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THEORY OF THE JUDICIAL PROCESS

CSABA VARGA

Theory of the Judicial Process

The Establishment of Facts



Szent István Társulat
az Apostoli Szentszék Könyvkiadója
Budapest 2011

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INTRODUCTION

In the legal thinking of this country, ever since modern times the tradition of legal positivism has held a rather strong, in important respects determinative, position.

What has been added to this by Marxism, with its institutionalized establishment, can be characterized as follows: a spiritual arsenal dating from the last century; its added functions, always present as a rallying-militant ideology, but further developed under Stalinism and reminiscent of a Byzantine *ersatz* state-religion; further a peculiar reductionism and simplification stemming from its critical position. All these were added to the prevailing legal positivism under the guise of socialist normativism,¹ concealing the fundamental voluntarism of the Stalinist political system under a theoretical veil. The destructive effect of these tenets could be identified, among others, in that the legal phenomenon was reduced to a mere will and to an arbitrary concept in a hardly veiled manner, despite a (sometimes exaggerated) verbal search for a socio-historical definition.

Possibly less spectacular, but in the long run just as much damaging, was that impact of Marxism—as established in the region—caused by its obstinate insistence on the last century's epistemological, linguistic-theoretical and scientific-methodological presuppositions. The said impact was even aggravated by Marxism's atavistic antipathy towards any modern linguistic-philosophical, logico- and scientific-philosophical achievements that had in the meantime been completely renewed in the western world, precisely from the final

¹ Cf. SZABÓ (1978), in particular par. 6; as to the theoretical background and underlying message, see VARGA (1985), in particular par. 1, and VARGA (1989).

third of the last century (i.e. by the time when the classical knowledge accumulated in Marxism had crystallized into a more or less final tenet).

Well, if I want to designate the nature, tasks, role and place of the present study—vis-à-vis the intellectual background to our sociological frame of mind—then I have to speak about its precedents, as well as about the major trends that might have had an impact on, or provided an encouragement to, it from anywhere in the world, or at least provided an inspiration.

At the beginning of my path as a researcher from the sixties on, I was motivated by an interest in the actual weight and role of the linguistic-logical components on the functioning of law. At that time my investigations were directed at revealing, within the prevailing positivist approach to law, those mediations, channels and instrumental determinations that have led from the general-abstract determination of the enactment of the law to the concrete-individual determination of the court decision in practice.²

When it became apparent that the research of such and similar problems would become impossible on account of the antagonistic attitude apparent in this country's Marxism against the doctrinal study of law or against any analytical research—stamped as formalistic³—all my related interest could only be expressed in a circumspect manner. One of the results of this was the investigation of formal rationality as the major motivating force behind codification (including its ideals and potentialities).⁴ Later on, the treatment of the juristic *Weltanschauung* (as well as the entire ideology of law-application within the said framework) as an ontological component, virtually became an element *sine qua non*.⁵ My fundamental realization in this train of ideas was that—at least through a socio-ontological

² Cf., among the papers published, primarily VARGA (1971a) and VARGA (1971b).

³ For the only expression in literature, see NAGY (1982), p. 507.

⁴ Cf. VARGA (1975).

⁵ Cf. VARGA (1981), ch. VI, par. 4, in particular at pp. 251 et seq.

approach—the juristic *Weltanschauung* was not merely a false ideology, but (at least as the professional deontology of the legal profession) it filled an essential, inevitable role both in the build-up and in the functioning of modern formal law. That concept of the juristic *Weltanschauung*, according to which norms are capable of determining personal choices with respect to human behaviour, could be criticized because of its ontologically unverified assumptions. However, that would only point to the limited nature of the ontological approach in an ontological explanation. In other words, the concept of the juristic *Weltanschauung* represents a basic component of the institutional-ideological set-up of modern formal law, without which its particular structure (with respect to validity), or its peculiar functioning (in respect of its lawfulness), simply cannot be explained.

This discernment—seeming paradoxical at that time—gave me an impetus that, after nearly a decade, I should revert, in a slightly more tolerant atmosphere and in possession of a growing theoretical experience, to the question of the judicial process. Meanwhile I did not abandon the possibility of a theoretical reconstruction embodying a socio-ontological approach and explaining the ideological constituents according to their actual role. Many essays had confirmed the existence of an open gulf between ideology and actual operation,⁶ showing—as they did—that the discretionary feature (which had been previously regarded as a circumvention of legality) was in fact inevitably concomitant with every process of law-application.⁷ Similarly, it has been demonstrated that the actual process of law-application was a paradigmatic consequence of the entire legal set-up (including presuppositions, attitudes, methods and skills, as well as associated thinking processes).⁸

The fact that my renewed interest in the judicial process became enhanced had met by chance with an international assignment, inviting me to carry out the critical re-evaluation of Kelsen's Pure

⁶ VARGA (1982).

⁷ Cf. VARGA (1978).

⁸ Cf. VARGA (1980b).

Theory of Law. In the course of my work, I found in Kelsen's approach not only an inner logic hardly to be infringed upon but, as I observed the changing accents with the progress of the Kelsenian oeuvre, and followed the gradual reshuffle of his principles, I became aware of their relativity. In this way, the said realignment of the emphases ultimately resulted in differing theoretical explanations of differing principles of classification.⁹

What I tried to make clear and to make use of through a potential theoretical reconstruction had been in Kelsen's own work only a latent inconsequentiality or contradiction, maybe a hardly uttered reference or an observation hinting at compromise. This is how I arrived at the definition of the criterion-generating nature of all that which—in a formalistic-normative process—was due to the fact that the individual acts constituting the said process were procedurally determined, i.e. that they possessed an irreplaceably constitutive character. Furthermore, I became aware of the criterion-generating character of the force of law in procedure which (as the specific legal consequence of the former) excluded any further procedural possibilities; thus creating a specific negative position as to the continuation of the process.

In many directions, so also in respect of the theoretical perception of the judicial process, my thinking was expanded when I attempted to use certain theoretical achievements of legal anthropology (that had been realized for long in the western world but hardly incorporated into our domestic legal thinking) in order to widen the horizon of our legal-philosophical reflexions. At the same time I tried to utilize these for testing some of its tenets, as well as the universality of our entire line of thought.

Ultimately that resulted in the re-thinking of the concept of law. Accordingly, this involved the extension of the concept of law, namely not only with the socio-historical background of the entire practice of law dependent on our cultural presuppositions,¹⁰ but it

⁹ Cf. VARGA (1986b).

¹⁰ Cf. VARGA (1984) and VARGA (1986a).

also entailed the identification of the concept of law as the result of the constant interaction of, merely *a posteriori* definable-identifiable, factors. These aspects and factors are: (1) the enactment of law, (2) the enforcement of law, and (3) compliance with, under the coverage of, the law. Once this step had been recognized, it led to further theoretical conclusions (promising further steps in methodology), according to which the law was nothing but a historical continuum showing certain characteristic points of condensation. This continuum, which is gaplessly made up not so much of the sharp distinction between law and non-law, but rather of the continuously changing borderlines between more law-like and less law-like concepts and components, is ultimately an ever-changing progression showing a trend in which something is turned into law and/or something else ceases to be law.¹¹

Only later did it become revealed that both in the ontological treatment over the ideology-critical level of the juristic world-concept, and in the theoretical description of the phenomenon of law—satisfying an anthropological approach but not attached to a single culture—and, lastly, also in the reassessment of the Kelsenian set of tenets, there was an inherent—methodological—possibility. Namely, the chance of demonstrating not merely the process-like character and the step-by-step self-reconstitution of the phenomenon inherent in the said formalistic-normative procedures but also that this process—due to its operational nature—closed itself step-by-step from within.

I am referring to the principle of autopoiesis in the theory of cellular reproduction of the biological sciences,¹² and in particular to its sociological restatements.¹³ Incidentally, up to now, these have been expressed in a rather rudimentary and doctrinaire manner, especially in their German variants. I met their explicit interpretations for

¹¹ Cf. VARGA (1985).

¹² Cf. MATURANA and VALERA (1972), as well as *Autopoiesis* (1981).

¹³ Cf., particularly, *Autopoiesis, Communication, and Society* (1980); *Self-Organizing Systems* (1981); *Autopoietic Law* (1988); TEUBNER (1989).

the first time in 1987, during my Australian study trip.¹⁴ On the other hand, as I have been able to learn recently, all that may have been included as an early and primitive realization, even cast in a preliminary (though diffused) form, in the course of my methodological path-finding efforts, in fact more than one and a half decades before, which may have played a basic organizational role in my efforts.¹⁵

A quarter-of-a-century ago, when I began my career, two main trends were in conflict with one another in the theory of legal reasoning. The formalistic school intended to prove that the judicial process could be described and defined with the tools of formal logic and deductive syllogism. Formal logic (including the so-called “deontic logic” hardly a few decades old at that time)¹⁶ was opposed by the so-called anti-formalistic trend,¹⁷ just being born and organizing itself into a scientific school. The latter maintained that, at every essential point, there was a situation of argumentation that designated the entire path of legal reasoning, its direction, and the aggregate of its pertinent premises. It was held that it was not the ready-made logical precepts and definitions but rather the arguments which played a decisive role in the way of how to shape and give an answer to those situations. Moreover, the said arguments were changeable depending on the concrete argumentative situation and proved either relevant or irrelevant, strong or weak, as it were. Thus, ultimately, the formalistic-logical relationships could be established only in the context of the said arguments, and subordinated to the latter.¹⁸

¹⁴ Cf. VARGA (1988).

¹⁵ My attention was drawn to that fact in the critical review of the English edition of my work on Lukács [VARGA (1981)] by the editor of the complete works of György Lukács published by Luchterhand Verlag, who was engaged at that time in the autopoietic philosophy of social systems. Cf. BENSELER (1987).

¹⁶ See, first of all, KALINOWSKI (1965).

¹⁷ Cf., primarily, PERELMAN and OLBRECHTS-TYTECA (1958) and PERELMAN (1976).

¹⁸ As to the main arguments of the debate, see *La logique du droit* (1966);

Well, the theory of argumentation proved a revolutionary concept, particularly as it was opposed to the feverish attempts at obtaining a monopoly position by the deontic logic and other formalistic, linguistic-logical approaches. Moreover, its doctrines proved durable. At the same time, I remained disturbed for a long time by its seemingly agnostic idealism in the background. Among others, I was troubled by the way it proceeded in the selection of the arguments, declaring some of them more and some of them less "relevant", or "convincing". At this stage, the argumentation theory appeared to be accepted by a hypothetical "universal audience" as providing the criterion of whether the process was or was not "convincing".

Subsequent developments, however, entailed a renewed outlook in several ways, virtually a complete transformation of methodology.

First of all, as a particular by-product of the struggle of formalistic and antiformalistic trends, there developed the argumentation theory of law. The aim of this theory is to expose that argumentative position (its foundations, its stock of arguments, its processes and rules) which will necessarily lead from the law's own presuppositions and propositions to a given legal decision. The result is subject to a community which argues rationally. Currently, the argumentation theory of law constitutes the prevailing, dominant pattern in western legal-theoretical thinking.¹⁹ Meanwhile (I dare say) neither the theories in question, nor the critiques addressed to them, have pointed out sufficiently that their results cannot be universally valid. More precisely, their validity is completely deontological, i.e. simultaneously ideal-typical and ideological. As it is, here a rational ideal is being outlined, construed and posited, which depends entirely on certain, given cultural assumptions.

Etudes de logique juridique (1966–1968); *Le raisonnement juridique* (1971); as well as—for an overview and valuation of the debate—HOROVITZ (1972) and VARGA (1976).

¹⁹ Chief representative of this trend in Anglo-American relations is DWORKIN (1986); in the European continental law, AARNIO (1977) and ALEXY (1978).

Nowadays, the argumentative approach is meeting with the re-valuation of the tradition on several points. It was mainly general hermeneutics, the importance of which having been admitted as an overall sociological methodology,²⁰ that led to the re-thinking of the problems of legal philosophy.²¹ At the same time, the tradition has also become apparent as an autonomous study, forming one of the key problems in any social approach.²²

Meanwhile, the comparative historico-legal studies also provided some methodological novelties suggesting a change of outlook. Namely, it has been proven by a series of case studies that the development of law was, generally speaking, nothing more than a sequence of imitations, reinterpretations and transplantations. Starting from the fact how the conceptual differentiations and solutions had proven indestructible and were not worn out through thousands of years (though in their time they had been—maybe—created by chance), the said tenet declared the re-adaptation of ready-made, available conceptual tools as a potential main factor of overall development.²³

In the domain of legal theory—in the narrower sense—there appeared so-called “new rhetorics” which attempts to map out the current reality of law from the aspect of the legal usage of language, with surprising success.²⁴

Partly separated from traditional linguistics, general semantics and semiotics were becoming accepted disciplines in scientific-philosophical methodology. Parallel with their coming to the fore, the legal-semantic and legal-semiotical researches were showing promising development. It was shown, for instance, that, in legal reasoning, one had to reckon with a language undetermined in its meaning-context; while in the conceptual transformation there were

²⁰ Cf., in particular, GADAMER (1960).

²¹ Cf., in particular, *Interpretation Symposium* (1985).

²² Cf. KRYGIER (1986).

²³ Cf., mainly, WATSON (1974); for a critical overview, see VARGA (1980a).

²⁴ For a fundamental study, cf. GOODRICH (1986) and GOODRICH (1987).

jumps which could not be accounted for by logic.²⁵ It was further proven that, in the context of linguistic signs, that relation which, in legal reasoning, we were attempting to prove as an inevitable necessity, brooking no alternative, was in fact not inevitable but depended rather on the entire social context of our communications.²⁶

Simultaneously other, decisive blows were also dealt to legal thinking from various other fields.

Perhaps most important among them was the school which aimed at the critical revision of literary criticism and its interpretations. In order to provide a basis for their surprising results, their scholars extended their researches to other fields of interpretation as well. Thus, seeking a parallel with the—then culminating—American trends of the re-interpretation of the Constitution, they finally arrived at the field of judicial law-making. Well, all this resulted in the movement—labelled Law and Literature—to the parallel investigations of these two fields which eventually proved the most radical ones from among the preceding doctrines. Notably, it started from the current contextual position and socio-cultural situation of the interpretator stressing, as it did, the creative significance of the interpretation guided by the former.²⁷

Last but not least, I have to mention the various contemporary philosophical trends (such as the philosophy of science and its critical theories; the cognitive sciences; as well as various trends of linguistic philosophy, language theory, theory of speech acts, etc.), all of them having a considerable importance.

Among these, the theory of the development of science revealed the paradigmatic precondition of all human knowledge; according

²⁵ PECZENIK and WRÓBLEWSKI (1985).

²⁶ Cf. JACKSON (1985) and KEVELSON (1988), further *Semiotics, Law and Social Science* (?) and Symposium (1985–1986); cf. also the hitherto published issues of *International Journal for the Semiotics of Law* (1988–1990).

²⁷ Cf. WHITE (1985), further FISH (1980) and FISH (1989), as well as [Law as Literature Issue] (1982); and, in an anthology-like compilation, *Interpreting Law and Literature* (1988).

to this, knowledge was anchored in a pre-existing knowledge and could be interpreted only on the basis of the former.²⁸

The theories of critical deconstruction showed that even the most natural evidence had such a paradigmatic character. This means that—in their own range—they serve as the premises of all kinds of knowledge. The fact that these are established in relation to evidence means that they are filling an ideological function as well, protecting a given social establishment and value-order.²⁹

A few, by now classic studies in sociology, methodology of science, ontology and epistemology, demonstrated that our social world should be regarded as a structure built on the basis of our society's existence. In other words (even despite any epistemological suggestion, however disanthropomorphical and objectivist they may seem), in actual fact they are the conceptual expressions of the products of our intersubjective social commerce.³⁰

As a by-product of the language-philosophy, legal thinking, too, came under the creative influence of certain Wittgensteinian queries, to wit: What is our relation to reality when we make a statement about it? Furthermore: how can we create the only realistic medium (shortly: our "form of life") which is the precondition of our being able to communicate intelligently at all (and to make reality the subject-matter of our communication)?³¹

When Saussure's general language theory became reassessed partly in the light of neo-Kantian methodology, partly under the aspect of Kelsen's Pure Theory of Law, some classical questions arose again, but perhaps in a more rigorous and consistent manner. I might mention the following ones: What does a system consist of? Wherein lies its unity? Particularly when the only reality backing it is the continuity of human actions, which—in its turn—is linked to the unity of a given system only by our continually

²⁸ Cf. KUHN (1970).

²⁹ Cf., especially, FOUCAULT (1969).

³⁰ Cf. BERGER and LUCKMANN (1966), respectively FEYERABEND (1975).

³¹ WITTGENSTEIN (1945) and YABLON (1987).

referring to it as one of the cases of the said system? Moreover: is there a rule at all, where the only reality consists of the continuity of human actions? While the latter seem to be supported by rules only because the action is referring to itself continuously as the realization of the rule?³²

The present-day researches into the nature of language and linguistic thinking point to the metaphorical character of the elementary operations of linguistic communication and thinking. And this indicates their being embedded in human experience, moreover, also—at every moment—its dependence on man's society-wide personal choices and answers (which, incidentally, become ever further extended in each and every communicative situation).³³

Finally, let us recall the doctrine, derived from linguistic-analytical investigations, on the creative power of speech acts resulting in social realities. That has generated new institutional theories on the plane of macro-sociology, legal theory and—within the latter—the acknowledgment of human conventions (as society-wide games) having the power to create social realities through the means of speech acts.³⁴

All these scholarly trends—still active these days—make us realize how much our theoretical renewal depends on a renewed outlook. It appears that an—already paradigmatic—change must ensue on the science-philosophical bases, viz. in the recognition of the true nature of the conceptual sphere.

At that point, it must be admitted that the picture formed on human cognition having become traditional in this country under the guise of Marxist traditions, has become hopelessly antiquated. In fact, it stands, in comparison with the up-to-date ontology as, say, does the Engelsian tenet on *The Origin of the Family, Private Property and the State* (1884) to the contemporary cultural-

³² SAUSSURE (1915).

³³ Cf., in particular, LLOYD (1966), and LAKOFF and JOHNSON (1980), further LAKOFF (1989).

³⁴ Cf. MacCORMICK and WEINBERGER (1986).

anthropology. (Incidentally, Engels' theory just preceded the formation of the latter.) Or, to continue the simile: it stands as does Lenin's *Materialism and Empirio-criticism* (1909) to the scientific methodology by then dominant in the Anglo-American and West European world, and the epistemological foundations of the latter. (Again, it should be stressed that Lenin had deliberately disregarded—for political reasons—the achievements of the scientific world outlook which had found its revival during the last decades of the past century, having forced us radically to reconsider all our scientific-philosophical presumptions.)

In other words, up to the present day, we can still "boast" of scientific tenets that had become stuck somewhere in time before the end of the last century, that is, before the time that the scientific revolution ended. Those obsolete concepts relate to, among others, the nature of the interpretation of the world and the role concepts, logic, as well as speech, can play both in our contacts with the external world and in the construction of the second reality which we are able to create for ourselves as a purely posited social reality.³⁵

The present book is a part of a more comprehensive venture. It intends (also in view of the necessity of re-assessing the phenomenon of law, possibly in an unbiased manner) to focus on the judicial actualization of law. From this aspect, we intend to clear up a little the nature of speech, concept and logic; furthermore, the determination of and by the meaning; first of all, we intend to throw light upon the particularity of judicial activity as being demarcated from the heterogeneity of everyday life but also from any other sphere of the homogeneity.

We intend to put such questions as:

- what does the judge do when making his decision?
- what are his points of reference when relying on the facts and norms and when using them in his further deliberation?
- and, as a premise: at which point does he arrive, at all, at the facts and norms?

³⁵ Cf. VARGA (1991), part I.

- in what way do the facts and norms appear in his mind? In other words: what does he truly rely on when he says that he is relying on facts and norms?
- how do facts and norms become a decision? Consequently, what does the judge transform and into what? And on what grounds and by what necessities, when he says that the facts of the case and the norms of the law conclude and generate the decision made by him?

In the said framework, the theoretical reconstruction of the judicial assessment of facts must primarily concentrate on the character of the fact and the concomitant set of operations as they appear in the realm of law. Therefore, the author attempts to reveal the cognitive content of the facts stated in law, and of the subsequent operations. And in any case: whatever has a cognitive character in it, how far is it a criterion? Thus, in contrast to that aspect of the judicial decision which focuses on the operations carried out with the help of norms (where the main point is the logical approach, i.e. the meaning of the norm and the logical consequences of that meaning), here the principal questions will relate to the role of cognitivity in the judicial assessment of the facts, that is, the accent will be put on the question marks raised by the epistemological approach.

All these questions obviously indicate the existence of some presuppositions; more precisely: background ideologies motivating our actions. Consequently, if the questions above are to be answered in a restrictive—or possibly negative—way, that does not mean the rejection or refusal of the legal process (or of the legal culture involved by it). No, we merely try to look behind the façade of the actual, true processes. Therefore, our investigation will not be restricted to a mere criticism of ideology. It also tries provide an ontological reconstruction.

The continuity and uninterrupted nature of social practice (while they tend to pop up from behind the façades of particular part-ideologies both in law and in other homogeneous spheres of social action) do not really provide a detailed answer. Nevertheless, this is an answer because it stakes out the direction of the research. And

the determination of the direction will suggest certain methods that will help us to obtain more elaborate answers in the course of future investigations.

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The idea of the book was born in the mid '80s, occasioned by the invitation of Professor Ota Weinberger (Graz) to contribute to the timeliness of Hans Kelsen's doctrine from a Marxist perspective. Suddenly I had been caught up by the topic to such a depth that I eventually missed both the deadlines set and the genuine relevance of Marxism to the treatment of the issue. What I had found challenging instead was the realization of the productive ambiguity of Kelsen's methodological thought, a topic of fundamental importance to which, later on, I dedicated a long paper, now included as Appendix I in the volume.³⁶ The next year I was invited by Professor Eugene Kamenka to carry out research as his guest at the History of Ideas Unit of the Research School of Social Sciences at the Australian National University in Canberra, where I had all the necessary facilities to work on the clarification of the possible links with, and the exploitation of the methodological potentialities offered by, the insight of autopoiesis. The result was a paper discussed at the 13th World Congress on Philosophy of Law and Social Philosophy

³⁶ First in Hungarian with abstracts in French and Russian as "Kelsen jogalkalmazástana (fejlődés, többértelműségek, megoldatlanságok)" *Állam- és Jogtudomány*, XXIX (1986) 4, pp. 569–591 and also in German as "Wechselverhältnis von prozessualen und materiellrechtlichen Regelungen im Recht—eine marxistische Revision von Hans Kelsen" in *Die Wechselwirkung zwischen verfahrens- und materiellrechtlichen Regelungen des Effektivitätskomponente des sozialistischen Rechts*. Materialien des VII. B[erliner] R[echtstheoretische] T[agungen], II, Karl A. Mollnau (ed.) (Berlin 1988), pp. 204–210 [Institut für Theorie des Staates und des Rechts der Akademie der Wissenschaften der DDR, Konferenzmaterialien II] and, in full, as "Hans Kelsens Rechtsanwendungslehre: Entwicklung, Mehrdeutigkeiten, offene Probleme, Perspektiven" *Archiv für Rechts- und Sozialphilosophie*, LXXXVI (1990) 3, pp. 348–366. Cf. also "Kelsen's Theory of Law-application (Developments, Ambiguities, Open Questions)" in *Acta Juridica Hungarica*, 36 (1994) 1–2, pp. 3–27.

in Kobe in 1987, now included as Appendix II in the volume,³⁷ and the drafting of the introductory chapter on presuppositions. When back again in Hungary, I completed the book in Hungarian within the span of one and a half years.³⁸ In 1988–89, when I spent almost a year at Yale as a scholar supported by a grant from the American Council of Learned Societies, I could verify (and also extend) its references while working on its English translation. In the meantime, I have tested parts of the English version in progress by presenting them at various international conferences and also publishing them as proceedings,³⁹ and also by widely lecturing on

³⁷ "Judicial Reproduction of the Law in an Autopoietical System?" in *Technischer Imperative und Legitimationskrise des Rechts*, Werner Krawietz, Antonio A. Martino and Kenneth I. Winston (eds), preface by Eugene Kamenka (Berlin: Duncker & Humblot 1991), pp. 305–313 [Rechtstheorie, Beiheft 11] and *Acta Juridica Academiae Scientiarum Hungaricae*, XXXII (1990) 1–2, pp. 144–151.

³⁸ Published subsequently as *A bírói ténymegállapítási folyamat természete* (Budapest: Akadémiai Kiadó 1992) 269 pp.

