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TOWARDS RATIONAL LEGISLATION

Introduction

“δει γάρ τόν μεν νόμον άρχειν πάντων”. The law ought to be supreme over all, wrote Aristotle in Politics. *Lex est, quod populus iubet atque constituit,* according to Roman Law: *consensus facit legem*. And, *ubi societas ibi ius.* The law is an expression of social power, probably. "Every law, when complete, is either of a *coercive* or *uncoercive* nature.

A coercive law is a *command*.

An uncoercive, or rather a *dis*coercive, law is the *revocation*, in whole, or in part, of a coercive law."[1]

Every *law* or *rule* (taken with the largest signification which can be given to the term *properly*) is a *command*. Or, rather, laws or rules, properly so called, are a *species* of commands..."[2] "...every positive law, or every law strictly so called, is a direct or circuitous command of a monarch or sovereign number ... to a person in a state of subjection to its author."[3]

According to *Kelsen*, "If a particular law is called a command, or "will" of the legislator, or if law is called the "command" or "will" of the "state", this can be taken as only a figurative expression... The law enacted by the legislator is a "command" only if it is assumed that this command has binding force. A command which has binding force is, indeed, a norm. But without the concept of the norm, the law can be described only with the help of a fiction, and *Austin's* assertion that legal rules are "commands" is a superflous and dangerous fiction of the "will" of the legislator or the state."[4]

The tenets, mentioned above, are down right classical commonplaces for jurisprudence up to date. The word about the meaning of terms: "*law*" is both an *academic* subject and a *practical* governmental vocation, the largest of all. When I use the term in these two senses I shall try to make clear which I intend. As an academic subject, law has long been a subdivision within the parent field of legal philosophy. In the other sense law is a practical or pragmatical term; it plays a specific role in the social order.

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[1] J. BENTHAM: An Introduction to the Principles of Morals and Legislation. The collected works of J. Bentham. Ed. by J. H. Burns H. L. A. Hart. University of London. The Athlone Press. 1970., p. 302.
[2] J. AUSTIN: The Province of Jurisprudence Determined. Oxford, 1954. p. 13.
[3] J. AUSTIN ibid., p. 134.
[4] H. KELSEN: The Pure Theory of Law and Analytical Jurisprudence. In: *What is Justice*. Law and Politics in the Mirror of Science. Collected essays by H. Kelsen. University of California Press, 1971. p. 273.

Let's suppose that the *law* is not part of natural reality but a norm by which reality may be measured.[5] A legal norm is used to stand for a system of coercive rules. To say that someone has a legal duty is therefore to say no more than that some rule of law makes the opposite conduct the condition for coercion to be applied to him. The *law is law:* a general social system of rules valid in space and time. Whatever is given for law by the person or persons recognized as possessing the power of making laws, is *law*. Therefore the legal rules defined the human conduct but the right definition of them may not be independent from real conditions.[6]

The law has many functions wherein coercive enforcement is very much in the background. At the turn of this century the practice of law dealt with a limited subject matter and law in well-defined patterns. Judges apply legal norms in cases in their jurisdiction. Judges presume usually that the legal norms they are applying are *rational*. And sometimes judges decide *against* the effective legal norm. These are real decisions but not formally valid law creating actions.

Implementation of law means to apply norms to social situations, i.e. in law-cases, to motivate people to obey the law either by voluntary compliance or by enforcing the law. Applied norm by jurisdiction and by the subjects of law is the *practical law* which always is changing.

Actually, the norms of law are not constitued forever and for each society. In realistic terms, what the public conceives as lawful or unlawful is almost changing day in and day out. Legal norms created by *legislative* authorities, too, are changing swiftly nowadays: what was still law in force yesterday may well have lost its validity by now. *Court* rulings, or judicial practice in general, also tend to be modified: judgments of yesterday are unlike those of today which, in turn, may be unlike those of tomorrow. In practical law, then, *change* is the most general feature.

