Ádám Miklós Balássy[1]

Uncertainties about the 'systemic' nature of the legal system

„The pound of flesh, which I demand of him,
Is dearly bought; 'tis mine and I will have it.
If you deny me, fie upon your law!
[…]
I crave the law,
The penalty and forfeit of my bond."[2]

General thoughts

Our legal norms are constantly changing (*panta rhei*), because law is only one of the infinite set of rules of social behaviour. In Heraclitus's formulation, different waters are always flowing over those who step into the river,[3] similarly, legal norms can be understood as people who are

1 LL. M., J.D., A.P., and PhD student at the Károli Gáspár University of the Reformed Church in Hungary, Postgraduate Doctoral School of Law and Political Sciences; supervisor: Prof. Dr. Zoltán J. Tóth professor, Department of Universal History, Theory, and Religious History Law.

2 Shakespeare: *In his drama The Merchant of Venice, we find a textbook example of the need for legal certainty and the constant change of law itself as a social norm. Shakespeare's work also shows that the very fact that a legal norm is created and promulgated by individuals empowered by society – by virtue of the fact that all the requirements necessary for the validity of the legal norm have been met at the time of its creation – does not make it just.* in William Shakespeare: *The Merchant of Venice,* IV. act 1. scene, also According to Plato, justice itself cannot consist in following the law.

3 Hermann Diels: *Doxographi graeci*, Georg Andreas Reimer, Berlin (Berolini), 1879, 471. pp. 4. §. *"βουλόμενος γὰρ ἐμφανίσαι, ὅτι αἱ φυχαὶ ἀναθυμιώμεναι νοεραὶ ἀεὶ γίνονται, εἴκασεν αὐτὰς τοῖς ποταμοῖς λέγων οὕτως , ποταμοῖσι τοῖσιν αὐτοῖσιν ἐμβαίνουσιν ἕτερα καὶ ἕτερα ὕδατα ἐπιρρεῖ. χαἰφυχαὶ δὲ ἀπὸ τῶν ὑγρῶν ἀναθυμιῶντα."* CF: Walther Kranz:

stepping into the river, and the changing social medium is nothing other than the moving water itself.[4] What that means that we have static norms whose material content does not change – i.e., the right to life, principle of *nullum crimen sine lege* –[5] but whose formality, – in the perspective of the syntactic and semantic relationship – does, as the social medium are changes. At the same time, we can also conclude that in contrast to our static norms, whose material content does not change, we have dynamic norms, whose material content dose change (by the interpretation of the law), even though their formality, – in the terms of the syntactic and semantic relationship does not change.

Nevertheless, this means that the legal system must be composed of a set of s t a t i c and d y n a m i c legal norms. On the one hand, it must have a set of norms that are static in order to be of value to the legal system – and, on the other hand, it must necessarily have a set of dynamic norms reflecting social, historical, economic and technological changes. The specificity of static legal norms is that they cannot contradict other norms and cannot be subject to legal interpretation – *verba clara non admittunt interpretationem, neque voluntas coniectura.*

To further expand on Heraclitus' thought, if water does not continue to flow, we can conceive of it as a single, static, and unchanging entity. For, if the river loses its dynamism, either it becomes stagnant water or it dries up, that is to say 'dies'.[6] This means that law must first be understood first as a system of values which reflecting a social expectations (as a mast

---

Die Fragmente der Vorsokratiker, Weidmannsohe Buchhandlung, Berlin, 1912,*80.* pp.“*Wer in dieselben Fluten hinabsteigt, dem strömt stets anderes Wasser zu. Auch die Seelen dünsten aus dem Feuchten hervor.”*

4 CF: J. R. R. Tolkien: *Lord of the Rings*, Book II. Chapter 9. The Great River, 388. pp. *For the Elves the world moves, and it moves both very swift and very slow. Swift, because they themselves change little, and all else fleets by it is a grief to them. Slow, because they need not count the running years, not for themselves. The passing seasons are but ripples ever repeated in the long-long stream. Yet beneath the Sun all things must wear to an end at last.*