³⁹ "The Fact and Its Approach in Philosophy and in Law" in *Law and Semiotics*, 3, Roberta Kevelson (ed.) (New York and London: Plenum Press 1989), pp. 357–382; "The Non-cognitive Character of the Judicial Establishment of Facts" in *Praktische Vernunft und Rechtsanwendung*. Verhandlungen des XV. Weltkongresses der Internationalen Vereinigung für Rechts- und Sozialphilosophie in Göttingen, August 1991, 4, Hans-Joachim Koch and Ulfried Neumann (eds) (Stuttgart: Franz Steiner Verlag 1994), pp. 230–239 [Archiv für Rechts- und Sozialphilosophie, Beiheft Nr. 53] and *Acta Juridica Academiae Scientiarum Hungaricae*, 32 (1990) 3–4, pp. 247–261; "The Unity of Fact and Law in Inferences in Law" abstracted in *Legal Semiotics Papers* (Edinburgh 1989), p. 42; "The Mental Transformation of Facts into a Case" abstracted in *Bulletin of the International Association for the Semiotics of Law* (August 1989), No. 5, p. 6 and, in full, *Archiv für Rechts- und Sozialphilosophie*, LXXVII (1991) 1, pp. 59–68; "Descriptivity, Normativity, and Ascriptivity: A Contribution to the Subsumption/Subordination Debate" in *Theoretische Grundlagen der Rechtspolitik*. Ungarisch-österreichisches Symposium der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1990, Peter Koller, Csaba Varga and Ota Weinberger (eds) (Stuttgart: Franz Steiner Verlag Wiesbaden GmbH 1992), pp. 162–172 [Archiv für Rechts- und Sozialphilosophie, Beiheft 54]; "The Judicial Establishment of Facts and Its Procedurality" in *Sprache, Performanz und Ontologie des Rechts*. Festschrift für Kazimierz Opalek zum 75. Geburtstag, Werner Krawietz and Jerzy Wróblewski (eds)

them.⁴⁰ Since the time of finishing inquiry upon the subject, I have only published a methodological recapitulation⁴¹ and a generalizing statement of theoretical perspectives⁴² relating to it. As to the rest of the more comprehensive venture of outlining a theory of the judicial process, one dealing with the judicial operation according to standard norms, only one paper has been dedicated to it to date, studying the proper place and role logic may have in judicial processes.⁴³

(Berlin: Duncker & Humblot 1993), pp. 245–258; "On Judicial Establishment of Facts" *Ratio Juris*, 4 (1991) 1, pp. 61–71.

⁴⁰ Among others, at universities of Budapest, Canberra, Connecticut at Hartford, Cornell at Ithaca, Miskolc, Münster, New South Wales in Sydney, Sydney, Warsaw, and Waseda in Tokyo, as well as at consecutive sessions of the European Academy of Legal Theory in Brussels.

⁴¹ "A bírói folyamat természetének kutatása" [Investigation into the nature of the judicial process] *Jogtudományi Közöny*, XLIX (December 1994) 11–12, pp. 459–464.

⁴² "European Integration and the Uniqueness of National Legal Cultures" in *The Common Law of Europe and the Future of Legal Education*, Bruno De Witte and Caroline Forder (eds) (Deventer: Kluwer Law and Taxation Publishers 1992), pp. 721–733 [METRO].

⁴³ "The Nature of the Judicial Application of Norms (Science- and Language-philosophical Considerations)" in Csaba Varga, *Law and Philosophy*. Selected Papers in Legal Theory (Budapest: Publications of the Project on Comparative Legal Cultures of the Faculty of Law of Loránd Eötvös University 1994), pp. 295–314 [Philosophiae Iuris], in parts as "Context of the Judicial Application of Norms" in *Prescriptive Formality and Normative Rationality in Modern Legal Systems*. Festschrift for Robert S. Summers, Werner Krawietz, Neil MacCormick and Georg Henrik von Wright (eds) (Berlin: Duncker & Humblot 1994), pp. 495–512 and "No Logical Consequence in the Normative Sphere?" in *Law, Justice and the State*, III: Problems in Law, Arend Soeteman and Mikael M. Karlsson (eds) (Stuttgart: Steiner 1995) forthcoming [Archiv für Rechts- und Sozialphilosophie, Beiheft 60], abstracted as "Law and Logic: Societal Contexture Mediated in Legal Reasoning" in *Law, Justice and the State*. Eyja Margét Brynjarsdóttir (ed.) (Reykjavík: University of Iceland 1993), p. 99 [16th World Congress on Philosophy of Law and Social Philosophy].

1. PRESUPPOSITIONS OF LEGAL THEORY AND PRACTICE

In the legal cultures based on the institutional-ideological set-up of modern formal law, the institutional framework and the tools of the judicial establishment of facts—including the overall concept of the process—are built on definite presuppositions.

According to these: (1) Judicial decision-making is a two-tier process. The two components—although built upon one another—can be clearly demarcated. The demarcation is not only a practical possibility but also an inevitable necessity, since within the decision-making two processes of different natures are to be found: the fact has to be established, while the law has to be applied. Consequently, the judicial decision-making process is nothing else than (2) the application of a normative value-standard to the reality, as it has been reconstructed on the basis of cognition. That is, in fact, a complex process, in which a normative pattern is being applied in practice to the outcome of theoretical cognition. Accordingly, the process is composed of cognitive and volitive acts relying on each other. It follows from this that (3) the theoretical moment will dominate the entire process. As it is, the fact—in itself—is objectively given. Thus, the fact has to be taken cognizance of; and the outcome of the cognition will determine the entire process. In fact, it is the cognition of the fact that starts the process, and the quality of the fact will determine the character of the procedure as well as the decision to be made as a part of the procedure. Thus that which happens with the facts during the judicial process will replace their cognition in any other way. Accordingly, the outcome of the judicial cognition is characterized by the latter's objective truth—that being the criterion. As usual in the domain of cognition, the outcome will be

expressed in a precept which is necessarily capable of being verified or falsified. All the more so because (4) the judicial cognition, essentially, cannot be limited. Its regulation—if any—has an auxiliary character only: it merely assists in fulfilling its role. Namely, it may support keeping the cognition within the desired channel, further, it helps to conclude the cognition within a reasonable time.

Consequently, judicial cognition is, by itself, non-specific. Its particularity consists of its being non-recurrent, its being oriented on a single past event (which shows an affinity with historical cognition), and of its eventual dramatic effect.

These presuppositions do not stand alone; nor did they develop by chance. They derive from the ideological environment which regards the judicial decision as a syllogism, consisting of a rule and of a statement of fact subsumed under the said rule, and of the logical consequence derived from their premises.

In continental Europe, the recognition of customary law was linked with the judicial acceptance of socially-approved practice even at an early stage of development, while subsequently it limited and reduced the law to so-called positive law, elaborated through definite processes and enacted in formal, written texts. In the cultures of Common Law the judge, availing himself of the art of distinguishing and the possibility of overruling, may insert certain intermediate steps into the decision-making process, nevertheless, he will always refer to some kind of a general rule, and confirm, by his decision, a "custom of the realm" conceived of as existing from "time immemorial".

Well, whichever the system, in western legal cultures the syllogistic form (whether conceived as the logical reconstruction of the operation or only as its brief, indicative form) will suggest such situations and conditions, in which there is a pre-existent norm, serving as *praemissa maior*, as well as the statement of facts (fully accidental from the aspect of the norm), serving as *praemissa minor*; the application of the former on the latter will yield the judicial decision as a logical necessity.

Thus, the syllogistic formula projects for us a situation (with an enhanced imagery and suggesting the inevitability of the process)

which expresses the rule of the general. It should be known that he who possesses the general also possesses the inherent particular. For the general becomes realized as an individual in that which is a case of the former. Here the general is everything, the only palpable, tangible factor. It is all that is capable of action, that is active, that is capable of moving things.

As against this, the individual will solely and exclusively exist as a case of the general, a manifestation, a mere example, in that which would be—otherwise—purely accidental. Still, however dependent the individual may be from this aspect, yet—when it exists—it will be perceived. When that happens it becomes liable to apply on itself, to realize on itself, the general. In other words, the individual provides an opportunity for the general to manifest itself in it.

All this will generate, inevitably, the idea of safety, of an inevitability, of an almost automatic mechanism. In fact, we learn about the general that it becomes realized. And of the individual, we learn how its realization has come about, namely by the subsuming of the individual under the general.

At the same time, the above presuppositions will trigger further presuppositions. Every presupposition needs a certain environment. So also the syllogistic form (whether conceived as a means of reconstruction or just as a genuine medium) can only be imagined in a definite intellectual atmosphere. Ultimately, we have to make a choice: the logical formula is either the true mental reproduction of some process, or just a game played with the help of symbols.

Well, the said formula cannot provide the essential characteristics of the process in question, unless (1) it is backed by a language in which the meaning is encoded, and so the relation of the signs and the concepts represented by them is unequivocal, and their linkage is fixed; further if (2) the nature and structure of the cognition is such as can ensure the linguistic expression of the subject of cognition by way of concepts and as the combination of concepts, in a sufficiently exact manner.

These presuppositions have been self-evident throughout the centuries and did not have to be proven. That fact is shown by the

circumstance that, for a long time, the problem of presuppositions, or the specific problem of the fact established by the court, did not even arise. (And that applies both to educational curricula and scholarly treatises, as well as to philosophical argumentations.) Simply, scholars did not perceive any specific character in this problem which would differ from any other domain of human perception.¹

In exceptional cases which were—seemingly—contrary to the above trend, i.e. when the problem of law-application was treated in an epistemological context, it will become apparent that that was due to the special nature of the approach (e.g. a conception defined by the Leninist theory of reflection). Accordingly, in such cases the doctrine did not intend either to support or to criticize the presuppositions (whether admitted as self-evident or merely laid down as ideological tenets).²

I should add that even the classic fundamental works of this century, having engaged in a sweeping criticism and having helped to destroy the existing myths and founding a more realistic juristic world-concept, even they have left these notional traditions and ideological *Weltanschauung* essentially intact—despite their seemingly all-embracing and annihilating criticism.

Notably, in the American movement formed at the end of the 19th century that had argued the obsolete clichés of the juristic outlook and considered the law as a social engagement by putting the judge's action into focus instead of the rigid textbooks, Jerome Frank played an outstanding role. Frank saw our human claim for legal certainty merely as an archetype, a subconscious extension of

¹ Let us mention, by way of example, from the American heritage, rather inclined to conceive law as a special craft and art, the following authors: CARDOZO (1921); POUND (1923); and SUMMERS (1982). From the relevant Hungarian literature, see KIRÁLY (1972), which is perhaps the last venture, outstanding even by international standards by its epistemological-logical outlook; further TAMÁS (1977), regarding the philosophical foundations.

² For instance—in the said narrow circle—PESCHKA (1985) (which is essentially a doctrine of legal sources), further PESCHKA (1965), ch. III, par. 2 (being a theory of norms), lastly PESCHKA (1979), ch. I, par. IV, and ch. II, par. 1, all representing the adaptation of the theory of reflection on the problems of law-application.

man's yearning after a paternal authority. In his eyes, legal certainty was nothing but wishful thinking—unsupported by theory and therefore indefensible.

In his view the judicial event (individual, irreproducible and unforeseeable) was the moment where and in which the law became defined and identified as law. He was the pioneer, maybe the greatest and unsurpassed one, among those scholars who developed their deep scepticism into a theory. He was also among those who doubted that the facts and the norms constituted some kind of concrete and determining factors of our environment, and that each played a decisive role in legal proceedings.³ Himself a practicing lawyer, judge of the Federal Appeals Court, he nourished a particularly devastating opinion on the judicial system and especially on the jury system, as well as on the judge's role in establishing the facts of the case. He found that the said process depended, on essential points, on the judge's subjective judgement and was therefore both uncontrolled and uncontrollable.⁴ His standpoint was both sharp and clear: "For court purposes, what the court thinks about the facts is all that matters. For actual events [...] happened in the past. They do not walk into the court."⁵ As it is, "the 'facts' [...] are not objective. They are what the judge thinks they are".⁶

And yet: from his work, from its emphases and context, it becomes apparent that, through all this, Frank did not want to deny the facts themselves, nor their being approachable through cognitive means and, eventually, their actual cognition. Just the opposite. As a practicing judge, he considered that the stake of the entire

³ Subsequently, such were the impacts (on the basis of psychology and, especially, psycho-analysis) of, e.g., SZABÓ (1941) and SZABÓ (1942); further (particularly in the wake of the concept of situation of the existentialist philosophy) of COHN (1955). As to the devastating criticism of the former, cf. SZABÓ (1955), pp. 485–486, respectively, PESCHKA (1963).

⁴ FRANK (1948), pp. 924–925.

⁵ FRANK (1949), p. 15.

⁶ FRANK (1930), p. XVIII.

judicial process lay in the facts, in the fight centering around the allegation and proof of the facts; in the dramatic fight of the two opposing parties in the closure of the fight by obtaining the court's conviction. (Let us not forget: his everyday experience in the appellate courts of the US must have borne this out.) Accordingly, his critique relies exactly on those presuppositions we have outlined above. It seems as if his entire work, his bitter recriminations, had been aimed at the full and undisturbed realization of these presuppositions. Thus, the said presuppositions not only provide the framework of his line of thought but they also fill it with content. The myth-destroyer, praised all over the world, himself nurtures a myth. The ideal he expresses, and by which he would measure the uncertainty, the accidental nature, and essential subjectivism of judicial fact-finding, is not excluded in principle. Nevertheless, he did not realize the difference in category by which the judicial establishment of facts deviates from the everyday or scientific cognition. Instead, he sought the reasons by which the "finding" of the "true facts" could be replaced by the "fight" waged for them, in the institutional set-up of the procedure, more precisely, in the role assigned to the judges of fact. And finally, this is what prompted him to criticize, with an unprecedented sharpness, the "unpredictability" of the judicial system. While he does not say so expressly, what he means is that the system, in a different, corrected set-up, i.e. under a changed principle of operation, could function in another way.⁷

Parallel with American realism, on the European continent, another trend was developing: one that perhaps led to less spectacular but tighter theoretical results. I am referring to the neo-Kantian approach anchored in the German classic philosophical traditions. The scholars of this line made an effort at a methodological consistency and purity. In other words, they tried to avoid the short-circuiting of the realms of *Sein* and *Sollen*, i.e. the blending of these two aspects. While the realism forged a theory from the

⁷ Cf. RUMBLE (1968), pp. 116–136.

individual and accidental components of judicial activity, neo-Kantianism (starting from its own philosophical and methodological assumptions) erected an impressive theoretical edifice on the pattern of the law, its functioning and principles. Frank had identified as law that which according to him was the only reality while being, in his view, merely accidental in the process; more closely: the outcome of merely accidental elements. As opposed to this, Kelsen would start just from that point, i.e. from the formal enactment of law.

Now, while it is true that the enactment defines the ideal operation of the law, yet it does so in a way that in the absence of any other possibility (*viz.* any possible limitation), eventually, any actual function could become ideal. In fact, any kind of actual operation may lead to final judgement and force of law. (As it is, by a purely accidental practical factor, namely by the mere fact that the given judicial process remained unassailed or was unassailable.) On the other hand, according to the said formal enactment, force of law is nothing but the declaration of the legal finality. Exactly, it is the declaration of the result in question which is situated "within" the valid precepts of the law, since it "corresponds" with the said precepts.⁸

This amounts to the assertion that each step in the decision-making process has a normative character and significance. Each step, therefore, is a constitutive contribution to the decision to be taken as an element which is the product of the very process. Thus, not a single element or moment of the process is, in itself or by itself, given.⁹

Kelsen stresses that this constitutive construction is a creative process and not a cognitive one.¹⁰ Nevertheless, this creation is not quite alien to cognition. While the process in question will necessarily be included, yet the legal facts that constitute a case are

⁸ KELSEN (1946), pp. 154–156. Cf. VARGA (1968), pp. 578–580.

⁹ KELSEN (1960a), ch. 35, par. g/a.

¹⁰ *Ibid.*, p. 240.

derived from the "natural" set of facts. Consequently, the said process shows "a certain parallelism" with the cognition.¹¹

Well, while in Frank's oeuvre it becomes apparent that behind the criticism of the apparently non-cognitive outcome of the judicial process there hides the possibility—even outright postulate—of cognition, in the case of Kelsen the philosophical-textual context suggests that, for him, the non-cognitive feature and the parallelism with cognition are not important individually, but only in their joint statement.

In Kelsen's opinion, both the "self-existent" facts and the "procedurally created" ones¹² are essential in their heterogeneity and concomitantly in their parallelism. It seems that that was the only possible way for him to transfer the non-law into the law. In other words, that enabled him to create the possibility of transition from the domain of *Sein* into that of *Sollen*, without infringing methodological purity. And, for this purpose, also to conserve all that had been given in the *Sein* by transcending (i.e. negating by retaining) them in the *Sollen* to the necessary extent and manner. This is what he meant by sublation.

¹¹ *Ibid.*, pp. 245 and 247.

¹² *Ibid.*, p. 246.

2. THE FACT AND ITS APPROACH IN PHILOSOPHY AND IN LAW

There is no privileged road to explain the nature of facts in philosophy, either. If I only refer to Marxist tradition and some well-known formulations in it, e.g. the range of problems spanning from Lenin's *Philosophical Notebooks* to his *Materialism and Empirio-criticism*, one may find notwithstanding some theses backed by common sense. For instance, what exists as reality is an unlimited totality both extensively and intensively. Totality is the object of human cognition, which can only be approached selectively. The prime means of selection is the human appropriation of the external world through the mediation of its conceptualized linguistic representation. Representation means selection, by naming what has been made the particular object of human cognition. As is known, human cognition can only proceed through the search for links and connections with the data of previous knowledge. It also makes the encounter of humankind with reality mediated from the very start. It is needless to say, that the encounter in question is also at the same time a function of the sensational, cognitive and conceptual human sensitivity of the human subject. That is to say, all we know about human cognition is not even comparable to the problems we face when understanding a "black box" of cybernetics, as the most we can obtain is nothing but hypotheses about outputs (in order to conclude upon the analysis of outputs what the inputs are aimed at having an inference concerning the inputs upon the basis of the analysis of outputs); and our knowledge about human information processing is even less reliable. Further we have to realize that no reference has been made as yet to the impact the linguistic formulation of ideas and the linguistic

structure of thinking (i.e. their limits and ambiguities) have on the cognition of reality, channelling it into given paths that are defined by previous cognition and thereby also prejudicing it.

2.1. The Understanding of Facts

The most relevant teaching of all what we know of facts is the conceptual ambiguity of the very notion and the variety of its uses, itself a source of philosophical debates.¹

For philosophy, a fact is not what in reality is but what has been asserted about it.² When referring to a fact ("it is a fact that...", "it is established as a fact that...", etc.), we have a statement about our linguistic communication instead of reality. Accordingly, facts are what factual statements refer to³ or, in a strict formulation, "[f]acts are what statements (when true) state; they are not what statements are about."⁴ That is to say, fact is what makes a statement true or false. It is something of a connection between things but not a thing itself, as things can only be named, in contrast to facts that are stated.⁵ Fact is attached to speech acts to such an extent that "[i]t is highly misleading to say that if a new thing comes into existence facts about it come into being along with it. It is better to say that what comes into being is a new subject for factual statements to be about."⁶

Providing that I seek a criterium not in the "truth" of the statement (as one of the possible results of cognition) but in

¹ Cf. SHORTER (1962), pp. 283ff.

² "The thing is not a fact; only *that* from the thing is a fact *that it exists...*" E. Husserl in the debate of June 21, 1906, of LALANDE (1983), pp. 338–339.

³ MACKIE (1951) as summarized by HERBST (1952), p. 93; as well as MACKIE (1952), p. 121.

⁴ STRAWSON (1951), p. 136.

⁵ György MÁRKUS' note 6 in his Appendix to WITTGENSTEIN (1921), p. 181.

⁶ HERBST (1952), p. 112.

answering the question of what entitles me to say that I take anything to be a fact, I can only reply that, in one way or another, I am in a position that I can attest to it, as I have a decisive argument or consideration in favour of stating it without doubting it. Analytically, a statement of fact is distinguished from matters of opinion by its direct and authoritative character.⁷ The differentiation between fact and opinion here is not the one of truth and the lack of it, but of the certainty of truth and the absence of it. Or, it is nothing else but the distinction between *episteme* and *doxa*, already known in the classical Greek philosophy and formulated by Plato who, by chance, happened to exemplify it by merely the judicial establishment of facts. "When, therefore, judges are justly persuaded about matters which you can know only by seeing them, and not in any other way, and when in judging of them from report they attain a true opinion about them, they judge without knowledge, and yet are rightly persuaded, if they have judged well. [...] And yet, o my friend, if true opinion in law courts and knowledge are the same, the perfect judge could only have judged rightly without knowledge; and therefore I must infer that they are not the same."⁸

In addition to the approaches outlined above, there are other explanations as well. Ontological attempts at reconstruction, for instance, aim at overcoming the reduction of facts to their linguistic statement. One author defines fact as a particularized universal. When perceiving any property, e.g. recognizing something as red, I take notice of the property not only as a peculiar possession of this but, at the same time, as a feature possibly common to other things as well, that is, I take notice of the property in question as a potentiality of this for resembling in some way other things. Accordingly, fact is nothing else than the exemplification of a property, or a relationship, by a particular.⁹

⁷ *Id.* at pp. 94–95.

⁸ PLATO, 201[b–c], at p. 408.

⁹ SPRIGGE (1970), pp. 82–85.

Finally, there are also attempts to reach a synthesis. According to the more sophisticated approach, "a fact is the objective correlative of every true descriptive statement".¹⁰

Such a definition already makes it possible to formulate reasonable questions and also to suggest further notional distinctions. As to its extension, comprising only what descriptive statements refer to as entities objectively existing in reality, it excludes everything that is a mere function of evaluation, ought-projection, human interpretation, or ordering. As to its contents, the question of whether it may be said to be true makes only a difference within the boundaries of description, differentiating it mainly from what is, as yet at least, unproved or unprovable.

After all, can it be claimed that what is a fact does actually also exist? The answer is rather complex. Partly and in a metaphorical sense: yes, since we have claimed the facts to be objective. Partly and also definitively: no, since it is merely the correlative of something else, consequently, it only exists in dependence on it. As expressed simplifyingly but basically, anything can be a fact only provided that we have formulated a statement on its existence as a fact and thereby asserted that it exists. For what is stated to be a fact has been named from within a totality in order to make it a subject of human communication. Or, any potentiality not actualized or never to actualize can also be qualified as a fact.¹¹ Also in line with it, nomic necessity and hypothetical force, characteristic of laws established by science, turn to be a possible component of facts, too. For scientific laws are beyond the sphere of anything actual and of what can be established by observation and experiment. They consist not only of generalized statements but of the latter's transformation into an axiomatic foundation stone of the system of scientific explanation as well, being the result of human

¹⁰ WEINBERGER (1979), p. 81.

¹¹ *Id.* at pp. 80–81. According to Weinberger, such a "fact-transcendent fact" is, for instance, the potential behaviour of a bar of iron if connected to a source of current or the half-life of Uranium.

cognition, involving the mind-dependent elements of both human decision and transfactual imputation.¹²

All this, however, is not an answer to the point. In order to be more specific, let me raise a question related to a domain apparently far away: what is what we call "the aesthetic"? What does the aesthetic quality consist of? The answer, as known, is polarized in two directions, both historically and logically.¹³ The first is the one of intuitive materialism conceiving of the world as the total sum of elementary parts and of their configurations. The world pictured as the realm of atoms is for the child: if he has a sharpened eye, he can observe, moreover, pick up and collect them; he can even make a bomb out of them (which is rather trivial an idea as inspired by the popular perception of the make-up of dynamite and trinitrotoluol). Accordingly, the aesthetic quality is objective in the same way and to the same extent as are the elements of the world and their configurations. The second is the one of naive solipsism. It suggests: I can feel pain when, let us say, knocking against the table. However, the mere fact that, by seeing and touching it, I feel I have perceived something table-like does not mean that I have known its nature to be a table. The image suggested by its sensing as something table-like is only one of the possible explanations I can have. To say it to be a table involves my own contribution, too, to span the gap between the elements of perception and their humanly conditioned interpretation; an interpretation which, in its turn, substantiates its conceptual qualification. Or, the aesthetic quality is not something exclusively external, either. It lies in us, at least partly, in our making it. As a function of human conditioning, it may differ according to social strata, societies, historical periods, cultures. To put it another way, the human act of its identification is not simply mere reaction; at the same time, it is genuine creation.

Can what is called aesthetic be the property of a crystal hidden in the bowels of the earth or an unknown planet? Where does the

¹² RESCHER (1969), pp. 185-195.

¹³ POSPERS (1967), pp. 52-55.

aesthetic quality of a picture taken by an electronic microscope disappear to when transformed into coded signs or computerized graphs? I can answer in only one way: I, who react to, by acting upon, am involved in person in the undertaking in question. I must actually have added something from me (an exclusively human property, like pleasure or imputation) to the subject I claim I am only reacting to.

