Megjelent / Published: THE TRANSFORMATION OF THE HUNGARIAN LEGAL ORDER 1985–2005. Transition to the rule of law and accession to the European Union. Szerk.: / Editors: András Jakab, Peéter Takács, Allan F. Tatham. Alphen aan den Rijn [The Netherlands], Kluwer Law International, 2007.

Máté Paksy – Péter Takács

CONTINUITY AND DISCONTINUITY IN HUNGARIAN LEGAL PHILOSOPHY

The lecture of Csaba Varga, which fills up a long-standing need, provides a panorama of the past 20 years of Hungarian legal philosophy (2/A – C) with an international outlook (1), a comprehensive analysis of a number of randomly selected crucial issues, a detailed assessment of the present situation (5 and *passim*), and an outline of future perspectives (6). The panorama we will deal with primarily in this supplementary paper is, within the limits of available space, almost complete and the accuracy of the overview is imposing. We agree with many of its substantive elements and the following comments are not intended to propose any alterations, but rather supplements. This obviously involves the modification of some accents and a small number of counter-arguments regarding the contents.

(1) One of the lecture's main statements is that, at the time of the fall of the *ancien régime* (1989), there prevailed 'a kind of continuity and permanence . . . , without an expressed break or division' in Hungarian legal philosophy.[247] We fully agree with this statement while, regarding the grammatical mode of one of the conclusions derived from that – therefore 'there was *no need* for any spectacular shift in theoretical legal thought' – we would find it more accurate to apply the indicative mode. Thus we would say: therefore 'there was *not* any spectacular shift in theoretical legal thought'. This difference in emphasis is substantiated by two

247. A similar attitude was taken in the issue by Béla Pokol who explained this in the mid 1990s by the fact that the break from the standpoint of so-called 'socialist normativism' as the official ideology of the communist era had taken place in the writings of Kálmán Kulcsár and Vilmos Peschka partly in the 1970s and in the works of András Sajó and Csaba Varga in the 1980s. *See* B. Pokol, *Jogbölcseleti vizsgálódások* (Reflexions in Philosophy of Law), (Nemzeti Tankönyvkiadó, Budapest, 1994), pp. 105–108. The same line of development was described by Péter Szilágyi's encyclopaedia entry entitled *'Jogbölcselet'* (Legal Philosophy) as well; *see Magyarország a XX. században* (Hungary in the 20th Century), (Babits, Szekszárd, 2000), p. 55. It is discernible, however, from a more sensitive analysis that the idea of 'continuity without break' would probably not be shared by younger generations of those cultivating legal theory in Hungary. This can be proven in connection with the evaluation of the philosophy of the recently deceased Vilmos Peschka. He is regarded by Péter Szilágyi as the most outstanding legal philosopher *(ibid.)* and the same opinion is shared by Péter Szigeti, who regards Peschka's oeuvre to be even more 'original' than the works of Felix Somló and Barna Horváth (*see* P. Szigeti, *'A marxista jogelmélet funkcionalitása Magyarországon, 1963 – 1988 között'* (The Functionality of the Marxist Legal Theory between 1963–1988), 2005/2 *Leviatán,* pp. 24–25). However, it is to be conceived as a kind of proof for the possible interruption of the 'chain novel' of the Hungarian legal philosophy that Mátyás Bódig (M. Bódig, *'Megértés, racionalitás, gyakorlati ész'* (Understanding, Rationality, Practical Reason), (2001) *Ius Humanum,* p. 223) had already cautiously criticized Peschka's hermeneutical approach. (It may be mentioned as well, that in the field of legal philosophy, Miklós Szabó is the most radical critic of the one-time normativist doctrine; *see* e.g., M. Szabó, 'Defensor Dogmatis' (2004) 4 *Világosság* 35.)

major questions that can be raised in connection with the lecture, with regard to the relationship of law and legal thought (and consequently of law and legal philosophy), as well as their continuity and the ruptures in them.

(2) One of them is about *legal continuity*: to what extent is the Hungarian legal system after 1990 – considering the constitutional character of the transition in 1989–1990 – a 'continuation' of the previous one? Our problem is, basically, how legal theoretical and legal philosophical thinking reacted to the response given to this question. Anyone who accepts the statement that practically a *new legal system* emerged in Hungary in 1990 and in consecutive years[248] (which, by the way, fits in the tradition of Hungarian history abounding in discontinuities, marked by symbolic dates like 1848, 1867, 1918–1920, 1945–1949) has to raise at least two further questions.

