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Unorthodoxy in legislation: The Hungarian experience.

by

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# UNORTHODOXY IN LEGISLATION: THE HUNGARIAN EXPERIENCE

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This paper deals with legal unorthodoxy. The main idea is to study the so-called unorthodox taxes Hungary has adopted in recent years. The study of unorthodox taxes will be preceded by a more general discussion of how law is made under unorthodoxy, and what are the special features of unorthodox legal policy. Unorthodoxy challenges equality before the law and is critical towards mass democracies. It also raises doubts on the operability of the rule of law, relying on personal skills, or loyalty, rather than on impersonal mechanisms arising from checks and balances as developed by the division of political power. Besides, for lack of legal suppositions, legislation suffers from casuistry and regulatory capture.

**Keywords:** unorthodox economic and legal policies, populism, special industry levies, quality of legislation, rule of law, legal certainty, substantive and procedural justice, review of constitutional provisions

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## 1. Introduction

“Never forget that everything Hitler did in Germany was legal.”

Martin Luther King

Legal positivism suggests that law, although being influenced by its social environment, is able to generate itself. Such a strong belief in law is broken at critical times. Following the cataclysm of the Nazi dictatorship or the holocaust, it was inevitable to come back to the non-legal fundamentals of civilisation. This way, law should be established on the basic value of human dignity, the protection of which is to be ensured without regard to how the state power operates.

Law may be subordinated to meta-juridical values in different ways. For example, Martin Luther King stood up for the equal treatment of citizens, no matter whether they were black or white. The choice of equal treatment should exceed the various options of interpreting law. Populist political systems are infamous for subduing law to political will. Quite similarly, unorthodox policies identify themselves that they are engaged in taking targeted measures at the time when conventional methods do not promise success. They do not continue to adhere to accepted norms. Instead, they seek to comply with values that are said to be more important than the alleged legal sophism.

In the following, legal unorthodoxy will be dealt with. The main idea is to study the so-called unorthodox taxes Hungary has adopted in the recent years. The study of unorthodox taxes should be preceded by the more general discussion of how law is made under unorthodoxy, and what are the special features of unorthodox legal policy. The present paper concerns this broader subject.

## 2. A theoretical framework for unorthodoxy in economic policy and legislation

Unorthodoxy is manifested in various policy fields. In legal policy, unorthodoxy badly affects the quality of legislation. Populism enhances the problems in handling the constitutional values of equality and the rule of law. In the following part, the paper seeks to clarify what are the main features of the policy courses of unorthodoxy and populism. Particular regard will be given to legal developments. Unorthodox law will also be illustrated by the examples of special industry levies.

### 2.1. Criticism of industrial societies and the performance of mass economies

Jürgen Habermas discovered the legitimacy crisis of late capitalism in the seventies of the last century. Already at this time he noted as crisis phenomena the disturbance of ecological balance, alienation and the explosive strain in international relations (Habermas 1995).<sup>1</sup> He argues that in these circumstances, it is not sufficient just to rely on the operation of the macro structures of society (on the organisation of social production and the centralisation of income) to achieve stability and cohesion in society. It is also important to acknowledge that physical place cannot be filled unless social space is evolved from time to time through the interactions of small groups affected in particular situations. Agents are distributed in the social space not only according to the overall volume of (economic, cultural, social and symbolic) capital they hold but, more importantly, also according to the relative weight of the different species of capital, as Bourdieu (1989) asserts.

In a world where the medium is message and social practice is proliferated in different layers of virtuality, mechanisms are active that can be interpreted by a growing tension which can be assumed between the aspects of social and systemic integration. In everyday life, informal communities operate due to bargaining and compromises, deliberation and orientation to coherence

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<sup>1</sup> “The resource of ‘value’, siphoned off by the tax office, has to make up for the scanty resource of ‘meaning’. Missing legitimations have to be replaced by social rewards such as money, time and security” (Habermas 1995: 154).

in values. In parallel to this, subsystems are also developed. In an analytic point of view, stability in social practice can be highlighted with regard to the interaction between a system and its environment. An empirically ascertainable connection exists between the principle of differentiation of social systems and the form, in which subsystems differentiate themselves in society, being self-referentially closed, and open to their environment (Luhmann 1988). In late functionalist sociology, what is causal will be replaced by what is structural.

In the traditional state-society interaction, the so-called state consent model of legitimacy was the foundation of the recognition of law and legislation. Law was supposed to be legitimate since it was (explicitly or implicitly) consented by the (democratically elected) representative bodies of people. In a changing state-society interaction, the traditional explanation of law does not seem to be sufficient. The official policy does not address people as long as it is not able to make impersonal relationships into personal. It is only able to take effect if it intrudes on private life. In this process, the borderline between privacy and public life is blurred.

Unorthodoxy is a product of the above mentioned social changes. It may assume policies that are not established on the standards of the rule of law and representative democracy. They are more personal, and private rather than public in nature. Unorthodoxy arises from the criticism of the performance of unarticulated common needs of industrial societies. The criticism of mass societies also leads to scepticism about modernity, and, learning from Ortega and Nietzsche, negation of the equality before the law principle.

Unorthodoxy appears first of all as economic policy. Under unorthodox economic policy, it is crucial to meet the basic needs of a large number of consumer households. To do that, it is not possible just to rely on the simple logic of being economic with scarce resources, because the aspirations of consumer households are complex. It is inevitable to involve public sources in meeting these complex needs on a large scale. Furthermore, unorthodox economic policy assumes the function of balancing between the needs of consumer households and the households of enterprises. This is inescapable again for lack of integrity in the relationship between consumers and enterprises, driven by the laws of market economy (Kopátsy 1995).

Unorthodox economic policy does not bother a lot about the development of human infrastructure and public institutions (schools, hospitals, institutions of social care, etc.). It is eager, however, to secure an acceptable standard of living for the families of ordinary people, for example, by freezing the energy prices private households have to pay. This policy does not place much stress on public institutions. It is vigilant, however, in assisting people in preserving what they have acquired for their private household. In general, people are appreciated if they are able to acquire financial means to meet private needs, and people are neglected who are not successful in this business for any reason.

Political power consists of the amalgam of people connected to each other like in confraternity, or rather clanship. The middle class, the position of which is maintained by administrative means fiercely resist any connection both with the poor who are not able to acquire goods, and foreign investors, with which they would not be able to keep pace in free competition.

After the time of mass societies, the mechanism of market demand and supply may fail to operate because needs are complex and unpredictable. Sales are not possible unless detailed offers are not agreed in advance. Relational goods emerge that can only be sold, taking into account the personal aspirations of those to whom products are addressed. Unorthodox economic policy seeks to improve the mechanisms of offer and acceptance by orienting private households of their chances (Kopátsy 1995: 66-67). Under these circumstances, economic efficiency will be superseded by the common will, as interpreted by the state.

It is a fundamental consequence of the operation of unorthodox policy that the material determination of justice prevails over legal formalities. Under such circumstances, it is difficult to do quality legislation. To be worse, every-day life experience is imbued with political explanations

that are far from any theoretical consideration. Then, legal hypotheses will also be depreciated. Impersonal legal mechanisms and sound law-making are debilitated by messianic or arbitrary views. The rule of law cannot be recognised in a field of irrational political decisions.

Where the state is engaged in transferring economic and non-economic resources among households, maintaining a high level of centralisation, laws are frequently tailored up to the individual positions of companies or groups of persons, legislation may be captured by lobby-groups, and there is no room for the enforcement of legal principles. Democratic procedures and fair trial are oppressed by the administration of justice addressed to individuals. As laws are adjusted to every-day targets, legal certainty will also be undermined.

## **2.2. Populism**

The political environment of populism can be characterised by the following (Laclau 2005):

- the language of public discourse is of paradigmatic, rather than of syntagmatic nature, i.e., political declarations are attractive rather than systematic;
- the holders of political power seek to present the politically organised space as a whole, as if it were equivalent with the political will as reflected by the major groups of society; and
- political power itself is able to generate ideological contents independently; so, what is representing may prevail over what is represented.

