PERSPECTIVE

Clausula rebus sic stantibus, Dynamics and Statics in Law

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1. All legal systems require a static foundation. The rules of objective law are being created in order to strengthen the well-known order of public relations whereas social activities and events are very dynamic in nature and are never able to be fully legalised within rational schemes of rules. This kind of conflict between the static nature of legal systems and their dynamicity within are particularly visible during great social cataclysms. Any legal provision is designed for a well-known factual situation and created with the assumption that the situation will develop in a more or less defined and possible way. The clause on a change of circumstances is typical to any legal provision; that is, the *clausula rebus sic stantibus*. If there is a fundamental change to the circumstances for which the legal rule is designed, the main idea is often lost and a strict adherence will not lead to the objective to which it was aiming.

2. Time has shown that the formal-legal approach is not appreciated nor respected during major socio-political cataclysms.

Because each and every case has its individual features and with it being impossible to cover an irrational flow of social relations with rational legal rules, judges cannot be strictly limited within the narrow framework of formal law but, rather, allowed to consider each case by its essence; that is, to assess the case freely. Assessing legal events separately from social changes would lead to a total isolation from the reality of the situation but it is also impossible to change the legal-normative approach because it would mean a negative answer to any legalisation. It is impossible to fully rationalise the social changes and, at the same time, to refuse any legal regionalisation. Both approaches contain some truth and some grounds.

3. Every person, first of all, needs to have the rule of law defined and, secondly, to have it stable and secure. He should know in advance what to do and how to do it. It is necessary for the individual to have a clear understanding of his rights and duties and, in general, his place inside the state organism. This very interest of a human being to have the mandatory rules defined in advance and to have them remain stable served as the grounds in world history for the writing of one of the first legal manuscripts, the *Leges XII Tabularum*.

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The history of the creation of the Law of Twelve Tables dates to the period of the beginning of the Republic wherein the uncertainty of customary law was one of the reasons for the conflict between the Plebs and the Patricians. The application of the law was in the hands of Patrician magistrates and its uncertainty allowed its abuse by the Patricians. To this end, the first demand of the Plebs was to make a set of statutes in a clear written form. In the year BC 462, the Tribune *C. Terentilius Arsa* proposed the setting up of a commission for the preparation of a set of laws which, in the form of The Law of Twelve Tables, consisted of ancient Roman customs. In fact, Decemvirs formulated and codified these customs and, for the sake of common certainty and understanding, only seldom added new provisions. The technique of a written formulation of mandatory rules was so successful that The Law of Twelve Tables later became a foundation for the National Roman Rules System, the *Jus civile*. The Civil Law developed in two directions; that is, a new legislature and the practical interpretation of The Twelve Tables which was done by pontificates who were the first lawyers and law commentators. Their role gained even more significance by the fact that, pursuant to Roman traditions, the statute had to be adopted or repealed wholly without any amendment. Rather than constantly making changes to the statute, it was preferred to have its new interpretation and application.

4. For the purpose of a universal understanding of the law, static-dogmatic and dynamic-teleological trends have begun to merge in Western Europe.

A normative, static system of law needs to include a dynamic element and to allow a space through which new social relationships would be legally formulated. Such a space for the law is the clause *rebus sic stantibus*. It is the principle of dynamicity in the legal system; that is, the rational notion about the irrational which enlivens the law by approximating it to the realities caused by changes.

To overcome these kinds of problems, private law has several mechanisms within its scope. There is, for example, the presumption of "release from performance" or "release from liability" where the French notion of *force majeure* has prevailed. This, however, does not exactly pertain to the French *force majeure* or other national doctrine. In English law, this notion has a rather artistic name, the Acts of God and Kings' Enemies.

5. Any contract obliges the parties to keep the promise within. Suppliers and customers want to see civil agreements successfully performed, for example. External circumstances, however, could make the performance impossible or entirely change the financial accounts of the parties involved. A typical clause on Force Majeure provides for the grounds of release from liability in cases where performance is, in fact, impossible. On the other hand, the clause *rebus sic stantibus*; that is, a change of circumstances, is applied if the terms and conditions change to the extent that performance is not impossible but extremely difficult for the party. Such a clause is necessary especially in consideration of large-scale and long-term contracts. During the implementation of such contracts, economic, political and factual conditions might change fundamentally within and make the project unworkable. To solve this problem, the scope of private law pro-

vides parties with two formal alternatives in the formation of contracts. The first one derives from the conditions of release from liability; the clause of Force Majeure releases the party from contractual penalties and causes the suspension of performance and the termination of the contract.

Clausula rebus sic stantibus, the clause on the change of circumstances, provides for negotiations on adaptation of the contract; that is, a review of the contract's terms and conditions to allow the prolongation of its performance.

The International Chamber of Commerce confirmed the existence of both clauses and recognised the importance of its implementation for any national legal system. According to this organisation, the clause may appear directly in the contract, if it is an international contract, or in a general reference within.

6. The International Chamber of Commerce has elaborated model principles, under which a party will not bear the responsibility for non-performance of any of his obligations, if he proves that:
– Such non-performance was caused by an impediment which is beyond the reasonable control of that party;
– He would not have been able to reasonably foresee and provide for the circumstances concerned or the consequences thereof at the time of conclusion of the contract;
– He was not able to personally prevent or overcome such impediments or, at least, their consequences.