Legal sciences give information in terms of norms at any levels of generalisation. Science, of course, is neither legislator nor judge. Legal science can only describe the law by making certain presuppositions. Let us suppose that Kant was right when he wrote that "Ob die Bearbeitung der Erkentnisse, die zum Vernunftgesch□fte gehören, den sicheren Gang einer Wissenschaft gehe oder nicht, das l□□t sich bald aus dem Erfolg beurteilen."[7]

The *law in force* and the *decision* of the court are equally *valid*. We suppose that the legal norm and the judicial decision are a limitation upon *rationality*.

If a judicial decision is according to a legal norm in force, that is *just*. If an act is applicable in the judicial practice, that is *right*. "True ideas are those that we can assimilate, validate, corroborate and verify. False ideas are those that we can not."[8]

Well then, we suppose that the codified law or the legislation of the law making organs is the *ultima ratio*. The legal norms are true ideas because we must assimilate them *(ignorantia iuris neminem excusat),* and the law applying organs *must* to validate,

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[5] See, for example. A. H□GERSTRÖM: Inquires into the Nature of Law and Morals. Almquist □ Wiksell. Stockholm, 1953.
[6] A. AARNIO: The Rational as Reasonable. Dordrecht, 1987. Ch. II.
[7] I. KANT: Kritik der reinen Vernunft. Hamburg, Felix Meiner 1976. BVII.
[8] W. JAMES: Pragmatism. Indianapolis-Cambridge, Hackett, 1988. p. 92.

corroborate and verify them. All law could be reduced to a logic of the *will* of the legislator perhaps, in which every human behaviour could be seen either as commanded or prohibited or allowed, or not commanded, not prohibited or not allowed by law. Where an act is commanded or prohibited or allowed, it is the subject of a legal duty. If the law ought to be supreme over all, then there is not a question of its rationality. Law is the rationality itself. *Error multiplex*, *veritas una*. This pretty statement is nice, everything is all right. Or not, perhaps?

The absurd law

Let us suppose a society where the all relevant social problems are regulated perfectly well by the legal rules of human conduct. The legal norms in the status of *perfection* are definitives, i.e. they are not changed. The court decides equally and always according to the legal norms. The jurisdiction and the reason of the legislation are adequate to each other. The effective law is the one best way for the regulation.

Thus the laws and the jurisdictions may be forever. If something is perfect, change is *irrational* and therefore shall be not allowed. In that case the people follow the rules of law: the reason of the human behaviour is adequate with laws. Thus the laws as *universal rationality* are for all mankind.

This is *lex aeterna,* the law of reason of the *cosmos*, the *logos*, which rules the universe. This is the idealistic State of *Platon* with an idealistic law which had attained perfection. The idealistic State and the idealistic law do not develop or change: they are perfect forms, i.e. forms of *perfect rationality*. Of course without variations, this is a global state and law.

It is only in the mind, naturally. In the reality, during the history of human kind, we cannot find any form of the idealistic (perfect) state or law. Rightly the *idealistic* state and law are equal with an *absurd* state and law. We know it right well that these may be goals for mankind but those aims cannot be attained. Thus, the *real rational* is *absurd* for us.

Legislation would like to create perfect legal norms. The law applying authorities would like to make perfect decisions according to the prescriptions of law in force. People do not want to hurt the legal prescriptions, usually. But imaginations, attempts and activities as results are inadequate with them.

In that sense, our *rational* aims are *irrational* ones. We would like to make constant or perfect laws for a long time. From one point of view of juristic analysis, the legislative, it no doubt is i.e. from the aspect of its future operations and its applicability to a set of cases. We would like a correct legal praxis, i.e. law applying decisions which are in accordance with the valid legal norms. We would like that people live under the laws. Thus, the target for us is an imagination which is equivalent with idealistic law and state, i.e. which are absurd rationalities. The fact in this field is the compromise. That is, some laws are good and some are bad. Some judicial decisions are just and some unjust. The activity of some people is legal and others are illegal. Accountability is based on legal norms. But the explanation and the interpretation of the laws are sometimes *out* of the legal normativity. A provision of law - if it is a rule for action - contains two main

elements: an idea of an action and some interpretative symbols. Some parts of the interpretations are out of legal norms (*metajuristic* elements). We do not have an absolute rule about when the use of metajuristic elements in interpretationis is acceptable or not acceptable.