The social environment of populism can be characterised as follows (Neumann 1949):

- populism provides the promise of getting easy access to material goods; this is a message contrary to be ascetic; in the light of the latter, people renounce consuming the goods that can be adjudged as evil in a process where suffering is manifested as reasonable and the individual, refraining himself or herself from action can be glorified and spiritualised;
- the individual is pathologically inflated, and the empty space left due to the disrespect of professional values is replaced by authority, or even force;
- repression comes to the fore that produces waste, the removal of which is only possible by the assumption of conflicts, and showing up scapegoats and fabricating conspiracies;
- no space is left for ethics; morality can be replaced by Darwinism, and legal regulation by voluntarism; and
- the possibility of social regulation is constrained (Freud 1921) by the facts that people who are hypnotised or neurotic in a crowd lose their judgment and morality, and they can be pathologically subordinated to their leaders, losing their sensibility to innovation.

A populist state seeks to invoke people directly, not refraining itself from entering the spheres that have been left before in intimacy. Populist politicians may organise by political force civil circles, elaborate the systems of the so-called national cooperation, attacking people by junk letters and bogus questionnaires, etc. The only function of these actions is to deepen the feelings of being identical with the distinct political power, undermining representative democracy. In the economic policy, a populist state prefers to apply the so-called unorthodox means. Examples include: preferential treatment of manufacturing to services, and even to the knowledge-based society, initiating so-called strategic agreements with selected big corporations, the use of the monetary reserves for financing targeted aid measures, the introduction of special and luxury taxes, etc.

## **2.3. Regional and Hungarian issues**

The above-mentioned reasons for unorthodoxy are present everywhere in current times. Ill performance of mass societies is clearly visible. In the region of Central and Eastern Europe, the problems of bad operation are even more apparent. This is due to the historic problems of transition into modernism. Unorthodoxy is usually the product of social malpractice. It is characteristic for the region that all the processes of modernisation started as in Western Europe. However, most of them

have not been completed. Therefore, one can conclude that here it is not a bourgeoisie that has organically developed, but a type of semi-bourgeois has appeared that by and large lacks autonomy in his or her course of actions.

The representatives of the lower middle class have been the victim of the change from progressive to proportional income tax. Local governments have been deprived of autonomy, public schools and hospitals have been centralised. It is a major barrier to competition that one cannot be successful without developing a nexus with politicians. This is true for public procurement, for applications to rent public land, or for getting licenses to operate monopolies (Kis 2013).

Populist policy means consumerism, converting citizens into common people. It also means paternalism in society and voluntarism in policies. Reference to patriotism is enhanced, justice can be promulgated, but it cannot be discussed. Political competitors are stigmatised, demagoguery becomes systemic, and the separation between the state and church is challenged (Ripp 2006). The buzzwords to be followed are resistance, preservation of ancient values, circumvention of law and avoidance of taxes. The alternatives of them would be: proactivity and deliberate actions, adaptation, catching up, balancing, progression. They are less popular, however (Csizmadia 2010). Unorthodoxy is an alternative to modernisation. It is viable in a system of managed capitalism (Tölgyessy 2013).

Special industry levies have been introduced in Hungary without previous negotiations and agreements with the various groups of interest. To be worse, special taxes were introduced in the autumn of 2010 with a retroactive effect to the beginning of the fiscal year. The democratic control of citizens was missing. Even if the distribution of the public burden to be incurred was negotiated with the participants of some special industries subsequently, the Hungarian government failed to respect agreements (e.g., that was the case with the agreement made, and broken, by the government in December 2011 with the Hungarian Bankers' Association).

Hungary has been a model country of fiscal populism since 2010 (a country that is no longer officially called as the Republic of Hungary). The Hungarian prime minister described the economic and fiscal policy of his country by the words as follows (Orbán 2011):

- share in the public burden: in the light of this buzzword, the principles of equality and legal certainty that would normally underlie the general share in the public burden can be loosened; examples for this are the withdrawal of the savings of private pension funds, the application of crisis taxes, or the introduction by force of the subsequent final repayment of mortgage loans and the foreign exchange rates on mortgage loans, fixed by the state below the market rates;
- corroboration: the addressee of this measure are the groups of the middle class selected by the government who are the beneficiaries of the proportional income tax replacing the progression in income tax; and
- economic restructuring: it relates to reduction in public debt, and suggests that the Hungarian state is interested in tax and regulatory competition, and disinterested in European tax harmonisation.

As the Hungarian prime minister explains, Europe is in crisis, and the time of crisis requires special measures to take. This is why targeted actions are preferred to legal certainty (Fehér 2013). In general, under populism, fiscal discipline is superseded by pro-cyclical discretionary fiscal policy (Kopits, 2001).<sup>2</sup>

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<sup>2</sup> George Kopits reported that in the first decade of the current century, both developed countries and emerging economies followed by and large fiscal discipline. Pro-cyclical discretionary fiscal policy was characteristic in the 70s of the 20<sup>th</sup> century.

## 2.4. An example for unorthodoxy: special industry levies

Special industry levies have proliferated in the recent years in some countries. Hungary is eminent in introducing such levies. Examples are: bank levy, financial transaction duty, telecom tax, special tax on energy suppliers, pharmaceuticals' contribution, and retail store tax.

Some considerations can be taken into account as to how much the application of special industry levies is reasonable:

- during an economic crisis, both the responsibility and the elbowroom of public intervention is increased;
- it is just and fair to apply levies on windfall gains if any; and
- special levies, being para-fiscal charges, are different from taxes due to the link established between payment and services, the dedication of revenue to particular goals, and the close link between tax and non-tax means of public intervention.

Furthermore:

- fiscal discipline could be superseded by pro-cyclical discretionary fiscal policy that is manifested in the unorthodox fiscal measures like the application of tax amnesty, confiscatory taxes, crisis taxes or Robin Hood taxes;
- targeted actions are preferred to legal certainty; and
- preferential treatment of manufacturing to services, and even to the knowledge-based society, is increasingly common, initiatives of so-called strategic agreements with selected big corporations, or the use of the monetary reserves for financing targeted aid measures can also be noticed.
- the principle of the general share in the public burden is adjusted under the umbrella of corporatism, according to which the liability to pay in favour of the public budget is determined in proportion to the social responsibility of corporate bodies; and
- the state is eager to arrange for the allocation of privileges among the selected players of the national economy, rather than to contribute to strengthening the principles of equality before law, fair treatment and effectiveness in the protection of citizens' rights.

Special industry levies can be indicated as Robin Hood taxes, considered as a means of restricting human behaviour, which cannot be accepted socially, or which can be reprimanded. A function of administering justice is frequently imputed to special industry levies. As the administration of such justice always lacks a sound basis, the introduction of Robin Hood taxes usually divides society.

It seems to be precluded that the methods of robbery could be ethically justified, even if they are popular. To illustrate this, one can see the story of Karl Moor as recounted by Friedrich Schiller, or that of Michael Kohlhaas narrated by Heinrich von Kleist. For the purposes of the rule of law principle, it is of particular danger if the state tolerates, or even furthers the application of the principle of "fiat iustitia, et pereat mundus".

It is a major problem in Hungary that no plan was prepared for compensation to be made in exchange for the payment of tax. For example, in other countries, the revenues collected from a bank levy go for special funds to support the development and secure operation of banks. Another example: the revenue gained from a Robin Hood tax that is imposed on energy suppliers can be used to finance the research for alternative sources of energy. In Hungary, special industry levies simply meet the appetite of the state budget. An indication of special industry levies lacking justification is that the Government itself considers them as provisional.

Hence, the Government that introduces special industry levies renounces justifying its policy. Justification would be possible only if there were clear plans for what purpose the revenue collected from these levies can be used, and a clear link would be created between the liability to pay and the

public services to be provided in exchange for payment. It would thus be required to determine needs before the democratic public and conduct plans for the benefit to be expected from the public investment.

