Law and Its Approach as a System

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1. THE LOGICAL STRUCTURE OF LAW AS A HISTORICAL PRODUCT

There is a statement largely widespread in social sciences according to which development, and particularly legal one, since the Revival of Learning has led to the triumph of logic. Marxist legal theory, too, although in its investigations it primarily concentrates on questions of social contents, wants to discover «un processus juridique et formel particulier» in the universal process of legal development, a process which is even considered as segregating the proper history of law from its prehistory ¹. Undoubtedly, simultaneously with its objectification as a written rule, with its development to something created, i.e. to statutory, codified law, in the course of its formation law has gradually undergone changes: it has transformed into a logically organized ensemble of rules, into a system elaborated in its notional coherence, on the creation of which the ideal of axiomatism, and on the application of which the demand for deductive definedness, have put their stamp.

All this is, however, not a straight-lined development tending towards infinity, or a self-contained development determined by and for itself. Even Fr. Engels brought the birth of the demand for a formal coherence in law, of the postulate that law is «ein in sich zusammenhängender Ausdruck, der sich nicht durch innere Widersprüche selbst ins Gesicht schlägt», decidedly into association with modern statehood ². What I have here in mind is that

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the 'technological' transformation of law, its manifestation in the form of a relatively autonomous, and also logically organized, system, is a historical formation. It is a historical product which came into being and developed in a given age for the satisfaction of given social and economic needs. Its presence is therefore far from being evident, even if the universal «Tendenz zur Rationalisierung des Rechts» might loom up as a natural property of the industrial society so characteristic of our age. Hence notwithstanding its ability to satisfy, to a certain extent, the needs of our age, the transformation in question is to be considered but a historical particularity whose explanation can be given only by historically unfolding it in its whole social and economic context.

«Wir kennen nur eine Wissenschaft, die Wissenschaft der Geschichte», wrote K. Marx and Fr. Engels in their early polemic work, thus indicating the ontological intertwining and multiple interaction of social phenomena among themselves and with the ones of nature. In the following I propose to undertake the unfolding of the formation, as well as of the structure and inner limits, of the demand for organizing law as a logical system and, as ideal, for conceiving of it under the changing, although lasting, influence exerted by the axiomatic-deductive pattern. Obviously the historical particularity of all these define at the same time the historical particularity of ideologies and theoretical images connected with them. As it will be shown, feudal absolutism and free-trade capitalism, by creating the structures of formal rationality, have not only given shape to a system of institutions and ideologies adequate exclusively to their own conditions. By turning these both socially typical and of determining effect, law has helped to power a set of instruments and ideologies which have pointed beyond their strictly limited historical condition in order to become the carrier of more general practical as well as theoretical tendencies. The fact that structures of formal rationality are being made use of by the social organisation of both monopol-capitalism and socialism as well, does not alter the original conditions once having produced them. It is exactly on the ground of their historical determination that I attempt the critique of the axiomatic-deductive theoretical patterns by demonstrating their conceptual as well as historical limitations. At the effect of what factors and in what forms this in its own age and under its own conditions adequate, classical axiomatic-deductive pattern has been salvaged for our times, has, however, to be made the subject-matter of another study.

2. Tendencies of Formal Rationalization in Legal Development

The category of formal rationality is the product of bourgeois development. In the focal point of formal rationality there is the demand for calculability,

a demand which in its elementary forms manifested itself in the organization of economy relying on double-entry book-keeping and, later on, on the rational calculation of capital. It was M. Weber who made it clear that the whole organization of bourgeois society consisted of a set of formally rationalized structures. Beyond economic organization he discovered this type of structures in the administrative, judicial, military, ecclesiastic, and party organizations as well. He revealed that impersonality and determinedness by a system of pre-established rules prevailing in the functioning of these structures had laid the foundations of bureaucratic rule and created the bureaucratic complexity of bourgeois society. Thus in the light of the Weberian exposition of bureaucratic organization the demand for formal rationality has become the stigmatic sign of capitalist society.

As Gy. Lukács has made it clear with reference to Taylorism, this most characteristic, though extreme, potentiality of the capitalist division of labour, formal rationality is but the dissolution, i.e. the cutting up, of organically united processes, on the ground of the cognition of the interrelation of their components, into a series of artificially interconnected part-process.

It is this structure that in feudal absolutism, advanced by the interests of the enlightened absolute monarch as backed at the same time by the growing bourgeoisie, had become institutionalized as a consequence of the development of state finances, state army, as well as state bureaucracy created for their uniform operation, even when the structure in question gained its decisive, typical and autonomous existence only in capitalist society.

Hence formal rationality is a historically defined phenomenon, on the one hand, however it is by no means void of antecedents, on the other. Formal rationality as a principle tending towards calculability is a characteristic product of bourgeois civilization, although it appears in its germs already at an early stage of social development. As far as legal regulation is concerned, formal rationality was the product of the coming into power of the bourgeois as brought to fruition by feudal absolutism. In a wider sense, in its elementary manifestations, formal rationality is, however, and indispensable property, the sine qua non precondition of any conscious, planned, willed and controlled, social influence.

As it is known there was a first and decisive change in the formal development of law when law broke off from the body of customary laws forming a unity with everyday social practice, and as a written law became objectified as something distinct and externalized from customary law. It was then that the norm-structure of law, too, developed, i.e. the structure which

turned the behaviour originally set as a goal and assigned as instrumental to the result to be achieved, into something independent; abstracted from the result to be achieved it set the behaviour itself as an autonomous objective before the addressee. By defining both the behaviour to be observed and the consequences of its observance or non-observance in a formal way segregated from the factuality of social practice, law has given a mentally pre-constructed normative pattern to social behaviour.

