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## Law, Understanding of Law, Application of Law

**Abstract.** After the classical heritage of both Civil Law and Common Law is characterised, their *juristische Weltanschauung* as professional deontology is reconstructed in parallel with their respective assumptions in theory formation. As to the nature of legal process, the moment of concealment is identified in both types with the final conclusion reached that humans' individual activity and personal responsibility is hidden in the machinery. Civil Law is defined by rules enacted as the sole embodiment of the law, treated conceptually in a linguistico-logical way so as to be suitable to lead to mechanical application within the range of a meta-level dogmatic system. The interplay between logical subsumption and volitional classificatory subordination is analysed in order to show what legal ascriptivity is and why it ends with the artificial construction of legal force. Accordingly, Civil Law ideology is imbued with analogies as if cognition were at stake, in contrast to Common Law openly undertaking fiction to explain in what manner the judicial deliberation on facts whilst reconstruing the whys and hows of past instances can result in ascertaining what the law has allegedly ever been. The law's understanding–theorised in the former and pragmatized in the latter case—is part of its applying as an ontic component of the very existence of the complex social phenomenon called law.

**Keywords:** concept of law, law-applying, *juristische Weltanschauung* as professional deontology, disanthropomorphisation, legal ideologies theorised/pragmatized, Civil Law, Common Law, comparative judicial mind

### I. Classical Heritage

1. The rich legal heritage of the *Romans*, with *its* changing internal emphases, assured a basis for the development of two differing traditions during the European Middle Ages and Modern Times. In the course of this formative process, starting in the 16<sup>th</sup> and 17<sup>th</sup> centuries the approaches to law characteristic of our Continent and of the Anglo-Saxon archipelago were gradually separated as they were strengthened by the failure of attempts to codify the law in England.<sup>1</sup>

#### 1. Continental Law

2. As soon as this separation has been perfected, in *continental* law nothing remains from the *ius* except that which has been posited as a *lex*. In terms of this transformation process, the *regola*—once serving as a didactic exercise and summation—becomes the sole bearer of any legal quality as a set of linguistic signs that is destined to embody the law.

From that time on, anyone who is eager to know what the law is (in terms of its sense, message or significance) must turn to its embodiment in and by *rules*.

3. By this act and starting from the Roman imperial epoch, such a *form* becomes the exclusive source of any contents hidden in and by it. Of course, this form may easily prove to be casual, random and/or fallible; nevertheless, nothing else can be taken as law other than precisely that which has been edicted. This form is no longer an external gown veiling

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<sup>1</sup> Cf., by Varga, Cs.: *Codification as a Socio-historical Phenomenon*. Budapest, 1991.

the legislator's idea but the *sole embodiment*. With such a solution principally strengthened (but still as a correction mechanism building around the original idea), it will be accepted only later that whatever interpretation of the law's provisions may nevertheless draw from the law-maker's intent—as an auxiliary source (that is, among other additional sources)—anything that can be read from (a) the conditions understood by the legislator, (b) the whole texture of regulation, (c) the actual knowledge as to the historical circumstances of legislation or (d) the intentions expressed during the bureaucratic procedure of legislation.

4. Law is, therefore, a *text* with a meaning that can be ascertained through textual analysis, that is, by the help of *linguistic* and *logical* devices used to look for connections and their disclosure. As interpretation theories would also formulate it, in case of necessity the interpreter might also have recourse to a search for proper meaning through the law's context as drawn from either (a) the intent of the legislator or (b) the historical conditions or (c) the systematic setting of the given piece of legislation.

5. The very fact that the law is embodied by enacted texts and, therefore, it is treated textually in practice makes it possible for jurisprudential interpretation to forge *concepts* out of mere *words* used in the legal texture, in the course of classifications. It is no longer simple words but conceptualisations that stand for—as a representation of—diverse aspects of reality, conceptualisations that are developed into a complex and hierarchically organised notional system, which is defined in its components' mutual relations by boundaries with edged contours. These concepts are positioned as *loci of a taxonomic systemicity*, erected in place of mere words.

6. Such conceptuality is, however, not imbued directly by the law's texture itself; the words used in the *gesetztes Recht* do not simply contain it. For *legis latio* is a *practical* act throughout. It is the *volitional* product of the agent authorised to issue normative texts. This is the mere result of some *volitio*: contingent in principle, plainly arbitrary in a philosophical sense, since, optionally, it could be something else as well.

