ON THE SOCIALLY DETERMINED NATURE OF LEGAL REASONING

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1. *Interrelation of the creation and application of law*

A number of facts, events and processes have cooperated in the creation of law in society. In the course of its development through many thousand years the law itself was in the service of a number of ends. The position occupied by law in the processes of social motion, its function and importance from the point of view of social development are determined by several concrete functions of the law, before all by a basic function dominating these functions. When now the time of the historical appearance of law and the various aspects of its institutionalization are considered, this underlying fundamental function will in the last resort appear "as a definite settlement of conflicts suiting particular classes, strata or groups of society, together with it the safeguarding of an order doing justice to dominant interests, first, through the settlement of the conflicts, then with the aid of a gradually developing system of standards providing the foundations for such a settlement and partly taking its shape from the conflict-resolving decisions, finally through the organization of society as a whole, or certain phenomena of it by means of legal norms." (1)

This notion of the basic function guarantees an extremely momentous position for the application of law (it defines the *raison d'être* of law almost wholly centred in the law-applying), still at the same time it offers a rather differentiated picture of the part of the creation of law, which manifests itself in the marshalling of conflict-resolving practice into a definite channel, in its entirety in a moulding of social life which equally incorporates the will of the State directed to the shaping of social relations as well as the formal estab-

lishment of means applicable or to be applied in the interest of the enforcement of this will. Actually, as is known, the creation of law has come in the forefront of the interest of society mainly because modern political life by aiming at the expansion of conscious social engineering and as a precondition of it at the ensuring of uniformity, has of necessity laid stress more and more on law-making. However, a vigorous concentration on legislation can be justified only within given limits. As a matter of fact the statement suggests itself that whatever ideas may encircle the activities of the legislator, whatever true or hoped-for significance may be attributed to the part played by him, it will be manifest that "the legislator translates only his immediate object into reality, whereas he will have to assign the realization of any subsequent object to others.» (2) And these «others» stand for the plurality of functions, or more precisely the plurality of persons discharging these functions and embodying the roles corresponding to them. In the sphere of these persons in the first place the judge deserves mention, i.e. the person in charge of the application of law called for the resolution of conflicts of a variety of types.

The relationship of the application of law to the making of law, i.e. of the conflict-resolving decision to positive law, the determinedness of the law-applying processes by a given, pre-existent and formally defined system of norms, the extent and manner of this determinedness, and in particular their theoretical notion, present a historically varied picture. In definite areas and periods, where and when there was a strong central power vested with adequate will and means, and having fair chances for the central guidance of society on a uniform line of policy, vigorous efforts were made for an extremely close delimination of the different elements and likely results of law-applying activity, and the deprivation of those responsible for the administration of justice of any possibility of appraisal or judicial discretion. This servile subordination of the application of law, its deprivation of any chances of an autonomous production of effects, or at least conscious tendencies drifting in this direction, manifest themselves already

in the beginnings of the growth of law. A replica of these, their historically modified variant, or even traces of them, may be discovered in phases of development of almost all historical periods.

Now as regards the restriction of application of law to a mere recital of statutes and simultaneously the detachment of the mental pictures called to reflect reality from reality and its actual potentialities, we believe we had better quote the almost Europe-wide general practice of the century preceding the French Revolution as the most characteristic and in theoretical lessons rich example, i.e. the practice of a period when parallel to the growing vigour of the central power and the rise of a new social class, a natural tendency could be experienced to squeeze law-applying activites into rigorous rules. It should be noted that this age was at the same time the age of the conquest of rationalism and the birth of the theoretical preliminary forms of modern legal positivism. Both the conquest of rationalism and the birth of positivism could manifest themselves as an intellectual expression of the claim advanced and intensified by the economic interests and political tendencies of the bourgeoisie made good in a similar form for a short time even after the Revolution.

This was the age when DESCARTES in his *Règles pour la direction de l'esprit II* formulated the thesis laying the foundations of Cartesian rationalisme viz. «Toutes les fois que deux hommes portent sur la même chose un jugement contraire, il est certain que l'un des deux se trompe. Il y a plus, aucun d'eux ne possède la vérité; car s'il en avait un claire et nette, il pourrait l'exposer à son adversaire de telle sorte qu'elle finirait par forcer sa conviction.» (3) And this was the age when LEIBNIZ in his *Nova Methodus discendae docendaeque jurisprudentiae* made attempts at reducing jurisprudence to a system of axioms, and at building up law itself in a corresponding mathematical form of a set of definitions, theorems and axioms. And finally this was the age when in the service of centralizing and unifying tendencies the identification of legislation and law-interpretation received its ideological ex-

pression. As may be read in a standard work written about three centuries ago, «Comme il n'y a que le Prince qui ait l'autorité d'établir des Loix, il n'y a aussi que lui qui ait le pouvoir d'interpréter celles qui sont établies, parce que l'interprétation de la Loy sert la Loy et elle en a l'autorité.» (4) As a matter of fact the institution of the *référé législatif*, which on the pattern of the *ordonnance* of 1667 following the Justinian example was established in 1790, i.e. during the Revolution, could prohibit the interpretation of law and endow with it the legislator only because in the notion of the age legal practice became for its content identified with legislation, i.e. legislation could so to say be substituted for legal practice. The concern felt for the law-applying process lest the interpretation of law should interfere with it, did not merely hint at a practical source of hazards or a chance of abuses, but at the same time declared an extreme theoretical potentiality of an administration of justice void of all elements of independence and restricted to the recital of the law, to be politically attested ideal, moreover an ideal to be translated into reality. The illusory character of this ideal could be unveiled only by the shortly supervening failure, which at the same time was the impetus that gave birth to a judicial practice in a modern sense and became the foundation of the modern system of superior courts with their function tending towards a unification of the interpretation of law. (5)

This notion of the relationship between legislator and those administering the law, a notion which as has been seen served not merely for the speculative delimitation of a historically given idea, but at the same time for the theoretical support of a practical solution (at least of one intended to be translated into practice) manifests itself in reality as the carrier and consequence of by far deeper tendencies of a theoretical value. As a matter of fact the theoretical tendency behind this notion in conjunction with the characteristically modern idea of the *mos geometricus* contained the allegation of the potentiality of a completely formal deduction and demonstration, of an exhaustive deductive definability by a system of norms, which essentially is but the projection of the funda-

mental idea of Cartesian rationalism onto the law, its adaptation to the peculiarities of the law. In the world of law, however, a similar position would qualify as extremely formal. In fact it necessarily contains a theoretical confirmation of the thesis that in law-applying processes the law to be applied manifests itself merely and exclusively as a set of sentences derived only and exclusively from positive law by means of strictly deductive logical processes and that the law applied as a set of sentences will be defined only and exclusively by the positive law as a system of norms. Obviously this approach may only offer an explanation for the condemnation of the law-interpretation as legislation of necessity, further for the formulation of the shaping of a process of law-application eliminating, and even denying the need of the interpretation of law as a goal. This picture of processes incorporating the administration of law, the certitude affecting the judicial decision and the provableness in a theoretical sense would on the other hand lead to a very abstract conclusion extremely alien to genuine social processes embracing the law and the entire mechanism of the administration of justice. As a matter of fact in the light of what has been set forth earlier then "In substance, given a well-drafted law and a certain fact, it is supposed that any judge, young or old, conservative or progressive, educated or ignorant, in any part of the globe, now or a hundred years ago, should arrive at the same conclusion" ([6]), what is already at the first glance an obvious absurdity, equally conflicting with reason and the actual conditions.

However, all this means but one extreme, one of the extremist points of view or potentialities. As is known the idea of a "legislation without judges" is opposed as the other pair of the antithesis by the idea of an "administration of justice without legislation". ([7]) A few of the theoretical and practical projections of this idea will be dealt with later on. At present we would merely remark that not even this idea exists merely as logical potentiality. In the course of history several attempts were made to establish this one in practice more or less completely, and are still being made in certain specific fields. How-

ever, as may be stated with a claim to generality, in most of the instances reality does not settle down at the extreme points. It takes a position in the intermediary field between the extremes, where the different components, sides and potentialitis operate on one another in the best possible may.

Hence as equally expressed by authors of different times, or professing divergent opinions, the judge "is not a person enforcing the law, like e.g. the bailiff enforcing the judgement». (8) He is vested with autonomous functions discharged and only dischargeable by him. In connection with the definition of this function Continental theory mostly emphasizes the moment of complexity, of dual restriction. As a French author puts it «Le juge est soumis ... à deux devoirs également impératifs: il doit 'rendre la justice', c'est-à-dire apporter au litige qui lui est soumis la solution qui lui paraît la plus équitable. Mais, en même temps, il est lié par le texte de la règle de droit qui doit servir de base à sa décision.» (9) A theoretically more precise, and at the same time more intensely polarized exposition of the Continental doctrine of the dual restriction of the process of judicial decision-making is before all part and parcel of the Scandinavian theory of legal realism. As a matter of fact this theory is to some extent allied to American realism, still at the same time as the ideological reflection of one of the particular members of the family of Continental legal systems conceives the legal rule as a precondition of judicial decision whose effect can be made to prevail only in conjunction with other factors, concurrently with, and defeating, them, and as a potential opponent of these other factors. The postulate of a procedure according to rules, the formal conformity with the provisions of law will accordingly manifest itself in a form necessarily dissolved in categories of more comprehensive contents. As a prominent representative of the movement of Scandinavian realism writes, "The judge is not an automaton which mechanically converts paper rules plus facts into decisions. He is a human being who will carefully attend to his social task by making decisions which he feels to be 'right' in the spirit of the legal and cultural tradition. His respect for the statute is not absolute, obedience to

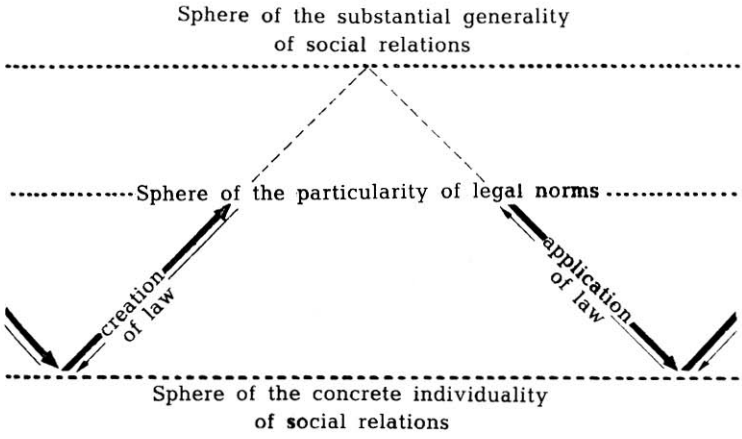
the law not his only motive. In his eyes the statute is not a magic formula, but a manifestation of the ideals, attitudes, standards or evaluations which we have called cultural tradition. Under the name of material legal consciousness this tradition is alive in the mind of the judge and creates a motive that might come into conflict with the demand of the formal legal consciousness for obedience to the law." ([10])

The socialist concept of the relationship between legislator and those applying the law also emphasizes complexity. However, at the same time it points at the different manifestation of divergent elements. As a matter of fact according to the point of view accepted as dominant "in a most general way the application of law is the enforcement of a provision of law, as a generally binding rule of conduct in individual cases and for individual cases within a process which does not merely mean the reciprocal projection of the general to the individual and vice versa, but also the necessity of the creation of the concrete unity of the individual interest and the general one.» ([11]) However, in the light of this notion the socialist state may guarantee the representation of the general interest not only through its legislative policy, but also through its general policy and policy of the enforcement of law. This justifies the exposition of the thesis in the form of a principle that "the law-enforcing agencies by way of individual acts of the application of law and the shaping their general practice of administering the law, and in conformity with the general policy of the socialist state and its law-enforcing policy, make socialist legality prevail", by this method guaranteeing that the law-enforcing agencies proceed "on the ground of socialist law, in conformity with the policy of the party and the state." ([12])

If we are now intent exploring the theoretical roots of this relationship between legislator and judge, before all we shall have to point out that as is known the processes of motion basically characteristic of the law proceed from the social relations to the legal norms, and then again the other way round to the social relations. However, this motion setting out from the social relations and through the mediation of the

legal norms again returning to the social relations does not appear as a process closed down in its non-recurrency, or as a unidirectional process, but as a continually renewed and never ceasing process of motion which at several points even incorporates a moment of feedback. ([13]) The two extreme points of this specifically social and legal motion are formed by the social relations on the one part, and the legal norms specifically reflecting these and occupying the different levels of generality, on the other. The social relation constituting the basis of the processes of legal motion, their starting point and terminal, obviously embody the totality of a number of concrete empirical signs, i.e. a concrete individuality. However, this concrete individuality at the same time contains the moment of substantial generality hidden in the totality in question. As regards the legal norms it has been ascertained that "neither the category of individuality, nor that of generality is capable of grasping the individual phenomena and substantial peculiarities of the social relation to be brought under regulation simultaneously in a way that by terminating and at the same time preserving both moments it would permit the reference of the legal provision to the concrete individual case so as to bring about a connection not only to the concrete individual form of phenomena of the social relation in question, but through this connection and together with it through influencing and deciding the concrete individual case in harmony with the general expressed in the content of the legal norm, at the same time to establish the transition to the substance and generality of the social relation." Under such circumstances as the outcome "not of fortuitous or autotelic arbitrariness, but as a socially much too definite necessity", "in the process of law-making the motion proceeding from the individual forms of phenomena of the social relation to be brought under regulation to the substantial generality and vice versa, concentrates in the particularity as the content of the legal norm," since "the dialectic unity and interrelation of the individual forms of phenomena of the social relation to be brought under regulation and its substantial generality find expression in the logical category of particularity." ([14])