(a) The first question is whether the *meaning* and *function* of legal philosophies before 1990 changed in a new social, political and professional context. And if so, does this affect the evaluation of them? Supposing with Derrida that *'(une) époque passée est en effet constituée de part en part comme en texte',*[249] these texts – according to us – will be read in other ways after the *caesura*, and other functions will or may be attributed to them.

The lecture did not raise this question, at least in paragraphs 2/A – C. Although it is not stated explicitly, to a certain extent it is suggested that, the 'uninterrupted continuity' has been carried on – besides a number of enrichments as regards topics and responses to new challenges – in the Hungarian legal philosophy of the past 15 years, and the former legal thought, in a certain sense, 'has already contained' the latter.

It should be remarked here that this problem, as far as is known to us, has not been exposed by others in Hungarian legal theory either. Nevertheless it is necessary to raise this question and to answer it, for the reason that this would cast a different light on a number of theoretical tendencies that will be exposed in this paper.

(i) Before indicating major problems of 'different readings' of the same texts, we mention, by way of minor but important example, the *relation* of Hungarian legal philosophy *to Marxism* as a social philosophical background. That is, during the past 15 years the evaluation of the possibility of a legal theory based on Marxian foundations has been endlessly changed.

(ii) The fact that the *social theory of law* has been gaining ground in Hungary during the 1980s and that undoubtedly this also represented one of the main trends in the 1990s as well, did not contribute to clarify the relation of Hungarian legal theory to legal positivism.

---

248. One of the contradictions in connection with the emergence of the new legal system is demonstrated by the following quote from László Sólyom (allowing ample space for critical reflections in legal philosophy): 'Legal certainty – in connection with which the Constitutional Court refers to legal continuity – gains its significance from political and ideological discontinuity': *see* L. Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* (The Beginning of Constitutional Adjudication in Hungary), (Osiris, Budapest, 2001), p. 65.

249. J. Derrida, *Grammatologie* (Les Éditions de Minuit, Paris, 1967), p. 8.

The reason for that is that questions posed by the positivity of law within a social theory of law were sufficiently answered by those authors who – like Béla Pokol, Péter Szigeti, Csaba Varga or Péter Szilágyi – elaborated original and self-sufficient theories focusing on the law's so-called 'layers', on its role 'within the totality of the social normative system' ontologically founded, or on its 'processuality'.[250] These answers, however, may prove to be inadequate when general and classical philosophical problems of legal positivism – e.g., the relationship between law and morality, the normative nature of legal validity, the moral and/or political aspects of legal interpretation, etc. – have to be solved. Some representatives of Hungarian legal theory, like Tamás Győrfi and Mátyás Bódig[251] (whom we group and coin as members of the 'Miskolc school') strove to solve these general philosophical problems, but – without any hints at particular social backgrounds – have closed their solutions into the conceptual system of the common-law based *analytical* legal theory. This fact – together with the so-called practical philosophy background of these theories (with just few and incidental connections to Hungarian legal practice) – made communication almost impossible with theoretical-professional lawyers, and likewise in respect of the whole of Hungarian legal philosophy.[252]

---

250. Regarding the sources of the literature, *see* the rich material of the lecture. In this respect we have in mind especially the following works: B. Pokol, above, and *Jogelmélet* (Legal Theory), 2001, 2005; P. Szigeti and P. Takács, *A jogállamiság jogelmélete* (Legal Theory of the Rule of Law), (Napvilág, Budapest, 1996); C. Varga, *A jog társadalomelmélete felé* (Towards a Social Theory of Law). (Budapest, 1999). The same sociological attitude of theoretical approach can be traced in the subject-centred oeuvre of Andás Sajó, and the work of András Tamás spanning across various fields of disciplines. *See, in this respect, also* A. Karácsony, *Jogfilozófia és társadalomelmélet* (Legal Philosophy and Social Theory), (Pallas Attraktor, Budapest, 2000).

251. As a monographic elaboration *see* T. Győrfi, *A kortárs jogpozitivizmus perspektívái* (Perspectives of Contemporary Legal Positivism), (Bíbor, Miskolc, 2006); M. Bódig, *Jogelmélet és gyakorlati filozófia* (Legal Theory and Practical Philosophy), (Bíbor, Miskolc, 2004), esp. Chapters I – II, pp. 25–197.