Or, what I am talking about is not a case of subjectivization or relativization of reality but only its human appropriation. For obvious reasons, it presupposes not only the object to be appropriated but also the subject appropriating and his act of appropriation as well. It is relational categories that stand for the linkage of some feature of reality with its human appropriation. Relational categories are two-poled. On the one hand, they convey messages about reality in an expressly non-disanthropomorphizing way. On the other hand, the messages they convey are not about reality *in se* and *per se* but about what the part and parcel of reality intellectually appropriated means or signifies to human practice. Certainly it is the structure of language and the human world picture (with its tendency to render over-absolute the process of disanthropomorphization in science) that are to explain why relational categories are expressed mostly in a veiled form, positing as something in itself objective what will actually be objectified only by the subject, as his/her relationship to it. Or, it will always be revealed in any case that, when you posit the quality to which relational categories refer, both the subject and the act of positing have indeed already been pre-positing in it.¹⁴

Well, may it be a similar case when we question ourselves about facts? For one certainly can assert that anything that exists does exist without needing to be asserted. And when I assert anything to exist I do so not for its sake but in order that I am related to it by mentally appropriating it. And a concept of fact identified with the one of reality would for obvious reasons be senseless. Its own

¹⁴ LUKÁCS (1963), p. 175.

concept stands for the object as appropriated by the subject. Accordingly, nothing but intellectually differentiated and, thereby, appropriated parts of reality can be called facts. (Appropriation, of course, does not need to be done by a conventional statement. For instance, the fire and its burning effect can be a fact to anyone able to experiment with that.)

2.2. The Cognition of Facts

In sum, the notion of facts refers to cognition that can lead to the formulation of a true statement.

In the context of the present topic, cognition as ideally conceived has at least three relevant features: it is, in point of principle, (1) not prejudiced by any particular interest or purpose; it is (2) not bound by any paradigm; it is (3) open to any contribution.

(*Ad 1*) As to its freedom from interference motivated by particular considerations, it seems to be a justified claim that cognition, isolated from the heterogeneous effects and influences of the practical sphere, be directed exclusively at doing its job. That is, the theoretical shall be separated from the practical. Such a claim is inherent in terming cognition "reflection", and its reality, "correspondence". Or, it suggests a more or less mechanical and, in any case, clearly reconstructive process which happens to materialize in the human body as within a sensation-processing system. Describing cognition as understanding, instead of reflection, is apparently a neo-Kantian characterization, which detects value aspects in the knowledge of human affairs.¹⁵ However, as it is known from the Gestalt psychology, human response to any situation is a whole, which cannot be divided into parts without destroying that whole.¹⁶ Modern epistemology considers previous knowledge that substantiates, shapes, and also delimits all kinds of cognition as a

¹⁵ Cf., e.g., RICKERT (1899); SIMMEL (1918); WEBER (1922).

¹⁶ Cf., e.g., KOFFKA (1935).

specific world concept to be a part of the whole.¹⁷ Whatever object it has, cognition will be built upon and substantiated by cognition. Making use of any previous knowledge presupposes its interpretation and thereby leads to the topic of hermeneutics.

(Ad 2) As to the paradigms unbound, I have in mind the fact that the bounded paradigm of the non-revolutionary phases of scientific development¹⁸ means not simply the presence of a set of rules or axioms codified but the predetermination of the whole process by ordering principle(s) embodied by "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners".¹⁹ It is the case of clusters suggesting frameworks and procedures for cognition, running from problem-sensitivity, through the ways of the search for paths of solution, to its ultimate proof and testing; clusters that both organize the process and provide final criterion for its result to be acknowledged as being within (by belonging to) the system. That is to say that science becomes actualized in human cognition and, in its turn, is also challenged by it. Cognitive processes end by either throwing within its framework or breaking through it. That is to say, paradigm is not a factor of predetermination but an ordering principle, the actual impact of which (i.e. the acknowledgment of the result reached as being within the system) can only be assessed by an ulterior reconstruction, that is, posteriorly.

Therefore, both in point of principle and as a matter of fact, there is large enough room for paradigms to compete. Albeit language as the instrument of notional identification "can achieve approximation at most", i.e. do its job through the endless series of classifying generalizations,²⁰ cognition is aimed at describing its subject and not simply pigeonholing it into one of a series of pre-codified cat-

¹⁷ Cf., e.g., POLANYI (1958).

¹⁸ Cf. KUHN (1970), Preface and ch. 5; as well as, in the context of legal science, AARNIO (1984).

¹⁹ KUHN (1962), p. viii.

²⁰ LUKÁCS [1971] II, p. 195.

egories. In other words, cognition is ideally meant to be free from any bonds. That is, the fact that it remains within a system of paradigms only proves that all the theoretical doubts that may have been raised about its result have finally been resolved. And until the set of paradigms is able to function as a system, it serves as a framework to manage tensions and not in order to prevent them. It makes it possible equally that old paradigms will be reinterpreted²¹ and new paradigms developed and/or introduced, until they reach the point to dissolve the entire system.²² And it is to be added that the paradigm is a cluster, that is, a continuum displaying density in certain direction(s). Accordingly, it can manage tensions between competing, moreover, conflicting trends; it can manage the clash of subsystems with parts crossing, moreover, negating one another.

(Ad 3) As to the freedom of contribution to cognition, there is no limitation on whom, when, where, and in which way it can be done. Of course, socialization as manifest in the continuous re-establishment of conventions is present in cognition in all its moments from the way of how to conceptualize a problem, through the way of how to link it to an already known paradigm and how to argue for and against it, to the way of how to build a theory from it. Or, even the search for truth can be interpreted as a game played by the rules of its own;²³ in consequence, each and every statement of fact from everyday communication to scientific conceptualization is normative in the weak sense,²⁴ regarding all this not so much as an insurpassable limit for, than as the medium of, cognition.²⁵

²¹ Cf., e.g., SCHNELLE and BALDAMUS (1978).

²² The dialectics of contradiction and unity with tensions leading to a change of systems is well described, in respect to the paradigms of basis and superstructure, by MARX [1859], pp. 182–183.

²³ BANKOWSKI (1981), p. 265.

²⁴ A remark I owe to consultation in 1987 with Professor Robert BROWN, History of Ideas Unit, The Research School of Social Sciences, The Australian National University, Canberra.

²⁵ E.g. *The Social Production* (1977).

Or, the circumstance that social activity is preconditioned by and, at the same time, results in socialization defines conventionality as the *sine qua non* factor of social activity. All in all, human cognition is both shaped and delimited by socialization, albeit it is by far not exempt from revolutionary changes in consequence of modified conventions, reinterpreted paradigms or transcended bonds. All this is to say that cognition is a part of human practice, subject to common determinations. The material and the social world of man is therefore also a product of his cognition, man and his nature being at the same time the product of the world he has created.²⁶

All what has been set out includes the acknowledgment that, *first*, there is no cognition in itself, as it could only be nothing but the reproduction of totality in its totality. Maybe it is sufficient to remember the mechanism of the establishment of elementary facts (purposeful selection, typification, generalization, ideation, metaphorical linguistic expression, balancing between the taxonomy of direct observation and types), the paradox of experimentation (presupposing selection, by decomposing artificially what has been a functional unit, and then, by throwing light on the decomposed component through shadowing its environment), and also the nature of relevancy, i.e. of the attachment of individual problems to anything known, identified as a procedure of problem-solving (in its original sense, relevancy is nothing else but the elevation of a thing out of its environment in order to see it, which in its turn corresponds to the Greek notion of "the truth", i.e. of *ta lethēs*),²⁷ in order to state: there is no cognition in abstract generality but only and exclusively one proceeding in given, individual contexts, picking out single components of a natural unit, within the system of fore-knowledge, "stemming from the predetermined goal of cognition".²⁸

²⁶ Cf., e.g., ISRAEL (1972a), p. 79.

²⁷ KENDAL (1980), pp. 2, 3, 12, 21–22.

²⁸ LUKÁCS (1963), p. 164.

In consequence, the system of paradigms, their context and goal are varied (and variable) to an extent defying predetermination. One cannot even set the level to qualify anything as a fact "elementary" or "atomic" either. For everything can also be described and construed in another way. And what is a "fact" for me does not necessarily "exist" for anybody else.²⁹ A bullet, the edge of a knife or a needle may equally be described by the terms of chemistry, physics, or molecular physics. Description of weight, solidity, hardness, or impenetrability is not incompatible with describing the same object as an almost empty space, only sparsely filled with some elements. For totality is a concept, and not a phenomenon. It is to denote and characterize something that exists. Any notional component of the totality is also a concept, and not a phenomenon. It is to denote and characterize something that exists within this totality. What is denoted and characterized in one way can be denoted and characterized in another way as well. Differing ways of denotations and characterizations do not necessarily exclude one another; cognition is just as much infinite as its subject, both intensively and extensively. Albeit, in point of principle, I may project the (only notionally conceivable) sum total of facts making up the world;³⁰ but even by that I cannot reconstruct it; the only thing I can do thereby is to model its conceivable structure notionally. This is why cognition, no matter how much its ambition is nothing but a reflection, is of a creative character and significance.

And it is to be added to all this that, *secondly*, "cognition" does not exist in a pure form, either. For contrasting theory and praxis is nothing but setting extreme points for conceptual differentiation in analysis. In reality, cognition is, albeit distinguished from, not completely detached from everyday consciousness; and praxis is the outcome of knowledge. To put it another way, with its heterogeneous structure, everyday life is the basis and end result of all

²⁹ A statement also due to Professor BROWN.

³⁰ E.g. WITTGENSTEIN (1921), par. 1-2.

human endeavours, including man's homogenizing activities (religion, law, science, arts, etc.) as well. In a constant flux, all these are to transcend one another, and it is their total motion built and superimposed upon it that shapes man's world.³¹ Obviously, in addition to unilateral moves, it involves interaction as well, in the course of which both the heterogeneous sphere can conflict with each and every of the homogeneous spheres, and each and every of the homogeneous spheres, both with its own components (e.g. law with its own competing strata,³² or science with its own individual trends) or with any other objectified spheres (e.g. law with science,³³ or even the law's own projection with the professional ideology it is built upon).³⁴

2.3. Brute Fact and Institutional Fact

The cognition of natural reality, as seen above, is itself part of social praxis and, therefore, stating a fact of it is normative in a weak sense. By stating it we assert that what it refers to does exist objectively. Obviously, it is only their cognition that is preconditioned by purposeful human activity; for it is us who relate to them. In contrast with natural reality, what is referred to as social reality does not exist independently of the totality of social existence, i.e. of the human-made world and the human understanding of both it and the human nature within it.³⁵ To put it another way, social knowledge is presupposed by the tacitly assumed set of stipulative propositions concerning man and society and their relationship.³⁶

³¹ HELLER (1970).

³² Cf., e.g., VARGA (1989).

³³ Cf., e.g., VARGA (1981) and VARGA (1985), part II.

³⁴ Cf., e.g., VARGA (1990).

³⁵ Cf., e.g., PARAIN-VIAL (1966a), ch. 6.

³⁶ E.g. ISRAEL (1972b).

Therefore, stating a fact of it is normative in a strong sense from the start,³⁷ for social praxis also creates its subject socially.

The notional distinction of brute and institutional facts stands for the differentiation of the failure of disanthropomorphizing the cognition of the man-created world both in everyday life and social-science thinking from the unconditional claim to objectivity and disanthropomorphization completed in natural sciences.

The distinction is based on the question: is it sufficient to characterize facts by their physical, chemical, etc. traits only, or their description by their physical, etc. properties is, at most, good for specifying the event through which they have become actualized, but not for defining them in their distinctively social existence? For there are facts that are preconditioned by human institutions, established by constitutive rules. "Every institutional fact is underlain by a (system of) rule(s) of the form 'X counts as Y in context S'."³⁸ It is only such a distinction that confers a reason for distinguishing uttered words from a "promise", the bringing of a quantity of potatoes to my house from my being supplied by the grocer, a ball game from "soccer", or the solemn meeting of two of opposite genders and their communication with a third person from a "marriage", etc.

2.3.1. Process-like Development

The institution is a complex phenomenon in a constant formation, which cannot simply be qualified as to have been "constituted" or not. Furthermore, it cannot simply be said that a given fact of life is the case of an institution or not. For institution is not a clear-cut classifying instrument in society. Institutions are established in order to set frameworks for and standardize forms of social practice; to make it conventional through the patterns which

³⁷ It is the expression of ISRAEL, cf. note 26.

³⁸ SEARLE (1969), pp. 51–52.

institutions offer; and, thereby, also to make it normative to a certain extent.

It goes without saying that I am free to act, independently of any pattern. In such a case, the classification of my behaviour will presumably establish its non-institutional character. On the other hand, when patterns are observed, there are several alternatives. For instance, when pattern conformism is kept to the end, I may feel to be entitled to meet all consequences attached to the institution. If, on the contrary, I insist on continuing in a non-institutional way, I may be said either to have remained within some institution but, notwithstanding, I am obliged to be faced with the consequences of my reluctance to comply with it completely, or to have been deprived (*ex nunc*, or even *ex tunc*) of the acceptance of any institutional relevance for my behaviour.

All this is a process proceeding in time: the institution is the result of its having been constituted. The rule of constitution offers a framework for our argumentation on the process as institutionally patterned, on the weighing of the pros and cons of a qualification until it is finally made, and also for the substantiation of the normative conclusion to be met when the qualification is already made.

In any case, some further, notably normative, rules may also be needed to channel institutional processes after the institution as such is constituted. (To take the example of chess, the structure of the chessboard and the role of the chess-pieces are undoubtedly of a constitutive character. But a constitutive definition of the moves would obviously exclude from the very start the possibility of breaking game rules and cheating in chess. For without the possibility of broken rules, there would be no sanction, either, with any deviant move having the only consequence of *eo ipso* disqualifying, and thereby ending, the whole game. Actually, there is such an ending but only as one of the sanctions, namely the most punitive.)³⁹ The basic situation is therefore more complex. Conform-

³⁹ The necessity to have both normative rules and possibility for cheating is argued for by Weinberger in his Introduction to MacCORMICK and WEINBERGER (1986), pp. 23–24. At the same time, the thorough analysis of the normative rules

ism to patterns means that “It is relevant that *P* process counts as *I* institution in context of the *C* constitutive rules.” Conformism to patterns is, however, not socially meaningful until it is made complete by the conclusion of normative consequences. “*P* process that it is relevant that counts as *I* institution in context of the *C* constitutive rules is to meet *S* sanctions (positive or negative) according to *N* normative rules.”⁴⁰

That is to say that the acknowledgment of any fact as institutional is part of social practice. Institutional development, e.g. of a form-conformist behaviour, is being shaped repeatedly in a testing way as oscillating between the dual definitions by the heterogeneity of everyday life and the homogeneity of the particular normative field by which the test is made. It can only proceed as a process gradually progressing through its layers being built successively one upon another. In the routine of everyday practice, all this goes on commonly as a matter of course, requiring formalized adjudication in exceptional, marginal cases only.

2.3.2. Graduality

Looking at the process from closed quarters as the sequence of progressing components (e.g., bringing an amount of potatoes to my house, being supplied by the grocer, then being billed by him),

and their relationship to the constitutive one is missing. For Weinberger's criticism is an answer to SEARLE (1964), which claimed to have deduced an ought-statement from the descriptive one of “I promise”, and thereby having spanned the gap between Ought and Is. According to WEINBERGER, *id.* at pp. 21–23, however, the utterance of “I promise” is in itself empty, and it is the institutional contexture of its actual uttering in which the normative rule of obligation is implied.

⁴⁰ MacCORMICK (1974), pp. 52–53, acknowledges only rules that establish an institution, define its consequences and terminate an institution, without paying attention to the *sine qua non* existence of genuinely constitutive rules. Such a characterization of the homogenizing tendency of modern formal law neglects necessarily the law's embeddedness in social praxis and its process-like development.

one has to realize: the differentiation between brute and institutional facts stands for qualities in a relative relationship of being more or less "brute", resp. "institutional", to one another.⁴¹

Is there anything absolute in them at all? As to the brute facts, their existence is already doubted by the game theory of cognition. In another formulation, the "bruteness" of a fact only means that, in comparison with others, it can be said to be "more brute", that is "less institutional", than those compared are. In the light of the game theory, every moment of cognition (from problem conceptualization to taking of proof) is a function of rules, conceived of as analogous to legal ones.⁴² Such an analogy, however, can easily turn to be senseless, as it amalgamates differing kinds of homogeneities (e.g. here science and law) and the heterogeneity of everyday life. Thereby normativity in a weak sense, common to all kinds of human activity, is made absolute and of an equal value with formalized, strong normativity. It mixes up *explananda* and *explanans* as well.

"Brute facts, such as, e.g., the fact that I weigh 160 pounds, of course require certain conventions of measuring weight and also require certain linguistic institutions in order to be stated in a language, but the fact stated is nonetheless a brute fact, as opposed to the fact that it was stated, which is an institutional fact."⁴³ There are aspects (e.g. the fact that I "weigh") that, characterized as brute facts, can be said "to be the case" without requiring to postulate my particular individual and intellectual existence or even the mere possibility of it. In any case, it is to be noted that, with the advance of socialization, the number and variety of those facts are being reduced which are like the ones referred to as "facts established". Let us bear in mind how predominant the categories of "mediation" and "mediatedness" have become from the very beginning of socialization ("social existence at the most primitive

⁴¹ ANSCOMBE (1958), p. 71.

⁴² Cf., e.g., BANKOWSKI (1981), p. 265 and MacCORMICK (1982), p. 102.

⁴³ SEARLE (1969), p. 51, note 1.

level of its development").⁴⁴ And one has also to consider that institutionalization is not necessarily linked to formalized homogenizing constructions exclusively (for a customary, or conventional, course can develop beyond them too); that it is not necessarily an exclusive property of high cultures either (for no community is known, primitive or not, in which it has not already been developed).⁴⁵ "And, at an even simpler level, it is only given the institution of money that I now have a five dollar bill in my hand. Take away the institution and all I have is a piece of paper with various grey and green markings."⁴⁶ Or, there is almost no brute fact that could be brought before a law court without some institutional setting, except to some facts that can also constitute a case in the most rudimentary definitions of crimes against the life and physical integrity.

2.3.3. Being Attached to Objectivisation or Self-generation

There are institutional facts that are characterized by their attachment to objectivisation. This is an objectivisation or a process existing or progressing in an externally observable manner, regarded as being institutional in the regular course of social practice (such as money, supply, the game). It becomes institutional due to meanings attached to brute facts. (For some physical property, or at least an ideal anticipation of it, has to be present in order that we can talk about game or money, even if a move or transaction with them is carried out on the plane of communication only. Stealing is also only conceivable by removing something, at least metaphorically, e.g. by unilaterally changing the

⁴⁴ LUKÁCS (1971) II, p. 140.

⁴⁵ In philosophical anthropology, the order postulate is the first universal human characteristic, referring at the same time to transcendency too. Cf., e.g., NYÍRI (1972), par. 5.2.1.1.

⁴⁶ SEARLE (1964), p. 51.

inventory of goods.) What pre-exists here in an elementary way is notwithstanding somehow pre-defined too. Brute fact can be labelled as institutionalized by its formalized contexture (e.g. a text being printed in the Official Gazette suggests that it is to be understood as an enacted law), or by the configuration (e.g. game) or the direction and outcome (e.g. stealing) of a process. In such a way, institutionalization may add a surplus meaning to anything, by putting it into a context which is not otherwise its own. To make a statement about anything that it is the case of an institutional fact involves the same classifying qualification as seen in any judicial establishment of facts: (1) such and such (brute) fact exists; (2) it is the case of such and such (institutional) fact; in consequence, (3) considering the existence of such and such (brute) fact, the case of such and such (institutional) fact is established.

A fact can also become institutionalized by generating itself. While a ceremony, in formal robes, with hands placed on The Bible, by repeating word for word, I can say: "I hereby promise." But I may make a promise by the utterance of any word or by any gesture as well. Some brute fact in any case is needed, even if not specified: a bodily motion or a vibration at least. Brute and institutional facts will remain differentiated notwithstanding, even if seemingly not in a more meaningful way than, for example, the conclusion according to which "To utter 'I thereby promise' is meant to make a promise".

It is a self-generating institution that has offered the chance for linguistic philosophy to define the possibilities of linguistic action. "[T]he *speaking* of language is part of an activity, or of a form of life."⁴⁷ Saying something may be meant to make a statement (*constative* function) and also to act thereby (*performative* function).⁴⁸ In such a way, we can envisage the estab-

⁴⁷ WITTGENSTEIN (1945), section 23, p. 11.

⁴⁸ Cf., primarily, AUSTIN (1955) and [1956]; SESONKE (1965); and, in respect of law, LEGAULT (1977), part II.

lishment and, with the advance of socialization, also the ever-increasing mass production of those institutions, in the case of which it is we who create, by speech acts, both the notional framework and the individual instance of the institution, and also the linguistic medium by the use of which we can state institutionally that the instance in question is a case of the institution.

There is also a third possibility for institutional facts to be brought about. For an institutional fact can also be built upon another institutional fact. I have in mind social formalism, invented for the sake of security, uniformity and unambiguity, by the means of which some accentuatedly formalized objectivisation or act strengthens the institutional nature of a fact, guaranteeing (by way of double institutionalization⁴⁹) that "[t]he usage of a formula realizes the foreseen result directly and with no possibility of doubting it".⁵⁰ Double institutionalization can be achieved through the doubling of the carrying objectivisation (e.g. in attaching *mancipatio* formalities to the sale of goods) or by self-generation (e.g. policeman in a civilian cloth, declaring himself by starting to act as if he were in uniform on duty by gestures or words).

As a matter of fact, such a differentiation is only meaningful on the level of analysis. For institutional existence cannot be anything else except a process of uninterrupted transformation, in a constant flux within its own potentialities. There is always a possibility for an alternative action to be taken, even if, from the viewpoint of social ontology, it can also be said that "activities, relationships, etc. are—independently of the extent to which they seem to be elementary for the first look—always correlations of complexes in which the elements can become truly effective as components of the complex in question".⁵¹

⁴⁹ A term defined by BOHANNAN (1969), p. 75.

⁵⁰ LÉVY-BRUHL (1953), p. 53.

⁵¹ LUKÁCS (1971) II, pp. 139–140.

2.3.4. Indeterminateness

There is no set of brute facts definable that could in itself guarantee that it is a case of an institutional fact. There is no definition either that could in itself necessarily determine when we actually have a case of an institution. "Thus the fact that something is done in a society with certain institutions, in the context of which it ordinarily amounts to such-and-such a transaction, is not absolute proof that such-and-such a transaction has taken place. What is true is this: what ordinarily amounts to such-and-such transaction is such-and-such a transaction, unless a special context gives it a different character."⁵² In the amorphosity of everyday life, any mental anticipation intended to offer patterns for social activity is nothing but ideal projection, that is continuum displaying certain density by its reference to some pattern-like amorphosity. In that amorphosity, what will finally be qualified as an institution is in the actual process oscillating among the pushes, moves and motives of everyday life. And what will be reconstructed by the final classifying qualification as a process of successful institutionalization is the outcome of an imputation, most commonly covering a kind of amalgam of deliberate purposefulness and stochastic casualty. "Every decision presupposes a context of normal procedure, but that context is not even implicitly described by the description. Exceptional circumstances could always make a difference, but they do not come into consideration without reason."⁵³

In jurisprudence, the same problem crops up under the guise of questions of fact and questions of law which, in point of principle, cannot be differentiated, at least not beyond the reach of the purely technical definitions of the law. The point is that the facts the judge is expected to establish in order that a case can be constituted in law are actually not exclusively factual, moreover, they are not complete and cannot possibly be complete. For the circumstances

⁵² ANSCOMBE (1958), p. 70.

⁵³ *Id.* at p. 71.

that can make any otherwise justified claim to establish the case of an institutional fact to fail, cannot be defined exhaustively. That is, no matter how strict a definition has been formulated in law, it cannot exclude the alternative application of another legal provision (mostly defined in evaluative terms, general clauses, etc.), openly with the aim of evading it.⁵⁴

Unfortunately, one cannot say theoretically whether such a determination is impossible on principle, or its absence is rather due to some imperfection.⁵⁵

Let us have a look at the inherent contradictory nature of the development of language. Its tendency to gain a level of unambiguity as high as possible has at all times been counterbalanced by both its own limitations and the limits arising from the fact that, being embedded in social practice, language has finally to meet the requirements set by practice.⁵⁶ Language is by far not an originator or independent agent of thinking, but only a medium thereof. It filters out all determinations arising from social practice through its own homogenizing medium until their heterogeneous mass is homogenized and their (apparent or real) contradictoriness resolved.

Accordingly, the question of what an institution is can only be answered by approximation. And the question of when an institution comes into being can be answered only by taking into consideration the whole contexture.

(I am to note that there are attempts at defining institutions in terms of the general, particular and individual, and, as applied to the institutions, in one of the typical, too. Such a conceptualization may throw light upon the question: what features with varied deg-

⁵⁴ Cf., e.g., GIZBERT-STUDNICKI (1979), p. 142.

