*1216-2574 / USD 20.00*


ACTA JURIDICA HUNGARICA
*49, No 4, pp. 469–482 (2008)*
*DOI: 10.1556/AJur.49.2008.4.5*

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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 *Newton*ian 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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[1] Cf. Varga, Cs.: *Lectures on the Paradigms of Legal Thinking*. Budapest, 1996.

just not simply a case of false ideology (as usually treated by *Marx*isms) 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

[2] Cf. Varga, Cs.: *The Place of Law in Lukács' World Concept.* Budapest, 1981. It is to be noted that 'mediation' [*Vermittlung*] itself is a key term of *Georg Lukács'* posthumous *Zur Ontologie des gesellschaftlichen Seins*. For a background, see Varga, Cs.: *Marxian Legal Theory.* Aldershot, Hong Kong, Singapore, Sydney, 1993.

[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* Kísérletek – kéziratban [*Searching for a path* Unpublished essays], Budapest, 2001, 4–18.

[4] Cf., in summation of a decade's research previously published in huge a many parts, Varga, Cs.: *Theory of the Judicial Process* The Establishment of Facts [1992], Budapest, 1995. Later on, a similar conclusion was reached from the phenomenologisation of Critical Legal Studies by Conklin, W. A.: *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Disclosure of Suffering. Aldershot, 1998, preceded, as a case study, by his Human Rights, Language and Law: A Survey of Semiotics and Phenomenology. *Ottawa Law Review* 27 (1995–1996) 129–173.

[5] Zweigert, K.: Solutions identiques par des voies différentes (Quelques observations en matières de droit comparé). *Revue internationale de Droit comparé* 18 (1966) 5–18.

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.

[6] Cf. Varga, Cs.: Theory and Practice in Law: On the Magical Role of Legal Technique. *Acta Juridica Hungarica* 47 (2006) 351–372 and <http://www.akademiai.com/content/j4k2u58xk7rj6541/fulltext.pdf>.

[7] For the foundational outlines, cf. Varga, Cs.–Szájer, J.: Legal Technique. In: Mock, E.–Varga, Cs. (eds.): *Rechtskultur – Denkkultur*. Ergebnisse des ungarisch-österreichischen Symposiums der Internationale Vereinigung für Rechts- und Sozialphilosophie 1987. Stuttgart, 1989, 136–147.

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*es 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.[8] 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

[8] Cf. Varga, Cs.: Is Law A System of Enactments? In: Peczenik, A.–Lindahl, L.–Roermund, B.: *Theory of Legal Science.* Dordrecht–Boston–Lancaster, 1984, 176.

European legal set-up, composed of Civil Law and Common Law regimes[9]).[10] 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'.[11]

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,[12] 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.

[9] For the expression, and its unfolding as a key term, cf. Legrand, P.: *Le droit comparé.* Paris, 1999, 127, and his *Fragments on Law-as-Culture.* Deventer, 1999.

[10] For their internal variety and richness with a partly heterogeneous historico-cultural potential, cf. Gessner, V.–Hoeland, A.–Varga, Cs. (eds.): *European Legal Cultures.* Aldershot–Brookfield USA–Singapore–Sydney, 1996.

[11] Cf. Varga, Cs.: Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline. *Acta Juridica Hungarica* 48 (2007) 95–113 and <http://akademiai.om.hu/content/gk485p7w8q5652x3/fulltext.pdf>.

[12] Cf. Varga, Cs.: Introduction to Varga, Cs. (ed.): *Comparative Legal Cultures.* Aldershot–Hong Kong–Singapore–Sydney–New York, 1992, and, more developed, his *Theatrum legale mundi* avagy a jogrendszerek osztályozása [On the Classification of Legal Systems]. In: Szilágyi, H. I.–Paksy, M. (eds.): *Ius unum, lex multiplex.* Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy). Budapest, 2005, 219–242 and 243–244.

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 (α) constitutionalised while also (β) multiculturally (γ) poly-centered under conditions when (δ) even its eventual codification cannot aim at more than just foreseeing patterns to be considered (δ/1) at the level of principles (δ/2) as the suggestion of the temporarily best solutions (that may be changed the next time), which (δ/3) openly calls for continuous judicial unfolding and further development (refinement and adaptation); or, summarily expressed, (ε) 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.

[14] Cf. Varga, Cs.: What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of "The Judicial Establishment of Facts". In: Atienza, M.–Pattaro, E.–Schulte, M.–Topornin, B.–Wyduckel, D. (eds.): *Theorie des Rechts und der Gesellschaft.* Festschrift für Werner Krawietz zum 70. Geburtstag. Berlin, 2003, 657–676 as well as his Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada), *Acta Juridica Hungarica* 44 (2003) 21–44 and <http://www.akademiai.com/content/x39m7w437134167l/fulltext.pdf>.

[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

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There is every reason to take this turn seriously–though this may mean that lawyers have to re-think their professional self-image. For issues of contextual justice cannot be solved by the application of ready-made rules or principles. Their solution requires venturing into fields such as politics, social and economic casuistry which were formally delimited beyond the point at which legal argument was supposed to stop in order to remain »legal«. To be sure, we shall remain uncertain. Resolutions based on political acceptability cannot be made with the kind of certainty post-Enlightenment lawyers once hoped to attain. And yet, it is only by their remaining so which will prevent their use as apologies for tyranny."

[16] In the context of Georg Lukács *Zur Ontologie des gesellschaftlichen Seins* (Prolegomena, MS in Lukács Archives M/153, p. 253), it is of a criterial importance that "social being" as such can only emerge once the phenomenon in question starts actually exerting specific effects [e.g., „Das Sein besteht aus unendlichen Wechselbeziehungen prozessierender Komplexe"].