In order to see what points may have been decisive in the universal development of formal rationality in law, we have to recall some of the most important teachings afforded by legal history as outlined in some of my previous papers. To begin at the beginning we have to note that for Marxism formal-technological metamorphosis of law, in like way as any change in its contents, is by no means a random-like unmotivated act: both supervene in dependence on the change of social-economic relations forming the real context of it.

As regards the first stage I have in mind the Mesopotamia of before and subsequent to the second millenium B.C., this historically unique situation when parallel to the transition to the wooden plough and the progress made in metal-working, this favourably sited region of a fair climate embarked on an unprecedented development. The want of prime materials encouraged trade, the construction of a system of irrigation and other public works prompted to wars for territorial conquest and for capture of war prisoners to become the slaves of their conquerors. All this, on the one hand, brought about a proliferating bureaucracy, and, on the other, a rapidly spreading empire, where the conscious establishment and empire-wide unification of the laws, i.e. their putting down in written objectification and so the very chance of their uniform enforcement, had become the pre-condition of survival. In the ensemble of rules known as the Code of Hammurabi norm-structures appeared in an already mature, almost perfect, form with presenting even their system-like organization in their objective consolidation and, partly, casuistic succession 7.

Be the role of Roman law and its consolidation by Justinian in view of subsequent development ever so significant, in the technological formation of law this had primarily a function only in the conceptualization of law as well as in its transformation into a phenomenon expressly established and enacted by the profane, personal and, in principle, arbitrary will of the ruler. Development meant thereby the change-over of rites of law to a craft relying on overtly practical rational considerations and manipulations.

Medieval development did not favour either central legislation or its rationalization. The Germanic principalities springing up on the ruins of the Roman Empire took trouble with the primary task of their organization

into an independent statehood and of putting into writing the mostly barbarous primitive law they brought with them. Centuries later dismemberment and the permanent unsettled feuds between ruler and his feoffers threw obstacles into the way of codification, and what anticipated subsequent development passed of in the towns, these early workshops of bourgeois civilization. It was there where Roman legal tradition got «de-nationalized» which, for want of other more applicable norms, meant the glossation of the classic surviving texts, i.e. their conceptual systematization by their coherent system-like organization as adapted to the needs of trading relations. This is what at a later stage became associated with the mathematical, axiomatic, system-centred approach of rationalism, a development which again gave expression to the calculatory exigencies of the bourgeois; then later with natural law, an ideological expression of the anti-feudal struggle of the rising bourgeoisie, which in its turn led to the formation of ideal systems of law constructed artificially in a quasi-axiomatic way.

Feudal development led of necessity to the transcendence of particularism. Enlightened absolute rulers got the upperhand of particularism at first, who as the means of their struggle began to take into their own hand the finances, to organize a regular army, to patronize industry and trade, etc. The discharge of such functions called for a professionally trained bureaucracy and, in order to canalize its activity in a uniform way, for an unequivocal, comprehensive set of rules, too, formulated with due regard to its bureaucratic mass use. At this juncture both the ruler and his bureaucracy demanded an enormous increase of the amount of rules: the extension of legal regulation to several new domains and, consequently, in view of the calculatory needs, its re-establishment in a form easy to handle. The old method of a quantitative consolidation was inadequate for the purpose. It was Frederick the Great who made the first comprehensive attempt to achieve any quasi-axiomatic trans-structuring of law. He meant formal law rationalization, as well as bureaucratic-military organization, for being his personal supports in rising his country to a European great power. Heated by the tyrannic passion of interference in everything and foresight of everything, the Prussian Landrecht, however, resulted in a logically coherent yet impractically redundant and confused series of casuistic rules, rather than in a system of norms of a truly rationalizing effect paving a path forward.

The break-through took place with the rise of the bourgeoisie to power, i.e. with the advent of the French Revolution. This was a revolution carried out consistently in which, by abolishing the old law, a new one had been institutionalized. The formation of a legal system as embodied by the Code

civil, compound of a series of consistent sequences from more general to ever more less general norms, sub-norms and exceptions as a formally rationalized optimum hierarchization, took place in one act with the national unification and a new, revolutionary start of law.

Formal rationalization seems to be a companion, in its impact continually growing, of legal development. Albeit a historical product of bourgeois development, formal rationalization as a moment of any actual social influence has a by far more universal role.

Law is the unity, historically at any time concretely defined, of two social functions. As to its main function, it is to regulate social relations while being a tool of, as integrated into, the exercise of power by the ruling classes. Obviously even if law with its class function withered away, the regulatory function would also insist on rationalization.

Or, to take some examples from history, it is characteristic that even when political structure (in feudal particularism) or legal tradition (in the countries of Common Law) precluded codification, social and economic development could nevertheless enforce a minimum of formal rationalization through the forced fulfillment of certain code-substituting functions. A rationalization of that kind was the practical use as sources of law, of both the collections of formulae compiled for didactic purposes, the compilations of regional customs intending to be but mnemonic aids, the rejected codes, and the ones drafted as private law-books in feudal development. Similarly, a rationalization of that kind has been the textbook-writing (arranging case-law as a system of principles) or the codification of a mere persuasive value (e.g. the Restatement of the Law) in Anglo-American development. Moreover such is the role of the official or unofficial collection of customary laws, further of the doctrinal systematization in the Afro-Asiatic territories where there has been a reluctance to the means of codification or where the development (or replacement) of the Islamic or tribal law has simply been sought by roundabout ways.

