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The imprevision in the reformed Civil Code

Acontecimientos imprevistos en la reforma del código civil

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ABSTRACT: The essay, based on the examination of the traditional orientation established in the Canal de Craponne arrêt, traces the evolution of the French system concerning the institution of imprévision. We know, art. 1195 of the reformed civil code, highlighting critical issues especially regarding judge discretion.

KEYWORDS: contract law, legal theory, doctrine, legal system

RESUMEN: El ensayo, a partir del examen de la orientación tradicional establecida en el arrêt Canal de Craponne, traza la evolución del sistema francés con respecto a la institución de la imprévision. Entonces, el arte. 1195 del código civil reformado, destacando las cuestiones críticas especialmente en lo que respecta a la discreción del juez.

PALABRAS CLAVE: contrato legal, teoría legal, doctrina, sistema legal.

JEL CODE: K41, P48.

INTRODUCTION

In international practise, we are now witnessing the diffusion of hardship clauses that allow the contract to be

adapted to unforeseeable and uncontrollable circumstances, as demonstrated by the Covid-19 pandemic. However, the problem arises in cases in which the contracting parties have not established any regulations in the face of an unexpected event. Part of the doctrine observes how in a complex and constantly evolving reality, the imprevision is relevant because it favours the preservation of the relationship, preserving its substantial justice. In particular, the advantages deriving from the renegotiation are highlighted[1].

This has led in recent years to the introduction of the institute in numerous codices (Momberg Uribe, 2011). Above all, the reform of the law of contracts and obligations of the French civil code of 2016 is significant of this new trend because it has led to the overcoming of the traditional orientation that consecrated the intangibility of contracts. On the influence of this model, the reform project of the Italian civil code would also like to introduce the same rule. However, despite the possible advantages, imprévision opens up to a possible judicial discretion, with repercussions on legal certainty.

1. THE TRADITIONAL ORIENTATION AND THE REASONS FOR A REFORM

In 1876 the Cour de Cassation was called upon to rule in Canal de Craponne on two contracts concluded in 1560 and 1567 concerning the supply of water to feed the canals. Given the passage of time, the agreed sum had become negligible, and the supplier was taking legal action asking for its revaluation. The application was rejected because - based on art. 1134 cc - "dans aucun cas, il n'appartient aux tribunaux, quelque équitable que puisse apparaître leur décision, to take into consideration the temps and the circonstances for modifier

1 This article was prepared as a partial fulfilment of my research projects at Universita degli Studi di Padova, Faculty of Law and Human Science's research group on Institutions, Justice and Legal Reform at Technological University of Peru (UTP) and GIDE – PUCE research group.

les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants "(Cass, 1876, p. 161). The reasons for the decision can be found in the sanctity of the contract as an expression of the autonomy of the parties and in the desire to ensure legal certainty, limiting the role of the judge. We are in the crisis years of the School of Exegesis, although new doctrines appeared in the background, the idea of the completeness of the code and of the function of jurisprudence as a mere "bouche de lois" was still widespread: fear and mistrust in the "Equitè de Parlaments" (Cabrillac, 2016, p. 137). However, the sentence did not concern a typical hypothesis of imprévision, since it was not so much a sudden and unforeseeable change in circumstances as it was an inadequacy of the agreement due to the passage of time.

Although the arret de Craponne was ignored for almost fifty years (Ancel, 2017, p. 1), it sets the principle to which the French courts followed until the entry into force of the reform in 2016 which introduced the imprévision. The choice, heralded by the reform projects, did not seem surprising and was, indeed, hoped for by the majority doctrine:

> Tant la Cour de cassation est soumise à une impressive doctrinal pression [...] d'autant plus remarquable qu'elle n 'est pas orchestrée par une chapelle ou une secte mais que, pour une fois, les hérauts du libéralisme contractuel, les gardiens de la tradition, les partisans de l'autilitarisme et les talibans du solidarisme, du moins certains d'entre eux, avancent main dans la main et adressent aux magistrats de la Cour de cassation, a vibrant << Osez!> > "In fact," the révision du contrat n'apparaît plus nécessairement comme une injure à la foi jurée, une entrave à la liberté contractuelle ou une arme contre la sécurité juridique. Elle se présente comme the instrument de la pérennité contractuelle,