5 Charter of Fundamental Rights of the European Union. (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012P%2FTXT)

6 CF: (edit:) Andrew Szudek: *How Philosophy works,* Dorling Kindersley, UK., 2019., 21. pp.

standing firm in a storm) and second as a set of conventions that change organically in the course of a continuous struggle – which only becomes *living law* if it is interpreted by the judge, so that the dynamic and static nature of the legal system can be seen as nothing more than a fundamental criterion of a complex society and the rule of law. The *rule of law*, however, does not mean the *rule of words* – in the grammatical sense of the word –, but the rule of the original nature and maker of law, which can be revealed by (legal) analogy – *analogia iurs est regula iuris non ex verbis, sed ex ratione legis deucta.*

On this basis, we can consistently expect law, as a concept, to have both a static and a dynamic function, – just like legal norms. And its static function[7] derives from the procedural obstacles that the law regulates, while its dynamic function derives from its continuous evolution – i.e., from the conflicts. It is an essential element of law that it defines for individuals, in general terms, some – prohibitive, permissive, or prescriptive – conduct.[8]

The legal norms can be understood as a subjective act (*facultas agendi*) in the meaning of the word of 'law' on the other hand as well as an objective act (*norma agenda*) in the meaning of the word of 'right'. The 'right' in the substantive sense (*droit, ius, Recht*) can be a diversity of sources of law, including the Acts that we have. 'Law' (*loi, lex, Gesetz*), on the on the other hand, is one type of source of law – but also the most important – and the most prominent source of law among *other regulators* (like *de facto* kind of source of norms).

This abstract principle can be formulated as the general applicability of a set of legal norms to the whole terrain of society, which can be (*pre*) judged in terms of its predictability, figuratively speaking, as the justice itself. And by justice – *not considering the exegesis of philosophy as a separate discipline*– we can also intuitively interpret legal predictability, as the legal certainty, because indirectly, in the 1993's, the Hungarian Constitutional

7 Note: It is of course only arbitrary to take a static view of an ever-changing legal system, because we pick a moment that suits us and analyse it.

8 Jerome Frank: *Law and the modern mind* in Steves & Sons Limited, London 1949, 52. pp. *„An essential characteristic of law is its generality; since justice requires equality of treatment for all persons, and this means generality. Another necessary characteristic of law is continuity".*

Court, in the name of justice, named justice itself as the basis of the law.[9] Withal, in furtherance to talk about *material* justice, we also demand the unity of the law, because this is what initiate *formal* predictability – which is a straightforward way to the legal certainty. The Constitutional Court has already stated that *"Legal certainty requires not only the clarity of individual acts, but also the predictability of the operation of individual legal institutions. Therefore, procedural guarantees are fundamental to legal certainty. Only by following the rules of a formalised procedure can a valid law be created, and only by complying with procedural norms can legal institutions function constitutionally*."[10] In other words, legal norms are fundamentally based on fuzzy concepts such as *justice*, *equity* or *fides*. These fundamental legal principles, in sequence to generate further – unspecified – legal principles, such as *legal predictability* or *legal certainty*. Legal principles, delimited by an appropriate linguistic system, which can, legitimise themselves by simply with the passage of time – like theories that have already been scientifically disproved. The first phase of legitimation begins with the (*pseudo*) scientific justification of a legal principle and continues with the second phase, in which it is followed by the construction of an 'anti-law' that can only be justified in the model defined, which is based on hypothetical propositions based on *specific axioms*. However, this justification can also be used to refute 'real' scientific principles outside the closed system. Which means nothing more than (arbitrary) extending the internal anti-system, thereby verifying the defined fundamental principles of law.

---

9 15/1993. (III. 12.) CC. decision: *The Constitution does not require the state to return to the original owners property that was unconstitutionally taken away under the previous systems, by the standards of the new rule of law. Similarly, the Constitution does not require the State to provide full compensation or reparation for these injuries. Nor, does the Constitution impose an obligation on the State to retroactively alter or derogate from general rules of civil law, administrative law or procedural law in order to restore property to its former owners or to provide them with full compensation.* CF: László Sólyom*: Az alkotmánybíráskodás kezdetei Magyarországon* in Osiris Kiadó, Budapest, 2001/2. 619. pp.