252. The space available here is not sufficient to analyse this problem of communication. Nevertheless it is to be remarked that the issue of the relation to legal positivism and the difference in the way of thinking according to these two (sociological versus analytical) directions of Hungarian legal philosophy are most likely connected with the problem of the *scientific character* of jurisprudence; viz., in so far as the continental version of positivism has, in contrast to the Anglo-Saxon one, been motivated, at least partly, by the ideal of 'scientific rigour' demanded by empirical sciences. Thus the fact that the social theory of law has become dominant and the majority of legal philosophers had increased the focus on legal sociology during the 1980s and 1990s can be partly explained by the need for getting rid of the ideological dogmatism. Within the boundaries of 'continental' positivism, the *statements* formulated in the discourse refer to *facts* (conceived in a certain sense), in contrast to the present situation when the participants of the discourse typically contrast *arguments* with *arguments.* And if there is, the 'final stand' to be taken by the 'tribunal of science' (partly owing also to the spread of Anglo-Saxon positivism) became significantly relativized. (On the scientific character of jurisprudence and as markedly differing approaches, among others *see* A. Sajó, *Kritikai értekezés a jogtudományról* (Critical Treatise on Legal Science), (Akadémiai Kiadó, Budapest, 1983); L. Cs. Kiss, *A jogtudomány eszméje és hivatása* (The Idea and the Profession of the Legal Science), (ELTE ÁJK, Budapest, 2004)).

Thus, in the situation that has emerged, almost the entire Hungarian legal philosophy (to quote the terminology of the lecture) is 'struggling' with the tradition of 'tight-fisted' legal positivism. At times we marvel that the 'past law also had a kind of positivity', wondering to find 'to the stand taken after the disintegration of positivism (in the past 60 years) in Western Europe ... the positivity of the law' had achieved 'a new interpretation' (which did not impregnate Hungarian thinking) and at the same time we are worrying about the 'future of legal positivism'. So, in this respect the situation is rather paradoxical and perplexing,[253] and the theoretical approach to it is, on the whole and despite the efforts at clarification,[254] ambivalent.

(iii) The present state of *natural law doctrines* does not fare better either. The emergence of this kind of thinking was an unpredicted and indeed unprecedented phenomenon in Hungarian legal theory. Of course, we cannot speak about its 'renaissance' (as in post-1945 German legal philosophy) but, at the most, – as Csaba Varga rightly formulates it – about its 'rehabilitation'. The intellectual traditions, however, that have played roles in this rehabilitation are rather different from each other. The most important of them are as follows: (A) After 1990 the idea of human rights appeared and became generally accepted, and 'talking in terms of rights' became part of constitutional practice; (B) to a certain extent so-called practical philosophy became accepted; and, additionally, (C) there was a need for the elaboration of a *Weltanschauung*-based social and legal philosophy; nevertheless, this mode of thinking on law – which is partly still outside the domain of legal philosophy – immediately became subject to (D) criticism, and (E) as the political transition was peaceful and constitutional in its character (i.e., the valid law was transformed within constitutional frameworks), the theoretically possible revolutionary potential of natural law was not accentuated either (except for attempts at retroactive administration of justice just after the Hungarian Rule of Law was born).[255] Therefore, Hungarian natural law thinking is today still in the state of an 'unfinished adventure'.

---

253. A minor example and indication for this is that in Hungarian jurisprudence – while we have been witnessing, for a few decades, a 'creeping and hidden reception of Kelsen' – to quote the formulation of L. Cs. Kiss, *'Hans Kelsen magyar fogadtatása'* (The Hungarian Reception of Hans Kelsen) (2005) 10 *Világosság,* p. 4 – Kelsen's *pure theory of law* was, around 1990, not a quoted reference (with all its theoretical, legal-political and ideological corollaries) either for the democratic opposition in the political transitions or for the 'founding fathers' of our Constitution, as it did happen, for instance, in post-1945 Italian legal theory or in post-Franco Spain. As to Italy, *see* U. Scarpelli, *Cos'è il positivismo giuridico*? (Comunità, Milan, 1965); for Spain, *see* A. Calsamiglia, 'For Kelsen' (2000) 13 *Ratio Juris,* pp. 196–215.