> le remède contre la précarité économique et même, parfois, comme la garantie de la paix sociale. Autant de raisons pour faire preuve aujourd'hui de bienveillance à l'égard de la révision du contrat (Mazeaud, 2005, p. 1)

First of all, the administrative jurisprudence had already recognized the institute in 1916: in a case concerning the concession of gas (CE, 1916, req. No 59928), the Conseil d'Etat had, in fact, ruled that, being the economy of the contract completely distorted due to the increase, not foreseeable by the parties, of the cost of production due to the price of coal, the concessionaire could not be required to ensure the operation of the service under the conditions originally established. It was therefore necessary to balance the interests: the company remained obliged to provide the service but had the right to be compensated for the pecuniary consequences of the situation which exceeded the normal economic risk. Later it was clarified that it had to be unforeseeable, exceptional and beyond the control of the parties. but she had the right to be compensated for the pecuniary consequences of the situation which exceeded the normal economic risk. Later it was clarified that it had to be unforeseeable, exceptional and beyond the control of the parties. but she had the right to be compensated for the pecuniary consequences of the situation which exceeded the normal economic risk. Later it was clarified that it had to be unforeseeable, exceptional and beyond the control of the parties.

Civil jurisprudence had also shown in recent years some fluctuations which made it possible to believe a change of direction. In 2010 the Cour de Cassation (Cass. Civ., 2010) had ruled on a contract that had become excessively onerous and had affirmed its lapse due to lack of cause due to the change in circumstances that had significantly changed the economy of the agreement (Mazeaud, 2010, p. 2481). The use of the cause

and not of good faith as the legal basis of imprévision was due to the desire to limit it only to the most severe cases when the consideration is lacking, is illusory or derisory. This also tended to prevent the possibility of review by the judge. However, this much-celebrated decision,

Furthermore, starting from the arret Huard of 1992 (Cass. Com., 1992, Bull. IV, n ° 340) based on the duty of good faith in the execution of the contract, the obligation to renegotiate in the event of changes in circumstances has been progressively admitted by the Cassation (Zacchaeus, 1994; Macario, 1996; Gambino, 2004; Gabrielli, 2013, p. 76). Initially, the address had a sanctioning nuance, as it was imposed on the party to whom the change in the situation was attributable (Mazeaud, 2008, pp. 581-582) and in the context of distribution contracts. In 2004 the Court affirmed the general scope of this obligation, provided that the imbalance was after the conclusion of the agreement and the performance of the service had not been withdrawn or interrupted (Mazeaud, 2004, p. 1754). This jurisprudence, together with the progressive insertion of hardship clauses (Cesaro, 2000; Venturelli, 2017, p. 1035) in the contracts served to temper the rigidity of the principle established in Canal de Craponne. The discipline of cases in which the renegotiation had failed remained uncertain. Indeed, there was no obligation to accept the amendments to the contract proposed by the other contractor or to revise it. Therefore, in doctrine it was suggested to allow the judge to check the reasons that led to the refusal and, if they were unlawful or constituted an abuse, to condemn the responsible party to compensation for damages (Mazeaud, 2007, p. 765).

The role of comparative law (Cousin et al., 2015, p. 1115; Antipas, 2016, p. 1620) and European law was also decisive in the introduction of imprévision. There is, on the one hand, the desire to adapt to the legal context and modern trends

and on the other the aspiration to be a reference model again in the hypothesis of a possible European codification. In the Report to the President of the Republic, it is noted that:

> La France is the one des derniers pays d'Europe in the past reconnaître la théorie de l'prévision comme cause modératrice de la force obligatoire du contrat. Cette consécration, inspirée du droit comparé comme des projets d'harmonisation européens, permet de lutter contre les déséquilibres contractuels majeurs qui surviennent en cours d'exécution, conformément à l'objectif de justice contractuelle poursuivi par l'ordonnance. (Ordonnance n ° 2014-326, 2014, n. p.)

Among these, in addition to European projects and international principles, the Romanian code of 2011, which adopted the unforeseenness of art. 1271 (Savaux, 2012, p. 281; Ganfalea, 2014, p. 63).

