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Judicial Black-box and the Rule of Law
in the Context of European Unification and Globalisation

I. Basic Issues in the Understanding of Law

1. For an ontological reconstruction, the significance of juristische Weltanschauung as one of the original components of the law’s very existence (besides objectified embodiments) is definitely shown by the fact that institutionalised social existence, whatever it be, cannot but withstand those kinds of simplification inspired by the Newtonian outlook of the universe (reducing reality to casual intertwinement of causal series originated by things and powers directed at them), in terms of which we may and have to differentiate the ‘construction’ itself (as given from the outset) from its ‘being made to function’ as a complementation exteriorly and posteriorly added to the former by an individual purposeful or random act; albeit when we are considering social dynamics with social institutions at work, we are tempted to take simplifyingly the two above components as some bifactoral mechanics that has been organised into one single functional system. As opposed to the physical world, however, in the specifically social world exclusively kinds of phenomena (features and aspects) suitable to be reconstrued from their actual movement as their genuine subsistence can be thought as prevailing as having the specific quality of ‘social existence’.1

Consequently, the ontological status of the way the jurist approaches to law in a manner sanctioned by the approved canon of the profession–describing the kinds of intellectual operations he/she usually performs by referencing to the law and the actual ways in which real life situations are judged by justices in law (as if all it were a simple deduction from the law valid at the time)–is hardly more or else than what is called professional deontology. And this is

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just not simply a case of false ideology (as usually treated by Marxsms) but a specific procedure of (virtual? real? in any case: actual) reality construction, controlled by the required mental referencing as a mediator wedged in-between.\(^2\)

As if the same background idea asserted in the professional conceptualisation of norms would also be repeated here as applied to the overall functioning of the normative world. For in the same way as neither the norm is descriptive—therefore necessarily true/false—a ‘reflection’ (the fact notwithstanding that its lingual expression suggests as if it were exactly some description of ontological relations),\(^3\) nor this reality construction is effectuated—‘caused’, or made to have no alternatives at all in practical decision making—by the norm (the fact notwithstanding that the normative understanding of norms pictures and officially justifies it as such).\(^4\)

2. The duality of ‘law in books’ and ‘law in action’ (which Roscoe Pound formulated originally as a pioneering category of legal sociology after he had realised that positivation itself cannot automatically be equated to textual effects referenced to in implementation) has turned into a genuine paradox when it has also been revealed that differing normative orders, heterogeneous to one another to an extent to be almost incommensurable by their textures compared, can nevertheless exert quite a commensurable impact as measured by the social effect to which, however, they may lead in societies at by and large comparable civilisational levels.\(^5\)

Accordingly, one may raise the issue whether or not there may be a hidden (and hitherto unrecognised) “magic” (perhaps exerting influence on/through


\(^3\) Cf. Varga, Cs.: A magatartási szabály és az objektív igazság kérdése [Rule of behaviour and the issue of objective truth] [1964], in his Útkeresés Kisérletek – kéziratban [Searching for a path Unpublished essays], Budapest, 2001, 4–18.


other–cultural?–paths) similarity (or some mechanism of effects resulting in comparable ends) among such linguistically differently expressed and culturally differently contextualised rules aiming at behavioural regulation and control, or the norm(s) posited by them can only qualify as a decisive factor of decision-making by their mere appearance and backing normative ideology solely, while in fact other (further) circumstances do play the role of determination in (parts or the over-weighty part of) the actual process.6

3. The answer is to be searched for in the actual functioning of the ‘judicial mind’ taken as a ‘black-box’ (symbol for a self-regulating cybernetic entity), in case of which, its internal laws remaining unknown, we can only try at re-constructing the regularities at work in it through the analysis of its actual data processing, by comparing what are their in-puts to what are their respective out-puts.

