CONFLICT OF LAWS IN THE WESTERN, SOCIALIST AND DEVELOPING COUNTRIES

By

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PART ONE

THE LEGAL RULE AND THE CONFLICT OF LAWS IN GENERAL

CHAPTER 1

THE CONCEPT OF THE LEGAL RULE

I. The object of this study in comparative law is to establish general principles for settling various categories of conflict of laws in the capitalist, socialist, and developing countries. This study embraces the various branches of law: civil, family and mercantile law; the law of bills of exchange and cheques; maritime and air law; labour law; the laws of civil and criminal procedure; criminal law; political and administrative law; and fiscal law.[1]

The dominant opinions in the literatures of the western and socialist countries are widely divergent in formulating the definition of the legal norm and the concept of law. Different ideas of the essence of law are also current in developing countries where tribal legal customs may still be in force. According to the concept dominant in western literature, the universe in which man lives consists of two great worlds: the world of facts and the world of values; or in other words, the world of nature and the world of intellect. Fact is part of nature, and nature is but the totality of phenomena related to one another according to the causal laws of nature. This may also be described as reality. Fact exists in space and time; it is causally necessary, apprehensible by the senses; it is the object of experience. On the other hand, value is not a category of space and time. It is not subject to the laws of causality and it is not apprehensible. Consequently, a value cannot be an object of experience. Fact exists; value is non-existent, but valid. Values such as goodness (moral value), truth (logical value), beauty (aesthetic value) are only contents of thought which have a sense and meaning, but are void of real existence.

How should the western concept of law be classified? Does it belong to the world of values, or to the world of facts? According to dominant western opinion, law does not fall exclusively within the province of facts. Kornfeld sees in law nothing but pure power, and confines it exclusively within the province of values. The Neo-Kantiens (Stamler, Somló, Kelsen) find in law only values, a norm possessing an ideal existence. Law is a two-sided concept, a 'value-reality', the association of the ideal (value) and the real (reality). Law is a norm and as such the content of thought, that is, it is a value which has a sense, a significance. Further, it is not only a norm, it is also human conduct. Living law, or positive law is a norm that becomes real in life, that men actually observe, that, as a Hungarian

[1] Graveson, R. H., *The Conflict of Laws*. 5th ed. 1965, pp. 3 et seq.—According to Graveson the conflict of laws is based on justice, convenience and comity. His analyses of the legal rules concerning the choice of jurisdiction, the choice of law and the recognition and enforcement of foreign judgments are of fundamental importance

author Gyula Moór writes, "becomes living reality in the order of human conduct".[1d]

It is this process of law becoming a living reality which Kocourek, a representative of American jurisprudence, considered in his investigations of the idea of the legal phenomenon. He understands the legal phenomenon to mean the situation where legal rule is applied in life. "Legal phenomena", writes Kocourek, "involve three elements: (1) a system of potential legal rules existing only in the abstract — potentially—awaiting application to concrete cases; (2) a factual situation upon which legal rules operate and to which they are applied; (3) a juridical relation, the connecting link between law regarded as a body of legal rules and the social acts upon which the law is to operate".[2]

So in western systems the legal rule is the normative element of the legal phenomenon; the situation of fact is its factual element; and the legal relation is the connecting link between the normative and factual element of the legal phenomenon, combining the normative and factual elements of the legal phenomenon.

According to western opinion there is a need for a link between the legal rules and the facts, which connects the system of the legal rules with the system of social acts and omissions. This is as indispensable as the connection between the steam compressed in a boiler and the system of pistons and valves, if the engine is to operate in a regular and useful manner. This connecting link between the force of law and social material is the legal relation, the *iuris nexus*, the *iuris vinculum*, which comes into being when the legal norm comes into contact with the actual situation. This legal relation is what western jurists call law.

