Some theoretical problem of legal validity

I. Premises of the research

The aim of this study is to show the particular problems of the legal validity in connection with the application of law. We can not try to analyse other different problems because the expression „legal validity" has a very wide meaning and it contains components both outside and inside of law.

I have choosen this theme for two reasons. On the one hand: this topic (the relation between legal validity and application of law) was hardly engaged in research. The Hungarian and the universal legal theory as well have pointed to just other aspects of this subject. On the other hand I tried to accomplish a comprehensive work about the legal validity in Hungarian which had not existed before. My study is expected to fill in this gap hopefully.

Therefore I would like to offer a brief survey of the method which played the main part in the universal jurisprudence examining the theory of legal validity and I am going to study what kind of unexpressed premises created this meaning and which concepts of the law reflected in the different ideas.

Particulary I focused my attention on legal theory of Herbert Hart and Hans Kelsen. Both of them intended to put the category of valdity in the centre of their researches and we can find analysis in depth and a considerable effect in their scientific achievements which makes this problem-solution inevitable for the following philosophers. This fact is a proof how impressive the two philosophers' accomplishments were especially in comparison with previous theories in the positivist era of the legal theory.

The subject of legal validity of Kelsen and Hart, regarding theory-making, gives us adequate standpoint for examining the most significant Hungarian theories of the legal validity for the last hundred years. After completing this scrunity we can make an

attempt to work out a theory that will be able to describe a problem of validity which has not been revealed before.

II. Research methods

When I mention methodological problems I mean issues in connection with the subject, the theoretical background and the cognition of the subject.

The subject of my research is a phenomenon which has both theoretical and practical projections. According to this, we can divide the subject into two parts. Partly, it can be studied as a theory of legal validity („idea of legal validity") partly, as a legal phenomenon. The two different aspects, obviously, need different methods.

If we are studying the validity as a legal phenomenon, we have to explore the function that it plays in the uses of lawyers.

The best way to study the validity as a legal phenomenon is the way of the analitical method. By this method we can demonstrate the substance of the legal validity in legal thinking. In such a case we „are looking not merely at words ... but also at the realities we use words to talk abaut. We are using a sharpened awareness of words to sharpen our perception of the phenomena." (John L. Austin)

In the course of the researches I am using the approach of the theory of system. It means I contemplate the law not as a static phenomenon but as a system which is in a dynamic relation with its surroundings constantly. Thus we can define what the function of the valid law is in the legal system.

Regarding the examining of the idea of the legal validity the application of the historical and the comparative methods seems to be the most lucrative methods because by that way the serious social and cultural inherences behind the examined subject can come to light. With the aid of these two methods we can reveal the

connection between the legal theory and the problem of validity as well as the reasons why the problem of legal validity is in the centre of the modern jurisprudence.

In the particular comparison I tried to use primer sources, classical and Hungarian philosophers' studies and the translations of these studies. My field of research (the relation between legal validity and application of law), in this connection, required a kind of standpoint which I could not find in the secunder literature.

The basis of my analysis is the perception that there are two differnt kinds of theory-making. One part of the philosophers has a preconception from the begining and they stand by this theory. For the other part only the subject of the research is given and they want to know more about only this particular piece.

I am using the subject-orientated method in my essay thus I am not following any special system of legal theories. This kind of distance way of looking does not mean my essay is in a „theoretical vacuum" (it would be inposssible as I have presumptions whether this problem is analysable or it is not). It means just one thing: I will not preclude *ab ovo* any phenomenona which can be in any relations with my research.

The next difficulty is to find out which level of the legal validity would be adequate for examining. *Prima facie* there are three different levels we can define: the legal system, the particular rule and the individual norm. In my opinion the most fathomable is the problem of the particular rules' validity. This is proved – *a posteriori* – by the history of jurisprudence where the validity of the rule has always been in the foreground. *A priori* it is well-known that the rule gives the most obvious experience which makes the law interpretable in its entirety.

III. The results of the research

My efforts were aimed partly at the definition of the problem of the legal validity's position in the jurisprudence (paragraph 1-5.) and partly at the establishment of a notion of the legal validity which reckons with the reality of the legal practice (paragraph 6.).