As it is shown by legal development, the tendency of formal rationalization stands for a codificational (or quasi-codificational) solution. Formal rationality comes to fruition in the highest degree when organized as a system. In the realm of law the path of codification is the one which lends itself most adequately for an organization as a system.

3. Historical development of the approach to law as a system

It stands out clearly from the survey of the most important stages of codificational development that formal rationalization of law was not the product of inner development: it was brought about by actual economic exigencies in conformity with already dominant ideological and methodological tendencies.

As is known the 17th century was the age of definitive victory of the scientific concept of the Universe over scholastic thinking characteristic of the Middle Ages. It was the age which announced the victory of human reason as an intellectual victory of bourgeoisie. By the way, the scientific concept of the Universe appeared as the adequate expression of middle-class economic interests.

The approach from the side of economic components will reveal that the impact of both rationalism and the idea of methesis universalis was the organization of partial systems belonging to various structures as the elements of an all-comprehensive coherent system, i.e. the subordination of the elements in question to regulating principles which render their interrelations ones of formal logical necessity, and the response to questions put in respect of any of the elements foreseeable and calculable. «All logic is derived from the pattern of the economic decision or... the economic pattern is the matrix of logic», writes an economist on analysing the ideological projections of capitalist economic development 12, whereas what corresponds to rational economic decision is the system-idea translating philosophic rationalism into the language of logic conditioning an axiomatic-deductive world concept as well. It was therefore not solely the domain of natural sciences where efforts were made for an axiomatic exposition. Treatises on politics, ethics, and law (by Hobbes, Spinoza, Grotius, etc.) were equally built up more geometrico, in the axiomatic method of Euclidean geometry with its notional coherence and certainty of reasoning, — or at least by having recourse to it as an ideal pattern. From this it followed that intellectually constructed natural laws, born as tools in the bourgeois struggle against feudalism but ideologically conceived as the eternal laws of reason equivalent to nature, also took on an axiomatic form. Moreover this triumphant world concept led, in the enthusiastic exposition by Leibniz, to the birth of the idea that in the course of continued development a stage would be reached where social and legal problems would in the safest way be solved by the method of «calculemus!» 13.

The idea of system was which manifested itself, ostensibly on the Justinianian pattern, in a variety of absolutistic legislations of wholly different social media and ideological conditions, before all in the administration and judicature of Prussia, characterized by its unrelenting attempt at reducing tus to lex. In its pure form this meant the limitation of any and all law to the enacted, statutory form; the demand for a system of norms bringing under regulation and foreseeing all, even in its minutest details; a system which apart from the law-giver did not tolerate even its interpretation, and authorized those responsible for its application to make their decisions only within the unconditioned thraldom dependency of a paragraph-automaton like a deductive machine.

Beyond the extremities of the patriarchal-despotic style of enlightened absolutistic ruling it was the idea of system which, with a by far more lasting historical validity, made its appearance in the codificational work of the French Revolution, giving consolidated expression to the calculatory exigencies of bourgeoisie. As regards its feature, I think of the specific dialectics guaranteeing sufficient free action in both directions, dialectics namely embodied by a system of rules logically rendering it closed while at the same time open. Sure, the process of codification was no sudden breakthrough caused by the flood of the Revolution: it was a mature product of numerous experimentations reflecting the many waves, political tendencies and phases of the Revolution, advancing its consolidation. Although in a manner bringing about a compromise, a chance was thus offered to bring into prominence the practical feature of codification without the illusions and excesses innate of necessity in the intrinsic logic of revolutions.

With the dialectic unity of closedness and openness codifiers understood to perform the extremely difficult task of objectifying law as a system of higher degree.

The Code could not, however, escape its fate: in the course of its practical implementation it passed through a variety of its most extreme potentialities. As regards the first phase, the Code seemed to be the perfect expression of the needs of liberal economy to an extent that, reinforced by the psychic components of the French gloire, it was before long conceived of as an almost sacred text, the sole and exclusive expression of the French civil law. Its appraisal as definitive and completed went together with the quite natural claim to have its provisions applied in their immediateness in judicial practice. In this manner at the beginning of the 19th century its exceptionally high adequacy with prevailing social conditions and the socially defined (yet epistemologically false) consciousness of its exaggerated valuation provided the social-economic foundations of its exegetical application which, though in a different manner and under different conditions, still in its structure similarly to the Prussian solution, aimed at confining the judge to a deductive machine within the system of administration of justice. Although the exegetetic method corresponded most directly to the axiomatic
ideal and coincided with the demands of philosophical positivism becoming the dominant world-conception of the age, it could obviously satisfy social development temporarily only, up to the limits of its inner adequacy. That is to say, the exegetic trend of code-application seemed to embody a possible alternative which in the light against arbitrariness implied by feudal particularism and feudal privileges, formulated the bourgeois claim for security and law and order in the field of administration of justice. As a matter of fact it served as an optimum pattern of law application adequate to liberal capitalism, gaining admission throughout Europe 14, however, it was unable at the same time, to meet the exigencies of the inevitable development to monopolization.