2. THE INSTITUTE

The introduction of imprévision (Recueil Dalloz, 2010, p. 2485) has been defined as one of the most symbolic innovations of the reform (Chenede, 2018, p. 25) together with the disappearance of the cause, albeit of limited practical relevance, so much so that in the doctrine it has been recalled the Gattopardesque phrase "everything must change so that everything remains as it is" (Stoffel-Munck, 2016, p. 30). The institute responds to those needs expressed in the Report to the President of the Republic of modernization, the pursuit of contractual justice and improvement of the attractiveness of the system. However, it would have needed particular attention (Confino, 2016, p. 345) in its definition because:

> The changement même des conditions économiques ne devrait pas, en thèse générale, justifier le manquement à la parole donnée (...); the destruction du contrat est

> also cells of the confiance et de la sécurité juridique; si elle se généralisait, si, sous le complaisant prétexte d'ouvrir des soupapes de sûreté afin de sauvegarder la paix sociale, on la faisait entrer dans nos moeurs, elle entraînerait le retour à un régime non-contractuel qui (...) était celui des sociétés primitives (...); à quoi bon contracter lorsque l'on sait que les engagements pris n'engagent pas? Organization et socialisation du contrat, oui; désorganisation et anarchie contractuelle, not. (Josserand, 1939, no. 405 bis 228)

The art. 1195 provides that, "if an unforeseeable change in circumstances after the conclusion of the contract makes the execution excessively burdensome for a party that has not accepted to assume the risk, the latter may request a renegotiation of the contract from the other party. This continues to fulfil its obligations during the renegotiation. In case of refusal or failure of the renegotiation, the parties can agree on the termination of the contract, on the established date and conditions, or ask the judge to adapt it. In the absence of an agreement within a reasonable time, the judge may, at the request of a party, review the contract or terminate it on the date and under the conditions it determines "(Fages, 2016, p. 295). The standard indicates a gradual path, but perhaps not very adequate to the reality of business. First, it is doubtful whether there is an obligation of renegotiation even if a doctrinal orientation seems to exclude it (Chantepie y Latina, 2016, p. 447). The second phase is limited in scope: it is unlikely that parties who have not reached an agreement during the renegotiation will express their consent to the termination of judicial review. This complex mechanism could, however, discourage legal recourse for fear that the Court will rewrite the contract. It differs from the Avant-Projet Catala characterized by a restrictive position and from the Projet de Chancellerie which required the agreement of the parties for the judicial review, while it is quite close to the Projet Terré.

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The doctrine has focused on the analysis of the objective and subjective assumptions established by art. 1195. The change in circumstances, which can be different, must be unpredictable. The notion (Barbier, 2016, p. 611) may concern the event or even its entity (Deffains y Ferey, 2010, p. 719). An indication is provided by the French case law on force majeure, which considers both aspects. This solution, consistent with the function of the institute, is then confirmed in the discipline on prejudice previsible. In the Italian legal system, it is specified (Macario, 2001, p. 647) how unpredictability must be "average", but it is the socio-economic context that determines its evaluation in practice.

The examination of excessive burdens raises two sets of questions:

A. In the first place, the delimitation of this hypothesis concerning similar cases is problematic. While, in fact, in theory, the distinction between imprévision, and impossibility is clear, in practice, the differences often blur. In the projet de Chancellerie, which referred to cases of unpredictable

and insurmountable excessive burdens, this was even more evident. However, this is a significant problem since only the former allows the judge to review. A further difficulty arises in determining whether the burden may also concern cases in which the party no longer has any interest in continuing the contract. The answer seems negative and, instead, the transience according to art. 1186 cc, however, the criticality in drawing the boundary line between the two hypotheses emerges as evidenced by the jurisprudential orientation that had framed the change in circumstances in the transience for the loss of the cause. It is not very specific, then, whether art. 1195 also covers cases of indirect cost, i.e. when there is a decrease in the value of the consideration, such as to make it negligible. Probably, jurisprudence does not extend the rule to these cases due to the still current influence of the previous one.

