

DOCTRINE AND TECHNIQUE IN LAW¹

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I. Law, Legal Policy and Legal Technique

The term ‘legal technique’ has to encompass, in principle, both legislation and the application of law. Although ‘legal technique’ is most often referred to in literature as the instrumental know-how of legislation,² for me it is the instrumental skill, covering the entire legal process from making to applying the law. For in historical times, human civilisation has developed something called ‘*law*’, as well as something else called ‘*legal policy*’. The latter symbolises, in a wider sense, the entire social medium in which a community of people, organised in a country, aims at achieving some goal(s) in a given manner through a specific medium. In a narrower sense, legal policy relates to the field of politics as organised partly in legislative power and, together or alongside with it, partly in governmental power (with public administration, including crime control) and, as the third branch of the state power, in judicial power – all working in their ways for that legal positivities can be implemented and actualised through a series of individual official decisions.³ In the last analysis, legal technique serves in fact as a bridge between law as an issue of positivation and its practical implementation as shaped by legal policy considerations.

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² As a literary outlook, cf. CSABA VARGA – JÓZSEF SZÁJER: Legal Technique. In ERHARD MOCK – CSABA VARGA (ed.): *Rechtskultur – Denkkultur*. Ergebnisse des ungarisch-österreichischen Symposiums der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1987. Stuttgart: Franz Steiner Verlag Wiesbaden, 1989, 136–147 [ARSP Beiheft 35] as well as – in a version as commissioned initially – CSABA VARGA – JÓZSEF SZÁJER: Technique juridique. In ANDRÉ-JEAN ARNAUD (ed.): *Dictionnaire encyclopédique de Théorie et de Sociologie du Droit*. Paris: Librairie Générale du Droit et de Jurisprudence & Bruxelles: E. Story-Scientia, 1988, 412–414 and 2^e éd. corr. et augm. Paris: Librairie Générale du Droit et de Jurisprudence, 1993, 605–607.

³ Cf. CSABA VARGA: Für die Selbstständigkeit der Rechtspolitik. In MIHÁLY SAMU (ed.): *Die rechtstheoretischen Probleme von der wissenschaftlichen Grundlegung der Rechtspolitik*. Budapest: Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály, 1986, 283–294.

Nowadays, the designation ‘law’ is actually used to denote *modern formal law*. This is categorised in a sequence of concepts and made dependent upon further formalities under the coverage of logic, inasmuch as it builds around itself a quasi-geometric structure in which conclusions have to be deduced and, in some arrangements, also publicly motivated and justified. However, in contrast with the recurrent image of the law-applying automaton suggested by this pattern, real judges are genuine humans with proper ethos, conscience and morality, who themselves act, too, under the pressure of their actual or targeted identification with a huge variety of further social roles. This is why – despite his professional education and socialisation – the judge filters his understanding of the law and of the legal relevancy of facts through his very personality. As an ethical being endowed with a particular belief, world-view and socio-political sensitivity, he may (and, indeed, has to) feel that he is inevitably responsible for his decisions and also for what shapes he gives to the law by his decision as an existentially decisive contribution.⁴ For, reminding of the advance of homogenisation in various aspects (spheres and fields) of human activity, George Lukács has already pointed out that the dilemma faced by any judicial decision originates as experiencing some real social conflict. It is only legal profession that, searching for a solution by homogenising this conflict as a case in law, will resolve it in a way to present it as an apparent conflict that will have been responded, too, by the law.⁵

II. Formalism and Anti-formalism

A few decades ago, Georges Kalinowski’s formalist stand was challenged by the antiformalism of Chaïm Perelman. The rear-guard fight continued for long, and in the meantime Aulis Aarnio, Robert Alexy and Aleksander Peczenik invariably attempted, in their theories of legal argumentation, to balance between logicism and argumentativism, so as to provide some explanation in presenting the decisions actually reached in law as ones to be finally inferable with uncompromising consequentiality and coherency from the very law. It was Peczenik – having adhered, in the beginning, to the perhaps most formalist attitude among the above – who finally arrived at a critical self-limitation, notably, at the recognition and formulation of the fact that, linguistically and as viewed from the aspect of a justifiable logical reconstruction, the final (or any) conclusion in law is eventually nothing else than the product of a logical “transformation” and, in it, of an inevitable “jump”.⁶ For one has to shift from one level of conceptual description (e.g., of the object-language) to

⁴ Cf. CSABA VARGA: *Lectures on the Paradigms of Legal Thinking*. Budapest: Akadémiai Kiadó, 1999. [Philosophiae Iuris].

⁵ Cf. CSABA VARGA: *The Place of Law in Lukács’ World Concept*. Budapest: Akadémiai Kiadó, 1985, 2nd [reprint] ed. 1998. 193, especially ch. VI, para 4.

⁶ ALEKSANDER PECZENIK: Non-equivalent Transformations and the Law. In ALEKSANDER PECZENIK – JYRKI UUSITALO (ed.): *Reasoning on Legal Reasoning*. Vammala: Vammalan Kirjapaino Oy, 1979, 47–64 [The Society of Finnish Lawyers Publications D6] and ALEKSANDER PECZENIK – JERZY WRÓBLEWSKI: Fuzziness and Transformation: Towards Explaining Legal Reasoning. *Theoria*, 51 (1985), 24–44.

another one (e.g., of the meta-language formulated by the law), by which the sequence of logical inference is arbitrarily but necessarily interrupted in logic. Resuming the same Lukácsian train of thought mentioned above, we may even add: from an analytical point of view, the actual conflict only becomes an apparent one when the judge rids it of its problematic character through the available means of linguistic (re- or trans-) classification, that is, through the act of *categorisation within the adopted classification* – like a deduction within a given scheme.⁷