To meet the imperatives of the monopolistic transformation of economy presupposed a far-reaching loosening of the whole — fixed — framework of law. This was the period of internal crisis characterized by the crying «la légalité nous tue!», the period of the torturing dilemma offering the alternative of either preserving revolutionary achievements or undertaking their jettison in order to go on in the name of further progress. As a matter of course it was economic interest that succeeded by initiating, in the name of free law-finding (freie Rechtsfindung, libre recherche scientifique), to loosen enacted law. From a historical perspective, however, eventually it was not a case of crisis of the rule of law principle itself, but the one of the adaptation of the liberal capitalistic law to the conditions of monopolisation, what amounted in Europe to the temporary swinging over from the one extreme to the other. In the first decades of our century the ardour of the free law movement slowly subsided, and although the adaptation of the law took place overwhelmingly by way of judicial re-interpretation instead of codification, before long a more solid bourgeois rule of law principle reborn, a principle somewhat acting a mediating role between the two extremes.

From the viewpoint of the system approach this transformation can be described as the replacement of the exaggerated conception of the closedness of code-system (in the case of exegetic law-applying) by the one of its openness (in that of free law movement). This process happened to go on until the flashover between the two extremes reached a relative point of rest.

In this connection, however, we are interested in the historically conditioned nature of the system approach rather than in capitalist development. As a matter of fact the system approach, considered in its ideological and methodological foundations, is but the product of the 17th century rationalism and of the classical idea of codification with its demand for exegetic code-application. Of course, this is by far not to be understood as if after this period law objectification in the framework of a system had

14. See e.g. KAYŠUFER Z., Historické základy právního positivmu (Historical Foundations of Legal Positivism), Prague, Academia, 1967.
been void of any significance or failing to meet more universal needs. It means merely that it was then that the system character of law reached its accomplished form. It was then that the objectification of law within the framework of a system had been established in its purest, most theoretical and even doctrinaire, form.

Still it is an ambivalent, Janus-faced situation we have to render account. Namely the treatment of law as a system was born in an extreme form, following the axiomatic pattern of geometry ad absurdum, i.e. in a wholly impracticable way. It was therefore inevitable that subsequent development should repudiate the results so achieved as truly illusory ones. Nevertheless all that had been institutionalized, continued to treat legal axiomatism as some sort of an ideal. It conceived of axiomatism as an ideal which, on the one hand, it tried to approximate as much as could be done, although, on the other, it was aware of the fact that law as a decisively practical system could not meet the exigencies of such an ideal.

It is the axiomatic ideal which to a by no means negligible degree shapes the physignomy of the ideology of law application, generally prevailing even today, and conceiving of the processes of motion, characteristic of law, as bipolarized ones: as processes of two factors embodying opposite functions. Namely legislation which merely creates general norms whereas the application of law relates them to individual cases.

This pattern of the law-applying processes may in the best way be characterized by the terms which M. Weber originally formulated as postulates of the exegesis adequate with the conditions of the 19th century free-trade capitalism: «(1) dass jede konkrete Rechtsentscheidung ‘Anwendung’ eines abstrakten Rechtssatzes auf einen konkreten ‘Tatbestand’ sei, – (2) dass für jeden konkreten Tatbestand mit den Mitteln der Rechtslogik eine Entscheidung aus den geltenden abstrakten Rechtssätzen zu gewinnen sein müsse, – (3) dass also das geltende objektive Recht ein ‘lückenloses’ System von Rechtssätzen darstellen oder latent in sich enthalten oder doch als ein solches für die Zwecke der Rechtsanwendung behandelt werden müsse, – (4) dass das, was sich juristisch nicht rational ‘konstruieren’ lasse, auch rechtlich nicht relevant sei, – (5) dass das Gemeinschaftshandeln der Menschen durchweg als ‘Anwendung’ oder ‘Ausführung’ von Rechtssätzen oder umgekehrt ‘Verstoss’ gegen Rechtssätze gedeutet werden müsse» 15.

This idealized an mostly fictitious concept is of an ambivalent nature owing to the circumstance that the epistemologically distorted structures are not necessarily ontologically distorted in case of the various objectifications called to life by social development. As Gy. Lukács said, the mediating partial complexes (e.g. language and law) could discharge their functions the better the more independently they develop their specific particularity within the total

complex. If such complexes of mediation are formations adequate to their social and economic conditions, even their possible fictitiousness will accurately correspond to the just-so-being of the society where they are to function. Or, it is exactly their total social determinedness which in their apparent self-determinedness may find expression.

4. PRESENT STATE OF THE ATTEMPTS AT A LOGICAL RECONSTRUCTION OF LAW AND LEGAL REASONING

The system-character of law, as seen before, is embedded in the non-epistemological, yet decisively practical dialectics of social development. At the same time, however, no answer has been obtained to the question whether law as organized or treated with a claim to axiomatism is in reality in possession of the properties of axiomatism, or whether it may possess these at all. A reply to such a question may not be attempted unless by a logical reconstruction.

Although in the first third of our century initiatives were taken in jurisprudence for logically exploring the structure of law codes the comprehensive endeavour for a logical modelling of law and legal processes had come from the outside. Following upon the turn of the century, development in the logical apparatus of mathematics as well as in coming into prominence of formal investigations (as further reinforced by the philosophical current of neopositivism) led to the birth of deontic logic, i.e. of formal logic dealing with ought-propositions. This logic was before all of philosophical character and significance. Within a brief span of time it called to life an enormous literature issuing in a variety of schools and formalistic systems. Before long an offshoot to it sprang up, notably its application to the specific problems of law, a development which within a few years resulted in both a proliferating literature and formalistic system-creating experiments.

20. TAMMELI I., Legal Dogmatics and the Mathesis Universalis, Heidelberg, Scherer, 1948;
This logic seemed to be a truly legal logic. In fact it was developed by students of law with a claim to logically reconstructing the processes of both law-making and law-applying.

