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Technischer Imperativ und Legitimationskrise des Rechts

Technical Imperatives and the Crisis of the Legitimacy of Law

Herausgegeben von / Edited by

Werner Krawietz / Antonio A. Martino
Kenneth I. Winston

Vorwort von / Preface by

Eugene Kamenka

Duncker & Humblot · Berlin

Technischer Imperativ und Legitimationskrise des Rechts

Technical Imperatives and the Crisis of the Legitimacy of Law

IVR

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Editorisches Vorwort

Vom 20. bis 26. August 1987 fand in Kobe, Japan, der 13. Weltkongreß der Internationalen Vereinigung für Rechts- und Sozialphilosophie (IVR) statt unter dem Rahmenthema „Law, Culture, Science and Technology – In Furtherance of Cross-Cultural Understanding“. Er wurde veranstaltet von der Japanischen Sektion der IVR und der Japan Association of Legal Philosophy. Das für die Veröffentlichung der Proceedings dieses Weltkongresses verantwortliche *Editorial Board,* das in einer hierfür eingesetzten engeren Arbeitsgruppe seine Tätigkeit in unmittelbarem Anschluß an den Kongreß aufnahm, legt hiermit einer weiteren Öffentlichkeit die Ergebnisse dieses Weltkongresses vor. Für die Veröffentlichung ausgewählt wurden insgesamt 112 Beiträge. Sie wurden abgedruckt in den Kongreßsprachen Englisch, Französisch und Deutsch in der Form, in der sie von den Autoren für die Veröffentlichung freigegeben wurden. Eine Hilfestellung bei der Finanzierung notwendiger Übersetzungsarbeiten hätte die Möglichkeiten der IVR, der Herausgeber der einzelnen Bände und des mit der Vorbereitung der Veröffentlichung befaßten Arbeitsstabes bei weitem überfordert.

Das Hauptthema dieses Weltkongresses wurde bestimmt und geprägt durch die Tatsache, daß es sich dabei um den ersten Weltkongreß der IVR handelte, der im *Fernen Osten* stattfand, obwohl die Vereinigung schon 1909 begründet wurde. Im Zentrum des Kongreßgeschehens standen – abgesehen von der kritischen Auseinandersetzung mit dem tradierten Rechtsdenken in den jeweiligen, heute vor allem staatlich organisierten Rechtssystemen – die Anforderungen, denen das Recht allenthalben unter der wachsenden Vorherrschaft technischer Imperative ausgesetzt ist. Auch die Probleme der Rezeption fremder Rechtsregeln sowie der Begründung des Rechts durch Vernunft und Moral erhalten dadurch eine ganz neue Dimension. Schließlich wurde hier vor allem deutlich, daß auch die modernen Staaten kein Monopol für Rechtserzeugung besitzen und die Weltgeschichte des Rechts weder auf eine Weltgeschichte Europas noch auf die Verfassungs- und Rechtsgeschichte der großen Industrienationen der westlichen Welt reduziert werden darf. Auch erscheint, wie vor allem interkulturelle vergleichende Untersuchungen zeigen, die Vorstellung einer Einheit des Rechts – im Weltmaßstab gesehen – ein wenig illusionär und ein Monismus im Rechtsdenken kaum realisierbar, wenn man den bestehenden Pluralismus der Rechtskulturen in Betracht zieht. All dies spiegelte sich auch in der Kongreßstruktur wider, die sich auf folgende Unterthemen konzentrierte:

(1) Law and Ethics in the Age of Science and Technology, (2) Basic Problems of Contemporary Philosophy of Law, (3) Basic Problems of Contemporary Social Philospphy, (4) Comparative Studies of Legal Cultures. Aus naheliegenden Gründen hat das Editorial Board davon abgesehen, bei der Veröffentlichung der Proceedings von der eher zufälligen Allokation der einzelnen Beiträge im Rahmen des Kongreßgeschehens auszugehen. Auch folgt die Veröffentlichung nicht der durch die Kongreßstruktur vorgegebenen Anordnung von Themen und Topics in den verschiedenen Plenarversammlungen und in den Arbeitssitzungen der diversen Sektionen. Vielmehr wurde eine hiervon abweichende Anordnung der Beiträge gewählt, die versucht, der Vielzahl und Vielfalt der behandelten Probleme gerecht zu werden, ohne durch die Form der Präsentation selbst Partei zu ergreifen.