It is a further problem that since the revenue to be collected from special industry levies is planned as provisional, the state budget that relies on it does not seem to be tenable. This is the main reason why at the time the special industry levies were introduced, a crisis of confidence developed between the Hungarian government and the European Commission concerning the credibility of the Hungarian state budget's estimates. Alternatively, were the special taxes not phased out – as there are hints at that – fiscal policy would retard investments and, this way, economic growth, and distort economic decisions. Under such circumstances, it is decisive for success how it is possible for companies to gain access to public resources and orders what would then depart the economic behaviour from free competition, and market-oriented rationality withers away.

Special industry levies seem to undermine not only the principle of legitimate expectations, but they also contribute to the implementation of creeping expropriation. However, international law prohibits expropriation if the final result of the state policy is to deteriorate the domestic conditions of foreign investors. Erosion of legal certainty may also lead to the violation of ownership, not to mention about stifling entrepreneurship.

While special industry levies are introduced, the liability to pay tax depends on the position the taxpayer holds in the national economy that can significantly be influenced by the state itself. Under such circumstances, it is not only the principle of proportionality of taxation can be suspended, but also the principle that taxation should take place according to the ability-to-pay. In case of special industry levies, it is not possible to compare with each other citizens on a horizontal axis, based on their financial capabilities because the state isolates from each other particular groups of citizens and enterprises, depending on particular positions they hold.

As a consequence, it is impossible to enforce not only fiscal neutrality, but also democratic control. Breaking neutrality also ensures that the state, while it claims to have wide control over resources, gives up being impartial. It will thus support selected companies and groups, introduce levies on particular branches, and it will be busy with centralisation, distribution and redistribution.

For lack of the methods of measuring social needs in conformity with the laws of a market economy, it is only possible to make a broad assessment of the volume of state responsibility, and the public revenue the state seeks to collect through the introduction of special industry levies. Special levies appear quite frequently as lump-sum taxes because no tax base could be determined exactly in monetary terms. Special industry levies may also be like poll taxes, which means that the same burden is imposed on each household, irrespective of the taxpayer's ability-to-pay. The effect of this however is a fierce regression in taxation.

### **3. Standards of orthodoxy in legislation**

Unorthodoxy can be determined as everything that is not orthodox. It can thus be characterised by means of describing orthodoxy. In the light of orthodoxy, it is reasonable to summarise the formal criteria, according to which legislation can be assessed in general. They are closely related to the notion of legal certainty. Once the standards of the rule of law and legal certainty are met, one can conclude that all is right with legislation. Legislation can thus be held as orthodox.

Formality of law can be discussed from different approaches (i.e., from the angle of legal positivism, natural law, or from other doctrines). This paper is not concerned with systematising the rule of law issue. Its only purpose is to highlight the features of orthodoxy in legislation. In this respect, the arguments delivered from different theoretical views may lead to the same conclusion, according to which it can be clarified what is unorthodoxy and unorthodoxy in legislation and legal



policy. It will then be possible to compare the practice of unorthodox legislation to the standards of orthodoxy. This is what is discussed below.

### 3.1. Rule of law and legal certainty

Rule of law emerges where political power is divided among several branches and the source of political power is the law (Carothers 1998; Mayhew 1968; Long 1968; Dicey 1964; Leibholz 1977). The hard core of the rule of law principle is the standard of legal certainty. Obviously, personal discretion must be subordinated to the general rule. This is because norms are able to negotiate social instructions more efficiently and in a more transparent and open way than specific legal measures (Scalia 1989).<sup>3</sup>

The term of legal certainty can be reflected in a dichotomy between predictability and acceptability. In the first case, the term suggests clarity, consistency and predictability of law, in the second case, social recognition. In the first respect, legal certainty serves stability, in the second one, flexibility. The first aspect is of formal, the second one of material nature (Paunio 2009). In practice, legal certainty is an issue of barely formal requirements. The material aspects of the appreciation of legislation may lead to the issue of administering distributive justice.

Paradoxically, while cohesion in law is crucial in common law jurisdictions where the state refrains from comprehensive intervention, and relies on the high-level abstraction of equal treatment, the term of legal certainty is not widely known in common law countries. Instead, they prefer simply to refer to the rule of law standard. According to Robert Summers (1999), the essential component of the rule of law is that laws should be validly made and publicly promulgated, be of general application, and they should be stable, clear in meaning, consistent and prospective. This is practically the same as the contents of the legal certainty maxim as drafted in Europe.

In common law jurisdictions, the rule of law principle is in fact confined to its formal meaning. This can also be seen from the idea of Summers quoted above. Although it could be possible to argue that in its material sense, rule of law means that political power should be traced back to law only, the material considerations of the relationship between law and society could be expressed by other terms, such as justice and the general welfare. Rule of law simply means that law should be created in a correct way (Maxeiner 2006-2007). Even if the requirement of certainty in law is acknowledged, more emphasis is placed on rules than on principles. In the European Union, the principles of equal treatment, proportionality and legitimate expectations have been developed under the auspices of the EU Court of Justice. The result of their application is to enforce legal certainty.

Under English common law, certainty in law is guaranteed first by the courts, who define and enforce the rights of the citizens, and secondly by the lawmaker who clearly and in advance prescribes which actions will be sanctioned. In the United States, the principle of the certainty of law is given through the “due-process” clause. There, the “vested rights” doctrine slowly evolves into a doctrine of the protection of legitimate expectations. In Europe, the modern concept of the certainty of law, as acknowledged by the EU Court of Justice, is based on the German doctrine and jurisprudence, defined as “Dispositionssicherheit” (Popelier 2000).

In the ancient times, the rule of law can be identified with the services of the public good and justice. More importantly, the guarantee for good governance is the personality of the ruler (the brave prince), not the law, as it is conceived at present. A monarch may be able to resist the extremes in all directions, reaching the golden mean. This can only happen in an aristocratic political system, as Platon and Aristotle claim (Tamanaha 2004).

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<sup>3</sup> Rightly constituted laws should be the final sovereign.

The rule of law is associated with the legal (formal) authority, as opposed to traditional and charismatic ones, and the (formal) rational legitimation of state power. This is at the time of free trade and political democracy where bureaucracy emerges, ensuring the formally rational operation of state power as described by Max Weber (Weber 1922). Broadly speaking, rule of law may come into force when the operation of the legal system is based on continuity, and distinction is valid and meaningful between rule of law as reason and rule of man as passion (Tamanaha 2004: 9).

### **3.2. Legal positivism and natural law, rule of law and rule of reason**

Common law jurisdictions, even if legal positivism of Herbert Hart and Joseph Raz has been widely appreciated, are open to the non-legal layers of social conventions. Although law is conceived as a system of rules that are consistent with each other, it is open first because a system of precedents cannot be as much closed as a statutory system of law, secondly because it is not precluded that common law is exceptionally adjusted by equity or natural justice. Law should eventually be subordinate to human rights and the protection of human dignity (King 1963). From this angle, even radical criticism can be drafted against the products of positive law, including tax legislation.

The strict position of legal positivism cannot be upheld in Europe either, in particular after the Second World War. The drama as depicted by Gustav Radbruch through the conflict-laden terms of “gesetzliches Unrecht” and “übergesetzliches Recht” (approximately: “being legally unjust” and “law beyond the scope of statutes”) was inconceivable before. Radbruch concluded that statutory law must be respected, but exceptionally it should be superseded by the commands of natural law. Hence, legal positivism must be complemented if necessary by the principles of the public good and justice (Radbruch 1946).<sup>4</sup> Legal certainty has priority in the normal life. It can be superseded in extreme situations only. However, law cannot obtain its validity from the law itself. The core of law is justice, and the core of justice is in turn equality. Positive law must actually be assessed in the light of equality (Radbruch 1946: 108-109).

Cicero introduces the idea that the rule of law should at the same time be the rule of reason. Law is eventually the manifestation of natural reason. Posited law must be subordinated to this higher layer of law (Tamanaha 2004: 11). Natural law reflects the social order that is emanated by the rule of reason. Reason is available for everyone, by means of which people are able to formulate, and can approximate with each other their will. The general will made by the agreements of rational agents may lead to freedom. This is the logic of enlightenment that has been guiding modern social practice to date.

