

## ■ József Szabadfalvi\*

### The Elements of Sociological Aspect in the Hungarian Legal Thinking until Mid-Twentieth Century

When we describe the Hungarian traditions of legal thinking, we generally emphasize two remarks.<sup>1</sup> Firstly, as a characteristic



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<sup>1</sup> See from the literature on the subject of history of Hungarian jurisprudence: Somló, B., 'Die neuere ungarische Rechtsphilosophie', in *Archiv für Rechts- und Wirtschaftsphilosophie*, 1, 1907-08, 315-323; Finkey, F., *A tételes jog alapelvei és vezéreszméi* [Principles and ideas of positive law], Budapest, 1908; Horváth, B., 'Die ungarische Rechtsphilosophie', in *Archiv für Rechts- und Wirtschaftsphilosophie*, 24, 1930, 37-85; Moór, Gy., 'Was ist Rechtsphilosophie?', in *Archiv für Rechts- und Sozialphilosophie*, 36 (1943) 3-49; Szabó, Imre, *A burzsoá állam- és jogbölcselet Magyarországon* [The bourgeois philosophy of state and law in Hungary], Budapest, 1955; Hanák, T., *Az elfelejtett reneszánsz. A magyar filozófiai gondolkodás századunk első felében* [The forgotten renaissance. Hungarian philosophical thinking in the first half of our century], Bern, 1981; Szilágyi, P., 'Fejezetek az ELTE Állam- és Jogelméleti Tanszékének történetéből' [Chapters from history of ELTE's department of theory of law], in *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominatae*, Tomus XXVI, Budapest, 1984, 105-153; Samu, M. – Szilágyi, P., 'Az állam- és jogelmélet oktatásának története egyetemünkön' [Teaching history of theory of state and law in our university], in Horváth, P. (ed.), *Az Állam- és Jogtudományi Kar szerepe a magyar jogtudomány fejlődésében*, Budapest, 1985, 313-392; Loss, S. – Szabadfalvi, J. – Szabó, M. – H. Szilágyi, I. – Zódi, ZS., *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből* [Portraits from the history of legal philosophy in Hungary], Miskolc, 1995; Percz, L., 'A belátásos elmélettől a mezőelméletig. A magyar jogfilozófia fél évszázada: Pikler, Somló, Moór, Horváth' [From the theory of discretion to the theory of law field. Half century of hungarian legal philosophy: Pikler, Somló, Moór, Horváth] in *Századvég*, 1998, 10, 73-94; Szabadfalvi, J., *Jogbölcseleti hagyományok* [Traditions of legal philosophy], Debrecen, 1999; Szabadfalvi, J., 'Transition and Tradition. Can Hungarian traditions of legal philosophy contribute to legal transition?', in *Rechtstheorie*, 1999, Beiheft 20, 1-19.; Szilágyi, P., 'Jogbölcselet' [Legal philosophy], in *Magyarország a XX. században*. V. köt., ed. István Kollega Tarsoly, Szekszárd, 2000, 39-47.; Szilágyi, P., 'Magyar jogbölcselet' [Hungarian legal philosophy], in Gergyely – Izsák (ed.), *A magyar államiság ezer éve*, Budapest, 2001, 257-270; Szabadfalvi, J., *A cselekvőségi elmélettől az újrealizmusig* [From the theory of activity to neo-realistic], Budapest, 2004.

feature deriving from the geographical conditions and historical-cultural ties of Hungary, the adaptation and interpretation of the achievement of Austrian and German jurisprudence are to be mentioned. Secondly, the dual nature of the legal thinking of this region of Europe is stressed, which comprises a tendency towards legal conservatism and an up-to-date interpretation of the most current legal philosophical trends. The most outstanding Hungarian lawyers have been characterized by the latter specific feature.

The mid-1980s signalled the revival of Hungarian legal traditions. By this time the Soviet type Marxism has lost ground in legal literature. Further confirmation of the previously unquestionable paradigms have not put researchers' existence into risk any longer. For jurists concerned with legal theory, it was only a choice of values to decide which paradigm would be fundamental for them. One of the forms of finding new ways was provided by studies in Hungarian traditions of legal thinking before the year of change, which were carried out by the concerned researchers still alive and the younger generations who view this kind of tradition as a neglected value and take responsibility for the rehabilitation of their predecessors' work.