10 11/1992. (III. 5.) CC. decision: „*Vagyis a jogbiztonság nem csupán az egyes normák egyértelműségét követeli meg, de az egyes jogintézmények működésének kiszámíthatóságát is. Ezért alapvetóek a jogbiztonság szempontjából az eljárási garanciák. Csak formalizált eljárás szabályainak".*

Notwithstanding with the previous observation, the predictability of the application of law must be stand like a fundamental social requirement (which also denotes the validity and practical applicability of the various social norm systems), because in the lack of knowledge of the system of the norm, we cannot speak about legitimate enforceability. If we cannot speak of legitimate enforceability, we cannot speak of legal (*norm*) application – "*Justice without power is inefficient; power without justice is tyranny. Justice without power is opposed, because there are always wicked men. Power without justice is soon questioned. Justice and power must therefore be brought together, so that whatever is just may be powerful, and whatever is powerful may be just.*"[11] Therefore, it can be concluded that the unity of law – in our intern model – is a fundamental requirement for the society, because if we did not define a general set of rules to be followed – prescribing a behaviour for everyone – we could not require an obligation of enforcement *(nullum crimen sine lege).*

Thoughts from the norms

The creation (because it's not a formal law which we 'made') of internal legal *(intern)* norms is the performance of a task which is outsourced by the public authorities when the internal state apparatus does not wish – or is unable – to regulate a subject matter by means of external normative *(extern normative)* acts. It also means that the outsourced body must create the internal norms that are capable of operating the body in accordance with the institutional framework. The application of these acts – directly and indirectly – to all those who come into contact with the body must apply, i.e. it is not merely a guideline but a binding procedural obligation for the body and individuals alike (*normative act*). "[*T*]*he acceptance of the recommendations of such legislation by the recipients concerned, or more precisely by the interested parties, is not binding, but is binding on the public bodies and their employees. Even if the recommendation itself does not contain sanctions, they are nevertheless to be considered as norms sanctioned by means of disciplinary and other legal liability of the public bodies obliged to promote them by way of referral.*"

11 Blaise Pascal: *Thoughts of Blaise Pascal* (translated by Allen, Morrill & Wardwell,) M. H. Newman, New York 1846, 131. pp.

The interference is self-evident; if internal legislation is not made by that is called 'normal' legislation – in a way that fits into the hierarchy of legal sources and meets the requirements of the rule of law – it cannot be a source of law.[12] On the contrary, these internal regulations exist, and it means that the use of undefined regulations are even recognised by specific laws. In the practice of international bodies, we refer to this using the term *soft law*. "*Nevertheless, by following the basic rules of logic, we can conclude that the correctness of premises does not lead to the absoluteness of the conclusion*"[13] – that is, the correct application of logical operations does not guarantee a correct conclusion. For just as two quite false premises can give rise to a true conclusion – if both premises are universal and the conclusion is assertive – so the inverse can also be true.

To justify the applicability of the norms, it is necessary to refer to Kelsen's *Pure Theory of Law (*here in after*:* PTL*)*. According to Kelsen's *pyramid of norms*, a norm can only continually derive its binding force from the norm above it in the pyramid.[14] My hypothesis is that, like the pyramid of norms, when a normative power is based on another norm, it does not imply that it carries with it the authority of that norm. On the other hand, from the point of view of applicability, it is necessary to enhance the (PTL) theory that if a norm – a defined norm – is empowered

12 CF: Fábio Perin Shecaira: *Sources of Law Are not Legal Norms* in Ratio juris an international journal of jurisprudence and philosophy of law, 2014 3. pp. *Thus, when one speaks of 'sources of law' with the intention of referring to sources as they are identified in the rule of recognition operating in a given legal system, one will normally be speaking of sources at an intermediate level of generality […] Source of law is not law (in the sense of legal norm); a source of law is something, most commonly a piece of text approved by law-making officials, from which legal norms can be derived.* https://www.corteidh.or.cr/tablas/r38580.pdf (download: 30.03.2022).