   First of all, the judicial mind aims at resolving (by settling) the conflicts of prevailing interests (involving the axiological conflicts behind them) brought before court fora, through asserting that alternative of resolution (settlement) which it considers the most defendable of (while balancing amongst) all the feasible (or presented) variations–by fulfilling, inasmuch as available at an optimum level, the ‘system of fulfilment’ [Verfüllungssystem] canonised in the given legal regime–, all this being operated by the law’s particular technicality which, in each and every case in principle, makes it possible with equal logical chance (that is, in a way not any longer limitable or controllable by logic) to select those procedures from the stock of available (by the way, even logically mutually counter running) techniques,7 with the help of which one may argue for the given norm either covering or non-covering (and therefore either to be applied or disapplied to) the case at hand, and respectively, by the help of which—in the name of our common respect for the law—either strict or equitable judicial adjudication can be reached almost at please, when also the strictness of the wording of the law is loosened in cases when a programme “to make the law liveable” is appealed for.


Accordingly, behind the stage appearance and ideology of mere norm application there is always a human being at standing work, with own valuation and further full human(e)ly personal facultas mobilised when the determination is taken to (and how to) decide. For the hermeneutic definition of the very understanding of norms as a kind of cultural predisposition [Vorverständnis] will from the beginning have a selective effect on the judicial ascertainment of both those facts that shall constitute the given case (Tatbestand, taken as the legally exclusively relevant set of facts to be judged) and the norm to be applied thereto (including its actual meaning reflected to, by validated in, the given case). On the one hand and always posteriorly, the logic of justification cannot do but infer the decision from the given normative set by positing that there is an available cluster of norms from which the case-specific and case-conform selection has been made and, on its turn, the selected norm will have already defined what fact(s) can be taken as relevant for the actual norm application. On the other hand, however, from the point of view of the logic of problem-solving (that is, the genuine logic at work in the actual process), any consideration of either facts or norms can at all be marshalled in simultaneous mutuality of both sides as complementarily reflected upon and through (as tested by) one another.

This is why for an ontological reconstruction of the judicial process, the judicial operation with both legal provisions and so called facts can only be termed as manipulation. On its behalf and as the temporary end product of judicial reality construction, this manipulation will produce so-called case-law, on the one hand, and law-case, on the other. The former represents law as actualised to a concrete life situation, while the latter stands for the legal reconstruction of real life facts that will then be adjudicated in law. It is to be seen that the exclusive reason and the genuine roots of both sides lies in their having been mutually reflected—the fact notwithstanding that the official court statement is to build on the hypothesis (taken as an ideological claim) of their being independently posited and then related to one another.

4. In sum, the law can not simply be reduced to rule components alone. What is more, similarities and dissimilarities amongst legal arrangements can not even be reduced to rule contextures termed as mentalités juridiques either (using a notion applied until now exclusively to the self-conflicting contemporary

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European legal set-up, composed of Civil Law and Common Law regimes. The realisation of differing legal mentalities lurking behind in the background is part of a larger problem indeed that can only be revealed, I believe, by future inquiries into what I propose to call ‘Comparative Judicial Mind’ within the larger domain of future analyses on the field what I do mean by ‘Comparative Legal Cultures’.

Unfolding what is inherently working within the judicial ‘black-box’ promises an answer to the query raised in the former paragraphs, namely, whether or not the law as the total sum of enactments is either one of the (probably determinative) relatively autonomous components of the complex legal network aiming at the regulation and effective control of behaviours or, simply, one of the (probably determinative) signals of cultural expectations formulated in many ways in the complex social patterning network taken in the largest sense, a total sum that can neither stand for nor substitute to the total complex of social patterning (which is to enclose into one framework both cultural determination and the entire process of getting determined in interaction).

Concludingly, the comparative analysis of the judicial ‘black-box’ is faced with a double task: on the one hand—as motivated by pure theoretical interest—, it recourses to historical “legal mapping”, that is, to draw the available taxonomy of all the variety of past and present legal experiences of theatrum legale mundi in representation of the whole arena of our historical and cultural diversity, and on the other hand—for the sake of assuring mutual cognition on behalf of all concerned and out of purely practical interest—, it is to promote interaction amongst differing civilisational superstructures, with approaches, conceptual sets and institutions, human sensitivities and professional skills included, for widening their horizons in a continued learning process.