Three great periods—natural law, legal positivism and Neo-Kantianism—are to be distinguished in the history of legal philosophy in Hungary up to the mid-twentieth century, mostly following the traditions of legal thinking in Europe. The attitude of legal positivism came into full power in the Hungarian literature of jurisprudence with the work of ÁGOST PULSZKY (1846–1901) in the last decades of the 19th century.<sup>2</sup> In his early works Pulszky was mainly concerned with the theories of More, Bacon, Hobbes and Locke, the classical representatives of English social philosophy. Later in his career Pulszky focused on the ethnological attitude represented by Lubbock, Waitz, McLennan, Tylor, Morgan and Maine. In 1875 Pulszky completed the translation of Henry Maine's *Ancient Law*. He also attached—similarly to his contemporary, Friedrich Pollock<sup>3</sup>—over a hundred-page notes of their own scientific value to Maine's work.<sup>4</sup> Afterwards he wrote a critical review of Herbert Spencer's philosophy, who was considered as innovator of the contemporary social scientific thinking. His major work titled *The Theory of Civil Law and Society* was published in Hungarian in 1885, and in English in 1888.<sup>5</sup> In spite of a favourable reaction to his work, he was not able to achieve his main goal, i.e. to enter and be accepted in the English scientific public life. However, Pulszky's work, according to Hungarian legal philosophy, is still

<sup>2</sup> Pulszky's main works of jurisprudence: *A római jog, s az újabbkori jogfejlődés* [Roman law and modern legal development], Pest, 1869; 'Az angol jogbölcselet történetéhez' [On history of English legal philosophy], in *Budapesti Szemle*, 1875, 126-148; *A jog és állambölcselet alaptanai* [The fundamental doctrine of philosophy of law and state], Budapest, 1885; *A jog és állambölcselet feladatai* [The tasks of philosophy of law and state], Budapest, 1888.

<sup>3</sup> Pollock, F., *Introduction and Notes to Sir Henry Maine's Ancient Law*, London, 1908.

<sup>4</sup> Maine, H., *A jog őskora, összeköttetése a társadalom alakulásának történetével, s viszonya az újkori eszmékhez* [Ancient law, its connections with the early history of society and its relation to modern ideas], (A Magyar Tudományos Akadémia megbízásából fordította, bevezette és jegyzetekkel kísérte Pulszky Ágost [Ágost Pulszky translated, wrote introduction and notes on Hungarian Academy of Sciences's authority]), Budapest, 1875.

<sup>5</sup> Pulszky, Á., *The Theory of Civil Law and Society*, London, 1888.

fundamental, since the publication of this book laid the cornerstone of legal positivism in Hungary. In his work Pulszky considered Maine's comparative-historical attitude and his theoretical theses were based on Spencer's ideas.

Pulszky's achievement is considered a milestone in Hungarian scientific life, since his major work established ground for legal positivism in Hungary. In his positivist view he accepted 'life interest', determining the idea of evolution, as a driving force as well as 'theory of activity' reflecting the classical liberal attitude to law, which claims that the greatest individual freedom, 'possibility for acting' is to be ensured by the state and law. Pulszky in due time realised the importance of social, economic and political changes at the end of the 19th century, and also their role in the scope of the activity of state. In his view, the increasing role of state was mostly apparent in the changes of economic conditions, in social policy and health service. Clearly perceiving tendencies in the development of contemporary capitalism, he outlined the idea of early social state beyond the classical liberal theoretical trend. He also paid attention to the conflict of nationalities beyond the boundaries of contemporary state. His work has influenced several branches of social science, in this way Pulszky's oeuvre is recognised not only by philosophy of law but by theory of state, politics and sociology as well. From the end of 1880s his active political role turned him away from science therefore his life-work is considered incomplete. Outstanding representatives of Hungarian progress after the turn of the century were among his students, for example Gyula Pikler and Bódog Somló, who later accomplished significant works of legal philosophy and Oszkár Jászi—politician and scientist—who, as bourgeois radicalists, were fighting for a new, modern, 20th-century Hungary devoid of any feudal constraints. They believed that a wide scope of social, political and legal modernisation can base the establishment of a Western-European model of evolution.