7. What pulls law as such to the conceptual world is the jurists' conceptual analysis: classification and system-building, through which the jurisprudential reasoning over the internal connections of the law-stuff will create concepts by drawing analogies amongst individual words or by breaking down and/or splitting already established concepts into others. As an obvious denominational analogy—supported by the memory of the strict conceptuality disassembled from Biblical texts—this is what we call *Rechtsdogmatik*. Such a doctrine is the production of legal scholars having analysed law texts with the intent of forging an internal systemic connection in view of reaching *this* available perfect conceptual systemic network from *that* resource of processing. Once established—and only provided that such a demand for conceptual systemic building is grounded on the common ethos of the given legal profession (not as an unnoticed pioneering attempt but expressing the mainstream of the age as, for instance, in *Leibniz'* epoch)—, such a doctrinal net (with the actual shape it has acquired) will form a *web of understanding* around the law, i.e. a weakly (though informal) normative environment that already serves as a kind of pre-understanding [*Vorverständnis*] for all kinds of juristic activity when those professionals (making, applying or just studying law) start dealing with normative or other legal texts.

Accordingly, and as a point of principle, *legal texts* themselves have ever been and will remain *incidental* and *fallible*. Their human understanding in this very culture (with the law already taken at a conceptual meta-level) will become *imbued* with such a *doctrinal knowledge*, slowly to be entirely presupposed by it.

(This is why in such cultures law, legal practice and their doctrinal representation may stand as relatively separate but mutually preconditioned and interactive entities, albeit in the social division of labour specialists are accustomed to cultivate one or the other as their specific fields.)

8. As soon as the legal text is seen as ordered by conceptual limitations and additional adjustments (e.g. by making exceptions through further internal splitting)—with any element or partial field treated as the product of the *breakdown* of the overall total regulation, considered (in given time segments) as a closed unit, logically coherent and settled in details—well, then whatever idea we can form about law will from the outset be *marked by a systemic place or locus*, the basic features and definitions of which will already derive from its systemic definition.

9. As a pattern of thought, thereby, the *mos geometricus* is given a shape. This is a concept deriving from the movement characteristic of the 16<sup>th</sup> century, when the European continental manner of studying law was set for centuries, that is, a methodological ideal that laid the constant foundation of our approach to law, prevalent even now. Beginning from classical times in Bologna, this idea permeated the reception of Roman law all over Latinic and Germanic Europe; despite all kinds of shaking, rectification, challenge and enrichment with new trends, this is the model that grants commonality in our respective understanding of law, while defining our identity and membership in one definite legal culture.

Within this intellectuality, the cultivation of law is seen in the composition of a series of operations similar to those in mathematics, upon the basis of which the ideal has ever been to build up a perfect system both closed and exclusive, which, if challenged, can only be replaced by another, completely new in principle, according to EUCLID's axiomatism.

10. The ideal of law represented by such an idea of normative systemicity will at the same time produce its pair and completion reflected in the world of factual reality, referenced in and by the law. This is the *Tatbestand*—taken as the aggregate of those *facts that constitute a case in law*—, which can only be thought of within the frame of a doctrinally organised approach to law (as a representation of *Sein* in counterpart to *Sollen*, with the former featuring the marks qualified by the latter). The notion of *Tatbestand* is a product of the mid-19<sup>th</sup> century continental culture, of the idea that legal scholarship reduced to *Begriffsjurisprudenz* [conceptual jurisprudence]—while approaching law-related (law-referenced) factual reality in a conceptual way—can be developed. It is not by chance that the term *Tatbestand* has no proper equivalent in English, where—without any polarisation between *Rechtssetzung* [law-making] and *Rechtsanwendung* [law-applying], *administration of justice* is practiced (instead of the law's 'application')<sup>2</sup>—it can only be circumscribed (as translated from *Max Weber*, for instance) by “operative facts”, “actual circumstances” or “facts that constitute a case in law”.

11. Well, according to its theoretical model, *law-application* projects the world of norms onto that of facts, ascribing the former's normative requirements to the latter. Or, what is modelled here is the set of reality aspects of those actual events, actions and situations that, matched separately one by one, will in their entirety add to define a particular *Tatbestand*, taken as a *case of the rule*, representing those reality aspects defined through

<sup>2</sup> Cf. Sack, P. S.: Law and Custom: Reflections on the Relations between English Law and the English Language. *Rechtstheorie*, 18 (1987) 4, 421–436.

the abstract formulations of a rule, to which the rule ascribes some legal conclusion (or sanction).

