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I. B. 1. The Structure of Legal Systems

CSABA VARGA[*]

Structure in Legal Systems:

Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context

Abstract. Does the legal system have a structure (according to sources and branches of law, general and special parts of codes, principles, rules and exceptions in regulation, etc.), or structuring is taken into it from the outside? And providing that it is taken, whoever is taking it? For neither principles, nor rules are given in themselves, separated from each other in a way classified in terms of the law's taxonomic systemicity as bearing their own separate meaning. All this can be but the result of a constitutive act. Based upon legal doctrines, it is judicial practice that builds different propositions into either principles or rules. Or, it is not logic itself that labels anything as a structuring element identified as either principle or rule but we, who ponder the mode of how to construct a sequence of distinction, deduction and justification conclusive enough to convince those controlling the issue we propose in the procedural hierarchy. Therefore the structuring features in law are construed and construing, constructed and constructing at the same time, for they do not and cannot exist in and by themselves at all.

Keywords: structure, division, legal system, principles and rules, legal doctrine, judicial practice, legal construct(ion)

The unquestionable hegemony of the idea of the positivity of law lasted until the third third of the 19th century on the European continent, all along the age of the exegetic application of statutory instruments, until the dawn of the movements of free law. Although re-codification was not effected in the second half of the 20th century—now disregarding the different direction of development taken by the socialist law—and the classical civil codes became gradually reduced, from their classical function of defining the law, to the increasingly passive role of being used as mere systemic *locus*-providers and *locus*-indicators of the direction and conceptuality taken by the judicial

[*] Scientific Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences, Budapest, H–1014 Budapest, Országház u. 30.; Professor and Director of the Institute for Legal Philosophy at the Pázmány Péter Catholic University, Budapest, H–1428 Budapest 8, P. O. Box 6.
E-mail: varga@jak.ppke.hu

law development,[1] the legal doctrine has nevertheless successfully cut down the disintegration caused by the free law movement and maintained a positivistic domination for yet another century on the European continent. Though legal positivism was not shattered by the brief rebirth of natural law which took place after the Second World War (as a post-war German reaction to warmongering), finally, the way of posing questions in legal sociology in Europe (from the 1910s on, launched by *Eugen Ehrlich*), the American "realist" pragmatism (from the 1930s on, inspired mainly by *Roscoe Pound*), the transformation of the new English linguistic and logical analysis of law (from the 1960s on, initiated by *H. L. A. Hart*) into an American-type reconstruction of legal discourses (effective from the 1970s, represented by *Ronald Dworkin*), and, at last—as a stroke of grace—in Europe itself, the stabilisation of the so-called anti-formalist stand (formulated by *Michel Villey* and *Chaïm Perelman*) in the debate on law and logic and its progress into a reconstructive inquiry of legal processes, on the one hand, and the foundation of a continental theory of argumentation, cultivated almost as a substitute to legal dogmatics (mainly introduced by *Robert Alexy* and *Aulis Aarnio*), on the other—well, all these challenged the validity of unconditional adherence to legal positivism—even if exclusively in theoretical explanation—, moreover, made it outdated by the 1980s.[2] In brief, what had seemed, just a few decades ago, to be a demand (guided by wishful thinking) of the "decline" of legal positivism, is now rather anticipated by several visions—instead of a stigma of decay—as the image of a positive escape forwards, resulting from having been transcended as transformed into something new, in a way, however, accompanied by a reassuring continuity.[3]

Nevertheless, the theoretical dominance of legal positivism in its era had offered two possibilities: notably, the acceptance of the actual definition of

[1] Cf., from the author, *Codification as a Socio-historical Phenomenon.* Budapest, 1991, ch. V, para. 5, especially at 121.

[2] For an overview, cf., from the author, *Theory of the Judicial Process* The Establishment of Facts, Budapest, 1995, ch. I.