⁵⁵ Methodologically, GIZBERT-STUDNICKI's argumentation, *id.* at p. 124, is reminiscent of Wróblewski's in PECZENIK and WRÓBLEWSKI (1985), sections II–IV, outlining the ideal picture in which legal language is a medium in full capacity of notional determination, with one single note remarking that, notwithstanding, practical systems do not fit the picture and what has been claimed to be otherwise necessary is by far not real.

⁵⁶ LUKÁCS (1971) II, pp. 195–206.

rees of generality are in average cases displayed by an institution? What features are in average cases needed to originate an institution? However, any attempt at answering it will reveal that the definition of any of them, and of the type in particular, is not a separate task: it is identical to the definition of the institution.)

Finally, as far as the "externally unambiguous general facts that constitute a case" are concerned, i.e. facts that define the behaviour "outwardly",⁵⁷ also lag behind any genuine solution. The solution they can offer is either verbal, or good only for transposing the solution. Such a definition of fact is either quantifying (e.g. by reducing "drunkenness" to the measurable ratio of alcohol in the blood⁵⁸) or attached to formalities (e.g. domicile as defined by registration). In any case, due to the artificial reduction of the *definiens*, it distorts the *definiendum* from the start, as it selects it on the exclusive basis of its practical provability. Strict definitions (as defined, e.g., in the special parts of criminal codes) are also unable to provide clear-cut differentiation. For no matter how strict a definition is, it can only operate in its own context. It cannot undertake proposing complete definition for any institution. (For example, the definition of a crime in the special part of a criminal code is only applicable within the context of the definition given in the general part of the same code, i.e. in function of a non-exhaustive and non-formal, non-defined and non-definable definition.)

2.3.5. Relativity

Independent of the circumstance whether a fact is brute or institutional, there is something in it that is given from the very start, and there is something else in it that becomes attached to it subsequently. Or, as Wittgenstein said: "What has to be accepted,

⁵⁷ WEBER (1960), p. 102.

⁵⁸ Cf. MOTTE (1961).

the given, is—so one could say—*forms of life*".⁵⁹ That is to say, it is the totality at any given time that defines with what further parts the part in question is a unity of, and so on (and the recognition of the mere fact that the parts form an ontological unity does not replace their cognition). Moreover, we cannot pre-define what context is attached to a given fact so that the outcome is acknowledged as an institutional fact. For from the viewpoint of results, no attachment can be taken for granted. One can only say that the meaning of the facts (e.g. their institutional character) is a function of their (construable) contexts. For example, starting from the elementary information given by Malinowski⁶⁰—the burial ceremony offered to a young male, died after having fallen from a coconut palm, transforms into a feud—, a rather complex institutional practice can be reconstructed: "the boy had committed suicide. The truth was that he had broken the rules of exogamy, the partner in his crime being his maternal cousin, the daughter of his mother's sister. This had been known and generally disapproved of, but nothing was done until the girl's discarded lover, who had wanted to marry her and who felt personally injured, took the initiative. This rival threatened first to use black magic against the guilty youth, but this had not much effect. Then one evening he insulted the culprit in public, accusing him in the hearing of the whole community of incest and hurling at him certain expressions intolerable to a native. For this there was only one remedy; only one means of escape remained to the unfortunate youth. Next morning he put on festive attire and ornamentation, climbed a coconut palm and addressed the community, speaking from among the palm leaves and bidding them farewell. He explained the reasons for his desperate deed and also launched forth a veiled accusation against the man who had driven him to his death, upon which it became the duty of his clansmen to avenge him. Then he

⁵⁹ WITTGENSTEIN (1945), p. 226.

⁶⁰ I owe the example taken from MALINOWSKI (1926), pp. 77–78, to the lecture presented by SACK (1987).

wailed aloud, as is the custom, jumped from a palm some sixty feet high and was killed on the spot. There followed a fight within the village in which the rival was wounded; and the quarrel was repeated during the funeral". Here, in an apparently elementary situation, primitive law and crime, custom, system of evasion, morals, magic and counter-magic are to meet to reconstruct a version of facts by giving it one of the possible interpretations.

Even more complex situations come into being if a multilayered network of institutions is projected onto the facts or an institutional web is artificially applied to the facts outwardly and posteriorly. For instance, events that are wholly accepted as patterned upon and totally justified within their proper orbit (e.g. as defence against the damages of the evil spirits or as the tolerated ratio of malpractice at the tribal traditional surgery of trepanation, statistically not even worse than the one in contemporary Europe) may happen to be judged upon as crime against human life by colonial justice.⁶¹ It is to say that the making of a connection between brute and institutional facts can be not only conventionalized but also imposed by force. To put it in another way: each and every fact, both brute and institutional, can be given an endless variety of interpretations, equally justifiable from an external viewpoint. Not only the number and configuration of establishable facts can have a variety not previously predictable and definable, but also the possible webs referred to in their interpretation as institutional facts.

2.3.6. Historicity and the Methodological Dilemma of Cognition

Behaviour is only comprehensible historically. That is, the social significance and institutional character attributed to it is the final outcome of the development of a diversity of elements, in their own context overlapping, intertwining, moreover, crossing over one

⁶¹ Cf. SEIDMAN (1966), in particular pp. 1137-1156.

another. "A series of behaviours establishes cumulative meanings. Sliding gradually into crime by a series of acts without having a definite criminal plan is an example. A radical break with tradition constitutes itself as such only by reference to the preceding acts in which tradition was followed. Each act, however radically new, gains meaning from the preceding acts and in turn contributes meaning to the acts which follow. Singular history realizes itself in a series of overlapping meanings which explain each other and establish a meaning-context."⁶²

The historical formation of institutional facts indicates two ways for their cognition: either I can reconstruct them retrospectively, rationalizing about them posteriorly, or I can trace them back to pre-defined patterns. In any case, I have my choice with a fairly large number of alternatives, for neither the way I select my values is influenced by any world concept in the strict sense⁶³ nor is my epistemological stand a function of ontological choices.⁶⁴ No fact can be made equivalent in itself to an institution. Either the pattern becomes applied to it posteriorly as if it were a conclusion of it or the facts are construed and interpreted by hypostatizing the pattern. Here any pre-positing pattern will be repeatedly and thoroughly tested as related to the facts, in order to assess whether I can recognize, in the process itself, any institutional factor participating in it by channelizing it or not. To put it another way, no matter what result will be reached, methodologically it is only approximate at the most. For there is no answer to the question: how to describe anything when we cannot define what we want to describe? For that matter, it is an old dilemma, formulated already in the classical debate between legal positivism and sociology of law, with Kelsen to prove that, in any description, to characterize anything as legal is only conceivable if preceded by a definition provided by positive

⁶² KENDAL (1980), p. 6.

⁶³ Cf., e.g., HELLER (1971).

⁶⁴ Cf., e.g., NYÍRI (1987).

law, designating what at all are the boundaries of the legal.⁶⁵ The same dilemma has cropped up as a methodological issue of the conceptualization of the practices of primitive communities. For commanding reasons, conceptualization has to start in their own context (as a folk system),⁶⁶ in order to lay the foundations of a general analytical system,⁶⁷ in the framework of which the folk-institution itself—as a fact “more brute” from an analytical point of view—can be interpreted at all.⁶⁸ Nevertheless, the end result of analysis, due to our paradigms, cannot be anything else than folk-categorization again, i.e. the imposition of the western world concept on the whole interpretative process. In the final account, the medium of our understanding may block the way to reach all-encompassing understanding.⁶⁹

How does a fact appear in law at all?

2.4. The Particularity of the Appearance of Fact in Law

There are approaches defining law as a kind of mirror image. For them, not even the question as formulated above can be raised in a meaningful way. For, according to them, *firstly*, law as a social category expresses something socially characteristic. For them, the normative definition of facts that constitute a case is socially descriptive. Consequently, the search for legal relevancy too is directed to define what is socially relevant. On the final analysis, they deny the law's socially distinctive contribution to shaping, while controlling, the humanly made world. According

⁶⁵ For the re-edition of the debate between KELSEN (1915–1917) and EHRLICH (1916–1917), see *Hans Kelsen und die Rechtssoziologie* (1993). For a restatement, see ROTTLEUTHNER (1981), section B. I. 1.

⁶⁶ Cf. BOHANNAN (1957).

⁶⁷ Cf. GLUCKMAN (1965), p. 215.

⁶⁸ POSPÍŠIL (1971), pp. 16–18.

⁶⁹ Cf. SACK (1985) and (1986).

to them, *secondly*, the procedural establishment of facts is a cognitive ascertainment of facts, to be compared to the facts defined by the law. Thereby they neglect the difference between brute and institutional facts. And, according to them, *thirdly and lastly*, the judicial process is directed towards stating the objective truth, in a procedure in the course of which a judgment is made upon the truth of the claimed facts. Thereby they dissolve specifically legal homogeneity in cognition, substituting truth for what has been established as proven in procedure and, its procedural nature, for an activity "as it corresponds to scientific requirements".⁷⁰

Other approaches offer more refined and differentiated explanations as the result of a multilayered logico-linguistic analysis. According to one of the most elaborated variants of them, there is a variety of types of facts in law, the most elementary of all being the "simple facts descriptively defined". Albeit their name or predicate is given by legal language, they are considered to be facts the same way as the ones in science; their statement is a statement of facts.⁷¹

Well, are simple descriptive facts conceivable in law at all?

For the sake of illustration, let us take the series of the following simple events. Persons *A*, *B*, *C*, *D*, *E* and *Z* happen to be at the same place and time. *A* is alone, *B* looks at *Z*, *C* speaks to *Z*, *D* touches *Z*, *E* makes a move in the direction of *Z*, and eventually *Z* dies.

As a matter of fact, being faced with the facts and nothing but the facts, I can have no imagination whether or not any component in the sequence of these events may have a legal relevance. The only thing I can know is that each and every component of it is conventional. That is, to link *Z* with any event or entity is conventional in a double sense: *first*, it is a function of the underlying world concept, cultural framework, ontological and

⁷⁰ E.g. SZABÓ (1963), pp. 309, 308 and 313–314.

⁷¹ WRÓBLEWSKI (1973), p. 175.

epistemological assumptions (*normativity in a weak sense*) and, *second*, it is a function of the choice made of the almost infinite variety of the series of possible institutionalizations (*normativity in a strong sense*). To see a linkage means establishing, or having established, it. That is to say that to associate Z with anybody else at a given place and/or time is, on the one hand, the result of the selection taken of what underlying paradigms and cultural framework I am to accept to substantiate my claim that, *one*, there is such an association when such and such conditions are met and that, *two*, the facts at hand are interpretable as being its case (this being the *normativity of cognition*) and, on the other hand, it is also a function of my decision made on what I intend to achieve or realize in social life by establishing such an association which is institutional or, at least, capable of being institutional (this being the *normativity of institutionalization*).

Namely, A may be involved in magic and B in witchcraft, both being directed against Z; but the acts of both A and B can be interpreted as having cured Z. C may offend Z in a way to cause him to die or commit suicide; but he also may have saved him thereby. D, by a chemical or physical effect, may equally cause his death and rescue. E, by shooting at Z, may cause a physically devastating bullet to penetrate him or a chemical material or radiation to touch him, with either a lethal or curative effect. In any case, it is socially and cognitively conditioned what we consider killing and curing and what remains as indifferent between the extreme points. It is a function of cultural conditioning to make an insult a cause of death or the committing of suicide the only response to a provocation. It is a function of the chemicals used in a culture and of the knowledge of their effects when coming into contact with them to be considered as having a poisonous or a curative effect. Presumably, enchanted thought will be indifferent towards E's behaviour. Possibly neither do we regard A's and B's behaviour as relevant. Nevertheless, it happens that a European surgeon has actually been sentenced to death by a tribal court for mutilation judged to be murder, in the same way as colonial authorities keep on criminalizing traditional tribal

medicine.⁷² Moreover, even the conflict between cultures is both conventional and relative. A conflict can occur on similar terms within the same culture, between two versions (official and non-official) of medicine,⁷³ and, within the official version too, between medical circles of differing prestige, specialization, with private interests also obstinately asserted to the extreme.⁷⁴

As is shown above, the dilemma of the fact as artifact may prove to be inexhaustible even in the light of a single instance. A thorough investigation based upon the considerations developed in the present study have to centre, among others, on the questions as follows: 1. From where does the approach to facts depart? Does the logical formula of the normative inference reflect the inference itself or merely its added justification? (*The difference between the logic of problems solution and of its added justification.*) 2. What is the character of the process like, in the course of which the approach to, encounter with and statement of the facts proceeds on? Does it aim exclusively at their cognition or is there also something more and else at stake? (*Differing homogeneities of cognition and judgment.*) 3. What is the basis, the framework and the end result of all this? What differentiates it from the approach to facts of another kind, and from the approach to similar facts in another context? (*The selective role of relevancy.*) 4. How are the undifferentiated flux and total unity of events processed until they become a distinct and isolated fact of life? Is it in the events themselves that facts become selected or is it rather us who, by

⁷² E.g. Yaro Paki, found guilty of homicide in a case of a tribal surgical operation which resulted in the patient dying from septicitis, was sentenced in 21 N. L. R. 63 (Supreme Court, Nigeria, 1955) after more than two thousand successful operations he had completed. Cf. SEIDMAN (1966), p. 1151.

⁷³ E.g., in treating cancer, between the official combination of radical surgery with medicine, both irreversible in their directly detrimental side-effects, and the non-official attempts at localizing the effects and improving the patient's conditions by natural medicines not detrimental in their direct effects: cf., as film documentation, SÁRA (1985).

⁷⁴ E.g. ANTAL (1986-1987), in particular pp. 103-106.

formulating statements about them in order to achieve something by stating them, finally establish them? (*Fact and case: a mental transformation.*) 5. Which way will the fact of life be given a legal character? Do its elements qualify as such or merely become qualified as such? What does their legal institutionalization lie in? (*The practical dependency and context of qualification.*) 6. Are there "simple descriptive" facts in law? Can anything descriptive be conceivable to exist in law at all, or is it definition only that can be found, notably a definition with normative purport? (*The lack of anything descriptive in the normative sphere: concept and type, the question of subsumption and subordination.*) 7. What is the relationship between fact and value like? Is it by chance or are they correlative to one another? (*Unity of fact and value.*) 8. What is the relationship between fact and law like? Does the inference depart from facts, or law is of a selective effect at all moments from the very beginning? (*Non-differentiation between fact and law in inferences in law: "questions of fact" and "questions of law", the question of "ordinary words".*) 9. Are the operations with fact and law parallel to or built upon each other? If they are intermingled with one another, what are their meanings and effects? (*Fact and law as aspects reflected on one another.*) 10. Can law be satisfied with "simple, descriptive" facts? What does the language context mean and why is it necessary to have facts, defined in a far more differentiated way? (*Limitations on cognition and the ambiguity of linguistic mediation.*) 11. What is the result of the process of inference being expressed in? Does it amount to a progress of cognition or is it basically another type of achievement which thereby has actually been reached? (*The non-cognitive dialectics of normative qualification.*) 12. Is the statement of the result attained of a descriptive character at all? What does the statement in question mean within an institutional context? (*The ascriptive character of the result achieved.*)

Evidently, these questions are multilayered themselves, although I have not yet taken into consideration the particular context in which they are raised in law. Accordingly, the questions above have to be supplemented by the following ones: 13. Are the facts

really considered as facts in the judicial procedure establishing the facts of the case? How are they represented in the procedure at all? (*The constitutive nature of the judicial establishment of facts.*) 14. What does it mean to say that there are proven facts? What kind of evidence and judicial certainty do we have when facts are taken as proven? (*Proof and proceduralism: the question of "certainty".*) 15. How is all this being shaped by the specificity of judicial procedure? What is actually concluded if and when procedure comes eventually to an end? (*The role of res judicata, i.e., of legal force.*)

3. THE IMPUTATIVE CHARACTER OF THE JUDICIAL ESTABLISHMENT OF FACTS

3.1. Logic of Problem Solving and Logic of Justification

A basic formula—according to the classic syllogistic formula of “All men are mortal / Caius is a man / Caius is mortal”—can be claimed to represent the syllogism of law-application only provided that a series of further propositions presupposing it are also accepted. These are the following ones: (a) operations with facts and operations with norms can be separated from one another; (b) operations with facts and operations with norms follow one another in the judicial process as cognitive, respectively evaluative/volitive, components of the process; (c) legal conclusion finally reached is of logical necessity; and (d) judicial process is totally governed by the law.

As a matter of fact, these presuppositions are meant to mean that: (a) the judge will “start out from the law” in order that, in reaching the decision, he/she will “accomplish the law”; (b) the decision is a consequence of the law as reflected in the given case by gradually breaking down the generality of the legal order to the individuality of the case; (c) propositions *a* and *b* apply to both aspects, or parts, of judicial activity, namely the judicial act of subsuming the case to the law as a case of the law, on the one hand, and the one of meting out legal consequences to the concrete situation, on the other.¹

However, claiming that we are stemming from the law in judicial process can be accepted as an argument only provided that we

¹ Cf. the socio-ontological version of the reflection theory of Marxism which, by referring to the “ontological fact” of the institutional differentiation between law-making and law-application, emphasizes that the point of departure for applying the law is provided by the law itself whenever law is put into action in a legal order. PESCHKA (1985), particularly pp. 223 et seq.

characterize judicial process either as logical deduction or epistemological reflection.² Consequently, the claim is much less convincing if it stands for a general theoretical formulation.

For the logic of problem solving may define a direction and methods for the process of reasoning, which are simply opposed to the direction and methods defined by the logic of justification. Though apparently the same operation can be characteristic of both kinds of logic, they are nevertheless not capable of being substituted one for another. The first is instrumental in finding the solution, the second in checking it. In general (and also in law in particular), axiomatic reasoning (deduction or demonstration, i.e. any procedure setting the claim of logical necessity) can at the most be instrumental in having a posterior control of what has finally been reached; and not as a tool of conducting the search for it. That is, formal demonstration is posterior to intuition and also to the issue it demonstrates.³

This is to say that justification of decisions is in fact posterior to the decisions as a control of their system-conformism,⁴ instead of being a tool for actually achieving them. In the same way as we can state that the motivation of decisions stands for their quasi-logical rationalization, instead of reporting about the thought process which has reached its climax when the decision was actually taken.

In this way, it is not too far away from reality to conclude that "[h]istorically and, as far as the thought process is concerned, also actually, it is the 'case' necessitating a 'solution' that serves as a stepping stone."⁵ For within its own reach—that is, having in mind the distinctiveness and the discreteness of fact and norm as perceived by the judge—the stand formulated above seems easy to defend. However, when interpreted as a theoretical answer, it

² This is the case when legal process is explained as specific, typifying transformation of social relations which, on their turn, will be projected back to social relations. Cf. PESCHKA (1965), ch. III, par. 2; PESCHKA (1979), ch. I, par. IV.

³ Cf., first of all, PÓLYA (1945).

⁴ Cf., e.g., WRÓBLEWSKI (1971).

⁵ FIKENTSCHER (1977), p. 202.

proves to be both narrow-minded and simplistic. It is itself not exempt from having been based on the assumption of the syllogism of law-application, either, as if it were to suggest: "Bring in your fact so that I can attach my law to it!"

A genuinely theoretical description has to commence at an earlier stage. It has to depart from the recognition that the event we hold an interest in springs from something differing from, and also preceding, the "case". For to have a "case" is a relatively late product of the legal process. Properly speaking, it is a relative end-product of abstract institutionalization. Precisely, it is the outcome of some events which were to have been formalized, artificially construed, and also simplified. In the process, formalization is made in a way that—as reduced to, and pigeon-holed as, *one* definitively defined actualization of the legal order—it can provide the conceptual basis for taking an action within the order.

"When the client pours out his troubles to his solicitor, the first step is to discover the legal pigeon-holes in which the facts are to be placed."⁶ Well, again, we may only state that notwithstanding the merits of such a sensible description, the same objection can be raised against it. For "facts" are by far not yet given at this very stage. Practice can only start out from the recognition of a problem, that is, of its identification, conceptualization, and classificatory expression. That is, practice will only start out from the realization that I want to have something or to do something.⁷

All I see at this point points to the conclusion that "facts" are in no way given at any primitive stage. That what is given, first, is at least an elementary awareness of what I wish and, second, also the situation which I claim it to offer some ground for formulating that which I wish. It may be so that, at a rather primitive stage, neither

⁶ PATON (1946), pp. 155 et seq.

⁷ "Any construction of facts sets out from raising a question [...] The way of how this question is formulated will at all time also determine the way of how it is going to be responded to." HRUSCHKA (1965), p. 22. Albeit this exposition may be fairly illustrative in its own context, it will be seen as one-sided once regarded as a general theoretical formulation.

expressed wish nor specifically defined situation that could be referred to, are present. For I have to know: nothing becomes isolated by itself from within the totality. It is us, only and exclusively us, who start isolating anything from within the totality by the very first act of having named it.

The way by which we perform isolation varies in function according to the following factors: (1) the reason of why I am naming, and (2) the variety of names to which I am disposed for naming it.

Clearly enough, as many nameable facts can be referred to the totality, as many names are available for their naming. That is, as many facts may be stated as much experience I have gained in order to ascertain that I can proceed on their naming to construe them as facts.

The first step to proceed on is to have any wish, even if unspecific, loose, or unexpressed. The consecutive steps will be formed from the following operations: tentative decision about the goal, defined primarily (and also on the alternatives to it); selection of the strategy and also of the paths which may be instrumental in which I can accomplish it; conceptualization of the situation in the light of the goals, as well as of the strategies and the pathways, which are defined in respect thereto; and finally, selection of the facts by reference to which the situation itself will be defined and located.

Needless to say that all these operations imply some kind of evaluation of the practical situation with reference given to considerations of law. No need to say, either, that both parties to the procedure, as well as the judge, all have their own roles to play, distinct from, and at the same time co-related to, one another. Being spokesmen of different interests, they bring their specific points and stands into the process. And all this means that neither "circumstances", nor "motives", nor "situations" (which seem to urge a decision) can be found, or made available, as ready made. None of them offers an indisputable starting point. Otherwise expressed, both the factual framework of and the references made in respect of the dispute are themselves formed by the acts of the parties to the given procedure. The way in which they are established and/or

shaped by the acts of the parties in the procedure is generally defined by the tactics of the same parties, which they can re-set or re-shape at any stage of the procedure.⁸

Accordingly, neither case nor norm is given from the very beginning. What is given is their "universe," at the most, according to its logical definition.⁹

In consequence, what is going on is a game, with rules valid in an institutionally established framework. If conditions for it are given, I may start to move in any direction at any given time. But I have to know from the very beginning that, according to a previously set convention, in order to reveal move in one or another direction, I am expected to discover one or another fact. And so on, and so on. The rub is that the fact required cannot be taken and brought directly into the game. (Not even the play of the chess game can be reduced to sheer physical acts of holding pieces and moving them, as it can appear to an outside observer.)

The only way I am permitted to show up the fact required is offered by entering into a second game within the first one. And I may do so only by asserting that that which I state as a fact is actually the case, and that this last statement can also be proved. Of course, this second game, played in order to bring facts into the game, will in the course of the procedure be identified with the game itself. For a judgment upon the fact I have brought into the game will logically imply a judgment touching upon the wish I have intended to realize when I have entered into the procedure.

As to its structure, the game in law, procedurally played, will be made up of a series of moves, succeeding after, and building upon, one another. This is one of the features which makes it analogous to the game of chess. For, in both, every step is tactically related to, as actually relying upon, another. It goes without saying that each and every step may, and will actually, have a variety of meanings and contexts. That is to say, each and every one of them

⁸ Cf., e.g., DERHAM (1963), pp. 338-349.

⁹ See ALCHOURRÓN and BULYGIN (1971).

also implies the possibility of becoming actualized differently, resulting in the display of a variety of own individual meanings and contexts.

As I have already noticed, when we are analyzing the understanding of the "development" of the meaning of any given human behaviour, the meaning of each and every new step, or move, or aspect, of human activity will finally have been circumscribed, and also defined, by the previous step[s] (and move[s] and aspect[s]) through their historically superimposed cumulative context. That is to say, any one (apparently single) human behaviour is the (relative) end result of a total process. And the progress embodied by the process in question can only develop step by step, move by move, only gaining an attributable meaning posteriorly. For the contextual position of a given step within the process (that is, its systemic relation to the prospected, or idealized, whole in formation) will only become defined posteriorly. Or, formulated differently, the relative end result of the total process at any given time will make any step, or move, the antecedent of that which the whole process will eventually resolve upon later.

Now, turning back to the main question, we may conclude that problem solving at most does not contradict intuition or whatever kind of intellectual experiment. For its logic is heuristic. Its operations are unbounded, far from being codified previously. As to problem solving in law, it is, paradoxically speaking, free in all aspects, except to the formal expression of its result. It is only legal decision that is bound. Or, pushing the paradoxicality of expression even further, I may even add: it is not legal decision itself, but its formal justification that is at all bound. For in the majority of legal cultures, only and exclusively such decisions can be accepted as ones issuing from the legal order that conform to the requirements the legal order itself sets for the logical and rational justification of the decisions made.¹⁰

¹⁰ Cf., e.g., WRÓBLEWSKI (1974); WRÓBLEWSKI (1979); WRÓBLEWSKI (1983).

3.2. The Difference between Cognition and Judging

As we have seen above, pre-assumptions related to the judicial process suggest that (1) facts are brought into the process through their cognizance and (2) cognition is followed by their evaluation, that is, a practical reaction to the facts in question. What occurs in reality, notwithstanding, is merely a sheer ideal happening with no actual facts involved in it.

For facts can only be isolated and named in the course of their cognition. And exclusively such facts can be isolated from the undifferentiated mass of potentialities (as equally conceivable factual, or factualizable, references) inherent in any given set of events that are fitting to the context of cognition in question.

There is an apparent contradiction here. Namely, independently of the question of how much directions and contexts of perception and conceptualization of events and problem sensitivity are limited in a community, cognition is in principle open. It is open in time and place. It is open towards theories and methods, outlooks and concepts. It is also open towards paradigms in formation. Nevertheless, within its own framework, it necessarily follows its own logic, although its only aim is to identify the individual components of a given phenomenon, as well as the principles of their organization.

In order to reconstruct the logic of formation and the one of functioning of the phenomenon in question, it does necessarily test a series of presuppositions, working hypotheses, intuitive formulations. In order to be able to reconstruct the logic of formation and the one of functioning of a phenomenon, the whole cognitive process has to be adaptable and open to the particularities of the subject to a maximum degree. For adaptation and openness are needed so that selection of facts, their interpretation, the definition of their context, as well as the explanation of the place assigned to them by the motion of social totality, can be adequately accomplished. In other words, the success of cognition is a function of its becoming subordinated to the phenomenon, subject matter of cognition.

That which concludes from a judicial process is certainly not a monographic description of a given situation. That which will finally be referred to as facts of the case is certainly not a kind of epistemologically-patterned reproduction (that is, ideal reconstruction) of a given object. For the judicial process, which ends in the normative classification of facts (in the process of their selection, naming, and assertion, followed by the repeated testing of all these in the same process), aims to realize something more than, and differing from, the simple reproduction of the own logic of the situation concerned.

First of all, law is *par excellence* a homogeneous medium.¹¹ At the same time, the homogeneous medium is by definition specific, differing from any other kind of homogeneity. For instance, if I am looking at an event from the point of view of chemistry, or physics, or biology, psychology, sociology, politics or history, the set of facts I shall establish and the logic of development and operation I shall reconstruct will definitely differ according to the point of view adopted. And notwithstanding the fact that I am free to recognize that all differing features are equally derived from (and by far not only arbitrarily merely referred to) the same totality, as differing aspects of the said totality, their actual difference lies in the context by the consideration of which they are selected and conceptualized. For cognition is always partial, dependent upon the choice made for a given context.

Formulated in another way, everything legal is, to a certain extent, of a random character in respect to its subject. For law is not a reconstruction of the inherent connections (if there are any) of an event. Law provides nothing but a network of criteria exteriorly and posteriorly projected onto the event. The underlying idea is to allow me to break an event into sets of concepts and conceptual connections (artificially established as seen from any purely theoretical reconstruction of its factors and elements)

¹¹ Cf. PESCHKA (1984), pp. 14-16.

so that, by their standards, I can issue a judgment upon the event.

In consequence, homogeneity of law (i.e. the statement according to which law has a character and nature of its own) means nothing more pretentious than this: the fact, which becomes established, assessed and tested, and also interpreted, from the law's own point of view, will be gained through the logic of the law's own homogenized (and therefore also homogenizing) medium, and not from the event itself. Theoretically speaking, this homogeneous medium originates the total set of facts from which facts of any case in law may, or may not, eventually be established.

This is the same as saying that law fulfills the ontological function to mediate among social complexes in interaction, through their qualification.¹² Law selects elements out of events that can be projected back onto the events under the guise of factual components of events. Only such components may be selected that are able to be qualified by the law according to its classificatory scheme of "facts in law" making up "a case of the law". This is the way in which they can be quite formally processed as facts of a case.

"The law is interested, not in the physical world as such, but in facts as seen by the law in relation to its particular frame of reference."¹³ Properly speaking, I could even add that law is interested, instead of facts themselves, in the making use thereof as a mere reference. Formulated in another way, I should say in a paradoxical manner: no parties to the procedure are interested in the knowledge of facts or anything like that. The only thing they really want is to win the match. Consequently, not even the intentions of, nor the goals set by, the parties are, as such, in themselves, of much or genuine relevance here. For even the question of what kinds of

¹² Cf., for the terms and the underlying ontological philosophy, LUKÁCS (1971), p. 92 and VARGA (1985), par. 5.1.3, pp. 107-110.

¹³ PATON (1946), p. 157.

intention can be discerned and goals set by the parties had to be answered procedurally at an earlier stage. It must have been determined by considering which selection of facts can be presented (i.e. brought into the procedure) as relevant and provable, and also effectively proved if needed.

Similarly, the stand the judge can take is also defined by an entirely retrospective strategy. Namely, he/she is expected to reach a decision which, following the established pattern of justification, can be justified in a logical manner to the sufficient depth posteriorly. That is to say, the logic of the events themselves (if there is any) can only be regarded as relevant insofar as it may be turned into being one of the parts of the logic established in the legal judgment of the event.

For instance, the cognizance of a violent action will differ depending on whether—after a lost war, or a fallen revolution, or amidst a permanent terror—I am to construe it as a case for criminal prosecution, or I am solely interested in it as a moralist, psychologist, sociologist, or historian. Or, considering the changing chances of human co-existence, it may make a difference whether I am establishing facts as grounds on which to take a legal action, or I do construct the logical sequence of events (by construing a definite relationship among them) only in order to justify the decision I have taken, or I do act simply as an outside observer (reporter, moralist, or psychologic commentator) of the activity of others or myself.

All this also holds true for cases in law, which are built up exclusively from material elements. Even if in such cases law seems to have been directly built upon, and tied in, the life processes as their regulatory medium.

For the sake of the manageability of law, foreseeability of legal actions, as well as security in daily legal practice, law constructs the formal definition of a legal case through defining the formal signs of human events which constitute a case. With such a construction, aspects of life events can become topical, which otherwise would continue simply unnoticed, providing that any other point of view were to prevail. The homogenizing medium of law can superimpose its own logic onto the conceptualization of the

event till the point of absurdity. Such a tendency of artificiality and estrangement can be even pushed further on by any intervention in the ways in which a case can be constructed or construed in the law and its facts can be proved. (This holds especially true for presumption, fiction, as well as the regulation of the burden of proof.)

Is it to mean that cognitive aspects (or effects) of operations with facts are fully negated by legal procedure? Definitely not, I would submit. All which I have tried to prove has to realize the only message: nothing is specified by recognizing that there is something cognitive, or quasi-cognitive, in the legal process. For cognition is one of the foundational pillars of human praxis. It can be detected in both the heterogeneity of everyday life and the various fields of social homogeneity. In consequence, what matters here is the specific impact and context of cognition. For it can be taken for granted: once cognition is differentiated from and lifted out of the heterogeneity of everyday life, it will be adapted to the homogenized form and structure of activity in which it finds its new contexture.

At the same time, there is latent contradiction in homogenization. On the one hand, it will result in differentiation, lifting out, and isolation. On the other, homogenization does not result in epistemological distortion. For homogenization does not touch upon theoretical cognition. It aims just at achieving homogenized reflection in order to be able to offer homogenizing reaction.

In a homogeneous context, like law, all components, including cognition with all its homogenized forms, are subordinated to the particular homogeneity of which they are the components. That is, in law, they matter only and exclusively as the elements of a classificatory system in qualifying life events. This means that the character and the impact of any cognitive moment are also subordinated to it. That is, this means that each and every element of the cognitive moment is shaped and formed from the very beginning by this homogenizing medium. Even its most elementary, primitive components can only be interpreted as built in and filtered through the law's classificatory-qualifying structure.

3.3. The Selective Role of Relevancy

"[T]he material contents of the case to be decided [...] are, at variance with the facts defined in the norm that constitute a case, not compounded by some notionally, clearly expressible circumstances; they display the entire richness of life. They are not separated in life as facts that define a case; they exist only as concealed in all the conceivable connections of economic and social life, mostly without having a definite beginning or end."¹⁴ I wonder whether thinking along the line of the above explanation through to the end, could it be said that, "in its social nature, a judgment" is given here which touches upon some individual social relationship; notably, a judgment which has been done "with the standard of a general rule"?¹⁵

As revealed by reconstructions of the early phases of development of the human intellect as well,¹⁶ the basic form of human cognition and thought process is analogy, attaching something that is less known (or is farther from being solved or cleared) to something else that is more known (or solved or cleared). It is relevancy that makes the linkage possible.¹⁷ Relevancy is an aspect of things related to one another, which makes the attachment in question conceivable, arguable and justifiable. In other words, relevancy is the recognition of the possibility and feasibility of a linkage. In point of principle, the number and configuration of the varieties of relevancy is endless. Being a function of creative human recognition, no concrete variant or manifestation of relevancy is pre-codified. It becomes defined in and through the cognitive process as one of the factors of its success. In law, too, all kinds of operation with facts have to start from the search after and with the identification of what is relevant. But in contrast to

¹⁴ ISAY (1929), pp. 350–351.

¹⁵ SZABÓ (1971), p. 128.

¹⁶ LLOYD [1966].

¹⁷ Cf. KENDAL (1980), p. 12.

non-legal fields, relevancy is pre-codified here: as previously, formally defined in a normative way, it is given to each and every kind of, and situation in, legal processes.¹⁸ Accordingly, legal relevancy canalizes any business directed to gaining (i.e., searching after, identifying, substantiating any claim for, and proving any establishment of) facts in a given path from the very start; at the same time, it also closes any other path (i.e., viewpoint, direction, possibility of interpretation of, or search for, connections)—except to cases in which, *one*, there are circumstances impeding the pre-codified path to be followed and, *two*, the law itself permits that any other path may be taken into consideration. In consequence, it goes without saying that law as a homogenized medium “deforms” the way in which facts and connections are established, i.e. identified and conceptualized.¹⁹

Accordingly, the problem of the relevance in law lies in the fact that it constitutes the point by which any “natural” description of both thought processes and judicial processes is turned upside down. Namely, legal process is usually characterized as a kind of problem solving, departing from any actual event in order to arrive at a practical answer (or reaction) to it, upon the basis of and with a reference to its qualification within the notional pigeon-holes of a normative system.²⁰ But law as such has simply no means to approach and treat events as events. What is more, due to its homogenized medium, law as such has simply no contact with events as events. For a contact is preconditioned by any element (i.e., aspect and/or connection) of the event being exposable, and actually becoming exposed, as a problem itemized within the legal system. And this is only possible through an attachment to what has previously been normatively projected for such an

¹⁸ In consequence, such a relevancy is at the same time also prescriptive. In contrast to it, ALCHOURRÓN and BULYGIN—in (1971), p. 103—term the relevancy resulting from normative enactment “descriptive”, and confront it to the “prescriptivity” of the relevancy which is only axiologically founded or determined.

¹⁹ SZABÓ (1971), p. 177.

²⁰ Cf. *infra*, par. 3.1.

itemization—that is, in case of relevancy. Consequently, the fact that there is something characterized as “fact in law” is determined only and exclusively by the law and not by the “nature of things”.²¹ In other words, law is not only a basis of classifying general qualification. In the whole business with facts, it is also of a constitutive character and effect. It predetermines from the very start which kinds of facts and configurations of facts can at all be searched for and established.

“[T]he same system of positive law offers, according to the choice of those interested, different webs of projection, and the same fact can display, according to the web applied, the contradictory characters of licitness and illicitness.”²² This statement allows at least two conclusions to be drawn therefrom: (1) in the function of the choice of relevancy made, different facts can be established in respect of the same event; and (2) in the function of the normative context taken, the same facts can also be differently qualified. It is due to the role the law plays in the selection of facts that one can say: there is no fact in law which is given as an objective given, i.e. as the pure product of reflection, as a really “pure” “fact” with no reference to rules.²³ Notwithstanding, it is obvious in the light of a purely logical reconstruction that, in principle, it is a “Universe of Cases” that I project onto the single event in order to see whether it belongs or not to the “Universe of Relevant Cases” (by displaying any of the properties of the “Universe of Relevant Properties”).²⁴ Or, providing that there is relevancy at all, it is this “Universe of Cases” that defines, which property, by the force of which relevancy, will lead me towards the construction of which case.

²¹ SILVING (1947), p. 642.

²² HUSSON (1974), p. 259.

²³ Cf., e.g., NERHOT (1985), p. 19.

²⁴ Cf. ALCHOURRÓN and BULYGIN (1971), ch. II, section 2 and ch. VI, sections 2 and 4.

3.4. Fact and Case: a Mental Transformation

According to an established opinion, "case" is nothing but the coincidence of circumstances, i.e. their cumulation; and the force of circumstances generating "a case" is rooted in the cumulative co-existence of a well-defined set of properties.²⁵ Accordingly, "an assemblage of circumstances may be considered as constituting a case."²⁶ Logically, following this idea up to the end, one has to state: "Every property of a Universe of Properties [...] will be said to define a (possible) case."²⁷

In the present context, my question is how an individual case can be established or construed, a case which is the case of a general case? As a matter of fact, I cannot take the concept of "property" from the definition above as a point of departure. For it is the logical analysis that posits its universality as an axiomatic precondition from the very start, albeit both its selection and recognition, identification and description are actually the result of the cognitive process.²⁸ Consequently, I have to formulate my question in the following way: are facts really selected from the event as facts "of a case"? What is the role of normative relevancy in such a selection? What else is needed for the event to be transformed into an aggregate of facts and, then, into a case? No matter whether or not I recognize that, in the syllogism of decision, the factual premiss includes two propositions from the start ("1. Such and such a fact has been established. 2. The fact that has been established is *P*."²⁹), eventually I have to reformulate my question in the following way: how can facts at all be selected, facts that have to be qualified if they are considered relevant?

²⁵ BENTHAM (1970), pp. 42–45.

²⁶ *Idem* at p. 45.

²⁷ ALCHOURRÓN and BULYGIN (1971), p. 12.

²⁸ For the same dilemma, with respect to Leibniz's "proposition machine", cf. VARGA (1987), pp. 116ff.

²⁹ PERELMAN (1961), p. 271.

As stated previously, it is the direction of and limitation on (i.e., a definite answer in) choices that are provided by normative relevancy. Relevancy can, however, designate a path at the most, i.e. a theoretical possibility of having a departure therefrom based on it. No need to say that the path has to be run by me in person. That is, relevancy is good to make a selection. But it is questionable whether it is also sufficient or not to establish "a case".

To take an example: let us assume we have a camera with the best specifications to take the picture of the totality of human events. Eventually, I shall be expected to obtain the total sum of actual facts in this way, indeed, of those facts at least that are able to be taken as pictures. Is the cumulation of such facts sufficient in itself to define (or produce) the facts that constitute a case? Logically, the answer is, without doubt, affirmative. As Wittgenstein said, it is the totality of facts that define the case of which is the case.³⁰ Accordingly, the total sum of facts defines the total sum of those facts that constitute a case. Such a statement is, however, nothing else but the definition in itself of an empty logical web, an intellectual undertaking similar to Leibniz's one, creating a proposition machine by feeding all the possible assertions (i.e., the ones that make a judgment true) attachable to a given subject and all the possible subjects (i.e., the ones that make a judgment true) attachable to a given assertion, into an imaginary combinatory structure. Notwithstanding, to the whole variety of questions, the proposition machine has nothing but two sorts of answer: either no-answer will be the answer or the machine will pour out the whole undifferentiated mass of pieces of information that have been fed in. Accordingly, the facts that constitute a case are only produced by the required arrangement of required facts.

In consequence, we cannot say that, for the sake of its legal consideration or judgment, "slices" are being "cut out" from the pictures of life.³¹ For, I repeat again, the rub is that such pictures

³⁰ WITTGENSTEIN (1921), 1.11.

³¹ WEIMAR's expression in (1969), p. 31.

do not exist at all. The only thing that exists is the total unity of events in itself undifferentiated, into which—for “language is the knife with which we cut out facts”³²—communication, only and exclusively human communication can project discrete elements. And the decision as to who takes the pictures, what kind of pictures are taken and when and on what are they taken, from which distance and with what kind of differentiation, is to be taken by us. And, in any case, it will be taken in the function of our culturally pre-disposed sensibility and intention, of our culturally set aim(s), that is, of the evaluative-volitive choice to be made between the chances of conceivable and realizable institutionalizations.

The message of the English film story, *Blowing Up*, in connection with the rather shady guess of a murder is that anything can be perceived only provided that one has previously formed some concept of the whole as the part of which one has conceptualized that which he/she has perceived. But in order to perceive anything, i.e. to gain any reasonable piece of information, one is expected previously to define the optimum degree of blowing up the elements of the object (or event) he/she is to perceive. This also holds true for the case of taking pictures mechanically. That is to say, from the whole series of taking pictures of all the aspects of the whole totality of events in question, even the film-chronicle of a murder will—by the very fact that it provides the optimum configuration of pictorial data in time and space, in optic and blowing up, that is, optimum configuration in the sense that it will be the one and the only one that makes it possible that the pictorial data in question can be interpreted as a murder at all—select and interpret elementary components from the very start. For instance, how can I take pictures of an event that lacks direct brutality albeit leads to a comparably similar result? It is obvious: elementary components can be identified only provided that the whole has already been interpreted. This way, we have returned again to the dialectics of the part and the whole. The whole cannot be construed

³² WAISMANN (1951), p. 141.

without its elements. But the question of which are these elements and how they are configured can only be answered in the light of the whole.

To conceptualize what is the whole presupposes something else as well. It is called by a variety of names. It has been termed as structure preceding understanding,³³ understanding,³⁴ previous understanding.³⁵ Nevertheless, in connection with facts, it seems to be most appropriate to call it presupposition. As a matter of fact, a bare encounter with facts may reveal that "there are an infinite number of aspects in any 'situation', and [that] in order to talk about it at all we have to select from among these infinitely varied aspects those which for some reason or other we are going to talk about", albeit, at the same time, "for talking about the selected aspects we have to relate them in such a way as to put them under some category, some class, for which we have (or perhaps create) a verbal symbol or name".³⁶ We cannot simply say that, for instance, in a most elementary encounter with events, our selection is to rely on evaluation, and the naming of what has been selected, on interpretation. For all this is nothing but a general background in the light of the realization that "what one observer 'abstracts' from the 'given' will depend upon his past experience and education as well as upon the purpose he has in view at the time".³⁷ In the way as in hermeneutics, for instance, the key to understanding is authority and tradition, here the perception of facts is seen as being dominated by the well-arranged total sum of experience: "the assumptions with which the observer approaches a given situation, assumptions which are derived from previous interpretations of selected data made by himself and others, will determine even more than his eyesight 'what' he sees, i.e., what

³³ HEIDEGGER's term from his *Sein und Zeit*, p. 312.

³⁴ GADAMER (1960), part II, ch. II, section 1/B.

³⁵ ESSER's term (1970).

³⁶ COOK (1936), p. 238.

³⁷ *Idem*, p. 239.

aspects he selects as his 'data' and what interpretation he gives to them after they have been selected".³⁸ In other words, my presupposition will pre-determine my perception by paradigmatically shaping and, thereby, also delimiting my sensibility and differentiation ability. And the same presupposition can, if modified, also open up new paths and perspectives, and it can thereby lead to new sensibilities and differentiation abilities, in short, to a change of paradigms.

Or, the point is the human being who is embedded in social context and who is also aware of it. He is rooted in history.³⁹ It means that the effect and the whole range of side effects of the fact that we are all participants of an overall process of socialization is to be taken into consideration. It is to say that, eventually, independently both of the kind of mediation we resort to and of the question whether the way we have resolved the conflict is commonly agreed upon or unilaterally imposed, it is we who produce and reproduce the law. In other words, law is able to function only and exclusively insofar as it is backed by socialization reaching the full range of its addressees. Independently of how much a normative system is elaborated conceptually and perfected on an abstract level, no system can be applied to any circle of addressees. For instance, it could not be applied to a society without the memory of common past and the transmission of traditions (i.e., to a society composed only of newborn babies or of those already fallen into their dotage without exception); or, what is more, it could not be applied to a society either, in which the gap between the law's culture and the culture of those subjected to it was unbridgeable.⁴⁰ For law has some definite preconditions and

³⁸ *Idem*, p. 240.

³⁹ Cf. LUKÁCS [1971] II, pp. 188–190; III, pp. 80, 115, 367–368, etc.

⁴⁰ For two striking instances of the failure of attempts at transplantation, otherwise exemplary both in the preparation of the text to be transplanted and the determination of transplantation as well, see TIMUR (1957), pp. 34–36 and STIRLING (1965), pp. 210–224, as well as VANDERLINDEN (1971), pp. 212ff and SCHOLLER and BRIETZKE (1976), pp. 80ff.

presuppositions in order to function. If radically changed, it will simply be unable to function. And the law's inability to function is not necessarily a function of individual determination but, generally, of the otherness of social sensibility. I have in mind the otherness of world picture. Taking the terms of Wittgenstein's *Philosophical Investigations*,⁴¹ I can only perceive and understand any killing as killing since I know why I sense, construe and reconstrue a thrust with a knife, an injection given or making something eaten, as killing, and why I shall probably neglect the physical event of casting a glance (which would otherwise be a synonym to a witch's glance, or wizardry or magic). In more composite cases such as blasphemy, obscenity or espionage, after the lapse of some generations' time possibly not even a member (or historian) of the same culture can take it for granted that he/she will be able to reconstruct the facts that once constituted a case, and to recognize its relevancies in the correct way. In case of offenses against traffic laws, economic crimes or treason, it may occur that even a most perceptive and responsive witnessing of all the perceptible moments will turn out to be quite irrelevant from the point of view of the "establishment" of the "facts". For it is evaluation (i.e. series of evaluations overlapping one another and fed back into the process) that makes it possible that facts can be established at all. It means that the road which leads from the event to the individual case through the establishment of facts, is both norm-dependent and (alongside with norm-dependency) also world-picture dependent.⁴²

"This is the reason why we cannot grasp correctly the way in which we become conscious of reality, if we regard it merely as an idea 'about something'. In fact, we must recognize in this 'about something' one of the necessary moments of the total intellectual process, that is, one of those moments that is abstracted from the

⁴¹ WITTGENSTEIN [1945].

⁴² With reference to WITTGENSTEIN (1969), this kind of dependency is outlined by AARNIO (1977), pp. 100-104, as the last foundation of human cognition.

socio-human activities of man but, finally and necessarily, leads back to it again."⁴³ Paradoxically, it could also be said: we state a fact by evaluating references referred to as facts. Or, what is referred to as a fact is actually a fact because it has been conventionalized as a fact in a given context.

Language expresses facts by symbolically objectifying them. The objectifying effect of linguistic expression has two directions. Notably, *one*, language re-establishes the object of communication when it homogenizes it to its own homogeneous medium. Indeed, "it expresses the processes communicated about in an objectified form",⁴⁴ which is only one of the several aspects of the transformation processes going on in linguistic mediation. At the same time, *two*, linguistic expression conceals the nature of the relationship between the speaker and his/her act of communication. Namely, by pushing disanthropomorphization to the end, it transforms its own constitutive contribution into some objectified form.⁴⁵ In sum, linguistic expression conceals not only the character of fact but also the nature of the operations with facts.

What kind of operations do I have in mind? Human thought process and its linguistic formulation may have various layers which have no necessary connections among themselves. Properly speaking, a connection will be established between them only and exclusively by a transformation process bridging the gap which spans the layers neither equal in depth, nor equivalent in extent to one another. Moreover, the statements representing the two respective layers are not only different in meaning but also the possibility of deduction is excluded between them.⁴⁶ If my eye registers a changing field of colours and shapes and I say "a white

⁴³ LUKÁCS (1971) III, p. 368.

⁴⁴ *Idem*, II, p. 652.

⁴⁵ *Idem*, II, p. 427.

⁴⁶ Cf. PECZENIK (1979), p. 54. The operations by both the natural and the artificial intelligence are characterized as linguistic transformations by KENDAL (1980), pp. 55-64.

cat is haunting a mouse", I have already made a series of transformation leading from perception to knowledge, to its expression as a statement, to its generalizing description, to its explanation (first, causal, then, intentional), and, finally, to its evaluation. The various layers cannot be replaced by each other, consequently there is no reciprocity among them either. These layers are being built upon one another by assuming that "we attribute to [them] properties which go far beyond mere observation".⁴⁷ It is not an internal, abstract logical necessity that stands behind all this but human practice that, by continued feedback, arranges all existentially justifiable results of this practice to be the components of ongoing practice. In this way, human being is at the same time the object and the agent of the appropriation of the world; in consequence, he/she is also both the product and the originator of his/her own social self and history. *One*, he/she is the object thereof, since all which he/she appropriates from the world (by perception, linguistic expression, differentiation, the acceptance of what is considered obvious, conclusion to the general, reconstruction of causality, etc.) will to a large extent also determine the path he/she will follow subsequently. Everything done is a function of the accumulation of human experience, of its organization into a coherent world picture, in short, of a form of life. *Two*, he/she is the creator thereof, since his/her personal contribution is constitutive of both these transformations and the continuous reproduction of the culture which puts them into their context.

3.5. The Practical Dependency and Context of Qualification

If I raise the question whether some fact (e.g. of A having added arsenic to the dessert offered to B) qualifies as being some other fact (e.g. of murder), the only answer I can give to it is negative. Notionally, qualification can be understood in a meaningful way

⁴⁷ POPPER (1959), p. 423.

only and exclusively as the description of a historically well-defined practice (e.g. as the usual characterization of an event at a given time and place by a given community). In this sense, qualification is a proposition formulated as true or false on another statement. At the same time, by its linguistic formulation, qualification disanthropomorphizes into events with added meaning, what are in fact coincidental series of individual human acts based upon a series of separate evaluation, the occurrence and the given combination of which is far from being necessary. For instance, to qualify a manipulation with arsenic as murder means only and exclusively that some given members of the given community (i.e. a majority or at least a dominant part of them) are used to qualify the given act in the given way at the given time and place. Consequently, the question whether manipulation with arsenic is or is not murder here and now can be answered only and exclusively through the manipulation being qualified, that is, by the stand taken by human decision, which constitutes the linkage in question by the way of propositional transformation.

(Of course, any such linkage is also, for the most part, to be justified by the community—either through a special procedure or in the due course of communication. Reference to past practice and to historically justified tradition has a decisive part to play in justification. Needless to say that reference to practice is not equal to practice referred to. It follows that practice referred to cannot be taken as a criterium by itself. Moreover, it cannot even be considered in itself as abstracted from the overall practice of justification.)

Now, it can be stated at this point of analysis: in case of non-equivalent transformation, events do not classify but become classified. What do I have in mind when I refer to non-equivalency and lack of reciprocity? Transformability is not an issue of what is to be transformed into a more general or differentiated mental representation. In other words: the mental representation into which the transformation is to be made does not entail the mental representation from which the transformation has been made. (Neither the chemical "facticity" of the composition of a

compound, nor the biological "facticity" of the end of life has in itself anything to do with what we regard as murder in the community here and now. Or, similarly, to define what is meant by "book" with the limitation of the minimum number of printed pages will only serve as a definition of another definition. It will not respond to the original question of what is meant by "book" and, consequently, it will not offer a solution to the everyday routine problem met by any cataloguing librarian. In the same way, the well-known compound of oxygen and hydrogen is good only for the chemical definition of water. It fails to provide an answer for the nuclear problem of heavy water or for the differentiation of meteoric water, rainwater and drinking water. For any further question can only be answered through its own formalizing-simplifying definition, without offering any differentiation in another direction.)

Accordingly, equivalency can only be found in relationship between entities established by abstract, conceptual definition. That is, between mathematical and logical classes, between their quantitative conceptual derivations. For instance, if I define that "A added to B is equal to C", then A added to B will be equal to C indeed, by the only and exclusive force of my definition. It is to be noted, however, that even in such a case there will remain some ambiguity. For instance, I can weigh anything by the swing of the balance beam. But how may I interpret the result upon the basis of this definition if the excursion is due to the balance's breakdown, to the change of centrifugal force or to the intervention of magnetic force? Similarly, in average cases of forensic medicine, quantifying methods may perform quite a good job. But how is it to be interpreted if the proven degree of alcoholic concentration in the blood (which is the notional criterium of drunkenness) is caused by some non-alcoholic compound, maybe not even bound to cause a dazed state?

All this explanation is meant to emphasize how constitutive and genuinely creative the operations of non-equivalent transformation are, i.e. operations that form the core of any human cognitive process. It is to say that human cognition is entirely

embedded in the social practice of man. It is why it is, both in whole and in any part of it, justifiable only as part of social practice, definable within social totality.

Human cognition displays at the same time a disanthropomorphizing tendency. This tendency is basically directed at concealing its actual anthropomorphous tendency, i.e. the fact that cognition is a result of individual human activity—which is, in its turn, a function of social practice. In other words, disanthropomorphization aims at homogenizing cognition in order to lift it out of its underlying practical heterogeneity. Accordingly, cognition is at no level “a quasi photographic, mechanically adequate copying of reality”. Human mental representation is notwithstanding a kind of copying, a kind of copying which is, both “in regard of its determination” and “of its concrete tendency”, inseparable, “genetically speaking, from the social reproduction of life, originally, from human labour”.⁴⁸ To be sure, the social determination of human cognition is not synonymous with its deformation or mechanical dependency. Social environment is to be understood simply as its medium. Lukács cites the example of wind to describe the apparent paradox lying in the fact that “the wind will only become the subject of social objectification in a given concrete process” (that is, the perception of its qualities, their comparison with other qualities, and also their evaluation “are only thinkable within this complex of existence”), on the one hand, while the features in question qualify “as the ones they are in this connection in a manner which is objective and not subjective”, on the other.⁴⁹ That is to say, all the features we can at all perceive at the various levels of analysis are objective and also praxis-dependent. For it is human practice that guarantees the objectivity of cognition by establishing, through continued feedback, a relative unity in its tendencies.

⁴⁸ LUKÁCS (1971) II, p. 38.

⁴⁹ *Idem*, pp. 355–356.

3.6. Descriptivity Excluded from the Normative Sphere

Transformation that both mentally and operationally bridges the gap between facts of life and case in law, is necessarily non-equivalent. In consequence, transformation can only be described logically as a jump, resulting in a creative progress. For what is transformed does not and cannot entail into what it is transformed. That is to say, transformation produces something that has not existed before and could not have been produced by any other way and/or means. It is transformation that brings into existence, among others, of course, that which is called knowledge in the theoretical activity, as well as that which is called problem solving in the practical one.⁵⁰

Is there any sign of the realization in our traditional legal ideology that it is transformation that has been made here? Terminology itself suggests a negative answer from the very beginning. Notably, terminology itself seems to have been built upon presuppositions suggesting judicial process to be of a cognitive character, and legal functioning to be of a mechanical one. For instance, legal doctrine has a rather uni-directed, misleading, albeit very well-pointed, rhetoric about "facts" in general. According to the world concept suggested by it, there is a huge variety of facts. And when the formal establishment is made of those facts which can be concluded by legal procedure, the facts in question get "inferred" in the concrete individual case as selected—so-called "secondary", "ultimate",⁵¹ or "material"⁵²—facts from the whole variety of "primary" facts by means of the available technique(s) of "inference". Or, what is even more, the process through which inference is performed is usually characterized as "denotation"⁵³ or "descrip-

⁵⁰ Cf., e.g., PECZENIK (n.y.), p. 5.

⁵¹ MORRIS (1942), p. 1326.

⁵² JACKSON (1983), p. 88.

⁵³ WILLIAMS (1976), p. 473.

tion".⁵⁴ That is, apparently, as it suggests, neither the jump from facts in life to facts in law, nor the inference from the former to the latter (or vice versa) has any legal specificity. As it is exemplified by one of the classical textbook definitions, "A statement of ultimate fact describes the very event" [or, in the wording of one of the subsequent phrases: "the aspects of the event"] "to which legal consequences follow".⁵⁵

Surprisingly enough, the same idea is shared by modern analytical trends as well. Though they ordinarily recognize that facts in hand are varied as to their underlying character, for the characterization of basic situations they only accept "simple facts determined descriptively". That is, they regard facts in law as facts in nature, even if the former ones are formulated, on the very first and primitive stage, as expressions of legal language. And they conclude therefrom that their establishment cannot be anything else but an existential statement.⁵⁶

What lies behind such an approach? Providing that we start out from the presuppositions of the way of thinking (or cognition, or logic) of everyday life or of the general semantics of natural languages, any approach like the one above can equally be justified. Notwithstanding, as I want to prove in the following, this type of approach completely disregards the specificity of law.

As is known, social ontologies conceptualize social existence as a (total) complex issuing from the interaction of a set of (part) complexes, that is, a complex in which language itself is considered to be one of the partial complexes, namely, the one whose sole function is to mediate among other complexes. It needs no special justification to state that, in one form or another, language is necessarily present in each and every kind of interaction, as it serves as "the instrument and the medium of the continuity which

⁵⁴ WILSON (1963), p. 611.

⁵⁵ MORRIS (1942), p. 1326.

⁵⁶ See WRÓBLEWSKI (1973), p. 175.

is realized in social existence".⁵⁷ However, by performing its mediating role through asserting the particular principles of its own establishment and functioning, language contributes to name, to communicate about, to make as an object of human practice, and, thereby, to bring into social existence, different kinds of entities. Notably, language will be the instrument, and also the medium, of a number of types of functioning which differ from one another as to their underlying characteristics, internal laws, and logic, when it turns to embody the functioning of various partial complexes. These partial complexes are considered to be homogeneous in themselves. They are, as a matter of fact, for they fulfill their role by naming objects (events, relations, etc.) in the name of their own distinctive self-identity, and by communicating about objects (events, relations, etc.) and also about their actual naming within the framework and in re-assertion of their own identity. Such complexes can be exemplified by, e.g., science and arts, politics and law as well. To be sure, the particular determinations specific of the respective partial complexes will be manifest in resulting, finally, in ontological differences as well.

What is specific of law is that no matter whether brute or institutional fact is referred to in law, its definition is doubly institutionalized: because it is a linguistic expression in the weak sense, on the one hand, and this is done within a legal framework in the strong sense, on the other. All this is to mean that description is simply inconceivable to take place in law. However I can, of course, describe the law—only providing that I am doing so from beyond the reach of the law. That is to say, once I accept normativity to be the basic feature of the field in question which affords criteria for each and every kind of selection made within the field in question, everything conceivable within the field will appear as somehow touched by normativity as filtered through, while being subordinated to, the field's particular normativity. In consequence, the difference between brute, and normative, fact cannot be found

⁵⁷ LUKÁCS [1971] II, p. 190.

any longer in any reified entity or their linguistic expression, either.⁵⁸ For their difference will only be defined by the underlying ontological character of what has linguistically been expressed, that is, by the special context and particular determination issuing from its application in the given partial complex.

Law is objectified as a formally closed system. In respect thereto, the external at any time provides the framework and also the goal of functioning. At the same time, any motive taken from the external is able to exert any influence only and exclusively as a moment of the internal. It means that any normative quality—including the meaning as well, which within the system can be nothing else but normative—can only originate from the internal.⁵⁹ Consequently, to say that the fact is descriptively determined can only be a meaningful statement within the system. It can only gain a meaning to differentiate one kind of determination from another kind (e.g. one axiologically defined) within the range of the same system.

For the system and its individual components as well work prescriptively in any normative system. This is the paradox of the use of natural language in law, that is, of the application of descriptive statements in a distinctively normative contexture. It is one of the aspects of the dialectic between cognitive openness and normative closedness in law. In the philosophy of law, it has already been noted that “we cannot imagine any definition of a given case that [...] could be other than descriptive and normative at the same time”.⁶⁰ Following this argument, we can even say that “determined, descriptive elements of a case” are only imaginable as quantitative definitions, the actual occurrence of which is by far not typical, or necessary, in law.⁶¹

⁵⁸ Cf., e.g., KINDHAUSER (1984), pp. 465–478.

⁵⁹ Cf. LUHMANN [1972], p. 284.

⁶⁰ RADBRUCH (1930), p. 66.

⁶¹ SCHOLZ (1940), p. 38.

Moreover, it is also to be concluded that no matter which kind of linguistic expression we have, it will turn to be a part of the normative contexture in a normative context. That is, none of its features can escape from getting subordinated to the normative qualities and determinations of the system. In consequence, it is far from being by chance that at the time when the institutional set-up and ideology of modern formal law won the day, the notion of "facts of a case" [*Tatbestand*] was invented as a specific legal concept, distinguished from any notion of everyday language denoting any non-specifically defined fact [*Tatsache*; *Sachverhalt*]. And this was done in a field of law which was the first to mark legal distinctiveness for reasons of guarantee, that is, in criminal law, as a precondition that the principle of *nullum crimen sine lege* is re-written in a legal rule.⁶²

(It is another question that only the development of the concept of the "facts of a case" [*Tatbestand*] will make it possible that such conditions of meting out legal consequences (i.e. sanctions) are defined that bring into one case events which are plainly constructed, not having anything in common among them even from a practical view. In such a way, "facts of a case" may be completely detached from, and alien to, the internal unity and logic of any natural event. This means that any natural relationship can be substituted by the necessity of concerted and unified practical reaction. For instance, in order that behaviour varying in time, instruments used, intentions, and intensity as well, can be treated as one singly-defined criminal act in harm of human environment,⁶³ what is needed is that all kinds of causal relations and also their cumulation will be rendered irrelevant, and the exclusivity of the normative imputation, guided solely by a plainly practical consideration, will be made relevant.)

⁶² For the first realization of the problem, see KLEIN (1796), p. 57, then STUBEL (1805). In the field of civil law, the first formulation comes only by THÖL (1851).

⁶³ Required by, e.g., SAMSON (1987).

"Every statutory use of a term is in itself a definition, for to use a term in a statute is to give it a meaning."⁶⁴ Or, the use of any linguistic expression in a normative context is preceded by interpretation. This is the message of the paradoxical statement as well, according to which even the needlessness of interpretation can only be construed by way of interpretation. Re-formulated in a non-paradoxical way, I would state that, instead of being the medium of solving our doubts in respect of the meaning of a text, interpretation is, in general, the conceptual precondition of the meaningful use of any text.

Interpretation necessarily presupposes to have evaluative choices made in respect of the use of interpretative directives. And to make use of interpretative directives will presuppose, in its turn, that they themselves are interpreted, and that evaluative choices among its differently interpreted variants are also made. And so further on.⁶⁵ In consequence, no matter how simple a question of conceptual identification is raised in practice (e.g., whether or not a given part of the body qualifies as an "organ", or a one-wheeled device, pushed by human force, as a "vehicle"), no answer will come by itself (e.g., by the force of dictionary definition) to mind, as the material itself needed for the answer (e.g., the meaning defined by the dictionary) has to be interpreted, too, and the interpretation is only able to be done in a given teleological context. That is, if I ask whether the hand is or is not an organ, and the children's toy a vehicle, evidently it will not be of much use if I learn which meaning can be found in which dictionary. What I am expected to do is to substantiate my claim to make the identification upon the basis of the given meaning, and for the purpose and in the context as they have been given.

For my stand and way of thinking in respect of the meaning may easily be varied in function as to whether I am writing poetry or fiction, reporting on an accident, translating an article on

⁶⁴ SILVING (1947), p. 647.

⁶⁵ Cf., e.g., WRÓBLEWSKI (1970), p. 167.

technology or, just the other way round, I am judging whether the text of a legal provision is or is not applicable in a given context. If I am a judge, needless to say that it is the normative context of the situation of decision-making, as well as the environment and purpose of the norm, that will matter. That is to say, the same, lexically-given meaning can be interpreted differently according to the system of law, area of law, wording and systemic environment of the law, in which the interpretation is made.⁶⁶ In this sense, even the statement can be added according to which "the already mentioned dialectic, the conflict of class interests that springs from this, becomes the ultimate determining factor, and the logical subsumption is based on this only as a phenomenal form".⁶⁷

This statement involves the following paradox as a consequence: what is called to be classification from the point of view of facts can only be understood as interpretation when conceptualized from the point of view of norms. This commonness can evidently be explained in a number of ways, even if "there is not any genuine logical distinction between the two types of problem." For, on the final analysis, the question is this: "Is r , s , t an instance of p for the purposes of applying *if p then q* ?"⁶⁸ For, providing that I do not intend establishing the ontological identity of differing kinds of being, I cannot really say more than that: x counts as an instance of y in c context.⁶⁹ And once "counting" in "context" is included, there is necessarily a personal stand, i.e. the impact of a decision, involved therein. " '[K]nowing' which particular fact-statement to adopt is not a matter of identification, but of decision."⁷⁰

⁶⁶ Cf., e.g., WILSON (1963), pp. 6 and 14.

⁶⁷ LUKÁCS (1971) II, p. 220.

⁶⁸ MacCORMICK (1978), p. 95.

⁶⁹ *Idem*, p. 93.

⁷⁰ DIAS (1980), p. 263.

3.6.1. Concept and Type, Subsumption and Subordination

The presuppositions that have suggested judicial process to represent a kind of cognition which, in its turn, is built up of descriptive elements, have fostered the development of a peculiar type of thought tradition. It is the dichotomy between type and concept, respectively typification and definition. During the '30s in Europe, this was heralded as being able to transcend one-sided interpretations. It is based upon the classical distinction the German methodology of science was bound to make between class concepts and concepts of order,⁷¹ a distinction the force of explanation of which was soon utilized in the reconstruction of the notional structure of legal thinking as well.⁷²

It is to be noted that the definite extension, as well as well-defined conceptual limits and borderlines, of the former make it possible that questions of class concepts are answered in a clear-cut way, "either/or". The concepts of order are, in contrast to the former, only circumscribed through latent tendencies of their development. This means that answers to them can only be forwarded by a vague formulation, "more or less". That is, they aim at attaining characterization *within* a given system rather than classification *of* a given system.

The distinction of concept and type has subsequently been developed therefrom, claiming that, against all appearances, not concept, but only type is the real carrier of legal phenomenon. Instead of accepting any subsumable identity, resp. entailment, between differing concepts, and concepts and factual description, the way of thinking in terms of type counts with analogical operations among entities characterizable through bare similarities.

⁷¹ Cf. HEMPEL and OPPENHEIM (1936) and OPPENHEIM (1937), as well as RADBRUCH (1938), p. 46.

⁷² Cf. *ibidem*.

And the end result is gained by "ascription" rather than by genuine "correspondence".⁷³

There is another trend of thought as well, conceptualizing law as a specific kind of reflection. It also conceives of law as a type, reflecting the social archetype, or prototype, it transforms into a norm (or regulation) of positive law. By its transformation into positive law, the archetype (or prototype) in question will be conceptually defined. This is to say that, by its formal definition, its typical character will also be sublated. On the other hand, however, when such a formally defined type-pattern is applied to a factual situation before the court of law, a kind of mediation between the general formulation of the norm and the individual features of the case comes about. The bare fact that the "essential" components of the social type are transposed (and thereby sublated) in the formal definition of the norm, renders it possible that a dialectic identity (in the form of formal entailment) is established between the general norm and the individual case in a subsumptive manner.⁷⁴

The first theory is a hermeneutic one, which attempts at grasping the nature of the process by the interplay of a dual, simultaneous motion, instead of the exclusivity of deduction from the norm, on the one hand, and the induction from the fact, on the other. The fact, however, that we are speaking about "analogy" and "correspondence" here, suggests that the process in question is conceived of as being of a cognitive nature from the very start. As a matter of fact, it suggests as if it were the case of logical operation between concepts the mutual relationship of which had previously been logically determined. And as if some of them had also previously been transformed, through a cognitive process, into individual concepts covering the facts of the case.

⁷³ Cf. ENGISCH (1943); LARENZ (1975); KAUFMANN (1982), in particular, pp. 40 and 48.

⁷⁴ Cf. PESCHKA (1975), pp. 76 et seq.; PESCHKA (1979), ch. II par. I/6; PESCHKA (1985), pp. 239-240; PESCHKA (1988), par. III/4 and 6.

In contrast to the former, the second explanation undertakes to build a reflection theory of law up to the end, conceptualizing law as a process leading, firstly, from the individual (fact-situations) to the general (norm-formulation) at the stage of law-making and, then, secondly, from the general (normative provision) back to the individual (factual situation) at the stage of law-application.⁷⁵ In this way, the genesis of law is traced back to its realization.

I am not concerned here with the question of how much directly, in which way, to what extent, and by what kind of necessity, will and can that which is considered to be typical according to its ontological existence,⁷⁶ be reflected, or reproduced, in the linguistic form which is the carrier vehicle of legal objectivation.

Nevertheless, there is no question that which is typical from the point of view of the judicial process is posited at least in two senses. On the one hand, from the body of what is typical in social ontology, exclusively that part will be relevant in law which is enlisted by, or named in, the normative text carrying the legal objectivisation. On the other hand, independently of how much the typical posited by the law is typical in social ontology indeed, it cannot serve as a criterium for the normative system. It is why the establishment, by subsumption, of "essential identity" has to be built upon legal relevancy (in order that what is "relevant" can be identified), and legal relevancy, in its turn, upon the normative definition provided by the normative text.

As social ontology suggests, legal objectivisation can only be considered as existent as long as it is recognized as such and also implemented into practice. Therefore its existence is a function of selective understanding and conscious (re)interpretation.⁷⁷ In consequence, the identity in question "is not given from the beginning, either [...]: for it has to be brought about first, through the process

⁷⁵ PESCHKA (1965), ch. III, par. 2.

⁷⁶ For the definition of the quality of typical, cf. LUKÁCS (1957), pp. 216-218; LUKÁCS (1963) II, p. 281.

⁷⁷ Cf., e.g. PESCHKA (1983), pp. 25-26.

of law-realization".⁷⁸ Thereby we have come back to the basic problem, from which we have just set out.

It is to be noticed, however, that the two attempts at theoretical reconstruction remind the confrontation of different terminologies rather than the formulation of conflicting theoretical messages. For, as the second trend witnessing of its Hegelian-cum-Marxian inspiration asserts, "dialectic identity" is a kind of identity which is composed of, among others, "non-identities", too.⁷⁹ This identity is established by the identity of "essential properties". By "essential properties" are meant as being those properties (qualified also as typical, by the way), "which have been defined by the law-giver as elements of facts that constitute a legal case".⁸⁰

Nonetheless, it has to be acknowledged even for Marxists, that "that what is really human [...] can only display stronger or weaker features of the typical".⁸¹ And, once we have accepted the thesis according to which "the typical in its directly abstracted purity cannot be found in the concrete totality of empirical phenomena, but it is human beings, situations, relations, as well as aspects of reality, that display the stronger or weaker features of it",⁸² the conclusion follows from it quasi-mechanically: "The judge investigates whether in the given case he/she can find the [...] stronger or weaker manifestations [...] of the features [...] of the social relationship grasped in the contents of the legal norm."⁸³

All this is the same as saying that according to the methodological tradition and terminological convention I adopt and share in, the operation which is actually performed in social practice under the aegis of application of the law can be either termed as subsumption

⁷⁸ KAUFMANN (1982), p. 76.

⁷⁹ It is definitively hold by PESCHKA (1979), p. 143 and PESCHKA (1985), p. 237.

⁸⁰ PESCHKA (1985), p. 238.

⁸¹ LUKÁCS (1957), p. 218.

⁸² PESCHKA (1975), p. 218.

⁸³ PESCHKA (1988), p. 93.

(which is based upon dialectical identity of the elements of the norm-formulation and the facts of the case) or called as ascription (which is based upon similarity between the elements of the norm-formulation and the facts of the case). In any case, I have to conceptualize in one way or another that which Lukács defined as "specific discrepancies", concomitant with any law-application in modern formal law, where there is a specific problem which crops up as "problem of subordination".⁸⁴

Nevertheless, it is to be realized that, in the final analysis, subsumption is only one of the logical aspects and subordination is hardly more than another, and subsumption and subordination as two equally possible kinds of operation are equivalent, insofar as one of them can be reduced to the other.⁸⁵

At the same time, may I recall one of the basic messages of social ontology? According to it, social processes are with all of their components embedded in the actual needs of social practice. That means that they are only interpretable within the context of the reproduction of social existence. For that matter, even if we treat reflection in a context of ontology, that is, as one aspect of social processes, one thing can notwithstanding be taken for granted. Namely, that reflection can in no way be reduced to mere cognition.

Ontologically speaking, the mere fact that different spheres of homogeneity (such as language, morals, law) have come into existence on the heterogeneous basis of our everyday life practice, paradoxically expressed we have gained kinds of images which portray something else of what they are—allegedly—a reflection.⁸⁶ For instance: in law, the underlying organizing principle of both the formation and the functioning of the law's homogeneous sphere is that "the establishment of the facts [...] is not rooted in social reality itself, but merely in the will of the ruling class

⁸⁴ LUKÁCS (1971) II, p. 220.

⁸⁵ Cf. RÖDIG (1973), pp. 166–167.