Such impediments may be caused by the following events which include but are not limited to:
a) international and civil wars, riots, revolutions, sabotage or piracy.
b) natural disasters, storm, cyclone, hurricane, earthquake, landslide, flood.
c) fires, explosions, destruction of factories and plants.
d) strike or boycott, any form of lockout, delay and suspension of works happening in the undertaking of the party requesting the excuse.
e) acts of governments or any other acts of authority whether lawful or unlawful, impeding the performance of obligations assumed by the party under the contract, unless the party has assumed this risk from the beginning.

Unless otherwise provided for by the contract, Force Majeure impediments do not cover the unavailability of permits, licenses or exit visas or a necessary permission for the performance of a contract to be issued by the state authorities of the party which claims to be released from liability. Under the practice of the International Chamber of Commerce, Force Majeure does not apply in such cases.

7. At times, the performance of an obligation, physically or legally, might become impossible independently from the party's will. If an earthquake, for example, has destroyed a factory where goods were being produced, it then becomes physically impossible to perform the obligations of the contract within the time frame assumed or it can be that the performance becomes legally impossible if a decree on the prohibition of export is adopted

after the conclusion of the contract. Such cases may be covered under one general impossibility; that is, the notion of Force Majeure.

Unlike Force Majeure, performing obligations means that it is sometimes necessary to overcome the occurred impediments imposing an additional burden upon one of the parties. In the case of a long-term contract on the supply of oil at fixed prices, for another example, and in light of a continuous increase in the prices which is financially destructive for the supplier, the party may refer to a hardship clause as grounds for justifying the non-performance in civil circulation in such circumstances in that it is a violation of the principle of equivalence.

8. Article 398 of the Civil Code of Georgia stipulates an adjustment of the contract to changed circumstances:
"1) If the circumstances that constituted the grounds for execution of the contract have evidently changed after execution of the contract and the parties, had they taken these changes into account, would not have executed the contract or would have executed it with different contents, then it may be demanded to adjust the contract to the changed circumstances. Otherwise, taking into account the individual circumstances, a party to the contract may not be required to strictly observe the unchanged contract.
2) It is the same as a change in circumstances when the understandings, which constituted the grounds for execution of the contract, have turned out to be incorrect.
3) In the first instance, the parties should try to adapt the contract to the changed circumstances. If such adaptation is impossible, or if the other party does not agree to it, the party whose interest has been harmed may then repudiate the contract".

In addition, a further significant aspect of the Georgian Civil Code is the special regulation on repudiation of a long-term relationship of obligation (Article 399). Any party to the contract may, on legitimate grounds, repudiate a long-term relationship of obligation without observing the time period fixed for the termination of the contract. The grounds are legitimate when, taking into account the specific situation – including Force Majeure and the mutual interests of the parties – the party seeking to terminate the contract cannot be obliged to continue the contractual relationship until the lapse of the agreed period of time or until the expiration of the period of time fixed for the termination of the contract.

9. In our opinion, private law is more dynamically resourceful than public law where statics, prevail over dynamics. This is also significantly conditioned by the fact that private law consists of discretionary rules whereas public law has peremptory rules. Despite such an inequality, it should be mentioned the problem related to the need of adjustment to a changed social relationship exists in both fields of law. Public law has tried to compensate for the lack of formal principles of adjustment to changed circumstances by developing judge-made law.

On the other hand, we think that the development of "judge-made law" was strongly inspired by the imperative nature of public law with its strictness and firmness of rules and its clarity compared to the flexibility of private law. Presumably, and for this reason, public law has paved the way to "judge-made law".

A further theory could be added to the plethora of theories regarding the separation of public and private laws: in private law, the balance of dynamicity exceeds a static character whereas a static character and absolute clarity significantly exceeds dynamicity in public law. Compared to public law, private law has more resources to adjust to changed social and legal relationships. The set of legal tools includes, besides the discretionary rules, all of the institutions: *Force Majeure* and *Clausula rebus sic stantibus* and the adjustment to changed circumstances as well as the presumption of a violation of long-term contracts which allows the solution of the problem without legislative changes. On the other hand, the scope of public law, in terms of adjustment to changed relations and overcoming the barriers encountered in the protection of legitimate interests, is rather small and problematic. In this regard, it could be said that the solution of its permanent "backwardness" falls mostly within the concept of "judge-made law".

10. The matter of the "dynamicity" and "static nature" of law is not an alternative but a proper combination of these elements. Both are necessary to solve the missions of the law: flexibility and extent and to meet the requirements caused by historical changes and social conditions. There is a need for clarity in order to create more or less of a permanence under the stabilising influence which can protect the public against permanent, unforeseen and uncontrollable changes. These elements should be combined in order to achieve the set goals. Stability should not become a barrier where manoeuvring and progress is necessary so as to avoid any progress falling out of the legal regulation framework. Dynamicity should not degrade and eliminate the clarity capable of becoming a stabilising influence otherwise the task to create a legal basis of social coexistence will fail. A change of legal rules becomes necessary only if their extent and flexibility prevents the solution of the set task.

