposes and defines which legal consequence should occur if we find ourselves in certain circumstances. Phrased even more clearly: law is a normative phenomenon that regulates social relations and puts values into effect. A legal positivist who overlooks that law has a value dimension or even tries to avoid it does not have a criterion for distinguishing between apologetic and scientific legal positivism.

And this is the greatest danger he finds himself in and which even increases when he is surrounded by a single-party and monopolistic political system. The danger is less marked in those legal areas that are traditionally relatively independent (e.g. in the areas of traditional civil law) and much greater in the areas that are politically sensitive and simultaneously approached the prototypes of a new (e.g. self-management) law.

The main works on the science of positive law were produced in the period between the two World Wars (especially in the areas of criminal and civil law). The conditions after the Second World War were less favourable to science. The Stalinist period forced it to adopt apologetic legal positivism, more liberal periods broadened the scientific horizons. Throughout this period, however, it was also important whether one was dealing with traditional legal areas domiciled also in the new system or with areas that were supposed to be typical of the new self-management system.

These are external circumstances that are certainly important, yet not so decisive as to drown out the power and creativity of individuals. While it is probably true that the sciences of legal history were more sheltered than the sciences of positive law, it nevertheless took the personal contributions of Viktor Korošec⁸ and Sergej Vilfan⁹ to write excellent works on legal history:

⁸ See e.g. Korošec, V.: *Die Erbenhaftung nach römischem Recht I. Das Zivil- und Amtsrecht*. Leipzig, 1927; *Hethitische Staatsverträge. Ein Beitrag zu ihrer juristischen Wertung*. Leipzig, 1931; *Hethitica. Prispevek k razvoju hetitskega prava* (Hethitica. Contribution to the Development of Hethitic Law). Ljubljana, 1958; Keilschriftrecht, in:

the former in the field of cuneiform laws and Roman law and the latter in the field of the legal history of Slovenes.

Individuals reacted to external circumstances in different ways: some accepted a good many imaginary innovations and tried to justify them, others were aware of the limitations and tried to salvage what could be salvaged within the limits of what was possible, another group moved on the margins and broadened the scientific space, again others stuck to the legal comparative method and discussed foreign law, whereas in reality they were critical of the national (e.g. constitutional) law, some stated a few cheap Marxist truths in the introduction and then fully applied themselves to their science and there were very few who did not show any consideration for external circumstances and deal with them in a polemical manner as well.

What I would like to say is: irrespective of the fact that some periods were really not favourable to science, we have high quality works in most legal areas. If some areas are still lacking, it is not just the dark periods of recent history that are to blame. The causes lie with ourselves and with the where and how of directing our energies.

The knowledge I have does not allow me to pass judgment on individual works. Nor is such the aim of this paper. I am actually concerned with something else, namely with the concept of the science of positive law.

4. The Concept of the Science of Positive Law

Historic experience proves that legal dogmatics, which is methodologically characteristic of individual sciences of positive law, can never be self-sufficient. At least, the science must continuously check whether the positive legal regulation expresses the “normative power of the factual” (Germ. *die normative Kraft des Faktischen*). Positive legal regulation always has certain value and sociological backgrounds, the social and value contexts co-determine the understanding of the statutes and it is the social reality to which the legal behaviour, legal violations and legal decision-making lead. These reasons and numerous others

Handbuch der Orientalistik, I/3. Leiden, 1964, and *Očrt rimskega prava* (Outline of Roman Law), 2nd edition. Ljubljana, 1980.

⁹ See e.g. Vilfan, S.: *Pravna zgodovina Slovencev* (The Legal History of Slovenes). Ljubljana, 1961; *Rechtsgeschichte der Slowenen* (= Grazer Rechts- und Staatswissenschaftliche Studien 21). Graz, 1968; Jugoslawien, in: *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte, III/5*. München, 1988. 323–470.; *Zgodovinska pravotvornost in Slovenci* (Historische Fähigkeit zur Rechtsbildung und die Slowenen). Ljubljana, 1996.

confirm that the science of positive law must not live in an ivory tower of normativity. If it does, it may easily turn into a dead letter or into an ideological ornament used by the political authority.

Legal dogmatics loses its firm ground when it deals with positive law past its expiration date or when positive law has been false and contrary to the nature of things from the very beginning. If positive law is such, life rebels against it sooner or later; life demands new criteria that enable it to remain in good condition, operate normally and develop further. Legal theory knows numerous schools of thought that have rebelled against fossilized legal dogmatics—e.g. free law theory, *Interessenjurisprudenz*, sociological jurisprudence, *Wertungsjurisprudenz*. Several new sciences have developed—e.g. the sociology of law, criminology, various legal and economic sciences, in the United States various critical jurisprudences have also developed in recent decades.

Between the two world wars, Slovenian legal science was especially influenced by Austrian-German legal positivism based on the normative-dogmatic method; additionally, the legal-comparative, sociological and axiological methods gradually became important as well. After the Second World War the development was rather uneven. In some critical periods an apologetic legal positivism gained the upper hand to a certain extent and in certain areas. It should not be overlooked, however, that legal positivism was also a defensive barrier against the invasion of legal science by political irrationality and despotism. The foundation of several new institutes and departments at the Faculty of Law furthered the development of a growing number of sciences (e.g. criminology, the sociology of law, political economics, public administration), which noticeably broadened the knowledge of law and at the same time connected law with the phenomena to which it is vitally linked. It is also important that several new scientific areas developed (for example, comparative commercial law, recently also comparative labour law and the law of the European Union), which are all legally comparative, and among the classical legal sciences, some (such as criminal law) have been enriched by additional methods (e.g. by sociological, axiological and comparative methods). Concerning the legal-comparative method, it should probably be added that it has been intensively gaining acceptance in all areas of civil law and recently again in the field of constitutional law.

5. The Worthlessness of Jurisprudence

And now we should return to von Kirchmann and to his statement that jurisprudence is “worthless” because its object constantly changes. If the sciences of positive law only studied the valid legislation of the day in a normative-

dogmatic manner, von Kirchmann's objection would be almost completely justified. It is not the task of science to identify with any enacted law, neither is its task for the method of research to create its own object of research. Most probably, the task of science is to choose the aspect of research, these aspects must correspond to the legal phenomenon and the legal phenomenon is certainly not encompassed by the positive legislation of the day. Evidently, the science of positive law cannot evade positive legislation, yet its mission is also to build on previous knowledge, to verify, complement and, if necessary, change this knowledge, to consider legal-comparative findings, to assess whether the enacted law is rationally designed and in accordance with life (with the so-called "nature of things"), to accompany and judge how this law is enforced in life and in legal (court) practice, and, last but not least, to propose how some areas could be differently and better regulated. If legal science really does this and if its research is of good quality, the results thereof are extremely valuable and outlive whole generations of legislators. Also in Slovenia numerous works have outlived their authors. A classic example is *The State* (1927) by Leonid Pitamic, the content and language of which still make for stimulating reading.¹⁰

Certainly, fewer works would be falling into oblivion if they had been true to the scientific postulates I mentioned above. A frequent weakness is that individual researchers focus on so-called "law in books" and neglect "law in action". An important element of living law is court practice, which, within a limited scope, also has the nature of case law. During the last decade constitutional law practice has also developed, which, however, is not really considered in theoretical works either. The shining exception has always been civil law specialists (Cigoj's school), who probably follow court practice in the most intensive manner.

Let me stress once more that the science of positive law is certainly not "worthless", but it is evidently not good if the legal positive regulation changes too frequently. But things do not change so quickly as it seems at first sight. Apart from the novelties introduced by socialism, the basic legal concepts and institutions have been changing organically and gradually and, if necessary, newly formed (for example, in the field of commercial law). The great codifications of the 19th century already played an important role whereby the core of modern law was consolidated. Neither should it be overlooked that the norms regarding closing legal gaps made it possible after the foundation of the Kingdom of Serbs, Croats and Slovenes in 1918, for the legislation valid in the territory of Slovenia when it entered the former common state to be used for

¹⁰ Pitamic, L.: *Država* (The State). Celje, 1927. Reprint: Cankarjeva založba, Ljubljana, 1996. See also the English edition: *A Treatise on the State*. J. H. Furst Company, Baltimore, 1933.

unregulated areas. This means that practically continuously, including to a limited extent even in the period of socialism, the classical thought of civil law was maintained in Slovenia.

6. Arguments of Unlawfulness, Legal Principles and Understanding of Legal Norms

Von Kirchmann's critical questions are not sufficient. In the 20th century it was again clearly shown that any science, even a positivistic one, does itself a disservice if it is not aware of its own limitations. The main drawback is that legal positivism does not answer the question of how it should be legally evaluated. Legal positivism shuts itself off from the arguments of unlawfulness, legal principles and of the understanding of legal norms. All three arguments are of an over-positivistic nature and each of them requires answers to value questions. The argument of unlawfulness concedes that a valid (positive) legal system may be humanly intolerable to such a degree that it has to be denied the nature of law. The argument of legal principles considers that each legal system comprises value standards directing the definition of legal norms concerning their content and the manner of their application. And the argument of the understanding of legal norms emphasizes that legal norms are only a result of the understanding of a statute in view of factual (practical interpretation) and imagined (methodical interpretation) life cases.

In the Slovenian legal sphere it was the objection of unlawfulness that fared worst. Between the two world wars legal positivism was too strong for this question to be raised at all. The most astute thinker was Leonid Pitamic, who already in 1917 maintained that also the science of positive law needed appropriate prerequisites.¹¹ The criticism of Pure Theory of Law finally led him to state that legal regulation "must consider its subject at least to such an extent that it does not take away its nature. If law is to remain law, it may only command or allow external human behaviour, but not its opposite, 'inhuman behaviour', if it does not want to lose the nature of law".¹² If I may quote myself, let me say that legal regulation must always be within the limits of legal rightness and the measure of this rightness comprises—at least in the world we belong to—basic human rights, the principles of a state under the rule

¹¹ See Pitamic, L.: Denkökonomische Voraussetzungen der Rechtswissenschaft. In: *Österreichische Zeitschrift für öffentliches Recht*, 1917, 339–367.

¹² See Pitamic, L.: Naturrecht und Natur des Rechts. In: *Österreichische Zeitschrift für öffentliches Recht*, 7 – N. F. 1956, 194.

of law and the institutions of democracy.¹³ In three cases the argument of unlawfulness was also used by the Slovenian Constitutional Court in referring to general legal principles acknowledged by civilized nations.¹⁴

The second objection against legal positivism, i.e. the argument of legal principles, fares a little better. It is a majority standpoint that law is only a system of legal norms (some speak merely of legal provisions!), yet this does not mean that the meaning of legal principles is completely overlooked. The theory considers them especially at the level of basic principles characterizing individual legal fields and much less as important standards of interpretation. The main exceptions are the standpoints of experts in civil and criminal law. It is encouraging that the argument of legal principles (especially that of a state under the rule of law) has been applied more and more often in the recent practice of the Constitutional Court.

Of the greatest practical value is the third objection, i.e. the argument of the understanding of legal norms. It is an invaluable argument for legal participants (for example, for judges), but also for all those legal observers—I am one of them—who are of the opinion that legal science must also deal with the nature of legal decision-making in concrete cases.¹⁵ A chapter on the interpretation of statute is contained in practically every systematic work dealing with any legal branch. For the most part it does not concern the theory of argumentation and legal valuation with special emphasis on the peculiarities of the branch in question, but it is more a general review of classical interpretation arguments as phrased by von Savigny.

We find ourselves in a very sensitive, sometimes even fragile and very important legal area. Law is a linguistic and cultural phenomenon which is an object of understanding. Legal understanding is not just a reconstruction of a thought (a legal norm) reported by the legislator, legal understanding is also the final shaping of a legal norm that must lead to a legal decision. The lawyer's (e.g. the judge's) decision is a value synthesis assessing the normative starting point with regard to the factual starting point, and *vice versa*. In this context the interpreter is the one to "reconstruct" the possibilities of the statute, to state the content of these possibilities more precisely (if they are uncertain in the statute) and to choose the combination that is in the closest accordance with the legally

¹³ Pavčnik, M.: *Teorija prava* (Theory of Law). 2nd Edition. Ljubljana, 2001. 20 and 479.

¹⁴ See Pavčnik, M.: *Pravni in ustavni temelji prava* (Legal and Constitutional Foundations of Law). In: *Ustavno sodstvo* (Constitutional Judiciary). Pavčnik, M. and Mavčič, A. (Eds.) Ljubljana, 2000. 396–397.

¹⁵ Cf. Pavčnik, M.: *Juristisches Verstehen und Entscheiden*. Wien–New York, 1993.

relevant characteristics of the life case. It is in the nature of legal understanding and decision-making that it is a creative or at least a co-creative legal act.

It is a matter for each theory of law (in the broader sense of the word) how it reacts to these questions. The worst solution is to accept the thesis that everything has been decided by the legislator and that it is only a question of mechanically recreating his decision in a concrete case. This is the so-called ideology of the application of law, which always suits the political forces laying claim to “creativity” and a monopoly on law-giving. Behind this “ideological veil” lies the actual creativity, which is all the more bound to the “ideological cliché” the more politically sensitive and important the legal decision is. It is in the nature of things that the decision-making in civil law cases is, in principle, more autonomous than in administrative and criminal cases where the “ideological cliché” is much more pronounced. Yet also here there are differences between the classic crime and the “socially” especially dangerous “crime”, which can be fully exploited as “political crime”.

The subject of my paper is not the concrete abuses that were most numerous and terrible in the Stalinist period. I would like to say that the ideology of the application of law disarms the legal participant and leaves him to his own devices. I do not at all wish to blame legal dogmatics for any abuses. I only think that it should also be accompanied and supplemented by other theoretical approaches, among them especially the theory of interpretation and argumentation in law, i.e. approaches that make the legal participant aware of the nature of legal understanding and offer him arguments for good decision-making and substantiating. I know very well that abuse cannot be avoided in such cases either. It does not lie within the power of theory to make abuse impossible, yet it is within its power to clearly tell the legal participant that he is also a decision-maker.

7. Law as a Phenomenon of Understanding and Interpretation

The fact that the law is a phenomenon to be understood and interpreted offers numerous creative possibilities to legal observers as well as to legal participants. If the legal system is to be stable, legal science must assume its share of responsibility as well. The constitution, legal codes and basic statutes can only live with the help of interpretation. The free law theory, *Interessenjurisprudenz*, *Wertungsjurisprudenz* are typical foreign examples that enable, for instance, the French and the German Civil Codes to still be valid without difficulty: the former is nearly two hundred years old and the latter turned one hundred years old at the turn of the millennium.

The same is true of the Austrian General Civil Code (of 1811), to which Slovenes have the closest relation and which was mentioned above in another

connection. This code was of special importance before 1978, when the new Act on Torts and Contracts was passed. Until then, torts and contracts were actually regulated by the rules of the Austrian General Civil Code of 1811, which were actively applied by the courts with the full and firm support of civil law theory with its interpretations and comments. The norms of the Austrian Civil Code also had an important role in classical law as regards real property and movables.

This also shows that court practice has an important role as well. It would be an exaggeration to say that it is a role approaching that of Anglo-American case law; there are certainly numerous similarities between both systems, but there are also numerous differences with their own historical background. In continental and also in Slovenian law, established court practice supplements statute law, normatively implements and rejuvenates it in the long term by preventing it from becoming rigid and losing touch with life. In this respect much has been achieved in Slovenia in the field of classic civil law. In the last ten years, especially since 1994, when the constitutional complaint was instituted in practice, the Constitutional Court has done much towards making case law statements obligatory; if regular courts do not act in accordance with established court practice, they violate the basic constitutional right of equality before the law, which is also a reason for constitutional complaints to be brought before the Constitutional Court.

The shift I am referring to will become more and more noticeable: the significance of court practice and Constitutional Court practice rises when legislation calms down and all main codes and statutes have been adopted, which at the same time requires that the theory of positive law also deals intensively with the theory of interpretation and argumentation in law. The statute is an object of understanding, but this understanding can only be of good quality and legally safe if it is ennobled by theory as well as by court practice. The statute—however excellent it may be—is just an element of the legal phenomenon; legal theory and court practice are responsible for it as well.

III. The transition from socialist law and the resurgence of traditional law

8. The so-called Socialist Law

The so-called socialist law had several complexions and did not represent a uniform, generally accepted concept. On the one hand, there were some classic Marxist standpoints (among them, especially Marx's) on the nature of socialist law, on the other hand there were different interpretations and reactions to these

standpoints, and, additionally, also the practices in individual socialist countries were different.¹⁶ A very characteristic example was the former Yugoslavia–Slovenia was its most-developed republic—which after the conflict with the Soviet Union in 1948 began to look for new solutions and after 1950 began to build up the political system of self-managing socialism. Self-managing socialism made it possible for the concept of socialist law to be less *etatistic* and more pluralistic than in the countries of the so-called “real socialism”. Yet it was also true of socialist Yugoslavia (and thus of socialist Slovenia) that the “bourgeois boundaries”¹⁷ of socialist law did not allow formal democracy. This was a very sensitive point and also the point that put the socialist state far below the standards of the capitalist state.

The so-called socialist law was not a uniform concept that could be compared to traditional law. If I look at former Yugoslavian and Slovenian law, the greatest differences with respect to traditional law can be found in the following areas: in constitutional law, which was supposed to have been surpassed by the political system of socialist self-management; in classic property law, wherein social property was to become the foundation of a new system; in labour law, which was characterised by workers’ self-management; in commercial law where instead of contract law, a social compact should have developed (the so-called association of labour and means); in administrative law, wherein the administration was professionally degraded and fragmented into individual areas of interest, etc. In addition, all legal areas were eschatologically marked by the principles of socialist self-management and socialist morals. These principles were mostly just an ideological ornament and did not carry much weight in practice. An exception were the so-called reserve clauses, which enabled the authorities to put their political will into effect in an ostensibly legal manner. A classic example were some very loose definitions of criminal offences that were contrary to the principle *Nullum crimen sine lege certa*.¹⁸

Among the characteristics of socialist law self-management law was often mentioned. Strictly speaking, self-management law was not a new kind of law or even a legal area (such as constitutional, civil or criminal law), but it was only a question of new formal sources of law comprising legal norms. These

¹⁶ Cf. Reich, N. (Ed.): *Marxistische und sozialistische Rechtstheorie*. Frankfurt/Main, 1972.

¹⁷ Cf. Marx, K.: Kritik des Gothaer Programms. In: *MEW* 19. Berlin, 1972. 20–21.

¹⁸ Cf. Pavčnik, M.: *Nullum crimen sine lege certa*. Beitrag zur Gesetzesauslegung am Beispiel des jugoslawischen Rechts. In: Weinberger, O. und W. Fischer, M. W. (Eds.): *Demokratie und Rationalität*. Wien, 1992. 191–199.

new sources of law were charters (internal statutes), self-managing agreements, social compacts, etc., they were implemented especially in the areas of labour and commercial law. One great problem of self-management sources of law was that they were ostensible and thereby ideological, since they created the appearance of real self-management, whereas actually the questions had already been regulated in the statutes in much detail.

9. Traditional Law in the Socialist Period

I have already partially dealt with this question above. It was a characteristic of Yugoslavian and Slovenian law that they were always closely connected with traditional law. This law was still active in all areas that were not taken over by the so-called socialist law that was supposed to “surpass” traditional law (see especially point 8). The connection to traditional law was also made possible by the norms regarding the filling in of legal gaps. As mentioned above, in Slovenia the regulations of the Austrian Civil Code were applied, especially for the legal areas of the general part of civil law, for property law and for the law of contracts and torts, which were largely codified only in 1978 and 1980.

An important role was also played by the system of legal education, which was mostly based on traditional law and traditional legal thinking. Of course, also the new socialist law was taught, yet it never dominated. One should also bear in mind that the older professors, who had studied in the period between the two world wars (often at first-rate foreign universities), mostly remained true to scientific legal positivism. A typical representative was the above-mentioned Professor Finžgar, who dealt with social property by interpreting and explaining it with the tools of classic civil law (especially property law). Moreover, a number of professors studied in the West (e.g. in the United States) also after the Second World War. Among them were Cigoj, a professor of civil law who developed case law thinking, and Bučar, an administrative law professor who also used system theory.

Compared to other former socialist countries, Yugoslavian and Slovenian theories were relatively well informed of what was happening elsewhere. If I take the theory of law, which is my subject, I can say that it was substantially more open and diverse than in other countries of “real socialism”.¹⁹ I do not want to say that the political system did not place ideological obstacles in the way of researchers (e.g. in discussions about natural law), yet they were not so

¹⁹ Cf. Perenič, A.: *Relativna samostojnost prava* (Relative Independence of Law). Ljubljana, 1981. and Pavčnik, M.: *Der Begriff des Rechts in der jugoslawischen Rechtslehre*, in: *Jahrbuch für Ostrecht* (München), 1989, 93–112.

high and formidable as if there were only one truth, without allowing for new research and new conclusions.²⁰

10. The New Constitutional Organisation

In the transition from socialism to the new state organisation, an important and even key role was played by the new Constitution of the Republic of Slovenia that was adopted on 28 December 1991. The quality and the essence of the new Constitution are very different from the previous constitutional order of 1974 when Slovenia was still a part of the Socialist Federative Republic of Yugoslavia. In the socialist era the foundations of the system were the right to self-management and social ownership (of the means of production), which were incorporated into a vision of a self-managing society and state that was determined right down to the last detail (which made it totalitarian in a certain sense). Basic human rights and freedoms were drowned in this vision.

Basic human rights were not the starting point of the system but just an element thereof, the scope of which was precisely measured off in advance. It was characteristic of this system that it accepted the thesis of the pluralism of self-managing interests, yet it was not ready to institutionalise this pluralism legally and politically. Pluralism was acceptable as long as it remained within the system. Once it began to doubt the system and tried to change it, however, it became suspect and even open to criminal prosecution. Thus, it is certainly not accidental that the Communist Party was defined already in the Constitution as the “leading ideological and political force of the working class and of all working people”.

The form of the authority of the state corresponded to a directorial (assembly) system (with elements of a parliamentary and even presidential system). It is typical that the system as designed in the constitution did not work and the elements of the principle of the division of powers were more a kind of an ideological ornament than serious institutions. The rules of the “division of powers” only make sense if at the same time cultural, economic and political conditions are also provided that activate this “game” (of the system of checks and balances). The system that was *de jure* and *de facto* dominated by only one political party (i.e. the communist party) certainly did not harbour this ambition. And this made the legal form ideological: it offered exactly what its actual designers did not at all want. Nevertheless, the right to self-management, social property and the pluralism of self-managing interests made possible

²⁰ Cf. Bröstl, A.: Troubles with Law, Justice and Nationalism. In: *Rechtstheorie*, 1993, 84–85.

numerous particular features of the Yugoslavian order and thus distanced it from the typical countries of “real socialism”.

And now, let us return to the Constitution of independent Slovenia, which is centred on the classic constitutional matter (*materia constitutionis*).²¹ On the one hand, there are the provisions that determine the form of the (Slovenian) state. Slovenia is defined as a republic with a parliamentary system, as a democratic state wherein power is vested in the people, a territorially unified and indivisible state with local self-government, as a state under the rule of law and as a social state. The second group of provisions encompasses a catalogue of the classic basic human rights and freedoms, which is completely in accordance with modern standards and modern constitutions. The third group of constitutional provisions refers to the organisation of the state. It comprises norms about the organisation of the central state bodies (legislative, executive and judicial bodies), their competencies and the relations between them. The relation between the legislative and the executive branches of power is designed in accordance with the parliamentary system (with the variant of a constructive vote of no confidence) and the design of the state order corresponds to the principle of “checks and balances”.

The principle of “checks and balances” is important not only in the relation between the legislative and the executive branches of powers, but also the composition and the manner of the operation of individual state bodies are such that a balanced operation is made possible within each body as well. A logical consequence of this regulation and of these principles is that also the judicial branch of power acquires a new position and a new quality.²² The Constitution especially emphasizes the independence of judges, the right to a natural judge (Germ. *gesetzlicher Richter*) and the principle of the permanence of judicial office. It is very important that the Constitution maintained the institution of the Constitutional Court, strengthened it and conferred numerous new responsibilities upon it.²³ *De jure* and *de facto*, the Constitutional Court is the “highest

²¹ Cf. Šturm, L. (Editor): *Komentar Ustave Republike Slovenije* (Commentary to the Constitution of the Republic of Slovenia). Ljubljana, 2002.

²² Cf. Příbáň, J.–Roberts, P.–Young, J. (Eds.): *Systems of Justice in Transition. Central European Experiences since 1989*. Aldershot, 2003. See especially the articles by Marko Novak (The Promising Gift of Precedents: Changes in Culture and Techniques of Judicial Decision-Making in Slovenia, 94–108) and Albin Igličar (The Judiciary in Slovenia: a Profession in the Ascendancy, 180–182).

²³ Cf. Mavčič, A.: *Slovenian Constitutional Review*. Ljubljana, 1995. and Pavčnik, M.–Mavčič, A. (Eds.): *Ustavno sodstvo* (Constitutional Judiciary). Ljubljana, 2000.–As regards the Czech experience, see the excellent monograph of Pavel Holländer: *Ústavněprávní*

office of judicial power” deciding whether general legal acts are constitutional and legal, deciding on constitutional complaints (due to violations of human rights and fundamental freedoms by individual acts of the authorities) and on some other matters (e.g. on the possible impeachment of the President of the Republic, the Prime Minister and individual ministers).

11. Transitional Problems and New Challenges

Since I look at the problem of transition from a broader point of view and from within a broader period of time, this possibly makes it easier for me not to dramatize the situation. Therein, I am also supported by the thought of the Slovenian legal historian Vilfan, who was convinced that the “Slovenian language as the basis of national consciousness (...) was preserved in suitable historical circumstances” and that “thus, Slovenes—in accordance with their historical situation and environment—have always been completely normal people.”²⁴

I do not quote this in order to show any kind of self-satisfaction or as if I did not want to admit there are any problems, but simply because I think that the problems are anything but black and white. Neither is this purely a transition from the period of socialist law because this law has always been connected with traditional law nor are we entering a new period of traditional law that would be wide open and waiting for us. The traditional law to which we are returning is not static, but is in constant movement and itself confronted with challenges and open questions.²⁵

It is undisputable, however, that foreign examples and foreign solutions cannot be uncritically transferred to the local legal system. The revival of traditional law must occur in accordance with historical and legal tradition, it must consider comparable foreign examples and decide in favour of those solutions and developments that fit into the local conditions.²⁶ Von Kirchmann

argumentace. Ohlédnutí po deseti letech Ústavního soudu (Constitutional Argumentation. Considerations after Ten Years of the Constitutional Court). Praha, 2003.

²⁴ Vilfan, S.: *Zgodovinska pravotvornost in Slovenci* (Historische Fähigkeit zur Rechtsbildung und die Slowenen). Ljubljana, 1996. 481.

²⁵ At the level of principles, cf. Nahtigal, M.: *Vloga prava v tranziciji* (The Role of Law in Transition). Ljubljana, 2002.