In law, the rule of reason suggests that the legal evaluation of actions can only be made properly in the light of specific facts and circumstances. In Community law, the restriction of one or more of the fundamental freedoms by Member State authorities can only be justified in the light of proportionality. That is, the means as chosen by the legislator should be in proportion to the legislative goal.

The rule of law has traditionally been developed as a counterbalance against the arbitrary executive power. After the Second World War, the concept of the rule of law has been broadened. Constitutional courts have been established first in Germany, then in the Latin countries of Europe, after then in Central and Eastern Europe. The reason for this is that it is not only the executive, but

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<sup>4</sup> “Rechtssicherheit ist nicht der einzige und nicht der entscheidende Wert, den das Recht zu verwirklichen hat. Neben die Rechtssicherheit treten vielmehr zwei andere Werte: Zweckmäßigkeit und Gerechtigkeit. In der Rangordnung dieser Werte haben wir die Zweckmäßigkeit des Rechts für das Gemeinwohl an die letzte Stelle zu setzen. Keineswegs ist Recht alles das, »was dem Volke nützt«, sondern dem Volke nützt letzten Endes nur, was Recht ist, was Rechtssicherheit schafft und Gerechtigkeit erstrebt. Die Rechtssicherheit, die jedem positiven Gesetz schon wegen seiner Positivität eignet, nimmt eine merkwürdige Mittelstellung zwischen Zweckmäßigkeit und Gerechtigkeit ein: sie ist einerseits vom Gemeinwohl gefordert, andererseits aber auch von der Gerechtigkeit.”

also the legislative power that must be checked from time to time (Popelier 2000: 326). This is the direction, from which the question of the quality of legislation can be formulated and approached. The abuse of monopoly power is thus not confined to the executive power. The parliamentary majority is willing to make an abuse of the monopoly of power in fragile democracies as well, in particular under populist governments.

From a positivist perspective, legal certainty is a key term in understanding law even in America. The idea of law is not to administer justice, but to provide legal certainty. Law pretends to do justice only. It provides, however, a predictable way to decide cases. Law is (in the celebrated definition of Justice Holmes) “nothing more pretentious” than “prophecies of what the courts will do in fact.” (Rumble 1961).<sup>5</sup> The conception of the rule of law is still not very much different, depending on whether interpreted from the angle of positive or natural law. On the one hand, Joseph Raz speaks that “the government shall be ruled by law and subject to it” and that “the creation of law [...] is itself legally regulated” (Raz 1977; O’Donnell 2004). On the other hand, John Finnis stresses quite similarly, although from another theoretical direction, that the legal system is an aspect of the overall social order that in principle “brings definition, specificity, clarity, and thus predictability into human interactions” (Finnis 1980; O’Donnell 2004).

The quality of legislation is emphasised in particular in the Benelux countries. In Belgium, Directives for regulations were released already in the early nineties. Citizens have the right to enforce the quality of legislation even before the court (Popelier 2000: 323).<sup>6</sup> Quite similarly, in the Netherlands, taxpayers can challenge tax statutes without being obliged to enlist the support of an administrator or administrative agency in order to advance the challenge (Happé – Gribnau 2007). With regard to retroactive tax legislation, the State Secretary has committed himself in a memorandum to rules of conduct with regard to different situations where he deems retroactive tax legislation to be justified (Gribnau 2013).

In Hungary, it is possible to implement self-audit concerning the interpretation of legal provisions.<sup>7</sup> The taxpayer may be of the opinion that the validity of the legal basis of the tax liability under audit can be challenged. If the payment of tax is refuted on that basis, the tax authorities are not allowed to determine unpaid tax or apply administrative or late payment penalties. If the tax authorities do not agree with the taxpayer’s position, the dispute can eventually be solved before the court.

### 3.3. Rules and principles

A rule is appropriate to address simple phenomena. It must be targeted at details. Principles or standards cover wider subjects and concern more complex issues (Braithwaite 2002). Although the tradition on the application of rules is very strong in certain countries (first of all the UK), currently, under the circumstances of the upheaval triggered by the global financial and economic crisis, it is all the less possible to uphold this. As the complexity, flux and the size of regulated economic interests increase, certainty progressively moves from being positively associated with the specificity of the acts mandated by rules to being negatively associated with rule specificity, as John

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<sup>5</sup> The opposite view on law is represented by Jerome Frank (1930), not followed however by most lawyers. His thesis is as follows: The essence of the basic legal myth or illusion is that law can be entirely predictable. Back of this illusion is the childish desire to have a fixed father-controlled universe, free of chance and error due to human fallibility.

<sup>6</sup> Directives for Regulations (*Zicht op Wetgeving*), 1990-1991, 2 TK, 22, at p. 008.

<sup>7</sup> Under Article 124B of Act CXII of 2003 on taxation rules, as amended, the tax authorities make a review of the taxpayer’s self-audit within 15 days of filing the self-audit by resolution, without implementing a tax audit where the taxpayer files the self-audit for the sole reason that the legal rules on tax obligation would not be consistent with the constitution or with Community law, or the resolutions of local governments would not be consistent with other legal rules, provided that, until the time of filing, no decision of the Constitutional Court, the Curia or the EU Court of Justice has been promulgated on the question the taxpayer referred to, or the self-audit has not been consistent with the promulgated decisions. It is possible under the general rules of taxation to lodge an appeal to the resolution on the review of the self-audit or seek for a review before the court.

Braithwaite (2002: 52) asserts. In the arena of international business, the application of principles cannot be avoided either. The reason for this is that the nation state is not able to serve companies engaged in business, while crossing the border of national jurisdictions.

Fiscal populism also prefers to take away rules, referring to the major ideas on non-law, like justice or patriotism. The vision of targeted actions to react to the changing environment of global economic crisis cannot bear legal considerations. The voluntarism of Robin Hood taxes and similar measures cannot host the discipline negotiated by the systematic application of particular rules.

From a libertarian perspective, the rule of law suggests that the state must not interfere with the economy, only in the capacity of making rules. The application of principles should then be precluded (Hayek 1960). From a left-wing and liberal viewpoint, the state should bear responsibility for maintaining economic and social balance. Upon systematic intervention, principles are indispensable (Dworkin 1986; Braithwaite 2002: 48).

From a very strong positivist and rule-bound viewpoint, the problem of principles like GAAR (general anti-avoidance rule) simply does not exist. This is characteristic for tax law scholars. According to them, the tax avoidance problem could in fact be reduced to that of tax expenditures. The whole problem could allegedly only exist because politicians want to introduce tax expenditures without specifically spelling out who the intended beneficiaries are, and because it would be politically dangerous to explicitly identify the intended beneficiary group. Hence, law cannot be a problem. If there are difficulties in legal application, they can be traced back to the deficiencies of out-of-law phenomena (Braithwaite 2002: 79).

In the context of the theory of law and economics, Luis Kaplow contends that because rules would have higher promulgation costs in deciding how to craft them “ex ante”, rules should only be written if the law were applied frequently. Standards would have lower promulgation costs than rules but higher application costs (i.e., costs in determining how they should apply to specific situations). Hence, standards could be more economically efficient in application to arrangements that would arise only rarely (Braithwaite 2002: 80). In civil law countries, the application of “ex ante” measures seems from this logic generally to be better investment than to rely on a variety of “ex post” measures.

The distinction between rules and principles must not be too rigid. One can argue that this would be a choice for the legislator on the surface only. Allegedly, uncertainty could not be expelled from rules, and principles would also hold a hard core (Schauer 2003). When authorised to act in accordance with rules, rule-subjects would tend to convert rules into standards by employing a battery of rule-avoiding devices that would serve to soften the hard edges of rules. Conversely, the adaptive behaviour of rule-subjects when given a standard would go in the opposite direction. These rule-subjects, when given few rules in the rules-standards sense, would apply them to their own allegedly discretionary behaviour, thus limiting significantly the case-sensitive discretion that it was the intention of the rule-maker to grant (Schauer 2003: 312). In the tax law practice, taxpayers are willing to dilute the applicable rules with a view to following tax planning strategies, on the one hand. On the other hand, upon the interpretation of tax law by the authorities, principles may receive more specific meaning, depending on special conditions.