**12.** This model is based on logical *inclusion*. What is at stake here is a particular actualisation on the plane of *individuality*, of what the norm has defined on the plane of *generality*. Starting from the norm, this will ground the logical necessity of judicial syllogism [*subsumptio*] that will lead to the judgment, based on the given norm, concluded from its generality. (For instance, providing the norm sanctions humans killing humans, and our case is about homicide, then the sanction imputed to anyone having performed the deed must be meted out.)<sup>3</sup>

## 2. *Anglo-Saxon Law*

**13.** The Anglo-Saxon mentality has adapted quite a differing pattern of legal regulation and judicial settlement of conflicts from the same Roman legacy. It continued its patterner's earlier attempts towards methodicalness, not departing too much further from the ancient Jewish and Islamic traditions.

It did not look for safety in either conceptualising generalisation or the systemicity it had achieved; it did not dedicate its exclusive trust to the force of central edicts, believed to be suitable to settle everything. It was satisfied to build up law through *examples* following other examples, progressing casually by concrete situations answered by justices, who drew their pattern from their comparisons with earlier patterns, with the final outcome being that the judges themselves, proceeding in individual cases, could become the agents to declare what the legal tradition (reflected in their case) had always been. In order to master the very process of such a continual actualisation of the law, discipline and rational safety had to be assured to the extent feasible. This way, the Anglo-Saxon law's casual and inductive processing and its respect for the unique in the genuine representation of the fullness of life (and, thereby, also its openness towards any novelty in a given situation) could preserve a bit of sensitivity toward practical reason and daily moral deliberations, notwithstanding the fact that it could also successfully separate itself from the heterogeneity of everyday life through the *artificial reason* it erected. On the one hand, in the case of adjudication it alleges it has based its judgment on *unstated rules* but, on the other, it refrains from declaring what *regolas* have indeed been serving it. In consequence, almost until today it has not cultivated the kind of doctrinal culture that may build on general abstract norms exclusively.

The Anglo-Saxon law cannot be taken as thoroughly conceptualised into an overall taxonomic system, independent of whether an enormous amount of rationalising literature has for centuries edified rather considerable meta-intellectuality above it. Instead of employing conceptual systemic consistency and completeness to build a replacement of the given chaotic accumulation, this literature responds mostly to practical challenges in terms of functionality and practicality.<sup>4</sup>

<sup>3</sup> Cf., in first formulation, by Varga, Cs.: *Moderne Staatlichkeit und modernes formales Rechts. Acta Juridica Hungarica*, 26 (1984) 1–2, 235–241.

<sup>4</sup> Cf., by Varga, Cs.: *Differing Mentalities of Civil Law and Common Law? The Issue of Logic in Law. Acta Juridica Hungarica*, 48 (2007) 4, 401–410 {and <<http://akademiai.om.hu/content/b0m8x67227572219/fulltext.pdf>>, abridged as Rule and/or Norm, or the Conceptualisability and Logifiability of Law. In: Schweighofer, E.–Liebwald, D.–Angeneder, S.–Menzel, T. (hrsg.): *Effizienz von e-Lösungen in Staat und Gesellschaft. Aktuelle Fragen der Rechtsinformatik. Tagungsband der 8. Internationalen Rechtsinformatik Symposions, IRIS 2005. Stuttgart–München–Hannover–Berlin–*

## II. Reality in our Approach to Law

14. The question arises whether or not our view formed on law in Civil Law cultures comports with institutional reality. The answer can only be ambivalent, that is, *duplicate* as formulated at *different levels*.

### 1. As Professional Deontology

15. Our previous characterisation is *true* in a *descriptive* sense in so far as it gives an account of the ideal pattern of our legal thought. For *ideology* as a kind of professional deontology, a manner of thinking specific to the legal profession, and in this sense a *juristische Weltanschauung*, has been and continues to be undoubtedly present in the approach to law rooted in our continental culture. In the above sense as well, ideology is *consciousness that exerts impacts onto practice*; consequently, it is a decisive component of the social ontological description of humans in action. This is part of a culture that assigns frames, within the boundaries of which we appropriate the world intellectually. Within them, we form key categories for understanding the world, while we also sense and/or attribute definite value-contexts of/to the same world. In its turn, *juristische Weltanschauung* is the foundation stone of legal cultures that shapes human abilities (skills and sensitivities) by which we may sense law at all and search for paths and spheres of action with reference to it. As a consequence, independent of its epistemological status (namely, of the issue of whether or not our specific law does indeed function this way, under its conditions and fulfilling its criteria), the lawyers' professional deontology is *part of the genuine ontology of legal arrangements*. Accordingly, it is part of the operation we can describe starting from the accumulated experience of (a) human practice making use of law, (b) the overall societal *praxis* and (c) *jurisprudencia* as the total sum of legal *praxis*.<sup>5</sup>

### 2. In its Theoretical Explanation

16. At the same time, *theoretical reconstruction* raises reasonable questions as to what indeed the existence of law does consist of, what are the consequences of its being carried by a linguistic medium, what are the chances of humans as socially exclusive acting agents and, at last but not least, in what exactly does their responsibility lie? Therefore, the inquiry goes on further: are we perhaps ourselves passive observers (perhaps mere reference points) in a structure operating like clockwork (possibly without our personal presence as well), since the law works as thoroughly logified within its pure formalism in a quasi-automatic way, broken down into a homogenised network that is empowered to produce its output, and which can reproduce itself continually—on the basis of its own presuppositions as equipped with its own laws and consequences, built in by some next-to-mechanical safety?