The positivist doctrine reached the peak of its history in Hungary with the work of GYULA PIKLER (1864–1937) at the turn of the century.<sup>6</sup> In his early works Pikler devoted attention to the inner contradictions of Spencer's theory against the intervention of state. Pikler did not consider Spencer's classical liberal attitude, which was based on biological conceptions as acceptable, and he emphasized the need for increased state intervention for the sake of society. Pikler's later works are all characterized by a discussion with Spencer whose theories he, on one hand, analyses for the support of his own theories, but on the other hand, he criticises and evaluates them. Spencer's influence is revealed in his theory of the evolution of law, or in his theory of 'discretion'. He believes that people act not by instincts but by purposeful discretion, and according to this, people realise and develop norms and institutions satisfying their needs more and more perfectly. In this way people establish society, institutions and law which are considered rational and purposeful by them. The first ones, who recognise purposeful discretion, are the most outstanding members of a society, the so called educated classes. From the 1910s Pikler was mainly concerned with biological and psychological reasons behind the phenomena of society. Consequently, he became estranged

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<sup>6</sup> Pikler's main works of jurisprudence: *Bevezető a jogbölcseletbe* [Introduction to philosophy of law], Budapest, 1892; *Az emberi egyesületek és különösen az állam keletkezése és fejlődése* [The origin and development of state in particular], Budapest, 1897; *A jog keletkezéséről és fejlődéséről* [About the origin and development of law], Budapest, 1897.

from questions of law and legal philosophy, and while changing his field of interest in science, he carried out experiments in psychophysics and sense physiology.

At the turn of the 20th-century BÓDOG SOMLÓ<sup>7</sup> (1871-1920) is the most reputable representative of Hungarian legal philosophy whose oeuvre greatly contributed to the development of the Neo-Kantian legal philosophy, the dominant trend prevailing in Central Europe at the time, a development that eventually resulted in modernising the legal scholarship and theoretical thought in law in Hungary. Somló is a classic authority of social theorising in Hungary. His professional activity, relatively limited in time, spanning about a quarter of a century, can be divided into two phases.

The first period of activity is characterised by the unconditioned acceptance and re-assertion of Spencer's doctrines, concomitant with personal adherence to his one-time professor Gyula Pikler's theoretical approach based on natural science and psychology within the framework of a slightly materialist version of the philosophy of history. In co-operation and co-authoring with Pikler,<sup>8</sup> Somló focused his attention mainly on sociological problems taken from a naturalistic perspective. During this period Somló became—together with Ágost Pulszky and Gyula Pikler—the third outstanding figure determining the future of sociological positivist philosophy of law in Hungary.

The second phase of Somló's scholarly career is defined by his Neo-Kantian turn, heralding maybe the most prosperous period that has ever existed in Hungarian legal philosophy which—represented mostly by his successor, Gyula Moór and, later, the renown legal sociologist Barna Horváth—lasted until World War Two, when the Soviet military occupation replaced local traditions with 'Soviet-type' Marxist theory as an all-substitutive panacea. Despite that for early Somló legal philosophy and legal sociology were equal in standing, his Neo-Kantian conceptualisation led to revision and separation of these inter-connected areas of legal inquiry. The outcome of this period founded and substantiated Somló's scholarly reputation in legal philosophy in Hungary and especially in German-speaking territories. Nowadays he is duly regarded as a classic authority of Neo-Kantian philosophising on law in Central Europe, among thinkers like Rudolf Stammler, Gustav Radbruch, Hans Kelsen and Alfred Verdross.