II. While dominant opinion in western jurisprudence considers law a two-sided thing, opinion prevailing in the legal literature of the socialist countries considers law neither a value-reality nor a power falling exclusively within the province of facts. Law is not a norm having an ideal existence belonging exclusively to the world of facts. It is the totality of rules established or sanctioned by the socialist state, the sovereign power, which expresses the will of the ruling class, the people, and whose application is guaranteed by the coercive power of the socialist state. The purpose of the rules is to ensure social order as well as useful and favourable conditions for the ruling working class, all working men and women, to safeguard these conditions, and to reinforce and develop them. A further purpose of these rules is to eliminate the remnants of capitalism in the economic system, in the way of living and in the minds of men, and to serve the building of communist society.[3] Hence in the socialist legal mind, law is the totality of rules established or sanctioned by the sovereign power, which expresses the will of the ruling class, and whose application is guaranteed by the coercive power of the state to safeguard

[1d] Moór, Gy., A jog mivolta az újabb kultúrfilozófia megvilágításában (The nature of law in the light of recent social philosophy). *Athenaeum 1942*, No. 3

[2] Kocourek, *Jural Relations*. The Bobbs-Meril Company, Indianapolis, 1927–1928; and *An Introduction to the Science of Law*. Little, Brown and Company, Boston 1930. See also Horváth, *Angol jogelmélet* (The English theory of law). 1934, pp. 596 et seq.

[3] Arzhanov, M. A., Ketchekyan, S.F., Mankovsky, B. S., Strogovich, M. S., *Állam és Jogelmélet* (Theory of state and law). University textbook, 1951 (Hungarian translation of the Russian original published in 1949), pp. 92–3

a social order favourable and useful to the ruling class and to its reinforcement and development.[4]

In socialist opinion, the state puts into practice the will of the ruling class. By its activity, it safeguards and guarantees the interests of this class. The interests of the ruling class require that a command expressing its will be compulsory for the society. Every citizen must be subordinated to this command and must observe it. To this end, in the capitalist state, the exploiting class enforces its will on the exploited, on the people subjugated by it, through the state. In the socialist state, the will of the working class, which has done away with exploitation, and which gives expression to the interests of all workers, is obligatory for all citizens. This will serves the purpose of consolidating socialist conditions and building the classless communist society.

The expression of the will of the ruling class, and the enforcement of this will, reinforces the development of the social order favourable and useful for the ruling class. This end is achieved by the ruling class with the aid of the law, by way of compulsory rules finding an expression in the statutes and other acts of the sovereign power. The observance of these rules is guaranteed by the power of the governmental machinery.[5]

III. Even if in the definition of the idea of law, the dominant concepts of western jurisprudence and those of the socialist world are widely divergent, the two systems do agree that, in the objective sense, law means a wholly self-contained legal rule, a command applying to external human conduct and carrying a sanction.

There are legal rules which are not commands of conduct and which do not impose a definite external course of behaviour. Such legal standards and principles refer to other social or legal rules, which limit or terminate the effect of other legal rules, or which amend or explain other legal standards and principles. However, these are not full-value, self-contained legal rules, but dependent, partial or defective rules void of independent legal significance. Considered by themselves they are not even legal rules, and are taken into account only in their relation to complete, self-contained legal rules, as parts of them.[6]

In addition to self-contained and dependent legal rules, a distinction may be made between legal rules containing a command and those containing a promise, namely command law and promise law. In command law, the legislator establishes norms for the conduct of others, whereas promise law regulates the conduct of the legislator. In the first case, the legislator addresses a command to others either directly, or indirectly. He invests certain legal persons with powers of

[4] Vishinsky, A. Y., Fundamental Tasks of Soviet Socialist Jurisprudence. *Proceedings of the first conference of workers of jurisprudence, July 16–19, 1938* (translation). Budapest 1950, p. 39

[5] (Aleksandrov, N. G., Kalynytchev, R. I., Karev, D. S., Nedabny, A. L., Tumanov, V. A. Shebanov, A. F.): Александров, Н. Г., Калиничев, Р. И., Карев, Д. С., Недабний, А. Л., Туманов, В. А., Шебанов, А. Ф., *Основы теории государства и права* (Fundamental theory of state and law). 1963, pp. 409 et seq.

[6] Szászy, I., *A magyar magánjog általános része. Különös tekintettel a külföldi magánjogi rendszerekre* (General part of Hungarian private law, with special regard to foreign systems of private law). Vol. I, 1947, p. 3. (hereinafter cited as Szászy. *Private Law*); Szászy, I., *International Civil Procedure. A Comparative Study.* 1967, pp. 93 et seq. (hereinafter cited as Szászy, *Procedure*)

command in such a way that in the concrete case, the command embodied by the legal rule will manifest itself as the will of the subject invested with power and not as that of the state. For example, the legal rules "Thou shalt not steal", "Thou shalt not kill", "Do your military service", or "Pay your taxes", are direct commands of the state. On the other hand, the command that a debtor should pay his debt to his creditor is an indirect command.