In einer Zeit der abnehmenden Zuwachsraten der öffentlichen Haushalte, in der es immer schwerer fällt, für die Ware Buch – unabhängig von der Wichtigkeit des Inhalts – auch die nötigen Käufer zu finden, ist es zunehmend schwierig geworden, wichtige Kongreßmaterialien in großer Zahl und großem Umfang zu veröffentlichen. Das Weltpräsidium der IVR, die Japanische Sektion und die Japan Association of Legal Philosophy als Veranstalter des Kongresses danken den Verlagen Franz Steiner, Stuttgart, und Duncker & Humblot, Berlin, für ihr einmal mehr unter Beweis gestelltes Engagement, das sie mit der Veröffentlichung der Proceedings dieses Weltkongresses unter Beweis gestellt haben. Nur durch die vereinten Bemühungen beider Verlage war es möglich, unter Verteilung der wirtschaftlichen Risiken insgesamt vier Bände zu veröffentlichen. Die im Interesse der Wissenschaft höchst erfreuliche Zusammenarbeit beider Verlage kommt auch darin zum Ausdruck, daß am Ende jedes einzelnen Bandes auf den Inhalt und den Erscheinungsort sämtlicher übrigen Bände unter Nennung der jeweiligen Autorennamen, Themen und Topics verwiesen wird. Für die erfreuliche Zusammenarbeit mit beiden Verlagen während der langwierigen Drucklegung bedanken sich auch das Editorial Board und die Herausgeber der jeweiligen Einzelbände. Den Autoren danken wir für ihre Beiträge und ihre Geduld!

Dank schulden wir auch der Commemorative Association for the Japan World Exposition (1970), die einen finanziellen Beitrag zur Veröffentlichung der Kongreß-Proceedings geleistet hat. Sie hat damit zugleich dabei mitgewirkt, die Verbreitung der hier gewonnenen Einsichten sicherzustellen.

Mitsukuni Yasaki *Werner Krawietz*

Editorial Preface

The 13th World Congress of the International Association for Philosphy of Law and Social Philosophy (IVR) took place in Kobe, Japan, from the 20th to the 26th of August, 1987. Arranged by the Japanese Section of the IVR and the Japan Association of Legal Philosophy, the general theme of the Congress was "Law, Culture, Science and Technology – In Furtherance of Cross-Cultural Understanding". The Editorial Board responsible for the publication of the proceedings of the Congress, working in a smaller group immediately following adjournment, presents in these volumes the results of the World Congress to a wider audience. A total of 112 contributions were selected for publication. They have been printed in the form in which they were submitted, in the official languages of the Congress – English, French and German. It was beyond the capabilities of the IVR, the editors of the individual volumes, and the staff responsible for preparing the publications to offer the financial assistance that would have been necessary to refine the contributions.

The main theme of the Congress was determined and marked by the fact that this was the very first IVR World Congress to be hold in the Far East, although the association was formed in 1909. Apart from the critique of traditional legal thinking in the respective systems of law, organized today largely as states, the activities of the Congress focused on the challenges faced by the law, everywhere, under the growing domination of the technical imperative. This also adds a completely new dimension to the problems of both: the reception of foreign legal rules and the establishing of law on the grounds of reason and morality. Finally, the Congress made it clear, above all, that the modern states have no monopoly on the creation of law, and the legal history cannot be reduced to European history or to the constitutional and legal history of the large industrial nations of the western world. In addition, seen in the light of intercultural comparative investigations the notion of a world wide unity of law seems somewhat illusionary; when one considers the existing pluralism of legal cultures, any kind of monism in legal thought seems scarcely attainable. This was all reflected in the structure of the Congress which concentrated on the following subthemes: (1) Law and Ethics in the Age of Science and Technology, (2) Basic Problems of Contemporary Philosophy of Law, (3) Basic Problems of Contemporary Social Philosophy, (4) Comparative Studies of Legal Cultures. In publishing the proceedings of the Congress, the Editorial Board has chosen

to order the contributions in such a way as to do justice to the number and variety of problems considered, without itself becoming party to the debate because of the form of presentation. The ordering of contributions does not follow, therefore, the more or less accidental assignment of the individual contributions within the framework of the activities of the Congress, nor does it follow the structural ordering of themes and topics in the various Plenary Sessions and in the Working Sessions of the different sections.