13 Adam M. Balássy: *Logikai "légvár" természete* in XVIII. Jogász Doktoranduszok Szakmai Találkozója, Jog és Állam 31. szám, Károli Gáspár Református Egyetem Állam- és Jogtudományi Kar (edit:) Péter Miskolczi-Bodnár, Budapest, 2021, 14. pp.

14 Hans Kelsen: *General theory of law and state*. Harvard University Press, Cambridge 1949. 131. pp […] *any 'superior' legal norm is the 'source' of the 'inferior' legal norm…a 'superior' legal norm in relation to an 'inferior' legal norm, or the method of creating an (inferior) norm determined by a (superior) norm, and that means a specific content of law.*

by another norm to regulate a matter, then, under the *procedural law theory*, it is considered to be "empowered". Henceforth, if we imply the intern norms automatically to the extern norms, then according to the rules of logic, the 'Kelsen norm pyramid' is transformed into *a closed-procedural staircase*. Which means nothing else but that the consistency of one norm is reduced to the consistency of another, also problematic norm (*regressus ad infinitum*). In order to avoid this 'gap', the legal system must be understood as an *axiomatic* system. The word axiom itself is derived from the Greek *ἀξίωμα* word, which is translated as: something that proves itself, i.e. a kind of fundamental truth. *Axiomatic* systems are basically constructed by reducing the elements of the system to other elements and proving each *theorem* by another theorem – *regressus ad infinitum*. However, in the process of regression, in contemplation to avoid inconsistency of the system, we must stop, and accept a (basic) theorem as an axiom. In our case, it should be understood as a premise whose truth we do not doubt. Undeniably, we can interpret the *mapping* of axiomatic models through *Euclidean* geometry, i.e. an axiomatic system is composed of a set of axioms and theorems. This means that the axioms must be logically trained general statements – these form the basis of the system. Thus, the basis of a legal system is an axiom (*hypothetical basic norm*), from which the possible proposition of the system necessarily follows. As a result of *inductive* reasoning from the *axiom*, we obtain the *theorems*, from which we can return to the axiomatic (hypothetical) basis of the model by subsumptive (*deductive*) logical backtracking. That is, in the case of the mapping, we must think in terms of a closed model, since for a closed and infallible system, human intervention is unnecessary.

The extern general norms can be distorted by (usually clarifying or implementing) intern sources of law – and the application procedures that go with them – and their purpose can even disrupt the systemic nature of (closed) law, in addition to the concrete misapplication, thus subverting the essential element of the Kelsen legal system, i.e., *the absence of contradictions* [law of non-contradiction (here in after: LNC)]. This is problematic because, the LNC guarantees that the model constructed by the theory 'should be' (*Sollen*), which means nothing else than that consistency itself ensures the (*Kelsenian*) interpretability, truth and applicability of the

theory, i.e., that it 'is' (*Sein*). The Kelsenian legal order[15] is a formal unity which constitutes a closed system of procedures, i.e. axioms and rules of inference, written in a precisely defined language – *intuitively evident, not provable by ordinary logical procedure.* In the current case, it can be compared to a closed system made from the legal order established under the Fundamental Law and Legislative Decree.

The basis of this assumption, which goes against the *Kelsenian* principles, is Kurt Gödel's first incompleteness theorem, according to which in an ... *there are statements of the language of which can neither be proved nor disproved*, in other words, Gödel proved that (a system that includes a part of arithmetic) *any consistent formal system within which a certain amount of elementary arithmetic can be carried out is incomplete*. According to Gödel, there exists – and must exist even if the system is based on the fact that there is no such system – a proposition in the Kelsen (*inconsistent*) system of laws that can neither be p r o v e d nor d i s p r o v e d . Such claims, in turn, can thus be regarded as formulas which are *independent of the axiom system*. And formulas which are i n d e p e n d e n t o f t h e a x i o m system will nothing more than typical 'c o n t e r r u l e' , which urge us to act counter-inductively against the thesis being developed. This also means that if we believe a system is consistent, we must be prepared to modify our claim in accordance with the falsifiability principle if new actors, arguments or data arise that show *that our consistent system is inconsistent.* So, the antisystem in our case is – following *Paul Feyerabend's* thought – the data that could disprove even a consistent theory. Actors, arguments or data, can often only be revealed by means of some alternative that contradicts the theory, because they can only emerge not through analysis but through so-called contrasts. That is, when we examine a system and cannot be certain of its infallibility, we must doubt it by means of a contrast statement and the