Touching on the relationship of the general, particular and individual we have to emphasize that the substantially general hidden in the social relations as a totality of a number of concrete individual phenomena will come to sight as general only in the process of human, scientific cognition and that only this cognition will lead to the creation of a system of norms which would permit the establishment of relations between the essentially general and the concrete individuality on the level of the particular, by stabilizing the typical elements of a concrete totality formed of individual phenomena. Hence the motion embodying the life of the law, as shown by the diagram in Fig. 1, fundamentally sets out from social relations in order

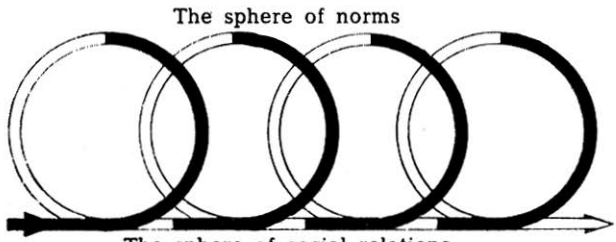


to achieve through the mediation of law-making and in the knowledge of substantial generality explored in the process of scientific cognition the stabilization of the typical traits on the level of the particularity, only in order that the application of law might turn this particular again to the social relations and by this process again to bring about the cross-reference of the general and the individual. In the relationship of the general, particular and individual it is evident that the bulk of the processes of motion leading from the social relations to the norms is carried by the specific legal activity finding ex-

pression in legislation. Still the mutual influencing of social relations and norms may as a matter of course apart from creation and application of the law in the strict sense manifest itself also through other channels, so before all through the non-legislative creation of norms and their effect on social conditions exercised through a medium other than the application of law. The potentiality of uninterrupted motion passing off in formal and non-formal manners between the individual and the general and vice versa, will therefore in all appearance be guaranteed by the organization as the intermediary medium of the particularity, and this organization will at the same time become the ground on which the delimitation of the place and function of the creation and application of law, and of the determinedness of their sphere of motion may rely.

From what has been set forth so far the conclusion may be drawn that motion between the general, the particular and the individual and vice versa is put together of a number of nonstop processes of transitions from the one to the other and that accordingly in this process of motion without a point of rest the segregation of the various components will, surveyed from the point of view of the totality of the processes of social motion, become a relative one. It is exactly the goal of the processes earlier described as processes of social-legal motions to bring about renewedly the transition of one to another, of the general, particular and individual, and vice versa. Law-making sets out from the social relations, whereas the application of law has the social relations as its terminal point. However, the creation of law is not the strictly taken starting point of this social and legal motion, nor is the application of law the terminus of it, inasmuch as the road covered from the social relations to the norms and thence back to the social relations appears merely as an artificially segregated section of this motion. In conformity with the diagram in Fig. 2 this continuously recurring process of motion, rebuilding itself in a continuously modified form, relies on social relations which exactly as a result of the processes of motion manifest themselves in a moulded form. The underlying theoretical ground of

Fig. 2



1 = processes of the creation /formation/ of law
2 = processes of the application /realization/ of law

the character of feedback of the fundamental processes of social and legal motion and of its description as a continuously progressing circular motion are guaranteed by the circumstance that the legal norm, as one of the intermediary points of the determining processes springing forth from the social relations, then reflecting them and in the last resort setting out from the relations of material production receives its shape as a formation defined by these processes. Sociology formulates this relation by bringing forward the statement that the two extreme points of the processes of motion here analyzed, i.e. human conduct finding expression in the social relations and the norm giving expression to the social relations in general present a determinedness by the same or similar factors, ([16]) and that this state of facts appears to be suitable for a repeated emphasis of the functional intertwining of the creation and application of law, their joint determinedness and their reciprocal conditionality in the process of motion characteristic of the life of law. As a matter of fact the making of law and its application are equally called with the knowledge of substantial generality, with the intention to grasp this generality, to interconnect the individual and the particular in a specifically legal manner possessing normativity. This common trait of the law-making and law-applying processes will on the level of the totality of legal phenomena as social phenomena create a

functional community even when it is known that the trend of the establishment of relations brought about by the creation and application of law between the individual and the particular will of necessity remain an antagonistic one. Beyond this we have to remember that as has already been made clear the making of law is not the only and exclusive potentiality of the motion setting out from, nor the application of law the only potentiality of the motion received at, the individual. Thus both the effect directly exercised by the application of law on the formation and moulding of norms, and the realization of norms not postulating application, will on their own part point at the moment of the functional community manifesting itself between the creation and application of the law. Hence in this way determinedness by identical factors and a certain dialectical uniformity of potentialities and effects seem to suggest that from the point of view of the totality of the processes of social motions and in particular of that of the fundamental, basic function of the law, making and applying the law must, at least in a single respect, viz. on the plane of the generality of the above-mentioned determinednesses and of the totality of legal phenomena as social phenomena carrying segregating, specific traits, be considered consubstantial. This con-substantiality does by no means prevent the antithetical directedness of the motions fundamentally characteristic of law-making and law-applying within the framework of this totality and fundamentally determining the specific substance of law-making and law-applying processes. On the other hand this consubstantiality at the same time reminds of an extremely significant circumstance namely that from the point of view of the totality of the processes of social motions and the fundamental functions regarding the law, law-making and law-applying must be qualified as two basic, equally indispensable means mutually dependent on each other, of any social arrangement carried through by means of the law. As a matter of fact creation and application of the law present themselves as consubstantial not only in that by the side of their fundamentally antagonistic direction of motion the two, viz. creation and application, in the face of the antagonism of their specific sub-

stance carry from the point of view of the delimitation of their generic substance common determinedness, but also in the sense that the specific substance, and so the *raison d'être* of both creation and application of the law exists not by itself, but in the other, or more precisely in a functional interconnection with the other. Strictly speaking the goal of the creation of law is not merely and simply the formation of norms, but the exercise of influence on the development of social relations transmitted in the course of enforcement and realization of the law by this formation of norms. Nor is the goal of the application of law merely and simply the unidirectional and in its individuality completed influencing of social relations, but a shaping of these relations of a truly creative character and organizing effect serving the development of social conditions. In this way at the same time the application of law may simultaneously with the development of social conditions become the basis of a new legislation and by this the guarantee of a process of a recirculating motion progressing in a continually modified form, of a process of preserving by terminating and of a feedback specific and desirable also in the life of the law.

If we now speak of the determinednesses jointly affecting creation and application of the law, i.e. of the circumstance that fundamentally and viewed from a given level of generality the same factors determine, and at the most critical points the same traits characterize, creation and application, then in this statement we shall have to take up that in both creation and application of the law these factors and traits will equally manifest themselves in a redoubled form, viz. partly transmitted by the other side of the social and legal process of motion, and partly in a manner independent of this, in an autonomous and direct form. This means that in creation of law beyond the direct social determinedness in general we shall discover the traces of the determindnesses and traits of earlier processes of applying the law, and vice versa, in a manner finding expression as a fundamental, formal postulate, explained by the application character and the specific substance of the administration of law, beyond the direct social determinedness we shall discover in it in all circumstances the

traces of the determinednesses and traits of earlier legislation. Hence the social and political character of influencing and determining the application of law will find expression necessarily in a redoubled form. As a matter of fact this is what as regards the intrinsic determinednesses of the norm to be applied the creation of law from the very outset transmits, on the one hand, and at the same time on the other, it is this which in the external determinednesses of the law-applying process as a social process becomes visible.

In the survey of the relationship between creation and application of law we have pointed at the community of the generic substance appearing on the level of totality of the law and also at the arrangement of these two fundamental sides of the processes of social and legal motion side by side. However, at the same time we have to call forth attention to a few peculiarities affecting the relation between creation and application of law in deeper regions, peculiarities manifesting themselves on the level of the specific substance moving in antagonistic direction and carrying into effect the fundamental differentiation within the sphere of totality of the law. As regards the relation between creation and application of law we may advance the statement that surveyed from the point of view of the institutionalized form of modern law at least in the Continental sense, its positive system of norms, its mechanism and structure of functioning, creation of law occupies the position of the factor dominating the various processes of legal motion, inasmuch as at least in the law in conformity with the traditional principle of the formally also stabilized system of the sources of law the set or the available store of patterns developed in the law-making processes determine, for the contents and formally equally, the application and so the realization of the law. Although from the sociological point of view we may accept the fact of feedback, i.e. the influence of earlier application of law on the creation of law as obvious, still this determinedness will never appear, and cannot even, projected as a formal postulate. On the other hand and simultaneously with it in another relation the application of law may have also to be recognized as a factor possessing a cer-

tain relative priority, inasmuch as it is the application of law as the carrier of the basic function and *raison d'être* of law which in its immediateness achieves the direct goal of the law, the appropriate resolution of social conflicts, and inasmuch as compared to this function the elaboration of the set of patterns in the law-making process will in fact appear rather as an instrumental function. This appreciation of the application of law seems to be sponsored also by the circumstance that there are examples which bear testimony to the more or less permanent or exceptional missing of legislation understood in a formal sense and performed by specialized agencies, in a given period ([16]) or in a given area ([17]). Similarly there are instances known testifying to the fact that given social interests proving sufficient strong will even in the presence of legislation proper may insist on the shaping of a pattern departing from the pattern of decision elaborated in the process of law-creation, which will be considered as valid only for a single case, or which in legal practice will, owing to continuous repetition and reinforcement, gradually take on the institutional form of a general validity. ([18])

The circumstance that as has been pointed out the determinednesses characteristic of both the creation and application of law manifest themselves in a double form again refer to a further peculiarity. The source of this peculiarity is hidden in the fact that the determinednesses influencing the two analyzed sides of the fundamental processes of social and legal motion in a direct and an indirect way, i.e. through the invention of the other side, are not always unidirectional: they do not always reinforce one another, they may be at cross-purposes or running counter one another, and so weaken or even annihilate one another. In the process of legislation the intersecting encounter of this bilateral determinedness will throw out no problems of principle at all. Obviously it is the external, direct social determinedness which will primarily, in a critical situation often exclusively, prevail. In this case the side of indirect determinedness will manifest itself as a negative feedback. On the other hand as far as the application of law is concerned the situation is by far not so clear-cut, for a

problem of this type could be resolved in a reversed form, in its practical effects in an extremely doubtful manner, at least in the form of a compromise only. If determinedness transmitted by the creation of law ran counter the actual, direct and concrete determinedness of the application of law, i.e. if the complex determinedness of the application of law manifested itself in a self-contradictory form, then the solution would from the point of view of formal postulates take shape by satisfying and recognizing the priority of, the indirect determinednesses, and from that of postulates of content by satisfying and recognizing the priority of, the direct determinednesses. At the same time, however, in reality again the dilemma of Scandinavian legal realism referred to earlier would emerge with its full weight, which could be overcome only in a form dependent on the concrete potentialities of the given situation, in most of the cases and likeliest in the form of a compromise.

Finally mention should be made also of the possibility of situations when the basic function of the law will appear in a subordinated form, thrust to the background, or even dissolved in other functions, so that the relation of creation and application of the law not even turn up in its original form. A situation of this type will present itself before all, when the law in its contents and functions anyhow carrying political moments will prove to be an immediate tool of politics and will so fail to serve the resolution of conflicts at all or at least not in a specifically legal manner, ([19]) or when general guidance and organization of society, though in the guise of law, supersedes the specific function of the resolution of conflicts in a manner not even postulating the emergence of legal disputes or their marshalling into given channels, because the use of a legal form is justified only by a notion shaped partly or primarily of a specific administrative idea, specific role, or specific interests.

2. *The socially determined nature of the application of law*

The determinedness of the application of law by the creation

of law at least in point of principle appears to be in general beyond dispute. On the other hand beyond the creation of law and the factors transmitted by the creation of law, the restrictions directly affecting the application of law, or having an effect on it, or moulding it directly, manifest themselves in a less obvious manner for a theoretical study. Normativist or positivist approaches appearing in a variety of forms, if only in order to preserve their methodological purity, in the majority of cases deny, or at least ignore the non-legal determinedness of the law-applying process. Therefore it is easy to see that the element of this external determinedness turning up outside the strictly circumscribable sphere of the making of law cannot serve even as the component of a formal logical approach purposing the full demonstration of the possibility of deducing the one side of the legal processes of motion from the other, and the axiomatization of these processes.