11. According to *Konrad Hesse*, one of the great Constitutionalists, the more precisely and comprehensively the constitution is objectively regulated, the more often and rapidly is the change of a constitution needed. "Amendments to a Constitution" shall be understood as a modification of the text of a constitution. "Violation of a Constitution;" that is, the derogation from the text of a constitution, should be distinguished in certain cases from "constitutional derogations" which refers not to the modification of the text, as such, because it remains unchanged, but to the concrete definition of constitutional rules which, having the extent and flexibility of many constitutional provisions, may lead in changed circumstances to different consequences and, therefore, facilitate "derogations."

The problem of amendment of a constitution becomes actual where the possibilities of "constitutional derogations" are exhausted. If constitutional amendments are complicated, and there is only a restricted possibility for derogations, then we can speak about the static character of a constitution. Moreover, if the contents of a constitutional rule are prescribed explicitly, then it is difficult for the constitution to fulfil its tasks in the historical reality of social life. The situation is no better when a constitution, in which derogations take place only in rare cases, can be amended at any time and without any complications; that is, when it is "flexible." Such a decision, however, allows the possibility to quickly

adapt to the uniqueness of the text of a constitution although the constitution, serving as the main legal basis of social existence, will fail to fulfil its tasks because of significantly losing the stabilising influence.

On the other hand, if the text allows for a certain freedom of constitutional "derogation" but the amendment of constitution is complicated, then it meets the idea and goals of a constitution. Such a decision means that there is some flexibility and stability at the same time which allows the constitution to properly implement the function of a stabilising influence and a reflection of occurring differences throughout the whole country (*Hesse*, Fundamentals of German Constitutional Law (in Russian), 1985, 123).

12. Throughout its two hundred years of history, the US Constitution has undergone twenty-six amendments. What is the secret of the stability and permanence of this constitution? In this regard, the role of the US Supreme Court in the US legal system should be analysed: the constitutional doctrines of the Supreme Court became the Constitution of the USA. Nothing amongst the fields of American law is so much the product of the Supreme Court's legislation as is the constitutional law and the Supreme Court's legislating function is more effectively and extensively implemented in the field of constitutional rules which, by means of court decisions, systematically adjusts to changing political and economic conditions.

On the other hand, the mechanism of amendment of any rule, including the constitutional one which is formally established in the constitution itself, by its actual meaning falls behind the Supreme Court's legislation both in German law and American constitutional law. The major part of the actual constitution is the result of the work of a judicial authority. We can prove that all constitutional amendments taken together, as well as legislative changes, have failed to make an exhaustive and multilateral influence on the US legal system when compared to the constitutional doctrines of the Supreme Court. According to the Chief Justice *Hughes*, "We are under a Constitution, but the Constitution is what the judges say it is".

13. The special role of the Supreme Court in the field of constitutional legislating is conditioned not only by its unique governmental authorities but, for the most part, also by the characteristics of the US Constitution of 1787. This document bears the nature of political compromise and is small in size and laconic in wording. It reflects the ideas of "social contract" and "separation of powers" of the 18th century as well as a quite unclear legal language which was typical of that time. American statesmen say that "the Constitution stands between the most incompatible, vague and incomplete statutes. Due to a lack of clarity, it is more a political than a legal document".

This very incompleteness and legal uncertainty of important provisions of the US Constitution, apparently, is a very convenient feature which has conditioned its adaptation, feasibility and sustainability. Today it is the oldest of all existing constitutions thereby establishing the cult of the constitution which has become the Bible of American society and a national political symbol. This has also been supported by the Supreme Court. The Chief

Justice, *Warren*, stated: "Any nation must have conscience, the American nation's conscience is its Constitution and the Supreme Court protects it". Ultimately, the main reason for the stability of the US Constitution is its instability. Americans proudly say that in the history of civilisation, it is only the Bible, the Koran, the Digestae, and the US Constitution where each rule within became the subject of universal discussion and interpretation.

14. Today, judge-made law has become not only the law of the Anglo-American common law countries but an integral part of entire legal theory. Its concept, however, continues to be the subject of heated debates about which a whole line of theories and trends have developed.

Nevertheless, what exactly is "judge-made law?" In the most general terms possible, the subject of this concept is the court's function to legislate. Its immediate goal, however, is not so much to show the role of court practice in the historical formation of legal systems, the mechanism of case application and the impact of court practice on the legislature but, rather, to overcome the general principle of "judge obeys the statute." The supporters of this concept consider that it is the judge, and not the legislator, who most perfectly communicates the law and, as such, requires a significant expansion of his terms of reference. This means, namely, authorising the judge to decide the case "against the statute" (*contra legem*) and to undertake the leading role in the field of legislation. Along with increasing the role of legislature in Anglo-American countries, the definition of "judge-made law," formerly related to the case system, is now applied more in regards to the specific case as grounds for a potential refusal on the application of the statute.

In continental law countries, the critique about statute and dogmatics has reached its zenith where the old perception of the judge has been abandoned and where the judge is now regarded as a "social architecture" because only he is able to speedily and explicitly decide legal problems created by our complicated industrialised and fast-paced society.