#### **4. Proceduralisation of law**

The crisis in legislation can be imputed to the major problem that it has been all the more difficult to interpret material justice both in legal and non-legal environment. Unorthodoxy can precisely be manifested in the fact that it disregards the difficulties in interpreting justice for legal purposes at the time when it is also problematic to manage social welfare. As understanding proceduralisation of law is important for the purpose of discussing orthodoxy and unorthodoxy in law, the emerging importance of the form of law will be discussed below.

#### 4.1. Substantive and procedural justice

The crisis of the welfare state has been made apparent by the neoliberal economics reviving in the 70s and 80s of the 20<sup>th</sup> century. Economist and, following them, the representatives of political and related sciences pointed out the relevance of the Leviathan state that would live on the surrounding society parasitically, and that would be lavishing and uncontrollable. The operation of a welfare state would be presupposed by permanent, comprehensive and systematic state intervention what would obviously consume much money. A consequence of this is not only the problem that the operation of public organs would be too expensive, but also that abundant public institutions would lose their authenticity. As the Leviathan would stifle healthy civic and entrepreneurial initiatives, it would become a major impediment to freedom.

If the welfare state is not able to meet the actual expectations, it is not in a position either to fill its basic role: it does not have enough power to enforce the principles of redistributive justice. The latter concerns justice that is viable in practice in the instance that social welfare that is identified to the materialised form of happiness can be broken down into basic units of measurement and, this way, it is distributable among the major groups of society. This type of justice can be said to be substantive. That is, it relates to the merits of cases, to the essence of things. This phenomenon can be expressed by lawyers that the aspirations of state organs to administer justice is framed by the principles of substantive law (Kolm 1993). The welfare state manifests itself, e.g., in the introduction of progression in income tax, the organisation of regional state aid, etc.

It is possible that one assumes fiscal policy, according to which the high-level standard of the equality before the law is applied to various social groups, while neglecting the real-life differences that otherwise exist between them. Alternatively, it is the material principle of redistribution that, above a certain level of richness, no state subsidy is given, while the cumulatively handicapped should pay no or less taxes. Substantive law occurs when, e.g., it must be determined what is the meaning of the right that labour must be duly compensated, or of the liability to pay tax. It is in turn a procedural law issue how the right to compensation can be enforced or how the liability to pay tax is administered. Broadly speaking, it is also of procedural law nature, or it is a question of modality in law, in which system of institutions the state organises itself in a certain territory at a certain time over a certain population, or even how the individual or normative measures of a state can be put in a legal order.

The goods redistributed by the welfare state are usually exclusive. That is, the more is consumed by certain persons, the less remains for the rest of population. This is the product of industrial mass societies that can be measured by and large reliably. The value of the goods or services to be distributed does not depend on to whom the goods or services are provided. The reason for this is that in a mass society it is the material needs as well that appear in bulk. The crisis of the welfare state can basically be explained by the fact that there are all the more difficulties in measuring fundamental goods (Hayek 1974).

One has to take into account the intellectual performance, the value of which is determined by the relationship that is given to the persons who acquire the product of this performance. Here, it is not the so-called positional goods, but the relational ones that appear. Since they are not of material nature, they cannot be measured either in the same way as the products of an industrial mass-society. As a consequence, they cannot be subject to the common criteria of distributive justice either (Bourdieu 2007; Bruno – Zamagni 2007; Bouckaert 2007).

Relational goods can only be enjoyed collectively in a social environment. They are not exclusive, or even it can occur that the more of which is consumed, the value of which becomes higher. For example, the student must be involved in the process of learning and teaching, the patient in the process of healing, and the services provided will be really valuable where interaction is developed between those who render, and those who receive the services in question. The private business

advice can also be like this, and even a novel, the product of fine literature, the copy of which a reader purchases, but he or she may also continue the writer's work to a certain extent, while enjoying it, that has already been completed on the author's side.

In the process of the recognition of the goods inserted into personal relationships, it is no longer a question what the material principles are, according to which goods can be distributed (e.g., those have to pay who benefit from the goods as provided or, on the contrary, it is desirable to try to alleviate social differences, etc.). It is important what the rules of game are, on which the participants of the game of distribution can agree with each other. Distributive justice can this way be replaced by procedural one. It is no longer needed to have a centre of power that is able to anticipate according to which principle the goods will be distributed. It is rather important that the participants contact each other, establishing a common language and an order of values that can be authoritative to them. Although this order of values cannot be valid, but in small groups, this is a means of distribution, however, that can take duly place in this environment (Hayek 1976).

Certain groups can be developed, mainly informally, but this does not mean that they would not be influential. Their members rely

- on compromises rather than on the principle of efficiency;
- on participatory democracy rather than on the alternate party-related mechanisms of representative democracy; and
- on the coherence of cohesive values that have been developed as the fruit of common efforts, rather than on legal certainty and the rule of law.

This is a world which seems to be quite far from the sphere of fiscal policy. This is not true, however. There have been all the more examples for the growing importance of such small groups. They can be developed in the process of the horizontal enforcement of tax liability (Happé 2007a; 2007b), in that of creating soft law, or in somewhere else (Gribnau 2007). Anyway, where taxpayers cannot be satisfied by the normal application of tax law, they seek for non-formal means of achieving certainty. A key to this is coherence to, not certainty of, law.

One cannot claim that relational goods have pushed out the traditional products of labour. The informal communities are for the time being only to complement the extensive state administration. Their role is growing nevertheless in determining the quality of life. Some examples for this development are the following: communities of deliberate consumers, communities of users and developers of open-source software, etc.

#### **4.2. Transformation of substantive law into procedural one**

Procedural justice, as interpreted above, can also be manifested in legal mechanisms. By the term of law one can understand of course not only the direct use of the means of administrative coercion. For example, in the European Union, the five-six decade long development of Community law allows several conclusions on its nature:

- it is autonomous;
- it has priority over Member State law in case of conflict; and
- its important provisions are directly applicable; that is, they are the proper means of the enforcement of individual rights, without being subject to application of national law.

Interestingly, although Community law has undoubtedly become a sovereign system of law, no state can be discovered that would stand behind the creation of this law. This is because the European Union cannot be considered even as a loose form of federation.

This law has been developed by availing itself to the "logic of Baron Münchhausen." It has thus been created due to the inner force of the lawyers' profession, more precisely, by the occasional

communities of players in various cases. One can raise the question: which way could that happen? The answer to this is that Community law has been developed as a means of converting real-life conflicts into juridic ones, concerning which Community law is able to provide solutions, while Member States are powerless.

It is characteristic for Community law that substantive and procedural laws are penetrated into each other. For example, the procedural law question that the public authorities of a Member State should initiate the exchange of information with their counterparts in another Member State must be assessed from the perspective of the fundamental Community freedoms (the free movement of goods, persons, services and capital). Is it important from the viewpoint of the enforceability of the fundamental freedoms, that the competent authorities of a Member State must initiate the exchange of information across borders.

The interrelationship between the forms of substantive and procedural law is true even inversely: substantive law may be transformed into procedural law. The authorities of a Member State can be expected to apply national law not yet adapted to EU law in a “friendly enough” way until adaptation happens. That is, they should contribute to possibly better and better enforcement of fundamental freedoms. It is thus not necessary to change national law in order to solve the problem of citizens, provided that the public authorities change their attitude, opening doors toward the growing claims of their citizens. For example, the French authorities of social security cannot be expected to pay without deliberation the cost of a French resident who got unexpectedly sick in Berlin and is subject to urgent medical treatment at a hospital there. It is required, however, that the French authorities examine whether the medical intervention made on the spot was proper. If so, it is proper as well to exceptionally reimburse the affected French citizen for the cost of the German medical treatment.<sup>8</sup>

In this case, harmonisation can take place bottom up, from a micro perspective. It cannot be achieved due to the mechanisms of official policy, but thanks to the sufficiently flexible management of the specific problem. The application of the statutory laws of a Member State has been subordinated to the standards of the equivalence of the legal systems of Member States, and the effectiveness in the protection of individual rights (effet utile) that are managed flexibly enough.