This expectation, however, proved to be abortive. Notably the extremely complex systems in question, formalized on a very high degree, were almost exclusively inspired by tendencies of formal deontic logic developed independently of law. These were applied to law more or less mechanically instead of setting out from the peculiarities of law. Consequently the intellectual performance hidden in their development could in the first place be appraised only from the aspect of logic. Substantially they did not contribute to the deepening of our theoretical reflection of law.

This was at least the formulated cause of and at the same time the conclusion drawn from the other tendency equally directed to logical reconstruction, which as a reaction to the former was born under the auspices of Ch. Perelman, the philosopher of law teaching in Brussels. Perelman’s antiformalism rejected the formalistic approach described before as something inadequately, aprioristically applied to law, and replaced it by quasi-empiric case-studies: by concrete analysis of the juristic approach to and solution of legal problems, and then by the attempt at a logical reconstruction built on such analysis.

The Perelmanian way of looking at and approaching to the specific structure of law is therefore more settled. His way of putting questions can be characterized as one permeated by juristic sensitivity. His school of Brussels regards before all the questions concerning the changes of law without formal changes in enacted law, i.e. the chance of cases where formal lawfulness may be reached in alternative ways in their contents sharply opposite to each other. To quote a few of his characteristic problems only: why


and how the French and the Belgian civil codes having a uniform wording
could in their life of about a century and a half develop highly divergent
judicial practices covering different solutions and legal realities? What
explains and permits that the legally as well as politically highest forum
administering justice in the United States of America, i.e. the Supreme
Court, passes its decisions relying on the same set of provisions mostly by
ratios of 6 to 3, or even 5 to 4?

The *formalism vs. anti-formalism confrontation* for almost a decade takes
place on various forums, with a high degree of regularity. It was rather
characteristic that on the occasion of the perhaps so far most passionate
debate of conflicting opinions, viz. at the 1969 Brussels colloquy, G.
Kalinowski in defence of *pure deductivism* concluded that there was no
legal logic as specific logic at all, because in legal reasoning what was
specifically legal in reality did not constitute the organic component of
either logic or reasoning. This was the point where Perelman could render
visible the inner limits of formalism eventually leading into a *cul-de-sac*, i.e.
that *formalism could not preserve its purism unless it sterilized legal proces-
ses*. For it is true that in legal reasoning one has to observe formal logic in
so far as it proves to be a satisfactory means. On the other hand, however,
when it proves to be not, it has to be replaced by *argumentation* which
corresponds to the concrete situation of reasoning. This is the case because
the *value of argument depends solely on the situation*, since the very same
argument can according to the situation be equally *relevant or irrelevant, strong or weak*. It is quite exactly obvious in the case of *gaps in law*, when
formal-deductive reasoning fails to reach a conclusion and only argumenta-
tion can produce a gap-filling solution. As Perelman said, «whenever you
have a rule in formal logic you are always allowed to apply it, whereas
when you have a rule in the theory of argumentation, you may apply it, but
there may be another rule that gives another result that you may also apply,
and this is the reason why you cannot always elaborate a complete system
saying in which case you apply this rule and in which case you apply the
other rule. Because law has to be applied also to unforeseen situations. You
may formalize law when it has to be applied to circumstances where ev-
everything has been foreseen, but whenever you come upon an unforeseen
situation, you cannot give rules telling you how to tackle them».

Since many years the positions of both formalism and anti-formalism have

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become substantially rigid. Research work focussed on concrete problems is going on in the one or the other of the two main tendencies in order to elaborate and deepen them. It is a striking feature that whereas one of the tendencies expressly sets out from the assumption that any legal structure, process, etc. may be exhaustively described with the formal apparatus of deontic logic and thus it represents a highly pure axiomatic-deductive pattern, as ideal this pattern has not been rejected even by the other tendency, although reckoning in beforehand with its impossibility it concentrates its efforts on showing the mediating paths as far as logically this is possible. In this way anti-formalism reaches substantially deeper interrelations. It is capable of achieving them not only by demonstrating the doctrinaire and absolutizing character of formalism, moreover not even by defining the place of argumentation in legal reasoning process, in addition to that of deduction. The point that weighs most is the recognition of practical determinedness, and directedness to practical goals, of the logical structure of law. At the same time, however, the expectedly fertile utilization of this recognition has for a certain degree been limited by the want of sociological view in its approach, by its idealism as well as value relativism.

As regards the mutual relations between formalism and anti-formalism, in the last analysis neither tendency should be promoted by categorically rejecting the other. As has been seen the formalistic standpoint has not wholly been rejected even by anti-formalism which seems to develop by preserving, while terminating, formalism. Now I believe that one of the most timely tasks of Marxism is to elaborate a conception which goes beyond even the anti-formalistic approach in order to unfold logic from the socio-historical dialectics of the subject-matter itself.

If we cast a glance at the world of facts it will be obvious that the official input accepted as premises of decision, fed into the judge's head as into a black-box, will not produce the official output. It means that the input will fail to define decision in a formal logical way. In order to describe the real network of the determination of judicial decision, before all we have to Establish what kind of legal structure is concretely of social necessity, forming a component part of the just-so-being of the society in which it functions, and what kind of its practical manipulation is to discharge functions of social existence.