The recognition of the direct social nature of the application of law and its restrictions independent of earlier legislation in the first place and in general finds expression when man suddenly realizes the worldliness, the personal and individual qualities of those responsible for the application of law. "Judges are men", writes Anatole FRANCE pithily in his *Les opinions de Jérôme Coignard*. By this he already points at something essential, namely that the judge too "has his notion of society, an ideology; he professes and detests something, he may be enthusiastic for something, find his salvation in something, and mentally he may take a stand against the antithesis of his Ego" ([21]), i.e. he too has a nature clinging to his individuality, more or less characteristic only of him.

However, the discovery of the physiognomy of the judge in connection with the external restrictions of the administration of justice in the last resort means but the postulation of the application of law, notwithstanding the intrinsic restriction and determinedness by legislation, as a personal performance of specific value, as the work of an individual. The recognition of the role of psychic factors hidden in the law-applying process operates though in the direction of the exploration of the moment of social character, on the other hand at the same

time this recognition does not permit the unfolding of this social character in its complete reality. In particular among legal realists there are approaches which in a by far more clear-cut manner permit an insight into the social character of the everyday environment of judicial decision-making. However, these doctrines still define this environment and its social character from the aspect of the judge, as its personal environment. According to the Scandinavian representative of this legal realism "the administration of justice is the resultant in a parallelogram of forces in which the dominant vectors are the formal and the material legal consciousness." ([22]) This idea has been formulated by the well-known Australian jurist in a similar manner. "The judgement is a complex purposive unit of discourse symbolically apprehending certain factual situations, as well as prior judicial discourses selected by reference to the socio-emotive purpose of the judge in the context of the instant case as he sees it." ([23])

As a matter of fact the application of law together with all of its conditions and factors, with the persons applying the law and their personal traits manifests itself in society as part and parcel of the socio-political processes of motion passing off together with the person administering the law and through his agency. Thus even if the rather palpable expression that "the courts are the catalysts of the legal order" ([24]) throws a light on the function of the law-applying agencies and their activities, the expression itself is nevertheless somehow distorted and so misleading. In fact as is known the catalysts do not take part in the processes elicited and triggered by them, whereas the courts of law through the resolution of conflicts constitute not only the initiators of certain definite processes, but thanks to their potential effects at the same time they constitute the various objects and passive subjects of effects coming from the outer world, the scene of significant political and legal events and the point of precipitation of conflicts. This immediateness of the social character of the application of law thus following from the nature of things objectifies this social character in the product of the law-applying, i.e. in the act of application itself. Consequently the judicial decision will

even for the American theoretical approach appear as "a product of social determinants and an index of social consequences." ([25])

The social determinedness of the law-applying process is for the Marxist doctrine a straightforward fact the more because the doctrine advanced by the classics of Marxism of the law and the general determinedness of the social phenomena and processes have operated in the direction of the emphasis of this determinedness from the very outset. ([26])

Moreover if we recall the fundamental function of the law directed to the resolution of social conflicts and also the circumstance that "the legal norm may define the reconciliation of general and individual interests and the manner of doing it only in an abstract-general form. It devolves on the judicial practice to consider, appraise and so to say classify the conflicting interests", ([27]) then we shall again come to the assertion of a determinedness of the law-applying processes going beyond the determinedness transmitted by the law-making and to some extent independent of it, i.e. to the assertion whose best founded exposition is part of Marxist sociology. As a matter of fact within Marxist sociology in connection with concrete empirical researches the conclusion has been reached that the tendencies in the law-applying processes may be influenced from the point of view of law-making secondary social factors in a significant or even decisive manner. ([28]) As for their immediate effects these factors precipitate in legal consciousness and prevail in the law-applying process through the mediation of this consciousness, and thus even if we have to accept Vishinskiy's statement as one influenced by concrete historical conditions, still for its merit we have to recognize it as true. Accordingly "the understanding of the particular 'circumstances' of the case, yet rather of its 'totality' and its appraisal is in direct relation to the ideas, political and moral opinions inveterate in the consciousness of the judges, to all what is called legal consciousness and what exercises a profound influence on the practical juristic activities of the judges, prosecutors, the agents conducting investiga-

tion, as members of 'their society', as members of the one or the other class of society at every step." ([29])

Apparently from what has been set forth above we are permitted to draw the conclusion that the social factors which permeating through the filter of legal consciousness turn up in the law-applying process, operate not only as *ad hoc* factors effective exclusively in the given case, but also as sets of elements defining the social nature of the application of law and bearing also the marks of generality, however, in the guise of the principles of the policy of law-applying activity, may manifest themselves as postulates for the subsequent application of the law, too. Approximated from the other side this means that the dual determinedness of the application of law will be embodied not only and not exclusively by the sociological facts and reality of the law-applying process conceived as a social process, but at the same time also by the hierarchically and functionally limited character of the law-applying agencies, often stabilized in a more or less open form. It follows "from the ultimate unity of the sovereign power that notwithstanding the organizational autonomy the application of law will be influenced by manifestations of state organs and by manifestations of party guiding these organs which give expression to the appraisal of the given socio-historical situation either as a general political line, or as a narrower guiding principle of legal policy." ([30])

The functions of these factors constituting the social environment of the law-applying process consist before all in their promotion of the mediation between the individuality of the case calling for a decision and the particularity of the norm serving as a possible and appropriate pattern, further of the mutual reference of the general moments hidden in the individual to the norm and of the individual moments potentially included in the particular to the concrete case. I.e. these factors have as their function repeatedly to define the tendencies, framework and contents of this operation, viz. its potentiality and purposiveness, and by this to turn the application of law in its character of application to creation. Although there are opinions which emphatically insist that "juridical valuation

is immanent in the law and not something transcendental toward which the law would tend as toward its purpose. The law does not seek or tend to realize justice because the law itself already is positive justice." ([31]) However, at the same time in the light of a sociological approach pointing beyond the dogmatic point of view the thesis, which would by way of conclusion suggest the mediatedness and determinedness of all qualities of the law conceived in its practical realization exclusively by legislation, could hardly hold its own when it comes to verify it. As a matter of fact as for its contents the law receives its formal determination through the creation of law. However, this determination by contents, exactly because it manifests itself as a formal determination, may become at several points mediated by formal categories, and in this manner more or less of necessity become formal in its entirety. On the other hand simultaneously with this the independent determinedness of the law-applying process will manifest itself in a manner not obligatory and not formalized, and so equally relieved of its stabilization and mediation by formal categories. Compared to the former this determinedness is secondary only, however, as an accessory factor it has a determining importance guaranteeing the immediateness of the social character of the law-applying process.

3. *The socially determined nature of legal reasoning*

In the application of law legal reasoning will turn up as a part of the process of reasoning which includes the definition and qualification of the facts of the case calling for decision, the selection and interpretation of the norm(s) which may come into consideration as a pattern of decision, further as the outcome of all this the projection of the norm(s) to be applied to the case in question. Thus obviously legal reasoning will qualify as a complex process, and if the components of it are examined on logical grounds then it will appear to be even more emphatic. As a matter of fact according to the testimony of logic applied to juridical activity, within the sphere of the

different forms of cogitation as delimited by legal reasoning in point of principle a line may be drawn between the operations of formal logic as logic of intellectual constraint and the operations of rhetoric logic as logic of persuasion on the one hand and the extra-logical, purely legal processes relying exclusively on presumptions, fictions and other provisions formed with the aid of law-making, on the other. ([32]) Now the rhetoric logical and extra-logical processes equally qualify as modalities of argumentation and in some of their components legal reasoning may appear in anyone of these three forms.

Owing to the specific nature and function of the law legal reasoning and the processes of reasoning will in many respects carry specific traits. E.g. in the light of a general methodological study "law-suits are just a special kind of rational dispute, for which the procedures and rules of argument have hardened into institutions", ([33]) so that for a logic conceived in a non-formal sense law-suits will manifest themselves as extremely favourable models of analysis. ([34])

In the socialist theory one sometimes encounters the formulation of the position which reduces legal reasoning to operations which may be performed within the framework of formal logic, and which consequently as regards the possibly mutually contradictory legal conclusions, of necessity establishes the in a strict epistemological sense conceived falsity of one of the conclusions. ([35]) However, this approach manifests itself rather by way of exception and mostly entails vigorous, almost unanimous criticisms. E.g. concerning the criminal law-applying process the thesis has been brought forward that of the application of norms formal correctness and expediency must be characteristic simultaneously. ([36]) In a methodological discussion it has also been set forth that formal logic may bring under regulation legal reasoning only on the grounds, in the manner and within the framework defined by dialectic logic. ([37])

Substantially and eventually the question is whether or not "the logical belongs to the reasoning side of juridical thinking and not to its juridical side", and whether or not the specific of the forms of reasoning characteristic of the law-applying

processes finds an expression in another, by far more specific trait, so e.g. in what formerly Hungarian bourgeois theory of private law for want of a better term defined as the contents of the power of discernment (*iudicium*), rather than the logically controlled nature appearing as an indispensable precondition in all types of practical activity. ([38]) This historically and ideologically equally restricted expression of the fundamental problem will with its psychologizing tendency easily lead astray the answer. Still at the same time this way of expressing the problem makes it clear in a palpable manner that the specific of legal reasoning must be sought for in a factor directly and concretely adhering to the peculiarities of the law, manifesting itself in its individuality and in this way defying formalization, rather than in a general, formal precondition.

Reference to an aspect of the specific is made by an opinion characteristic of the Brussels circle, according to which "les problèmes spécifiques à la logique juridique ne sont pas ceux de la déduction formellement correcte, à partir des prémisses, mais ceux relatifs à l'argumentation permettant de fonder les prémisses du raisonnement." ([39]) As a matter of fact in the sphere of common forms of law and practical activity in the manner of approach specific of the Brussels theorists, as formulated by a leading personality of French philosophy of law in connection with the exposition of his point of view, "On n'y part point d'axiomes certains ni d'évidences cartésiennes, mais plus humblement *d'opinions* socialement admises, et comme disait le moyen âge, *d'autorités*: que cela plaise ou non à Descartes, il en est ainsi, parce que nous n'avons pas d'évidences, et que la connaissance du concret n'est point œuvre à quoi puisse suffire une intelligence isolée, mais œuvre sociale, collective. Et la recherche ... se fait à plusieurs, polyphoniquement, par la controverse, le dialogue, par la dialectique." ([40])

Hence in conformity with the Brussels doctrine the proper foundation of the logic of legal reasoning is provided only and exclusively by argumentation, the controversy of the parties, the decision made by considering the arguments and the counter-arguments and its substantiation rather than by any

possibility of formal demonstration. ([41]) And a logic conceived in this manner will in every respect qualify as peculiar, departing specifically from any non-argumentative process, for in point of fact the characteristic of particular means of reasoning is the circumstance that "Un argument n'est pas correct et contraignant ou incorrect et sans valeur, mais est relevant ou irrelevant, fort ou faible, en fonction de raisons justifiant son emploi en l'occurrence." ([42]) In the scope of this anti-formalistic approach it has been voiced as a significant argument that collective decision-making agencies pass their resolutions mostly by a majority of votes rather than unanimously, and that an explanation of this phenomenon may be given only by the fact that practical reasoning presuming value disputes relies on rhetorical dialectical argumentation guaranteeing the interaction of experiences, convictions and notions of partly indefinite content, which cannot be expressed in the categories of strictly interpreted epistemological truth. ([43]) The nature of legal reasoning void of the possibility of formal demonstration thus manifests itself as an obvious fact which even if the final ends or values are generally accepted is confirmed by the authoritative methods of making the choice between alternatives presenting themselves for concrete practical realization. And in the sphere of law, as the final conclusion puts it, this turning the choice into an authoritative one obtains an expressly institutionalized form. As a matter of fact the legislative act with the weight of legal effect, the law-applying act with that of legal force, for want of rational conviction in a clear-cut manner preclude the contesting of the choice, and so the evidence of a formal demonstration is relieved by the force of power and authority. ([44])

The correctness of the notion presented as the characterization of the specific of legal reasoning, it appears, has at least in the generality of its moments received the support of many a known and extensively approved opinion. As regards e.g. the actual function of the legal force of juridical decision in particular manifesting itself in extraordinary cases, with a certain scepticism it has been pointed out already earlier that "in the judicial application of law often several judicial forums

deciding the same case may have to have their choice of several equally legitimate possibilities and for want of an absolute measure what the highest forum will pronounce will only on the principle of legal force be the best possible choice." ([45]) As regards the question of concrete individuality implied in the decision, and so of a certain personal character referring to the need of conviction, in socialist jurisprudence in the light of the position to be considered general too "it is obvious that the impressions observed during the trial, notwithstanding the fact that the effects were the same and impacted on the members of the court at the same time, will not elicit the same effects from the members of the court". In this manner the end of the collectivity in decision-making will be formulated expressly as the possible reconciliation of personal traits and other intrinsic conditions and the guarantee of many-sided argumentation. ([46]) Socialist literature for its part in all appearance emphasizes partly a certain instrumentality of the intrinsic condition of the subject in making the decision, ([47]) partly the need for the projection of the intrinsic, subjective conviction on to other subjects, i.e. the inter-subjectivity of conviction. It defines the reasonableness of the conviction by declaring that this "has developed on the ground of proofs and arguments interconnecting them tested and cross-checked in the course of procedure conducted in conformity with the rules of procedural cognition and evidence, i.e. on the ground of proofs, arguments and certainty which are already independent of man, in the first place of the personality of the judge and which will elicit in everybody the same conviction, the same certainty, the same general convincing effect." ([48])

Thus the specific of legal reasoning could perhaps most generally be formulated in a way that the specific manifests itself in the shaping of the premisses constituting the preconditions of the deduction implied in reasoning, that is in the non-formal, concrete, individual manner of the shaping of the premisses participating of the personal traits of the subject, thus demanding personal conviction and persuasion, rather than in the process of legal reasoning itself. As has been seen

this statement has been accepted in its entirety and in a direct form by the Brussels circle marked as anti-formalistic. However, at the same time the statement is not alien to the Marxist position quoted earlier. As a matter of fact socialist jurisprudence, when in its application and effects subordinates formal logic equally to dialectic logic and beyond its formal correctness recognizes the desirableness of the emphasis of a number of other considerations, such as e.g. expediency, essentially it transposes the problem strictly speaking into the truly dialectic phase of a non-formal content, opening a wide scope to the influence of concrete individual factors of the process of legal reasoning.