In many areas, there has not been political will to approximate the laws of Member States. In the light of the Community freedoms developed in Community practice, the authorities of Member States are still expected to make it possible for the principles of Community law developed at a high level to be effectively enforceable in individual cases. To this end, the authorities of Member States should proceed in a way that the Community freedoms should not be restricted unnecessarily or in a non-proportionate way. It is not prescribed how these conditions must be met. They can still be read from the practice of the EU Court of Justice. The issue under discussion is thus not what we want, but that the way in which we pursue our goals. Hence, it has not actually been a substantive, but a procedural law problem of how to argue, and decide, in specific cases.

### **4.3. Form and law**

Procedural justice is the consequence of the formalisation of the redistributive mechanisms of power. The centres of the organisation and redistribution of social production are confined to guarantee the operation of the transparent and predictable forums of safeguarding of interests. In such an environment, law has also been formalised. Namely, the legislator does not seek to allocate the rights and obligations that can be associated to different major social groups. It concentrates instead on the most effective way in which rights and obligations can be enforced that may otherwise be very different from each other.

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<sup>8</sup> See the following case of the ECJ: C-56/01 *Patricia Inizan*, ECR 2003, p. I-12403, Para. 60.

Substantive law answers the question of what rights and obligation one can hold. Procedural law addresses the issue of how these rights and obligations can be enforced. It is a question of procedural law as well how law can be created. Concerning the development of law, one can highlight that the point of law is to formalize the contents determined by political considerations from outside and above the law. As it can be read on the Communist Manifesto of Marx and Engels, law is nothing else, but the will expressed by the ruling classes (Marx – Engels 1974). The relationship between politics and law in this way is determined by politics. The same logic can be found in Hungary from 2010 on in case of the Hungarian ruling party, although their representatives would not be willing to refer to the classics of Marxism.

It is another possible approach to this relationship that one has to identify not law in general, but the right law. The validity of law can in this case be determined, depending on the fact whether the ways and means, in which statutory law is created are immaculate (according to Hobbes, “auctoritas, non veritas facit legem”; see Stammler 1926; Radbruch 1956). Consequently, it cannot be adjudged whether law is right, based on its contents, but on its author.<sup>9</sup> It is important whether the law to be created can be smoothly placed into a given legal order, contributing to the consistency and integrity of the existing law.

In the era of enlightenment, the doctrine of the division of the branches of power has been introduced to provide defence against the over-concentration of political power. What the individual can assert against excessive power is the naked form. It is not really possible to be defended, while being hidden behind bastions. It is not the force of administration either that can be useful, but barely the form as negotiated by law. In free-trade capitalism, it is common to introduce rule-orientation, that is, to apply conceptually constructed rules through deductive logic. Later, the welfare state is aimed at the correction of market imperfections. Therefore, the purposive programmes of action come to the fore. In the postmodern era, self-generating legal systems are developed, while law is confined to providing offers of dispute settlements (Teubner 1983).

Where the legal form is respected, the political contents cannot become part of law, only through transposal. This is for the benefit of law, and also good for society. Valuable things cannot be obtained by force. It is necessary to come to agreements for the purpose that, in the process of giving and accepting goods, the participants of a game could find and fill their own roles. The values that determine the quality of life are worthy to the extent that they can be put into personal relationships.

Law that is designed to bridge over the differences in interests in a civilised way is able to serve such a process of personification, provided it is able to hold inner consistency and reflect outward harmony. For this purpose, law should operate in a sovereign way. If outside factors, like politics, interfere with law, it is mockery, or the rude forms of political will only that can be produced.

The creation of law, including a constitution, cannot start anew each time. The law under creation is embedded in a legal order that has already existed. One can hardly imagine in law a case of “tabula rasa”. It is on the surface only that it would be possible to start from scratch. Importantly, new laws should be adjusted to the old ones because this is the way, in which cohesion in law can grow. This is the way, in which, after the changes of the political and economic system, the Republic of Hungary could find itself in 1989 as a successor of the People’s Republic of Hungary that existed before. The force inherent in continuity cannot be replaced by even the strongest political will.

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<sup>9</sup> With Thomas Hobbes, abstraction from material justice does not lead in fact to the rule of law, but to the justification of the absolute monarch whose action could not allegedly be challenged by referring to material values. Therefore, one can argue that the impersonal mechanisms of the rule of law cannot affect the social environment favorably unless the monarch is bound to a social compact he or she concluded with his or her subjects. The abuse of material justice through unorthodoxy can also be criticized by referring to theories of skepticism, represented already in the era of enlightenment by David Hume.



The majority-holders of political power are in error, thinking about they would be able to impose their will by force. The influence of political power cannot be significant on a society unless its holders take into account the hidden, but existing barriers that arise from the social structure. For political power it may be highly desired to remove the barriers from the enforcement of political will. This is what is called voluntarism. Those who bear in mind barriers, take into account the form of social relations. The form, which seems to be an impediment to the direct enforcement of political will, is a social product that implies common wisdom. The form suggests that the social environment gives clear signs of society to the majority of political power: there are other players on the social scene as well (Fuller 1964).<sup>10</sup>

The form implies human relationships. Those who give respect to the form work on building peace. Instead of focusing on irregular contents, such persons look for the subject, on which it is possible to agree. As seeking for the harmony and balance of society means requirements that can be met from case to case only, the legal form has usually to dispense with the contents that would be determined preliminarily. This does not mean, however, that the inner needs of harmony could be disregarded.

## **5. Assessment of quality of legislation as reflected in the recent practice of the Hungarian Constitutional Court**

The constitutional order has been in a state of flux in Hungary in the recent years. A new constitution (called Fundamental Law) was introduced in 2012 that has already been amended five times so far. It is a break with the previous constitutional order in many respects, of which, the following can be highlighted:

- the Parliament readopted the essence of the transitory provisions attached to the constitution that were formerly repealed by the Constitutional Court;
- the review of constitutional provisions has been explicitly restricted; and
- the former resolutions of the Constitutional Court have lost their effect.

The insufficiencies of the current constitutional practice can mainly be imputed to considerations of unorthodox legal policy. The changes in constitutional law clearly show that law has been subject to political discussions. These tendencies will be summarised below.

### **5.1. Review of the transitory provisions attached to the constitution**

The Hungarian Constitutional Court is not authorised to review the constitution itself and the amendment of it, only in respect to the procedural requirements that concern the creation and promulgation of the constitution and its amendment, and are included in the constitution itself.<sup>11</sup> The procedural requirements on how to create or amend the constitution are determined by Article (S) of the Fundamental Law.<sup>12</sup> This is the aftermath of a judgment the Constitutional Court made before on the annulment of the transitory provisions of the Fundamental Law.<sup>13</sup>

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<sup>10</sup> Lon Fuller speaks about eight “desiderata”, while discussing the inner morality of law. They constitute the eight kinds of excellence in law that are purely based formally.

<sup>11</sup> Article 24 (5) of the Fundamental Law of Hungary, as adopted on 25 April 2011, entered into force on 1 January 2012, and has already been amended five times. This wording was stated by the Fourth Amendment to the Fundamental Law, and is effective as of 1 April 2013. This restriction was in fact introduced on the occasion of the second Constitutional Court decision on severance payments made to public employees, in which the Court declared the 98% special tax unconstitutional, being inconsistent with the principle of human dignity (37/2011. (10.V.) AB).

<sup>12</sup> This Article addresses the following issues:

- who, and in which way, is authorized to make a proposal for the adoption of the constitution or of its amendment;
- what is the order of voting by which the respective proposal can be adopted;

The Constitutional Court decided, based on the proposal of the commissioner of fundamental rights (general ombudsman), and in favour of this proposal. The general ombudsman challenged the transitory provisions of the constitution.<sup>14</sup> He was of the opinion that they contained norms that should have been passed in the constitution itself (examples for the norms that were included in the transitory provisions were: on the early resignation of judges, on the dismissal of the commissioner of data protection in office, on the legal status of churches, on the registration procedure upon elections, etc.).