15 Hans Kelsen: *Concept of legal order* translated by Stanley L. Paulson in American Journal of Jurisprudence 64. pp. "*A legal order is an aggregate or a plurality of general and individual norms that govern human behaviour, that prescribe, in other words, how one ought to behave. That behaviour is prescribed in a norm or, what amounts to the same thing, is the content of a norm means that one ought to behave in a certain way. The concept of the norm and the concept of the 'ought' coincide. To prescribe in a norm how one ought to behave is understood here not only as a command but also as a positive permission or an authorization.*"

principle of scepticism. So if after such an examination there is not sufficient certainty that the system is consistent then the sceptical thinker can say that such a system is improbable, uncertain or false – ergo it does not exist.

Feyerabend argues, however, that conductive to secure *empirical content*, one must match theories with other theories, not with experience, and try to apply 'competitively defeated conceptions' (i.e., so-called *pluralistic methodology).* Therefore, if the extern norm only provides the theoretical framework (authority) for the *intern* (concretised) norm, then the purpose of the legal order will only be reflected in the norms governing organisational procedures directly affecting individuals. It follows that it is not the entire legal order that is available to society as a whole, but only the authorised, concrete norms –intern norm, in this case.

If the elements of one system are assigned to the elements of another system, the second system becomes the equivalent of the first system. In our case, we can define the mapping from the point of view of the legal system as the interpretation itself, i.e. *the method and process of interpreting the law.* And the process of attribution in the field of logic can be seen as a mapping or transformation. By mapping or transformation, we mean the process of interpreting elements of one (*primary*) system in terms of elements of another (*secondary*) system – according to some arbitrary but purposefully chosen mapping rule. Accordingly, a *myriad of mapping* systems (*models of interpretation*) can be constructed. Among these, the so-called reversible interpretation methods are the most important ones, where the relation between two systems can be reconstructed in each case and the interpretation itself can be unambiguously verified backwards.

The purpose of legal interpretation is to store information about the original (*primary*) system – and the legal norms it contains as well – and to convey the extracted content of the interpreted norms to the legal practitioner. With a properly and appropriately chosen interpretation system, the mapped context (*interpreted norm*) can be better understood than the original one, and its examination can reveal the context of the original system. In addition, the analysis of the system can be taped and transported for communication purposes – the mapping can therefore be chained when the original is used. However, a system is constructed not only from elements, but also from the system of relationships between elements, i.e. if both elements and system of relationships are mapped so

that both elements and system of relationships in the new system conform to some *mapping rule*, then the mapping of the original system of elements and system of relationships must also *conform*. Which means nothing more than that the mapping can be done in both directions, and when transformed back to the original system, the mapping is *reversible*, and if not, it is *irreversible*. Which means that, in the case of an unambiguous transformation, a first system element may have only one second system element, and in the case of an ambiguous transformation, one system element may have several equivalents in the other system. Ergo, in the case of a complete mapping, every element – and element relation – in the first system has an element – and element relation – in the second system.