[3] For the decline, see, e.g., Villey, M.: 'Essor et décadence du volontarisme juridique' *Archives de Philosophie du Droit* 3: Le rôle de la volonté dans le Droit. Paris, 1958. As to continuity, it is characteristic that—only to take just one telling example—the editor of *Transformation de la culture juridique québécoise* dir. Bjarne Melkevik, Québec, 1998, Avant-propos, 7, had to leave his working hypothesis behind as unfounded. Albeit the sub-topic of the debate in question was heralded as „Est-ce la fin de l'hégémonie positiviste?", it does not feature any longer in the printed collection of the proceedings, as the workshop has proven just the antithesis, namely, „l'hégémonie positiviste ne touche nullement à sa fin au Québec, pas plus qu'en d'autres lieux".

the law by positive law in practical legal processes and the explanation of any kind of eventual difference as only an exceptional deviance, on the one hand, and taking the formal and official positivation of the law also as a theoretically descriptive conceptual criterion of legal phenomena, on the other. While the cutting back of the latter took place relatively soon as applied to the notion of juridicity itself,[4] moreover, the former was also cut back in a conclusive way (as mainly replaced by explanation within the framework of the processes of an overall autopoietic system),[5] paradoxically all this has not affected in nearly any respect the range of problems raised by "The Structure of Legal Systems".

In the field of continental civil law, it seemed to be a self-evident fact, not questioned by anybody until the recent decades, that the structure of legal systems consists partly of their visible *external division* (according to *branches* of the law and, inside any of them, according to its *formal sources*)—that is, their division into individual branches of the law, including the relevant provisions of the Constitution, the appropriate code(s) and law(s), the eventual decrees and orders designed to ensure their implementation, as well as the judicial guiding principles, decisions for the uniformity of jurisprudence, and the individual judgements—, and partly of the *internal (logical) self-division* of any legal (normative) regulation resulting from the axiomatic ideal of modern legislation, that is, the fact that regulation is mostly effected by

[4] As a programme and a realisation, cf., from the author, 'Quelques questions méthodologiques de la formation des concepts en sciences juridiques' [1970] *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), para. 4, in particular at 223 et seq. [reprinted in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: Eötvös Lóránd University Project on "Comparative Legal Cultures" 1994), 7–33 {Philosophiae Iuris}].

[5] Cf., as a philosophy of language reconstruction, from the author, *Theory of the Judicial Process…* [1987], passim, and 'The Context of the Judicial Application of Norms' [1988] in *Prescriptive Formality and Normative Rationality in Modern Legal Systems* Festschrift for Robert S. Summers, ed. Werner Krawietz—Neil MacCormick—Georg Henrik von Wright, Berlin, 1994, 495–512. [reprinted as 'The Nature of the Judicial Application of Norms (Science- and Language-philosophical Considerations)' in his *Law and Philosophy*, 295–314], and, as a restatement characteristic of the critical legal studies, Conklin, W. A.: *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Discourse of Suffering. Aldershot, 1998. xii + 258., respectively. It is to be noted that essays on the turn of the 19th and 20th centuries in Central Europe already explored such arguments for theoretical explanation. Cf., above all, Wurzel, K. G.: *Das juristische Denken*, Wien, 1904 [trans. Ernest Bruncken as 'Methods of Juridical Thinking' in *Science of Legal Method*, Boston, 1917 (reprint: New York, 1969), 286–428. (The Modern Legal Philosophy Series IX)].

general rules and particular dispositions in the *general*, as well as the *particular parts* of the law-code in question, on the one hand, and by established *principles*, main *rules* (disposing of the particular area of regulation), rules (breaking them further down in concretisation), *exceptions* (allowing concessions from these), as well as sub-exceptions (making additional concessions available with regard to their last specification), on the other. All this encountered no problems for a long time, because it was made visible exactly this way; however, also because a number of legal theories (including, of course, that of MARXISM) were trying to find (simplifyingly, viewing law as the reflection of something else, external to and outside of it, hence having to conform in features, structure, etc. to what it is a reflection of) a kind of correspondence between law and the spheres of (social) reality regulated by it, which is not merely instrumental and/or functional, but also epistemologically interpretable;[6] as well as because these theories took far too seriously the suggestion of all the positive law's staff on the exclusivity of established juristic methods in legal processes. This was the shift in codification from the casuistry to the axiomatic ideal, the transition from the *creative precedential induction* (method of comparing, assimilating and distinguishing those precedents, taking the individual cases for a starting point), to the *reproductive* and *mechanical, deductive rule-application* (starting out from the mass of provisions at various degrees of generality of the code, construed as constituents of one logical system, following the axiomatic ideal).[7]

What the DWORKINian theoretical challenge has made unambiguous is that there are principles in every system which are, as to their nature, not only different from the rules but, in fact, control the very policy of the

[6] Cf., e.g., Samu, M.: *A szocialista jogrendszer tagozódásának alapja* [The basis of divisions structuring the socialist legal system]. Budapest, 1964. 268., and, as its ontological criticism, from the present author, *The Place of Law in Lukács' World Concept*, Budapest, 1985 [reprint 1998], ch. 5, para. 3, especially at 123 et seq.