However, this community appearing on the plane of general conclusions does not at the same time stand for a complete uniformity of opinions. In the following we shall briefly touch on the problem of the concrete relationship of Marxist theory to the antiformalistic concept of the Brussels circle. Here we would merely note that although the concept of dialectics developed by the doctrine of argumentation represents Aristotelian dialectics and not dialectics in the Marxist meaning of the term, the recognition of the proper function of subjective factors will not necessarily produce manifestations of subjectivism, and that the settlement of conflict of opinions in an authoritative manner is not absolutely concomitant of a certain type of agnosticism. On the other hand the two approaches of the specific of legal reasoning will as a consequence appear as if it presented a genuine, absolute community in a single respect only, namely in the effort directed to the delimitation of the potentialities of formal logic and its subordination to other factors.

However, even beyond this in our opinion there is yet a point where a specific trait of legal reasoning and a certain community of ideas cannot escape notice. Already in 1967, in the Paris colloquy devoted to the problem of judicial logic one of the lecturers noticed a certain dichotomy in the law-applying decision, when he said that "dès que le juge a posé les prémisses, il ne peut qu'en tirer rigoureusement les conclusions. Le jugement ... revêt ainsi un caractère qu'on pourrait dire

manichéen. Tout aménagement par le juge de la situation qui lui est soumise lui est interdit: ou bien l'acte argué de nullité sera déclaré nul et ne produira aucun effet, ou bien il sera déclaré valable et il produira tous les effets que la loi ou la convention en fait découler." ([49]) This dichotomy does not merely mean that the formulation of the premisses of decision in a given (and in no other) way will entail definite, predictable conclusions previously laid down in the wording of the provision of law, but substantially and before all that the formulation of the premisse itself can take place only in a given way and in a given form, so that in the last resort there are two cases, two potentialities only for the formulation of premisses or the qualification of facts.

In philosophy the uninterrupted, non-stop process of the continuous motion of things, their changing over to other things, and their mutual transformation to one another are generally known phenomena. In like way it is generally recognized that the concepts are artificial, since of necessity they stand for artificial classification and systematization in this process of transformation. For practical purposes any process of cogitation and reasoning will qualify as one of conceptual character. However, in most of the cases this does not preclude these processes from reckoning with the continuous motion of things and at least by way of approximation, from grasping the things in their moving. And in fact from under the flexibility and multi-directional dialectic potentialities of conceptual reflection there is substantially a single exception only, notably the one which has been established for the law and for dogmatic systems similar to the law, such as the theological theories, the system of the rules of games, and some other kinds of what are called "künstliche menschliche Konstruktionen". ([50]) This may be explained by the fact that in a logically closed system every question has its own proper answer, i.e. in the terms of the law (interpreted in a definite manner) a given case must be either subordinated, or not subordinated to the one or the other of the patterns of decision fixed by the law in question. As a matter of fact qualification takes place in the vigorously polarized terms of this system.

Qualification and reasoning by analogy will thus bring about a consciously artificial identification, and finally the structure of legal reasoning will conjure up a structure of Manichean dichotomy, and in its positivist form prefer a structure, which in the last resort will accept definite replies only in the categoric terms of "Yes" and "No".

In this manner the Manichean character of legal reasoning is on the one hand explained by the existence of a system of norms tending in a natural way towards closedness and axiomatization. In this system a given number and quality of factual situations, further the set of consequences assigned to them in a normative manner will receive their definition. At the same time the judicial decision, which on the other hand interprets the Manichean character from another aspect, will function as an act of decision rather than an act of cognition. The element of decision will naturally be given expression in the process of reasoning itself. As a matter of fact reasoning whatever non-formal, argumentative contents and dialectic moments it would carry, may hardly lead to uncertain results constituting a transition between different solutions, or bridging over them, or resolving strictly circumscribed general concepts into type concepts. ([51]) And in this way qualification will of necessity stand for the realization of alternative exclusiveness and thus the manifestation of the creation of dichotomy. This is the case because the subordination of facts to a definite concept, or several of them, and the corresponding drawing the legal consequences defined within a more or less narrow sphere in an automatic way may take place unconditionally, in their entirety and exclusively only. So this subordination and drawing of conclusions may not imply the alternativity, dividedness, splitting into parts or the drawing of legal conclusions looking at another (possible and likely) qualification(s). And with this tendency towards complete closedness we shall in a particularly clear-cut form discover the specifically fictitious character of legal analogy. As a matter of fact in reality whatever may be the degree of similarity, analogical qualification will never imply conclusions to dialectic (partial) identity or similarity, but in all

cases to a definite intersection concerning the place of the object in the system, to a complete, formal identification finding expression in the community of consequences and so to drawing of the object into another class of object.

For that matter, it should be noted, the decision-making character of the reference of the facts to the legal system will as consequence entail the appearance of specific signs which on gnoseological considerations can qualify only as artificial, alien elements, as elements which more or less stand in opposition to the authentic and genuine cognition of the phenomenon in question. As a matter of fact the specifically Manichean character of legal reasoning may lead to the adulteration of reality, i.e. to a state where reasoning itself will dispose of "anti-gnoseological" significance in order that law might in the service of the influence by the various factors of social determinedness discharge its function as means of standardization and as standardized mediator.

However, the exposition of the peculiarities, dialectic traits, directedness towards decision-making, and non-formal determinednesses of legal reasoning, we believe, cannot at the same time be responsible for the neglect of the actual significance of the role of traditional logical reasoning played through syllogisms in legal reasoning.

Theory unanimously acknowledges the presence of the conclusion drawn from the premisses of decision constituting the acme of the law-applying process and expressing the result of the interpretation of norms and the qualification of facts, as a syllogistic conclusion coming within the sphere of formal logic. The drawing of a conclusion of this category is an essential precondition of all application of law, as in fact "The norm syllogism — the application of the general command to the special or quite concrete case — is ... the only possible form of rationality in our moral and legal life." ([52]) However, beyond the generally accepted opinion according to which from the point of view of scientific analysis syllogistic reasoning appears as a formal, significant, indispensable, still by itself insufficient momentum of a process leading to a genuine and substantial result, the theory of judicial decision-making

relying on syllogisms has been made subject to limitations by recent investigations also from another aspect. So before all it has been suggested that the application of law itself, in association with the valuation of facts and the drawing of legal conclusions and so of the sanctions, may be split up into "a series of different basic and accessory syllogisms", a process which from the very outset lends a certain vagueness to the classical theory of syllogism originally relying on a single syllogism. ([53]) In addition it has also been explained that in the application of law the case is by far not one of a pure, single syllogism, but of one including in its premisses the establishment and qualification of facts, duplicated syllogism, since "en réalité, la mineure qui se présente sous la forme, qui paraît unitaire: tel fait est (ou n'est pas) P, doit se décomposer en deux parties entièrement distinctes: 1. Tel fait est (ou n'est pas) établi, 2. Le fait ainsi établi ... est P." ([54]) And finally the system of syllogisms having a place in the law-applying process appears in a specific way also for the very reason because in them the projection of premisses is to a certain extent shaped by one another. This is the case, because in the formulation of the decision implied in the judgement as a process of reasoning the fact-establishing and law-interpreting acts are intertwined and continuously and mutually presuppose one another. ([55]) Thus in case of the application of law, as suggested by the simultaneous multiplication and intertwining of the premisses of decision and also their relative segregation and coalescence, we have to speak of a genuinely composite, dialectical process of reasoning.

All these problems will stand out even more distinctly, if we try to plot the logical model of the process of reasoning in question. The fact that the structure of legal reasoning in reality is built up of a real system of syllogistic conclusions, will cause no serious difficulties by itself. As a matter of fact each particular conclusion may be traced back to either one of the now discussed basic conclusions, or another syllogistic form known from its Aristotelian exposition. Now reasoning typical for the application of law conforms to the classical syllogistic formula: "All men are mortal — Caius is a man —

Caius is mortal". Here Caius is the subject (*S*), as predicate (*P*) stands the statement of mortality, and as mediating medium (*M*) the notion of man. The logical formula of this form of reasoning as may be seen in Fig. 3 is an extremely simple

Fig. 3

$$\begin{array}{l} M = P \\ S = M \\ \hline S = P \end{array}$$

one, the more because its premisses will in their established form manifest themselves as given. On the other hand in legal reasoning the premisses of decision will in all cases appear as still to be formulated. To begin with we would remark that for the judge in principle the legal system in its entirety including norms of a number ($l - n$) is given. In this system with the facts (M) of a number ($l - n$) in principle legal consequences (P) of a number ($l - n$) are associated. Among these the judge will by exploring the facts of the case, further by way of the intertwining and mutually transient operations of qualification and interpretation establish the identity between the case (S) and a definite, selected legal fact (M_x), which identity may then become the basis of the reference of the legal consequence (P_x) pertaining to the fact at issue in question to the actual case. However, at the same time the exploration of the facts of the case will also become a composite process. As a matter of fact in the first place the judge will in object-language, i.e. by setting aside any valuation and without the use of legal terms have to establish the facts (a, b, c, etc.) of the case. Then he will have to qualify, valuate and express by legal terms the facts so established as properly interpreted statutory facts. This will

already permit the following more or less mechanical or perhaps creative drawing of the legal consequences. As regards propositions it is of frequent occurrence that a conclusion of similar structure may be derived from the useless form which through segregated theses gives the impression of the existence of a difference, which, however, will melt away in the thing itself. ([56]) Still in legal reasoning this is not the case. As a matter of fact, on the one part, the legal consequence becomes attached to the statutory fact and the case to be determined not by describing (=), but by prescribing (⇒) realization of something as target, and on the other, the qualification of the facts of the case is not merely the unfolding of the intrinsic determinednesses hidden in the facts, but subordination (→) of the description (=) in object-language to the conceptual system of the system of norms reflecting a peculiar valuation. This again throws out the problem of the reciprocal reference of reality and its normative reflection to each other.