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Weimar–Dresden, 2005, 58–65}, as well as Varga, Cs.: Law and its Doctrinal Study (On Legal Dogmatics). *Acta Juridica Hungarica*, 49 (2008) 3, 253–274 {and <<http://akademaii.om.hu/content/g352w44h21258427/fulltext.pdf>>} and Varga, Cs.: Legal Traditions? In Search for Families and Cultures of Law. In: Moreso, J. J. (eds): *Legal Theory / Teoría del derecho. Legal Positivism and Conceptual Analysis / Postivismo jurídico y análisis conceptual: Proceedings of the 22<sup>nd</sup> IVR World Congress Granada 2005*, I. Stuttgart, 2007, 181–193 {and [as a national report presented at the World Congress of the Académie internationale de Droit comparé] in <<http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf>> and *Acta Juridica Hungarica*, 46 (2005) 3–4, 177–197 and <<http://www.akademaii.com/content/f4q29175h0174r11/fulltext.pdf>>}.

<sup>5</sup> Cf., by Varga, Cs.: *The Place of Law in Lukács' World Concept*. Budapest, 1985, 193.

The answer can only be formulated in terms of the *suitability of human practice for self-reproduction through its own traditions* as characterised by today's social theories, on the one hand, and of the *irrevocable human responsibility* as cultivated by the known theologies of morals, on the other.

17. Well, the ideological stand implied by our *juristische Weltanschauung* approaches both language and law as if they were simple objects of the world's reality; as if it was going to suggest exactly what metaphysically inspired logic wanted to inspire actual belief in (particularly in Germanic philosophies<sup>6</sup>)—namely, that relations (of logic and dialectic especially) are hidden in, or implied by, things and objects (their moves, coincidences or configurations) themselves. Nonetheless, it is exclusively *statements* that we can make as to objects and as to whatever kind of virtuality, that is, practically as to anything that can be specified by human ingenuity in the course of our mental appropriation of any imaginable world (involving the Golden Fleece or a unicorn, or hypothesising such limiting units of reference as the absolute cold or the arithmetic zero point, or abstracting the philosophical conclusion of “*Das Nicht nichtet*”, as developed by *Martin Heidegger*<sup>7</sup>). If and insofar as we treat such statements within one single coherently comprehensive perspective, then once the truth/falsity of any of them, grounding our argumentation, is acknowledged, we may deduce true/false conclusions from them.

18. At the same time, law is thoroughly *disantropomorphised*, and it is we who have done this. By abstracting from our subject's substance and genuine nature (dependent directly on human volition, practice, consideration or pure interest), we are used to investing our trust (which we have not undertaken, because it is not relegated to our rational common sense) in something else—notably, in some virtually reified entity or safety, projected from ourselves into a kind of substitute authority. Accordingly, we began to treat law as a reified construction alienated from ourselves, as if it could operate without us, like the Delphi oracle or a God-judgment set in motion as a specific slot-machine to settle our case, into which (as we are made to believe under the constraints of our professional socialisation) we might feed the parameters of the given case so that it would then dispense from its “black box” the single conclusive decision.

19. As to the device of our communication, we have to be aware of the fact that law as *linguistic practice* also can only be intelligible for those who are skilled enough to use it properly. The case is by no means one of mute signs that catch or address us. It is we who make the language sounded in sending and receiving *signs as markers*. Of course, we do not act as isolated Robinsons. We are equipped with general societal (and added professional) education, socialisation and practice of common understanding. This is strengthened by daily use, suitable to re-conventionalise language practice. Thereby, we actualise the language that may make both our procedures and life in society liveable and reasonable.

20. Language is certainly not exact, on the one hand. This continues to be so notwithstanding the fact that, as the most available mediator in societal contact and commerce, only such an ambivalent medium can fulfil language's ontological role, on the

<sup>6</sup> See, e.g. the discussion on the ontology of nature between *Eugen Dühring* and *Friedrich Engels*.