Thus the rationality of law is *not a pure* legal rationality. The "original" legal rationalities are valid together with other kind of social thought. The point is that a legal norm must be applied with other rules and imaginations of the society. Thus the legal norms cannot be exact now as expressions of real rationality. The "*perfect law*" is only an *idea*, the idea of *absurd* law. It is a source of legal thinking, legal myths and theoretical ballasts. Really, we cannot create good legal norms or law applying decisions for everlasting time, mostly because the nature of law. That is, that law is obeyed by everybody. But law is not the aim of life for humans. The binding force of a rule and the aims of human beings are different things. The *law* is only *law*, and the aim of human life is not only to follow the rules of law.

Creating legal rules, we cannot define the reason for human life. That is, the legal norms may not be absolute rules. But the target-state may be artificial and absurd. Thus, the rationality of law and rational legislation may be to establish and examine in *space* and *time*. *Plato* had written the indealistic State (and law). And he wrote also, in Statesman: "The differences of men and their conduct, and the fact that in human affairs nothing ever stands still, do not permit a general and universal rule in anything. No art can lay down a rule which will last forever.".

The real law

True law is right reason in agreement with legal *norms* and social *facts*[9]: they are of universal application, not unchanging and everlasting, they summon to duty by their commands, and avert from wrongdoing by their prohibitions. Which is the true law: the *positive* law or that which functions in lawcases (*subjective* law)? According to the legal order, or Constitutionalism, of first important in legalism or constitutionalism: may be the rule of law of the act, and not the subjective *right*. The legal norm is in the first place, and in the second is the subjective law. It is quite sure that the mentioned doctrin's a principe of *validity* which is not valid in the problem of the *rationality* of law.

Really, legal reasoning in general, and thus the application, implementation and justification of rules is held to be a rational activity. In a *formalistic* sense the rationality of an jurisdictional *decision* comes from the applied *act*. Therefore a judgement could not derogate from the rules of positive law. Rationality of an act is based upon the constitution. Thus, the constitution is the law of laws, an universal *logos* which is the origin of all legal rationalities. This is a general measure used by parliament, government and constitutional court. They can solve all the problems on this basis. On the basis of *myth* of law. In that way it is a very hard task to find the rationality of law, especially the rationality of legislation.

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[9] K. OLIVECRONA: Law as Fact. Copenhagen-London. 1939.

There is what they ought to do, and what is rational, which are not the same. Probably, the concept of legal rationality may be defined without the idea of validity or binding force of law. But the concept of law we can not define without the validity of law, i.e. what they ought to do. Othervise, a norm is a conditional obligation, a judicial decision is a defined obligation. In a realistic sense, the latter is the stronger, i.e this is the real law.

We *believe* that the rationality of law is evidence. The rationality is the *legal* and *sociological* reason of the norms and the law administering decisions. The rationality of law, in this aspect, is the changing of the juridical praxis and the changing of legislator's praxis. It is changing because it is rational. And, it is not changing, because it is rational. It is changing according to ethical, political, economical, cultural and sociological conditions of a society. The law is that part of culture which shaped and formed the social conditions, is the framework of political and economical relations and stands on the base of ethics, usually. The changing of law is equivalent with the development of law and society. Thus the law is rational, because it is developing. Thus, the social conditions, and circumstances define the content of legal rationality, and the legal norms define the development of the society. It looks like this is a typical *idem per idem*, or the great act of Münchausen.

There has been much discussion amongst political theorists and lawyers as to the meaning and usefulness of the rationality of law. It is indeed difficult in theory and impossible in practice to draw a precise dividing line between legislative rationality on the one hand and the social, political and economic on the other, and there is an inseparable mingling of the theoretically separate functions. We have no exact measures to qualify the rationality of legislation. Theories of up to date jurisprudence on the rationality of legislation solve no real problem. Just now we have no exact measures to qualify the rationality of law and legislation. When one comes to such questions as freedom, value judgments, or the nature of the connection of mind and social relations we are left completely in the dark. In reality the legal reasons have been expressed in imperative form through up to date formal legislation, and are beginning to be preserved in the same form in books of law. The effect of the theories on legal rationality here is simply to open our minds to receiving any evidence, not to furnish evidence.