However, the logical formula of legal reasoning as given in Fig. 4 at the same time points out merely the direction of

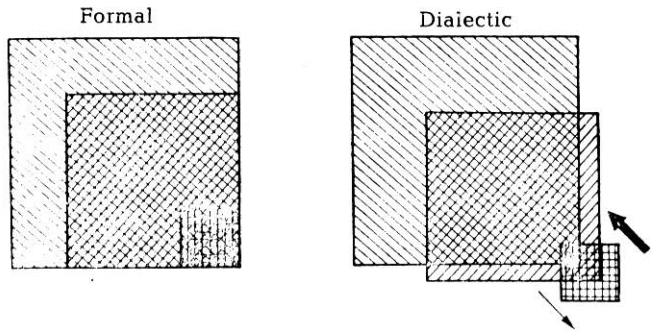
Fig. 4

$M_{1-n} \Rightarrow P_{1-n}$
$S = a, b, c, \text{etc.}$
$a, b, c, \text{etc.} \rightarrow M_x$
$S \rightarrow M_x$
$S \Rightarrow P_x$

the basic operations to be performed, whereas their content relations remain to a large extent obscured. If on the one hand we accept as true that in the scope of law the specifically legal processes of motion between the individual and general are mediated by law-making and law-applying, ([57]) we may on the other hand admit as true that law-making will reach the term-

inus of these processes in the stabilization on the level of the particular, of the general determinedness implied in the individual, whereas law-applying will attain its goal in the translation of the particular into the individual, in the realization on the level of the unique, of the general determinednesses stabilized on the level of the particular. Now the concrete individual case will always appear as concrete totality, as the concrete set of an infinite number of signs, so that both the description in object-language and the qualification of it in the conceptual system of the system of norms will of necessity produce an extremely energetic narrowing down and impoverishment. The qualification of the traits of the individual case in the mirror of the general and the interpretation of the general norm content projected on to the individual equally insist on the ceaseless transition and mutual overlapping of these two sides of legal reasoning, and this process will, having terminated by preserving the original form and determinednesses of both the norm content projected to the individual and the case-totality subordinated to the general be renewed and reborn. In this sense and in this mental framework the statement "General propositions do not decide concrete cases" ([58]) will in its symbolic meaning become in fact true, for in the application of law a formal, complete identity of the general and the individual will never come into being. Although the individual will partly contain the different particular and general determinednesses, and vice versa, the individual will appear as incorporated partly in the general and the particular, nevertheless this will produce dialectical identities only, there being no direct, mutual and complete correspondence between a given number of the individual and the particular and general. Thanks to its dialectical character the application of law will so always appear as a creative operation where the possibility of the establishment of a connection between the case to be determined and the norm serving as the pattern of decision, will as may be seen in Fig. 5 depend on whether the common determinednesses retrievable in the case and in the norm will appear in this respect and in a satisfactory manner as substantial determinednesses providing the

Fig. 5
identity of the
general particular, and individual



possibility of mutual reference and subordination of the one to the other.

The question of the community, i.e. identity or similarity of substantial determinednesses will normally emerge in a particularly keen form when there may be doubts as to the mutual referableness of case and norm, i.e. when the judge will have to decide whether by having recourse to an *argumentum e contrario* he will preclude the application of the norm in question, or by resorting to an *argumentum a simile* decree the application of the norm not embracing the case directly, in a manner justified by a possible analogy. Choice between these two solutions will primarily depend on what should be considered a gap in the law ([59]), or in the case of the establishment of a gap what should be accepted as a substantial community of the elements of the facts at issue. ([60]) As a matter of fact the conditions of relevant similarity opening the road to an analogical application of law have so far not been defined either by statutory law or jurisprudence. If this were the case, i.e. if these conditions were defined, then the question would be one of the application of a statutory or jurisprudential definition rather than one of that of analogy. ([61]) Consequently in cases when the choice between two possible mutually exclusive solutions is not influenced unequivocally by the lin-

guistic expression of the norm in question, e.g. by the what is called intensive or still better reciprocal form "... only and exclusively when ..." ([62]) of the implicative relation between the normative precondition and the normative consequence, or by any other logically significant factor, the judge will "undoubtedly take a position weighing the question in every respect and springing up from the soil of moral considerations or such of expediency rather than perform a logical function". ([63]) He will make a decision in a teleological manner, ([64]) inasmuch as eventually analogy consists in drawing the case not into the sphere of similarity of another case, but into the sphere of another case itself, a process which from the point of view of formal logic will in point of principle and in all cases qualify as arbitrary. ([65]) Yet in this way it will seem that "the genuine analogical inference ... does not in fact constitute a logical mode of argument but rather an heuristic procedure based on the practical directive: whenever there is no law applying explicitly to a given case, try to find a valid generalization of some existing law so as to make it applicable to the case." ([66])

Hence as has been seen logic understood in its formal sense has an indispensable function in the process of legal reasoning. However, at least for an analytical investigation this function may appear not only as formal, but as one exposed to other factors. The limitations of the logical determinedness of legal reasoning will manifest themselves mostly in border-line cases, so e.g. in the logical irresolvability of the not too frequent, still not even wholly exceptional dilemma of the *argumentum e contrario* and the *argumentum a simile*. Logic as conceived in the formal sense will appear in the structure of legal reasoning everywhere, and as has been seen, this structure will in fact become organized in a manner describable by formal logic. Still the function of this logic will have to be designated as the possible control of legal reasoning rather determination will be attended to by factors outside the law than as its determination. As a matter of fact the function of and its intrinsic logical relations, transmitted by the social environment of the law and its application, and exercising a

decisive influence on the law and its logically controlled nature as well. The chances of a genuine effectiveness of logic are from the very outset objectively delimited by the nature of the factors of legal reasoning and its components, and this delimitation may even be reinforced by the at any time given social conditioning of legal reasoning. To the theoretical delineation of the fundamental problems will not altogether unjustifiably often set out from the statement that "une solution économiquement et socialement souhaitable doit être juridiquement possible ... Le technicien du droit doit pouvoir fournir les outils nécessaires, les moyens propres à réaliser une règle souhaitée," ([67]) and this refers to a qualitatively specific independent function of logic. This function has already been formulated by a Scandinavian author quoted before: "Any trained lawyer ... must know how technically to justify by interpretative arguments the legal solution he finds 'just' or desirable. But it would be a mistake to accept the technical arguments as true reasons. The true reasons must be sought in the legal consciousness of the judge or the interests defended by the counsel. The function of the methods of interpretation is to set up boundaries to the freedom of the judge in the administration of justice — they determine the area of justifiable solutions." ([68])

Under such conditions, even when we consider this exposition from the aspect of a given legal policy in a critical manner, logic in the formal sense will manifest itself only as one of the elements of decision-making, as an element which may serve for controlling or justifying other elements, as the case may be, but can in no circumstances act instead of them or as their genuine determinant. Hence we shall have to interpret in this sense the statement declaring that "To treat the results of logical deduction from existing premisses as a substitute for the assessment of all aspects of the given situation and notably for its ethical and sociological aspects is essentially an abuse of logic, leading to legal anomalies and distortions." ([69]) As a matter of fact as is known, "at decision-making the judge will not take into consideration the elements of fact and law emerged in the lawsuit only, but beyond these also

the expectable effect of the judgement relying on these, and make a decision only whose predictable results will suit his will." ([70]) The social contents of legal reasoning will define the trend and results of reasoning in its entirety, and within this process each factor and element, i.e. both the qualification of facts associated with the case demanding a decision and the interpretation of norms serving as possible patterns of decision, will receive their place, function, significance and specific validity equally from these social contents. Marxist sociology defines this type of social contents as the social situation and environment of the application of law, and is making definite attempts at the detailed elaboration of the sociological relations and the politically conditioned nature of this situation. In the process of a delineation of the perspectives of research in any event it has been established that "one of the most important elements of the situation of the application of law is the legal provision to be applied, which at the very outset already introduces the political element into the law-applying process and which in a general manner even provides factors and influences. However, the interpretation of law will often affect subsequent political relations and consequently further political factors will find an expression in this interpretation. As a matter of fact the legal provision gives a positive form to the policy formulated on a more general level for the given case and ultimately stands for an ancillary activity, i.e. an activity serving also certain political ideas ... The judge is in the position to 'perceive' the meaning of the legal provision which suits best the end to be served by interpretation and to have recourse to the method by means of which he may explore this meaning." ([71])

The goal to the achievement of which the interpretation and together with it the application of law as a whole tend, may expressed in a most general manner, be of a stabilized historical meaning, in all cases identical with itself, attributed to the maker of the law, and together with it the repeated enforcement of a stabilized legal order, in all cases identical with itself, preserving itself in an unchanged form; or the establishment of a non-stabilized actual meaning, existing in

the social environment of the law-applying process, capable of change and together with it the renewed enforcement of a non-stabilized legal order, capable of change, adapting itself in an incessantly modifying form to the development of the conditions of life. It is implied in this dichotomy of goals that in the scope of guiding principles relating to the interpretation of law a distinction may be made between static and dynamic theories of interpretation. ([72]) Naturally these theories have come into being in order to satisfy divergent ends and are in the service of divergent practical purposes. Now in all appearance the forms of expression of the law extend equally extraordinarily vigorous assistance to the possible rigidity or, on the contrary, to the creative autonomy of interpretation.

As far as the meaning of the legal terms is concerned, earlier it has been made clear that a "proper," "genuine" or "true" meaning, i.e. one unalterably referred to a linguistic sign with a claim to exclusiveness is out of the question, inasmuch as "The meaning of the norm (like the meaning of any other linguistic expression) is relative to the directives used to fix its meaning." ([73]) On the ground of the analysis of Anglo-Saxon legal practice the statement has been advanced that the concrete meaning of each word is delimited by its syntactic position in the sentence, the contextual environment of the sentence, the outcome of the legal case in question and the social situation where the problem of meaning itself has emerged. However, even so the case must not necessarily have a single meaning only. ([74]) According to a figurative expression the terms occurring in the wording of the law are like chameleons whose colour changes with the background. ([75]) And, as has been indicated earlier, one of the reasons of this possible change is the extraordinarily high level of the "*bruits de fond*" characteristic of the legal concepts. ([76])

An interesting research of the Brussels circle of logicians of law was launched with the goal to establish how legal concepts behaved and what properties they were carrying in the light of the interpretation and qualification of a case which in conformity with the wordings of the law could be solved with alternatives mutually contradicting one another. Now as

an outcome the conclusion was reached that legal concepts in all cases carried certain elements of ambiguity, indefinableness and vagueness. In fact to circumscribe their scope of application in a *ne variatur* manner proves abortive, and so the interpretation of these concepts will be practically defined, at least in the scope delimited by the factors of uncertainty, by the consequences forthcoming from the concepts in question. ([77])

In other words this means that the legal concepts and the legal norms formulated by establishing definite relations between the concepts in question may serve merely as the ideal types of certain contents existing in reality. ([78]) As a matter of fact the concept as the expression of the general and particular is in an extremely close relation, quantitative as well as qualitative, to the individual: the concept grows out of the individual, it obtains its definition on the ground of the individual, however, the concept once formulated does not merely refer to the individual, it might as well dissociate itself from it and embody an autonomous quality. Thus it will become the carrier of a content where the individual may appear indirectly, having a remodelled form, in certain of its moments and elements only. Hence the relation between concrete individual phenomena and the concepts representing them on the level of the general will stand for a relation between different, in many respects autonomous properties. The elements of this relation cannot be identified with one another, nor can the one take the place of the other. The segregation of the phenomena and concepts from one another will as a matter of course manifest itself as antagonism conditionally only, as the moment of dialectic contradiction describing the things in their development. As a matter of fact the self-movement of phenomena and concepts may turn up also in the sphere of segregation, in itself not yet presupposing antagonism or finding expression as antagonism. This is the sphere of segregation where the properness and the qualitative independence of the phenomenon and the concept, and the undeterminedness of the one by the other find expression. Thus this is the sphere which by the side of mutual implication, determinedness and refer-

ableness equally embraces the elements of non-implication, non-determinedness and non-referableness. Thus in the sphere of legal concepts in this field will manifest themselves the uncertainties which increasingly convert interpretation into an operation having a primordial social character and significance, and which may in reality justify the statement that in the last resort "The meaning of the statute consists in the system of social consequences to which it leads or of the solutions of all the possible social questions that can arise under it." ([79])

When now the practical consequences are considered this factor of uncertainties touching on the meaning of legal concepts will indicate on the one hand that the meaning cannot be conceived or established in a formal manner or with a logical necessity, and so already in the exploration of the meaning, in the selection and use of the directives applicable to that exploration an external factor, the social contents of legal reasoning embodied in the social environment of law-applying, will invade this process, and on the other, that a formally interpreted definition of the meaning which disregards signs of content, will of necessity produce distortions in all cases. E.g. in an actual case it was stated in this sense that "As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied." ([80]) And so this case is not remote from the problems which in each instance are thrown out by the selection and definition of the legal concepts in the course of law-making. E.g. only to quote an atypical, yet for our purpose highly instructive problem of legislation, let us refer to a decision of the Supreme Court of the State of California, where the court held that an enactment according to which "no licence may be issued authorizing the marriage of a white person with a Negro, mulatto, Mongolian, or member of the Malay race ..." was unconstitutional among others for the reason that the exact meaning of these terms was unidentifiable ([81]), and also to the reported fact that in the Republic of South Africa,

where racism had been raised to a principle of legislation, already in 1957 the congestion of more than 100,000 borderline cases defying unambiguous classification yet awaiting settlement had been established. It was found that those responsible for a regulation attempted "to define the indefinable" in vain, for according to the common course of events they were unable to provide this legislation with an adequately elaborated, solid foundation which could be transplanted also into the law. ([82])