After the time the Constitutional Court annulled the transitory provisions of the constitution, the Parliament reassumed the incriminated provisions almost in their entirety, now integrated into the body of the constitution itself. The reason for this was that, according to the Parliament, the Constitutional Court referred to formal deficiencies only. Therefore, the Parliament was free to adopt the same law again.

The Constitutional Court held that the contents of the transitory provisions attached to the constitution, were not in fact of transitory, but of perennial nature. At the same time, they were not yet part of the constitution. It was not clarified by the legislator what was in fact the scope of the transitory provisions, and how they were related to the constitution itself.<sup>15</sup> So, the transitory provisions attached to the constitution were declared as unconstitutional.

The Constitutional Court confirmed that the infringement of the constitutional order on creating law ensues that the law under constitutional review must be annulled as unconstitutional even for lack of substantive unconstitutionality.<sup>16</sup> The Constitutional Court referred to the criteria, according to which legal provisions could be considered as transitory. They were as follows: they were related to the entry of a law into force, they were of technical nature, or they served for interpretational purposes.<sup>17</sup> The Parliament interpreted the above objection as a formal one. Therefore, the Parliament did not feel itself prevented from readopting the major contents of the transitory provisions, now as part of the amended constitution.

## 5.2. Review of constitutional provisions

The Constitutional Court held<sup>18</sup> that it does not consider itself to be authorised to review the constitution itself unless the constitutional provisions have been adopted in a defective procedure. However, the Constitutional Court insists on the level the constitutional protection of rights has already reached. This level cannot be lowered, but exceptionally and in accordance with the proportionality standard. Where the Constitutional Court discovers contradictions in the constitutional order, or the lack of consistency with the widely accepted principles of international law, it is entitled, and obliged, to declare these deficiencies.<sup>19</sup>

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- which way is the president of the republic obliged to sign the constitution or its amendment as adopted; and  
- what is the way, in which the constitution or its amendment as adopted shall be promulgated.

<sup>13</sup> 45/2012. (29.XII.) AB.

<sup>14</sup> There is no general ombudsman, and there are no special ombudsmen any longer in Hungary. Instead, there is just a single ombudsman with deputy ombudsmen (ombudswomen) without independent decision-making authority.

<sup>15</sup> III. 3.4, Paras 71-79.

<sup>16</sup> IV.1.1, Para. 95.

<sup>17</sup> V, Paras. 131-135.

<sup>18</sup> 61/2011. (13.VII.) AB, Para. V.3.

<sup>19</sup> Para. V.6. In its concurrent opinion, István Stumpf, a member of the Constitutional Court imputes to the formal criteria of evaluating the constitution or its amendment less importance. For example, even if a constitutional amendment is based on the individual proposal of a member of the parliament – that can be criticized –, the public law validity of the constitutional amendment cannot be challenged solely for this reason, he argues (Para. 1). Further, according to him, no difference can be discovered between the constitution and its amendment. The starting point for constitutional review should always be the assumption that the constitution appears in a single, closed system. Where there conflicts between separate provisions within the constitution, they are to be solved based on the assumption that

In this case, the Constitutional Court had to deal with the question whether, as a product of the amendment of the constitution, the prohibition of the Constitutional Court from the review of tax matters,<sup>20</sup> and the introduction of a 98% tax on the income derived from severance payments made in the public sector<sup>21</sup> are consistent with the constitution. As these measures have been directly built in the constitution, and they have been duly passed in a normal order, the Constitutional Court did not find itself competent in making a judgment on these measures.

The Parliament had the firm intention to stop the Constitutional Court from the review of the constitution itself unless there are formal reasons for it. The legislator has made clear its position that in substantive law matters the Parliament should be sovereign. The Parliament may have entertained the idea that the power of the Constitutional Court in the review of the constitution should be severely restricted this way. The Parliament cannot be absolutely sure, however, of the fact that the Constitutional Court would not have obtained this way more power of review than envisaged. The form of law and, in particular, the formal criteria of legislation, matter.

Formality in law suggests that there can be defects in the process of enacting law. For example, a law was not passed by majority voting as required, or a law was not duly signed by the president of republic. More importantly, contradictory or vague legal provisions are obviously defective. Another problem can be that the new law does not provide the addressee of law with enough time to make preparations, or even it is retroactive. Further, a law that is not consistent with international law may be invalid.

The legislator may have taken the position that the formal criteria of legislation are subordinate, compared to the substantive values of policy options. According to this logic, the form of law is of secondary importance, compared to the content of law. This statement can be questioned, however. In the recent decades, formal issues of law have manifestly been appreciated.

The Hungarian Constitutional Court can afford to find in the form of law a subordinated means of social control. It can also afford, however, to recognise in this form the culture of agreements that goes beyond politics. Then, it cannot regard the product of the will of political power that created the new constitution so that it would be beyond any constitutional scrutiny. Constitutional requirements cannot be expressed in a simple black and white way. This does not mean, however, that they would be of abstract nature. The solution the Constitutional Court can find in a particular case depends on the case itself.

Once the Hungarian Constitutional Court is authorised to review the constitutionality of law, including the constitution itself, for formal, rather than for material reasons, it did not receive less, but more. The manner in which the constitution is created, and amended, is the essence of law. In any case, the basic value of European civilisation is the respect of form.

### **5.3. Effect of the former resolutions of the Constitutional Court**

As a result of one of the reactions the Parliament made to the decisions of the Constitutional Court on the annulment of the above discussed transitory provisions, the constitution currently includes in

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the constitution is a single building block (Para. 2.2). Interestingly, the methodology on the possible justification of the restriction of fundamental rights by referring to the proportionality standard cannot be applied to the issue of the division of power. Consequently, the restriction of the scope of constitutional review cannot be interpreted with reference to the proportionality principle (Para. 2.3). The “*ius cogens*” evolving in international law cannot be part of the constitution, being a single complex. International law is superior, but it cannot be ranked on the same level as the constitution. A constitutional review cannot therefore be established on direct reference to international law (Para. 3). As the constitution must be interpreted in its entirety, constitutional provisions are to be reviewed without limitation by the Constitutional Court. The integrity of the constitution suggests more than the single constitutional provisions. From this angle, the constitutional review cannot be reduced to formal criteria (Para. 4).

<sup>20</sup> Sec. 32A of Act XX of 1949 on the constitution of the Republic of Hungary, repealed as of 1 January 2012.

<sup>21</sup> Sec. 70I (2) Act XX of 1949.

its closing provisions that the resolutions the Constitutional Court has passed before 1 January 2012 have lost their effect, except that the legal consequences these resolutions have elicited are not affected.<sup>22</sup> As a matter of law, the Constitutional Court has been prevented from making reference to its former decisions. The Constitutional Court claims in a judgment,<sup>23</sup> however, that it can benefit from the legal reasoning to be found in earlier decisions, provided that this exercise is consistent with the provisions of the constitution under review that are identical or similar to the respective provisions of the former constitution that was in effect before 2012.

As the Constitutional Court argues, the national and international development of constitutional law may affect the interpretation of the current constitution. The Constitutional Court should be allowed to refer to the former resolutions of the Constitutional Court because, under the rule of law, the reasoning inherent in the former resolutions and the sources of constitutional law should be available to every citizen. Legal certainty requires that the reasoning behind the decisions of the Constitutional Court to be transparent, traceable and verifiable.<sup>24</sup>

The quality of legislation is not only the matter of legislation itself, strictly speaking. The interpretation of laws as applied by public authorities is also important. As such interpretation must be consistent with statutory laws and must serve for achieving a growing level of consistency in law, the question of quality should refer to formal criteria. These formalities are in turn crucial for the operation of public authorities and the legal system of a country, in accordance with the rule of law principle.

## **6. Concluding remarks concerning orthodoxy and unorthodoxy in legislation**

### **6.1. Orthodoxy**

To begin with explaining the orthodoxy of legislation, the rule of law principle must be referred to. It is the result of a break with an idea that was entertained from ancient times through the Middle Ages over long centuries that the guarantee for good governance would be a brave prince. Under the rule of law, the guarantee for the state's smooth operation is not produced by courageous persons, but by the impersonal mechanism of law.