In a time of waning growth in the public coffer, a time of increasing difficulty in finding the necessary buyers for books – never mind how important – it has become an ever greater problem to publish significant conference materials in larger numbers and substantial breadth. The World Presidium of the IVR, the Japanese Section of the IVR and the Japan Association of Legal Philosophy as the Organizers of the Congress, thank the publishers Franz Steiner in Stuttgart and Duncker & Humblot in Berlin for the engagement they have shown, once again, in publishing the proceedings of this World Congress. Only the joint effort of both houses made it possible, by dividing the economic risk, to publish a total of four volumes. Their noteworthy cooperative effort, serving the best interests of scholarship, also made it possible to indicate at the end of each volume – in the course of naming authors, themes, and topics – the context and the place of publication of the other volumes. The Editorial Board and the respective editors of the individual volumes thank both publishing houses for their cooperation during the lengthy process of publication. And we thank the authors for their contributions and for their patience!

We are also grateful to the Commemorative Association for the Japan World Exposition (1970) for its financial assistance in this publication. The Foundation has helped thereby in bringing about wider circulation of the insights won at the World Congress in Kobe.

Mitsukuni Yasaki *Werner Krawietz*

Preface

Today, lawyers live in an exciting, complex and troubled era. It is an era of ever more rapid social, moral and technological change, of expanding horizons, increasing interaction and more strident criticism and self-assertion. We live, all of us, in one world and many worlds, in competing and interpenetrating cultures, in crumbling traditions and new hopes and demands.

The post-war history of the IVR itself brings out the extent to which these changes have affected our academic lives and perspectives. The IVR World Congress held in St. Louis in 1975 was the first held outside Europe. Since then, we have met in Australia, in Mexico and Japan, as well as Switzerland, Greece, Finland and the United Kingdom. With the admission of scholarly groups from Hong Kong, Bulgaria and the People's Republic of China, the number of our national sections has increased to 42; our world congresses have become biennial; the number of members attending has risen to nearly 500. Our current Executive Committee contains eminent scholars from Australia, the USSR, Austria, Finland, the USA, the Federal Republic of Germany, Spain, Italy, France, Argentina, Japan, Hungary, Korea, Poland, Chile, and the UK. The cultural allegiances and affiliations of the contributors to this volume – based on papers given in Kobe – are equally varied, ranging from Denmark to China, from Poland to Japan and Puerto Rico. Yet, as readers of this volume will instantly recognise, we can find a common language of rational discussion and a common concern with truth and justice. To the promotion of that, the IVR as an international organisation of scholars is deeply committed.

Culture, the IVR President, Professor Alice Tay, and I have written, "rests on the motto that nothing human is alien to me; it thrives on admiration for, and emulation of, the best that has been thought and said, felt and done, anywhere. It finds that in Europe *and* in Asia, in Israel *and* in Babylon. Culture promotes intellectual development and moral understanding, it enriches lives and minds, through knowledge, criticism, imagination and sensibility. It judges with compassion but also with precision. It recognizes complexity without losing a sense of order and direction; it grasps the reality, the power and intensity, of evil and irrationality without helplessly surrendering before them, or denying that they are properly called evil or irrational. It has room for both Ariel and Caliban, and knows that human beings are both and neither. Culture thrives not on the joyful, but passive, surren-

der to nature, or the "people" or the sense of nationhood, but on asphalt and overcrowding, on creative tensions between suffering and hope, pride and despair, anxiety and ambition, nationalism and internationalism; it rests, like revolution, on reality-centred but unsatisfied longings, on a delicate balance between denial and affirmation, criticism of, and respect for, the traditions and society in which persons live. For culture is not only firmly international in its nature and effects, it makes people and peoples "transcend" themselves and their seemingly narrow, time- and space-bound, capacities. Culture draws them, or is constituted by their being drawn, into a continuing world-wide republic of art and letters, knowledge and imagination; it gives them a universal, both cosmic and human, dimension that transcends, without denying, both their historical period and their geographical location."

Law is an integral part of culture, of human achievement, in this universalistic sense. But it is also socially and historically conditioned, part of *a* culture in the sense in which anthropologists speak of the many different cultures to be found in the world. The results of that recognition have become dramatically evident in a major change in the social-legal climate of the 1970s. The great German jurist, Rudolf von Ihering, in the late nineteenth century had poured scorn on the Platonic heaven of juristic concepts and, in a radical departure from his earlier work, proclaimed the jurisprudence of interests. Ever since there has been a growing trend in Western societies toward so-called legal realism. The 'modern' tendency has been to discount the internal coherence and historical integrity of law, its claim to mould society and to represent specifically legal traditions, procedures and ideals. Court decisions have been studied to bring out the extent to which they allegedly are not and cannot be derived from legal maxims, so-called principles of law, statutes or precedents, but reflect wider, social, conflicts and interests. The operation of law has rightly been recognised to extend far beyond the courtroom dramas recorded in law reports and casebooks – positively in the operation of that 'living law' internalised in a community's customs, expectations and ways of behaving, negatively in the use and abuse of threat, negotiation and extra-legal power that precede or replace the courtroom appearance. The trend has been to deintellectualise law, to pit life against what is written in the law books, to demolish the fences that an earlier generation had put up to distinguish law from custom, morality, politics and the legally irrelevant. Many now insist that law stands neither above nor outside society, but within it, and that it does not simply make its own history. All this, of course, is true. It is not obviously true, however, that legal history is simply social, or political or economic history – law *does,* at first sight, have its own traditions, concepts, nodal points, lines of development that mingle with external determinations upon it.