15. The predecessor of the idea of "judge-made law" could be considered to be the theory of the "freedom of discretion of judges" which originated at the end of the 19th century in the situation of sociological jurisprudence. Together with the similarity of the "freedom of discretion of judges" and "judge-made law", however, there are differences, too. The requirements of "judge-made law" become more and more radical with the scope of its application having significantly expanded at present time.

The efforts "to tie the hands" of judges have become incompatible with rapidly changing social relationships and the need for their regulation. Considering the growth pace of legislatures, however, as, for example, in Germany where each Parliamentary Legislature adopts 400-500 new statutes, a strange picture appears. The activation of a legislator's action is accompanied by the conflict of the statute and the judge wherein there is an intention to turn the judge into a leader of social development; that is, the real lawmaker.

The success of the concept of "judge-made law" is significantly conditioned by the legislature itself:

a) covering a large amount of flexible rules and notions which allows for miscellaneous judgment and interpretation.
b) adoption of certain compromise statutes (which reflects parliamentary political powers), almost always could be understood and specified at the judges' discretion.
c) increase of legislature in number leading to its "inflation" to some extent and disallowing judicial manoeuvring. Supreme judicial bodies will firmly establish the way of "judge-made law". The German Federal Constitutional Court states that it will guide, along with the Constitution, with supra-legal principles with other systems of German justice having followed this example.

16. There are scholars who discuss the existence of "judge-made" law, not in opposition to the statute and lawmaker, but as an immanent requirement for the feasibility of positive law. Without the active lawmaking role of a judge, a country's legal system would become stagnated and fail to develop properly. Legislative law does not at all exclude the "judge-made" one. On the contrary, it needs "judge-made law" in order not to solidify (*Haudte*, Naturrecht, Richterrecht, Gesetzesrecht, 1974, 123).

Leon Duge, the famous French Constitutionalist, said: "I belong to ones who think that law is only slightly a creation of a lawmaker; positive statutes, stringent texts of codes may remain untouched: by force of subjects, by influence of facts, by practical requirements, new legal institutions continuously originate". The law texts remain but they lose their power and life as a result of some scholars or a new interpretation which give them a degree and importance which they did not have when they were drafted by the legislator. The legislator is no longer the only and dominant maker of law (*Duge*, General Transformations of Civil Law since the Code of Napoleon (in Russian), 1910, 33).

17. Where does the "judge-made law" find its use in the interpretation of a statute or in the laying down of a new rule? Both approaches have supporters and critics. *Hale* said that court judgements have a considerable weight and authority in the declaration of a law, especially if they coincide with previous judgements. They do not, however, create their own law because they "are less than law." Law is independent from judicial manifestation (*Hale*, The History of the Common Law in England, 1971, 207).

The American scholar, *Soper*, noted that legislators lay down the law and judges "find" it. The judicial reading of a statute becomes a precedent but only a so-called "precedence of interpretation." Precedence of interpretation is different because it is based upon the statutes. Precedents of interpretation can fundamentally change the contents of statutory law with a possibility for the contents of statute and the contents taken by judges to become very different. This opinion is justified by the English scholar, *Walker*, who stated that: "Legislature as a source of law is in a less favourable situation because a Parliamentary Act needs judicial interpretation which then becomes a court case. Therefore, things would become easier if parliamentary legislature would be considered as a source of law superior than precedence" (*Walker*, The English Judicial System (in Russian), 1980, 112).

Currently, the supporters of positivism acknowledge the fact of "judge-made law." Case law is law consisting of rules and principles laid down and applied by judges whilst making decisions.

The school of analytical positivism acknowledges the court case as a source of law whereas the supporters of sociological trend intend to make the entire law one of being "judge-made". It is analytical positivism which prevails in Anglo-Saxon law whereas it is sociological positivism in the USA.

18. Naturally, "judge-made law" is not acknowledged on a legislative level. Following the example of the famous rule within the Swiss Civil Code that stipulates that in the absence of an applicable legal provision, the judge shall not be allowed to refuse the case and shall decide it according to the rule which he would establish as a legislator, this provision may become disputable as well. Only the Constitution of India stipulates that judgements of the Supreme Court are binding. Before 1966, the English House of Lords was also attached to its past judgements but, since its abolishment, the English practice did not develop in favour of precedents. In Canada, one part of surveyed judges thinks that the principle of judicial precedent is a legal provision whilst others believe that it is a custom or conventional rule established by the law.

19. Roman law directly affected the establishment of the continental legal system (Roman-German law) unlike the common law (English law). This provision needs to be specified. However paradoxical it may be, the technique developed by English judges is close to the instruments of Roman law. According to *Zweigert/Kötz*, "Lawyers of both common and Roman law avoid generalisations and, if possible, notions, too. Their method is an active casuistry. They move from one particular case to another and try to establish an effective mechanism of regulation for each of them".

English lawyers note that the English judge intuitively came to the Roman law techniques a hundred years ago. "Active casuistry" influenced the characteristics of the "common law" system. Herein, this refers to legal continuity, the characteristics of the notion of the rule, the structure of law and the system of sources.

Although declaring itself a successor of Roman law traditions, the Roman-German law still denied "the active casuistry" and accepted the rule of law. It recognised, then, the concept *res judicata* according to which a court judgement is binding only for parties to the case.