The rule of law principle introduced in the 19<sup>th</sup> century was later on completed by the legal certainty principle on the European continent. The reason for this was (Harlow 2006) that it was important for citizens to organise themselves against the discretionary power of the public authorities (in France) or to secure a sufficient level of protection of fundamental rights (in Germany). After the Second World War, it was experienced in Europe that the abuse of power can arise not only from the malpractice of the executive, but also from the legislative power. This is where the question of the quality of legislation can be raised. It does not concern the way in which distributive justice is administered through the choice of substantive legal values. In this respect, the legislative power is recognised as sovereign. Legislation is still subject to a series of formal requirements. The point to them is that law should be created aptly. More closely, it may be compared to the standards of legal certainty, proportionality and equality.

Standards, to which laws can be measured under orthodoxy can be formulated, based on the following:

- The question of the quality of legislation is developed at the moment when it becomes significant to check not only the executive, but also the legislative power.

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<sup>22</sup> Fundamental Law of Hungary (as amended), Closing provisions, Para 5.

<sup>23</sup> 13/2013 (17.VI.) AB.

<sup>24</sup> 13/2013 (17.VI.) AB, III, Para 33.

- Formality matters for the quality of legislation: formal, rather than material considerations carry weight: clarity, consistency and predictability are important, acceptance is not.
- Equality versus the allocation of rights and liabilities: equality on a high level of abstraction and legal certainty are highlighted, in contrast to the emphasis placed on the allocation of rights and obligations.
- Law, justice and equality: the core of law is justice, and the core of justice is in turn equality; positive law must be assessed in the light of equality.
- Law, reason and freedom: reason is available for everyone, by means of which people are able to formulate, and can approximate with their wills; the general will is made by the agreements of rational agents and may lead to freedom.

Further:

- No protection of rights on a lower level than what has already been reached: the Hungarian Constitutional Court has held that it does not consider itself to be authorised to review the constitution itself unless the constitutional provisions have been adopted in a defective procedure; however, the Constitutional Court insists that the level as reached cannot be lowered, but exceptionally and in accordance with the proportionality standard.
- Consistency and integrity of law: where the Constitutional Court discovers contradictions in the constitutional order, or the lack of consistency with the widely accepted principles of international law, it is entitled and obliged, in the light of protecting the integrity of the constitution, to declare (but not to remove) these deficiencies.
- No direct influence of politics on law: where the legal form is respected, the political contents cannot become part of law, only through transposal.
- No law without its antecedents: the law under creation is embedded in a legal order that has already existed; one can hardly imagine a case of “tabula rasa” in law; new law should be adjusted to the old ones because this is the way in which cohesion in law can grow.
- Preference of the inner form (according to Fuller, inner morality) of law to its substance: the Hungarian Constitutional Court can afford to find in the form of law a subordinated means of social control; it can also afford, however, to recognise in this form the culture of consensus that goes beyond politics.

## 6.2. Unorthodoxy

The quality of legislation is an issue in the era of unorthodoxy because the Hungarian legislative power is not effectively subject to the review to be made by the Constitutional Court. The abuse of legislative power cannot thus be precluded. The Constitutional Court is banned from the substantive review of constitutional amendments, and from the review of substantive tax legislation. Besides, the decisions of the Constitutional Court made before the entry into force of the Fundamental Law have lost their legally binding nature. The legislator’s intent was to introduce a constitutional doctrine of discontinuity between the Fundamental Law and the former constitution. This is in contrast to the principle of constitutional continuity, uniformly followed for twenty years in Hungary after the changes of the economic and political system (Halmai – Scheppele 2013). It comes from the adopted doctrine of discontinuity that it is not precluded that the level of protecting fundamental rights can be lowered, depending on the deliberation of politically organised communities.

Unorthodoxy makes use of law as an instrument of directly expressing political will. This stance on law is also extended to constitutional issues. It comes from these changes that the legislator

exercises the power of constitutionalisation, not different from that of common legislation, without effective limits. This is all the more dangerous because a number of fundamental rights are restricted by the Fundamental Law itself. For example, the freedom of conscience is restricted by the Fundamental Law to the extent that religious belief can only be confessed in community through religious organisations recognised by the state. The Hungarian Parliament decides by political resolution whether an applicant organisation will be recognised as church or not. Truncated fundamental rights are not able to provide the function of serving as a standard, to which the state of human rights could be effectively measured. Due to imperfection of the constitutional regulation of human rights, it is also a question whether the Fundamental Law itself can be considered as a fully-fledged legal document of constitutional character (Vörös 2013).

It is crucial in a society to reach agreement concerning the way in which material justice can be administered. Subsidiarity is the starting point for social organisation. Then, the freedom of enterprise may result in increasing social differences. They must be tolerated, however, as long as basic liberties are given to each citizen. Unorthodoxy does concern the question of material justice. It does not touch upon a more fundamental layer of social life, however, making it impossible to achieve agreement of how disputes, if any, can be settled.

Unorthodoxy challenges equality before the law, being critical towards mass democracies. It also raises doubts on the operability of the rule of law, relying on personal skills, or loyalty, rather than on impersonal mechanisms that might arise from the checks and balances as developed upon the division of political power. Unorthodox policies refer to the individual motive of acquiring as many material goods as possible. As a result, society will be weak in cooperation. Besides, it can happen that law is subordinated to political aspirations. For lack of legal suppositions, legislation suffers from casuistry and regulatory capture.

The major impact of unorthodox policies on social practice is that impersonal mechanisms of democratic procedures and the rule of law are blurred. Instead, social relations, including even economic ones, are personalised. The reason for this is that, despite the fact that a society has been on the way of modernisation, it may remain to be weak in functional differentiation. It is then more than difficult to develop subsystems that would be able to follow their own deliberation. The spheres of social life, like economy, academia, religion, public administration or law are politicised. Everything will be of political importance. The micro processes of social life are not able to make up for missing subsystems either. Unorthodox policies are engaged in adjusting personal relationships, intruding on privacy. Therefore, informal communities will also be subject to political games.

As a consequence of these changes, not only legislation suffers from the interference by unorthodox policies, but, more importantly, contractual and other horizontal relationships are also deformed by political aspirations. Under such circumstances, law is not able to develop itself as an order of rules that are consistent with each other, being integrated into a single system. Besides, for lack of freedom from political influence, there are no chances for contracting out of the system. The application of law is then unable to improve legal culture, nor support legislation.

Unorthodox policies are inevitably bound to the current time horizon. The state is always busy with transforming economic and non-economic resources among selected groups that are to be protected against international competition by administrative measures. For lack of institutional guarantees for democratic decision-making, there are no limits to centralisation. Problems of imbalances can be managed by concentrated political power. This does not ensure survival, however. Unorthodox policies have to cope with problems of imbalances and look for solutions, just moving from case to case. In this course, political power is blind to the future.

Irrationality undermines the chances of legislation. In successful societies, non-legal problems are converted into legal ones. This way, material problems cannot be solved on their merits. They can

eventually be managed for the sake of society, however (Kelsen 1945; Ost 1988; Pound 1942).<sup>25</sup> Under unorthodoxy, this is inversely. Legal matters are so strongly influenced by political deliberation that they are converted into non-legal ones. A big disadvantage of this development is that social conflicts cannot be alleviated. Social practice, being subject to political actions, is overheated. Unexpected affections cannot be removed. In such circumstances, it is not only problematic that legal suppositions are squeezed out, but More importantly, it is impossible to arrive at sound decisions.

All these trends of development drastically limit the chances of economic and social development in the near future. It is always a matter of the state's responsibility how social differences are managed. A key to this is tax legislation because it contributes to the maintenance of a system of institutions where social production is controlled and redistribution is organised. Such institutions of centralisation and redistribution should be balanced and flexible enough, constituting a preliminary condition of the recognition of social differences. The interrelationship between unorthodoxy and tax legislation will be the subject of another study on unorthodox taxes that will follow the present one.

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<sup>25</sup> "Just as everything King Midas touched turned into gold, everything to which the law refers becomes law, i.e., something legally existing."

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