254. Among others, *see* M. Szabó (ed.), *Natura iuris* (Bíbor, Miskolc, 2002).

255. As the text-like document of paras α-ε (*see* J. Kis, *Vannak-e emberi jogaink?* (Do We Have Human Rights?). (Magyar Füzetek, Paris, 1988), reprinted: (Stencil, Budapest, 2003); G. Halmai and G.A. Tóth (eds) *Emberi jogok* (Human Rights), (Osiris, Budapest, 2003); J. Sári, *Alapjogok* (Fundamental Rights), (Osiris, Budapest. 2005); P. Erdő, *'Vannak-e természetes jogok az emberi jogok mögött?'* (Are There Natural Rights behind Human Rights?), (1999) 2 *Magyar Tudomány* 129; F. Hörcher, *'Egy pragmatikus természetjog felé'* (Towards a Pragmatic Natural Law), (1997) 4 *Századvég* 109; J. Frivaldszky, *Természetjog* (Natural Law), (Szent István Társulat, Budapest, 2001); J. Frivaldszky, *'Egy ma vállalható természetjogi*

These and similar problems have not been tackled in the lecture, and the line of the argumentation is broken at times. It is as if the author, metaphorically speaking, seems to serve two gods, referring, on the one hand, to (Catholic) natural law, as 'the literally ultimate promise ... for our world having lost direction and endangered', while, stating on the other hand, in a different context (in a way reminiscent of the Scandinavian tradition of legal theory) that 'the only thing the law has is its own formality, that is, its being objectivated as a text'. From this we can conclude – as we consider this situation to be typical of not only the lecture but of the whole of our legal theory – that the position and the role of natural law as legal philosophy within the general theory of law, what is more, of a value-oriented legal philosophy,[256] have not yet been clarified or at least not been settled in Hungary.

(b) As to the break of legal continuity – assuming that theory has practical functions, too, in every epoch – we find that a certain kind of question is conspicuously missing from the lecture. We mean the question of how Hungarian legal theory reacted in the past 15 years to a legal system with *basically fresh* contents, *entirely new* institutions, which *operates in novel ways* in several aspects. So the question is: has this legal theory processed and worked out the observations and experiences related to the post-1990 Hungarian legal system?

We assume that legal theory and theoretical legal thought – reflecting the change of positive law and the practice of new institutions – have *begun* this endeavour in several ways and, starting out from several directions, have even reached a number of achievements, but this work is, on the whole, so far *partial* and *unfinished.*

The fact that the work has started was indicated, among others, by analyses examining the judicial practice of the Constitutional Court, the parliamentarism or the role of judicial practice in legal development, and this was extended soon to the analysis of the statics and dynamics of the legal system (we refer here to only some random examples, i.e., some examinations published at times in articles and chapters of books).[257]

---

elmélet körvonalai' (Outlines of a Plausible Doctrine of Natural Law), (2002) *Natura iuris* 59; L. Boda, *Természetjog, erkölcs, humánum* (Natural Law, Morality, Humanity), (Szent István Társulat, Budapest, 2001); S. Tattay, 'Natural Law and Legal Semiotics: Are They Irreconcilable?' (2006) 2 *Jogelméleti Szemle*; A. Sajó, *Jogosultságok* (Rights), (MTA Állam- és Jogtudományi Intézete - Seneca, Budapest, 1996); A. Sajó, *'Az emberi jogok haszontalanságairól és lehetetlenségeiről'* (On the Uselessness and Impossibility of Human Rights), (1990) 8/9 *Világosság* 573; A. Sajó, *'Az emberi jogi ideológia egy pozitív korban'* (The Ideology of Human Rights in a Positivist Age), (1993) 8 *Magyar Tudomány* 936. For the criteria to distinguish religious and other, *Weltanschaung*-based natural law doctrines, *see* P. Erdő, *Egyházjog* (Canon Law), (Szent István Társulat, Budapest), s.a. p. 36.

256. It is Miklós Szabó whose works seem to most promise the possibility of a value-oriented classical legal theory but the research direction chosen by him (*viz.,* legal dogmatics, *see* below, 2.b) has not yet allowed the detailed explication of this.

257. *See* references to the ample literature in the lecture (e.g., quoting works by András Bragyova, Tamás Győrfi, Béla Pokol and Antal Visegrády), as far as public law is concerned. *See also in a constitutional law respect*: B. Pokol, *A magyar parlamentarizmus* (Hungarian Parliamentarism), (Cserépfalvi, Budapest, 1994); J. Kis, *Alkotmányos demokrácia* (Constitutional Democracy), (Indok, Budapest, 2000); L. Sólyom, above. For the structural issues of the legal system

There are, however, many signs of partiality. For instance, in some (A) important areas related to private law, e.g., regarding the theory of property, there was hardly any legal theoretical research at all, while (B) in others, such as, in contract law, only occasional attempts took place, and (C) a theory of responsibility was cultivated, at a level relevant also to the legal theory, only by lawyers specialized to this field.[258] That the project is unfinished is proven by the fact that neither the 'legal theory of political transition' (or rather, its legal sociology), nor the general theory – covering institutions and the analysis of their mode of operation as well as feeding on the analysis of these – of the new legal system have still yet to be born.[259]