[7] Cf., from the author, *Lectures on the Paradigms of Legal Thinking*, Budapest, 1999, ch. 2, para. 1, 9 et seq. [Philosophiae Iuris]. See, also from the author, as the first critical formulation of its primitive idea, with his proposition to transcend it, 'A magatartási szabály és az objektív igazság kérdése' [Rule of behaviour and the question of objective truth, 1964] in *Útkeresés* Kísérletek — kéziratban [The Search for a Path: Early Essays in Manuscript]. Budapest, 2001, 4–18. [Jogfilozófiák] and, as applied to the paradigm of basis and superstructure in *Marx*ism, 'Autonomy and Instrumentality of Law in a Super-structural Perspective' [1985] *Acta Juridica Hungarica* 40 (1999) 3–4, 213–235.

applicability of rules and, thereby, also their actual practice.[8] Well, it is not by mere chance that, based upon this, it was in the United States of America, the flagship of politicised aspirations and expectations, that the practice known as constitutionalisation (subjecting any issue at will to get reduced to—for being inferred directly from—basic rights or constitutional values)[9] had evolved. In parallel with this, as a result of the compromise between the needs in changing life and the technical availabilities offered by the law's codification, after the Second World War the German style of legal dogmatics had, as its own construction developed from the practice based on general clauses, already definitely nourished a conception of law, defining it as a texture made up of principles and rules.[10]

However, as it can be told about the facts that they never get to the court by themselves, labelled and prepared for a syllogistic inference from the complex of facts and norms[11] (but only as the result of a *creative*—both *normative*[12] and *constructive*[13]—act of the judicial forum taking a decision),[14]

[8] Since the classical *topos* by Ronald M. Dworkin's 'The Model of Rules' *University of Chicago Law Review* 35 (1967), 14 et seq., his entire oeuvre seems to substantiate the underlying idea mostly in a constitutional context.

[9] For a dissent in a similarly politicised mirror, see Bork, R. H.: *Slouching towards Gomorrah* Modern Liberalism and American Decline. New York, 1997. xiv + 382. Also cf., from the present author, 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* Tanulmányok Várkonyi Nándor: Az ötödik ember című művéről [Human species drifting: On Várkonyi's The Fifth Man] Katalin Mezey ed. Budapest, 2000, 61–93, in particular at 71–76.

[10] Cf., above all, Alexy, R.: *Theorie der Grundrechte.* Baden-Baden, 1985, and, as built into a coherent theory, Pokol, B.: *The Concept of Law* The Multi-layered Legal System, Budapest, 2001, particularly ch. VIII, 90–106. For the overall debate, cf., e.g., Carl E. Schneider 'State-interest Analysis in Fourteenth Amendment »Privacy Law«: An Essay on the Constitutionalization of Social Issues' *Law and Contemporary Problems* 1988/1, 79–121; Epp, Ch. R.: *The Rights Revolution*, Chicago—London, 1988; Koch, H.: 'Constitutionalization of Legal Order', Copenhagen, 1998. [a paper presented at the XVth World Congress of Comparative Law, Bristol]; Poplawska, E.: 'Constitutionalization of the Legal Order' *Polish Contemporary Law* 1998/1–4, 115–133.

[11] "For court purposes, what the court thinks about the facts is all that matters. For actual events […] happened in the past. They do not walk into the court." Jerome Frank *Courts on Trial* Myth and Reality in American Justice, Princeton, 1949, 15.

[12] See, e.g., most expressedly from Joachim Israel, 'Is a Non-normative Social Science Possible?' *Acta Sociologica* 15 (1972) 1, 69–87 and 'Stipulations and Construction in the Social Sciences' in *The Context of Social Psychology* A Critical Assessment, ed. J. Israel—H. Tajfel, London—New York, 1972, 123–211.

similarly, neither the principles nor the rules are given in themselves, separated as such from each other in a way classified according to the law's taxonomic systemicity as bearing their own, separate meaning. As is known, all this can only be the result of a creative act. Based upon the *doctrinal study of law*, which classifies the law's notions by transforming them into a legal system, it is the *judicial forum*, exercising its authority while undertaking its exclusive responsibility to decide, that builds different propositions into (or, properly speaking, uses them in its reasoning openly or implicitly as) either principles or rules, respectively. And, in parallel with this, it is their *posterior analytical reconstruction* that will also label them, interpreting the immense mass of normative regulations and reasonings used as just a raw material, as principles or rules.