20. The whole system of law should be seen in the light of the principle of equity. The compulsory correlator of this principle is some uncertainty of its rules. It is not always possible to find a solution of individual cases in it such as, for example, when determining the sentence in criminal law, the civil law solution often depends on judge's discretion.

The following civil-political prerequisite served as basis for the famous German Civil Code.

The authors of the Code outlined three principles:
a) The statute should be impartial.
b) The statute should strive to achieve material and not formal truth.
c) The statute should give a wide scope to judicial discretion so it is possible to define parties' relations on a fair basis.

This new trend reflected in the third principle prevailed throughout the entire legal atmosphere and became a kind of *communis opinion* and re-evaluated old doctrines and principles.

In a spiritual world, factual victory is sometimes not enough and the winner often wants to justify himself and theoretically substantiate the success. This need was felt by the new theory on the role of judges wherein numerous observations were made to justify themselves theoretically.

21. However far the sceptical attitude towards the statute and interest of a judge's particular legislative activity goes, it is clearly impossible to free a judge from the clear and definite rules of the statute. If the idea of the law does not cause doubts, then the judge can only obey even if this idea significantly conflicts with the judge's opinion on impartiality or reasonableness. "If we allow a judicial review of the statute," said *Gény*, a prominent French theorist, "it means the legalisation of legal anarchy" (*Gény*, Méthode de interprétation et source en droit priceé positif, Paris, 1899).

The judge's role of legislative activity applies to cases wherein the statute neither directly specifies nor provides for a lawmaking rule and where, for this reason, there is a need for filling the gap of the missing will of the legislator. The topic of scientific research becomes the subject of finding the best method of filling such a gap; that is, the issue of a more reasonable method of interpretation.

22. If the legislator is unable to follow the development of social relations, there is an urgent need to involve a judge as a living regulator and to give him discretion but it should not be a totally free, absolute and independent judicial subjectivism. Such subjectivism would come into conflict with the objective legal order. For a logical judgement and substantiation, the judge should guide with rules not from himself but with those existing independently from the outside and with absolutely objective sources.

The absolute majority of researchers consider that the statute enjoys a dominant position herein even though it is not able to individually provide for every case. The statue is merely an initiative of a competent authority providing for the trend and general guidance for what to do and how it should be done.

The meaning of guidance should not be overwhelming as in the case of prevailing doctrine. Statutes always speak generally and do not take account of innumerable clauses which we have to fill through other ways and means. The prevailing doctrine for the solution of this problem required the true will of a legislator as much as it can be achieved by the well-known techniques of the interpretation of legal provisions.

23. According to *Gény*, the main methodological mistake is hidden exactly herein. The statute itself as an authoritative guidance is the conclusion of a competent government which is the supreme source of all statutes and laws – of the nature of subjects, the "*nature des choses*," according to which a substantive legal system is another arrangement – with the supreme nature of subjects consisting of rational principles and having a stable moral meaning. With an absolute impartiality binding for a legislator, it is binding for the judge, as well where the gaps of substantive sources force them to create the law themselves. To define the nature of these subjects, the judge needs to have a broad background of knowledge and perform tremendous intellectual work in each particular case. Besides analysing the facts, like a legislator, he must carefully analyse the essence of the social events he is facing and identify the interests and the statutes on their probable harmony. The work is extremely difficult but there is support for the judge as appears in tradition and authority; that is court practice and jurisprudence (*Gény*, Méthode de interprétation et source en droit priceé positif, 1899, 290).

24. *Lambert*, another researcher in this field, believes that one should base himself upon comparative law, not natural law, for the method of interpretation of a statute and base himself also on the laws of modern cultural states in equal social and economic conditions. In this respect, it is important to study related legal systems which will show the creators of national law the opportunities which, in other countries, regulate one and the same legal problem. The most useful examples from within these opportunities will be received naturally and cause a general internationalisation of law. In this way, an international general civil code could be developed which could become a common and impartial source of development of any national law through either legislature or interpretation (*Lambert*, La Function du Droit Civil Comparé, Paris, 1903, 178).

25. *Saleilles* criticises natural law and believes that the judge will be left with only pure subjective judgment and individual opinions about justice and morality in search of a solution. It would be wilful, and we should be afraid of wilful interpretation of a statute, if judges base their decision upon their own opinions about justice, morality and religion. In this case, we will have a judge who is an agent of social anarchy.

The free interpretation and wide authority that we require from judges is permissible only if it can give some objective grounds for such interpretation.

Imperative elements that a judge must use and seek should necessarily have an objective reality independent from the subjective cognition of those who use it. Such objective elements, in the opinion of Saleilles, could be sought by purely positive ways in the following three fields: legislative analogy, public legal awareness and comparative law (*Saleilles*, De la Declaration de Volonte, 1919, 109).

26. Legislative analogy tries to find the basis for judicial evolution by establishing the legislator's true or possible will. Comparative jurisprudence is also of great importance. One and the same legal ideas originate almost similarly amongst all peoples being on

equal economic and social development levels. These ideas might not be as sophisticated and established in one nation as they would be in another. By taking the foreign legislation into consideration, the judge would merely supplement the ideas of its own domestic legislation.