If we concentrate our investigations on socialist society, we may state that in order to guarantee its centrally directed and controlled social organization, and to ensure law and order, further a high degree of the citizen's acquaintance with law, socialism will in its consolidated phases of development bring about a formally rationalized legal order tending towards and

optimum state of codification. Nevertheless, it will be a legal order practically manipulated in dependence on the concrete situation the court is expected to advance, permit or tolerate, most often in cases where the judge is directed also by the policy-making decisions sanctioned as formally obligatory, issued by the Supreme Court.

If the judicial decision is expected to have been standardized by conceptually preestablished patterns of decision, then from the very outset we have to reckon with their only limited guidance as being realized only through linguistic mediation. In the field of law to this yet a number of other elements have to be added. Before all, the premises of legal reasoning leading to judgement are not ready given. These have to be formulated normatively: they rely on normative subsumptions. In the law-applying process the most critical point is the qualification, i.e. the normative subordination of facts, officially established and then described in an object-language, to the classes of qualification, formulated in the meta-language offered by the given set of official patterns of decision. Here we have the peculiar situation that the basic unit of normative language, i.e. legal notion, possesses an alternative exclusiveness. Namely as the result of qualification we have to establish either the presence or the non-presence of a given case. There is neither a third, nor an intermediate solution. Either subordination or its preclusion has in the last analysis to be established categorically, unconditionally, without any reservation, alternativity or conceptual dividedness within the framework of the given set of normative patterns of decision. This is why legal analogy authorized for filling gaps in law will remain but a fictitious one. Be the case in of a similarity of whatever degree actually, analogical qualification will never be an inference to either dialectic identity or partial similarity: it will in each case imply a sharp cutting off as far as the place of the notion, etc. in question within the system is concerned, – i.e. a complete, formal identification finding expression in the community of legal consequences, i.e. the drawing of the notion, etc. into another class of notions, i.e. its complete dissolution.

5. Question of the Axiomatic Conception of Law

Although it seems to be polarized still confronted by the pragmatic, as well as inductive, concept of Common law, the statement which differentiates Continental law as axiomatically orientated from the problem-orientated nature of Common law, remains a basically true one. This is the approach which forwards the definition according to which «Ein logisch geschlossenes Rechtssystem, an dessen Spitz deduktiv ergiebige Obersätze stehen, haben wir als axiomatisch orientiert bezeichnet» 29.

Now the historically conditioned, institutional-ideological set-up which manifests itself in the formation of Continental law as a system, has beyond its peculiarly historical roots encountered a new stimulant in the 20th century. Namely the development of cybernetics and the general systems-theory to autonomous branches of science, on the one hand, and the need brought about by modern bureaucratic organization for producing an enormous mass of provisions nevertheless, hardly to be wielded anymore, on the other, have made indispensable recourse to using electronic computers for the storage of legal information with assuring its optimum retrieval and thus contributing to decision-making process. All these have led to the reinforcement of the system approach. While the traditional outlook of the system approach, rooted in rationalism and the struggle of bourgeoisie against feudalism, has been salvaged to our age, the demand for system-creation ensuing from the modern tendencies of formal logic has of necessity come into contact with the problem-setting characteristic of cybernetics, in order to reinforce each other, i.e. in order to conceive of law in an axiomatic way 30, moreover, in order to attempt even the axiomatic treatment of law and legal theory as well 31.

If, however, axiomatic reconstruction of law is not to be considered as a mere ideological tendency, but as coherent accomplishment of the total set of faith by Hilbertian optimism, viz. «Ich glaube: Alles, was Gegenstand des wissenschaftlichen Denkens überhaupt sein kann, verfällt, sobald es zur Bildung einer Theorie reif ist, der axiomatischen Methode und damit mittelbar der Mathematik. Durch Vordringen zu immer tieferliegender Schichten von Axiomen im vorhin dargelegten Sinne gewinnen wir auch in das Wesen der wissenschaftlichen Denkens selbst immer tiefere Einblicke und werden des Einheit unseres Wissens immer mehr bewusst. In dem Zeichen der axiomatischen Methode erscheint die Mathematik berufen zu


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einer führenden Rolle in der Wissenschaft überhaupt» 32. — provided that Wissenschaft has to include social sciences as well, — relies on an unproved and even unprovable generalization.

As is known the soul, i.e. the sine qua non condition of any axiomatic systems is the deductive sequence of sentences following from one another, or, more precisely, the logically unequivocal deduction of all possible sentences (theorems) from a given set of basic sentences (axioms). Or, in the axiomatic system (1) there must be a finite number of concepts whose meaning is self-evident, and the meaning of all others must be definable by them; and (2) there must be a finite number of sentences whose validity is self-evident, and the validity of all others must be deducible from them. These are the two conditions embodying the specificity of axiomatic systems, which notwithstanding any reconstruction attempted are of necessity to remain unsatisfied in law.

This is the case, first, because law is before all a practical system whose just-so-being in society, as well as practical functioning having a social existence, are of necessity associated with its permanent motion and practical manipulation. Thus notwithstanding any theoretical or ideological closedness, law will of necessity incorporate the element of openness. Secondly, because as a methodological principle, deductivity cannot become a general characteristic of legal enactment. Neither the concepts nor the sentences of the valid law engage one with another following a purely logical or formal necessity. Both the concepts and the sentences are tied to one another by interrelations of contents considerably exceeding the sphere of mere deductibility. Legal norms are mostly formed following the patterns of behaviours of an instrumental value which are considered to be desirable or non-desirable for the achievement of mostly undefined ends whose further, executively deepened, regulation supposes practical valuation of possible means to given ends rather than a deductive sequence.

Incidentally this is the reason why in social regulation the instrumental valutations attached to the ends to be achieved, if they are of legal significance, are normatively defined by the legislator on every level instead of entrusting them either to legal dogmatics or to the practical process of administration of justice.