Does the legal system itself have a structure, or is any structure taken into (or given to) it from the outside? And if it is taken, whoever is taking it? I think it would be absurd to give any kind of negative answer: how would it be possible to transplant any structure into something thought to be unstructured by itself? Or, for the sake of any reasonable answer, we have to hypothesise the legal system as being *structured* in itself. However, the questions "what is it?" and "what does it consist of?", "how is it divided and into what?" and "what is the meaning of this all and of any of its structured components?", as well as "what is the significance of its being structured?"—well, all these depend already upon the sense given (or, more precisely, attributed) to law.

Formerly, in a somewhat similar context, I had already presented the figure of three partially intersecting circles. This was intended to prove, as against the normativist message of legal positivism (claiming that by means of norms alone one can bring about a medium of own existence, capable of effective operation in social practice), that the criteria for the law set when it has been made positive do not necessarily imply more than sheer manifestations of an intention that existed at the time of positivation. Therefore, the concern of what the law has been intended to be (i.e., to signify and represent) by its drafter(s) when it has been promulgated (e.g., in legislation) is not necessarily identical with the one of what and how the law is being formed into—when re-asserted, adapted, or ceased practically to exist—in either its official "application" (e.g., in judicial practice) or its

[13] See, e.g., most forcefully, Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik, Leipzig—Wien, 1934.

[14] Cf., from the author, *Theory of the Judicial Process*, passim.

actual community practice respecting the unofficial and spontaneous, popular ways of customary proceeding as legal.[15]

Well, we can apply again the aforementioned figure (implying the practice of hermeneutical communities, giving and exchanging meanings) as reflected to the issue of the internal structuring of the legal system itself, by placing the intersecting circles into a circle partly closed. [Figure] The reason for this is that the legislator may influence the decision to be taken by the legal and/or the social community on what is what amongst the possible structuring components of the legal system and also on what kind of one-sided or symmetrical connection is being implied by each of these in what type of horizontal or vertical context. However, we also have to bear in mind that, according to the nature of things, any creature of the legislator can exclusively become productive in the hands and through the understandings of its addressees as clients—as operated by its professional official administrator and/or the practice of non-professionals—by their standardising pattern which, as conventionalisingly re-asserted, may become organised as and integrated into social tradition. There is one considerable difference from the instance invoked above, relating to the theoretical understanding of facts, notwithstanding. Namely, the entirety of processes and interactions in question is mediated through and within the bounds of a *legal doctrine*, that is, by the conceptual sets and contexts of its prevailing *dogmatics*, constantly refined by both practitioners and prudents of the law, i.e., by a dogmatics that albeit mostly lacks officially established and formal qualities, yet exerts, by means of professional socialisation, a practically exclusive impact upon how the law, as explored and solidified in its internal system, is actually understood and practised. And no need to say that the more the legal processes (legislation and administration of justice) are practised and controlled by the *legal profession*, the more the *doctrinal* representation and mediation of the law prevails.

In consequence, it is not logic itself that labels anything as a structuring element identified either as a principle or as a rule, but we, who ponder, as the only possibility, always based upon the more or less successful comprehension of such a doctrine, projected through its re-consideration and reconstructive re-interpretation onto our given question, the mode of how to construct a sequence *of distinguishing*, *deduction* and *justification*,

[15] Cf., from the author, 'Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures' [1985] in *Law in East and West* ed. Institute of Comparative Law of the Waseda University, Tokyo, 1988, especially at 271–272 [reprinted in his *Law and Philosophy*, 437–457].

which seems to be utilisable and conclusive enough to convince those who control the issue we propose, in the procedural hierarchy. In doing so, we start from a practically optional formulation of normative language and reasoning (or from any expressions or even fragments of these), and within the boundaries of the internal 'rules of the [legal] game' (of how to proceed in identification, argumentation and induction/deduction, etc.) as established and re-confirmed by the legal profession in practice.