The third and most important guide for judges should be the public legal conscience. Social life is permanently evolving and social conditions are changing and, simultaneously, so do the views of those who are especially interested in maintaining the status quo. Ideas do their work and nothing, even the interests conflicting with them, can stop their movement. Gradually, the attempts of compromise and tolerance appear, even by masters of the situation, or dissatisfaction will result. This is how a new legal conscience originates and establishes itself and where the role of the judge first appears. There are those who are ready to compromise and those who oppose new ideas, merely following the lead of others, even amongst the objectors of the future system. The noble and social role of a judge should be to seize this opportunity, to realise that the conditions have matured for changes and to initiate these matured changes (*consiliateur social*).

The judge will convert what was the ideal of the minority into an ultimate custom with such careful attempts helping to adapt new social conditions to life without radical transformation and turning the law, in the hands of a judge, into an instrument of social progress (*Saleilles*, De la Declaration de Volonte, 1919, 286).

27. The German, *Rudolf Stammler*, joined the dispute regarding role of judge's lawmaking activity. According to him, the doctrine of judicial margin of appreciation shall not mean purely personal and subjective appreciation. The law applies to its subordinates, it strives to stipulate their behaviour within the well-known order of coexistence, it seeks how to make an individual's behaviour dependant on a third person's potential decisions based on his subjective, discretionary opinion. Would it mean the same as the famous Arab proverb: "A Christian will understand the Islamic law on the way back from the court". Would it mean to require the subordinates "to behave the way the judge would later decide appropriate?" (*Stammler*, Die Lehre von dem richtigen Rechte, 1902, 161).

Stammler, unlike another French scholar, also tried to pave a new, personal way with his guide being the idea of law of equity. Law is nothing else but an attempt to regulate coexistence according to a social ideal. This social ideal was a supreme source and a determinant of the work of both a legislator and a judge and he should draw the norms for his decision from this reality. A social ideal can only be a society where each person is considered an end in himself with a society characterised as a community of free willed persons or *Gemeinschaft der freiwollenden Menschen*.

28. The dispute was coloured by the involvement of *Ehrlich* who believed that a judge's discretionary lawmaking (*Rechtsfindung*) is inevitable and even theoretically absolutely legitimate. The proverbial Achilles' heel of this question is to ask where the guarantees

are that this discretionary lawmaking would not turn into self-will and judicial anarchy or judicial tyranny. *Ehrlich*'s answer to this is brief and laconic: there are none and cannot be any other guarantees of justice but a judge's personality. Since the centre of gravity of jurisdiction has been artificially moved to legislature, it became possible to popularise the opinion that a judge is required to have the degree of intellectuality and moral power which greatly exceed the normal level for the fulfilment of his judicial tasks. Not everyone succeeded in achieving this level or showing in practice the ability to comprehend the most difficult paragraphs. The principles of instances and that of collectivity totally destroy the individuality (*Ehrlich,* Freie Rechtsfindung und freie Rechtswissenschaft, 1903, 125).

Personality has always left a mark on the judiciary and at all times was influenced by contemporary social, political and cultural movements. The only point is not to regard this fact as wrong – even unavoidable – but that we should welcome and try to understand that the person who happened to have this role should deserve it. The problem of free lawmaking, then, is the problem not of substantive law but the problem of selection of judges; that is, of a judicial system which should ensure to open the way to strong persons (*Ehrlich,* Freie Rechtsfindung und freie Rechtswissenschaft, 1903, 30).

29. There are two types of interpretation; namely, interpretation pare les principes and interpretation les precedents. The first, the traditional method of interpretation, originated where the legal opinion emerged from Roman law. It reflects the idea of the supremacy of the statute and derives from its will and principles which ultimately facilitates a stagnation of law and day-by-day increases the gap between the law and contemporary needs.

After some time, of course, the outdated statute can be annulled or amended by a new legislative act and the outdated code can be revised. In this way, however, legal development will not proceed consistently and in a stable manner but will be marked with periodic jumps and certain obstacles within (*Lambert*, La Function du Droit Civil Comparé, Paris, 1903, 812).

The second type is the free method of interpretation which greatly appreciates the continuity of social evolution directly as it constantly affects daily life. Herein, courts will find better and quicker methods to meet the needs of legal life, they will relieve and accelerate the process of legal development and become the factor of social progress. In this regard, Roman law has made a chilling effect on the legal development of continental Europe whose legislature always falls behind.

Over-certainty and firmness of law often becomes the source of unfair decisions. Even Plato compared the statute to a stubborn man not allowing anyone to ask him something or to have anything done against him (*Plato*, Politicus, 294).

30. The most vivid denial of all the objections of a judge's lawmaking role is the Anglo-Saxon system of legal sources where we see the absolutely perfect organisation of law and full legal welfare. This system significantly differs from the continental system

where the main source of law is not the statute but common law which is customary law with a completely different essence. The main source of law is the rules formulated by court practice. The first characteristic of Anglo-Saxon law, then, is its casuistic nature, the second is what a judge acquires in this regard and the third is the auxiliary role of the statute because the law and order exists independently from and without the statute.

The law system applicable in continental Europe, as a consequence, is not the only system known to contemporary law and order. The continental system is the direct outcome of the past and of worshipping the statute which was the result of absolutism, on one hand, and of revolution, on the other. It can be said, perhaps, that this system is not at all an integral part of a modern rule-of-law state. The law aims at strengthening social conditions but it needs room for dynamics and for something irrational in order to make for a strong law system. Such can be the static formulas of dynamics and rationalistic formulas of something irrational. The principle *clausula rebus sic stantibus* is one of such formulas of dynamics in the law system.

31. Since the statute is the main source of law, it provokes a strengthening of case-law positions because legislature needs to be modernised and a stable application of law established.

We should forget the belief about a perfect legislature. The pace of legislative drafting can never catch up with the pace of organically changing life. In such a situation, nothing else remains but to expand a judge's role and to accept this role which belongs to him but which had been strongly rejected and covered with all kinds of methods for a very long time.

The founder of the psychological school of law, *Leon Petrazycki*, has an original view of the role of court practice in the law system. Court practice should sometimes, and necessarily so, acquire the meaning of normative fact in the human mind. In other words, there are legal feelings, including legal duties and rights, by making a reference that such is the court practice and that this is formerly how courts had "always" decided the relevant issues or, as well, that this is how the Supreme Court had defined many issues. A special type of positive law, then, appears which cannot be found in court decisions but in the minds of those who feel these decisions as imperative-attributive ideas through normative facts. In other words, it is where the contemporary science of law does not look for justice (*Petrazycki*, Common Law Theory in View of Moral Theory (in Russian), 1910, Vol. 2, 334).

32. The Russian scholar, *Muromtsev*, and the German, *Bulov*, named the idea of compliance of all court decisions with statutes as purely fiction from where the crisis of a doctrine of statute as of main source of law begins as early as 1880. A judge formulates and applies the law, not demonstrated as a statute but existing in the society, and the appropriateness of his decision in this case does not at all mean the compliance of the decision with the statute.

Law and order is nothing without an intelligent, observable, eager judge. So said *Ramph*. This doctrine replaced the other doctrine regarding a judge's passive role and artistically expressed by *Bacon* who stated: "*Optima Lex qude minimum judici relinquit; Optimus judex, qui minimum sibi*" or "That law is the best which leaves the least discretion to the judge. He is the best judge who relies as little as possible on his own discretion".

Law and statute are not equivalent notions and it is not right to think of law as an abstract statute which adopts mathematically accurate decisions for all predictable occasions. Law is an actual living element of justice as understood and implemented by people in a particular period of time. Justice is directly linked with a specific life and morality with a judge's decision having to demonstrate the moral and legal conscientiousness of that period.

33. If A took a ten-year loan from B, we can ask the question whether or not it is necessary for the court to make reference to the relevant articles of the Civil Code in order to adopt a decision in favour of B to be repaid by A. Even if the statute had lacked such a rule, the decision would still be made in this way with the judge having to acknowledge the legal relationship between A and B in spite of how hard he might try to make his argument one way or another. It does not matter whether or not he makes reference to particular civil law rules.

Reinach has established a special theory on the certainty and clarity of legal truth as serving as grounds for civil law. In other words, it is necessary to develop the system of the certainty of legal truths independently from any positive rules (*Reinach*, Die apriorische Grundlagen des bürgerlichen Rechts, Berlin, 1914, 254).

34. According to *Krabbe*, the essence of positive rules becomes obvious not otherwise and no later than in the process of their application. Every statute becomes exposed through commentary and explanation which might derive from an absolutely different basis. Often, even if the statute is available in a written text, objective law is as clarified for the parties as in the case of general unwritten rule (*Krabbe,* Die moderne Staatsidee, Hague, 1923, 43).

Krabbe's argumentation, however, that the essence of legal rules becomes obvious only in the process of their application, is questionable. Such an understanding is wrong and entirely denies the principles of legal certainty and predictability which, clearly, are very important. The idea forgets that legal entities shall predict the requirements of legal rules which are their own rights and basis of their liability. When signing a contract, for example, parties preliminarily analyse their own positions. Some legal relationships might exhaust themselves without arriving before the court at all. The prospects of "judge-made law" do not at all mean the predictability of legal rules and elimination of their firmness. By specifying and supplementing the general rules of statute case-law, its elements are strengthened even more.

35. Many different types of legal positivism have been established throughout the two thousand year history of the notion of law. Only the key elements of this notion

could be summarised here. The general thesis of all theories of positivistic law states that there is no necessary link between the law and moral. "Law" herein means positive law and moral is what is traditionally called a "natural law," "reasonable law" or "justice." Consequently, a positivistic thesis could be that any subject matter, even clearly conflicting the fundamental principles of justice, may become law. The postulate, which corresponds this thesis, is that on the basis of the accuracy of linguistic terms, there should be a distinction between the law as it exists and the law as it should have been. The positivistic notion of law is limited to law as it exists. In other words, the applicable law, whereas material correctness of a rule or set of rules as an element of definition, is taken out of context. The positivist theories use two main elements for the definition of the notion of law: firstly, there is authoritarian legitimacy and, secondly, the social effectiveness of a rule or system of rules.

In debates against the positivistic notion of law, the argument of injustice, about the rules and system of rules which are so unjust that their legal validity and legal character must be denied, is the one most used. From the history of legal philosophy, this argument is renown in its various forms such as, for example, the argument of tyranny and *lex corupta*. Its topicality in modern times is thanks to recent totalitarian dictatorships, especially distortions of law occurring in the German "Third Reich." Consequently, it could be called the argument of distortion or totalitarianism.