With these difficulties, Leibniz discovers the difference that the connection between logic and linguistics can be adequately analysed, so that the mapping can perform a propositional task for the system. Although *Legislative Decree* specifically mentions these externalised (*secunder*) norms (*false*), which are indispensable for the functioning of society, the consistency of our legal system shows that the legislator's (*primary*) intention is to create a single normative system, which is poor in inconsistency, and that we cannot therefore assume that norms (*primary*) and internal normative acts (*secnuder*) are equivalent. The requirement of consistency is therefore nothing other than the absence of inconsistencies between the elements of a given (*legal*) system – i.e. there are no laws, internal normative acts (*regulations, instructions)* which are inconsistent. *"The requirement of the logical inconsistency of a legal system is therefore not a mere logical requirement, but a specific social necessity, namely a necessary expression of the political unity of state power."*[16]

Final thoughts

The legislative system is like the story of Cinderella. For the interpretation of the law works like a magic wand; it is individual and arbitrary, i.e. it bends in any direction the 'magician' (the interpreter) wants by means of semantic, logical, historical and taxonomic manipulation.[17] In the field

16 György ANTALFFY – Mihály SAMU – Imre SZABÓ – Mihály SZOTÁCZKY*: Állam- és jogelmélet*, Tankönyvkiadó, Budapest 1970. 327 and 328. pp.

17 CF: Takyoshi KAWASHIMA: *Japanese Way of legal thinking in Comparative Legal*

of legal interpretation, it is left to the discretion of the legal practitioner to decide which method of interpretation to use, since there is no explicit rule as to which method of interpretation should be used in a given case and which should not. A further problem is that the different methods are not hierarchically related to each other and can therefore lead to conflicting results. Given that our palette of legal interpretations can be considered unlimited, we can conclude that unlimited results can be created.

'The proof of the pudding is in the eating'. Just as in the field of classical physics we are aware that the very act of measurement is an intervention, so in the field of law we can say the same about the interpretation of law.

For when the legal practitioner begins to interpret and examine the content of the law, the result of the examination can only be subjective. In fact, the examination itself changes the objective content of the object under examination, and it is the process of interpretation itself that shifts the content of the object under examination from the objective to the subjective realm.

Our European legal system is based on the logic established by Aristotle, whereas the normative system established by other (Eastern) states is based on an intuitive philosophy of life on a non-rational basis. *Nevertheless, for society, law is a tool, not a solution*. The rules of the game established by the legal system are finite (*ultima ratio*), which means that the norms are impersonal, general, and abstract. Therefore, manipulative social regulation by means of intern legal norms must be avoided, because – in the meaning of the formal source of law – it cannot affect all members of society. In view of all this, we can conclude that 'justness' is therefore not associated with rights and duties, but with justice itself. *The logic applied in the field of law does not always lead to a just result, because individual circumstances cannot be taken into account and, in their absence, because they may distort the consistency of the legal system, and because they are too far removed from the real state of affairs.*[18]

Culture, Dartmouth 1992. "*Our legal system is just like the Cinderella story. Interpretation is the magic wand witch which everything needed can be accomplished through some kind of semantic manipulation.*"

18 CF: Chin Kim and Craig M. Lawson: *The Law of the Subtle Mind: The Traditional Japanese Conception of Law* in International and Comprative Law Quarterly, 1979/28, 3-act 496, 502. pp.

References:

György ANTALFFY – Mihály SAMU – Imre SZABÓ – Mihály SZOTÁCZKY*: Állam- és jogelmélet*, Tankönyvkiadó, Budapest 1970.

Blaise PASCAL: *Thoughts of Blaise Pascal* (translated by Allen, Morrill & Wardwell,) M. H. Newman, New York 1846.

Chin KIM and Craig M. LAWSON: *The Law of the Subtle Mind: The Traditional Japanese Conception of Law* in International and Comprative Law Quarterly, 1979.

Hans KELSEN: *Concept of legal order* translated by Stanley L. Paulson in American Journal of Jurisprudence.

Hans KELSEN: *General theory of law and state*. Harvard University Press, Cambridge 1949.

JEROME Frank: *Law and the modern mind* in Steves & Sons Limited, London 1949.

Takyoshi KAWASHIMA: *Japanese Way of legal thinking in Comparative Legal Culture*, Dartmouth 1992.

Keywords:

legal interpretation, uncertainties, intern and extern norms, jurisprudence, law of non-contradiction, consistency