Of course, in practice all this appears as dynamism, and not as chaos; as openness to new issues, but by no means unforeseeability lacking any perspective. This assumes creative and constructive co-operation with normative force on behalf of all actors and, at the same time, also a community game processualised in formal sequences, as controlled in multiple ways many times; in which although equal chances are granted to everyone in principle, and anyone may innovate or deviate from earlier rules, yet anybody doing so not only has to give motives and justification for this, but also to derive this as inevitably resulting (even if not perceived and not practised by anybody so far) from the normative order which is continuously claimed to have remained untouched as a whole, and thereby again re-established and re-asserted (that is, re-conventionalised) in its overall arrangement.[16]

In a final conclusion, notwithstanding, in the long run and in their practical continuity, both the structuralisation of the legal system and the considerable stability of the way it is made up can be taken as granted. As opposed to the obvious architectural analogy in this case, our edifice is not built into one single construction by assembling components originating from different sources and made up of different elements—in architecture: bricks, mortar and plaster. On the contrary, we build and live the lawyer's

[16] All this recalls the obvious parallel with the challenge of *Euclid*'s geometry by *Bolyai* and *Lobachevsky*. "From an external point of view […] the creation of »another new world« is manifest in the choice between equally eligible incidentalities and the presentation of the selected variant as perfect and logically necessary. […] This concerns conceptualisation, namely the fact that conceptual systems, be they as perfect as possible from an internal point of view or had they the most convincing explanatory force when describing the external world, can merely be regarded as mental experiments. They are nothing but games, which we make use of *faute de mieux*." Varga *Lectures*, 38.

It is to be noted, however, that legal systems achieving a mature and balanced state are characterised exactly by the conscious institutionalisation of the ability of challenging the system from within the system (as an own judicial solution on account of gaps in the law unfillable otherwise, pursuant to, e.g., overruling precedents in England or § 1 (2) of the Swiss *Zivilgesetzbuch*), however, due to the self-disciplining force of the system, this does not proliferate in practice, being resorted to as a corrective measure only in the last resort.

profession using the only one material at our disposal, notably, language, in which words are selected to refer to concepts so that the suitable series of intellectual (logical) operations can be performed.[17] Well, the question of which word stands in the place of what (the role it will be used in and what it will refer to in the given hermeneutical situation) depends, in addition to the language use socialised and conventionalised,[18] in a direct sense exclusively on those who perform the intellectual (logical) operation in question. And the person concerned is involved as a hermeneutical actor in the given circles of communication, on the one hand, and, at the same time, is also an actor of some sociological situation, on the other, who, in average cases, will act in the way he is expected to, not exceeding the justifiable boundaries of his professional socialisation(s).

It can be established, therefore, that in our human world one acts amongst and as confronted with a huge number of various *donnés* crystallised in conventionalised (and continuously re-conventionalising) tradition, that is, *donnés* that never stand by themselves as they are never freed from their humanly given meaning. Time after time *construits* are being generated out of these, for and to the benefit of man performing an action, which are going to be transmitted to his fellows and to the posterity, only to become a tradition which, in its turn, will be further handed down again merely in its quality as a *donné*.[19] Well, if we inquire, in an ontological sense, about the continuity and practicality of these and the safety of their meaningful transmission, we can confirm that, throughout the historical process of conventionalisations, a kind of "tendential unity"[20] can always be safely recognised—both in the sense of the actuality of their functional correspondence to the overall social practice and of the reliability of their materialisation through speech acts.

All in all, my report has intended to present, as a basis, the elementary component of the idea underlying the questions set forth above, namely, the apparent paradox traceable in it, according to which structuring features in law are, in their massive incidence, construed/constructed and construing/constructing at the same time, for they do not and cannot exist in and by themselves at all.

[17] For the stand of logic and conceptuality in human thinking, cf., from the author, 'Az ellentmondás természete' [The nature of contradiction, 1989] in his *Útkeresés*, 138–139.

[18] Cf., e.g., Ost, F. : 'Le code et le dictionnaire: Acceptabilité linguistique et validité juridique' *Sociologie et sociétés* XVIII (avril 1986) 1, 59–75.

[19] For the expression of *François Gény,* cf. Varga *Lectures*, 4.

[20] For the expression of *Georg Lukács*, cf. Varga *The Place of Law*, *ibidem.*

[Figure]