5. Up to the point reached here, our developments have been grounded on the widely held assumption of classical legal positivism as the approach to law traditionalised in the western civilisation.\(^{13}\) However, our inquiry must diversify into further paths of research and extended cores of problematisation, taking also into account the materialisation of the law’s own (so called) post modern conditions under which the new juristische Weltanschauung itself will declare (or simply tolerate the hard empirical facts of) the re/dis-solution of legal positivism (taken narrow-mindedly as rule-positivism) in a legal regime that asserts itself as thoroughly (\(\alpha\)) constitutionalised while also (\(\beta\)) multiculturally (\(\gamma\)) poly-centered under conditions when (\(\delta\)) even its eventual codification cannot aim at more than just foreseeing patterns to be considered (\(\delta/1\)) at the level of principles (\(\delta/2\)) as the suggestion of the temporarily best solutions (that may be changed the next time), which (\(\delta/3\)) openly calls for continuous judicial unfolding and further development (refinement and adaptation); or, summarily expressed, (\(\varepsilon\)) the final re/dis-solution of classical legal positivism in what adepts now call ‘legal socio-positivism’ [socio-positivisme juridique].\(^{14}\)

Well, the ERC advanced research proposed has also to involve the foresight in what way and how such a new setting (with further ongoing moves also considered) will have a detouring accumulated impact on the tasks judicial law-actualisation is going to face in actual court processes.

A further complementary issue and topic of problematisation is set by the renewing international arena as well. This is dedicated partly to those forms that the above re/dis-solution may have on the field of international law proper\(^{15}\) and partly to forms that the structural arrangement and internal

\(^{13}\) As mirrored by the development of the idea of law-codification and the adventure of its variegated uses and attempts at implementation, cf. Varga, Cs.: Codification as a Socio-historical Phenomenon. Budapest, 1991.


\(^{15}\) According to Koskenniemi, M.: The Politics of International Law. European Journal of International Law 1 (1990) 4–32. „Social theorists have documented a recent modern turn in national societies away from the Rechtsstaat into a society in which social conflict is increasingly met with flexible, contextually determined standards and compromises. The turn away from general principles and formal rules into contextually determined equity may reflect a similar turn in the development of international legal thought and practice.
organisation of *international humanitarian law* will probably establish when it is about to reach its relative completion. For, as known, its novel structuration is based growingly on the call for a mode of thinking asserting definite (well-circumscribed) value-preferences in military/civil strategic/tactic planning and execution, rather than on traditional schemes of mere issuing rules of behaviour, a regulatory model historically practiced hitherto in law. Well, the query focuses here on what repercussions this new method of patterning may and probably will have as regards to the development of domestic laws and the diversification of the latter’s instruments.

6. It can be taken for granted that so long as it is not cleared adequately and to the sufficient depth what law in social existence truly is (that is, what indeed makes it suitable to exert normative effects in the realms of both the Ought/Sollen and the Is/Sein as well),

16 certainly we shall not be in a position to control its conscious planning and shaping, that is, its overall destiny. Until it we cannot help entertaining ourselves in re of law if not in a merely symbolical sense and with a sheerly metaphorical force, i.e., in the exclusive manner of signalling something as referring to it at the most.17 When in everyday professional
routine we act as jurists, usually we identify what we mean by the law through its eventually objectified phenomenal forms, that is, through the latter’s procedurally due formal enactment, its textual wording, as carrier of what we qualify by legal validity,\textsuperscript{18} although when we act as jurisprudents we are aware of the underlying fact that this is but a simplifyingly abbreviated expression, and no criteria set by actually canonised states of an ideology (upheld temporarily by the legal profession) is entitled to substitute to scientific description and definition. This is why the subject and main vocation of our present interest in the recent research topic is to circumscribe, as exactly as possible, those necessarily fragmentarily objectified items (composing parts) of the law (necessarily withstanding, of course, definitions pointing beyond the limingly relativising terms of “in this or that sense” and “more or less”, because the law stuff, lingually expressed, is the same for law enacted, law enforced, law doctrinally treated in so called \textit{Rechtsdogmatik}, as well as for law as the scientific object of study), together with those entire social, institutional, and intellectually represented environments of law that, on the final analysis and at any given time, will in their totality create and make up as well as form and shape the law.

7. In want of a deepened answer to the above, it is by far not unambiguous what we exactly desire for when, for instance, we announce our strive for the harmonisation of laws within the European Union (unifying them by common codification, among others),\textsuperscript{19} or when, responding to the challenges made

\textsuperscript{18} Cf. Varga, Cs.: Validity. \textit{Acta Juridica Hungarica} 41 (2000) 155–166 and <http://springer.o.m.hu/content/mk0r8mu315574066/fulltext.pdf>.

explicit by the globalisation process ongoing in our days, we declare our longing for a substantiated respect for ‘the rule of law’ and ‘legality’, both in the further shaping of international law and especially within the decision making processes of international organisations (such as the United Nations).20 For nowadays more than dreams are at stake on this global terrain. Firm determination is almost reached for that upon the model offered domestically by constitutional courts, some legal/juristic filtering agent should and shall indeed be built in at/around the peaks of such big international organisations (amongst which mostly the United Nations Organisation Security Council is specified by the literature), with a clear intent to control and possibly also efficaciously sanction the conformity of the course they are actually taking with the ideal of what is now called ‘the international rule of law’, even if it is by far not thoroughly and reassuringly clarified what is meant exactly thereby and how it can be measured within a multi-partnership complex network operated by various sides and under ever-changing conditions.

II. Questions to be Raised by Legal Arrangements Individually

8. All these developments precondition to clarify the (simultaneously conditioning and conditional) basic issue in what law does indeed subsist.

The overall query for identifying what on final analysis law consists of and what it is building constantly from can only be detected from its actual operation, that is, from the moves by which it is operated and made to function, otherwise speaking, from its practical working (including the ways by which it recurrently reconventionalises its standing or innovative routine), or, in sum, from the analysis of intellectual/mental operations actually effected on/by (while appeals and/or references are getting made to) the law. For reaching adequate

jogkodifikáció [The common law of the European Union: Harmonisation and codification].


20 Cf., e.g., Bryde, B.-O.: Konstitutionalisierung des Völkerrechts und Internationa
knowledge, we have to reconstruct exactly what it is that on final account gets referred to as the law, and indeed, what is the relationship reconstructible through such analyses between its aspect (property, feature, etc.) referred to as ‘the law’ and the practical conclusion inferred (stated, motivated, and justified mostly by justices) as ‘the conclusion of the law’.

9. Triple sorts of questions can be formulated here as queries to be addressed to all legal traditions and arrangements that can at all be included in such an inquiry: whether or not (1) their law is exhaustively embodied by their given textual corpuses, or those texts, destined only to offer from what to learn the law, are mere signals as exemplifications from the law, or references to realise how rich the potential hidden in the entire stuff of the law is, or not more ambitious then serving as memo-props or didactic help on desirable or mostly followed practices in the name of the law; whether or not (2) in the medium carrying or lingually manifesting it, the law is also conceptualised, that is, its words used are at the same time defined as systemic and taxonomic locuses of a notional network built at varying (adequate) levels of generality with the claim of exhaustive completeness, or all these are, in want of better, linguistically exhibited for the exclusive sake of making communication possible at all on law, with kinds of mere naming that only characterise, instead of any classification performed within some relatively closed and internally arranged taxonomy; and lastly, whether or not (3) in the intellectual operational series targeting that the mutual reflection of the law and the facts constituting the case of it will be achieved in the case at hand, the claim is formulated and enforced for the legal decision being derived from the law as a logical conclusion of it (parallel to the requirement for its categorically formal and exhaustive posterior justification excluding any alternative to the decision reached), or logic can only and will in fact remain in the background all through, playing, if at all, some merely controlling function at the most.21

10. This inquiry can be assured by investigating applied legal techniques in quadruple directions that may have developed in each and every legal system to a locally sufficient degree, that is, techniques which, on the one hand, (a) have to guarantee the need of any given law and order to remain stable and preserved in its identity through the continued flow of challenges it is faced to answer in the meantime all along, (b–c) have to produce instrumentalities available as suitable for that change, adaptation, or mere refinement as needed at any time can be effectuated, and which, on the other hand, (d) can close down the mutual reflection of rules and facts by/upon one another in a way excluding any doubt–mostly by the mere fact (or authority) of the decision taken or the self-comforting cover of its alleged logical certainty.