The admissibility of imprévision positive is also controversial, which concerns the possibility for one party to request the adjustment of the conditions when the contract becomes exceptionally and unpredictably advantageous for the other. The doctrine has established that this will depend on the interpretation that will be given of the general principle of good faith codified in art. 1104 cc (Jutras, 2017, p. 138). A possible solution emerges from the decision of the Quebec Court of Appeal (Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016, 1er août). In 1969 a contract was stipulated between CFLC and HydroQuebec which provided for the financing for the construction of a hydro-electric power plant with the commitment to purchase almost all of the energy at a fixed rate. The deal proved extremely beneficial to HydroQuebec, and CFLC was then taking legal action to review the terms. The request was rejected, and in the motivation, it is clarified how good faith can be used to make up for the choice of the legislator not to provide for the institution of imprévision to protect the party damaged by an unpredictable

and extraordinary change in circumstances. However, it cannot lead to a change in the contract to redistribute the earnings: "in a contractual relationship between experienced and well-informed individuals who have negotiated a complex contract for long months with considerable financial burdens, there is no obligation for the parties to" give priority to the interests of the other contracting party. "A contract like this is not a marriage, even for one simple reason. Such an almost final form of "contractual solidarity" would go far beyond what is required by the good faith "(Churchill Falls - Labrador - Corporation Limited v. Hydro-Québec, 2016). The thesis is acceptable: giving all'équité, "notion flour, difficile à cerner avec précision et encore plus à véritablement définir" (Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016), the scope desired by CFLC meant " to introduce une forme de justice distributive en droit des contrats. Ce n'est pas le rôle que le législateur a confié aux tribunaux "(Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016). The thesis is acceptable: giving all'équité, "notion floue, difficile à cerner avec précision et encore plus à véritablement définir" (Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016), the scope desired by CFLC meant " to introduce une forme de justice distributive en droit des contrats. Ce n'est pas le rôle que le législateur a confié aux tribunaux "(Churchill Falls -Labrador- Corporation Limited v. Hydro-Québec, 2016).

B. Secondly, the benchmark of excessive burden must be provided. In the Italian legal system, it is believed that "it must affect the performance in its objectivity, not for the subjective conditions of the debtor" (Roppo, 2011, p. 950); otherwise, in the Dutch system the situation in which the obliged subject finds himself is also considered significant. The solution depends on the jurisprudential interpretation, even if adherence to the objective concept can be considered probable. The doctrine has highlighted how the question is also reflected

in the extension of the rule to unilateral acts, but at the moment, it does not appear easy. The examination of the extent of excess relates, then, to the assessment of the hazard and cannot be carried out without an examination of the specific case.

Controversial is the choice to adopt the imprévision in cases "in which the party has not accepted the risk", distinguishing itself from the Italian discipline which does not allow resolution for excessive burdens when the event falls within the normal range (Gambino, 2001) (Article 1467 of the Civil Code), was excluded by the parties or it is a random contract (1469 of the Civil Code).

An orientation (Deshayes, Genicon y Laithier, 2016, p. 400 ff.) identifies, therefore, the need to consider in the hypothesis in which there is no express acceptance of the risk: the contractual type with attention to the average risk of contract as in the Italian legal system (Gabrielli, 2001, p. 2); duration; the quality of the parts; the presence of particular clauses that indicate caution and the will to protect oneself against specific changes in conditions.

3. THE ROLE OF THE JUDGE

The introduction of imprévision can be seen as a positive aspect of the reform; however, it is uncertain whether it could contribute, together with other innovations, to improving the competitiveness of French contract law. Moreover, the questionability of relying on this criterion in writing a reform has been effectively emphasized as it is almost impossible to assess to what extent it will bring benefits to the country or encourage new economic investments (Usunier, 2017, p. 345). It is difficult to define which elements affect to determine the attractiveness of a legal system: the law chosen depends on often external factors such as the nationality of the parties (Cartwright, 2015, p. 691), the place of the dispute (Cuniberti,

2014, p. 253), the efficiency of the courts. It is also complex to predict how the new rules will affect. They will harmonize with each other and with the solutions already in place, creating a new and autonomous system. The interpretation that the courts will give is decisive. If we can speak of attractiveness (Sejean, 2016, p. 1151), the evaluation must, therefore, be made in a not short period and this also depends on the economic strength of the country.