However, to all appearance the moment of this relative logical undeterminedness implied in the law and with it the moment of direct social determinedness have been accentuated equally by the peculiarities of the legal concepts and norms. As a matter of fact as is known from a study of Continental lawmaking, for the solution of cases hardly comprehensible by statutory regulation and appearing as atypical to legislative appraisal, the legislator will in his codification often be compelled to the formulation of rules, principles or clauses of a general content to the extent offering an opportunity for the judge to set aside an otherwise relevant provision and determine the case on the ground of other norms. ([83]) Rules of such a general nature for practical purposes occur in all branches of the law, even in criminal law, and their function is not merely to build up a comprehensive policy-making framework for the regulation in question, but at the same time to guarantee the equally satisfactory linking up of the postulates of both sides of the general and individual in the application of law, and the effectiveness of the influence of various external social factors directly impacting on one another in an increased degree. These general rules, principles or clauses carry a legal content up to one half only, whereas their other half is made up of a content of direct social significance, ([84]) viz. a content whose exploration and definition projected to the concrete case will in each case depend on a social valuation, i.e. a creative operation to a lesser degree defined than the usual application of law. ([85])

In the application of the general rules and principles of law the element of the social character will prevail in an even more direct, and as regards the establishment of a connection be-

tween the extraordinary general content and the concrete individual problem in a yet more decisive manner. As a matter of fact the giving a positive form to this generality of content, its regeneration and realization in a concrete individual form, presupposes enforcement of a creative nature, which cannot be expressed in the notional sphere of logical necessity. It is the element of this social character which an author by giving it the name of positive natural law defined as the expression of tendencies in a latent form inherent in collective consciousness and transmitted by the judge as citizen and a moral being. ([86]) Still in point of fact here too, as has been demonstrated by Marxist sociology, we have the case of the influence and defining function of the social environment of the law-applying process. In the application of the different clauses, or, in the lawsuit itself, in the admission of evidence and the shaping of conviction, or by no means in the last resort, in the discretionary procedure ([87]), "the idea of 'the person's own' is in fact a social one, because the idea of the judge of its own function, the facts which he observes and the provisions of law which he has to apply, and so also the assessment of expediency and correctness ... are defined by social factors. In the process of the socialization of the judge these social factors will as a matter of course mostly become internal ones to an extent that in the law-applying activity they will act as internal and not as external factors." ([88])

Finally in a form more complete and more direct than any earlier form, almost with a claim to exclusiveness, the social character from time to time appearing in the guise of equity will enter the process of legal reasoning, i.e. the social character which in the possible conflict of considerations of legality and justness will as the limiting factor of the former and the supporter of the latter serve the ends of "a social critique of a certain degree of the positive law", "the mitigation of the crudeness of the enforcement of the legal order." ([89]) As a matter of fact equity as a principle discharging mediating functions in the conflict between legality and justness, a principle of relative contents and limited independence, and carrying the correction of positive law, will appear in a form socially directly

defined, dependent on social development. ([90]) Its significance we shall be able to appraise only when we remember that in the last resort equity "performs a function for the individual case overruling the law and creating an exception", and in this way "providing opportunity for considering certain situations of facts at issue with respect to the too broad generality of the law, in a constant manner." ([91])

Naturally there are many possible mediating channels and ideological expressions of the direct influencing function of the social character and other extra-legal factors. E.g. an extremely peculiar variant of these factors, appearing almost in the guise of natural law, however, on theoretical considerations highly distorted, is the one which may be termed as "principes généraux du droit applicables même en l'absence de textes", to which the Conseil d'Etat in its decision of October 26, 1945 referred as "lois fondamentales même non écrites du régime républicain de France." ([92]) As a matter of fact in the overwhelming majority of instances, and in particular in the socialist society we may rather encounter the even theoretically precise ideological expression of this direct effect. As a characteristic example of this expression we may quote the policy-making declaration according to which in the first phase of the interpretation of Soviet law the political line of the Communist Party of the Soviet Union, the general principles of the Soviet legal system and its branches, the humanitarianism of Soviet law and finally the direct and final purpose of the promulgation of the law in question will have to be considered in all circumstances. ([93]) In this connection even the thesis formulated in a characteristic manner according to which each element of the law-applying decision, exactly because of its appartenance to the decision will eventually appear as having a legal quality, may gain significance. ([94]) This is the case because it implies the emphasis on the need for the formation of a picture genuinely reflecting the decision-making process, and of the survey of the actual effect of non-legal factors instrumental in this process.

In general it cannot be doubted that the law constitutes the partial expression of a finalizing human idea, the formal stab-

ilization of the methods of realizing expressly undefined ends, ([95]) and that the legislator cannot expose these ends and their motives in his act for the very reason lest by a possible motivation of the ends and formulation of the means of their achievement in an equally normative manner, and by an in this case indispensable comparison and discussion of the motivation and the means he should jeopardize the unfolding of the normative significance of the provisions. ([96]) The formulation of the reason and the general motivation of the regulation will, however, appear in the law occasionally, and the preamble, the typical carrier of these formulations, will in the process of legal reasoning gain a normative significance corresponding to its evaluating social contents, to the practical usefulness of its content elements. ([97]) In this connection we have to remark that for the purpose of the direct social influencing of legal reasoning the rules of a general content and the typical contents of preambles may point at divergent directions. In point of fact the former substantially throw open the path to the influence of the social reality continuously in process of formation and itself in a continuously modifying form regenerating, whereas the preambles lay down the ends and social components at the moment of the creation of law given and make them the subject-matter of legal reasoning.

However, on this understanding we have nevertheless to qualify the opinion according to which "he in whose hands is the application of law, has in his hands the interpretation of law and he in whose hands is the interpretation of law has the law itself in his hands" ([98]) as misleading. In fact the exposition of the fundamental problem we have attempted has by far not served for the establishment of the arbitrariness of the judge, but for the presentation of a peculiar case of social determinedness and for the explanation of the fact that legal practice manifests itself as an in its entirety socially determined activity adapting itself to the social situation and contents of law-applying, by referring, on definite level of generality, the regulation to the individual, and by lending a positive form to this regulation filling gaps in the individual not only of extent, but also such as are called gaps of depth ([99]), as an activity of

a creative and, at least within this sphere, of a really forming character.

In legal reasoning, as we have tried to present, the social character expressing the effect of economic, political and other factors in a concentrated form, will prevail through different channels, equally directly and indirectly, and gain a defining influence. The moment of social character will be embodied already by the norm to be applied. However, this social character reflects conditions and potentialities as they existed at the time of norm-making, so that in the process of application the norm will, dependent on the social contents of legal reasoning and the social environment of law-applying, be concretized by leaving the social determinedness of the norm intact, or made subject to correction which goes beyond the social determinedness itself of the norm in question. In this way the moment of actual social determinedness will in a direct form find expression in legal reasoning itself, and according as whether or not this moment agrees with the one of the historical social determinedness of the norm, it will operate towards the reinforcement of this social determinedness, or even exceed this determinedness to a lesser or greater degree. As a possible channel of direct social influencing before all the selection of the norm to be applied and the establishment of its meaning will appear. Secondly, there will follow the selection and definition of the facts of the case in question, the admission of evidence in the course of hearing the case, the qualification of the facts associated with the interpretation of the norm, and finally the shaping of conviction. As conclusion in the course of drawing the legal consequences the concrete specification of the provision included in the norm closes the process. Here we may encounter certain law-applying situations mostly presenting themselves as problems in the process of legal reasoning which provide particularly appropriate opportunities for direct social influencing, which therefore deserve special mention. These are before all the possible need for making a choice between the *argumentum a simile* and the *argumentum e contrario*, the establishment of the meaning of general legal concepts and the application of general rules, principles or

clauses, the use of the evaluating contents of preambles in legal reasoning, the so-called free estimation of evidence, and the cases of discretionary power and equity.

If given knowledge of the direct methods and potentialities of social influencing we proceed to studying legal reasoning from the formal aspect of logical necessity and its possible expression in an exact mathematical form, then we shall infallibly come to a negative conclusion. As a matter of fact as components of legal reasoning in all cases there will loom up the problem of the definition of meaning and the problem of valuation, further the circumstance that in the logical structure of the process of reasoning deductiveness will in most cases provide a general framework only. This is the case because pieces of information derived from the relevant facts of the case and the contents of the norm as officially recognized input elements by themselves do not define the specification contained in the decision as output in an unambiguous form. To this we shall have to add the element of formal indeterminedness implied in the process of filling gaps and that of what is called rational non-deductive and non-evident argumentation. This argumentation will have a considerable function primarily at the concretization of the general principles and at so-called free deliberation. ([100]) By summing up all that has been said of the logical and social aspects of legal reasoning we may now advance the statement that in the process of reasoning logic acts as factor of control and not as one of determination. In fact as has already been made clear on a theoretical plane in the last resort "Le caractère particulier du raisonnement juridique résulte de ce qu'il est possible d'induire, à partir d'un même ensemble de lois, plusieurs systèmes juridiques, chacun permettant d'interpréter autrement les mêmes textes." ([101]) Also the social conditioning of legal reasoning, i.e. the social contents of law-applying, will perform the function of determining not only in the direction of the components of the process of reasoning, not controlled or controllable by logic, but in the last resort even in the direction of the practical potentialities, depth and effectiveness of logical control itself.

4. *The question of perspectives*

In association with the analysis of the structure and mechanism of legal reasoning substantially two methods of approach, two lines of ersearch may be distinguished in the logic of law, viz. the formalistic trend of investigation and the anti-formalistic one. These two trends are not mutually exclusive, still they discover the central problem in different factors. Earlier we have already touched on a number of traits of the formalistic approach and the anti-formalistic one, so that for the sake of a delimitation we would merely remark that the anti-formalistic trend manifests itself as a trend exceeding the formalistic one. Anti-formalism enters the scene with the claim to the formation of a dialectic logic concentrating on moments of content, and by making an attempt at giving a by itself satisfactory reply to the basic questions of legal reasoning.

So far the anti-formalistic approach has been embodied in the doctrine of argumentation whose foundations have been laid by the logicians of law of the Brussels circle already mentioned on several occasions. This doctrine may be considered the only properly elaborated line which at the same time leads to profitable and novel results. The Brussels circle of the logicians of law has substantially made an attempt at developing the logic of practical reasoning manifesting itself in several forms of practical activity. Here as central category the element of subjective conviction of a new, in the Aristotelian sense dialectic logic based on argumentation figures, and not the element of demonstration of traditional formal logic. Both the dialectic logic in the Marxist sense, so far elaborated in a few basic questions of theory only, and the approach by the present paper will qualify as particularly anti-formalistic. However, this anti-formalism has in common with the doctrine of argumentation before all the elaboration of the limitations of formal logic and the exploitation of the results of the doctrine of argumentation as partial components of instrumental value of a more comprehensive theoretical framework.

As regards the position taken by Marxist theory to this word of the Brussels circle, not long before criticism was advanced which objected to the directedness of the argumentative approach to the concrete individual case, the applicability of the formulae of argumentation claimed "mit mathematischer Gewissheit" allied to the formulae of formal logic, in general to the presumed pretention of the doctrine of argumentation to setting up categories, formulae or laws "auf jeden konkreten Einzelfall ausnahmlos und gänzlich wahr und gültig". ([102]) However, the directedness of the investigation to concrete individual cases appears to be relied on methodological presumptions, on the rejection of any kind of *a priorism*, consciously approved by the Brussels logicians of law, and also on the definite tendency to attempt the formulation of conclusions lending themselves for exploitation and possibly also for generalization, in the light of case studies, instead of outlining some sort of a general philosophy of decision. For our part the main point of the doctrine of argumentation which methodologically may appear as problematic, is the one where the Brussels logicians of law seem to have set out from a peculiar subjectivist philosophical standpoint in many respects related to axiological relativism and gnoseological agnosticism. So the doctrine has not been given the programme of exploring social antagonisms and within them real conflicts of interests and not focused full attention on the social character of the law and legal reasoning itself. ([103]) Under such circumstances when argumentation moves in the sphere of ideas void of real social interests, and among beings burdened with longings and convictions of a rather subjective character and value, argumentation itself and its means will obtain a rather one-sided representation and so fail to offer an in itself satisfactory reply to the basic question. On the other hand unlike the formalist approaches ignoring personal factors and tending towards truly objective certainty we believe that the subjective determinedness of the direct effect of the applied forms of argumentation and of the practical methodology of argumentation follow from the substance of the doctrine of argumentation. We should remember that as for its function the doctrine of

argumentation constitutes the logic of personal conviction and not that of impersonal demonstration. In the last resort this means that as has been made clear by he first representative of the doctrine of argumentation though this doctrine may formulate rules, nevertheless the validity and the scope of application of these rules will in each case, partially at least, remain dependent on subjective factors. ([104])