The scepticism about law has been strengthened by the continuing and everwidening rejection of traditional external authority, of an authority of origins, that was an important theme of the Protestant Reformation, the French Enlightenment and the French Revolution. It has been followed more recently by a further rejection, in some circles, of the so-called 'liberal' conception of the rule of law, of the authority, that is, of abstract and impersonal laws, which had been elevated by nineteenth-century liberal thinkers and societies. The call now is to 'humanise' and 'demythologise' law and legal relations, to make law a servant and not a master, to set up over it and against it the values and demands of 'man', 'society', 'the people', or the 'rational' pursuit of 'rational' goals. Not 'law and order', but 'steering society', 'promoting equality and community', planning for the future, providing scope for creativity, 'self-expression' and the natural life, protecting the environment and averting ecological disaster are popular catch-phrases in many intellectual circles today. They represent and bear witness to a remarkable strengthening and increasing spread of sociological critiques of law.

The topics addressed by the contributions to this volume therefore, are more than 'relevant' or *aktuell:* they go to the very heart of serious thinking about the role of legal rules, legal cultures and legal traditions in a socially, morally and technologically changing world. For while Western radicals chant 'down with the abstraction and alienation of law', much of the rest of the world seeks to strengthen and develop its legal systems and its legal culture, to turn from the authority of men, or ideologies, to the authority of law. In one way and another these fundamental problems and concerns are reflected in the contributions to this volume. I have enjoyed reading them and learnt much from them; I trust the reader will find the same and will share my gratitude to Professors Krawietz, Martino and Winston for the effort they have put into collecting them for this volume.

Eugene Kamenka

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I. Recht als technischer Imperativ

TECHNICAL IMPERATIVE AND THE LEGITIMACY OF LAW*

By Aulis Aarnio, Helsinki

I recall having once read a story about the man who invented the game of chess.[1] The story takes place in India, a long time ago. A wise man came to see a prince, and to present the game of chess to him. The prince was so pleased with the new game that he promised the wise man whatever he would wish as a reward for it. After some consideration, the wise man made his choice: one grain of wheat for the first square of the chess board, two for the second one, four for the third, eight for the fourth, and so on. The prince regarded the wish as slightly foolish, and accepted it without hesitation.

The outcome, however, was quite different from what the prince had thought. He had not taken into account that the board of chess has 64 squares, and that the initial one grain of wheat grew exponentially in quantity – yielding interest on interest. If the wise man had adhered to the promise made, the prince would have been ruined, since the reward would have vastly exceeded the total national wheat production of India at the time. The story does not tell us how the prince dealt with the situation. Still, the story contains an important moral lesson: the miracle of exponential growth in all its simplicity.

Let us begin from the first square of the chess board. As said, we place one grain of wheat there. Each time we move on to the next square, we double the amount of wheat placed on the preceding square.[2] To maintain such a growth rate, we need 64 tons of wheat at the halfway of the chess board. In square 44 we need a ship of 250 000 G. R. T. to transport the wheat. Still 12

* An opening address presented by the President of the IVR, translation from Finnish by Mr. Raimo Siltala, LL. M. Ec. M.

[1] For the story and the morality implied by it, I am greatly indebted to my friend Mr. *Eero Silvasti,* author and columnist, who has commented the story in his work Jäätynyt unelma (A Frozen Dream; in Finnish), 1982.

[2] The mathematical series could be formulated as:

$$X = 2^{(n-1)},\ n = 1, 2, 3, \ldots, 64.$$

The sum total of the series is obtained from the formula:

$$S = \frac{a(1-q^n)}{1-q}$$, *where* "a" is the first term of the series, and "q" is the ration between $X_{(n+1)}$ and X_n.