⁸⁶ Cf. VARGA (1985), p. 126.

to regulate social practice in a way of suiting best to its own purposes".⁸⁷

Consequently, that what the epistemological investigation of the genesis of law conceptualizes in Marxism as the reflection of the socially typical, cannot be interpreted, if not within the framework of a "particular socio-historical dialectics"—that is, ontologically. This has an "alternative foundation", in which the merely cognitive consideration, including "the cognitively objective identity or convergence, cannot be the decisive motive of its selection or non-selection." For the actual choice "is always rooted in the social needs of the present as it is given at any time".⁸⁸

Hence, both the acceptance of anything as typical and the classification (i.e. ascription and/or subsumption) of any individual as typical can only be interpreted within the framework of such dialectics.

3.7. The Unity of Fact and Value

Attempting to describe what is distinctively human through the analysis of mind, philosophy has concluded that it cannot be characterized as a "machine" with a "ghost" built into it. It has no part whatever which, when the whole machinery is set to motion, is to start working according to own laws and regularities.⁸⁹ In its existence, the human being is a whole having its imprint on each and every segment and moment of its existence. This is what Marx meant too when stating that both social nature and historical character were inherent in humankind.

This is also established in psychology: pure perception is nothing else but mere theoretical abstraction. What will come to mind as perception is already evaluated at some level, i.e.

⁸⁷ LUKÁCS (1971) II, p. 218.

⁸⁸ LUKÁCS (1971) II, p. 189; I, pp. 388 and 390; II, p. 98.

⁸⁹ Cf. RYLE (1949).

processed through the psychological structure individually characteristic of our personality. Gestalt psychology discovered several decades ago that fields of perception showed qualities that could not be determined by single sensory stimuli, but expressed attributes of more or less extended areas (of space or time).⁹⁰ Upon this recognition, a totality concept was methodologically defined some decades ago, proposing not only that parts were at any given instance determined by the whole and that, accordingly, investigation had at any time to depart from this whole, but also that parts could not even in themselves be neutral static components, either, as it was just their configuration in one structured organization that at any time made up the whole.⁹¹ In consequence, no intellectual construction reduced to elements can be turned into something meaningful. For even in an elementary situation (with elementary conditions in an elementary isolation, etc.), human response always embodies a relative unity.

Human attachment to events and matters is necessarily discrete: we appropriate what we encounter as mediated by our psychological reactions from the start, and not directly in their own materiality. Of course, this builds into our perception processes an abstractive-transformative filter from the start, which makes fact and value seen as a unity. "Even, however, when the 'facts' in question are not infused with empirically intractable value-elements, they still represent patterns more or less severely abstracted from any concrete events."⁹² Strictly speaking, patterns referred to are by far not pure facts any longer; they are fact-value complexes. As a matter of fact, they are the only factors that really exist in our human world.⁹³

The fact-value complex in itself is, however, not a subject of communication. Once we name or communicate on an event by

⁹⁰ Cf., e.g., WERTHEIMER (1959).

⁹¹ Cf. STROMBACH (1983), p. 68.

⁹² STONE (1966), p. 738.

⁹³ Cf. STONE (1964), ch. 7.

asserting it as a fact, it will also be filtered through linguistic mediation. And as known, language preconditions and expresses, while creating and reproducing, a given form of life.⁹⁴ This is so because of the ontological fact of social embeddedness (that is, at the same time being conditioned and conditioning),⁹⁵ and also by virtue of the particular features and instrumental definition of the given medium. Language is able to communicate by making ideas "speakable" as " 'projected' into discursive form".⁹⁶ Its semantics and syntax are equally built on "a linear, discrete, successive order" structure.⁹⁷ In other words, both the elements of linguistic expression and its complex structures are built on an endless series of operations establishing relations (analogies and distinctions), which are from the start to wedge an evaluative moment into the fact-value complex in respect to the particularity of the linguistic medium too. It has two aspects. As already seen, any transformation into linguistic expression is in itself a kind of institutionalization which assumes evaluation. At the same time, the understanding of what has been linguistically communicated also preconditions transformation, i.e., further evaluation. Since communication is only conceivable through generalizing classification,⁹⁸ it is justifiable to say that "every word is to some extent a word of degree",⁹⁹ made and interpreted via non-equivalent transformation. And what is not equivalent is constitutive.

That is to say that the road from individual perception through generalizing linguistic expression to a concretizing interpretation as reflected in a given situation displays the same dialectic of the individual and the general that has been used to describe law-

⁹⁴ E.g. WITTGENSTEIN (1945).

⁹⁵ LUKÁCS (1971) II, cf. VARGA (1985).

⁹⁶ LANGER (1942), p. 93.

⁹⁷ *Ibidem*, p. 80.

⁹⁸ LUKÁCS (1971) II, p. 195.

⁹⁹ WILLIAMS (1976), p. 535.

making as projecting the general and judicial application of the law conceived of as its individuation.¹⁰⁰

The statement according to which "even indisputable facts need interpretation"¹⁰¹ seems to be corroborated. "It is commonly known that the facts of a case are not 'brute' facts, but interpreted facts."¹⁰² What are called facts are at the same time evaluation as well. In another formulation, the social nature of facts is also mediated by the evaluations inherent in the fact-value complex. Or, as one of the classics of American legal realism said, "to one brought up in [a given culture], varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books".¹⁰³

Fact and value are, in consequence, co-related to one another. They themselves are analytical concepts; they can only be stated in unity. Their complex stands for the understanding that fact is only conceivable as evaluated and, evaluation, as being attached to fact. As parts of a totality,¹⁰⁴ they gain meaning from the whole. Both their existence and their meaning can only evolve in the process of a ceaseless interaction between these two components. In consequence, (1) the whole construction breaks down if any of its components is extracted therefrom; (2) the whole construction becomes re-posed if any of its components is re-posed; (3) the whole construction gets modified if any of its components is modified.

¹⁰⁰ E.g. PESCHKA (1965), ch. 3. For a theoretical criticism, see VARGA (1981a) and VARGA (1981b).

¹⁰¹ AARNIO (1977), p. 70.

¹⁰² KLAMI (1980), pp. 69 and 73.

¹⁰³ Justice Holmes in *Diaz v. Gonzales*, 261 U.S. 102 (1923), 67 L. Ed. 550, 552 as quoted by KENDAL (1980), p. 61.

¹⁰⁴ Cf. NERHOT (1988), p. 20.

3.8. The Unity of Fact and Law

In point of principle, reality is one and undivided. It is a totality at any given time of the motions actually taking place in it. Reality as a subject of human praxis, notwithstanding, cannot be separated from the communicative practice of humankind and from human evaluations and normative expectations. As seen in another context, the establishment of facts is an intellectual appropriation with human evaluative involvement in it. In the social construction of reality, neither facts nor factual operations can meaningfully be considered as abstracted from social praxis.

If normative expectations appear repeatedly in a way pointing to the desirability of a legal solution and to the attempt at having an enquiry into its conceivability, in human perception and evaluation a search for relevancy is to gain ground as a prime factor of selection and ordering, a search which, if initially reconfirmed, will turn out to be almost exclusive in order to lead to a genuine law-application.

To be sure, the law is far from being a panacea with universal application omnipresent and omnipotent. Nevertheless, if there is any point in having a mediation through the law, law turns out to be co-related to something else (in the course and for the sake of this mediation). Certainly, no exclusivity in this attempt is needed. Human perception and evaluation of facts can at the same time have several conceptual webs, operational functions, attempts at being reflected in more than one direction.

"The organization of facts that allows the application of a rule is supported by a prior interpretation, without which these facts have no meaning whatever. This prior interpretation is supplied by the legal rule itself, and is in no way an objective datum, a pure reflection of reality." For "the law is in no way attached to the 'materiality' of the facts, acts, and various events that it considers, but to the meaning they have within the legal system itself. This meaning is in no way bound up with the elementary events, taken in isolation, that constitute them; it results from the

whole of them as a construct under the rules".¹⁰⁵ This is why "the factual situation brought before the court is already a 'legally filtered' situation defining at least in outlines also the applicable rules".¹⁰⁶

For facts themselves have no meaning at all; they have no names, either. "Fact situations do not await us neatly labelled, creased, and folded; nor is their legal classification written on them to be simply read off by the judge. Instead, in applying legal rules, someone must take the responsibility of deciding that words do or do not cover some case in hand, with all the practical consequences involved in this decision."¹⁰⁷ And giving a name is at the same time qualifying what has been named. "Qualification [...] establishes a relation between a concept and an element which is told to fall or not to fall within the extension of the concept."¹⁰⁸ For qualifying, we are also expected to interpret in order that the extension of the concept to be qualified can be defined. That is, the meaning of the word involved in naming is to be established. "Or, the question is not to have a search for any true meaning of the words as Socrates believed, as if there were any external world or world of ideas offering one single solution that can be exclusively conform to reality; it is rather a practical job to find and work out the meaning which may fit the most to a concrete solution proposed by some consideration."¹⁰⁹ Consequently, "having a meaning" and "giving a meaning" become differentiated in argumentation, albeit their notional extension may be the same in ontological reconstruction.¹¹⁰

In other words, they are synonyms indeed, with the former disanthropomorphizing what is, both apparently and as to its actual functioning, only anthropomorphous. Even logical schools of

¹⁰⁵ NERHOT (1988), pp. 321 and 322.

¹⁰⁶ LAGNEAU-DEVILLE (1978), p. 528.

¹⁰⁷ HART (1958), pp. 63-64.

¹⁰⁸ PERELMAN (1961), p. 275.

¹⁰⁹ PERELMAN (1976), p. 121.

¹¹⁰ Cf., first of all, PERELMAN (1962).

thought reducing legal processes to merely cognitive ones consider the act of giving a name a complex operation of searching for, while establishing, meaning, in which “problems [...] are fundamentally semantic, since the main difficulty lies in identifying the property referred to by the expressions found in legal discourse”.¹¹¹ Are problems semantic? It means that even apparently elementary operations we are inclined to regard as purely factual are already embedded in the social context of formulating them as a question, embedded from the very start in the evaluations that are inherent in both perceiving facts and making use of legal relevancy to serve as a criterion in their selection and ordering. This is why the statement, even if simplistic, can be justified, according to which “the qualification of facts is implied by their conceptualization”.¹¹²

It is a classical paradox of philosophy of law that legal consequence can only be construed as related to the judicial establishment of facts that constitute a case and, vice versa, the question whether facts constituting a case are judicially establishable is only answered alongside the realization whether exacting legal consequences is desirable or not.¹¹³ And this is again to arrive at a position already taken, according to which no operation can withstand becoming normative in a normative context.

3.8.1. “Question of Fact” and “Question of Law”

The debate about the separation of “questions of fact” and “questions of law” is expressive of the basic structural and paradigmatic features of our legal arrangement and legal ideology, even if positive law may temporarily put it aside.¹¹⁴ A fundamental procedural

¹¹¹ ALCHOURRÓN and BULYGIN (1971), p. 147, quotation at 153.

¹¹² HÉBRAUD (1969), p. 31.

¹¹³ E.g. RADBRUCH (1914), p. 199.

¹¹⁴ For an attempt at overcoming it, see, e.g., NAGY (1974), pp. 266–267.

institution in both Common Law and Civil Law cultures,¹¹⁵ a deeply traditionalized division of the ideals and directions of juristic thinking, it has already fully permeated Roman law as a kind of false ideology.

As a conceptual distinction, it has been realized by contrasting *factum* to *jus* as achieved in the series of *questio facti* and *questio juris*, *res facti* and *res juris*, as well as *actio in factum* and *actio in jus*. As it may be seen in classical texts clearly,¹¹⁶ law is what exists in terms of *jus commune*, what is being considered valid, or what one concludes therefrom as valid (or, as we could say now, what is present for a deductive breaking down), in opposition to fact, what exists exclusively providing, to the extent, with a degree of validity and in a composition, that which has been proven or sanctioned (or, as we could express now, what can be added inductively and posteriorly to what is already present). That is to say that, both in the classical age and in the Roman Law *redivivus* of the Middle Ages, law conceived of as fundamental, primary and unchangingly standing will be contrasted to a legal projection, or principle, as fact, which is subordinated, secondary, unknown, not inferable therefrom, or which, even if regarded as valid, is unable to invalidate the former. In other words, the conceptual distinction is a means of internal movement and development; at the same time, it shapes legal thinking as well.

(As opposed to the intuition of everyday thinking, owing, on the basis of the everyday routine and scientific experience, priority, and also cognitive significance, to the operations with facts, it is worth noting that both the differentiation of fact and law and the understanding of fact as reality are, in Latin and in the languages derived therefrom as well, stemmed not from everyday routine and scientific experience, but precisely from law, precisely from this distinction,

¹¹⁵ Surveyed by ROTONDI (1977), p. 12, note 18.

¹¹⁶ Cf. VASSALI (1960), pp. 422ff and PROSDOCIMI (1956), pp. 808ff, as quoted and further developed by ROTONDI (1977), pp. 7-8.

and spread over to many other fields.¹¹⁷ Or, in Latin and German, the primitive and first meaning of "true" is "[procedurally] right", which in its turn transforms into "reality" as opposed to the merely assumed or presumed,¹¹⁸ differing from the English, where the original meaning of "true" is "plighted faith".¹¹⁹ Accordingly, the concept of both the fact and the true is basically procedurally conceived, as opposed to, e.g., Greek, in which *ta lethēs* [true] is that which is revealed¹²⁰ without tradition continued.)

In procedural systems having developed from modern times, the differentiation between question of fact and question of law is of fundamental importance. By the very fact of having a strict distinction (e.g. of the competencies of non-professional jury and professional judge in complementing one another; of the procedural phases of a given procedure; of subjects that can be appealed against), it suggests diverging approaches, paths of thought, terminologies, and references for decision. Moreover, it puts its stamp on the limitations of the preparatory stages of a trial process, of drafting documents, of evidencing, witnessing and expertizing as well in order that they cannot be prejudiced in questions of law; what is even more, it can even define how the judge is expected to understand a norm, notably by separating the normative message of a norm to be accepted by the judge as a fact from the one to be interpreted as a law.

The significance attributed to this distinction¹²¹ is based upon the definability of the conceptual sphere of the questions of fact, to be separated from what is law. Accordingly, definitions are mostly

¹¹⁷ Cf. MAUTHNER (1924), p. 303, quoted by SILVING (1947), pp. 644 and 656, notes 13-14.

¹¹⁸ Cf. MAUTHNER (1924), p. 349 and "Wahr" in *Deutsches Wörterbuch*, p. 691 [referring to the wording in the *Ulmisches Urkundenbuch* (1316)], quoted by SILVING (1947), pp. 644 and 656, notes 15-16.

¹¹⁹ KENDAL (1980), p. 21.

¹²⁰ *Idem*.

¹²¹ "Ad questionem facti non respondent iudices; ad questionem juris non respondent juratores." *Isack v. Clarke*, 1 Rolle, 125, 132 (1613) and *Coke Co. Lit.* (1628) 155b as quoted by POUND (1959), p. 547.

simplistic, knowing no reservation. "A question of fact [...] is one which has not been thus [in accordance with established principles] predetermined";¹²² "The questions of fact [...] are those questions which may be determined without reference to any rule or standard prescribed by the state";¹²³ "when one of two different versions of events must be accepted, a question of fact is raised".¹²⁴ The ideological stand (i.e. the de-juridifying disanthropomorphization of the fact distinguished from the law) is revealed by authors commonly having as a touchstone the fact as given self-evidently in itself. But what criterium is adopted to substantiate such a claim for distinction?

To be sure, there is a logic proper to this institutional differentiation and there are formal arguments to support it. According to one of the formulations, "[t]he issuable facts [...] should be alleged as they actually existed or occurred [...] Every attempt to combine fact and law, to give the facts a legal colouring and aspect, to present them in their legal bearing upon the issues rather than in their actual naked simplicity, is so far forth an averment of law instead of fact, and is a direct violation of the principle upon which the codes have constructed their system of pleading. [...] [T]he allegation must be dry, naked, actual facts, while the rules of law applicable thereto, and the legal rights and duties arising therefrom, must be left entirely to the courts".¹²⁵ However, the basic idea is unfounded as "naked fact" is itself an abstraction that actually does not exist. What do exist are situations that are lived through exclusively, from the endless potentialities of fact (and aspects of potentialities of fact) of which only the evaluation of the user can provide a selection, which is obviously a function of the use the user has in mind; and in order to communicate the result of the

¹²² SALMOND (1902), p. 15.

¹²³ BROWN (1943), p. 901.

¹²⁴ MORRIS (1942), p. 1314.

¹²⁵ POMEROY (1904), pp. 560–561, quoted by COOK (1936), pp. 236–237, note 7.

selection, the user also has to name it, i.e. also to interpret it, which again is a function of the intended use.¹²⁶ This is to say that fact exists exclusively in concrete context, and not in abstract generality. Accordingly, to formulate a question about it is only meaningful if it involves the considerations leading to it, i.e. its whole context.¹²⁷

Notwithstanding, there is a common stand according to which these are "distinct categories, involving real differences for the lawyer and judge. And the difference is one of kind, and not merely one of degree [...] The difference between the two kinds of questions is qualitative, not relative; but the distinction can be made only after the position of the disputants is fully known".¹²⁸ Or, the attempt at making a distinction is doomed to failure from the start because what renders them differentiated lies outside them. At the same time it is clear that, no matter whether they can be distinguished or not, their differentiation (as expressed, e.g., in their channelizing into differing paths or procedure) will be realized in practice. For the distinction of questions of fact and law involves not only differing area and procedure, and differing normative definitions and expectations in them, but also differing context, reference and, consequently, differing argumentation as well,¹²⁹ whilst the interdependency of the two sides, as well as the constitutive character of the whole process are unchanged. "But I can find no reason for supposing that the nature of the judicial process is different when the question is said to be one of fact from what it is when the question is said to be one of law."¹³⁰

How can the apparent paradox be solved?

¹²⁶ *Idem*, p. 238.

¹²⁷ E.g. JACKSON (1983), p. 87.

¹²⁸ MORRIS (1942), p. 1306.

¹²⁹ E.g. JACKSON (1983), p. 94.

¹³⁰ Lord Reid in *Griffiths v. J. P. Harrison, Ltd.* (1962) 909 at p. 916, quoted by WILSON (1963), p. 621, note 84.

The solution is to be found in the reversal of the way of raising the question and, thereby, in the explanation why the question has been raised at all. That is to say, it is not the ideologically dis-anthropomorphized evidence of the fact that is the basis upon which the evaluation of law is based, but it is the praxis, in the course of which, in order to standardize practical activity, humankind builds a system of normative expectations and references, in which, as differentiated from the purely normative mental operations with the conceptual components of the normative sphere, it is also humankind in practice that posits the normative appropriation of reality and its processing in the normative sphere as quasi-reality. This is an appropriation of reality too, albeit posited by, and in the interests of, law. Actually they differ, but only in a procedural sense. Their differentiation can only be made in a given procedural context. That is, it is a given procedure as an aggregate of normative projections defining a normative practical process that serves as a basis for the whole enterprise, at the same time determining the criteria of the differentiation itself, thereby deciding upon its final issue as well.

Or, the methodological dilemma is unchanged: in order to appropriate reality (practically or theoretically), we are expected to create concepts and to classify them, pretending as if the existence of our concepts, as well as their discreteness, were the mere transposition (i.e. pure consequence) of the existence of reality reflected by these concepts. Although we are aware of the fact that reality is not discrete but continuous; and in the interest, and within the context, of its (practical or theoretical) appropriation it is we who make it conceptually discrete. In respect of law, what we have in mind is, however, not directly reality but a conventionalizing conceptual network and referential practice, established artificially in order to exert an influence on reality. It is within this context that the question of the differentiation between questions of fact and questions of law is formulated. It is another question that I have no other choice than to formulate this in the medium of the same language which is, at the same time, also the object of the question. (It is to be noted, however,

that a distinction has to be made among the language of the law, carrying on what has been enacted or posited as law; the language of lawyers, by the means of which legal acts as specific forms of objectivisation are being made from an itself a mute set of signs by reference to the law; the language of ideologists/critics of the law, reconstructing the language of the law as if it were from inside but actually from outside, i.e. without resulting in legal acts; and the language of legal scholarship, attempting at a theoretical description by reconstructing the ontological context behind their epistemological assumptions and ideological projections.) In point of principle, the question itself and its object can be distinguished on the abstract conceptual level of analysis; in practice, however, there is no label on the words I use and on the notions I refer to, which could signal this distinction in a clearly unambiguous way. Once I leave the preciseness of the abstract conceptual analysis, I am to cope with the chances of notional confusion and ambiguous connotation.

In sum, I can say that the duality and confrontation of the questions of fact and questions of law simply do not exist beyond the reach of the humanly-made legal reality. All this can only be interpreted as an institutional question, in the function of a system of norms laying the foundations of, and defining, a given system of procedure. As has been seen, (1) the differentiation has nothing but a merely law-positing foundation; (2) as relational categories, any of them has a meaning only vis-à-vis the other; in consequence, (3) their definition is reflexive, too, one being the negation of the other; while the answer to the question of (4) which is what can only be done exclusively in function of positions, i.e. in the course of the procedure, through the interpretation of the position, as related to one another, of the acts in succession to one another in procedure within the conceptual network and context of the procedure. It is like a move in the game, which cannot be defined beyond its scope as a merely physical or mental event, and which cannot define its own normative meaning and significance exclusively in itself within the game, either, as it only becomes

defined through the individual moves in succession to one another, strictly speaking, through their interpretation within the scope of the game. On the other hand, once it becomes defined, in addition to its channelizing into a given procedural contexture (i.e., into a given procedural path and phase and availability of appeal, etc.), it may lay the foundations of an argumentation of a differing character and direction and of a reference of a differing nature in argumentation.

In sum, the institutional differentiation of questions of fact and law is imputatively defined, and not cognitively. The primary message it mediates is the idea according to which there are questions of fact as distinct from questions of law. This means that epistemological assumptions at the very foundations of legal ideology and institutional set-up are present here too, and, as principles of organization and professional ideology defining the particularity and distinctiveness of law as a specific complex of mediation, they assert themselves even when it is not preconditioned, or posited, by any specific law of procedure. It is something more than merely a function, and concrete individual institutionalization, of its positing by any given law. It bears testimony to our basic professional assumptions and to distinctively legal thought, i.e. of the uninterrupted continuity of the common grounds of the cultures of both Common Law and Continental (Civil) Law in Roman Law.

3.8.2. The Question of "Ordinary Words"

The question itself is of the particular domain of the high technical complexity of the organization of procedure and of the selective role of the differentiation between questions of fact and law within it, for there is no rule, practice or tradition to define which words qualify "ordinary" ones, and it is not concluded from the nature of words by the force of any logic or consideration in principle. From an external viewpoint, it is purely random what will qualify as "ordinary word" in any family and culture of law, moreover, in any

system of laws in force, in any particular field thereof or in any given act thereof. What is more, there is no unambiguous criterium for defining it within the law, either.

To be sure, what has been defined by the law-maker (and, accordingly, what has to be interpreted by the agency applying it) cannot qualify as "ordinary". To put it in the reverse sense, every word that must not be interpreted by the agency applying the law (by force of the argument that it would have been defined by the law-maker if it were intended to do so) will qualify as "ordinary". All this does not imply, however, that the word not defined is *eo ipso* "ordinary"; what is implied is only this: what is "ordinary" qualifies as a question of fact and, vice versa, the word qualified as a question of fact has to be treated as "ordinary".

What stands behind the façade of principles is a complex or, properly speaking, confused practice¹³¹ with the basic task to free legal action, by classifying the terms of normative texts into questions of fact and law and, thereby, by differentiating the ways and paths and agencies of their treatment, from the accumulation of the endless series of definitions and interpretations which would otherwise be an unmanageable burden on it.¹³²

It is to be noted, however, that no matter how strong an effort has been made to qualify only words as "ordinary" in respect of which both the establishment of relevant facts and their qualification as a case of the class defined by the words in question are presented as "question of degree",¹³³ to qualify a word as being "ordinary" presupposes, in the absence of unambiguous criteria, a procedural decision. As to the jurisprudence of the English Road Traffic Acts, for instance, it is to be decided according to the everyday use of the word as a question of degree whether driving has been "dangerous" to the community or not, but the question whether the same driving

¹³¹ For a survey, see WILSON (1969), pp. 361–362; WILLIAMS (1976), in particular pp. 477–479 and 536–537; OCKELTON (1983), pp. 103–104.

¹³² Cf., e.g., JACKSON (1983), p. 93.

¹³³ Cf., e.g., WILLIAMS (1945), pp. 179ff; WILSON (1969), *passim*.

has actually led to what is called an "accident" by the law is a pure question of law, to be decided according to legal definitions. Notwithstanding, the same jurisprudence proves that not even the meaning of "ordinary words" can be established in isolation, either, that is, it can only be established as a question of fact differentiated from questions of law, i.e., in function of normative provisions insitutionalizing such a differentiation. And the other way round, questions of law can qualify questions of non-degree only according to their own legal ideal.¹³⁴

3.9. The Reflexivity of Factual and Normative Operations

The question is raised whether the operations with facts can at all be separated as an independent phase in or a component of the judicial process?