In the course of legal reasoning subjective determinedness can change over an objective determinedness obviously only through the mediation of the social character. The criticism of the point of view of formal logic brought forward by the doctrine of argumentation will of course be fully approved by Marxist theory. Still at the same the Marxism will accept also the logic of argumentation with some limitations. A logical analysis of the methods of argumentation as methods applied beyond the ones of formal logic, their validity and scope is therefore also from the point of view of Marxist theory in every respect justified and necessary. This will not however guarantee a fully satisfactory exploration of the substance of legal reasoning by itself. As a matter of fact surpassing this approach in the direction of a logic of law truly of substance will in the Marxist sense come to naught unless a dialectic logic of objects has been elaborated whose subject-matter would be the peculiar totality of social-legal phenomena given in the law-applying process and which would bring to the surface the categories and regularities disposing of the sphere of validity characteristic of the social tendencies from the concrete subject itself, and so would attempt their generalization. ([105])

The actual content and structure of legal reasoning which a logic unfortunately not yet elaborated even in its outline and rather existing as a demand, ought to explore, primarily depend on the preconditions, concrete contents and structure of the conflict-resolving processes. Now on the level of generality literature draws a line between two possible forms of decision, viz. a procedural form relying on models of decision, rules or precedents in a formal manner previously established, and another one relying on concrete equity, justness or the socially

useful solution of the case to be settled independently of the before mentioned rules or precedents. ([106]) As regards the principal line of the historical evolution of law, there are authors who implied in the treatment of law as a rule in the "modern" in a clear-cut manner distinguish the element of deductivity natural law and positivist doctrines from the "classical" notion attributed to Roman Law, where in a controversial procedure the rules were not yet applied as premisses of decision, but so to say as stepping-stones in the invention of the law which served for the indication of the concrete solution sought for in the particular cases rather than for that of the rules. ([107]) In comparative studies of legal systems bearing testimony to the exploitation of different principles of settlement a number of authors are inclined to draw a distinction between "Christian", "Western", or "European" way of doing justice, i.e. administration of justice relying on the authority of the majority position on the one hand, and the Confucian way of doing justice of the Far East, ([108]) or the traditional one of Equatorial Africa, in particular the one designated as Bantu, ([109]) on the other hand. As a matter of fact the latter by their traditional force are primarily directed to the achievement of appeasement, harmony, the satisfaction of all without any formal procedure, coercion or holding out sanctions, to the replacement of *"l'esprit de géométrie"* by *"l'esprit de finesse"*, ([110]) to the guarantee of the enforceability of individual determinednesses void of barriers.

Obviously considerable differences will present themselves in the sphere of settlements relying on a pattern of decision predetermined in a formal way according as the case is one of a judicial precedent as pattern of decision approximating the individual at several points, or one of a legislative regulation appearing on a given level of particularity. Still within the sphere of procedures relying on patterns of these kinds deductivity will more or less prevail as if of necessity, and so the model of legal reasoning as outlined in this paper will be applied more or less. The differences concealed in the generality of the patterns of decision may manifest themselves as fundamental differences producing divergent qualities. How-

ever, on the other hand as opposed to the other kind of patterns of decision these differences constitute a relatively uniform characteristic. Now in practice irrespective of the level of generality of this pattern there are tendencies which have made the consolidation of the two potential methods outlined earlier and their combination terminating in a compromise, the subject of their experimentations. As regards American law it was suggested to make use of the principle of restricted utilitariansm in a two-level process of justification, ([111]) when the judicial decision would receive its justification partly on the ground of referableness to a previously established rule, and partly on the ground of the expediency of the rule in question to be justified in each case separately. In Scandinavian law an author compared the "model of adjudication" to the more desirable "model of open debate", ([112]) where an optimal variant of the decision would in the first be shaped on the ground of arguments reflecting certain open, sociological facts, the trends in public opinion and its likely response, and then the final decision would be come to in the process of confrontation of this variant with the provisions of positive law, and historical and other valuating materials. In Japan, perhaps under the influence of still living and effective traditions of Confucian origin embodied in the peculiar Japanese legal conception it has been established as living fact that the judge equally called to the application of the law in force and to a settlement satisfying the parties, has the power to subvert the presumption of the rationalism of the law and to substitute for it another ground of decision in the light of the case in question more convincing and more rational, and justified with the aid of appropriate interpretation. ([113])

The picture given of these models of the processes of decision-making, of such and similar ideas would modify the structural outlines and relations we have drawn of legal reasoning substantially. However, most of the ideas in question made their appearance, or are still present, as historically delimited phenomena, for the discharge of historically delimited functions, and could therefore hardly be subservient to the enrichment of socialist theory. ([114]) As a matter of fact the position

of socialist theory based on the social necessity of the primacy of law-making, at least in point of principle, demands that the application of law should in fact manifest itself as the translation of the law developed in the course of law-making into reality. ([115]) Referred to the sphere of problems analyzed in this paper this gives expression to the postulate of legal policy that the actual social character and determinedness directly prevailing in the law-applying process, manifesting itself in the social conditioning of legal reasoning and in the social contents and environment of the application of law should operate towards the reinforcement of the historical social character and determinedness indirectly effective by the mediation of the norm applicable and to be applied to the case in question, and that the directly effective actual social character discharging the function of determination should in conformity with the formal aspect of legality advance the full discharge of another function, the function of logical control, and beyond the potential sphere of logical control, in conformity with the content aspect of legality serve the reconciliation of conflicting interests and the satisfaction of the postulates of social development to the highest degree.

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NOTES

([1]) KULCSÁR, Kálmán: A jogalkalmazás funkcionális elemzésének problémái (Problems of the functional analysis of the application of law), *Állam- és Jogtudomány* XII (1969) N°. 4, p. 605.

([2]) PESCHKA, Vilmos: Célszerüség a munkafolyamatban és a jogi normában (Expedience in the working process and in the legal norm), *Állam- és Jogtudomány* XI (1968) N°. 2, p. 216.

([3]) Œuvres de DESCARTES, trad. par V. Cousin, vol. XI, Paris, 1826, pp. 205-206, quoted by PERELMAN, Chaim: Raisonnement juridique et logique juridique, *Archives de Philosophie du Droit* XI (1966), pp. 2-3.

([4]) FERRIÈRE, Claude de: *La Jurisprudence du Code de Justinien conférée avec les ordonnances royaux*, Paris, 1684, p. 124.

(5) For the history of the problem and for some of its theoretical lessons see HUFTEAU, Yves-Louis: *Le référé législatif et les pouvoirs du juge dans le silence de la loi,* Paris, 1965.

(6) MENEGHELLO Bruno: Il formalismo nello interpretazione giuridica, *Jus* (1964) p. 228, quoted by CAPPELLETTI Mauro- MERRYMAN John Henry-PERILLO, Joseph M.: *The Italian Legal System*: An Introduction, Stanford, 1967, p. 248.

(7) Cf. PERELMAN, Chaim: *Justice et raison,* Brussels, 1963, pp. 252-255.

(8) BAUMGARTEN, Izidor: *A biró* (The judge), Budapest 1911, p. 15.

(9) LÉVY-BRUHL, Henri: *La sociologie du droit,* Paris, 1961, p. 34.

(10) Ross, Alf: *On Law and Justice* London, 1958, p. 138.

(11) SZABÓ, Imre: *A szocialista jog* (Socialist law), Budapest, 1963, pp. 300 and 305.

(12) *Ibid.,* pp. 306-307 and by the same author: Jogalkalmazás és szocialista törvényesség (The application of law and socialist legality), *Magyar Jog* III (1956), N°. 5, p. 129.

(13) For the definition and diagrammatic representation of the directions of multiple feedback characteristic of the fundamental processes of motion in the law see VARGA, Csaba: A «Jogforrás és jogalkotás» problematikájához (To the problem of the work "The source of law and law-making"), *Jogtudományi Közlöny* XXV (1970) N° 9, (4.1), p. 506.

(14) PESCHKA, Vilmos: *Jogforrás és jogalkotás* (The source of law and law-making), Budapest, 1965, pp. 324-325 and 327.

(15) Cf. KULCSÁR, Kálmán: *A jog nevelö szerepe a szocialista társadalomban* (Educative function of the law in socialist society), Budapest, 1961, pp. 76-77.

(16) In the evolution of socialist law see the example of the judicial practice resting on rules and principles of extremely vague contents of the October Socialist Revolution of 1917 [VARGA, Csaba: (Lenin and the revolutionary legislation), in *V. I. Lenin o sotsialistitscheskom gossudarstve i prave* (V. I. Lenin on the socialist state and law), Moscow, 1969, pp. 271 et seq.] and of the Hungarian Republic of Councils of 1919 [VARGA, Csaba: Sarlós: A Tanácsköztársaság jogrendszerének kialakulása (Sarlós: Genesis of the legal system of the Republic of Councils), *Állam és Jogtudomány* XII (1969) N°. 2, pp. 362-363].

(17) Only from the sphere of socialist law we would mention economic arbitration as example, which on theoretical consideration is but "administration of justice without any application of law, or the 'application' of a vague legal framework where actual decision depends on economic considerations or such of economic policy more than was usual in the course of traditional decision-making by the Judiciary». KULCSÁR: *op. cit.* in note 1, p. 616.

(18) See in general PESCHKA: *op. cit.* in note 14, chapter II, paragraph 2. For socialist law see in particular: WLODYKA, Stanisław: Prawotwórcza działalność Sądu Najwyższego (Law-making activity of the Supreme Court), *Prace prawnicze*: Zeszyty naukowe Uniwersytetu Jagiellońskiego, Kraków

(1967) CLX zeszyt 31, pp. 158-187 and KNAPP, Viktor: La création du droit par le juge dans les pays socialistes, in *Ius Privatum Gentium:* Festschrift für Max Rheinstein, Band I, Tübingen, 1969, pp. 67-84.

([19]) Among others see the example of a large portion of revolutionary Soviet legislation of 1917, when exclusively and directly on political considerations documents for political use only were promulgated in a legal form [KULCSÁR, Kálmán: A politika és a jog viszonya Lenin müveiben (Relations of law and politics in Lenin's works), *Állam- és Jogtudomány* XIII (1970) N°. 1, p. 19]. Or see the practice of the supreme courts of a number of countries regarding the scrutiny of legislation on grounds of constitutionality, where by the side of purely political play-acting the resolution of conflicts may serve as a pretexte only or as a policy-making potentiality.

([20]) FRANCE Anatole: *Les opinions de Jérôme Coignard.*

([21]) BAUMGARTEN, *op. cit.* in note 8, p. 14.

([22]) ROSS: *op. cit.* in note 10, p. 139.

([23]) STONE, Julius: *Law and the Social Sciences in the Second Half-Century,* Minneapolis, 1966, p. 63.

([24]) TROLLER, Alois: *The Law and Order:* An Introduction to Thinking about the Nature of Law, Leyden, 1969, p. 89.

([25]) COHEN, Felix S.: *The Legal Conscience,* New Haven, 1960, p. 70.

([26]) ENGELS, Friedrich: Die Lage der arbeitenden Klasse in England, in MARX, Karl — ENGELS, Friedrich: *Historisch-kritische Gesamtausgabe,* Erste Abt., Band 4, Moscow-Leningrad, 1933, pp. 266-267; MARX, Karl — ENGELS, Friedrich: Die deutsche Ideologie, in *ibid.,* Band 5, Berlin, 1932, p. 321; MARX, Karl: *Capital:* A Critique of Political Economy, vol. I, New York, 1967, p. 248; *ibid.,* vol. III, pp. 89-91.

([27]) SZABÓ, Imre: *Társadalom és jog* (Society and law), Budapest, 1964, p. 115.

([28]) Cf. e.g. KULCSÁR, Kálmán: A politikai elem a birói és az államigazgatási jogalkalmazásban (The political element in judicial and administrative application of law), in *Jubileumi tanulmányok* (Jubilee studies), vol. II, Pécs, 1967, pp. 204 and seq.; KULCSÁR, Kálmán — HOÓZ, István: A büntetéskiszabásról (On the Imposition of Punishment), *Jogtudományi Közlöny* XXIII (1968) N°. 10, p. 491.

([29]) VISHINSKY, A. Y.: *Teoriya sudebnykh dokazatelst v sovetskom prave* (Theory of evidence in the lawsuit in Soviet law), Moscow, 1950, pp. 157-158.

([30]) KULCSÁR, Kálmán: A szituáció jelentősége a jogalkalmazás folyamatában (Significance of the situation in the process of application of law), *Állam- és Jogtudomány* XI (1968) N°. 4, p. 563.

([31]) COSSIO, Carlos: Phenomenology of the Decision, in *Latin-American Legal Philosophy,* Cambridge (Mass.), 1948, pp. 375-476.

([32]) Cf. e.g. KALINOWSKI, Georges: *Introduction à la logique juridique,* Paris, 1965, pp. 141-142.

(33) TOULMIN, Stephen Edelston: *The Uses of Argument*, Cambridge, 1964, pp. 7-8.

(34) Among others see WRÓBLEWSKI, Jerzy: Legal Reasoning in Legal Interpretation, in *Études de logique juridique*, vol. III, Brussels, 1969, pp. 3 seq., in particular p. 31.