A legal rule including a promise is only a partial or defective rule, and will not become a full-value, self-contained legal rule until the legislator is obliged by some other legal rule to fulfil his promise. This other legal rule originates from a superior legislator.

Hence a full-value, self-contained legal rule is a social rule effective in reality which regulates external human conduct and which expressly or tacitly holds out direct and indirect, formal and substantive sanctions. In case of need, the sanctions may involve the application of physical coercion and by this, their actual effectiveness is, if necessary, guaranteed by the strongest social power.

Every full-value, self-contained legal rule applies to external human conduct (doing or not doing). Such external human conduct constitutes the direct object of the legal rule. Every full-value, self-contained legal rule requires a person to follow a definite line of external conduct. In every full-value, self-contained legal rule the idea of a postulate is included. The legal rule does not declare what is displayed, what was and what is going to be displayed. It simply defines the external conduct which has to be displayed. This is what lends a normative character to the legal rule and what distinguishes it from a law of nature.

In the background of every full-value, self-contained legal rule there is the power of society, ready to translate its threat into reality and when necessary to have recourse to force. At the present stage of legal evolution this social power is, within the state, the sovereign power; in international life it is the international balance of powers that is the strongest physical power, so that in the last resort all law, including domestic law, has its roots in physical power. Each full-value, self-contained legal rule has to be effective, as only a living legal rule is in fact a legal rule which men in general obey.

Every full-value, self-contained legal rule is a command. As a prominent American jurist, Hearn, aptly remarked, in each command seven conceptual features may be discovered. These are: the issuer; the people concerned; the wish of the issuer; the desired conduct; the expression of the wish; the threat; and the assumption of the coercive force. The complete, self-contained legal command differs from any other command in the fact that here the strongest social power is the issuer; the addressee is the one obliged; the wish of the issuer is that the addressee should display a definite external conduct; the desired conduct is the external conduct; the threat is the potential sanction of physical coercion, and the assumed coercive power is the social power.

Human conduct consists of any positively or negatively directed act, that is, every action and omission. Human conduct is called external when it manifests itself also in the physical world, in an external fact. It becomes an internal act when it finds expression in a person's heart or feelings. Several authors, following John Stuart Mill and Del Vecchio, are of the opinion that external and internal human conduct cannot be distinguished, because all human conduct consists of two conceptual elements, namely an external act belonging to the physical world,

and an internal moment of volition coming within the province of the world of intellect. However, this opinion cannot be approved, for there is purely internal human conduct which occurs in the world of man's thought, in his feelings. The solution of a mathematical problem in the mind of the mathematician is internal conduct, and so is any decision of the will before it finds an expression in external facts.[7]

IV. Western and socialist literature further agree that legal rules create legal relations of subjective law between the legal subjects. However, the definitions of the notion of legal relations in western and socialist jurisprudence again diverge. Moreover, in this respect, there is no uniform concept even in socialist jurisprudence.

As Peschka explains, according to the socialist idea, "a legal relation results from the legal evolution of the social relations defined by the legal rules through the realization of the legal rule, i.e. the subjects of these relations become the bearers of concrete rights (subjective rights) and legal obligations defined by the effective legal rules and stipulated by the state".[8] Világhy and Eörsi consider the socialist concept of legal relation in a similar way and suggest that the foundations of legal relations "are formed by the actual relations coming into being between men in society, by the social relations. Among these, the most important group of a decisive character is that of productive relations, i.e. the relations established between men in the process of production. The productive relations define the character of all other social relations coming into existence between men. In order that social relations might take on the form of legal relations, they have to be recognized by the legislature. When in the interests of the ruling class, the state creates the legal rules regulating social relations, it does so to exercise an active effect on the social relations, to safeguard the given economic order, and to further its development. In the socialist state this active effect is exercised for the development, consolidation and protection of the socialist social relations."[8a]