1. One of the most important statements in the essay – which was my methodological choise as well – is that the different *levels of legal validity need to be separated* before any kind of examining. The reference of legal validity can be the *individual norm, the general rule and the level of the whole legal system.* The question of validity appears differently on both three levels and their problems obviously are various.

2. If we are examining the ideas of the validity historically we can come to the conclusion that the problem of legal validity which is deprived of moral questions became the main examination of the jurisprudence at the time of the domination of the legal positivism. The problems in connection with the designation of the territory of the valid law expected the theoretical self-reflection id est the clarification of the validity's definition. This clarification is examinable in the conception of Hart and Kelsen.

3. If we are exammining the concepts of legal validity of Hart and Kelsen we can realise the differences between the two ideas which discrepancy are deducible both from the fact that they were socialized by divergent legal cultures and from their unlike philosophical fundamentals. Hart prefered to connect the basis of the idea of his legal validity to the attitude and the work of the people who apply the law while Kelsen tried to find it staying inside of the system of the legal norms. The differences between their philosophical background become clear if we consider the relation between them and their validity-theories. The neokantian Kelsen deemed necessary defining the pure notion of the validity and separating it from the creator

consciousness (metaphisical and objective characters of the validity). Whereas Hart intended to reveal what words meant for the speakers when they used them so he tended to reconstruct the meaning regarding the validity. He did not have to use the metaphisical categories for the interpretation of the validity but even despite this fact his theory did not become subjective.

4. Their theories have similar elements because of their particular presuppositions. Both philosophers accepted the notion that making a statement abaut the nature of law could be possible in general. The consequence of this notion was that both of them were convinced they had to find common characteristics in single – historically changed – laws. It seemed obvious for them that the rule (norm) was the entity which constituted the basis of every legal system. *The reduction of the legal validity to the validity of rule effects a kind of defectiveness which we can find examining the description of the model of law-applaying.* Even so the application of law – which is expected to make the right decision – is not the application of rules. Considering this perception a concept of realist legal validity has to reckon also with the validity of legal elements besides the rules.

5. The most important consequence we can find looking through the literature of Hungarian jurisprudence is that most philosophers think that the subject of the problem of legal validity is the validity of rules and just a few of them consider the other elements of the law should be examined.

6. The theoretical divergences in connection with the concept of the legal validity can be traced back to the several parallel existing interpretations of the validity. There are three different approaches: an epistemological, an ontological and an ethical.

The relative originality of my validity-concept is that I interpret the notion of legal validity not just in the level of formal elements of the law and I do not separate the problem of application and validity. As a consequence of my experiments I came to the conclusion that people who applicate law search for the right solution not for rules in most cases (however sometimes the two instances can coincide with each other). For making the right decision the law-applier uses „legal patterns" which include rules and non-formal elements that influent the decisions. The validity of the non-formal

legal patterns is supported in the legal profession by a sort of consensus (see Kuhn's theory on the nature of the scientific paradigm).

This kind of distinction can be useful for law-makers to show the bounds of the political legislation.

IV. List of publications

1. Persistent questions – „regular" answers. H. L. A. Hart: Concept of law. (in: *Magyar Jog*, 8/1997. 498-501 pp.)

2. Private sins – public morality. H. L. A. Hart: Law, freedom, morals. (in: *Magyar Jog*, 6/2000. 377-381 pp.)

3. A professional institution in everyday life. (in: *Jogelméleti Szemle*, 1/2003)

4. On fields of legal knowledge. (in: *Állam- és Jogtudomány*, 1-2/2001 169-179. pp.)

5. The theoretical and historical way of legal validity researches. (in: *Jogelméleti Szemle*, 2/2002)

6. The place of the sociological approach in the comparative law – reflections on the work of Zweigert and Kötz. (*Kontroll*, 1/2003 – under editing)

7. Approaches of the problem of legal validity. (in: *Jogelméleti Szemle* 1/2003)

The other results of my research are also planned to be published in Hungarian literaturies and the publishing of the the short version of this study is in preparation in an own volume edited by University of Debrecen, Faculty of Law and State.