Beyond this we may even add that a legal system has no basic concepts having of a by itself evident meaning. Moreover, exactly because of its both practical and open nature, the system will never contain its own rules of interpretation in an exhaustive manner.

Deductivity, in so far as there is any sort of it in the field of law at all, has its legitimate role to play in the administration of justice rather than within

the sphere of legislation. If nevertheless we tried to organize the total sum of norms as elements of an axiomatic system, we should have to accept almost each norm, or at least their overwhelming majority, as axioms, — an act obviously meaningless and producing nothing but a verbal solution. According to the very core of any axiomatic system, within an unorganized pile of building blocks there must always be cornerstones a building may be built up of in a given way, i.e. in a single, and at any time reproducible, form. Relations between the building blocks of any legal system are not of a kind that could of necessity be built up in a single way only. The principle of deductivity is the core of any axiomatism. In its absence only a solution can be imaginable whose realization, even if provided, would not bring us closer to the axiomatics of law. Its acceptance would amount to the explanation of the structure of a building exclusively by stating, as condition, the definability of a definite architectural method and a few cornerstones in a way that each built-in brick would be represented as cornerstone, and each technological momentum of building as basic process.  

6. Heuristick value of the approach to law as a system

Any attempts in history to organize law within the framework of an axiomatic system have of necessity suffered a defeat. It may be proved easily from history that it was the goal set that was unrealistic, and not the bare process adopted.

In absolutistic régimes aiming at the unconditional enforcement of a despotic will (e.g. in the case of Justinian, Ivan the Terrible, or Frederick the Great); in the extreme demand for rule of law in periods of revolutionary law-renewal (e.g. in defence of the French revolutionary legislation against the mere possibility of judicial sabotage by the institutionalization of référent législatif); or in the endeavours of a Puritan sectarian community to enforce Biblical commands on earth (e.g. of those taking refuge from religious persecution in England to colonial America), — in all these cases attempts may be discovered to administer justice in a rigorously, formally axiomatic-deductive manner on the basis of a given set of norms conceived of as a system. All these attempts, however, led either to an obvious failure or to an impracticable result in the respective community. The statement that «nothing is more removed from actual events than the closed rational system. Under certain circumstances, nothing contains more irrational drive than a fully self-contained, intellectualistic world-view» reflects experience of a historical generality. It is therefore possible, although the probability of the

opposite result is greater, that «Chiliastic-ecstatic element will ebb away behind the intellectual façade» 34.

Still in like way as the attempts at building up axiomatically patterned legal systems have been historically conditioned 35, objective factors will be instrumental also in preserving the axiomatic pattern as an ideal 36. The organization of society as backed by planning, enforcement and control, equally central, will of necessity strive for elaborating as well as implementing into practice, a pattern theoretically preconceived of as a system. With this striving both structurally and methodologically mostly the concept of a closed system will agree. This is the pattern most traditionally rooted in the Continental ideology of law and law-applying processes. On the other hand, the strictly deductive concept of a formally hierarchic system of legal provisions, traditional in Europe, has never struck roots in the Common law development. The social milieu of judicial law-making as accompanied by the procedural approach to law as well as by the recognition of precedents as primary sources of the law, has created an empiric, and inductive, conception of law focussing on the concrete case with concern of its most concretely given social political, etc. aspects, which seems to justify even the statement that in the judge's hand law is not law because of whence it has been taken, but because of what is has been made by him, as the basis of his decision producing a further precedent. As it is known, in Europe development has brought about a conception of law exactly of the opposite sense, which for its formal application derives law from its being positively enacted. To this conception a deductive method corresponds, i.e. the method aiming properly at applying the law, and as an ideal basis thereto, a complete, free-of-gaps, axiomatically ordered, system of norms.

It follows from the pursuit of completenss that in point of principle the achievable greatest degree of closedness has been set as a goal, whereas in reality some sort of a compromise between closedness and openness (on its turn dependent on concrete social, etc. conditions) can be achieved at most. It is a compromise since, on the one hand, the system will be an open one it will of necessity yield, at least through its adaptation by judicial

practice, to social and economic imperatives urging a change. On the other hand, it will nevertheless preserve its closedness as the ideal pattern will invariably remain a static closed system. And, we may add, after any external movement the system will in fact close. For what happens to penetrate into the system after all, will not be a foreign body, but something organized therein as an integrated element of it.

Naturally such an ideal pattern can be followed by and large only. Anyhow it is a fact of legal development that legal systems may integrate to themselves new, moreover destructive, elements. While accumulating them, however, the process of change may arrive at a threshold whose crossing will inevitably be accompanied by the disintegration of the system. Nevertheless, by preserving certain of its basic principles the continual adaptation of the system in question can be achievable to a high degree, a process most clearly demonstrated by the adaptation of the law codes of liberal capitalism to the needs of monopoly capitalism through, overwhelmingly, judicial practice.

The compromise of closedness and openness can be reached only through building some peculiar legislative techniques into the enacted system of norms. First of all, a considerable space of freedom of action will be itself derive from the notional expression in any case to be characterized by a classifying generality. The effects derived from it may largely be intensified by further techniques. Such is the preamble which, unlike to the statement of motives accompanying the presentation of a Bill and having a force convincing from a historical point of view only, attaches normatively enacted evaluation-contents to the norm-contents of the Act, formally but having the same normative force. Consequently, the evaluation-contents are expected to be applied on par with norms. Furthermore such are those legal propositions formulated on different levels of generality, which seem to be interrelated, though are not detailed enough to present a by itself sufficient regulation of the given question. Thus as general clauses, or principles, of law, they are being filled with concrete contents while their practical application only. Finally such is the institutional provision for filling the law, which dependent on concrete social conditions may function as the continual complement, moreover critical corrective, of the legal system in question.