---

see the works by Péter Szilágyi and András Jakab, A. Jakab, *A jogszabálytan főbb kérdéseiről* (On the Principal Questions of a Theory of Legal Acts), (Unió, Budapest, 2003) and P. Szilágyi, *Jogi alaptan* (A Study of Basic Legal Concepts), (2nd ed., Osiris, Budapest, 2003); on principles of law, *see* A. Tamás, *Állam- és jogelmélet* (Theory of State and Law), (Unió, Budapest, 1998), pp. 143–151; on acquired rights P. Szigeti and P. Takács, above, pp. 281–283. On the theory of legislation, *see* A. Tamás, *Legistica* (Szent István Társulat, Budapest, 1999); on the theory of adjudication, *see* e.g., M. Bencze, *'Az "ítélkezéstan" alapvonalai'* (Outlines of the 'Theory of Adjudication'), (2005) *Leviatán,* pp. 229–244.

258. In connection with para. (α) we also refer here to the property-theories of private lawyers; *see* e.g., B. Lenkovics, *Magyar polgári jog. Dologi jog* (Hungarian Civil Law. Law of Property), (6th rev. ed., Eötvös J., Budapest, 2001); F. Mádl, *'A tulajdon rehabilitációja'* (The Rehabilitation of Property), in *Liber Amicorum. Studia A. Harmathy dedicata* (ELTE ÁJK, Budapest, 2003), pp. 209–226; and A. Menyhárd, *'A tulajdonjog absztrakt felfogása a magánjogban'* (The Abstract Concept of the Property in Civil Law), *ibid.* pp. 227–254. As to property rights, *see* in the field of legal philosophy, P. Szigeti, *Jogtani és államtani alapvonalak* (Outlines of the Theory of Law and State), (Rejtjel, Budapest, 2002), p. 141 *et seq.* To para. (β) *see* A. Sajó, *'Ígéret és szerződés: az eszmék korlátozott szerepéről'* (Promise and Contract: On the Limited Role of the Ideas)' in *Eörsi Gyula emlékkönyv. 1922 – 1992* (Festschrift in Honour of Gyula Eörsi 1922–1992), (Hvg-Orac, Budapest, 2002), pp. 91–133. To para. (γ) – referring to the preliminaries signified in the theory of responsibility in civil law by works of Gyula Eörsi and László Asztalos, Ferenc Mádl and Attila Harmathy, as well as László Sólyom written in the 1960s and 1970s – *see* A. Földi, *A másért való felelősség a római jogban jogelméleti és összehasonlító polgári jogi kitekintéssel* (Responsibility for Others in Roman Law with an Outlook to Legal Theory and Comparative Law), (Rejtjel, Budapest, 2004), esp. Chapters I/1–5 and IV/3. *See also* the short *études* of Tamás Lábady, Miklós Király, János Zlinszky and the classical work of Géza Marton in a re-edited form (1993). In relation to the theory of responsibility in criminal law, *see* N. Kis, *A bűnösségi elv hanyatlása a büntetőjogban* (The Decline of the Principle of Responsibility in the Criminal Law), (Unió, Budapest, 2005). In the field of legal philosophy, a synthesis of these researches could have – as the continuation of his earlier efforts – has been provided by Péter Szilágyi (cf. P. Szilágyi, *'A jogi felelősség alapja – avagy mire jó a felelősségelmélet'* (The Foundation of Responsibility in Law – Or, What the Theory of Responsibility is Good for), in *Felelősség és szankció a jogban* (Responsibility and Sanction in Law), (KJK, Budapest, 1980) pp. 57–108; and *A szankcionálás és a szankció a jogi felelősségi rendszerben* (Execution of the Sanction and Sanction in the System of Legal Responsibility), (KJK, Budapest, 1990).

259. For the sake of accuracy it is to be noted that there has been an attempt to formulate the legal theory of one of the aspects of the new *political* order, the institutional structure influenced by the ideal of the Rule of Law (*see* Szigeti and Takács, above – in relation to the chapters written by Péter Szigeti): however, this monograph, published in the form of a textbook, was in fact left without a substantive critical response.