<sup>7</sup> What has already been (reminding this above form of “*The nothing noths*”) raised as a problem in English–American analytics (by *Rudolf Carnap*, *John Austin*, etc.) as well.

other hand. Moreover, not even in principle could language be reduced into a less unambiguous mediator or conveyor of meanings. At the most, we may try to be more precise in our handling and resolution (dedicated to given relationships or limiting issues, when we draw limits or weigh individual situations), by asserting in a socially valid way what we want to express then and there. When we proceed by defining an actualised meaning (instead of the physical act or linguistic symbolism pointing directly at what we actually mean), a step forward is taken indeed, but without ameliorating *the* language itself, its state of being *fuzzy* from the beginning. Our innovation or rectification generated at one moment will inevitably become like mist when problematising at another moment and this goes on infinitely. For the next moment we have language as it has ever been: silent—and defective in counselling. This is to say that the next moment is faced with a new situation, with novel expectations toward language, or mediation through language.

21. That which may catch and bind us in fact is neither language nor law expressed lingually, but our *conventionality*. In societal cooperation we do rely on law, among other things. We call upon it, refer to and interpret it, trying to settle affairs according to patterns it has forwarded. For law offers orientation in settling disputable practical issues. It offers guidance and proposes a normative model. It serves us by being wedged *amongst us*, separating the partners in dispute, by being *independent* of each of us and disposing of relative *consistency*. For it is suitable for mediation by offering a *pattern* to our action. That is, it can model dispute resolution so that the outcome will be not of mine or yours but that foreseen with respect to all such (essentially or substantially similar) situations, cognoscible by anyone in advance. So, what will be concluded will have already been patterned.

22. It is facts that surround us in nature and social life. These are mostly facts simple and unmediated, “brute” and formless. What we are faced with in the law’s *Tatbestand* are already *institutional* facts. For law is not to be found in our affairs themselves. We identify it mostly *outside of* and *above*, and *subsequent* to, the elementary formative components of our affairs, at a time when we, reinterpreting them in the law’s normative context, try to project the law’s structured messages onto a factual or hypothetic case. Life is going on incessantly, following heterogeneous tracks. And the law is—allegorically speaking—withdrawn like a spider, expecting now and then to strike at any of its selected aspects. Once that happens, the law will assimilate this whole life event (by denaturing the latter’s heterogeneous full complexity) to the former’s homogenised—simplified—norming [*Normierung*]. Literally expressed, no one can any longer identify what the law has made out of it, and perhaps not those who are targeted by it; since one given *Tatbestand* (predefined by the law) will have been distilled from its primitively unique full-of-life richness. And this is so because the *Tatbestand* cannot be anything other than the factual reflection of the corresponding normative ruling. The only features that can be included as imputed to the humans in question (to their casual drama or luck, taken as a personal, non-recurrently individual event) are those who have already been specified as *relevant* in the abstract regulation.

23. All this is as if artificially erected nightmarish shades were looking for opportunities, with projective nets, in the density of life, with the aim of picking suitable relevance-sets from it. That is, an *external logic* is projected upon *acts in life*, according to different available considerations—for instance, to impute to a flighty irascibility (attributed, e.g. to

O. J. Simpson<sup>8</sup>) homicide, adultery, personal injury, perhaps breach of contract, or even failure to meet his obligations for maintenance, out of the caldron of the legal witches' kitchen. This is to say that as long as we have not decided at all *what* of this or that qualifies *as having occurred* according to the law, we may only ponder in silence. However, as soon as that is decided, we start banging on every gate: this is *that*, and only *that*, moreover, a master case of *that*—as if *that* had been invented from the beginning and only to sanction our client's case.

Our game could appear to be funny as well if it were not both serious and indispensable. This structured and more-or-less homogenised thought is applied in all fields of socialisation and societal transmission, that is, within the bounds of our humanly created *second nature*. As a consequence, life itself will be arranged following such a logic, destitute of the values and intimacy of the heterogeneity of everyday life but equipped with the force of social ordering and engineering, and, therefore, desired as the *sine qua non* of civilised human existence. For the sake of generating law and order for ourselves, we raise fixed points that are extrapolated and alienated from ourselves as the standards addressing us.

24. I may happen to carry only a potato to you. However, I cannot know in advance whether and when my or your lawyer will call it delivery, agency or necessity, supply or disturbance of possession, perhaps theft, or something else. In any case, the internal (primitive) logic of my action (with its process-like development and gradualness) may well differ considerably from that which will be ascribed to me in law. This is so because the action in question may have followed its own path alongside its *ad hoc* "logic" (chaotic in itself as having been formed from one moment to the next), with open alternatives in every movement forward here and there. And all this notwithstanding, the juridically constructed *Tatbestand* will reconstruct a cumulative development out of this, as a one-way process that may have pursued one preset end with features that involve nothing more than those facts that may make a case in law. And what is more, the way I shall be *judged* will be seen as the outcome of *cognition*, as if I were tracked all the way through by the knowledge of a neutral outsider—instead of treating me as the subject to whom the normative consequence of a system of norms is meted out.