Some elements, however, leave doubts about its effectiveness right now. The imprecise legislative technique has been highlighted, which involves gaps and does not allow sufficient certainty to be reached (Mekki, 2017, p. 431). There is an evident contradiction: on the one hand, the opportunities for judicial intervention seem numerically diminished, on the other hand, its powers are indeterminate and potentially more pervasive concerning the decision maker's ability to review or affect the contract. This emerges from the multiplication of relative standards and qualifications and some changes such as the abolition of the cause. Art. 1169 cc could become a way to control not so much the illusory or negligence of the consideration as to impose paternalistic or solidarity criteria. The same wording of art. 1195 gives rise to perplexity when it establishes that the judge, in the absence of an agreement within a reasonable time, can terminate the contract within the times and under the conditions set by it or modify it. The choice is analogous[2] . To that accomplished in art. 6: 258 of the Dutch code which authorizes the judge to review or terminate the contract at the request of a party in the event of unforeseeable circumstances that make its maintenance at the original conditions contrary to reasonableness and justice. The parties may, however, contractually allocate the risks or provide for adjustments that could then be used by the judge.

2 The possibility of a judge's review is also allowed in European projects

Unlike the French system, the rule (Meijers, vC Bezers, 2012) is imperative. The art. 6: 258 was, however, rarely employed.

Critical is the choice not to provide parameters that the judge must observe in the review, in this disagreeing with the Projet Terré, in which it was established that the judge had to have regard to the legitimate expectations of the parties (Stoffel-Munck, 2016, p. 35). The principles to be followed by the Court in the review are also clarified in the Unidroit Principles and the European projects. They relate to the need for the contractual balance to be re-established with an equitable division of the losses and gains deriving from the change in circumstances, or to the tracing of the excessively burdensome obligation to reasonableness and equity.

According to art. 1195 the judge can, therefore, decide according to his vision and his way of perceiving a case in point or he can seek the will of the contractors in order to determine which set of interests they would have liked. The indications that can be obtained from the reform would seem to favour this second solution. It is interesting to note that in the Belgian Avant projet there is a similar provision that requires the judge to adjust the contract to make it compliant with what the parties would have reasonably agreed if they had known about the change in circumstances. The difficulty in finding a correct solution should be emphasized in the case of complex contracts, with clauses that are the result of delicate compromises, balancing costs and benefits and have as parts subjects of different legal systems. Therefore, the party must identify the specific changes deemed appropriate. This option is preferable to a general review question, which would give the judge the power to mask his decision with the use of parameters such as good faith, reasonableness and fairness which are indeterminable rules, thus limiting his discretion.

It was, however, highlighted as:

> Les juges ne semblent pas très desireux d'être chargés de refaire les contrats. Certes, ils n'hésitent parfois pas à tailler dans un contrat mort en interprétant ardiment certaines de ses stipulations ou en en desactivant d'autres au nom de la bonne foi, de la cause ou de bien d'autres concepts. En revanche, retailler un contrat vif ferait peser sur les magistrats une responsabilité qu'ils ne sont guère formés pour assumer. Juger, c'est "<< rendre à chacun le sien >> selon la justice; the maîtrise du droit éclairé par un sentiment d'équité peut y suffire. Fixer pour avenir les termes d'un contrat, c'est métier d'homme d'affaires. Le juge n'est pas dans son élément, spécialement dans les secteurs dont la compréhension nécessite une culture technique qu'il n'a pas. (Stoffel-Munck, 2015, p. 262)

In some contracts, an effective judicial review, which also takes into account the context, the possible developments of the situation, the economic implications and the evolution of the market, seems utopian. The risk is that the changes lead to worse situations than those to which we wanted to remedy, also because it was highlighted as "il n'est pas sûr que, si elle (l'prévision) était admise chez nous, ce serait aux contractants économiquement les plus faibles qu'elle servirait le plus". (Carbonnier, 2000, p. 287). It does not even respond to a real will of the companies which are one of the main recipients of the reform:

An objection to the criticisms is found in the adoption of the judiciary revision in European projects and international principles. It should not be forgotten, however, that the former is currently the expression of a doctrinal will to unify the law that today seems increasingly utopian, while the others can be used as applicable law or integration in international contracts

that often provide for the devolution of disputes to specialized arbitrators; a certain mistrust of the rewriting of the contract also remains. This aspect is emblematic of a not completely convincing use of the comparative method.

