Csaba Varga

DEVELOPMENT OF THEORETICAL LEGAL THOUGHT IN HUNGARY AT THE TURN OF THE MILLENNIUM

The overall picture about the development of theoretical legal thought in the Central and Eastern European region with Hungary included is rather paradoxical indeed. Namely, there has been neither a major breakthrough nor shifts of emphasis in the past one to two decades. However, the evolution of tendencies perceptible anyway does indicate the potentiality for a strong impulse that may grow to changes with milestone significance in the near future.185

(1) International environment. As known, the period between the end of the Second World War and the turn of the millennium became increasingly dominated by an analytical approach worldwide – first in the Atlantic world, then also spreading slowly to Europe.186 Accordingly, Anglo-American analytical jurisprudence (in tandem with its somewhat parallel European equivalent) is the direct legacy of the turn of the millennium for our present day. Therefore, it is no mere chance that for the recent time we can mostly encounter the immeasurable sprawling of these, by their growing into the only preferable way of thinking about law. In result of this, impoverishment and depletion of all the other directions are to follow, exemplifying the aggressiveness of any kind of imperialism in this easy victory (that may make us prey to some kind of a scholarly vogue), indicating some deep uncertainty at the same time.

Because, despite the general intellectual revival following the Second World War with the demand to face (by looking back on) law itself as a potential source of danger – in the course of which, first, revival of the law’s ontological foundations and epistemological properties could be re-formulated with some natural law perspective in describing its borderlines; then, these ontological and epistemological approaches became unified, in order to culminate later on in a clash between formalism and anti-formalism in the context of law and language, law and logic, law and rhetoric – well, following the subsequent internal self-emptying of formalism and exhaustion of anti-formalism,187 all such progress has suddenly become (in a typically European continental way) relegated to the


187. More precisely, after the death of Villey and Perelman without having established proper schools or institutional continuation, in want of appropriate successors.
background with striking rapidity, just to yield to that new kind of denaturation (perhaps at the same time also as a particularly perverse fulfilment) by the advance of analyticalism.

For it occurred the first time in the European history of ideas that a space, apparently emptied out by itself, was filled by the direct theoretical influx of an Anglo-American legal thought. Although, due to the fact that – figuratively speaking – Michel Villey and Chaim Perelman have been replaced by H.L.A. Hart and Ronald M. Dworkin in determining the tone of ongoing debates, the effect of post-Second World War continental natural law and anti-formalism, limiting and even alleviating the earlier predominance of legal positivism, could even further intensify, on the one hand. However, this became realized under the aegis of linguistic analysis alien to the continental legal perspective by its origins, having also emerged in Anglo-American jurisprudence as a by-product of the intention at formalizing ethics, and thus, later on, only transferred in a by far not organic way to the field of law, on the other. Nonetheless, this analytical image of law, due to its mere artificiality and inner tendency to simulate law in a virtualized manner (instead of actual investigation into the subject matter), required and also cultivated legal sociology as a specific requisite to legal theory, as an indispensably auxiliary discipline in the macro- and micro-level research of legal reality, in which – let us recall here – a worldwide and emphatic co-operation between continental and Anglo-American legal scholarship could well have developed since the emergence of legal sociology, that is, for nearly a century now. Although the analytical study of law has in the meantime (by overestimating its own potential) gained predominance in most of Western Europe, it has still proven short-lived (at least in its form known until now) in historical dimensions.

Its striving for exclusivity at the fora of legal theorizing with a profoundly sterile predominance was met with rejection by those of the professional community teaching practical subjects of positive law (as perceivable now in the Nordic and Western European restriction of legal theoretical and philosophical subjects in the university curricula, assessable as a compulsive reaction). Meanwhile, the fora of the theoretical inquiries about law seem to join forces in the hope of some re-orientation with new beginnings.

In summary, the international reality of the turn of the millennium is hardly more than a cavalcade of basic ethoses and approaches, in which the American scene is continuing to be dominated by the re-consideration of the feasible contents and ways of the judicial development of law through principles drawn from the constitution with human rights ideologies in the background, while the European

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188. In which, of course, with basic definitions unchanged, features of the one-sidedness are being gradually eroded, moreover, with a demand for and also attempt at universality (by metamorphizing into a comprehensive general theory) also assessed.

stand stresses a pretended harmony of post-modernity, nurturing itself from the cacophony of manifold ambiguities and vaguenesses. 190

(2) The situation in Hungary. By the end of the communist party rule, theoretical legal thought in Hungary191 had undergone substantial changes: it definitely became open as it continuously adapted itself to its international environment in a permanent dialogue less in debate with than in an increasingly creative participation to (and as an acknowledged part of) it. In all this, in parallel with the total rejection of the imposed political regime of socialism, 192 a kind of continuity and permanence reasonably could yet prevail, without an expressed break or division. For its once decisive authors had gradually risen anyway to great old names in the representation of the past and, thereby, also to antecedents in a sequence of the historical generation of ideas. Its most creative authors were writing opuses of synthesis in reconsideration of their established views, surrounded anyway by international attention; and its mid-generation was to experiment with its own ways to make it possible for a fresh Euro-Atlantic way of thinking to be cultivated as well in the domestic medium, especially in the classical fields of legal philosophy, sociological jurisprudence and linguistic-logical reconstruction. Moreover, in addition to the emergence of works preparing for the future, attempts at re-integrating the past (once spectacularly renounced by the communists’ alleged revolutionary discontinuity) may have also started.

This way, irrespective of the nature and success of the political change in the country anyway, there was no need for any spectacular shift in theoretical legal thought. Even if it may seem alien to scholarship’s self-esteem and sublime intellectuality, let me make the following remark: as a result of the mere fact that academic publishing had finally become the exclusive matter of financing

190. An especially instructive example is offered by the destiny of Peczenik who could first, as the President of the International Association for Philosophy of Law and Social Philosophy (IVR), build up his own memorial then had to live to see, before his sadly early death, the teaching of theoretical legal subjects being questioned by all the three faculties in Sweden. For the a propos of such faculty boards’ re-evaluation was just his speciality on the field, namely, philosophizing and theorizing on law reduced to the long-term sterility of mere conceptual analysis.


(freed from administrative constraints and privileged positions characteristic of the
dictatorial regime which used to select according to non-academic merits from the
outset) and due to the statutory re-framing of the status of universities with the first
grades of academic (scientific) qualification relocated under their responsibility,
they could after all become (again) the fundamental workshop for the cultivation of
scholarship, in parallel with the doubling of the number of faculties of law within a
few years. Well, in contrast to the past regime spanning half a century, all this has
offered entirely new and hitherto unknown prospects for both preparing own text-
books and publishing a wide number of papers at the growing fora of
publication.193

Or, new vistas were opened during the last two decades to be overviewed here,
first of all in (a) the publication of own textbooks, lectures and notes varying now
from one alma mater to the next one, with the need also to regularly revise, rewrite
and enlarge them; in (b) the cultivation of scholarship expanding to newer fields,
from among which (1) the investigation into the connections between law and
language and logic and rhetoric could result in the reformulation of earlier results
with an increasingly synthesizing force; (2) the Anglo-American type of conceptual
analysis (hardly practised in Hungary till then) entered the scene with the
downright claim to found an exclusive school within an unprecedentedly short
period of time; and (3) after an almost complete silencing for more than half a
century, the idea of natural law started to vindicate its own place under the sun
through a series of published historical overviews and monographical papers; in (c)
the key subsidiary and apparently marginal fields, there came (1) a disciplinary re-
start of (A) the classical cultivation of the history of ideas, (B) legal anthropology
gained new force and a somewhat independent form, (C) legal sociology became a
nation-wide movement indeed, while (D) in the field of legal comparativism,
foundational works have been born, and all this – if the projected researches
would in fact start and produce substantial results – (2) might augment the circle
of problems covered by theoretical legal investigation with newer topics, such as
(A) the research into the doctrinal bases of law, (B) the enquiry from the case-
historical and narrative aspect of ‘law and literature’ and, by (C) expressing our
day’s preference to economism and the drive to quantify, the theorizing in terms of
‘law and economics’.

(a) Two major circumstances brought new perspective, internal encourage-
ment and special dynamism into textbook-writing. The first is that in a country of
ten million inhabitants, there are now eight faculties of law offering their own
programmes for quite an extended and deepened teaching in legal theory as a basic

193. Just to give a hint of the abundance unseen till then, it may suffice to refer to the presence of a
journal initiated and edited in chief by B. Pokol – Jogelméleti Szemle (Review of Legal
Theory), (2000 – ) published electronically <http://jesz.ajk.elte.hu>—as well as the series of
books ‘Jogfilozófiák’ in Hungarian and ‘Philosophiae Iuris’ in Western languages, launched
and edited by C. Varga (now in the Institute for Legal Philosophy he founded at the Catholic
University in 1995 which has been awarded – as the first ever had at department level in
Hungary – ‘A Place of Excellence’ by the National Accreditation Committee), and the series
Prudentia iuris launched and edited by M. Szabó at the University of Miskolc.
The second is that with a new system of academic qualification introduced, most faculties launched doctoral schools which, within the perspective of Ph.D thesis-writing, may have added – as an extra impulse – the preparation of teaching aids. Besides summarization and recapitulation in textbooks, sophisticated elaborations of partial topics as well as foundational translations and re-editions have been produced for study purposes either in the compulsory main subject of legal theory (following propedeutics) or the specialist seminars attached to it, as well as in doctoral courses, re-systematizing of or problematizing on legal theoretical thought, which are expected to superimpose to one another.

(b) Obviously, only just a few major fields can be mentioned to indicate the transformation of the fields of scholarship cultivated, in addition to the fortunately growing number of either festchrift volumes of essays in honour of eminent personalities or proceedings of conferences held either on anniversaries or in international or domestic workshops, on the one hand, and to endeavours at laying the foundations.

194. For a description of courses, see C. Varga ‘The Teaching of Legal Philosophy in Hungary’ (2004) IVR Newsletter No. 33, pp. 23–24: <http://www.ivr2003.net/bologna/newsletters/33.pdf> It is to be noted that by the academic year starting in 2006, natural law was also transformed into an obligatory subject, and comparative legal cultures as well as sociology of the state (political sociology) are classed within optionally obligatory subjects.


clarifying key problems, collecting authors’ own papers, on the other. Let me highlight some of them below.

(i) Investigation relating to law and language, law and logic as well as rhetoric, seems to occupy a special place from the outset. Namely, no matter how


pioneering a role it once used to play from the end of the 1960s in the theoretical loosening of the positions of classical positivism (or, in Hungarian, of socialist normativism), including their transcendence by developing new paradigms, today it still represents the memory of some connection to the European past because, even if detached by its framework of interpretation, it can still be correlated to the law’s one-time comprehension by ontologies and epistemologies while,


perhaps up to the present day, it is the most powerful trend that has proved most effective in describing the whys and hows of the law’s actual construction and operation by looking behind the law’s ideologically postulated formal construction and operation, in order to reconstruct their genuine components.

(ii) The analytical trend in legal scholarship – borrowed from the Anglo-American mainstream with presuppositions characteristic of a definite political philosophical viewpoint and cultivated mostly in frameworking interpretations, whose Hungarian reception has practically no reflection to either its continental parallels or to its further developed variants (continental or realized elsewhere) – has obviously arrived from outside, with proper claims, approach, methodology, sources, and conceptual world. However – as this became clear in, e.g., Poland, in competition with Marxism nearly for three decades now – this analytical trend not only had a fermenting effect but was also able to challenge the typically continental patterns of thought accustomed in Hungary by raising new questions. With this, it can reach (if it has not already reached) not only its conceptual world and to some extent also its underlying political and philosophical worldview being adapted but also becoming itself the natural subject of legal discourses.

(iii) Together with all the ‘bourgeois’ legacies cultivated as legal philosophy mostly along new-Kantian methodological confines between the two World Wars in Hungary, it was natural law that suffered the greatest losses of the Muscovite-style of ideological homogenization in Hungary, stricken, in addition to being silenced, by another circumstance as well, notably, that natural law as such hardly existed for almost one whole century in Hungary, because even its earlier cultivation, both in the pre-war and inter-war periods, was done rather theologically than as an organic part of legal philosophizing. All that notwithstanding, today it occupies an in-between position, because both in general and in its having covered by lawyers, it is part of the international catholic intellectual revival and also of a reconsideration of basic issues demanded by the age. At the same time it is also activated both as the ever-green historical counter-pole to legal positivism (under general criticism and attack now) and as the literally ultimate promise of offering some axiological foundation and point of reference, suitable to define (upon its tradition lived through millennia) reliable criteria so wanted for our world having lost its direction and being endangered from several sides.

(c) On the auxiliary and marginal areas, (A) history of ideas was so to speak never regularly cultivated in a classical sense earlier in Hungary. Our related scanty literary outputs, starting from, say, the end of the 19th century, is scarcely more than a set of occasional digressions, anniversary commemorations or prefaces. In contrast, what is about to come to fruition at present (and perhaps in the hope of a better future) already now shows the signs of a certain abundance.

Namely, researchers have started becoming specialized in studying certain historical trends and schools from antiquity\textsuperscript{205} to the early modern\textsuperscript{206} and modern age,\textsuperscript{207} in addition to reconsidering contemporary development — mostly through Western\textsuperscript{208} and Central and Eastern European\textsuperscript{209} or domestic\textsuperscript{210} antecedents —.


\textsuperscript{206} E.g., S. Tattay, ‘Natural Law and Natural Rights in Ockham’s Legal Philosophy’, in H. Szilágyi and Paksy (eds), above, pp. 539–555.


including both reprints (at times enlarged into collections)\textsuperscript{211} and translations,\textsuperscript{212} moreover, at times also original texts editions.\textsuperscript{213} In laying social theoretical foundations for legal philosophical thought, a key role may be played

\begin{itemize}
\item 213. E.g., H. Kelsen, Reine Rechtslehre (1934), I. Bibó (trans.) (1937) and C. Varga (ed.), Tiszta jogtan (Jogfilozófiák, Eötvös Loránd Tudományegyetem Bibó István Szakkollégium, Budapest, 1988. Repr. Rejtjel, Budapest, 2001); C. Varga (ed.), Aus dem Nachlaß von Julius Moór (Philosophiae Iuris, ELTE ‘Comparative Legal Cultures’ Project, Budapest, 1995); and
\end{itemize}
by (B) anthropology and (C) sociology. As to legal anthropology, the very start of its cultivation is remarkable itself.\textsuperscript{214} On the other hand, legal sociology is refounding itself to become an independent discipline by elaborating monographs\textsuperscript{215} and papers\textsuperscript{216} in addition to textbooks and the launching of its own periodical.\textsuperscript{217} However, it is still far from that flourishing which proved to be an effective force forming society at the time of socialism through both theoretical (macro-sociological) and concrete-empirical (micro-sociological) investigations. Lastly, (D) legal comparativism is scarcely more today than a respectable subject to

\begin{thebibliography}{99}
\bibitem{Kul} First of all, K. Kulcsár, Modernisation and Law (Akadémiai Kiadó, Budapest, 1992) p. 282.
\bibitem{Kont} E.g., the annually published Kontroll (2003 – ) with rotating university backgrounds and chairs to edit it.
\end{thebibliography}
teach, which (despite partial analyses on the field) is still waiting for being recapitulated in textbooks and for a re-start of preparing for monographs (as widely done in the socialist past as acknowledged internationally) by academic encouragement. Nevertheless, it is now widely recognized that comparativism is simply an old-new sine qua non and, after proper university fora will have been formed, its cultivation shall also become regular. As a result of all this, (b) research may fortunately expand to further areas which (A) at last attempt to lay foundations for the doctrinal study of law, (B) realize interdisciplinarity between living law and philosophical jurisprudence within the (American-type) informalism of ‘law and literature’ (having by now also penetrated Europe), or (C) try to find more guarantee for plannability and foreseeability in the intermediate sphere of ‘law and economy’ (just as once legal behaviourism hoped to realize the indexation of foreseeability through the statistics of judicial behaviour).

From among all these directions with re-starts and attempts, mutual influences and intertwinings, it is the repeated debate on law taken as language and logic (in a continuous struggle with the tradition of legal positivism) that comes


out as the most innovative in effects, as it resulted (nearly one and a half decades ago) in recognizing law first as a process, then (searching for the societal embedding of processes) as a culture, having generated by today the law’s investigation in a deeper medium, in the historico-comparative examination of legal cultures themselves. That is, the rejection of positivism’s tight-fistedness and the relevant studies in classical legal comparativism (attempts at some self-transcendence) could after all establish a new interest, namely, the investigation within the perspective of comparative legal cultures, already involving (as both a promise and as a perspective) the aspiration for comparative judicial mind, that is, the comparison of how justices arrive at judicial conclusion in different cultures with differing ideas on which ways law and order is to be standardized and reached.

(3) Outlook I: The historical-comparative study of legal cultures and of the lawyerly way of thinking. The comparative study222 (assuming also historical explanation) of legal cultures223 may even reverse the order accepted so far in the cultivation of universal jurisprudence. Because it can be justifiably proposed that at the intersection of legal history, legal theory, legal anthropology and comparative law, it is individual legal cultures (i.e., sets of traditions organized – despite their specific and growing interactions – into autochthonous blocs) that need to be characterized first, so that the formalistic envelope usually examined by comparative law, that is, the positized institutional superstructure, can be built in these.

The actual novelty in all this is the recognition of the presence of paradigms perceivable locally in a given time and space, that is, the presumption that in principle every viable culture generates (or may generate) some kind of geniosity mostly characteristic of it alone, with kinds of technical procedure promising very much potentially and also performing much in fact, which guarantees (systematically and with the required particular balance) both the synchrony and the optimally achievable success of preservation and renewal at any time. That is, the once usual extensive (quasi-questionary) description reduced normally to the mere listing (in a catalogue-like manner) of data, as some specific legal mapping, can and shall be replaced by a characterization aiming at highlighting the specificities and the potentially fertilizing force of \( \text{la mentalité juridique} \)224 developed in a given

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224. The term was introduced as a key term by Pierre Legrand.
culture according to changing criteria in function of timely challenges and tradition continued.

Thus, investigations for an ontology of law carried out within my researches on George Lukács225 have already presented the prevailing lawyerly ideology as an ontological component of the given legal reality, and the developments on the paradigms of legal thinking226 have tried, at the level of analysis at least, to uncover law from its dys-anthropomorphizing and depersonalizing formalistic envelope by presenting it in its own complexity, involving its application, too, as a directly social human product in the shaping of which both the entire society in general and especially its lawyerly elite in particular (and, after all, every single addressee actually contributing to the hermeneutic process of shaping the public understanding of law) take part with full responsibility.

A possible and desirable research in this circle will above all contrast the positions of legal positivism (classical comparative law) to the stand taken after the disintegration of positivism (comparative legal cultures). Within such a context, even the selection of either ‘legal culture227 or ‘legal tradition’228 as a key term will be a crucial issue, together with the dilemma of how far the hitherto properly working genealogical category of ‘legal family’ remains (or may remain) an operative concept in future development with growing unification and globalization as future trends.

This will presumably involve the assumption of definite attitudes in extremely topical debates (forecasting developmental tendencies) such as, e.g., the convergence between civil law and common law within the European Union (as a prerequisite to a genuine unification or, at least, an important stepping stone in advance); the codification of the law common for the European Union (especially as to its means, methods and techniques for judicial actualization); as well as the description of the process actually going on under the aegis of the interpretation and application of the provisions of national legal orders in the jurisprudence of the common judicial fora of the European Union. The last concern to be addressed in this circle is globalism and its legal treatment, with particular attention to the effect of its foreseeable developmental perspectives on the sustainability of the diversity of legal cultures and ways of thinking having evolved so far mostly within national bounds.

For what is just going on either within re-considerations after the European Union’s completed and forthcoming enlargements or under the aegis of globalization (and whose starting point, even if of a symbolic value, is the efforts at constitution-making at the level of the Union, together with present-day failures) will

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presumably determine the fate of mankind for centuries. A clarification of the mutual relations of such great trends is a task to be carried out by the profession, along with meditation on the issue of what is referred to by scholarship as the sustainability of diversity in law and legal traditions.229

All this may provide foundations for yet another topic of research, founded on the dilemma raised once by Zweigert,230 who was the first, four decades ago, to problematize on the chance of \textit{solutions identiques} through \textit{voies différentes} in law, for the first sight involving an apparent paradox.

Well, exactly such is the direction already raised in international literature as a potentiality one decade ago (highlighted by me, as it happens) under the name of the ‘comparative judicial mind’, aiming at mutually contrasted comparative examinations – firstly, through the accepted judicial ways of thinking and argumentation (or, in English, canons); secondly, through legal techniques applied231 – of the factors that may allow legal statements with similar conclusions to be drawn from dissimilar laws, on the one hand, and assure (in most of them) the adaptation to changing conditions at all times, by responding reliably and flexibly to new challenges through a practical development of the law, on the other. At the same time, this same examination may afford ontological reconstruction as well, expecting to inform on the very nature of law: how and with what technical instruments (in addition to the posited legal text) will the actors’ own professional values, skills, conceptual sensitivity, paths, lawyerly ideology (etc.) contribute to the actual shaping of the specific culture of the given legal order and its preservation and renewal through changes of times.

Some research of a comparable scope took place nearly one century ago, in the decades between the inquiries of François Gény in France (around the turn of the 19th and 20th centuries) and of Jean Dabin in Belgium (between the two World Wars), approaching law in an ontological perspective (describing the construction of its proper existence) through a focus on conceptual patterns, transformations and jumps – that is, techniques applied – in the actual process of its application.232 Present-day trends in hermeneutics, legal semantics and pragmatics (with language taken as metaphor, as symbolism, as medium of post-Wittgensteinian speech-acts in the background) all point to the promise and necessity of an examination of such kind. However, up to now, nothing of the kind has taken place in the law. For it is only the United Kingdom and some sporadic irradiations where attempts can at all

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be encountered at offering explanations in terms of legal semiotics or as based on a comparison of, e.g., English and German juristic methods.

In so far as we reflect such methodological insights onto the present facts of the European Union and the conceivable perspectives of globalization taking place, research should cover the effects of the law commonly codified by the Union, its judicial and administrative application by the common fora of the Union with repercussions on the chances of survival of the historical particularities and relative autonomy (differing conceptuality, structure, problem-sensitivity, technical store of instruments, as well as skills) of individual national legal systems.

However, formulated from the opposite direction, all this is to raise the issue whether or not, and in what sense and extent, the law of the European Union is going to be (i.e., to become or to embody) some independent sui generis formation or, otherwise speaking, how far its making, together with its administrative usage and judicial application, will be a scene, medium and issue of competition of the (above all) English, French and German internal (domestic) traditions (each of them in a constant fight to expand their respective influences) for a genuinely international (i.e., EU-level) recognition. This is a complex issue in itself, with a number a topics to be treated. Firstly, there is the issue of whether the parallelity between the so far separate mentalities of continental civil law and Anglo-Saxon common law will be preserved or they will rather intermingle with one another eventually. Secondly, the patterns, techniques and chances of the common European law’s codification. Thirdly, the patterns actually followed in the jurisprudence of the common judicial fora of the European Community. And, in general, the mapping of the legal traditions which make up the European Union, with the description of their respective weighs and interrelationships as well as of the chances of their survival despite their continuous transformation and metabolism (with special regards to their respective sources of the law, conceptuality and techniques, as well as judicial methodology).

There is a particular stress on being sensitive enough while responding to the concern of sustainability, that is, the prospects of an alternative between remaining roughly the same in mutual interaction or assimilating incessantly to the rest (with the issue of the pressure and/or predomination by certain actors) and of what role some historically-evolved traditions may eventually play in forming this, by defining its basic directions and (besides adaptation) becoming a factor of stability and strength at any time.

Reverting to the initial ideas, those issues that may need further elaboration in the near future do include, primarily, the definition of the law’s identity and, thereby, also of the criterion of juridicity by either the exclusivity of some or the plurality of all its aspects and contexts (above all, whether the understanding of law and juridicity is being reduced to some posited text or becomes dissolved in the facts of legal practice, the so-called ‘judicial event’), and, arising from these, also the explanation of the role law-applying may play in terms of either creative responsibility or executory mechanicity, with the variety of factors in the making and eventual shaping of the law, the relative autonomy of their paths, as well as,
simultaneously, the doctrinal frames and relatively open chances of legal development, with the significance attributed to the law in resolution of social conflicts involved.

(4) Outlook II: The paradigmatic enigma of the transition to rule of law. The seemingly temporary topicality of the problems indicated above is in the last analysis also telling about the very existence and ultimate meaning and self-


identity of law. It is to be remembered that dictatorships born in Europe and the Far East between the two World Wars (with the regime of national socialism in the lead) raised already somewhat similar questions. However, these last ones may have arisen mostly from doctrinal interest. For the regimes concerned were either terminated by war victory, only to be replaced by a new regime due to intervention by the authorities of military occupation rather than to democracy only lately and gradually superimposed (in Germany, Italy and Japan), or they expired in a peacefully old age, bearing their own democratic transcendence in themselves, nurtured by a kind of underlying social concord (Spain, Portugal).

In contrast to instances from the inter-war period, the collapse of communism took place everywhere in the region imbued with aspirations to a democratic rule of law and with the determination for developing also its cultural medium – even if its low intensity, counter-run by bygone habits and burdened with growing uncertainty (especially intensified eastwards), resulted in the partial revival of centuries-old local traditions (reactivating, in the east proper, also Byzantine and Mongolian roots). All in all, from a lawyer’s perspective, this was not only the encounter of value-negation (from the aspect of a democratic constitutional arrangement) with a (new) value-assertion but this also amalgamated otherwise antagonistic positions, in terms of which the democratic change of regimes was directly prepared by the preceding dictatorial system while the new democratic attitude to the criminal past also had to be defined partly by the former (dictatorial) system. Because the new cannot raise itself out of nothing. Even if it has plenty of external patterns to draw from, it has to define itself – its ethics, its initiatives and the latter’s ways and boundaries – in relationship to its own predecessor. In the strain of the sine qua non of judging the past while taking a stand between this age-old pair of opposites of any western legal philosophizing, justice and legality, it cannot avoid the necessity of deciding either for one of them or for a compromise of balancing in-between them, which are mutually excluding in face value yet in fact complementary sides, serving and thereby also reciprocally presupposing one another. For, as we know, past law also had had a kind of positivity, on the one hand, while the transition from it was required exactly by the affirmation of democratic values, inescapably reclaiming for judging and condemning the same past, on the other. Then again, we can see that inequitable, unfair, moreover, overtly unworkable responses can and could be given to this complex intellectual and moral challenge, in so far as one of those particular positions is absolutized (in a way unsuitable to verification, because withstandng interpretability in a logic of problem-solving but solely

accepting it in a logic of demonstration, that is, in the very formal, artificially constructed world of the law, where any conclusion and its opposite with a variety of in-between compromise solutions can be upheld, if met — by chance — by the final legal force. And this practical outcome of rejecting the very chance of facing with the past in law hardly indicates anything else than (in want of the above material comprehension) the one-sidedness of some inequitable blindness, issuing from the primitive condition in which the question itself was in fact posed polarizingly, to the exclusive alternative of taking a stand between some either/or.\textsuperscript{234}

What follows as a symbolic message from all the above, from the necessary failure of seeking merely formal solutions, is just the need for reconsidering law by recognizing that its positivation cannot be more than a surface phenomenon exclusively. It becomes conspicuous only in borderline situations (away from everyday routine) that anyone positing it posits it based on definite value-choices. And such value-choices refer back to society as to the source of everything societal, as to its hermeneutical medium, and also as to the subject owing to whom the law gets actualized and reactualized, conventionalized and reconventionalized. Obviously, any agent is in principle free to deviate from values generally followed, moreover, to effect an operation bound to failure. Any choice can indeed be done by free will. The only option excluded is to claim to have been acting under some external constraint. For, in the final analysis, the only thing the law has is its own formality, that is, its being objectivated in/as a text. Accordingly, the law itself has no coercive force either, as it does not assert itself through any mechanicity, with no alternative offered. Or, this is to say that the agent is free to choose any solution he finds conclusive (and can turn to be successful if there is no legal objection to it and/or if the society’s legal institutionalization will not reject it), however, his responsibility is as undivided as if he had taken any other choice. It usually becomes clear in borderline situations that in respect of the requirements of the law’s formal positivity, on the one hand, and the (final and instrumental) values to be protected in and by the law, on the other, it is not strain or tension that is at stake (and even less a case of contradiction) but — putting it briefly — the sensitive relationship between goals and means.

In such relationships, there may be goals in a merely instrumental role as compared to ultimate material goals, but differentiations like this can only stratify the instrumental side.\footnote{235 Cf., e.g., C. Varga, ‘Buts et moyens en droit’, in A. Loiodice and M. Vari (eds), Giovanni Paolo II. Le vie della giustizia: Itinerari per il terzo millennio (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato) (Bardi Editore – Libreria Editrice Vaticana, Roma, 2003), pp. 71–75; and C. Varga, ‘Goals and Means in Law’ in (2005) Jurisprudencia (Vilnius) No. 68(60), 5–10, and <http://www.thomasinternational.org/–projects/step/conferences/20050712Bp/varga1.htm>; as well as C. Varga, ‘Law, Ethics, Economy: Independent Paths or Shared Ways?’ <http://www.thomasinternational.org/projects/step/conferences/20050920barcelona/varga1.htm>}

Consequently, call-words (ideals and values) of our culture, homogenized under the aegis of law in everyday social heterogeneity, like democratism, human rights, constitutionality, or legality – well, all these are to be interpreted within such a framework, even if some of them are placed at the highest level(s); otherwise speaking, even if they seem to be ultimate goals viewed from lower levels of institutionalization, while they obviously cannot claim to have anything more than the role of serving (viewed from the aspect of the ultimate material goals to be achieved). Henceforth, their suitability in their concrete actuality can quite well be questioned and alternative solutions and new balances within their circles can equally be searched for.\footnote{236 Cf., e.g., C. Varga ‘Rule of Law – At the Crossroads of Challenges’ (2005) I Justum, Aequam, Salutare 73.}

Or, by summing all this up,\footnote{237 C. Varga, ‘Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisations (The Experience of Lithuania)’ (2005) 46 Acta Juridica 1; C. Varga, ‘Transition to Rule of Law: A Philosophical Assessment of Challenges and Realisations in a Historico-comparative Perspective’, in Sadakata (ed.), above, pp. 185–214; and C. Varga, ‘Legal Renovation through Constitutional Judiciary?’, Sadakata (ed.), ibid, pp. 287–312.} we can tell scarcely more: No matter how carefully we tend and protect the treasure we used to be deprived of during the imposed regime of socialism, that is, the prestige of law, after all we have to realize that all this – together with our own legal culture in general – is only destined for man. It must not serve itself and must not turn into anti-human fetishization either.

Nevertheless, the above claim does involve its reverse as well, because the very fact of presenting ultimate values in the context of goals and means raises necessarily the theoretical dilemma of whether or not our ideals are universal indeed or depend on the here and now at any time, which, historically speaking, can only be particular and concrete.\footnote{238 In its first formulation, cf., e.g., C. Varga, ‘Le droit en tant qu’histoire’, in Lukic (ed.), above, pp. 13–24.} All the issue is now further coloured by the phenomenon of globalism, obviously insisting on the ways and means of the universal expansion of the American pattern of democracy (complemented to by the ideology of human rights and the rights language) to be widely accepted.\footnote{239 E.g., A. Sajo, (ed.), Western Rights? Post-communist Application (Kluwer Law International, The Hague, 1996); and A. Sajo (ed.), Human Rights with Modesty: The Problem of Universalism (Martinus Nijhoff Publishers, Leiden/Boston, 2004).} Evidently, this is the key issue of the overall legal transfers. For the ever growing
catalogue of failures accompanying them worldwide seems to indicate something of which even our legal sociology of the late socialist period was quite aware. Notably, there are no entities in law reducible to mere formalities as replaceable freely, at will. For all appearances notwithstanding, anything formalized in law is at the same time contextualized in the legal system, conditioned by a given medium of interpretation, with meanings attributed to in the given culture. And it is for this very reason that a purely technical term borrowed from an external system can turn to be as alien and destructive in a medium unfamiliar to it as an understanding and arrangement of democracy exported into some differing historical context and cultural ideal of order.

(5) Incongruity in practice. The medium conditioning theoretical legal thought is necessarily shaped by the field of studies in positive law that on their turn dialogize with legal practice on a day-to-day basis. However, transition to the rule of law, once having promised an easy victory in Hungary (to be fully achievable through just reiterated magic formulas in theory and practice) has by now, viewed from inside the European Union, become the subject of harsh external criticism, as all we in Central Europe are being called to account for the want of the paradigmatic change in legal practice that has been successfully implemented in Western Europe since the Second World War, that is, for the lack of shifts of emphasis from rules to principles, of the practical dissolution of the law’s positivity – or, briefly, of all the developments whose recognition and also theoretical implementation with us are for the time being embryonic at the most.

For that what had once solidified as ideals for our ‘actually existing system of socialism’ could hardly be more than a Russian vision on Western Europe, as seen for instance by Lenin in his emigration (searching for its improvement by drawing back to the Byzantine and Mongolian tradition of a well-centralized state) and turned into brutal reality by Stalin’s regime.

All in all, although the official slogans of socialist legality and its theoretically refined normativism discredited themselves for the Hungarian legal profession, nevertheless these remained the very pattern which even the bravest actors of that era dared only to criticize, that is – and all that notwithstanding – these were the only ones available to provide a basis even for any re-organization or theoretical renewal whatsoever.

So, that what had taken place in Western Europe following the Second World War might be perceived by the contemporary legal profession (with its most

enlightened representatives included) here with a shudder at the most, even with
bewilderment and – despite the geographical proximity – only from a great and
unbridgeable distance (as symbolized by the Iron Curtain). Or, the role of princi-
pies, the fertilizing potential that can be drawn from general clauses, the strength of
definitions that can be developed out of the nature of things and, above all, the
underlying democratic and responsive human attitude could hardly accumulate
here to a full sense of professional culture in local minds.

The suspicion inspired by such absurd and at times expressly destructive
pernicious slogans as the ‘disintegration of imperialism’, the ‘escalating crisis
of legality’, the ‘legal uncertainty’ having allegedly become predominant in
Anglo-Saxon case law and statements on ‘the ruling class withdrawing its rule
itself’ (etc.), must have prevented any attempt to see clearly from becoming
besmirched. At the same time, what the regime of socialism imposed upon the
region as its adequate legal arrangement was hardly more than the European ideal
(by then already shaken and collapsed) of the early 20th century. Moreover, what
we are mostly just about to restore from our own past as memories of civic ideals is
exactly what was left behind (convincingly as its pre-history, that is, once and for
all) by Western Europe six decades ago, when it started to recommence after the
Second World War – independently of whether or not we are to remember it with
nostalgic esteem. So, our Western European and Atlantic companions in the EU
and NATO may have good reasons to realize that we, recently-joined full members
of the Union – Poland, Czech Republic and Hungary (etc.) – walk about at the fora
established in Luxembourg, Strasbourg and Brussels in a rather strange attire, one
they may remember only from the times preceding their grandparents’ age.

(6) Perspectives. Our ways of cultivating law by erecting theories are rich in
approaches and views, trends and methods, and abound in debates and outcomes.
Hungarian legal theorizing is rather open to the outside world but is more receptive
in adopting Anglo-American patterns than duly reflecting on the developments of
either continental companions in the Union or the neighbouring Central and
Eastern European region. Thus, for example, it still fails to realize that
actual motions of the law both in the Union and as covered by globalization
243. The overly significant role played in science organization by the Hungarian Academy of
Sciences and its Institute for Legal Studies during socialism may have fulfilled functions
that can scarcely be exploited now in a democracy arising from the diffuse eventualities of
spontaneity. For these could once include an established framework for practical education
preparing for scientific research, extensive and systematic legal bibliographizing, profound
and regular critical reviewing of domestic and foreign legal literature, presentation of
Hungarian legal scholarship abroad with a comprehensive international academic
co-operation, regarding which the network of contacts and partnerships in our neighbourhood
and wider region as well was almost perfect and smoothly working. Nevertheless, compared to
the level of international integration at the time, even our Western European and Atlantic
presence might have been more powerful than today, in the epoch of globalization, when
international representation unorganized is almost equalling to national interests relinquished.
244. E.g., as preliminary studies, M. Szabó, ‘Tradition of a Common European Legal Culture’, in
Cipkar (ed.), above, pp. 192–195; C. Varga, ‘European Integration and the Uniqueness of
National Legal Cultures’, in B. de Witte and C. Forder (eds), The Common Law of Europe and
trends do have and need to have own particular legal theories. It also fails to realize that from now on our foreseeable future depends less on merely own will than on the balanced encounter of our domestic law and legal vision with their European surroundings. The future of legal positivism (with our image of the law’s self-identity included) depends on the relative strength of trends prevailing within the Union and on our ability to influence them. Or, the genuine place our law, jurisprudence and theoretical legal thought may occupy under the sun, will henceforth be determined by our actual performance in the Union. And, in a Union-level co-operation, the issue of who will have proven to be great or small will exclusively depend on their respective ability to exert a pressure in or a decisive effect on a game, in which all players have mostly equal access proving their conclusive force.

Or, there is an elementary interest in developing theory, the more so because what will eventually certainly remain is the human factor with the chance of mastering the law by developing deeper insights and more responsive commitment to values that may inspire man to make the most out of the instruments at his disposal.

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246. E.g., C. Varga ‘Legal Scholarship at the Threshold of a New Millennium (For Transition to Rule of Law in the Central and Eastern European Region)’ (2001) 42 Acta Juridica 181, reproduced in W. Krawietz and C. Varga (eds), above, pp. 515–531.