[17] As already demonstrated by the author–*Lectures on the Paradigms... op. cit.*, passim–, in addition to the ways in which the law shall be treated and applied (as something ready-made), also–as a prior issue–the ways by which the law can be produced (e.g., which procedure can result in a law made, fed from what and attaining what degree of completion) are getting conventionalised by the ideology of the legal profession. For we could take it as previously given from our inquiries into the methodology of the formation of legal notions–Varga, Cs.: Quelques questions méthodologiques de la formation des concepts en sciences juridiques in *Archives de Philosophie du Droit* 16 (1973) 205–241–and into the law's anthropological foundations–Varga, Cs.: Anthropological Jurisprudence? Leopold Pospíšil and the Comparative Study of Legal Cultures in *Law in East and West.* Tokyo,

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;[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 limitingly 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 *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),[19] or when, responding to the challenges made

1988, 265–285 and his 'Law', or 'More or Less Legal?' *Acta Juridica Hungarica* 34 (1992) 139–146–that independently of the self-definition and self-provision of the law, there is a constant battle for both its everyday uses and tendential definition ongoing among at least three of its feasible components in mutual rivalry: positing as law / enforcing as law / popular practicing as law. Accordingly, instead of 'law' in general, we can only speak about law with further specification implied, that is, as circumscribing it in and against a multifactoral continuous move. Or, on final analysis, the question of '*what* the law is' is changed by the sole issue in which sense the law is properly and actually meant; whether anything meant is meant so either more or less; and if it is meant so at all, then in which phase of either developing to become, or ceasing to have been, a law.

[18] Cf. Varga, Cs.: Validity. *Acta Juridica Hungarica* 41 (2000) 155–166 and <http://springer.om.hu/content/mk0r8mu315574066/fulltext.pdf>.

[19] Cf. Varga, Cs.: La Codification à l'aube du troisième millénaire in: Cohen-Jonathan, G.–Gaudemet, Y.–Hertzog, R.–Wachsmann, P.–Waline, J. (eds.): *Mélanges Paul Amselek.* Bruxelles, 2004, 779–800 and his Codification at the Threshold of the Third Millennium. *Acta Juridica Hungarica* 47 (2006) 89–117 and <http://www.akademiai.com/content/cv56l91505t7k36q/fulltext.pdf>, as well as Az Európai Unió közös joga: Jogharmonizálás és

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

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jogkodifikáció [The common law of the European Union: Harmonisation and codification]. *Iustum Aequum Salutare* 4 (2008) 131–150 and 283.

[20] Cf., e.g., Bryde, B.-O.: Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts. *Der Staat* 42 (2003) 1, 61 et seq. and, for the background, Goldstein, J. et al. (ed.): *Legalization and World Politics.* Cambridge, Ma., 2001, and Pildes, R. H.: Conflicts between American and European Views of Law: The Dark Side of Legalism. *Virginia Journal of International Law* 44 (2002), 145 et seq. For an overview, see also by the author 'Jogi kultúránk – európai és globális távlatban' [Our legal culture from a European and global perspective] in: Paksy, M. (ed.): *Európai jog és jogfilozófia.* Tanulmányok az európai integráció ötvenedik évfordulójának ünnepére [European law and philosophy of law: Papers dedicated to the half-of-the-century of European integration]. Budapest, 2008, 13–42, particularly para. 5: "The rule of law", 25 et seq.

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 reconstruable 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 *corpus*es, 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]

[21] For some basic hints, cf. Varga, Cs.: Jogdogmatika, avagy jus, jurisprudentia és társai – tudományelméleti nézőpontból [Rechtsdogmatik, or jus and jurisprudentia in the perspective of the theory of science] and 'Jog', 'jogtudomány', 'tudomány' – lét- és ismeretelméleti nézőpontból (Viszontválasz) [Law, science of law, and science, in an ontological and epistemological perspective] and A dogmatika természetét illető kutatások lehetséges hozadéka (Hozzászólás) [The possible fruits of inquiries into the nature of dogmatics]. In: Szabó, M. (ed.): Jogdogmatika és jogelmélet. A Miskolci Egyetem és a Miskolci Akadémiai Bizottság által 2006. november 10-én és 11-én rendezett konferencia anyaga [Legal dogmatics and legal theory: Conference proceedings]. Miskolc, 2007, 11–26, 68–80 and 245–251, as well as his Law and its Doctrinal Study (On Legal Dogmatics). *Acta*

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 synthesis[22] unifying the

*Juridica Hungarica* 49 (2008) 253–274 and <http://akademiai.om.hu/content/g352w44h21258427/fulltext.pdf>.

[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,[23] 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

theorie in der ersten Hälfte des XX. Jahrhunderts. *Archiv für Rechts- und Sozialphilosophie* 94 (2008) 264–272.

[23] Cf. with para. 5 above.

roots, (3) the classical Jewish and Arabic traditions, contrasted–for signalling the availably 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

[24] Cf. Varga, Cs.: *Theory of the Judicial Process* The Establishment of Facts. Budapest, 1995 and his What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of "The Judicial Establishment of Facts". In: Atienza, M.–Pattaro, E.–Schulte, M.–Topornin, B.–Wyduckel, D. (Hrsg.): *Theorie des Rechts und der Gesellschaft.* Festschrift für Werner Krawietz zum 70. Geburtstag. Berlin, 2003, 657–676.

yet. What I call post modern challenges of and by the law[25] 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* fore-*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 (3aα) 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.