Equally problematic is the absence of a hierarchy of remedies for the judge who seems to be able to decide freely between revision and resolution (Tuccari, 2017, p. 1536). The uncertainty is aggravated by the fact that "le juge peut mettre fin... à la date et aux conditions qu'il fixe". The doctrine questions how the termination of the contract will have to be managed (Stoffel-Munck, 2015), how the temporal question will have to be addressed if side effects must be considered. Everything seems to be left to the discretion of the judge.

The reform has now sanctioned the judicial interventionism from which it is difficult for the moment to go back (Aynes, 2016, p. 14). On the other hand, as it has been correctly noted, "it matters little if the French legislator tries to limit the role of the judge or not, the courts are, however, going to appropriate a vital role that of creators of normative rules. It remains to be known whether they should be applauded or criticized... "(Masch, 2013, p. 103). Above all, it should be assessed whether the enthusiasm of the doctrine and part of the judiciary for this expansion of powers is accompanied, on the one hand,

CONCLUSIONS

The art. 1195 cc is a clear example of the problems of the French reform that "ne rendra certiinement pas notre droit plus attractif. Elle fragilise la force obligatoire du contrat, multiplie les sources de contentieux et transforme le juge en une veritable troisième partie au contrat. Dans les contrats internationaux, les grandes entreprises soumettent déjà leurs relations à un droit et à un juge ou arbiter étranger. La réforme renforcera cette

tendance, au profit notamment du juge et du droit suisses, ce dernier étant plus prévisible et plus respectueux de la volunté des parties. Finally, la lourdeur et la rigueur du droit français ne s'imposeront qu'aux entreprises françaises traitant avec des entreprises localisées en France, ainsi soumises à un droit plus contraignant que leurs concurrents. Not seulement le nouveau droit ne sera pas attractif, but the fera subir aux entreprises françaises un nouveau déficit de compétitivité. Arguer en faveur de la neutralité du droit, condition indispensable de son efficacité, ne conduit pas à se désintéresser de la justice, mais signifie simplement que les questions de redistribution doivent être réglées par des dispositions spécifiques et non, comme le fait aujourd'hui le législateur français, dans le cadre du droit général des contrats ". (Voegel, 2016, p. 309) If the assertion according to which "reformer se souvent deformer" (Downe, 2016, p. 43) seems excessive, the criticalities are evident. It should not be forgotten that "an overall judgment on the civil code does not depend solely on the undeniable technical progress it may have made with respect to the pre-existing legislation, nor on its suggestive systematic design. It mainly depends on the vitality of the fundamental ideas that constitute its substratum and foundations and on the degree of exactness with which those ideas have been transformed and translated into legal formulas "(Nicolò, 1960, p. 248). Many expectations have been disappointed and the technical uncertainties seem to reflect the lack of a vision only hidden by the enunciation of generic objectives. Reforming a code is not easy and we can agree with the position expressed by the Swiss Conseil federal according to which "the coût d'une révision de la partie générale du CO est très élevé tandis que son utilité est jugée plutôt faible et que le risque d'échec est considérable .. Mais c'est surtout les avis très clairs émis par les praticiens qui occupent une place centrale dans the general appraisal du Conseil fédéral: les specialists ne voient de toute évidence dans le texte normatif, malgré ses

lacunes attestées, aucun préjudice mesurable pour leur travail. Il manque donc une condition essentielle d'une grande révision "(Modernization de la partie générale du code des obligations Rapport du Conseil fédéral en réponse aux Postulats 13.3217 Bischof et 13.3226 Caroni du 31 janvier 2018).

However, the French reform does not represent an isolated experience and seems to mark a return to the civil code, perhaps not by chance. In a moment of mistrust in globalization, of tensions that pervade the current reality, of the disintegration of society, we aspire to that world of security of which the codes were a symbol (Irti, 1979). Furthermore, even the states in crisis today are trying to find their past strength in this way. The jurist, on the other hand, is entrusted with the task of "understanding, reassembling the logic of one's time among the ruins of the past and the faint or uncertain signs of the future" (Irti, 1979, p. 34).

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