Political legislation

Let us suppose that the growing complexity of society, however, does not allow lawyers to regard legislation as a form of "*art*" any longer. In order to face this growing complexity, legislative ruling in the 21st century will demonstrate an increasing need for new theoretical frameworks that can help to focus on new questions and analyses and generate appropriate solutions. A legisprudential approach to legal theory aims to contribute to the construction and development of such a framework, that will be interdisciplinary in nature.

As to legislation as a form of "art" of lawyers, in Hungary I cannot say that this is so. The legislation is a specific result of political compromises. It looks, Hungarian legislation in this century is under different *political* ideas. After the first world war Hungary renewed legal norms according to changing political, economical and territorial conditions. The renovation attached to public law, mostly.

After the second world war Hungary renewed its legal system again. This reform was general, i.e. in all fields of the law. The purpose of all kinds of legislation was the creation of the "socialist legal order".

After 1989 the Hungarian legal order was changing. This legal reform was also general, i.e. it extended to all fields of law. The general purposes of our legislation after 1989 was simply: abrogation of the socialist legal order on the one hand and the creation of a new legal order which follows the laws of the European Community on the other hand. It is easy to understand that in this century in Hungarian legislation *politics* played the main role. Politics, is sometimes rationality but usually is coercion. In that situation what about "rationality" of legislation? In practical politics an academic attempt to draw the theoretical line may be contrary to facts and common sense.

Actually, Hungarian legislation in this century is *overpolitised,* i.e. the concludent reasons of law-creation are based on mostly political ideas. The terminology and the rules of law have too many political ideals and rationalities, expressed in legal form, of course. The morality and the cultural traditions are under the clouds. It looks that the main aspect of politics is *usefulness* in the practice of the last ten years, and the usefulness for politicians, over all. All the changing of general policy *demoralised* the people. But when people saw that ruling policy is for politicians and not for all the people, at the elections they changed them. Therefore different governments followed in Hungary, from 1989. I am convinced that in 1989 the voting was against the communist régime and not for the *Antall* régime. People did not want to follow the communist régime, and for the change the Antall version of politics was a realistic alternative. The Antall regime could not solve the general problems of society, but solved some private problems of some politicians. In 1994 the election changed the Antall régime to the *Horn* régime. The voting was against the Antall régime, and not for socialism. The Horn régime could not solve the general problems of society, but solved some private problems of some politicians. In 1998 the voters changed the *Horn* régime. The votes are against the Horn-government and it is not quite sure that they were the *for Orban* government. That is, in Hungary the people vote *against* for something, and not for something. This is very important. Whatever political rationality cannot be acceptable if it demoralizes the society or some important part of the society.

The practical rationality of legislation is a rather complicated problem. Scholars and politicians of the classical Western countries imagine sometimes that they know everything about the rationality - i.e. democratic rationality - of legislation. This is a mistake. I suppose, those who do not know enough about *dictatorship*, cannot explain the essence of democracy. In a political sense, if we speak about legal rationality, maybe the preliminary questionis the evidence of *democracy* and dictatorship. In a realistic sense this problem is equivalent with the exercising of the ruling power in a society.

Centralization or contrentration of the ruling power in a society is that specific form, which shall lead us to a dictatorship. Democratism, liberalism, in a specific form shall lead us to a disorder, i.e. to anarchy. Dictatorship and anarchy are the bad forms of the social coesistence. With other words they are the *irrational forms* of the existence of a society. But unfortunatedly, they may be very logical forms, of course in a special idealistic point of view.

Thus, the first or preliminary political question of the rationality of legislation is, which kind of society and state are we speaking about. There is a quite different rationality of legislation for a democratic state, and for a dictatorship. This is not an academic or political question. If a democracy can not live, it is followed by a dictatorship, usually.

For Hungary, and for Central European countries now, dictatorship is a "bad dream", and a fact of the past, but it is not an absolutely irrationality: when democracy ends dictatorship begins. There is a pretty task to separate the rationality of the legislation of a democracy and a dictatorship. This based upon, of course, political rationalities.