For the novelty of its construction socialist codification deserves special attention. I mean its formulating besides the formal norm-contents the generalized social contents of any relevant behaviour in the terms of a general

37. Cf. e.g. LÉVY-BRULÉ H., Tensions et conflits au sein d’un même système juridique, «Cahiers internationaux de Sociologie», XXX (1961), pp. 35 et seq.
principle of law. Socialist codification by formulating some general principles constituting the comprehensive social policy-making framework of the whole body of the detailed regulation, offers an opportunity for those responsible for law-application to set aside any otherwise relevant provision in order to determine the case on the ground of other norm(s). As a reversal of the bourgeois prohibition of abuse of rights, socialist civil codes by declaring the obligation of proper use of rights (i.e. by making the exercise of any of the legal rights conditional on its adequacy to the policies, etc. specified in the general principles) have relativized the legal consequences calibrated to the typical by a mobile evaluation gaining concretization in the process of law-application only. Hence, according to the general principles, all that qualifies as atypical will get classified into a special order achieving solution in an atypical way, i.e. on the ground of the general principle in question. In criminal codes the segregation of the atypic takes place in a way that, for establishing the existence of crime and/or imposing punishment, the codifier combines the facts at issue, defined by the general as well as the special parts of the code, with the concrete danger the act constitutes to society. I the act before the court does not present a relevant danger, again recourse will be had to the atypical solution on the ground of the general principle in question.

Irrespective of whether law is actually organized, or is being treated as a system, there is a field where it will nevertheless be considered as a static closed system – no matter whether or not being backed by social as well as legal tradition and practice. I have in mind the approach characteristic of information theory, cybernetics, etc., i.e. the par excellence system approach, which, though being aware of the fact that legal system can be considered neither static nor closed, still for the sake of the coherent observance of its own methodological postulates, is forced to conceive of law as a series of static closed systems succeeding one the other at given moments of time. Although this static closedness seems to be accepted between brackets only as a mere postulate, still any informatic-cybernetic operation will have a meaning only on this assumption. Or, what is more, we have to assume that the inputs fed in will suffice for unequivocally defining the respective output. E.g. although in their ideological and administration of justice patterns the Common law and the Civil law systems are rooted in opposite traditions, the informatic-cybernetic treatment of both the (inductively utilisable) set of judicial precedents and the (deductively applicable) system of enacted legal provisions do not present any significative difference in the established constructions.

In legal practice the postulates characteristic of the system approach may appear as self-evident, although as for their nature they are strongly dis-

puted. I have in mind the basic exigencies of axiomatics prevailing also in
the field of law. Exigencies such as consistence which means that in the
system a given behaviour may be qualified only as X or non-X, i.e. it cannot
occur that in the same system the same behaviour should at the same time
be qualified as lawful and unlawful; categoricity which means that no prin-
ciples, etc. excluding each other are found in the system; and at last but
not least completeness, which implies that normative qualification of any
behaviour within the system should be deductively inferable from the sen-
tences of the legal system.

Here we have to remember that there are attempts of an axiomatic intend
which while going beyond the boundaries of the enacted law, consider it
complete by the force of nothing but an a priori definition. These attempts,
however, pay for this consideration with the arbitrary assumption of artifi-
cial theoretical constructions. On the one hand they allege that be in the
case of whatever kind of behaviour, it gets qualified normatively by the
norms of the system. On the other they postulate a general closing norm
which would vest behaviours qualified as neither obligatory, nor permissive
or prohibited by the norms of the system, with the qualification «norma-
tively indifferent» 42. The completeness of the system, however, can be only
one within the system. It is the doctrinal analysis of the propositions for-
mulated in the system (gaps in law in the positivistic sense) and/or the as-
sertion of social demands for the system (gaps in law in the sociological
sense) which may eventually decide what may be qualified as belonging to
or existing within the system 43. Hence anything that does not belong to the
system is not qualified at all by the system: it stands simply outside, beyond
the sphere which the system responds within or which the system applies to.

It has to be emphasized once again that these postulates are not real in the
practical, dynamic, and partly open, system of law. Still in several legal
systems they serve as an ideal. Moreover in certain branches of law, e.g. in
criminal law, where for reasons of guarantee the postulate of formal legality
comes to the fore, efforts are being made for the possibly most coherent
enforcement of them.

As regards their proper nature they present many similarities to general prin-
ciples of law which reflect demands partly realized, partly merely to be
realized 44. These postulates having a primordially methodological signifi-

42. Conte A., Saggio sulla completezza degli ordinamenti giuridici, Torino, Giappichelli, 1962,
pp. 79 et seq.; Wroblewski J., Systems of Norms and Legal System, «Rivista internazionale di
Filosofia del Diritto», 2/1972, pp. 231 et seq.
43. As to such an inner duality and of, respective differentiation between, juridical concepts,
see Varga Cs., Quelques questions méthodologiques de la formation des concepts en sciences
44. Szántó I., A szocialista jog (Socialist Law), Budapest, Közgazdasági és Jogi Kiadó, 1963,
pp. 67 et seq.
cance are, however, not enacted in any positive legal form. By consequence it is the rational interpreter of law who has to presume their existence 45 46.