In accordance with the above, (a) the first of the directions relating to applied legal technicalities moves (by oscillating) between the (frequently simultaneous) opposites of conservatio/novatio, with the recourse to which partial renewal may of course be achieved by interpretation but in most of the cases only fragmentarily at a given time, as emphatically counterbalanced by the simultaneous conservation of all the other terrains and domains of regulation for a while; (b) the second of the directions (sometimes in parallel to the former) moves (by oscillating) between what is considered ius strictum / ius aequum in the given moment of the ever-developing overall regulatory arrangement, which move (somewhat modelling the former) may venture either to loosen the original (or derivative) strictness of the regulation in question (mostly in its practical legal consequence) or, vice versa, to fix the original (or derivative) equity available in the actual regulation, in each case preserving the prevailing state of strictness/equity of all the other fields; (c) a two-way option almost depending on free choice as an evergreen instrumental trouvaille of legal technicality can also be realised by the continuing tension between moves targeting generalisatio/exceptio, in case of which conservation/novation and/or strictness/loosening are/is either generalised or made to become an exception (whilst we have to be aware of the fact that, logically from the outset, any change as compared to the original state makes it an exception). Finally, (d) for that the law’s abstract normative expectations can be related–projected, then ascribed–to actual facts by performing a formal synthesis22 unifying the

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22 This is what a Hungarian classic of legal sociology once termed as synopsis for his processual theorising. Cf. Varga, Cs. (ed.): Horváth, B.: The Bases of Law / A jog alapjai [1948]. Budapest, 2006. Cf. also Jakab, A.: Neukantianismus in der ungarischen Rechts-
heterogeneities of Ought and Is in the court’s *dictum* normatively judging upon sheer facts, an artificially formalised gesture is also required (reminding of the otherwise a-natural effects of, say, *mancipatio* in Roman law, activated—as an institutional act with normative effects—by an easily memorisable formal human gesture as the *sine qua non* complementation eventually performing it in law), by means of which in order to officially ascertain equalisibility (reflectability and ascribibility, or correspondence or similarity) between the two sides, depending on the logical transcription of their connection established, either logified subsumption [*subsumptio*] or discretionally decided subordination [*subordinatio*] will finally be declared by mobilising all the available and freely disposable legal techniques for its demonstration [*justificatio / motivatio*].

(It is to be noted that the classical stock of legal technicalities have to be expanded so as to include, for instance, techniques of argumentation by basic principles and of the constitutionalisation of issues, as well as the recourse to filling gaps in the law or the case-specific determination of the meaning of so-called flexible or uncertain terms in law.)

### III. The Circle of Legal Arrangements to be Included in the Investigation

11. The investigation revolving around the judicial ‘black-box’ is to concentrate (1) on *Civil Law and Common Law* arrangements, decisive for foreseeing the prospects of their future dis/con-vergence what is at stake when we aim at the eventual unification of laws within the European Union, by surveying also, on the one hand, (1/a) their antecedents, involving the kinds of legal reasoning characteristic of the ancient Greeks and Romans (differentiated amongst themselves according to relevant periods) and, on the other, (1/b) their historical formation within/into own so called families or groups—separately in the (1/b/α) Latin and Germanic, as well as the (1/b/β) Nordic stuffs—, enlarged up to include (1/c) their mixed/mixing branching(s) off in the world (exemplified primarily by Scotland, Québec, Louisiana, and the State of Israel) as well. This has to be complemented by the other part of the diversity of world civilisations, namely, by (2) what can be learned about the resolution/settlement of legal conflicts in autochthonous societies, as probably our common civilisational root culture (with the data of contemporary legal anthropological researches and tribal materials included), as well as, nearing the specifically European

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23 Cf. with para. 5 above.
roots, (3) the classical Jewish and Arabic traditions, contrasted—for signalling the available practiced variety of patterns—with at least (4) the Asian tradition exemplified by the Korean, Chinese and Japanese procedures and lastly, as annexed by—in function of the availability of data and monographic treatments—, for instance, (5) the Persian, Indian, or other tradition(s).