In his writings published around the turn of the century, he criticised the scholarly ideals established by his contemporaries, from the perspective of natural-science-inspired positivism and evolutionism. His positivist theoretical outlook was all the way through complemented by scholarly interest and personal involvement in public affairs. One of his major works characteristic of this period is the book-size treatise

<sup>7</sup> Somló's main works of jurisprudence: *Állami beavatkozás és individualizmus* [State intervention and individualism] Budapest, 1900; *Jogbölcséleti előadások* [Lectures in legal philosophy] Kolozsvár, 1906; 'Masstäbe zur Bewertung des Rechts', in *Archiv für Rechts- und Wirtschaftsphilosophie*, 3 (1909-10) 508-522; 'A jog értékmérői' [Value standards of law], in *Huszadik Század*, 11 (1910) 1-14; 'Das Wertproblem', in *Zeitschrift für die Philosophie und philosophische Kritik*, (1912) 66-95; 'A szokásjog' [Customary law], in *Farkas Lajos emlékkönyv*, Kolozsvár, 1914, 339-369; *A helyes jog elméletéről* [On the theory of right-law theory] Kolozsvár 1914; *Juristische Grundlehre*, Leipzig, 1917. [2. ed: 1927, and reprinted: 1973]; *Jogbölcsészeti* [Legal philosophy] Budapest, 1920.

<sup>8</sup> Pikler – Somló, *Der Ursprung des Totemismus: Ein Beitrag zur materialistischen Geschichtstheorie*, Berlin, 1900.

on *Állami beavatkozás és individualizmus* [State intervention and individualism] published in 1900. The greater role the state was to play and the formation of monopol capitalism both demanded reformulation and adaptation of the respective roles and institutions of law, state and politics.

From the early 1930s, in the prevailing Neo-Kantian philosophy BARNÁ HORVÁTH<sup>9</sup> (1896-1973) created a new colour in the Hungarian traditions of legal philosophy. In his view of legal theory, which he preferred calling legal sociology or even 'pure legal sociology' according to Hans Kelsen's terminology, his originality was mainly revealed in his so called synoptic attitude and the functionally related processional legal view. He has created something new by conforming two paradigms that were considered antagonistic in contemporary legal philosophy. A parallel existence of Neo-Kantian (Lask, Rickert, Verdross, Kelsen, etc.) and pragmatic-empirical attitudes (Pound, American realism, psychologism, etc.) and their relation to each other was regarded as a breakthrough not only in Hungarian but also in European legal thinking. The consideration of these two influential paradigms is not by chance. While between the two World Wars Neo-Kantian paradigm is to be considered evident in Middle Europe, pragmatism appeared as a new idea mainly in the Hungarian public view of legal philosophy. Horváth's susceptibility to empiricism can be attributed to two reasons. On one hand, he as practising lawyer realised contradictions in norms and reality, which was neglected by Neo-Kantian philosophy. On the other hand, during his journey to England in the late 1920s, Anglo-Saxon legal culture made a great impact on him. His connection with Leonard Hobhouse, English sociologist, and Moris Ginsberg, his student, influenced the elaboration of his procedural legal attitude since Horváth adapted from their views the division of four types of social evolution. After coming home from England, Horváth reported in a number of papers on the achievements of both American and English jurisprudence. The experiences and impressions he gained in England urged him to complete the history of English legal philosophy.

The synoptic method elaborated by Horváth is an original interpretation of one of the fundamental questions of Neo-Kantian legal philosophy, namely the connection between value and reality. The most significant representatives of 'contemporary' Hungarian philosophy of law, including Moór, Somló and Horváth, all concerned themselves with finding a solution to this problem. Horváth's starting point was the essence of legal activity, and considered law as a pattern of thoughts in a judge's

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<sup>9</sup> Horváth's main works of jurisprudence: 'Die Idee der Gerechtigkeit', in *Zeitschrift für öffentliches Recht*, 7, 1928, 508-544; 'Természetjog és pozitivizmus' [Natural law and legal positivism], in *Társadalomtudomány*, 8, 1928, 212-247; 'Gerechtigkeit und Wahrheit', in *Internationale Zeitschrift für Theorie des Rechts*, 4, 1929, 1-54; 'Die Gerechtigkeitslehre der Vorsokratiker', in *Studi Filosofico-Giuridici dedicati a Giorgio Del Vecchio*, Modena, 1930, 336-372; *Die Gerechtigkeitslehre des Aristoteles*, Szeged, 1931; 'Hegel und das Recht', in *Zeitschrift für öffentliches Recht*, 12, 1932, 52-89; *Bevezetés a jogtudományba* [Introduction to jurisprudence], Szeged, 1932; *Rechtssoziologie. Probleme des Gesellschaftslehre und der Geschichtslehre des Recht*, Berlin-Grunewald, 1934; 'Sociologie juridique et Théorie Processuelle du droit', in *Archives de Philosophie du droit et de Sociologie Juridique*, 5, 1935, 181-242; *A jogelmélet vázlata* [Sketch of legal theory], Szeged, 1937; 'Der Sinn der Utopie', in *Zeitschrift für öffentliches Recht*, 20, 1940, 198-230; 'Prolegomena zur Soziologie', in *Archiv für Rechts- und Sozialphilosophie*, 37, 1943, 50-67; *Angol jogelmélet* [English legal theory], Budapest, 1943.