For me, the paradigmatic basis of such a reconstruction is that every linguistic expression is ambivalent from the outset, because nothing in our world has coercive force in and by itself. It is to be remembered that hardly half a century ago scholars of law might have felt it to be right when taking a classical positivistic stand. For instance, the Hungarian Imre Szabó in his *The Interpretation of Legal Rules* was to attempt a methodically unyielding reconstruction. According to him, for the lawyer everything is simply given, including law itself. When he gets in practical contact with law, he only effects chains of operations on what is already given, eventually approving of, extending or narrowing it.⁸ Yet if the judge might deem that by way of his interpretation he will have actually added to or extracted from this already given thing, all this shall qualify, if at all, exclusively his preliminary assumption and interpretative intention but by far not the given thing in question: by interpretation, the judge can at the most declare what qualities have ever been present as existing and prevailing from the very beginning. Consequently, legal technique is an instrument for him to declare – rather than to create – identities. This is the stand of classical legal positivism which became eroded in Western Europe following World War II, but which became for a while even further strengthened (with the ideological overtone of “socialist normativism” as exemplified by the above instance) in the Central and Eastern European region, owing to a whole complex of Lenin-cum-Stalinian and Vishinskyan inspirations, all rooted back in Western European jurisprudential developments characteristic of the 19th and early 20th centuries.

III. Law: Potentiality and Actualisation

However, my view of legal technique implies – subjecting the micro-analyses carried out so far to further micro-analyses – just the contrary, namely, that nothing is given as ready-made: our life is an uninterrupted sequence of materialisations from among an infinite range of potentialities. Therefore, in every event when a decision is made, it is something selected that gets actualised. (It is thus no mere chance that anthropological case-studies have led to the recognition of judicial event having become the real life – or test – of the law in American legal thought.) The use of law is also actualisation of the law, and legal technique is a compound made up of feasible and

⁷ Cf. CSABA VARGA: *Theory of the Judicial Process. The Establishment of Facts*. Budapest: Akadémiai Kiadó, 1995.

⁸ IMRE SZABÓ: *A jogszabályok értelmezése*. Budapest: Közgazdasági és Jogi Könyvkiadó, 1960, 618, especially part III: »Az értelmezés eredménye« [The result of interpretation], 237–325.

practised forms of how to proceed on and justify in law. And I do repeat here that every moment contributing to the decision made in law is ambivalent in itself, and nothing is compelling by its mere existence. For we have to know in advance – only to start at this point the specifically hermeneutic explanation – what the law is, what we can do with it and what we can achieve through its instrumentality in a given culture so that we can successfully argue with and within it. Or, it is necessarily a given *auditoire*⁹ faced with a *real situation of life* and, within it, also a definite context, together with its concrete social, ethical, economic and political implications, in which we can extend or narrow our interpretation and qualification. Or, all this is somewhat similar to the sociological description by Kálmán Kulcsár of the “situation of law-application”, taken as a socially thoroughly conditioned situation, saturated with moral and all other kinds of considerations, in which any question can at all be raised and answered; in which ideas, presuppositions and alternatives can be reasonably formulated; and within which law in action or, in the final analysis, the eventually historically evolved legal culture of an entire nation will accept or reject one given alternative, as the manifestation and final declaration of what the law is on a concrete issue.¹⁰ (In contrast, legal technique in Szabó’s approach merely applies the finitely ready-made law, by operating it when declaring a meaning which has – according to him – from the very beginning been assigned to it; consequently, there is nothing genuinely process-like in it which could require personal stand and responsible human choice.)

What is identifiable of law with no prior implementation or judicial actualisation is a potentiality at the most, which can only become anything more exclusively through a legal technical operation, when it may already gain an ontological existence (in the sense Lukács used the term), asserting itself by exerting an influence upon social existence.¹¹ This way, in its everyday functioning, law seems to embody two different mediums: a homogenised formal concentrate, on the one hand, and a practical action dominated by felt needs, on the other; and it is their amalgamation

⁹ The notion ‘*auditoire universelle*’ was introduced by CHAÏM PERELMAN in his *Droit, morale et philosophie*. Paris: Librairie Générale de Droit et de Jurisprudence, 1968, 149. [Bibliothèque de Philosophie du Droit VIII].

¹⁰ Cf. by KULCSÁR KÁLMÁN: A politikai elem a bírói és az államigazgatási jogalkalmazásban. In PAP TIBOR (ed.): *Jubileumi tanulmányok, II*. Budapest: Tankönyvkiadó, 1967, 193–232. and especially KULCSÁR KÁLMÁN: A szituáció jelentősége a jogalkalmazás folyamatában. *Allam- és Jogtudomány*, XI (1968), 545–570.

¹¹ If and in so far as we had an elaborated legal ontology, it should be able to define what is the kind of existence the exertion of influence of which can specifically arise from the subsistence and accessibility (i.e., the judicial cognisance) of a norm-text enacted as valid. Legal sociologies (spanning in Hungary, e.g., from Barna Horváth to Kálmán Kulcsár) have clarified the possible difference and even the conflict within the dual operational mechanism of, on the one hand, enacting norms and, on the other, enforcing them judicially. Empirical surveys on the knowledge of law seem to support the hypothesis according to which the knowledge of norms can be most effectively mediated by any actual practice having standing reference to these very norms. See KÁLMÁN KULCSÁR: *Jogszociológia*. Budapest: Kulturtrade, 1997, 265–266. and, as quoted, MARK GALANTER: The Radiating Effects of Courts. In K. O. BOYUM – L. MATHER (ed.): *Empirical Theories about Courts*. New York: Longman, 1983.

that will appear for the outworld posteriorly as law converted into reality. In the first decades of the 20th century, it was François GénY in France and Jean Dabin in Belgium who pioneered in describing this metamorphosis open-chanced in logic (and therefore “magical”¹²), which is the necessary outcome when a practical response is concluded from a pure form.¹³ Or, this is the source of recognition according to which legal culture implies something added that cannot be found in law taken in abstract formality – and this, again, is provided by legal technique. Thus, legal technique is the cumulative effect of intentions and skills, procedures and methods, sensitivities and emphases aimed at producing some given (and not other) realities out of the given *dynamei* in the name and as the act of – and in conformity to – the “law”.