(35) Cf. e.g. NEDBAYLO, P. E.: *Primenenie sovetskikh pravovykh norm* (Application of the soviet legal norms), Moscow, 1960, p. 419.

(36) Cf. KUDRYAVTSEV, V. N.: *Teoretitcheskie osnovy kvalifikatsiy prestupleniy* (Theoretical foundations of the qualification of criminal offences), Moscow, 1963, p. 149.

(37) KAZIMIRTCHUK, V. P.: *Pravo i metody ego izutecheniya* (The law and the methods of its research), Moscow, 1965, p. 63.

(38) See SZABÓ, József: A jogászi gondolkodás bölcselete (Philosophy of judicial thinking), *Acta Universitatis Szegediensis*: Sectio Juridica-Politica (1941), pp. 41, 67, etc.

(39) PERELMAN, Chaim: Problèmes de logique juridique, *Journal des Tribunaux* (April 22, 1956) N°. 4104, p. 272, quoted by HOROVITZ, Joseph: Exposé et critique d'une illustration du caractère prétendu non-formel de la logique juridique, *Archives de Philosophie du Droit* XI (1966), p. 198.

(40) VILLEY, Michel: Chaim Perelman: Justice et raison, *Archives de Philosophie du Droit* X (1965), p. 369.

(41) PERELMAN: *op. cit.* in note 7, pp. 194 and 208-209.

(42) *Ibid.*, pp. 220-221.

(43) PERELMAN, Chaim: *Droit, morale et philosophie*, Paris, 1968, p. 62.

(44) *Ibid.*, pp. 75 and 85-93.

(45) MARKÓ, Jenő: A jogalkalmazás tudományának alapjai (Foundations of the theory of the application of law), Budapest, 1936, p. 127.

(46) NAGY, Lajos: A büntetőbirósági tanács döntésének kialakulása (Genesis of the decision of the criminal court), *Jogtudományi Közlöny* XXV (1970) N°. 10, p. 525.

(47) Cf. NAGY, Lajos: A büntetőbirói döntés pszichológiájának néhány kérdése (Certain questions of the psychology of the decisions of the criminal court), *Állam- és Jogtudomány* XIII (1970) N°. 3, p. 463.

(48) *Ibid.*, p. 478.

(49) SOULEAU, Philippe: La logique du juge, in *La Logique judiciaire:* 5e Colloque des Instituts d'Etudes Judiciaires, Paris, 1969, p. 56.

(50) For the use of this term, see KLAUS, Georg: *Einführung in die formale Logik*, Berlin, 1958, p. 72.

(51) For the use of these notions, see JØRGENSEN, Stig: *Law and Society*, Aarhus, 1971, pp. 10-11.

(52) CASTBERG, Frede: *Problems of Legal Philosophy*, Oslo-London, 1957, p. 55.

(53) SZABÓ: *op. cit.* in note 11, p. 321.

(54) PERELMAN, Chaim: La distinction du fait et du droit: Le point de vue du logicien, in *Le fait et le droit:* Études de logique juridique, Brussels, 1961, p. 271.

(55) Cf. in Hungarian literature among others Moór, Gyula: *A logikum a jogban* (The logical in law), Budapest, 1928, p. 34; Nagy, Lajos: A bünösséget megállapitó itélet indokolása (Motivation of the sentence establishing guiltiness), *Állam- és Jogtudomány* IX (1966) N°. 4, pp. 625-659; Szabó: *op. cit.* in note 11, pp. 320-321, etc.

(56) «Man wird sogleich von Langeweile befallen, wenn man einen solchen Schluss hereinziehen hört; — dies rührt von jener unnützen Form her, die einen Schein von Verschiedenheit durch die abgesonderten Sätze gibt, der sich in der Sache selbst sogleich auslöst.» Hegel, Georg Wilhelm Friedrich: *Wissenschaft der Logik,* Zweiter Teil, 3. Auflage, Stuttgart, 1949, p. 125.

(57) Cf. in particular Peschka, Vilmos: Die Besonderheit als Bewegungsraum der juristischen Argumentation, in *Le raisonnement juridique,* Brussels, 1971, pp. 122-124.

(58) Justice Holmes, Oliver Wendell, in Lochner v. New York (1905), 198 U.S. 78.

(59) Cf. Varga, Csaba: A jogtudományi fogalomképzés néhány módszertani kérdése (Some methodological problems of the formation of concepts in jurisprudence), *Állam- és Jogtudomány* XIII (1970) N°. 3, (4.4), pp. 602-603.

(60) Cf. Szabó, Imre: *A jogszabályok értelmezése* (The interpretation of law), Budapest, 1960, pp. 390 et seq.

(61) Sawyer, Geoffrey: *Law in Society,* Oxford, 1965, pp. 9-11.

(62) Klug, Ulrich: Observations sur le problème des lacunes en droit, in *Le problème des lacunes en droit,* Brussels, 1968, pp. 101-102.

(63) Moór: *op. cit.* in note 55, p. 36.

(64) Klug, Ulrich: *Juristische Logik,* Zweite Auflage, Berlin-Heidelberg-New York, 1958, pp. 128 and 134.

(65) Cf. Horovitz, Joseph: Ulrich Klug's Legal Logic: A Critical Account, in *Études de logique juridique,* vol. I, Brussels, 1966, pp. 104 et seq.

(66) *Ibid.,* p. 115.

(67) Dekkers, René: Reflexions sur un outil, *Journal des Tribunaux* (April 22, 1956) N°. 4104, p. 271, quoted by Horovitz: *op. cit.* in note 39, pp. 196-197.

(68) Ross: *op. cit.* in note 10, p. 153.

(69) Stone: *op. cit.* in note 23, p. 146.

(70) Markó: *op. cit.* in note 45, p. 97 and similarly, yet in a by far more pronounced form, Baumgarten: *op. cit.* in note 8, p. 3.

(71) Kulcsár: *op. cit.* in note 28, pp. 223-224.

(72) Cf. Wróblewski, Jerzy: *Zagadnienia teorii wykladni prawa ludowego* (Outlines of the theory of interpretation of the people's law), Warsaw, 1959, pp. 151 et seq.

(73) Wróblewski, Jerzy: The Problem of the Meaning of the Legal Norm, *Österreichische Zeitschrift für öffentliches Recht* XIV (1964) N°°. 3-4, p. 264.

(74) Stone: *op. cit.* in note 23, p. 64.

(75) Cf. Reichel, Hans: *Gesetz und Richterspruch,* p. 65.

(76) Cf. PARAIN-VIAL, J.: La nature du concept juridique et la logique, *Archives de Philosophie du Droit* XI (1966), pp. 49 et seq.

(77) MOTTE, Marie Therèse — FORIERS, Paul — DEKKERS, René — PERELMAN, Chaim: Essais de logique juridique: A propos de l'usufruit d'une créance, *Journal des Tribunaux* (April 22, 1956), N°. 4104, pp. 261-274, quoted by BAYART, A.: Le centre national belge de recherches de logique, *Archives de Philosophie du Droit* XI (1966), pp. 172-173.

(78) Cf. HUSSON, L.: Les apories de la logique juridique, *Annales de la Faculté de Droit et des Sciences Economiques de Toulouse* XV (1967) N°. 1, pp. 38 et seq.

(79) COHEN, Morris R.: *Law and the Social Order:* Essays in Legal Philosophy, New York, 1933, p. 130.

(80) Justice HOLMES in Guy v. Donald (1906), 203 U. S. 399, 406.

(81) Perez v. Sharp (1948), 32 Cal. 2d 711.

(82) SUZMAN: Race Classification and Definition in the Legislation of the Union of South Africa: 1910-1960, *Acta Iuridica* (Cape Town) (1960), pp. 339, 355 and 367.

(83) Cf. VARGA: *op. cit.* in note 13, p. 507.

(84) Cf. DAVID, René: *Traité élémentaire de droit civil comparé:* Introduction à l'étude des droits étrangers et à la méthode comparative, Paris, 1950, p. 17.

(85) Cf. RENAULD, Jean G.: La systématisation dans le raisonnement juridique, *Logique et Analyse* I (1958) N°s 3-4, p. 176.

(86) FORIERS, Paul: Le juriste et le droit naturel: Essai de définition d'un droit naturel positif, *Revue Internationale de Philosophie* (1963) N°. 3, pp. 1-18, quoted by BAYART: *op. cit.* in note 77, pp. 178-180.

(87) Cf. e.g. in connection with public administrative practice NAGY, Endre: Diszkréció és bürokrácia (Discretion and Bureaucracy), *Állam és Igazgatás* XXII (1972) N° 3, pp. 220 et seq.

(88) KULCSÁR: *op. cit.* in note 28, p. 221.

(89) SZABÓ, Imre: Méltányosság a szocialista jogban (Equity in socialist law), *Jogtudományi Közlöny* XXV (1970) N°s 4-5, pp. 145 and 149-150.

(90) Cf. SZABÓ, Imre: *Le traitement de l'équité dans les divers systèmes juridiques* (Rapport général présenté au VIII^e Congrès international de Droit comparé), Budapest, 1970, pp. 12-13.

(91) SZABÓ: *op. cit.* in note 89, pp. 148 and 149.

(92) BUCH, Henri: La nature des principes généraux du droit, in *Rapports belges au VI^e Congrès international de Droit Comparé,* Brussels, 1962, p. 67.

(93) *Obshchaya teoriya sovetskogo prava* (General theory of Soviet Law), ed. by BRATUS, S. N., — SAMOSHCHENKO, I. S., Moscow, 1966, pp. 239-240.

(94) Cf. e. g. NODA, Yosiyuki: *Introduction au droit japonais,* Paris, 1966. p. 233.

(95) DAVID, Aurel: La Cybernétique et le Droit, *Annales de la Faculté de Droit et des Sciences économiques de Toulouse* XV (1967) N°. 1, p. 160.

(96) Cf. BATTIFOL, Henri: *La philosophie du droit,* Paris, 1962, p. 21.

(97) Cf. VARGA, Csaba: The Preamble: A Question of Jurisprudence, *Acta Juridica Academiae Scientiarum Hungaricae* XIII (1971) N^{os} 1-2, in particular pp. 106-121.

(98) BAUMGARTEN: *op. cit.* in note 8, p. 11.

(99) For this formulation of the problem of gaps see NASCHITZ, Anita M. — FODOR, Inna: *Rorul practici judiciare in formarea si perfectionarea normelor dreptului socialist* (The function of judicial practice in the formation and perfection of the norms of socialist law), Bucharest, 1961, pp. 194-212.

(100) Cf. WEINBERGER, Ota: Methodology of Juridical Argumentation and Legal Cybernetics, *Kybernetika a právo* (Prague) I (1967) N°. 1.

(101) PERELMAN: *op. cit.* in note 39, p. 274, quoted by HOROVITZ: *op. cit.* in note 39, p. 200.

(102) PESCHKA: *op. cit.* in note 57, p. 125.

(103) Cf. VARGA, Csaba: Les bases sociales du raisonnement juridique, in *Le raisonnement juridique,* Brussels, 1971, pp. 172-175.

(104) PERELMAN, Chaim: (Discussion), in *Etudes de logique juridique,* vol. IV, Brussels, 1970, pp. 54-55.

(105) Cf. PESCHKA: *op. cit.* in note 57, p. 125.

(106) Cf. e.g. WASSERSTROM, Richard A.: *The Judicial Decision*: Toward a Theory of Legal Justification, Stanford, 1961, pp. 90-91.

(107) Before all see e.g. VILLEY, Michel: *Cours d'histoire de la philosophie du droit,* fasc. IV, Paris, 1965, pp. 402-404 and by the same author: Questions de logique juridique dans l'histoire de la philosophie du droit, in *Etudes de logique juridique,* vol. II, Brussels, 1967, pp. 3-22.

(108) DAVID, René: Deux conceptions de l'ordre social, in *Ius Privatum Gentium:* Festschrift für Max Rheinstein, Band I, Tübingen, 1969, pp. 53-66.

(109) DEKKERS, René: Justice bantou, *Revue Roumaine des Sciences sociales:* Série de Sciences juridiques XII (1968) N°. 1, pp. 57-62.

(110) Cf. DEKKERS, René: Les sources du droit chinois contemporain, in *Zbornik radova o stranom i uporednom pravu* (Collection of papers from the field of foreign and comparative law), vol. IV, Belgrade, 1966, p. 75.

(111) WASSERSTROM: *op. cit.* in note 106, pp. 122-136.

(112) BOLDING, Per Olof: Reliance on Authorities or Open Debate ? Two Models of Legal Argumentation, *Scandinavian Studies in Law* XIII (1969), pp. 65 et seq.

(113) NODA: *op. cit.* in note 94, p. 236.

(114) Cf. SZABÓ, Imre: *Szocialista jogelmélet — népi demokratikus jog* (Socialist theory of law — people's democratic law), Budapest, 1967, p. 109.

(115) *Ibid.,* p. 103.