25. The declared result of normative imputation is *ascriptive*. It will conclude some normative consequences of my action by the force of someone's volitive act and discretion. The legal status as to which my action is being *qualified* or *classified* will be defined with the above *intention of imposing those consequences*, and not as issuing from mere cognition. The whole process is not cognition as a result of someone having (with a magnifier) searched in the law or examined the collective memory of my action in order to identify exactly what (and how) may have met in the two (normative and factual) components. In fact, my judge has tested variations to couple them—according to additional considerations such as the prevailing interests and, maybe, intuitive sym/anti-pathy towards me. By the very fact of having *qualified* the event *as the case* of the given legal category, my case has already been *decided*. This legal category being an institutional fact itself, it is not cognition but exclusively a *volitional classification* that will classify my action as a case of the law. In law, nothing is described: we only classify actual life situations here and there. Instead of cognising, we decide—with as much rationally as we can, and based on evidence as much as we can. Therefore, instead of converting the action into anything of logical necessity (that

<sup>8</sup> Cf. <[http://en.wikipedia.org/wiki/O.\\_J.\\_Simpson\\_murder\\_case](http://en.wikipedia.org/wiki/O._J._Simpson_murder_case)>.



is, into subsumption or a logically obvious conclusion), we *subordinate* it to something else with the justices' volitional act's force.

26. Let us pay attention to the change in emphasis here, from the logical model establishing necessary connections amongst our things in an impersonal way, to the social ontological nature of what in fact is stricken out and produced by our social action of fore-planning, since all the connected steps are of such a type here that could have not ensued without their actual performance. Our human involvement is, therefore, creative and strictly *constitutive*, irreplaceably effectuating something. In other words, it is *arbitrary* in the sense of logical necessity, even if not otherwise senseless, indefensible or irrational. This is to say that it is mostly *practical problem-solving* that we are engaged in, whilst the motivation for our verdict—its *justification*—will prove, from the texture of the law, to be the compelling *demand*, that is, the necessity (even in details) of such—and only such—a solution.

27. All this takes the form of a *decision*. For the given solution never could be completed in another way without artificially *cutting off* all the further (and otherwise feasible) paths and ways of the endless series of doubts, including the temptation to consider crossroads with alternative solutions. Until we have manipulated (interpreted and arranged) the facts to an adequate depth, not even their legal classification is finalised. Nevertheless, disputing what *this* was, actually how *this* happened and what grounds we have for qualifying *this* as the case of *that*, can only be cut as a Gordian knot. This is equal to saying that our *certainty* is by no means absolute; therefore, the certainty concerned will be termed as “judicial” (i.e. *artificial*), “rational” (i.e. *limited*) and/or “procedural” (i.e. with exclusive *validity for the judgment*) at most.<sup>9</sup>

<sup>9</sup> We should consider how much we are used to ignore, when approaching law-application in a purely juristic manner (breaking it down into a syllogistic form), its fallible and contingent nature only justifiable through the long-term reliability of human *praxis* in the last resort (which reproduces itself incessantly) in general, and the underlying character of the *qualification of facts*—for the story itself is to be reconstructed from the witnesses' narrations expressed in different object-languages, which has to be transformed (transcribed) into a fact in the law, that is, “qualified” as the case, or subordinated to be a case, of an abstract definition—and of the gaining of *judicial certainty*—with compiling the story in the course of evidence anyhow: from bare fragments, probability conclusions at different levels that may result mostly from additional circumstances, all them serving as the sufficient base to declare categorically sometime that *that* happened in fact—in particular. For all these components with their most elementary constituents are creative with a constructive force, irreducible to formal certainty in a scientific sense, and as such, unsuitable to total rational reconstruction; the fact notwithstanding that these are the most substantive moments—serving as the turning points [*Eckdaten*—of each and every judgement in justice.