The situation is, nevertheless and all things considered, not as bad as it seems. Our legal theory has one field connected to the 'living' legal system, notably, *legal methodology* (*juristische Methodenlehre)* or, as referred to in Hungary by many, legal dogmatics, where the results are noteworthy without any doubt. The lecture characterises this as the law's 'investigation into the connections between law and language and logic and rhetoric', which once 'used to play a pioneering role' and proved to be one of the fields 'most innovative in its effect' in the past 20 years in Hungary. We agree with the evaluation. Namely, several independent methodological theories (including, besides language, logic and rhetoric, the theory of interpretation, the theory of argumentation and other fields of legal dogmatics, not omitting the examination of other elements of legal culture) have emerged over the past two decades – primarily developed by Miklós Szabó,[260] or explicated from perspectives of legal philosophy and comparative law by Csaba Varga, and within the general legal theory of Béla Pokol.[261] These theories took into account the general features of the law *and* the characteristics of the post-1990 Hungarian legal system in different ways. The above-mentioned authors, in different ways but parallel with each other, are in line with the European traditions and meet contemporary requirements.

(3) The second question in connection with continuity and discontinuity is to what extent the *own traditions* of Hungarian legal philosophical thinking (partly originating from the era before 1989–1990, partly from the epoch before 1945) assert themselves today. In this respect the lecture provides rather only 'signs', e.g., when it writes that one research trend or another 'has obviously arrived from outside … along with … its approach', or that another field 'so to speak never regularly cultivated … in Hungary earlier' and in case of a third one 'the very start of its cultivation is remarkable itself'. This leads us to the conclusion that Csaba Varga – while he indicates, also correctly, with bibliographical data, that the intellectual and moral *rehabilitation* of the pre-1945 Hungarian legal philosophy has taken place, and has, in fact, been completed – rather accentuates the *novel features* of the scholarly development after 1985, examining it in connection with international tendencies.

It is true that the 'new' Hungarian legal theory could not return to its predecessors from before 1945 in respects of contents. (After all, legal philosophy with a pure Neo-Kantian background was uncontinuable at the end of the 20th

260. M. Szabó, *Jogdogmatikai előadások* (Lectures on Legal Dogmatics), (Bíbor, Miskolc, 1994); M. Szabó, *A jogdogmatika előkérdéseiről* (On the Preliminary Questions of Legal Dogmatics), (Bíbor, Miskolc, 1996); M. Szabó, *Trivium* (Bíbor, Miskolc, 2001); M. Szabó, *Ars iuris* (Bíbor, Miskolc, 2005).

261. C. Varga, *Előadások a jogi gondolkodás paradigmáiról* (Lectures on the Paradigms of Legal Thinking), (Osiris, Budapest, 1996, 1997, 1998); C. Varga, *A jogi gondolkodás paradigmái* (Paradigms of Legal Thinking), (Szent István Társulat, Budapest, 2004); C. Varga, *A jog mint logika, rendszer és technika* (Law as Logic, System and Technique), (Szent István Társulat, Budapest, 2000); B. Pokol, above. Also including the doctrine of legislation into legal methodology conceived of, in a broader sense, *see as well* the works of Péter Szilágyi and András Tamás referred to above.

century.) However, we are of the opinion that, as a result of a more definite investigation into the relation to the past of some 150 years, the question could have been raised whether we have – be it good or bad – *traditions* that have asserted themselves in the past 15 years as well. In this respect, for instance, the question arises: has Hungarian legal philosophy produced anything really *original* during the last one and a half centuries? Or has it, instead, only played some *peripheral role* as a follower? To what extent did it combine *reception* with *tradition*? How did it reconcile the requirements of *scholarship* with the *political aspirations* inherent in the value choices of those cultivating it? These questions are complicated and solving them obviously is not the task of this lecture. We just mention that one can find – as fittingly formulated by one of the analysts[262] – a number of 'comfortably unreflected', 'very well established and compact' stereotypes in the related professional literature.

At least according to us, what can be declared in all certainty is that the pre-1945-traditions of Hungarian legal theory have also continued after 1990 in the following respects: (a) its representatives are, in their value-choices regarding *Weltanschauung* and politics behind the theories, rather *divided* than unified; (b) our legal theory is, in an international comparison, on the whole (i.e., with a few exceptions), rather *adaptive* than original; (c) it derives its inspirations from extremely *diverse*, often counter-running sources, in result of which a number of individuals cultivating it often rather communicate with 'abroad' than with each other; (d) its international position – quoting and supplementing the proper evaluation of the subject's practised analyst[263] – was characterized in the past 15 years by that what has always been typical of it, that is, it was striving to fill the role of a *worthy partner* on an equal footing with others; however, only its most talented representatives succeeded in achieving this. And last but not least (e) its achievements will be viewed by both those involved and by posterity as 'accomplished' individual *oeuvres* instead of as results of either schools or of creative communities.