mind, which is nothing else in this way but a 'reflexive theoretical product'. The procedure by a lawyer becomes synoptic through his applying a legal case to a legal norm, and at the same time, *vica versa*, relating a legal norm to a legal case. The lawyer, therefore, relates normative matters of fact to real matters of fact. In order to do this job, the lawyer needs a knowledge of facts selected according to legal rules, and also a knowledge of laws selected according to matters of fact. While a practising lawyer focuses his attention mainly on a legal case, a theoretical lawyer concentrates on statutes of law, but both consider the legal case and the law at the same time.

According to Horváth's professional attitude, closely related to his synoptic method, law cannot simply be regarded as norm but as an abstract behavioural pattern and relating actual behaviour, or in other words, a connection between norm and behaviour, which is the procedure itself. Procedure is the 'genus proximum' of law. That is to say, a continuous relation (of synoptic structure) of a legal case to the legal norm will create a procedural process. In Horváth's opinion, law as the most developed social procedure establishes the most advanced stage of procedures by establishing the most developed procedural institution.

Horváth's role lies in the fact that traditional German-Austrian ties of the 20th century Neo-Kantian Hungarian legal philosophical thoughts were 'tailored' by him through transferring Anglo-Saxon theories of jurisprudence and created new perspectives for further development in Hungarian legal theory. Regrettably, the Second World War and the following political changes forced him to emigrate in 1949 and there he did not have the opportunity to continue developing his theory.<sup>10</sup>

JÓZSEF SZABÓ<sup>11</sup> (1909-1992) was a prominent representative of the gifted and promising generation, who achieved brilliant careers during the Second World War, and who were involved in the intellectual and scientific renewal of the country after the war. After graduation he became acquainted with Barna Horváth, founder of school and an exceptional personality of Hungarian legal philosophy. Horváth's personality and his legal philosophical approach representing the influence of Anglo-Saxon jurisprudence and legal culture gave rise to Szabó's enthusiasm. It was the period in the Hungarian legal philosophical thinking when, besides the achievements of Austrian, German and French legal philosophy, those of English and American jurisprudence were also considered.

<sup>10</sup> Horváth's works from the 50s and 60s: 'Between Legal Realism and Idealism', in *Northwestern University Law Review*, 48 (1954) 639-713; 'Rights of Man: Due Process of Law and Exces de Pouvoir', in: *The American Journal of Comparative Law*, 4 (1955) 539-573; 'Field Law and Law Field', in *Österreichische Zeitschrift für öffentliches Recht*, 8 (1957) 44-81; 'Moral, Recht und Politik', in: *Österreichische Zeitschrift für öffentliches Recht*, 14 (1963) 218-252; 'Comparative Conflicts Law and the Concept of Changing Law', in *The American Journal of Comparative Law*, 15 (1966-67) 136-158; 'Twilight of Government of Laws', in *Archiv für Rechts- und Sozialphilosophie*, 64 (1968) 1-26.

<sup>11</sup> Szabó's main works of jurisprudence: *A jog alapjai* [The foundations of law], Budapest, 1938; *A jogász gondolkodás bölcselete* [Philosophy of lawyer's thinking], Szeged, 1941; 'Hol az igazság? A bírói lélektan problémái' [Where is the justice? Problems of judge's psychology], in *Társadalomtudomány*, 22, 1942, 1, 1-55; 'Wahrheit, Wert und Symbol im Rechte', in *Archiv für Rechts- und Sozialphilosophie*, 37, 1943, 101-121; 'Der Rechtsbegriff in einer neutralistischen Beleuchtung', in *Österreichische Zeitschrift für öffentliches Recht*, 1, 1948, 3, 291-331.