Methodologically speaking, it could only be compared to *theology* in explanation of the transcendence of human life, which, since the age of Saint *Thomas Aquinas*, was explicated in masses of volumes of great systemic corpuses, expressed in incessant discussions (in lines of competing directions) for centuries. Behind the whole undertaking, however, it is the humanity's fullness of being—their total existential and practical consideration and decision, their extraordinary complex (psychological and other) attitude—that stands, which, in their finite life and personal options, express an act of volition that, beyond a certain limit, cannot be stressed further by the mere means of *ratio*. This is the moment of *credo* (specified as the realisation of *credo quia absurdum*). Such realisation will be socialised by us as a *Ding für uns*, as something given to us, that we have to develop in our earthly life by the intervention of *faith*, that is, by recognising our created nature with the whole chain of ensuing conclusions. Once this recognition is achieved as wedged in our socialisation, every

28. This is why adjudication is eventually finalised with *legal force*. Whatever decision is reached, it cannot tempt any longer. It must be finally accomplished, placed in the archives' oblivion, as a past instance of accomplishment of the then-prevalent law and order.

29. Musing on the ordering role of law in society, we may ponder on how many thousands of thousandths of our daily transactions are selected in order to provoke law-sensitive deliberation at all, how many thousandths of them are made controversial in order to await judicial deliberation. A great volume, the overwhelming majority, of both deviances and actions that are hardly defensible in law will remain free from legal reaction. What percentage of the other part will gain final force without any appeal against its first adjudication? Perhaps this will be a majority of the cases whose juridical solution would presumably never reach reconfirmation in legal reconsideration, while convenience, triviality or other petty conditions may have been in play in promoting their first conclusion with legal force.<sup>10;11</sup>

### III. The Complexity of the Lawyers' World Concept

30. The unification in institutional operation of conceptual patterning, on the one hand, with linguistic formulations, on the other, presumes complex constructions, together with the formation of human skills (mentalities and procedures) matched to these.

#### 1. The Complexity of Civil Law Mentality

31. Within the range of utmost possibilities, the continental legal game builds up law-application processes as an *analogy* of the *cognitive* ones common to the sciences: firm platforms (as indubitable stepping stones), logified steps (inspired by mathematics), strictly methodical interpretation (of rules) and verification (of facts), all concluded to a certainty. Behind such an analogy, the lawyers' ideology assists. It suggests logical force as a necessity with no alternative. As the entire construct is humanly operated, only a role of the police officer who directs traffic at turnouts seems to have been assigned to the lawyer. And behind

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component of the reconstructions from such theologies (with their mission's vocation) turns at once to be intelligible for us, raising the awareness of its conclusions as well. But when this is missing, in the given field—and in regards of the actor in question—the object itself (together with the complex net of relevancies) will be lost: it will cancel itself out of their well-developed potential.

<sup>10</sup> Cf., by Varga, Cs.: *Theory of the Judicial Process. The Establishment of Facts*. Budapest, 1995; and Varga, Cs.: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1999.

<sup>11</sup> The historical explanation by Shapiro, M.: Islam and Appeal. *California Law Review*, 68 (1980) 2, 350–381. In: Varga, Cs. (ed.): *Comparative Legal Cultures*. Aldershot–Hong Kong–Singapore–Sydney: Dartmouth–New York, 1992, 299–330, is inspired by such recognition. According to it, the state power that controls the course of “law and order” implementation has to tolerate—up to a certain level, grade and depth, having in view the practical considerations of practical operationability—the variety of jurisprudence effected in the name of law (with the competition of divergences involved), as inseparable from the total function. However, as a practical test of the legally relevant qualities of jurisprudence (such as unity, security, justice, and expediency) it will subject a randomly selected part of jurisprudential issues to sample-taking, in order to filter their quality. So, historically speaking, this is the origin and the mental root *appeal*.

the scenes nothing but our well-educated professional socialisation stands, requiring that the sole *right* decision will be reached from all available alternatives, the one which can be identified within the polarity of either truth or falsity.

## 2. *The Complexity of Common Law Mentality*

**32.** From a European continental perspective, we are used to considering the Anglo-Saxon approach as freed from ideology, because it abounds in marks of unsophisticated naturalness without artificial mediatedness. No consideration is usually given to the fact that even its myth-coloured basic definition is formed ideologically from the outset. For, as is well known, that approach generates a judicial declaration of what the law *is* from the alleged positivity of the *immemorial custom of the Realm*. Moreover, it is expressedly alienating by tripping the entire justice-game into lawyerly technical subtleties and tricks, in opposition to the logical clarity and transparent foreseeability of the continental *Professorenrecht*.<sup>12</sup> And, last but not least (and unless it creates its own subject of analysis as the result of today's analytics) its demands are strikingly *a*-theoretical, with no receptivity to conceptual issues.<sup>13</sup>

## IV. With Humans in the Legal Machinery

**33.** In turn, "*humans are hidden in the machinery*" as the law cannot function without an active human component. This is obvious, since there are no "correct" answers in themselves, as no exemplar of them can be found.<sup>14</sup> We may endeavour to reach a rational