Rationality of the legislation depends on to democracy and dictatorship. When analysing the legal rules in force, the task is more complicated. Because, we can find a set of norms enacted by a dictatorship, which are very democratic ones, virtually. And one can find a set of norms enacted in a democracy, which looks like authoritian provisions.

The legal norms are results of *political actions*, usually. Political actions, through which parliament and government are directed, represent power relations involving bargaining, competition, and compromise. The mobilization of "political capital" in the coercion-legitimacy continuum, makes society through policy and legislation. The process referrs to the events which are involved in the determination and implementation of political goals and the differential distribution and use of power within the society or social groups concerned with the goals being considered. The political actions and system can be analyzed systematically by using different methods. And when we are really at home in the interpretation of political actions, then we are rather far from legal rationality of rational legislation.

Technicalities

Our century is the time of the *decline* of law. In the last century there was no doubt that the rationality of legislation is a question of legal rationality. In the last century the idea of legislation was equivalent with the classical or dogmatic legal theory. In this century there emerged the point of view of sociology, politics, the political economy and the management sciences which *destroyed* the authority of law and *morals*.

Nowadays the main point of view of law is neither legal dogmatism, nor morals. The general principles like usefulness, effectiveness, efficiency, the individual freedom, etc. demoralized the "classical" legal aspects.

The general theory of law and legal philosophy was penetrated with sociology, politics and management, and it lost the battle. Now we have legal sociology, linguistic jurisprudence, political jurisprudence, existential legal philosophy etc., which in common make dubious the sense of legal rationality. The result of different theories is that they attain the weakeness of dogmatism under the *aegis* of modern political and sociological sciences.

If the legal profession can really give lessons in legislation, it is only do so by modestly exercising its talent for observing general principles, for looking always for the substance

of justice and for showing a normal suspicion of excuses based on governmental convenience, the public interest, and so forth.

The legal rationality of legislation becomes *technicalities* only. This is a result of political liberalism and transigent jurisprudence. It looks, once a radical movement takes over the establishment against which it revolted, there is less need for methodological self-consciousness, self-criticism, or a sense of location in real space and time. The main legal rationalities may be universal human rights, the common European laws and constitutionalism. These technicalities are a pretty set of *legal myths*.

Universal human rights cannot be serve as a basic rationality of a legal system. The doctrine of human rights is a political tenet or fiction. They cannot be universal, because there are so many societies, so many human rights. There is no universal rationality.

There is the same matter with *common European laws*. The provisions for a common Europe, made in Bruxelles for the unification of the European laws are political demands of an organisation.

The *constitution* as an universal rationality for a legal order connected with the doctrine of "rechstaat". The European constitutions contain a lot of prescritions which are judicially enforceable, i.e. they are political demands only. If the constitution tries to specify something to which a decent society commits itself that is only a myth of law, worth nothing in the real world.

It looks, we cannot live without legal myths. Rational legislation cannot, I suspect, be written without one or the other of these aspects. If there are no intuitions into which to resolve concepts nor any internal relations among concepts to make possible linguistic discoveries, then indeed it is hard to imagine what rationality might be.

Emerging now as a new science is legisprudence[10], which is working on such problems by trying to focus on the possibilities and limits of scientific research and teaching as applied to the processes and contents of legislation, the legis-tactics, the legis-methodology and the legis- implementation. They are all technical expressions of the problems of modern legislation. This effort to discover and describe the characteristics that identify law usually meets with a measure of legal techniques. Wisely, few experts of legisprudence any longer try to explain what rationality might be in a general sense. "Rationality does not require that we know everything[11] but only that we make the best use of what knowledge we have or can get."

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[10] U. CARPEN: Legislation and Legistics in European Countries. In: Legislation in European Countries. Ed. by U. Karpen. Nomos Verlagsgesellschaft. Baden-Baden, 1996. pp. 11-12.
[11] A. KAPLAN: Some limitations on rationality. In: Rational decision. Ed. by C. J. Friedrich I. Nomos VII. Atherton Press, New York, 1964. p. 58.