As a result of Barna Horváth's aim to establish a school, the 'school of Szeged' was founded, and it included, besides Szabó, István Bibó, who later abandoned legal philosophy, and also Tibor Vas, who became Marxist in the 1950s and renounced the mentality of the school. Szabó's legal philosophical thinking bears the strongest marks of the master's irradant influence. He began to elaborate his independent legal philosophical doctrine in the late 1930s. He was also deeply involved in issues on constitutional and international laws.

In his writings on legal philosophy Szabó attempts to discredit the Neo-Kantian model by using the outcomes of criticism, according to David Hume, and the American legal realism. Szabó, in his works published in the early 1940s, attempted to create a 'neo-realistic' approach to the concept of law. Applying the method common in Anglo-Saxon professional literature, he modelled the essence of legal thinking with describing legal cases. With this kind of approach, he seemed to discover a number of similar features between English and Hungarian 'traditional' legal attitudes. Citing the ideas of Jerome Frank, Edward Robinson and Thurman Arnold, the most outstanding personalities of American legal realism, Szabó abandoned belief in legal security, which was, in his opinion, revived by a faulty logical philosophy of law. In his theory he also used Frank's doctrine of 'fact-sceptics' and 'rule-sceptics'. Szabó claimed that in law enforcement it is not merely the legal norms one is to consider when looking for justice, since the statement of facts is as important a precondition for a righteous judgement as the interpretation of the corresponding law. He believed that legal decisions are influenced by 'psychological circumstances'.

When reading Szabó's works, one can clearly perceive the ideas of American legal realism. At that time, in the early 1940s, this kind of theory was considered rather exceptional in the Hungarian literature of legal philosophy. The influence exerted by the classical representatives of legal realism is undeniable. When appreciating Szabó's work one can suggest that, in a similar way to the evaluation of Horváth's work, he also gave particular pragmatic explanations to the classical Neo-Kantian problems. Doing so, he created the possibility for a prolific interrelation of two legal cultures, and abolished the previous one-sided Austrian and German orientation in the Hungarian legal philosophical thinking. This is considered very important even if we sometimes come across rather eclectic explanations. Neither the master nor his student is an exception to this. Regrettably, however, Szabó was not able to work out further systematic explanations to his theory of legal philosophy called 'neo-realistic'.

During the after-war years he was involved in reorganising the legal faculty of the university in Szeged. After the 'decisive year' (1949) like the reputation of many of his contemporaries, his reputation was also ruined. After his long imprisonment, with a short interruption after the revolution in 1956, Szabó lived in intellectual exile for a number of decades. Some of his papers and reviews were published only abroad. Only the last years of his life, after his restitution, brought him the opportunity to be involved in the professional public life of the country for a brief period.

A key precondition for us for being included in the European scientific life again is to know our traditions in legal philosophy and to apply all the research finds that our predecessors have accumulated. However, we also have to be careful about fragmented oeuvres and they are to be compared to the scientific level of the concerned period. If we realise that there is a lack of original ideas and the theories

only belong to the second line, we have to express this. On the other hand, however, we should be proud of what is valuable even today.

Finally, we must clarify that, from the end of the last century, Hungarian legal philosophical thinking have supported the bourgeois transformation and the establishment of a modern civil society, according to the demand for modernisation of the society. Ágost Pulszky, Gyula Pikler, Bódog Somló, Barna Horváth, József Szabó and their students have become fighting representatives of Hungarian progress and they visioned a modern 20th-century Hungary. In this ambition a great role can be attributed to the 'empirical state', which is the driving force of modernisation, to the realisation of what kind of development can satisfy the needs of society, to 'correct law' required for achieving the goals, to the investigation of the nature of law supporting the regime, and also to the comparison of empirical reality and the related norms, and to everything that can provide the widest scope of freedom in the Kantian view. This list could be continued but even so we might perceive what kind of ambition our predecessors had taken upon themselves. Although they could not provide a safe recipe but they have established the starting-points for us, since even today we often face the same problems and we do not have divergent goals, though we tend to achieve them by drawing on different paradigms.