IV. Constitutional Adjudication

If all this is true, we may establish that in our recent “constitutional revolution” accomplished under the abstract norm-control of the Constitutional Court of Hungary, the decisions taken by its justices in crucial issues of the transition process (ranging from compensation for property dispossessed under Communism to coming to terms with the socialist past in criminal law) with a homogenising view developed from the “invisible Constitution” the justices themselves hypostatized in order to substitute (or, properly speaking: to disregard and surpass) the written Constitution exclusively in force, well, those decisions annihilated (as with a kind of axe axing everything to get axe-shaped) rather than answered the underlying great questions calling for matured responses in law; for the Court has in fact practically not given any genuine answer to underlying social problems which were to generate these questions. In the name of legal continuity, the rule of law as conceived by Hungary’s first constitutional justices has turned out to be more inclined to develop solidarity with the tyranny of the past than to understand and foster the genuine meaning of the transition to take a new fresh start, by helping a truly socio-political change to progress, as it was widely expected. Actually, they have preferred the blind logicism of formalism deliberately disabling itself to laying the genuine foundations of the rule of law by calling for the implementation of its particular ethos and values; in contrast with the perhaps more balanced German or Czech variations to constitutional review which – as it appears from some of their momentous decisions¹⁴ –, instead of taking the rule of law as simply ordained from above, cared for it as a common cause,

¹² From a “juristic” perspective, it was HANS Kelsen: *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*. Tübingen: Mohr, 1911, 334. and, especially, 441. to speak of “the great mystery” of the law’s operation.

¹³ By FRANÇOIS GÉNY: *Méthode d’interprétation et sources en droit privé positif, I–II*. Paris: Librairie Générale de Droit et de Jurisprudence, 1899. and, especially, *Science et technique en droit privé positif, I–IV*. Paris: Sirey, 1914–1921.; by JEAN DABIN: *La théorie générale du droit*. Bruxelles: Bruylant, 1944, part 2: »La méthode juridique«, 97–203. in general and *La technique de l’élaboration du droit positif*. Bruxelles: Bruylant & Paris: Sirey, 1935. in particular.

¹⁴ Cf. CSABA VARGA (ed.): *Coming to Terms with the Past under the Rule of Law. The German and the Czech Models*. Budapest: Windsor Klub, 1994.

pertinent to the whole society, by responding to the latter's lawful expectations in merits. If this was a failure in Hungary, it was, indeed, the one of legal technique: the failure of the legal profession and of its positivistic self-closure, basically indifferent to the moral and socio-psychological foundations of a genuine rule of law. For those who, as a result of the encounter of historical incidents, happened to be in the position to decide on law and constitutionality at those moments, declined to face the problem itself, unlike their numerous fellows in other countries of the region. Seeing the world in black and white, they subordinated all other values not less crucial to one single (in itself doubtlessly crucial) value, denying and thereby practically excluding the relevance of all further values: as if decision were just a knockout game with a lot at stake (notably, gaining or losing everything), and not a process requiring a rather tiring job of weighing and balancing among values – values, each of which may need to be considered equally seriously, by the art of searching humbly and indefatigably for a feasible and justifiable compromise through exhaustive pondering via hesitations and long maturing until a final decision can be reached –, instead of the total reduction to a simple act of will, by differentiating out any aspect and argument not fitting in the line of this wilful determination, i.e., an act of reduction to elementary and primitive forms (manifested, by the way, also in dicing or even in showing a thumb turned down).¹⁵

In an earlier paper, I have already described how a change of any law can be effected through either the direct modification of its textual wording or the reshaping of its social interpretative medium, by tacitly reconventionalising the conventions that may give it a meaning.¹⁶ Well, this *duality* explains the fact why the same rule does not necessarily work the same way in different cultures, or why it is mostly not enough, for implementing a reform in society, only to have a law simply imposed upon or adopted under the push of forceful pressure-groups (like, e.g., a series of race relations acts in the United Kingdom¹⁷ or the regulation of nationalities and minorities issues in those so called successor states created by the dissolution – in terms of the post-WWI Peace Treaty – of historical Hungary). Maybe there is a third, alternative path as well, afforded by shaping further specific legal techniques so as to be able to bring about changes in the long run, even without modifying the law's texture or its social conventionalisation (e.g., as part of the modernisation strategies through the law, recurrently analysed by Kulcsár¹⁸).

¹⁵ Cf. by CSABA VARGA: Legal Renovation through Constitutional Judiciary? In MAMORU SADAKATA (ed.): *Hungary's Legal Assistance Experiences in the Age of Globalization*. Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange, 2006, 287–312. as well as Rule of Law – At the Crossroads of Challenges. *Iustum, Aequum, Salutare*, 2005/1–2, 73–88.

¹⁶ Cf. CSABA VARGA: Law as History? In STAVROS PANOU – GEORG BOZONIS – DEMETRIOS GEORGAS – PAUL TRAPPE (ed.): *Philosophy of Law in the History of Human Thought*. Stuttgart: Franz Steiner Verlag Wiesbaden, 1988, 191–198 [ARSP, Supplementa 2].