(4) The lecture's effort to establish a connection between *legal theory,* legal philosophy and *theoretical legal thinking* is exceptionally enlightening. Nonetheless there are a number of other theoretical possibilities to interpret this connection that are still open.

One of these possibilities is to examine what kind of legal theories and legal approaches operate, consciously or unconsciously, during the formulation of theories, in the minds of professional lawyers analysing the new legal system from the perspective of different branches of law. To our knowledge, such research has not yet been conducted in Hungary, with one exception.[264]

---

262. M. Szabó, *'Megkísértett humanizmus'* (Seducted Humanism), in M. Szabó (ed.), *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből* (Portraits from the History of Hungarian Legal Philosophy), (Bíbor, Miskolc, 1995), p. 1.
263. M. Szabó (ed.), *'A magyar jogbölcseleti gondolkodás történetének vázlata'* (A Sketch on the History of Hungarian Legal Philosophy), in J. Szabadfalvi, *Fejezetek a jogbölcseleti gondolkodás történetéből* (Chapters from the History of Legal Philosophy), (Bíbor, Miskolc, 2004), p. 39.

Another aspect of 'theoretical legal thinking' is the one referred to above, namely how those engaged in legal philosophy think. As indicated above (*see 2/b*), their *mentalité* has, in reaction to the new institutions and mode of operation of the changed legal system, changed to a great extent.

What is more, it may perhaps even be stated here that while legal theory was, before 1990, typically the *philosophers*' (and social scientists' in general) legal philosophy, today it is rather the *lawyers*' legal philosophy.

This – taking into account the requirements involved by the Rule of Law and also the needs of practising lawyers – has brought about, among others, that concept-analysis and argumentation theory have come into prominence. So, in this context, the expansion of the Anglo-Saxon-rooted legal analytics and the spread of the analytical mode of theory formation – spearheaded by representatives of the 'Miskolc school' mentioned already – must not be regarded as incidental or resulting merely from some 'extra-scientific', individual interest. On the contrary, it is a matter of the change of the theoretical thinking made possible and even inspired by the new *legal milieu.*

Similarly, the relaxation of the scholarly discipline of traditional legal theory[265] as well as the evolution of the present diversity – about which the lecture (with reference to the trends of legal anthropology, law and literature, law and economics, etc.) reports comprehensively – were inspired by the change of the legal milieu and made possible by the alteration of the social-political environment (of the scientific infrastructure).

The interrelation of legal philosophy and its *social-political milieu* is remarkable in one more respect. We point to the fact that – apart from a few exceptions[266] – there have been no harsh debates in Hungarian legal philosophy and that, while the older generation emphasizes continuity, the younger generation engaged in the cultivation of this discipline either keeps quiet about the legal theory before the political transition (but its representatives do not deny the past) or selects from it in an *à la carte* manner, signify that the professional community of our legal philosophy is facing a *generational clash.* And, as these generations think according to different patterns, in the future this will also doubtlessly affect the character of our 'theoretical legal thinking'.

---

264. Also this exception is only partial as far as it is related to the intention. One of the initial objectives (true, realized, eventually only to a modest degree) of the conference entitled *'The Legal Philosophy of the Marxism of Socialism'* (2003) was namely to examine to what extent the elements of Marxist and socialist legal thinking are present in analyses of professional law (civil law, criminal law, constitutional law, etc.) ten years after the political transition.
265. Regarding the lowering of disciplinary boundaries, we think of the works by Attila Badó, Péter Cserne, István H. Szilágyi, Sándor Loss (†2004) and Tamás Nagy, mostly quoted in the lecture of Csaba Varga.
266. In this respect *see* – especially on the virtual pages of *Jogelméleti Szemle* (Review of Legal Theory), <www.ajk.elte.hu/jesz>, a lively intellectual forum (e. g., 2003/1–2; 2004/4 and 2006/1), and partly in other sources – the debates between Mátyás Bódig, Mátyás Bence, András Jakab and Béla Pokol, as well as Mátyás Bódig, plus Tamás Győrfi and Lajos Cs. Kiss, as well as Mátyás Bódig and Péter Szigeti, too.

(5) The author of the lecture sees correctly that the cultivation of legal philosophy as a discipline and the development of theoretical legal thinking are, in addition to other factors, significantly determined by the *infrastructure* (financial allocation, publishing, international relations, system of academic qualification, etc.), too. We also agree with Csaba Varga in the evaluation of this – the developments of the past two decades have been incredibly hopeful in this field. Nevertheless the accents of the lecture must be modified at least on one point.