<sup>12</sup> It is no chance that legal theories of alienation were mainly formulated in the domain of Common Law. Cf., e.g. Conklin, W. E.: *The Phenomenology of Modern Legal Discourse. The Juridical Production and the Disclosure of Suffering*. Aldershot and Brookfield (USA), 1998. Moreover, the exclusive purpose of the modern mainstream trend of Critical Legal Studies—cf., e.g. Bauman, R. W.: *Ideology and Community in the First Wave of Critical Legal Studies*. Toronto, 2002—is to unseal the relations of dominance (as its fighters claim: the capitalistic, male-chauvinistic, or European regimes, or the ones ruled by the centres of the world economy or by the *Christian* faith, and so on) from the artificial ideological (defensive) linguistic cover of the law (provided with codes of mere technicality).

<sup>13</sup> Almost the only exception I have taken cognisance about is Samuel, G.: *Epistemology and Method in Law*. Aldershot and Burlington (VA), 2003.

It is an alarming instance to learn from a dispute—*Ratio Juris*, 20 (2007) 2, 302–334—launched by Italian and Polish scholars about a volume—Shiner, R. A.: *Legal Institutions and the Sources of Law*. Dordrecht, 2005—of a representative international series—Pattaro, E. (ed.): *A Treatise of Legal Philosophy and General Jurisprudence* 3—the doubts expressed on the sense of such a universalising bosh, which is destitute of the lowest theoretical sensitivity in the author's exclusive dealings with American daily topics under the aegis of global legal theorising, stuffed with the want of genuine academic knowledge, as if the author never heard, for instance, of the doctrine on the sources of law, legal institutionalism, or *Hans Kelsen's* foundational doctrine. Rounding this specimen of intellectual poverty by not even understanding the stake, in his rebutter the author calls its European critics to the respect of liberal tolerance and academic freedom, perhaps for lack of anything better.

<sup>14</sup> In theoretical reconstruction, my concern is certainly not the validity of propositions that *natural law doctrines* (aiming at ontological foundations inspired by theological presuppositions) or *practical philosophies* (in their rebirth today) may advance in search for connections, but exclusively the specific issue of the ways in which prevalent trends (or their comparable analogons) may exert fermentative effect on the daily administration of justice.

justification at the most, and through benevolent discourses in human communities, an optimum solution has to be targeted somehow. We are fallible humans, as fallible as are our endeavours to make the world better. We may try to find salvation exclusively with skills and instruments we have developed, and, of course, through unceasingly adapting and correcting them.

**34.** Irrevocably and unavoidably, all that remains is to draw on the recognition that, notwithstanding our different societal roles, somehow we all are parts of the practice of reproducing this understanding with full *personal responsibility*—whether as citizens, or as educators and socialisers (who form the public understanding professionally as teachers, priests, journalists and other social workers), or as intellectuals or politicians (who shape the former’s frameworks), or having been specifically initiated as actors in the law’s workings.

**35.** In the final analysis, our law as actually practiced will hardly be anything other than that which we have formed out of it through our social co-operation and the fights we have undertaken.<sup>15</sup>

**36.** In the end, law is a mode of speaking. It is practiced as a specific field of communication with a game of open scenes, which is actualised if played by humans through actual referencing. Accordingly—and instead of “what *it* is?”—“all that notwithstanding: how *it* can be achieved” will be the final question that serves as a criterion as well.

This also involves a call for axiology, in order to set some standard as a foundational stepping stone. This is to be done even if in the absence of a claim that we have made it suitable to conclude anything from it or subordinate anything to it (as the past antagonistic rivalry between the doctrines of natural law and legal positivism stressed). And this may presume to arrive finally at a development from thesis via anti-thesis to syn-thesis related to the correlation among humanity’s natural, societal and spiritually founded intellectual world, perhaps strengthened as well by the re-/dis-solution of the law’s positivistic self-definition. Thereby, a genuine re-foundation may also be achieved in order to master humanity’s response to the global challenges that are at our door.

<sup>15</sup> For an outlook, cf., by Varga, Cs.: *Doctrine and Technique in Law. Iustum Aequum Salutare*, IV (2008) 1, 23–37 {and <<http://www.jak.ppke.hu/hir/ias/20081sz/02.pdf>> and [www.univie.ac.at/RI/IRIS2004/ArbeitspapierIn/Publikationsfreigabe/Csaba\\_Phil/Csaba\\_Phil.doc](http://www.univie.ac.at/RI/IRIS2004/ArbeitspapierIn/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc)}.