¹⁷ Cf. VARGA CSABA: A jog és korlátai: Antony Allott a hatékony jogi cselekvés hatáiról. *Állam- és Jogtudomány*, XXVIII (1985), 796–810. {partially also as The Law and its Limits. In his *Law and Philosophy*. Selected Papers in Legal Theory. Budapest: ELTE “Comparative Legal Cultures” Project, 1994. xi+530 [Philosophiae Iuris], 91–96.}.

¹⁸ KÁLMÁN KULCSÁR: *Modernization and Law. (Theses and Thoughts.)* Budapest: Institute of Sociology of the Hungarian Academy of Sciences, 1987, 198. and in his *Jogszociológia* [note 10]. ch. VI, para 3: »A modernizáció és a jogalkotás« [Modernisation and legislation]. 221–257.

V. Legal Imaginability

It was during the first debate in Hungary on how to come to terms with the past under the rule of law that I realised (in responding to the preconceived reservations by György Bence, both initiating and at the same time also sidetracking the debate),¹⁹ that there may be some deep truth in what René Dekkers used to allude to at his time: namely, conceivability in law is by far not simply a function of the law itself but is as much one of the society-wide understanding and interpreting of what law ought to be, in constant dialogue with what the law is. This is to state that what can be rationally and logically justified is also mostly feasible in the law. Or, as concluded by Perelman from the analysis of historical instances as methodologically evident:²⁰ providing that socially properly weighty considerations prevail, society can (with the legal profession and legal academia included) indeed mobilise the means of rational justification with proper logical standards so that the necessary and available effect is eventually also legally reached.²¹

And as Hans Kelsen on later age re-considered his theory of law-application, in terms of which the prevalence of legal qualities (lawfulness, constitutionality, etc.) – not their “existence” but the very fact that (as a result of the act of qualification by a competent agent in the law) the “case” of such qualities is officially established or construed – is never one of a quality existing *in se et per se* but the function of an act in procedure by a procedural actor with proper authority, that is, the consequence resulting from a decision. Furthermore, neither incoherence nor contradiction *in se et per se* can be found in law.²² Well, translating the message of all this to our question here, we may conclude: the circumstance that some proposition apparently running against a legal provision is in principle excluded from the law only means – in the language of the Kelsenian (eventually: processual) normativism – that I, as an official actor in procedure, cannot declare openly that the proposition I am just introducing officially in the law runs against the same law.

The interest of Gény and Dabin was exactly aroused by the recognition of the importance of legal techniques in that such techniques provide instruments for the lawyer to build constructions, in terms of which what is conventionally and determinedly

¹⁹ In BENCE GYÖRGY– CHAMBRE ÁGNES– KELEMEN JÁNOS (ed.): *Visszamenőleges igazságszolgáltatás új rezsimekben*. [Published as a manuscript.] Budapest: ELTE BTK Társadalomfilozófia és Etika Tanszék, 1990, [FIL 2 Gyorsszimpózium.] and *Világosság*, XXXI (1990) 8–9.

²⁰ First of all, ANDRÉ VANWELKENHUYZEN: De quelques lacunes du Droit constitutionnel belge. In CH. PERELMAN (ed.): *Le problème des lacunes en droit*. Bruxelles: Bruylant, 1968, 339–361. [Travaux de Centre National de Recherches de Logique] and – as a framework – CHAIM PERELMAN: *Logique juridique. Nouvelle rhétorique*. Paris: Dalloz, 1976, 76–79. [Méthodes du Droit].

²¹ As a background, cf. CSABA VARGA: *Transition to Rule of Law. On the Democratic Transformation in Hungary*. Budapest: Eötvös Loránd University “Comparative Legal Cultures” Project, 1995, 190. [Philosophiae Iuris].

²² Cf. by CSABA VARGA: No Logical Consequence in the Normative Sphere? In AREND SOETEMAN – MIKAEL M. KARLSSON (ed.): *Law, Justice and the State*. Proceedings of the 16th World Congress of the International Association for Philosophy of Law and Social Philosophy (IVR), Reykjavík, 26 May–2 June, 1993. III: *Problems in Law*. Stuttgart: Steiner, 1995. 31–37. [Archiv für Rechts- und Sozialphilosophie, Beiheft 60].

preferred by important sectors of society to be achieved (guaranteed, etc.) will also be legally feasible (conceivable and realisable) in principle, at least in average cases. It was during my first visits to the Czech Republic, then, later, to Israel and then to the United States (especially also after the terrorist attack of September 11) and studying their professional texts (including the legal and political substantiation of their claims, and the latter's argumentation and styling) that I felt that in some organically self-building societies a social substrate may develop, in the womb of which (at least in certain key fields such as national survival strategy and other especially sensitive areas) a nation-wide consensus can historically crystallise regarding those issues they have for long and determinedly been wanting to realise, and, sharing a tacit awareness of it, also mechanisms may develop to work for its optimum attainment tirelessly and even through detours if needed, always returning to the main track; and these societies do mostly develop also as becoming structured enough (in their entirety, as to their professions and media, etc.) so that eventual external and internal strains notwithstanding, their dominant will can eventually prevail.