The relation of *universitas* and *academia* has significantly changed over the past 20 years. No doubt, the most spectacular change was that one of the *academy*'s functions in the field of legal policy and politics, characteristic between 1948 and 1990 (viz., the formation of an official legal ideology also appearing in textbooks the control and as well as the substantive determination of university education) had ceased, with the academy's direct influence on the political directives with regard to the scientific activity having changed. In this situation (made more complex by the diversity allowed by the democratic political milieu) *universities* acted independently and they fulfilled their (primarily educational) duty, which has, by the way, a crucial role – through the education of practising lawyers – also in operating the institutional system of the Rule of Law. As lawyers in Hungary are still being trained basically within 'faculties of law', in the meantime they were also cultivating science.[267] Within this, they also tried, besides other tasks, to perform (with varying success) a part of the scholarly duties (e.g., the practical training for the scholarly profession and the basically European cooperation) not performed by the academy due to other factors. Nevertheless, there has *not* evolved any *consensus* in the past 15 years between the two institutions regarding the relation between the cultivation of scholarship and the training of lawyers, the division of the relevant duties or the role and weight of factors involved in this relation. This can be traced back to on the one hand the lawyers' training shifting contents, and disproportional size due to mistaken political decisions, and on the other hand the change in the academy's position also in terms of finances and funding. For these reasons this relation in the field of jurisprudence in general can nowadays be described as deteriorated and burdened by conflicts, while a substantial part of the scholarly performance of our legal theory of the past two decades, no matter how we evaluate it, is institutionally connected to the faculties of law.

(6) According to the lecture's assessment Hungarian legal philosophy is now found – after its representatives performed, over the past 20 years, to be an extremely comprehensive, intensive and, from a professional aspect, highly reputable work – in a kind of state of 'calm before the storm'.[268] Although – as we can read – 'there have been neither major breakthroughs nor shifts of emphasis in the

267. As far as known to us, it has not yet been examined by anyone whether monographs in the forms of textbooks, collections, manuals, etc. have any separate scientific value in themselves (beyond that of transmitting information), and if they have, of what character and scope it is. It is a fact, however – and it is often an unpleasant one for law students – that textbook authors write their texts quite frequently (also) for their colleagues.

past one to two decades', the various tendencies 'indicate' 'the potentiality of a strong impulse that may grow to changes with a milestone's significance in the near future'.

Maybe, this is (will) and maybe this is (will) not (be) so – i.e., in our opinion, the 'new start' regarding the future can neither be predicted nor excluded. What we know for sure is that great intellectual accomplishments have on the whole never stood alone but have been produced by masterminds who happened to get into a historically and intellectually favourable medium. At the moment the historical, spiritual and intellectual situation seems to be very encouraging. So the best we can do – with regard to the past 20 years' achievements – is to be trusting and wishing them the best.

268. This impression is even accentuated by the evaluation about the international environment as the lecture maintains that – while the Anglo-Saxon legal analytics, rejected by practical legal science, has became 'over-emphasized' in intellectual weight – classical European legal philosophy is waiting for a change of paradigms. As far as we are concerned we are of the opinion that there has indeed not been a breakthrough amounting to a change of paradigms in classical legal theory at the international level over the past 45 years; but (in addition to the hundreds of excellent monographs written by authors like Chaïm Perelman, Norberto Bobbio, Robert Alexy, Joseph Raz and several others who cannot be mentioned here for limits of space) in the era treated by the lecture, there have emerged a dozen significant works like *Law's Empire* (1986), *Faktizität und Geltung* (1992) and *La globalización del derecho* (1998). This leads us to conclude that the picture is far from being as gloomy as suggested by the lecturer. At the same time we also think that, although this *may* influence Hungarian legal philosophy, it is *not* this fact that determines its present status and future prospects.

Published in:

The Transformation of the Hungarian Legal Order 1985–2005

Transition to the Rule of Law and Accession to the European Union

Editors

András Jakab, Péter Takács and Allan F. Tatham

KLUWER LAW
INTERNATIONAL

Published by:
Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: sales@kluwerlaw.com
Website: http://www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.,
7201 McKinney Circle
Frederick, MD 21704
United States of America

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive,
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom

ISBN 978-90-411-2180-6

List of Contributors

Máté Paksy	Assistant Professor	PPKE
Péter Takács	Professor, C.Sc., dr. habil.	ELTE

Contents

VII. Society, Politics, and Law