When applied to this particular case, we obtain:

$$S = 2^{64} - 1.$$

squares more, and we need the whole of the annual wheat harvest of today's world. We are then in square number 56. We still have eight squares left, but the growth will not cease. At the last square, we need 250 times the annual wheat production of the world – and all we had to presume is the exponential growth rate, together with the fact that 1000 grains of wheat will weight 38 grams.

Let us take another example. If national economic growth is 3,5% per annum, the volume of the gross national product will be doubled in 20 years. In a hundred years, the volume of production will be even more than five times the initial volume, because the growth rate yields interest on interest. The figures are impressive, since the economic growth objective of the industrialized countries has often been set at about 3,5% p.a.

One natural question rises here on the basis of these fact. The question is a follows: can such an economic growth continue endlessly. One can very much hesitate it, for simple reasons. The obstacles of exponential growth are inherent in nature itself. The amount of the natural resources is limited, even if one assumed that they would suffice for longer than nowadays predicted. The ecological system has suffered from serious man-made damages, e.g. erosion of land and the expanding areas of dry desert. Moreover, air pollution threatens the whole living earth, as the ozone sphere becomes thinner and the so-called greenhouse phenomenon affects the temperature of the earth.

I still return to the chess board illustration for a monent. An exponential growth of 3,5% p.a. implies that in 640 years a single wheat of grain will have grown into such proportions which exceed manifoldly the capacities of the earth. The economic growth models of the industrial societies must therefore involve some highly questionable premises.

Nevertheless, many decision makers in the industrialized world hold the firm belief that the present course of action can be continued endlessly. Belief in the triumphant progress of technology is their creed. Even if some technological achievement did, in fact, bring some disadvantages with it, there is no doubt about their elimination in future by some other technological device. New inventions just await to be discovered, and no sacrifices are thus needed. A rational attitude towards science and technology is no longer involved. The situation rather bears resemblance with such unfounded future optimism, which was characteristic to the Victorian era in Europe. One should, indeed, speak about a transition form a merely rational standing into obvious science religion.

This means that so called technological imperative has began to rule the ways of life of all the Western societies. A Finnish philosopher *Georg Henrik von Wright* has characterized it as follows: everything which is technically possible to make or to produce, must also be put into practice. When inter-

preted like this, it can be considered to be normative modification to the Aristotelian "principle of plentitude". In practice the technological imperative means that technology locks not only the means which are available to people but also the goals. Politicians can no more freely decide, which is best to a human being. We are prisoners of the circumstances. Von Wright doesn't speak in vain about the dictatorship of the circumstances.

Here lies the core of the above mentioned story of a man who invented the game of chess. The technical imperative ruins or makes at least very problematic the traditional view of *social planning*. Furthermore, the social planning is realized by means of legal norm. The planned society is a result of legal order. The problem of the technical imperative is thus deeply intertwined with the problems of modern legal systems. Hence, my title seems to be well-founded: the technical imperative and the legitimacy of law.

In the theory of modern societies – and in the theory of modernity in general – can be often identified references to the *crisis* of modern law. In this respect, the terminology is quite loose. First of all, one has to keep the concept of crisis separate from the concept of *crisis tendencies*. The speech about crisis tendencies does not imply any empirical claims that there has been and/or that there is a crisis e. g. in the modern European legal systems. Independent of this kind empirical statements the focus of our interest may lie on the possible trends of development inherent in our modern world. What are then, however, those crisis tendencies?

Let us begin with a reference to the well-know concept of rationality introduced by *Max Weber*. According to him, the rationality primarily is goal rationality. Weber adopted an idealistic view about goal rationality. He thought that in the administration of social affairs the goals are defined by the democratic bodies of society. The civil servants only specify the means necessary and/or sufficient for the reaching of the goal. However, our traditional picture of the relation of means and goal gets obscured. We can no more speak about goal-rationality in the spirit of Max Weber. Technology which has come to a head and the expert elite which maintains it, defines not only the methods but also the goals. Or to put it more exactly: the means begin to get the character of the goal; no-one asks seriously for the contents of the goals. A critical hold to the basis of the way of life is missing.

These phenomena reflect in many different ways in the law of a welfare state. This gives the basis for a discussion about the problems of modern law. In this discussion, Max Weber's interpretation of formal-rational nature of modern law has often been the core of the discussion. One of the main thesis is as follows: the development of the modern legal system has undermined the formal rationality of law. It is here that we meet the very concept of the crisis tendency. We can speak of at least three types of such tendencies[3]: