LEGAL REASONING IN HISTORY

Laszlo Tarnoi de Tharno

Ultima Ratio Legum ([1]), was the inscription engraved on the biggest cannon of the Austro-Hungarian Monarchy. Although this 'ultimate reason' sometimes backfired, no disasters, destruction, ruins were able to shake the belief that brute force should be the arbiter whenever reasonableness failed to reconcile enemies. Legal reasoning overlaps the pages of history; indeed, the last argument in deciding irreconcilable interests is revolutions and wars.

Adding his word to the weight of a thousand pounds of gold, the Gallic chieftain Brennus woefully told to the Roman tribune exacting the war tribute, *Vae Victis !* ([2]).

But, as Bernard Shaw remarks in his *The Revolutionist's Handbook,*

"What experience and history teach is this — that people and governments never have learnt anything from history, or acted on principles deduced from it."

Should we rather believe the statement of Schiller: *Die Weltgeschichte ist das Weltgericht* ([3]) (*?*)

The proposal of this study is (A) to present some extreme cases in which laws disregarding their ontologically unsurmountable limits lost their *raison d'être*; ([4] (B) to give the broad outlines of a historical approach to suprajuridical ideals; ([5]) and (C) to distinguish in legal reasoning between material juridical logic and formal juridical logic ([6]).

A

During the Peloponnesian war, with the purpose of delaying the truce of the gods established by the Karnean feast, the Argives decreed time to be stopped; nevertheless the days ran away, and that decree became a fantastic invention without

any legal force. In the Middle Ages ecclesiastic courts sentenced Copernicus's heliocentric theory; nevertheless, our globe continued revolving around the sun. In both cases a *physical impossibility* prevented the law from being enforced.

Emperor Diocletian imposed a death penalty for the violation of his edict regulating the maximum prices of prime necessities. Because of an *economic impossibility,* this edict became ineffective.

Herod ordered that every new-born was to be killed. He could do it once. Had he done it annually, it would have failed on a *social impossibility,* because it would exterminate that society which was to obey the laws.

The emperor worship of Augustus signified the unity of the Roman empire; when Caligula pretended to be a god, his command failed because of a *cultural impossibility* like the failure of a Habsburg emperor who had demanded that his statue in a Swiss cemetery be revered even by the deceased.

The first organized persecution of Christianity began with the 'loyalty test' under the reign of Decius (AD 249-251); continued with the confiscation of economic resources decreed by Valerian (AD 257) and ended with the death penalty under Diocletian (AD 303-11). Because of a *psychological impossibility,* the religious persecution could not attain the aimed effect. In his edict of Milan, Constantine the Great granted religious freedom (AD 311), and under Theodosius I (AD 378-95) Christianity became the religion of the state. The first extermination edict, issued by Haman, the prime minister of King Xerxes (about 480 BC) failed as well as the concentration camps of Nazi Germany, which could not annihilate all the Jews, either.

With the purpose of regaining their self-determination, the Magyars defeated the Austrian armies in 1848. Emperor Francis Joseph called upon Tzar Nicholas I to suppress the insurrection. The Russian army crushed that revolution; nevertheless, in 1867, Austria had to recognize the constitution of Hungary. After the Second World War the Union of the Soviet Socialist Republics generously sent back the freedom flags captured by Tzarist Russia, and, in 1956, they oppressed the Hungarian

freedom insurrection again. Today, although the Soviet military occupation still continues, a more liberal policy is allowed to the Magyars.

The selections show some of the physical, economic, social, cultural, and psychological impossibilities invalidating the effectiveness of law. There are others ([7]).

By attempting to regulate the pregnancy term to three months instead of nine, the legislator will fail because of a *biological impossiiblity*.

If a dictator commands that two times two is to be five, he will fail because of a *logical impossibility*.

The Art. 1 of the Austro-Hungarian Civil Code prescribing the clause of perpetuality failed because of a *historical impossibility* — ever-changing Law is the expression of the social needs determined by the civilization of a certain age and geographical place ([8]).

B

We can read on a black diorite, which had been transported from Babylon to Susa in about 1800 BC:

"The gods Anu and Bel delighted the flesh of mankind by calling me the god-fearing Hammurabi to establish justice on the earth, to destroy the wicked, and to hold back the strong from oppressing the poor..." ([9]).

Hellenic mythology distinguished between Δικη ([10]) symbolizing judicial decision andΘεμις ([11]) representing 'good advice'. Later, Νομος ([12]) signified man-made-law. Pythagoras counselled the Senate of Krotona to erect a temple dedicated to the Muses symbolizing symphony, harmony, and rhythm in order to achieve concord among the citizens. Solon attributed discord, disorder, and civil wars to flagrant injustice when political leaders plundered the goods belonging to the community ([13]). Socrates believed that justice is to be a virtue. Euripides saw the source of justice in moral conscience manifested in remorse. Pericles's political idea was ευνομη ([14]) good order under good laws. According to Protagoras, justice is what human law declares as

such. Trasymachos believed that justice was the bilateral relationship between rulers and ruled. In a dramatic dialogue of the Athenians versus the Melians, Thucydides transformed Callicles's 'might makes right' thesis into a tremendous doctrine:

"So far as justice is concerned [say the Athenians], keep in mind that the stronger must rule the weak. It is a universal law that the stronger must rule wherever he can. We neither invented this law, nor are the first to enforce it. We are merely acting in accordance with it, and we are sure that you, yourselves [the Melians] or anybody else would proceed in the same way. We have inherited it from our forefathers and bequeath it to the generations of coming times" ([15]).

Roman legal reasoning matched the concept of Law to actual facts rather than following philosophical speculations of Hellenic mind. The practical principle of the Decemvires responsible for the Twelve Table Code was that Law does not create justice, its task is to avoid injustice ([16]).

According to del Vecchio, the etymology of the Latin *jus, justum, justicia* has a connotation to the Sanskrit *ju* [*you*] ([17]) which means to bind, to join. Thus, injustice should be all that involves depravation, disruption, disorder, and dishonesty. Seneca summarizes, "Legem dicimus justi injustique regulam esse" ([18]).

The idea of 'rectitude' (rightness) is a Roman contribution to legal reasoning. It reappears in Dante's *Monarchia*:

"Justitia, de se et in propria natura considerata, est quaedam rectitudo sive regula, obliquum hic inde abiciens" ([19]).

The *Civitas Dei* by St. Augustine gave the origin of the Natural Law theories, distinguishing divine law from human law and, following the patristic tradition, St. Thomas made a triple division separating from each other the divine law, natural law, and human law.

Within this paper there is no space for a detailed analysis of the Natural Law theories which, since the Treaty of Westphalia (1648) never ceased to influence legal reasoning in history. As Cassirer remarks, Hugo Grotius believed that he had encountered such immutable legal principles like Descartes

in his *Mathesis Universalis*. Between 1699-1708, Giambattista Vico wrote:

"The Romans attached to the word jurisprudentia the same meaning as the Greeks attached to the word sapientia (wisdom). For the Romans jurisprudence was the scientia (knowledge) of all things religious and secular" ([20]).

Grotius, the author of *De Jure Belli ac Pacis*, and Vico, the author of the *Scienza Nuova*, have been called the 'jurisconsults of mankind'. I would say that they are the prophets of the legal ideals of mankind. Grotius's 'natural law of nations' as well as Vico's 'diritto universale' wanted to establish a universal system of law which would 'preserve human nature from destruction'. Both overlooked the enormous effect of another kind of legal reasoning which had been written by Machiavelli, who likewise believed that, in his *Il Principe*, he had revealed the invariable motives of human nature which (as Thucidides stated) is and remains always the same.

Emil Lask in his posthumous *Juridical Philosophy* ([21]) states that, by assuming the reality of ideas, all Natural Law theories are based upon a hypostasis which leads to the fiction that Natural Law consisting of extrajuridical ideals is to be considered as the only actual one, and the human law is no law. Nevertheless, he says, the fact of having believed in the regulative force of intemporal ideals is not as many think an error refuted by historical reasoning but rather it has been an undying merit.

C

If we cast a glance into the past, we realize surprisingly that the syllogistic form of legal reasoning appeared the first time in the afore-mentioned Code of Hammurabi:

"If a man has committed highway robbery ... he shall be put to death" (Art. 22). "If a wife ... has belittled her husband, she shall be drowned" (Art. 143)" ([22]).

Maybe, today many victims of highway robbery would not condemn the Art. 22 of the Hammurabi Code. But, the Art. 143 ?

Would there be enough ocean to drown all women who belittle their husbands ?

"If one sings a satyrical song before the house of another, let him be beaten until he dies". "If a man breaks the bone of a freeman, the penalty shall be three hundred *asses*; if he breaks the bone of a slave, one hundred fifty asses ([23]). We can observe the same legal technique in the Twelve Tables Code of Rome (about 450 BC). The syllogistic structure 'If A is C, and B is C, then A is B' is invariably the same but how about the content ?

Some journalists and TV commentators would be perplexed if slandering should be sanctioned today like it was in the early Roman republic. Fervent defenders of human rights are scandalized by the fact that the penalty was twice for breaking the leg of a freeman compared to that of a slave; however, Voltaire tells us that, during the age of enlightenment, Candide met a negro with one hand and one leg in a Dutch colony, and the wretched slave exclaimed, "When we work at the sugar canes and the mill snatches hold of a finger, they cut off a leg..." ([24]). Fanatic saviors of the world proletariat are shocked by the fact that, in Rome, the leg of the poor was cheaper than that of the wealthy; however, they consider it 'social justice' that if someone, be he poor or rich, is unwilling to bow his head before the commanding omnipotent dictator, his head should be cut off.

Tempora mutantur ([25]) ... but, do we also change with them ?

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Legal reasoning, sometimes, is identified with syllogistic reasoning; however, it seems to be appropriate to distinguish between the inference deriving logical conclusions from facts and, on the other hand, subsumption qualifying the facts according to patterns mentally preconceived. The philosophical research striving to discover the relationship between the normative 'ought-to-be' and the actual 'to-be' of law [*jus, droit, Recht, diritto, derecho*] belongs to the material juridical logic; the scientific investigation directed toward the structural analysis of the law [*lex, lois, Gesetz, legge, ley*] and the normative validity of law, pertains to the field of the formal juridical

logic. Both inquiries are justified in their respective fields; the material juridical logic is concerned with the *logos* of Law and the indissoluble uuity of form and content; the formal juridical logic is concerned with structural relations and categories of the juridical norm ([26]).

When judging the practical value of the formal juridical logic, we have to keep in mind that even the best legal technique is a poor vehicle to put in motion the content of law. The operative value of any legal procedure depends upon its effectiveness. If the judge is controlled by the precedent, the courts become syllogisms producing factories of a system condemned to death ([27]).

Before summarizing let me quote a brilliant American jurisconsult, Justice Wendel Holmes:

"The life of law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism determining the rules by which men should be governed. The Law embodies the story of a nations' development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is we must know what it has been and what it tends to become" ([28]).

Briefly, the dilemma is this: might the premises 'A is C' of today be equated with those 'A is C' of yesterday or is there an impossibility which invalidates the vigor of 'C' ? With other words, does it correspond to actual needs that the woman who has belittled her husband is to be drowned or do the conditions of modern civilization demand other measures ?

Conclusion

We have seen some cases of legal reasoning in history. Before concluding, let us show two episodes taken from the history of legal reasoning.

In 1892 Rudolph Jhering who had been responsible for the European free-law-school movement celebrated his fiftieth Doctoral anniversary. The eminent 74 year old philosopher of law who during his life destroyed the false myth of the tyranny of abstract juridical concepts, said:

"The end of law is peace; but the means of this end is war... The life of law is a ceaseless struggle. It can be successful only if the individual is ever ready to defend his rights... He must be vigilant of the sacred rights of free personality and the common welfare of society... The battle for constitutional law is none other than the battle for private law... what is sowed in private law is reaped in public law. Every despotism began with attacks on private law and with the violation of the civil rights of the individual" ([29]).

Under the enormous effect of Jhering, American juridical pragmatism considers that the principal objective of Law is to reconcile conflicting interests. History gives the evidence that the aim of Law is rather to reconcile the conflicting interests with extrajuridical ideals ([30]).

This battle of beliefs and misbeliefs is fought not on the barricades nor in the battlefields. It is waged in the minds of the free individuals. Here, in the depth of human soul can be found those insurmountable barriers which are opposed to any flagrant injustice and the loss of the *raison d'être* of our life-freedom ([31]).

If the Natural Law has not been able to give us immutable laws valid for all spaces and every time, it has pointed out those everlasting ideals, the contempt of which shall necessarily cause the ethical impossibilities of law. For such a reason, the theory concerned with that which cannot be law might be called *Negative Natural Law* ([32]).

In a broader view, every national constitution can be considered as the *Magna Carta* of these common beliefs forming the negative limits of positive law.

To be sure no ideals are able to determine what must be done, but they clearly mark what *can not* be done.

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In *The Law in Literature,* James Jones writes: ([33]):

> "I understand it."
> "No you don't. Every man's supposed to have certain rights."
> "Certain inalienable rights," Starke said, "to liberty, equality and the pursuit of happiness. I learnt it in school as a kid."
> "Not that," Prew said. "That's the Constitution. Nobody believes that any more."
> "Sure they do," Starke said. "They all believe it. They just don't do it. But they believe it."
> "Sure," Prew said. "That's what I mean."
> "But at least in this country they believe it," Starke said "even if they don't do it..."

NOTES

([1]) Ultimate Reason of Laws.

([2]) "Woe to the conquered !".

([3]) History is world's court of judgment.

([4]) *Los Limites Negatives del Derecho* [Negative Limits of Law] Jurisprudencia Argentina, Buenos Aires, No 6551, 1956. *Jog, Hatalom, Erkolcs* [Law, Power, Ethics], Doctoral thesis, Centrum, Budapest, 1934.

([5]) *Las Categorias Onticas del Derecho* [Ontic Categories of Law], paper delivered before the 2nd Inter-American Congress of Philosophy, Santiago, 1956. *Ontological Modalities of Law,* paper delivered before the 2nd Extraordinary Inter-American Congress of Philosophy, Washington, D. C., 1957.

([6]) *Logica Juridica Formal, Logica Juridica Material* [Formal Juridical Logic, Material Juridical Logic], lecture delivered before the Centre for Philosophical Studies of the Autonom University of Mexico, 1963, and Bar Association of Costa Rica, San Jose, 1963, published in the *Revista Brasileira de Filosofia,* Sao Paolo, Vol. XIII, Fasc. 1963, and *Estudios de Derecho,* Magazine of Social Science, Law School, Antioquia University, Colombia, 1963, Vol. XXIV.

([7]) *Derecho, Poder, Moral* [Law, Power, Morality], lecture delivered before the Catholic University of Chile, Santiago, 1956. *Idem:* Law School, National University of Zulia, Maracaibo, Venezuela, 1957. Published in *Ciencia* y *Cultura,* Review of the National University of Zulia.

([8]) *Temas Principales de la Filosofia del Derecho* [Principal Themes of the Philosopy of Law], Vol. I: *Teoria Fundamental,* Book 94 pp., Ed. Avila, Caracas, 1952, and Vol. II: *Metalogica del Derecho,* Libreria Juridica, Buenos Aires, 1956.

(9) DURANT, Will, *The Story of Civilization: Our Oriental Heritage,* Simon & Schuster, New York, 1957.

(10) Dike.

(11) Themis.

(12) Nomos.

(13) LLAMBIAS DE AZEVEDO, J., *El Pensamiento Juridico y del Estado en la Antiquedad: desde Homeros hasta Platon.* (The Juridical and Political Thought in the Antiquity — from Homer to Plato). Libreria Juridica, Buenos Aires, 1956.

(14) Eunome.

(15) THUCIDYDES, *The Peloponnesian War,* Chapter XVII, Transl. by John H. FINLEY, Jr., The Modern Library, New York, 1951.

(16) Author, *From Ancient Mythologies to the Modern Myth of the State,* Hamilton College, New York, 1965, mimeo.

(17) DEL VECCHIO, Giorgio, *La Justicia,* Chap. I, Ed. De Palma, Buenos Aires, 1952.

(18) *Ibid.,* Justice, considered in itself and in its nature, is *rightness* or rule, eliminating the oblique.

(19) *Ibid.,* 15.

(20) *Vico, Giambattista: an International Symposium,* Editor: WHITE, H. V., The Hopkins Press, Baltimore, 1969, p. 51, D. FAUCCI, *Vico and Grotius: Jurisconsults of Mankind,* and E. GIANTURCO, *Vico's Significance in the History of Legal Thought.*

(21) LASK, Emil, *Filosofia Juridica* [Philosophy of Law], Ed. De Palma, Buenos Aires, 1946.

(22) CARROL, EMBREE, MELLON, SCHRIER and TAYLOR, *The Development of Civilization: a Documentary History of Politics, Society, and Thought.* Scott, Foresman & Co., Chicago, 1962.

(23) MOMMSEN, Th., *The History of Rome,* Vol. I., Phoenix Verlag, Lesering, 1955.

(24) DURANT, Will, *The Story of Philosophy,* p. 223, Washington Square Press, New York, 1965.

(25) Times change...

(26) RECASENS SICHES, L., *Nueva Filosofia de la Interpretation del Derecho* [New Philosophy of the Interpretation of Law], Fondo de Cultura Economica, Mexico, 1956, and GARCIA MAYNEZ, E., *Logica del Concepto Juridico* [Logic of the Juridical Concept], Fondo de Cultura Economica, Mexico, 1959.

(27) Author, *Metodologia del Derecho* [Metodology of Law], Bulletin of Central University of Caracas, 1952.

(28) *The Law in Literature,* edited by London, E., Simon & Schuster, New York, 1960.

(29) Author, *Introduction to the Philosophy of Law,* lectures delivered before students of Cornell College, Iowa, and Hamilton College, New York, 1964-65. Mimeographed.

(30) Author, *The Myth of a Mortal God: The Downfall of the Totalitarian*

State, the Hourglass, a Quarterly Journal of Ecumenics for Today and Tomorrow, Center of Interfaith Studies, Lincoln University, Pennsylvania, 1970,

(31) *Ibid.*

(32) *Ibid.*, [2], [5], and [6].

(33) *Ibid.*, [26].