²⁶ Compare with the instructions on how to fill legal gaps. See the Courts Act (1994): “If a civil law matter cannot be solved on the basis of valid regulations, the judge considers a regulation intended for similar cases. If the solution of the matter is nevertheless legally doubtful, he decides in accordance with the general principles of legal order in the country.

would probably say that it must be the law which is the most intrinsic with regard to the local conditions. Attention must also be paid to the fact that no solutions (either local or foreign or both) are introduced which are not in mutual harmony or are even mutually exclusive.

The transition from socialism to traditional law evidently has taken more time than originally expected. This is especially true of the privatisation of the economy and the denationalisation of once nationalized property. These processes are often legally very demanding and take much time (especially if the complications are dealt with in administrative as well as in court proceedings). It is equally—and possibly even more—important that no durable and firm political blocks (with corresponding political parties) have developed as yet and that a political culture which accepts the values of a state governed by the rule of law and those of a social state (together with the system of checks and balances) is still under development.

The question of an appropriate political culture²⁷ is among the most sensitive of issues. New political parties often hide behind the principle of the division of powers and are more interested in the division itself (somehow in the spirit of *Divide et impera!*) than in the divided exercise of power that has to be mutually harmonized and controlled. A logical continuation of these views is that most parties do not have a well thought-out attitude to the social state and to social justice. Market fundamentalism and the “liberal paradigm” that any acquisition on the basis of (non-monopolistic) market exchange is legal, legitimate and just²⁸ are just too strong and without any real competition that would stand up to them to any significant degree and in an efficient manner. Major positive changes will only occur when a sufficiently strong socially oriented political group is formed and when also the Constitutional Court has the opportunity to intervene more frequently by means of its decisions. If the Constitutional Court received a greater number of proposals, it could react in an appropriate manner because the principle of a social state is one of the most important constitutional principles.

The reactions to the new challenges of traditional law are and will be somehow different in individual (former socialist) states because also their historical

In this he acts in accordance with *legal tradition and fixed findings of legal knowledge*” (italics added by M. P., Art. 3/2).

²⁷ Cf. Gessner, V.–Hoeland, A.–Varga, Cs. (eds): *European Legal Cultures*. Aldershot (etc.) 1996.

²⁸ Rus, V.: Enakost in pravičnost (Equality and Justice). In: Zalar, A. (Ed.): *Enakost in pravičnost v pravni in socialni državi* (Equality and Justice in a State that is Social and Governed by the Rule of Law). Ljubljana, 1998, 14.

development and their present starting points are different. Concerning Slovenia, I have already explained its peculiarities and certain advantages in comparison with the former countries of “real socialism”. But there are also new challenges and new circumstances that cannot be avoided. Fortunately, the approaching membership in the European Union has acted in a cohesive manner. The task of the new members of the EU is to adopt and realize the fundamental economic freedoms that refer to the free movement of goods, the free movement of workers, the right of establishment, the free movement of services and the free movement of capital and payments. A prerequisite for all four said freedoms is that traditional civil and commercial law are valid in all countries. Slovenia has already adopted appropriate laws in these areas. There should especially be mentioned the Companies Act (1993), Protection of Competition Act (1993), Prevention of Restriction of Competition Act (1999), Securities Market Act (1999), Maritime Code (2001), Code of Obligations (2001) and Property Code (2002).

European unification and even wider globalisation processes also contain numerous hidden traps and dangers. For a small country and a small nation, it is of special importance to maintain the cultural and national identity. In principle, small countries will probably not be able to design the economic and political form of the EU and other broader international communities in a decisive manner. The power of small countries resides in their mutual cooperation and the preservation of the differences that are a *conditio sine qua non* of any national identity. At the same time, this is also the reserve clause and the limit beyond which the exercise of a part of national competence cannot be transferred to international organisations and communities. The European Union is “unity in variety” and “variety in unity”.²⁹ If the European Union does not accept this condition, it would make itself look ridiculous. Thus, the real question is not whether there should be variety or not, the real question is how and to what degree this variety should be put into effect and how harmoniously (and colourfully) the European orchestra should play.

²⁹ Cf. the special issue “Evropski izziv” (“European Challenge”), in: *Nova revija* (Ljubljana), 2003, 252–253, 1–473.