Pursuant to the formula of *Gustav Radbruch*, the conflict between positive law and justice is solved the following way: positive law, especially the state statute, takes priority even if its contents are unjust "unless the conflict of the statute with justice reaches to the point of unbearability that the statute as "an unjust law" denies justice" (*Radbruch*, Rechtsphilosophie, Heidelberg, 1973, 339-350). *Radbruch* takes the criteria of justice from the traditions of human and civil rights and, first of all, from the principle of equality.

According to *Kriele*, the necessary link between legal obligation and moral obligation is that the implementation of positive law is an obligation if the law generally and principally takes account of morality (*Kriele*, Recht und praktische Vernunft, 1979, Kap. 5).

36. The German Federal Supreme Court and the Federal Constitutional Court have used the Radbruchian formula in many fundamental decisions. The decision of Federal Court of 1968, for example, on citizenship regarding validity of law, namely the legal character of No 11 enactment of the Statute on Citizenship of 25 November 1941, under which the immigrant Jews on racial grounds were deprived of German citizenship. The 1-3 thesis of motivational part of this decision is as follows:

1) The rules of national-socialist "law" might be refused the legal validity if they contradict the fundamental principles of justice so clearly that judge who should have applied them or who wanted to acknowledge their legal consequence, deems them as injustice and not as law;

2) The debate about justice in the 11th enactment has become so unbearable that it should have been deemed null and void from the beginning.
3) Injustice once legalised, clearly violating the fundamental principles of law, will never become law because it was applied or protected.

37. *Ralf Dreier*, a contemporary researcher of the notion of law, states: "I base on thesis that dogmatics of law is the discipline primarily oriented on judges and consequently theory of law must develop a notion of law oriented primarily on judges" (This postulate deserves a similar comment to that expressed about *Krabbe*, G.G.).

Every judge has a more or less clear notion of the law. The task of the theory of law is to understand and examine this notion of law. For a judge, law is a set of rules according to which he decides cases. It means that a judge's legal notion is not empirical but a normative one. It stipulates criteria that a judge uses to identify the rules as such which, in the legal system that the judge follows, are applied legally and, consequently, are legally binding. At the same time, the judge is not aware of a distinction between the law as it exists and the one as it should be. In other words, the notion of law in a judge's understanding is the legally applicable legal notion which, for judges as well as for all lawyers, in general lies in legal validity. As *Kelzen* said, "specific availability of rule," "existing law," "positive law" and "legally valid law" are synonyms in legal terms.

Positivistic strategy states that the judge is authorised for moral self-assessment in unclear situations of positive law. The strategy of principles says that even in this field, at least in a broader sense, the judge is limited to legally applicable principles. It is interesting to see how the values and goals should be named on which the judges are oriented; that is, moral or law. The theory of principles confirms that and how the legal substantiation is possible even in the heaviest cases.

It is opposed by "the theory of valuating order" which requires the increasing scope of a judge's self assessment and adaptation of legal structures to them. The key argument used against the theory of "valuating order" states that the flexibility of law related with this theory will lead to the deprivation of the principle of rule of law and state independence and movement of over-authorisation to the courts in the system of the separation of powers.

Finally, *Dreier* tries to find a golden mean and constructs the notion of law by integrating the elements of authoritarian legitimacy, social effectiveness and ethics into one system.

Law is the combination of rules belonging to the system of rules organised on the state level or between states because it is socially effective, wholly and fully, and expresses the minimum of ethical justification or justifiability as well as the set of rules laid down in accordance with the order of this system because they themselves express the minimum of social effectiveness and chances of effectiveness and ethical

justification and or the minimum of justifiability (*Reiner,* Notion of Law, Samartali 1995, 1-2).

38. The elements of *Dreier*'s notion, in our opinion, are more clearly contained in the common law. English Law by the resource of considering its social effectiveness, its adaptation to changed circumstances and legal rules in the light of moral and law, exceeds the system of continental law. The English system compensates for the problem of legitimacy and predictability of law by other factors instead of the statute. Specific cases do not differ from statutes in terms of their firmness and even by the periods of application. Consequently, the process of merging successful elements of these two main legal systems is on going today.

The issue of a judge's role and interpretation of statutes, as well as a major part of legal policy issues, does not allow for the one common and final solution for all times and all peoples. The solution of a problem always depends on specific conditions of circumstances. The more or less active role of a judge requires the availability of certain conditions. These include, namely, special training of judges leading to the uniform approach to solution of problems in practice and the establishment of legal traditions and a high level of legal culture in the country which ultimately lead the approximation of common legal consciousness to the level of the legal consciousness of a judge.

As law historians observe, if such conditions are lacking, the statute's claim of monopoly in legislative activity finds useful conditions. Although the statute does not manage to take the position of the only source of law, the judge's role in such cases is significantly modest and the statute is supplemented mainly by orders and customs of administration rather than judge's legislative activity. Even in such cases, however, and in general understanding, it will never be possible to turn a judge into a passive instrument of a lawmaker without a legislative role.