IV. Purpose and Impact of Investigations

12. The research hypothesis itself is addressing important challenges at the frontiers of the field addressed by its being grounded on assumptions going substantially beyond the current mainstream state of the art. Its underlying approach to law through the reinterpreted duality of “law in books” and “law in action” between which the judicial ‘black-box’ (calling for unfolding in the present project) can only erect a bridge by opening up quite new horizons, once it is also recognised that the very fact of (alongside the manner in which) exerting social influence constitutes—serving as the basis for—the ontological existence of law. Thereby features of law in practice perceived mostly as either contingently added moments or mere accidents of false consciousness (and therefore treated, if at all, epistemologically) are elevated into the unified domain of the law’s very ontology. In parallel with the distinction of the logic of problem solving from the one of formal justification, the very notion of legal technique and its usual assessment as mere accompaniment in instrumental complementation is changed to an unconventionally novel one, with a creative or arbitrative potential able to marshal the process up to its outcome.24 By launching a research to be carried on ‘the comparative judicial mind’, the concept of “legal mentalities” itself (quite à la mode now and excellently useful in prophesising on the con-/dis-verging prospects of Civil Law and Common Law in the European Union) is transubstantiated into a transdisciplinary notion that can only be described by a long series of multidisciplinary investigations. Such features of law as its exhaustive embodiment in textures, conceptualisation perfected, or thorough logification, have never been systematically surveyed through historico-comparative inquiries. Moreover, neither themselves indeed nor their varieties in various legal-cultural settings have been notionalised as

yet. What I call post modern challenges of and by the law is well cultivated in literature but without having been generalised as parts (or the over-weighty superior part) in any overall Juristische Methodenlehre (or juristic methodology). And almost the same holds for international law, for neither humanitarian methodology nor post positivism’s challenge to international regulation has ever been subjected to legal philosophical reflection, generalisation and application up to now.

European endeavours at unifying/codifying/harmonising member states’ laws are mostly politically expressed and sectorally advanced in travaux préparatoires rather than envisaged in all their possible actual implementations, including their feasible legal-philosophical dimensions. As a matter of due course, ‘Rule of Law’ and ‘international rule of law’ have only simply been mostly used as key words without whatever theoretical-methodological scrutiny done to the depth, what the present paper proposes to achieve. Accordingly, the conceptualisation itself it is bound to conclude by has to be unconventionally novel.

Or, the impact will be (1) a more differentiatedly complex notion of law in which both the classical positivist and the post positivist stands are transcended by a concept based upon something operated rather than merely positivated; (2) a theatrum legale mundi with a thorough historico-comparative overview of the kinds of judicial mind actively working in all its representative varieties, past and present; and (3) a legal-philosophical substantiation of (3a) what can at all be meant (3aa) by the “rule of law” and “international rule of law” and also (3aβ) by unification, codification and harmonisation of laws, especially in a European Union context; as well as (3b) what impact so called post modern conditions of law expressed by the constitutionalisation of issues and the argumentation by principles may have on the future of judicial adjudication in view of the self-strengthening re-/dis-solution of classical rule-positivism; (3cα) what impact the specific methodology of international humanitarian law may have on other fields of law, including the issue of (3cβ) what impact post modern novelties and humanitarian specificities may have on the understanding and individual identifiability of what is meant exactly by the “rule of law” and “international rule of law”.26

25 Para. 5 above.
26 A proposal prepared under–and within the finances of–the Hungarian Scientific Research Fund (OTKA) project K62382.