The interest of Gény and Dabin was awakened exactly by the whirling theoretical perspective of the realisation that law – expressed with an outsider's cynicism – depends on its cultural (“hermeneutical”) environment to such an extent that – speaking in extremes – almost anything and also its opposite may have a chance of equally standing the test of the law; of course, not through any kind of the law's formal violation but, quite to the contrary, due to the excellently sophisticated elaboration of the proposed solution, after having constructed (with deepened comparative and historical knowledge, consciousness of past experience and the uses of channels of argumentation once proven successful) all the bridges of argumentation. So that it can be achieved, for instance, that by the end of a mandatory dependence and through the extending generalisation (by far not customary in case of punitive retaliation with civilised nations) of a law (the continuation of validity of which is expressly denied by the one-time colonising power but re-asserted as a validity allegedly inherited by the successor state), collective responsibility is instituted and/or extraordinary coercive sanctions are met out with lasting and irreversible effects, without the protection of either procedural guarantees or judicial control, as a legally justifiable preventive measure.²³

²³ According to analyses born on the one side – e.g., MARTHA MOFFETT: *Perpetual Emergency. A Legal Analysis of Israel's Use of the British Defence (Emergency) Regulations, 1945*. Ramallah: Al-Haq, 1989, 92. [Occasional Paper 6] and LYNN WELCHMAN: *A Thousand and One Homes. Israel's Demolition and Sealing of Houses in the Occupied Palestinian Territories*. Ramallah: Al-Haq, 1993, 140. [Occasional Paper 11] –, the British mandatory authorities in Palestine expressly revoked the order – they introduced in 1937 (on the model of the summary orders the British authorities issued when faced with public disturbances in Ireland in the 1920s) and re-issued in 1945 – two days before the expiry of their mandate, with the decree of the *Palestine (Revocations) Order in Council, 1948*, on May 12, to be effective from Midnight of the next day on. This is debated by the other side, because this revocative act was not published in the then official journal, the *Palestinian Gazette*. However, as the former side claims, this has never been a condition for British monarchic acts to be valid. Anyway, the reference to the legal constraint as inherited by the State of Israel was expressly rejected by the state referred to,

VI. Linguistic Mediation

Behind all these considerations concerning the simultaneity of applicative and creative effects of the so-called law-applying process, there is a stimulating strain that prevails between living language(-use) and the blind (and in itself empty) logicism of a system homogenised through a formalising filter. And the significance of legal technique and the inevitably magic transformation effectuated in any legal process may become comprehensible only in the moment when we realise: law is not simply made up of rules, as in themselves they are nothing but sheer symbols of logical abstractions. For anyone wishing to reasonably communicate with others cannot but use categories already interpreted in communication with others. Thanks to its reserves, language offers paths and ways of how to proceed while, if examined more closely, these are extremely uncertain signals, full of ambivalences. This is a circumstance which is of course not especially striking in everyday usage, that is, speaking in terms of pure logic, after the gaps left by such signals are completely filled in through our everyday conventions and conventionalisations. Law conceived as a rule in the ontological reconstruction of linguistic mediation is just a medium

when eventually Foreign Secretary William Waldegrave declared, in the name of the Government of Her Majesty, that these emergency orders had been “repealed long ago and are not part of British law”, and Lord Glenarthur shifted the responsibility for its continuing application after the revocation in question on the applier, by saying that “If the Israelis now seek to apply the same or similar regulations, that is their decision for which they must take responsibility.” [*Hansard Official Records: House of Commons* (22 December 1988), 665., as well as *House of Lords* (15 December 1988), 1113.]. For that matter, § 11 of the *Law and Administration Ordinance (Amendment) Law*, promulgated by the *Knesset* [in *Laws of the State of Israel*. I (1948), 7.], had indeed deleted in 1949 those laws from the legal system in formation of the State of Israel which were passed during the period in question without being published – despite the “obligatory or customary” procedure – in the then official journal. With this, however, the State of Israel re-asserted the effect of a law about which, back in time of the British mandate, when the said law had been used against the settlers, Dov Joseph, later Israeli Minister of Justice, set forth that, with the enforcement of “collective responsibility”, “[a]ll of the six hundred thousand settlers could be hanged for a crime committed by one person.”, and another future Minister of Justice, Yaacov Shapira had declared downright that it was “unparalleled in any civilized country. Even in Nazi Germany there were no such laws.”, for its orders were found by a later Judge of the Israeli Supreme Court, Moshe Dunkelblum, too, to “violate the basic principles of law, justice, and jurisprudence” [all quoted by SABRI JIRYIS: *The Arabs in Israel*. Beirut: 1976, 11–12.]. For the whole complexity of the issue, see the follow-up through balanced analyses in JOHN QUIGLEY: *Palestine and Israel. A Challenge to Justice*. Durham & London: Duke University Press, 1990, 30–31., 102–104. et seq. Cf. also MICHAEL SALTMAN: *The Use of Mandatory Emergency Laws by the Israeli Government*. *International Journal of the Sociology of Law* 10 (1982), 385. et seq. and LISA HAJJAR: *Courting Conflict. The Israeli Military Court System in the West Bank and Gaza*. Berkeley & London: University of California Press, 2005., YEHEZKEL LEIN: *Civilians under Siege. Restrictions on Freedom of Movement as Collective Punishment*. Jerusalem: B’tselem, 2001, 65. and HUMAN RIGHTS WATCH: *In a Dark Hour. The Use of Civilian during IDF Arrest Operations: Israel, the Occupied West Bank and Gaza Strip, and the Palestine Authority Territories*. Washington & London: Human Rights Watch, 2002, 23. [The Middle East and North Africa, 14/2]; as well as – for the background – EUGENE COTRAN – MAI YAMANI: *The Rule of Law in the Middle East and the Islamic World. Human Rights and the Judicial Process*. London & New York: I. B. Tauris, 2000, especially chs. 3–5. and DEENA HURWITZ (ed.): *Walking the Red Line. Israelis in Search of Justice for Palestine*. Philadelphia: New Society Publisher, 2002.

being incessantly formed through a series of interactions; and legal technique serves as just a bridge helping the lawyer to reach a concrete and definite legal conclusion.

Language provides a means for us to express and receive messages, a means that does not label itself. No matter what I say, all I can do is only indicate (either even mistakenly or misleadingly) at what level, in what layer and whether conceptually or some other way I do so. And the meta-reconstruction by those whom I have addressed will approve of or modify – i.e., interpret – it anyway. That is, linguistically transmitted information gets always labelled posteriorly and retrospectively, upon the basis of our mutual comprehension at any time, that is, upon the basis of contexts constructed and construable exclusively by us in view of the aims of the given communication.

Consequently, the aspiration of any objectivist approach to design law as able to carry on independent, sovereign, unequivocally comprehensible and by far not individually specific clear messages is indeed the principal motive force of modern formal law in its development at any time. As is known, the judge distinguishes his judicial quality from his common self by wearing a powdered wig and a specific robe when he acts as a judge, and, in result of his socialisation, he wears such ritual signals of this differentiated self also when this allusion does not appear physically, as the symbolic particularity of his clothing, but only in his own way to act as a decision-maker in law. Yet, the formal logifying claim that concrete norms as applied to concrete facts are deduced from abstract norms is by far not naturally given but is – irrespective of its actual social support – an artifact made by normative requirement as the internal rule of the legal game which, however, can only be asserted in some specifically given micro- and macro-sociological situation, in the definition of the field of meaning of which the judge also takes part inevitably with his entire personality; and, in this definition, subtle shifts of emphases, indiscernible in themselves, may also add up to definite shifts of direction in the long run.

All this is to mean that endeavours for *homogenisation* and *unambiguity* go hand in hand with both the incessantly continuous attempt at reaching these in practice and their necessary stumbling in new *heterogeneities* and *ambiguities*, that is, with a continuous tension that constantly maintains both the strain (in theory) and the attempt (in practice) at resolving this once and for all. As if hyperbolic curves were at stake: we are fighting for definite aims but meanwhile we also move away from them, making detours again and again unavoidably. Or, the sphere of action of the judge is certainly limited but in terms by what and how is also ambivalent. For we place artificial human constructions into a homogenising medium in order to apply its rules to them. However, we cannot entirely separate these humanly made constructs from the naturally given heterogeneous environment of their usages; consequently, in each moment and operation, their eventual partial definition by *real-life situations* will also be inevitable.

VII. Rechtsdogmatik

The only way available to the legislator to act is to produce a text and, at once, also to label it, as if proclaiming to the outside world: Behold, law, that is, a norm-text,

valid and effective according to the law's own rules, has thereby been promulgated. In ancient Iceland, for instance, laws used to be recited by the law-speaker standing on a rock amidst the folks' gathering, and therefrom loudly declaring what the law's formal consequences were.²⁴ Modern formal law surpasses this level of practical action in as much as its doctrinal aspirations do not stop at actuating a set of norms as mere texts; it formulates, by help of a series of linguistic and logical operations, a conceptual system from their amalgamate, too. The doctrine emerging therefrom is again not a readily given result but a process itself. It is what we are socialised in, thus we, as lawyers, also shape it to some extent incessantly. Consequently, we suppose from the outset – and rightly – that when we are establishing or applying a rule, we all resort to conceptual instruments refined to a systematic set in the doctrine. That is, there is a specific kind of co-operation to be seen both at the level of linguistic signs and at the meta-level of the commonality of meanings in defining the rule. So, if any one of us says anything about the law, the other will understand something similar or comparable to the one the former might have meant by saying it, thanks to our common professional socialisation, doctrine and practice, all acquired, mastered and further shaped in common by us, even if this deep cultural embeddedness of meanings cannot be found in the linguistic formulation itself. Or, explaining more precisely, if this natural environment of meaning is neither represented in the signs themselves (semiotics) nor in their strictly defined and generalisable meanings (semantics) but does feature exclusively in the practice of language use (praxeology), that amounts to mean that, ontologically speaking, only actual use is able to give actual existence to all it. That is, it is language through which we communicate but, meanwhile, we do operate in fact with concepts elaborated up to their systemic completion in the reconstructive language that stands above the object-language as a meta-language, presumed as actually signified by it.²⁵ Well, it is just the *doctrinal study of law* that forms the second level, which has in common with legal techniques that both are (supposed to be) applied whenever law is practically referred to.

The doctrinal study of law, too, has a technique of its own, obviously. All these and similar techniques are certainly interrelated but are far from being identical. As once established by Bronisław Wróblewski (the professorial father of our friend recently gone away), the law and its doctrinal study, as well as legal scholarship and the law practiced, all have their own languages discernible from each other;²⁶ and, as we may conclude therefrom similarly, these various techniques have partly differing stores of instruments, too. As known, Jhering and Savigny equally emphasised back in their time that the techniques of the doctrinal study of law follow a basically theoretical model as

²⁴ Cf., e.g., SIGURÐUR LINDAL: Law and Legislation in the Icelandic Commonwealth. *Scandinavian Studies in Law*, 37. Stockholm: Jurisförlaget, 1993, 55–92.

²⁵ See SZABÓ MIKLÓS–VARGA CSABA (ed.): *Jog és nyelv*. Budapest: [Books-in-Print], 2000. [Jogfilozófiák] and – as an additional background – SZABÓ MIKLÓS: *Trivium. Grammatika, logika, retorika*. Miskolc: Bibor Kiadó, 2001. 264. [Prudentia Juris 14]

²⁶ BRONISŁAW WRÓBLEWSKI: *Język prawny i prawniczy*. Kraków: 1948. [Prace Komisji Prawniczej Polskiej Akademii Umisjetności 3]

patterned in both theological dogmatics and other thoroughly formalised systems of mental representation; or, jurists do employ the logical instruments of conceptual analysis first of all. At the same time, it is to be remembered that what I have earlier in this paper referred to as techniques with an effect resulting in a magical transformation in practice does not obviously suggest any priority guaranteed to the instruments of logics, for it has presented the techniques of law as basically techniques of reasoning. It is characteristically the medium of reasoning within which we may want to restrict or expand the field of application of a rule, in the light of the understanding of given practical issues and contextures. However, it is not simply casually any longer but as – and within – the description of the notional relationships among rules and thereby also of the texture of actual regulation that conceptual analysis re-formulates – by means of conceptual differentiation and classification, induction and deduction (etc.) – the notional set of the law's categories, as constituents of a mentally represented system.

VIII. Clauses and Principles

Regarding the very logic of law, it is quite symptomatic that while the dominance of formal inference makes its way uncompromisingly, in any case it will turn out that all this may remain valid only for the routine cases of the average. For as soon as the feasibility to follow the routine of conceptual categorisation becomes questioned with a borderline case (classifiable or not onto a given category), logic too becomes at once irrelevant, as it has no message whatsoever specific to borderlines that may transcend the bounds of everyday routine in practice. This is why my bewilderment as a first reaction calmed slowly down to melancholy from an outrage when I was first appalled to realise that in case of clauses on the proper use of rights in civil codes, essentially the same is at stake as in case of the *sine qua non* criterion of the deed displaying an actual danger to society, taken as a general part conceptual prerequisite of criminal acts in penal codes. Notably, what is striking here is that the special parts of the codes usually call for a relentlessly logical application of the regulation broken down systematically from principles to rules and rules to exceptions – to the exclusion of the only one single case, namely, when the applicability of such a general clause or principle from somewhere in the general part of the code emerges. For instance, in socialism, whenever any ground for suspicion of a case of either abuse of rights or lack of actual danger to society emerged, all the stuff of the strict and minutely detailed regulation offered by the entire special part of the code had at once become non-applicable as irrelevant, with the questioned case judged in almost a legal vacuum, with the sole reference to one or another general principle laconically drafted in the general part.

Passing over the actuality of typical abuses by the practical annihilation of the law in socialism,²⁷ we are to characterise legal technique as a specific store of instruments by which all these features have ever been present in any legal culture from the very

²⁷ Cf. CSABA VARGA: Liberty, Equality, and the Conceptual Minimum of Legal Mediation. In NEIL MACCORMICK – ZENON BANKOWSKI (ed.): *Enlightenment, Rights and Revolution. Essays in Legal and Social Philosophy*. Aberdeen: Aberdeen University Press, 1989, ch. 11: 229–251.

beginning, alongside with the conclusion that the above paradox of the law's demand for strict conformity except to out-of-routine situations left in hardly limited wilderness (involving a self-contradiction of quite an ontological nature) is and does remain a symptomatic property of any law indeed. Notably: attempts are first made to homogenise law in order to depersonalise its application, at the same time rather loosely formulated clauses (in form of flexible, evaluating, etc. concepts) are introduced in it for that, eventually, anything and everything can be legally put away by being dispensed with, if needed. For the end-result will display a genuine paradox indeed: vaguely defined clauses are asserted for that by resorting to them, the judge may forbear to apply the most minutely elaborated sets of the same law's rules.²⁸

Albeit a sad aspect of our question is how socialism actually used to misuse such clauses when it denied entrepreneurial initiatives a civil law protection on the pretext of abuse of rights or when it retaliated friendly private gatherings of old monks and nuns dispersed from their disbanded monasteries by qualifying them to abuse the right of assembly. Notwithstanding, all this does not in the least alter the fact that every living culture of law incorporates clauses into its order for the same very reason and in its own manner: namely, to prevent those applying the law from being forced to resort to a rigid application of rules in certain legally not properly specifiable borderline cases in a way leading to nothing but social damages and shaking the popular trust in legal justice, that is, otherwise formulated, leading to an apparently correct application allowing the lawyerly self-conceit nothing but a Pyrrhic victory. For instance, the clause of public order (primarily in public administration) has at all times aimed exactly at bringing about a balance like this – quite until it had finally fallen into disuse in the wake of the movement of false liberalisation, individualising and eventually atomising society.

IX. Safety Velvets Built in Law

As regards theoretical foundations, I recall what social ontology has revealed about the dialectics inherent in any real process, namely, the practicality of solving conflicting interests and the methodological discrepancies necessarily involved in and by it: each motion presupposes some kind of counter-motion. Accordingly, not even homogenisation is conceivable without simultaneous re-heterogenisation. Or, expressed simplifyingly, law is too serious a thing to leave it for *beaux esprits* or moral heroes to solve genuine conflicts in life, especially under limiting conditions. Safety valves have to be built into the law's networking system as well, from the very

²⁸ A similar logic can be seen in the Dworkinian breakthrough (as contrasted to the positivism of H. L. A. Hart), which took a start by the recognition that no matter how self-evidently complete and exhaustive a set of rules derivable from precedents seems to be, its applicability cannot be taken as granted even in apparently relevant cases either, as actual social considerations and prevailing judgements of values may rival with these rules by actualising general principles, maybe latent in the system but making them operative now, in a way to exclude the relevancy of the application of a given rule (providing, e.g., *in re* of inheritance by the murderer of a testator or the limitation of liability by a hazardous plant) for the adjudication of the given case and prospectively too. RONALD M. DWORNIK: *The Model of Rules. University of Chicago Law Review*, 35 (1967), 14 et seq.

beginning. Perhaps also legal history can prove that the first formalisations ever had were already accompanied by clause-like de-formalisations.²⁹

First of all, as known, it is the way of structuring legal techniques that differentiates the pattern characteristic of Common Law from the one of Civil Law. It is so much so that a few decades ago Hungarian scholars could hardly imagine (and not because of socialist ideological self-closure but of their stubborn adherence to classical – pre-war – Civil Law professional deontology) that the very fact, characteristic of Common Law, that judgements are passed in conclusion of only precedents and that rules governing the adjudication are only declared in the process itself, does by far not imply a scene with everyone at each stage acting, according to a *mihi placet* choice.³⁰ As is to be remembered, the famous provision of the Swiss *Zivilgesetzbuch* in its para. 4 had already aroused world-wide outrage when it was just a draft: in what a self-renunciation of codification ending in a confused administration of justice would it result if the judge could decide as if he were to legislate in the given case.³¹ Well, it is due to the balanced legal culture of the Swiss – and not to the provision’s technical formula – that it has in fact become one of the provisions applied most rarely and with the greatest moderation in the world.

Obviously, legal technique is itself a many-edged and almost omnipotent weapon: anyone may use it to achieve almost anything in any direction. However, we can only proceed on in a given legal culture and, by its conventions, this, from the very beginning, delineates and constantly re-delineates the actual limits of what we can conclude to and from what. For example, in the logical culture of the Oxford-type conceptual analysis, authors ranging from Jean-Paul Sartre in France to Tamás Földesi and János Kis in present-day Hungary have been used to deducing with unscrupulous conceptual certainty when one is allowed to kill his/her comrade, mother, or foetus.³² Although it may seem as if one’s act committing or avoiding murder depended on nothing but a logical inference, one has to be aware of that although many things can be proven on paper, however, in real-life situations one with healthy dispositions does not do anything prompted by a few indications on a piece of paper. For in general, we think in more complex a manner, relying – beyond the presumed Pure Reason – on our additional skills, endowments and abilities as well. After all, there is a background

²⁹ First, when conflicts emerged, such de-formalisations could operate as a principle of the presumed order inherent in law, then as one posited also increasingly.

³⁰ For instance, socialist compendia of legal history used to excel in such a generation of easy (but consciously misconceived) criticism, as a bolshevik exemplification of ideological class struggle. For topical examples how this practice may have hindered even theoretical reconstruction, see, VARGA CSABA: A »Jogforrás és jogalkotás« problematikájához. *Jogtudományi Közlöny*, XXIV (1970), 502–509.

³¹ See, e.g., as just two specimens from continental responses, the reservations made by EUGEN EHRLICH: *Freie Rechtsfindung und freie Rechtswissenschaft*. Leipzig: Hirschfeld, 1903. and GNAEUS FLAVIUS [HERMANN KANTOROWICZ]: *Der Kampf um die Rechtswissenschaft*. Heidelberg: Carl Winter, 1906. or the reaction by BENJAMIN N. CARDOZO: *The Nature of the Judicial Press*. New Haven (Conn.): Yale University Press, 1921. Lecture III [The Storrs Lectures].

³² E.g., JEAN-PAUL SARTRE: *L’Existentialisme est un humanisme*. Paris: Nagel, 1946, 141 [Pensées]; FÖLDESI TAMÁS: *Erkölcscről mindenkinek*. Budapest: Móra, 1978, 2nd rev. ed. Budapest: Kozmosz, 1981. 287 [Én és a világ]; KIS JÁNOS: *Az abortuszról. Érvék és ellenérvék*. Budapest: Cserépfalvi, 1992, 236. Cf. also VARGA (1999) *op. cit.* [note 4], 91–92.

culture behind us (much more sophisticated than the above presumption), saturated with instincts, emotions and traditions, past and present habits, enriched by community practices and experiences as well.

We live in the same culture with both vague clauses guiding to nothing in any concrete situation and rules calling for a strict application. And if, in the name of a law, either dysfunctionality, due to the law's blind enforcement, or, despite the law's formal assertion, its practical negation will arise, the reason is not necessarily to be sought for in the given technical procedure. For it is known to all us that practical life, with the entire network of subsystems within it, is operated by the same human involvement and social activity, after all. In case political considerations would unduly overwhelm the law's operation, they can as well utilise any instrument they have access to, to subject the law to them.

Democratic legal culture serves not only as a veil to support any decision at wish but as one of the most distinguished media through which values inherited and continuously accumulating in society are developed – first clashing, then rubbing and polishing, finally harmonisingly reconciled, with one another – in order to become, through experiencing the patterns, channels and cultures of reasoning offered by that professional culture, a genuine mediator, serving as one of the most effective factors of social culture.³³

³³ The problems addressed at the workshop on “Intermediateness and decision: the fundamental issues of the political and legal theory of Carl Schmitt”, organised by the Faculty of Law of Eötvös Loránd University in Budapest on November 22, 2002, focussed on the interdependence, moreover, interlacing confluence in one real-life process of the logic taken as a pre-coded automatism, on the one hand, and the moment of *decisio* as a sovereign resolution responding to a given situation, on the other. Cf. CSABA VARGA: Change of Paradigms in Legal Reconstruction. (Carl Schmitt and the Temptation to Finally Reach a Synthesis.) In PETER WAHLGREN (ed.): *Perspectives on Jurisprudence. Essays in Honor of Jes Bjarup*. Stockholm: Stockholm Institute for Scandinavian Law, 2005. [= *Scandinavian Studies in Law*, 48.] 517–529. & *Rivista internazionale di Filosofia del Diritto*, LXXXI (ottobre / dicembre 2004), 691–707. As a summary of the underlying wider problem of how mere forms can be made liveable with substantive reason or goal-orientation in implementation, cf. also by CSABA VARGA: Buts et moyens en droit. In ALDO LOIODICE – MASSIMO VARI (ed.): *Giovanni Paolo II. Le vie della giustizia: Itinerari per il terzo millennio. (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato.)* Roma: Bardi Editore & Libreria Editrice Vaticana, 2003, 71–75.