Socialist writers point out that like all social sciences, the western theories of legal relations, and also the theories of law, have a class content, are class-angled theories, and perform social, political and ideological functions; that is, they try to satisfy the social, political and ideological needs of the bourgeoisie with concepts of the theory of legal relations, and with their solutions for the problems.[9] Their methods and theories are metaphysical and idealist. Their principal error is that for them a legal relation boils down to rights and obligations.[10] According to socialist writers, the various bourgeois theories content themselves with offering a formal logical analysis of the various possible relations between rights and obligations. In the course of these analyses they consciously or unconsciously detach the rights and obligations from their social content and degrade them to empty forms. Since they do not approach legal relations from the aspect of social relations, and are content with dogmatic and formal logical analyses, they conceal the social

[7] Del Vecchio, G., *Lehrbuch der Rechtsphilosophie*. 1937, pp. 235 et seq.

[8] Peschka, V., *A jogviszony-elmélet alapvető kérdései* (Fundamental problems of the legal relations theory). 1960, p. 36

[8a] Világhy, M., Eörsi, Gy., *Magyar polgári jog* (Hungarian civil law). 1962, Vol. I, p. 89

[9] Peschka, *Op. cit.*, p. 33

[10] Peschka, *Op. cit.*, p. 17

essence, purpose and function of the legal relation. In the world of rights and obligations, as abstracted from every social content, there is no difference between capitalist and worker, and so the social essence of these rights and obligations, the class content of the legal relations, disappears.

It should be noted, however, that the concept of a legal relation has not been defined definitively in socialist jurisprudence. In the evolution of Soviet theory of law as regards the problem of legal relations, three ideas of significance, which try to formulate the socialist theory of legal relations on the ground of Marxism–Leninism, may be encountered. Immediately after the Great October Socialist Revolution, Stutchka's and Pashukanis's concept of the legal relation was generally accepted as the Soviet theory of law. From the 'thirties onwards, Vishinsky's theory of legal relations became predominant, until in the years before the 20th Congress of the Communist Party of the Soviet Union, a new concept of the legal relation began to take shape. This new concept is associated mainly with the names Ketchekyan, Piontkovsky, and Aleksandrov.[11]

Stutchka and Pashukanis expressed in absolute terms the fundamental teachings of Marxism, but they exaggerated the significance of the material, economic side, failed to understand the Marxist theory of reflection correctly, degraded the significance of the legal rules, and concentrated their attention exclusively on social conditions. On the other hand, Vishinsky primarily had the legal rules in mind and thrust the problems of the theory of legal relations somewhat into the background. The theory of legal relations which made its appearance after the second world war tried to relieve the rigidity and one-sidedness of the two earlier concepts, and to synthesize their results.

V. The present author attempted to define the concept of a legal relation as early as 1947. He tried to demonstrate that the western authors failed to offer a correct definition of the legal relation even on formal, logical grounds. On formal, logical considerations, a legal relation may be divided into basic legal situations, that is, basic relations.[12] These basic legal situations may be divided into two large groups. Although it is a matter of dispute in socialist literature, the author still believes that there are basic legal situations which do not establish relations among several persons, which do not create legal connections, legal ties, *iuris nexus*, *iuris vinculum*, between the subject of the legal situation and those of other legal situations, but merely provide a legal potentiality for these persons to enter into legal relations with others. On the other hand, there are basic legal situations which do create legal relations, *iuris nexus*, *iuris vinculum*, among several persons, the subjects of several legal situations.

The former group includes the legal capacities (legal capacity proper, capacity of acquisition, capacity of legal acts and torts) and the legally relevant states of the person (age, bodily or mental health, sex, nationality, honour, family status, religion, domicile, or the quality of being an heir).

[11] For the titles of the relevant works of Soviet literature see Szászy, *Nemzetközi munkajog. Összehasonlító jogi tanulmány* (International labour law. A comparative survey). 1969, p. 266, Note 5. (Hereinafter cited as: Szászy, *Munkajog*)

[12] Szászy, *Private Law*. Vol. I, pp. 133 et seq.; by the same author, *International Labour Law. A comparative survey of the conflict rules affecting labour legislation and regulations*. 1968, pp. 193 et seq. (Hereinafter cited as Szászy, *Labour Law*)