According to the basic assumptions of the law and legal processes, the claim for separation—resulting in the realization that, following the operations with facts and, respectively, with norms, their linkage is the third component, separable both operationally and in time¹³⁵—obviously preconditions the discreteness and otherness of the individual components. And conversely, if I am to describe the judicial process as the continued mutual reflection of the factual and the normative operations in which both the mutual conditioning of these two sides and their being fed back issuing from their continued mutual reflection are also of a decisive importance (and here I would notice that even the traditional Marxist approach has already concluded that the mutuality of "the

¹³⁴ According to *R. v. Morris* [1972] 1. All R.E. 384, 386 as quoted by JACKSON (1983), p. 92, no matter how much the definition of "accident" as "an unintended occurrence which has an adverse physical result" is applicable in a criterium-like way to some situations, there are other situations (e.g. to what extent and in which seriousness of the case can an emotional shock or nervous breakdown be considered an accident) when it can only be decided as a question of degree.

¹³⁵ 'It will be [...] related [...] afterwards only [...].' PESCHKA (1985), p. 217.

concretization of the abstract rule and, at the same time, the abstraction from the individual case" will unite these two sides, because "only the mutual reflection of these two sides, made to come closer to one another [...] can lead to an act of law-application"¹³⁶), it is evident that I am to count with unity in the premisses of decision themselves.

It is well known that in the philosophy of law in Hungary, there is an early formulation of the tenet according to which the legal case and the legal provision are by definition nothing other than correlative concepts mutually defining one another.¹³⁷ Accordingly, not even the legal provision has any meaning in and by itself, since it is to be interpreted in each and every case in principle and its own interpretation cannot be determined by itself. At the same time, its interpretation has always a chance of alternativity without, however, having any option backed by the force of logical necessity. That is, all this needs a practical decision, i.e. evaluation in function of value judgments of the given (range of) case(s).¹³⁸ This is why the author suggests as the only chance left to have the two sides reflected on one another, that is, to make the two sides come closer to one another by continued mental experiment through a "continual distinction" to the extent which is exclusively conceivable on the basis of the evaluative practical experience and, as such, makes it a necessary solution that the given case shall be subordinated to the legal provision.¹³⁹ "By repeated hypothetical judgments, we can reduce the irrationality of subsumption to the borderline of the impracticability of doubts."¹⁴⁰

In this way, the methodological insight named as a synopsis here came close to what is called reflective equilibrium by contemporary

¹³⁶ SZABÓ (1977), p. 254.

¹³⁷ HORVÁTH (1932), p. 116.

¹³⁸ *Idem*, pp. 120–127.

¹³⁹ *Idem*, pp. 128–129.

¹⁴⁰ *Idem*, p. 130.

moral philosophy.¹⁴¹ This is to say with methodological clarity that principles in themselves, at the level of abstract generality, have not too much to say. For instance, I cannot properly judge what I mean by justice as fairness until I fail to circumvent it by testing it through a series of cases in order to set its limiting cases. It is only by reaching its reflection coming in equilibrium that its abstract generality becomes concretized reasonably meaningfully.

As a methodology, it suggests: the notional volume of a principle or rule can be defined in a way transcending abstract generality if and only if, by reflecting it vis-à-vis groups of cases and, thereby, by circumscribing its borderlines, I fill it with concrete contents. How can it be done? In order to exemplify the difference between morals and the law, let us take the following simple case. If I say "I follow the moral value of justice as fairness" this means at least that, as the basic precondition of all kinds of thought process, I have to meet the requirements of coherency and consequentiality in my value system when I am to judge my mentally anticipated or actual behaviour. Due to the fact that there is no pre-codified normative conceptual frame wedged in between the institution of morals and my moral value judgment, I reach my judgment in a way to set out from the principle and the behaviour simultaneously in order to break down the former and build up the latter step by step so that I can formulate my judgment referring to the principle as being reflected against the concrete case. My reasoning keeps on to be dichotomic to the end, i.e. oscillating within the range of the pair of categories of "Yes" and "No" (*A* and *non-A*), for I have at all levels to tell my stand concerning the realization of the principle (as broken down to the given level) in the concrete situation (conceptualized at a given level). Notably, the behaviour in question is either the case of justice conceived of as fairness or the one of its negation (or, properly formulated, either it fulfils it, corresponds to it, etc., or not). Its intensive endlessness notwithstanding, with my mental experiment I can

¹⁴¹ E.g. RAWLS (1971), pp. 20–21, 48–51 and 120, referring to GOODMAN (1955), pp. 65–68.

circumvent the notion in whatever direction in order to attempt at circumscribing, by the continued reflection between the various types of breaking down the principle and the various types of conceptualization of my behaviour (by excluding, as less coherent and/or consequential, the types of linkage not accepted as the case of the principle), the notional volume and extension of the principle. In contrast to morals, law is not only conventionalized as an institution; it is at the same time emphatically formalized as well. With the norm completely broken down through normative relevancy, a pre-codified normative conceptual frame will be wedged in between the principle and the behaviour; moreover, in order to formalize reflection as well, behaviour itself also becomes formalized as a case. Thereby, as law case and case law, a normative totality will be assumed to have been projected, a totality within the framework of which the former will be subordinated to the latter.

In this way, both their mutual conditioning and the progress of the reasoning process through their continued mutual reflection are equally self-evident. "The 'interpretation of the texts' cannot be detached from its application to a situation which itself is already 'interpreted'."¹⁴² "Considering its legal relevancy, the concrete fact of life can exclusively be understood in the light of the conceivable norm(s), while the meaning of the legal norm(s) can only be established through the understanding of the fact of life."¹⁴³ In consequence, the judicial process is a kind of "thought process in the course of which the 'brute fact' will be reshaped as the final establishment of the facts that constitute a legal case, and the norm text as the brute state of a norm, as a norm concretized to the sufficient depth so that it can serve as a standard to judge the aforementioned fact".¹⁴⁴ The operation itself is barely more than "the wandering forth and back of the look",¹⁴⁵ that is, "mutual

¹⁴² LAGNAU-DEVILLE (1978), p. 528.

¹⁴³ KAUFMANN (1984), p. 74.

¹⁴⁴ LARENZ (1975), p. 265.

¹⁴⁵ ENGISCH (1960), p. 14.

interpenetration between the acts of the establishment of facts and the legal qualification".¹⁴⁶ Thereby we have already returned back to what is called the "phenomenal form of the 'hermeneutic circle' ";¹⁴⁷ the underlying problem of which can be summarized as this: "the only thing the interpreter wants is to understand this general, i.e. the text[...]. But in order to understand it, he cannot abstract from himself and the concrete hermeneutical situation he is locked in".¹⁴⁸

For that matter, the hermeneutical situation is nothing else but a situation in a social ontological sense, historically concretely determined at any time, in which consciousness fills in "a function specifically dynamic, having its own existence", and hence with "the preservation of the memory of past facts in the social memory" will also "act as a social force" insofar as "the consciously preserved experiences of the past, practically applied and consciously processed to suit new situations, also contribute to the objectively produced and objectively efficient conditions of any further steps."¹⁴⁹

Accordingly, understanding can only be interpreted within the framework of a relative totality of ceaseless motion between the "whole" and the "parts" at any given time and resulting thereby in repeated feedback.¹⁵⁰ What matters from all this for us here and now is that both sides are shaped by, as actualized in the medium of, the other.

Needless to say that the event in life in its directness is not necessarily a function of the norm just as much as the destiny of the norm in its directness is not necessarily an issue of the event concerned. Yet, in its totality the normative sphere has a meaning at all only providing that a world of facts is posited against, as

¹⁴⁶ SCHEUERLE (1952), p. 23.

¹⁴⁷ LARENZ (1975), *ibid.*

¹⁴⁸ GADAMER (1960), p. 228.

¹⁴⁹ LUKÁCS (1971) II, pp. 188–189.

¹⁵⁰ Cf., e.g., KUHN (1977), p. xii; FEYERABEND (1975), p. 251; GEERTZ (1979), p. 239. Cf. also BERNSTEIN (1983), pp. 132–133.

confronted with, it. And normativity can play a role in social life only by assuming that as soon as the bare possibility of becoming related is raised in the mind, actualization will be conducted through becoming actualized by the other. Just in the way as any merely mechanical distinction makes our thought faulty from the very start,¹⁵¹ not even in social existence—just because it is made socialized as a thorough socialized existence—can we confront the objective and the subjective either as two entities able to be isolated in and by themselves (as, e.g., two bowling balls which can both be stopped, bowled in parallel or knocked against one another). Once existence becomes socialized, nothing of it can be isolated or confronted with it on the pattern of either “things” and “processes”, or “creator” and “creature”,¹⁵² for the separation of “material processes” from the “‘purely’ mental ones” can only be done through a “brutal formalizing epistemological abstraction”, since their ontological difference notwithstanding, “on the field of social existence the primary ontological fact of their impact is just that they co-exist inseparably from one another”.¹⁵³

It is this dialectic of the mutuality of the objective and the subjective that is reflected in that neither the fact nor the norm can be played out as either purely objective or fully subjective against one another. That what can be said regarding the one in their relative totality can equally be said regarding the other too. “Albeit in the mirror of the facts of life and the judge’s subjectivity the volume of the legal rule can be seen differently according to the cutting, in the final analysis, however, it is always the volume of the legal norm that becomes finally reflected”,¹⁵⁴ the same also holds the other way round: “Albeit in the mirror of the facts of life and the judge’s subjectivity the legal case can be seen differently according to the cutting, in the final analysis, however,

¹⁵¹ Cf., e.g., RYLE (1949), in particular ch. I.

¹⁵² E.g. LUKÁCS (1971) III, pp. 97 and 351.

¹⁵³ *Idem*, p. 352.

¹⁵⁴ PESCHKA (1986), p. 387.

it is always the volume of the facts of life that becomes finally reflected."

No matter how much it is true at a certain level of generality and in a certain notional context that the contents gained by interpretation in law are "contents of the legal norm as of a legal objectivation of a general validity",¹⁵⁵ "moving within the limits of the legal objectivation at all times",¹⁵⁶ all this cannot mean to reach beyond the problem of the object and the subject and, thereby, the hermeneutic situation. For what is called legal objectivisation can be regarded as legal objectivisation (and not, let us say, some paper product with leaded smear or a non-articulated voice) only insofar as I can understand it as a sign. And obviously it can only be understood as a sign insofar as a socially conventionalized meaning is attributed to it. Or, I cannot escape from its mutual connection, conditioning and determination. I cannot escape from its linguistic mediation, either, to be considered not simply one of the possible choices of my intellectual character or self-expression but as "the instrument and medium of the continuity of societal life",¹⁵⁷ maybe the most influential factor of our social existence.

Following this explanation, two equally conceivable and logically equivalent reconstructions are given. I may interpret identity in a way from the beginning that similarity expressed as analogicity will stand between existence and its conceptualization. In this case, my operation will aim to "bring in correspondence" the two sides by "identifying their meaning-relations"—through rendering similar both sides until they will be united. True, subsumption will notionally be excluded, but superfluous as well.¹⁵⁸ Or, by concretizing step by step the norm as reflected in the case and by abstracting step by step the fact in the light of the norm, I may make it possible that the two sides can meet so that subsumption will take place, formally at least.

¹⁵⁵ *Ibid.*

¹⁵⁶ PESCHKA (1985), p. 226.

¹⁵⁷ LUKÁCS (1971) II, p. 190.

¹⁵⁸ Cf. KAUFMANN (1982).

And one of the possible explanations will be the "hermeneutical pressure of the norm and the case" in a way and with the need that the materially just solution of the case will meet the justice of equal treatment according to normfulness. This is Fikentscher's theory of the case norm, in which the hermeneutic pressure "pushes the hermeneutic process to turning point", which, at a time when "with the given yardsticks of the object and the justice, neither the further specification of the norm nor the further breaking down of the notions of the facts that constitute a legal case is not possible any longer", will be reached.¹⁵⁹

3.10. The Limited Nature of Cognition and the Indefinability of Language

All what we have said till now about the problem of the establishment of facts has assumed a basic situation, namely that the facts to be established are being defined in a "simple, descriptive way" by the law. But we know that no matter of how many artificial components are displayed by law due to its internal definitions and normative linkages, law shares the attributes of natural language.¹⁶⁰ Albeit the normative usage may try to differentiate it and the presence of specific semantics and syntax can be discerned through linguistic reconstruction, all this is not enough to lift it out of its embeddedness in the medium of natural language or to transcend its fuzziness and vagueness, fundamental characteristics of all kinds of natural language.¹⁶¹

This makes it theoretically possible to reformulate the problem of the normative linguistic definition (or expression) of the facts as the one of indefinability and indeterminacy inherent in

¹⁵⁹ FIKENTSCHER (1977), pp. 198, 100 and 198.

¹⁶⁰ Cf. WRÓBLEWSKI (1948); WRÓBLEWSKI (1972), ch. II; ZIEMBIŃSKI (1974).

¹⁶¹ E.g. PECZENIK and WRÓBLEWSKI (1985), pp. 24-26 and 32-34.

language.¹⁶² For—and I am reminded of it—it is just as the limit of linguistic-logical approach that it has already been formulated: the certainty of any conclusion, connection or proposition can be guaranteed only if “a meaning, precise enough”, is assured.¹⁶³ That is, only in the extreme, ideal (hence not realistic) case when there is no longer any interpretation; consequently any evaluative choice (or any alternative) is excluded from the start.

However, at this point we are bound to ask: What kind of definition of facts is this when it is not a “simple, descriptive” one? Well, it may be either composite or relational or axiological.¹⁶⁴ However, as will be demonstrated presently, for our purposes, any other possibility will differ from the “simple, descriptive” one only in the character, depth, and justification of indeterminacy.

As to the evaluative terms just as in the other kinds of linguistic indeterminacy, it will be obvious that they include a dual uncertainty. Notably, both the definition of the term and the determination of the set of facts to be evaluated from the aspect of the term, are absent.¹⁶⁵ That is why we have to state that their reference is illusory¹⁶⁶ since their uncertainty is embedded in the substance itself.

Accordingly, it must be clear for us that while we may lessen the uncertainty to some degree by way of directives of interpretation, we cannot eliminate it completely¹⁶⁷—for the very reason that it is impossible to cancel completely the inherent indeterminacy of the linguistic medium and, on the other hand, not even the interpretation directive is devoid of uncertainty.

As it is, in the case when the indeterminacy lies in the graduality of the term (e.g. “young” and “old”, or “grevious” and “light”

¹⁶² Cf., e.g., SCHOLCZ (1940), pp. 58 and 62, as an early formulation.

¹⁶³ WRÓBLEWSKI (1970), p. 167.

¹⁶⁴ E.g. WRÓBLEVSKI (1973), p. 175.

¹⁶⁵ Cf., e.g., TARUFFO (1985), p. 50.

¹⁶⁶ STONE (1985), term used in ch. 4.

¹⁶⁷ Cf., e.g., GIZBERT-STUDNICKI (1983), p. 27.

bodily harm), the insertion of intermediate terms will not lessen the uncertainty, but merely increase the number of borderline cases.¹⁶⁸ In other uncertainties, where a given semantic field tallies entirely with a given area through concepts whose extension is interchangeable (e.g. the denomination of kinships in the natural language; or the grade of the participation in the crime in the legal language), the basic indeterminacy cannot be eliminated, yet whatever our interpretation of whichever element, the interpretation will merely start a chain reaction that will eventually influence all the other components.¹⁶⁹

So, there arises an unavoidable dilemma. And that is: either one must avoid the specifying definitions (even the unification of the usage of the terminology), lest the judicial evaluation be infringed or made impossible and thus the entire construction be rendered useless.¹⁷⁰ Or—in the opposite case—one must try to eliminate the uncertainty by way of definition. The latter, however, has the defect that it can never be complete or devoid of discrepancies. (For instance, if we define drunkenness as “absence of control over own actions”, then we have coupled the cause with only one of the concomitant effects, while drunkenness is only one of the possible causes that may result in the loss of self-control. When, on the other side, one tries to define drunkenness in a measurable and demonstrable way, i.e. by the concentration of alcohol in the blood, then one becomes involved in the web of various reasons that may generate the alcohol-concentration; however, the limits of proof may exclude a number of directions. For instance, in the event when the taking of blood, or its valuation as the definition of drunkenness, are made impossible by forensic considerations.¹⁷¹)

Accordingly, it is especially in the cases of deliberate uncertainties (i.e. in the case of the use of evaluative terms) that the claim

¹⁶⁸ E.g. *ibid.*, p. 18.

¹⁶⁹ E.g. *ibid.*, pp. 20–21.

¹⁷⁰ BOLAND (1961).

¹⁷¹ Cf., e.g., MOTTE (1961).

of quantification will arise (i.e., their reduction to quantitative determinations). In the literature that appears as the condition of a guaranteed statutory regulation, i.e., *nullum crimen sine lege* and *nulla poena sine lege*.¹⁷² At the same time, it is known from practice that any such reduction will remain a *desideratum* since it cannot eliminate the uncertainty, at most it may lessen it partially and in certain directions. In other words, it will transfer the source of indeterminacy onto the quantifying term, yet at the cost of leaving the uncertainty intact in the non-quantified directions.¹⁷³

The analytical theory of law summarizes the position as follows: whilst our insight, our experience and our routine may suggest an identity; nevertheless, as soon as it becomes debated or questionable that the facts of a given case are, in effect, the facts of a normative definition, then we are forced to adopt the following reasoning: the former "resembles [the latter] 'sufficiently' in 'relevant' respects". However, this reasoning lacks two basic definitions. To wit: it is not unequivocal, what we mean by "relevant respects", secondly, what will qualify (and under what conditions) as being ascertainable as " 'sufficiently' resembling".¹⁷⁴

Thus, on the one hand, "certainty at the borderline is the price to be paid for the use of general classifying terms". On the other hand, this is not simply an abandonment of something. In point of fact, it is an inevitable condition that the continued adaptation to the varying circumstances should be assured (while leaving the normative web intact), that is that, even in the medium of constancy, the desired—and still supportable—degree of change, will be made possible.¹⁷⁵

Formerly, we had considered the apparently differing sides of fact and law in a unity; now, in a similar manner, the question "What is?" and the question "What we want to do or to achieve?"

¹⁷² Cf. WOLTER (1977), p. 4; GIZBERT-STUDNICKI (1983), p. 26.

¹⁷³ Cf. GIZBERT-STUDNICKI (1983), pp. 25–26.

¹⁷⁴ Terms by HART (1961), p. 124.

¹⁷⁵ Cf., e.g., *ibid.*, p. 125 and WRÓBLEWSKI (1983), p. 328.

will also be intertwined. Thus the sources of uncertainty are twofold while at the same time being strictly interrelated. So we might say that these two connected handicaps can be expressed by the "relative ignorance of fact" and the "relative indeterminacy of aim".¹⁷⁶

As to the place of facts in this duality, they are characterized—as seen before—partly by indeterminacies, partly by the impossibility of determination. We might say that: "If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, the provision could be made in advance for every possibility."¹⁷⁷ But that is sheer utopia. It is not merely an utopia which cannot be realized accidentally; it is one that is conceptually excluded. For fact is a relational concept, standing for the actual possession of the outside world in our changing practice.

It may appear paradoxical that not even Leibniz had reckoned with this. Although he had aimed at the linguistic denomination of every possible concept in his *Characteristica universalis*, in creating the *Calculus ratorator*, he aimed at the logical projection of their every possible mode.¹⁷⁸ Meanwhile, the question is not just whether these facts are discrete and whether they exist in an objective manner (i.e., independently of their cognizance), further whether it is possible to compile their complete catalogue. Instead, the question is also, what is the role of the language in these cognitive operations, and what are the instrumental consequences

¹⁷⁶ HART (1961), p. 125.

¹⁷⁷ *Ibid.*

¹⁷⁸ Cf. VARGA (1973), p. 602 and RÖD (1970), ch. IV. Only in WITTGENSTEIN (1921), par. 4.26, p. 137, can we read a productive ambiguity on that by the total number of *Elementarsätze* the total world is described exhaustively. At the same time it must be clearly seen that although this formulation of the sets of the *Elementarsätze* is not only acceptable in a logical reconstruction but also inevitable, yet the said formulation, as a principle of explanation, applies exclusively to the given reconstruction, and not to reality.

of the circumstances in which the use of language cannot be avoided.

At this juncture I refer to the relation of language and reality, more precisely, to the appropriation of reality through language, for in the said relation language shows a multiple linkage inducing a structural particularity; an almost inevitable discrepancy. The mentioned discrepancy is truly expressed in the paradoxical statement "particularly in respect of the law", according to which "the more precise its concepts are, the less they represent reality".¹⁷⁹

The answer is found in what language philosophy designates as the open texture of natural language. The following is at issue here: "We introduce a concept and limit it in *some* directions[...]. This suffices for our present needs[...]. We tend to *overlook* the fact that there are always other directions in which the concept has not been defined."

Thus, the "open texture" is an objectively present, inextricable limitation (due to the inherent indeterminacy of any linguistic communication) with the result that "it is not possible to define a concept [...] with absolute precision", for "the extension of the concept is *not* closed by a frontier[...]. It is not everywhere circumscribed by rules." As we know, this situation cannot be changed by any subsequent effort at limitation.¹⁸⁰

While the open texture of language may constitute a problem in everyday communication, or in science, nowhere does it appear as such an unavoidable limitation and a criterion as in legal reasoning. In the latter, namely, the subject matter of communication is not some kind of external reality (expressed, indicated, or merely referred to by linguistic means), but a conceptual construction within the frame of an authoritative text, where the construction is inextricably intertwined with its linguistic form. Here we are faced with a fact determined in a normative context as an individual

¹⁷⁹ PARAIN-VIAL (1961), p. 49.

¹⁸⁰ WAISMANN (1961), p. 49.

occurrence, which has to be subsumed under facts that, according to their generalized abstract linguistic definition, do constitute a legal case.¹⁸¹

When the concrete is subjected to the abstract, one has to deal, exclusively, with the normative correspondence of the former to the externally recognizable signs of these facts that constitute a case in law. So much so that the said signs or the underlying conceptual construction may be irreducibly detached from the teleological projection that had, originally, served as a basis of the legislation in the given matter. All that need not change even slightly the functional importance of the given normative regulation. For the advantages derived from this instrumental transformation, we merely have to pay with the possibility of certain specific discrepancies.¹⁸²

In the said linguistic medium, there is always the possibility of an alternative solution (in the sense of approximate definitions); in theory there is always another path, solution or leeway. Of course, this secondary solution can, ultimately, be only justified by an evaluative choice.¹⁸³

That explains the fact that, in order to replace the logic of norms, there was already introduced at an early stage the logic of choice as a seemingly all-redeeming answer. The underlying consideration holds that while logic was present in legal reasoning, yet it was not as a means of the identification of already made premises, and the conclusions derived from the latter, but rather as the means of controlling the selection and the definition of these very premises.

According to its doctrine, the "rules are understood to be tools for guiding inferences leading to action".¹⁸⁴ In other words, the

¹⁸¹ WILLIAMS (1945), p. 191, presenting it as a common feature of law and theology.

¹⁸² Cf., e.g., VARGA and SZÁJER (1988).

¹⁸³ E.g. WRÓBLEWSKI (1983), p. 323.

¹⁸⁴ GOTTLIEB (1968), p. 157.

logic of choice is called to see to it that "the interpretation of laws be consistent with the policy of legal rules" in a rationally justifiable way;¹⁸⁵ moreover, its conceptual framework should be such where the "policy" is synonymous with the term "purpose".¹⁸⁶

Consequently, the question "Is there always a right answer?"¹⁸⁷ may be extended, as it is warranted even if applied to facts. In the process which culminates in the decision,¹⁸⁸ any other consideration regarding the facts can solely be expressed in that what is called "firm determination".¹⁸⁹

As a result, all that can be of a cognitive character for the decision-maker faced with the facts and their conceptual classification will be dissolved by the normative subordination—i.e., when the decision classifying the concrete-individual is justified in the normative context. For centuries, some classical judicial dicta have relied on this perception. One of such outbursts says: "Courts of Justice ought not to be puzzled by such old scholastic questions as to where the horse's tail begins and where it ceases. You are obliged to say, 'This is a horse's tail', at some time."¹⁹⁰

Nothing more should be said in this respect. It is not our language that has to be blamed but our false expectations. The uncertainty lays not in linguistic deficiency. "It is a vague rule[...], it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day, but on the question now before the Court, though you cannot draw the precise line, you can say on which side of the line the case is."¹⁹¹

¹⁸⁵ *Ibid.*, p. 128.

¹⁸⁶ WRÓBLEWSKI (1970b), p. 382.

¹⁸⁷ Cf. PECZENIK (1983).

¹⁸⁸ GUEST (1961) stresses this on p. 188.

¹⁸⁹ Thus, e.g., OCKELTON (1983), p. 107.

¹⁹⁰ CHITTY (1888), p. 517; see WILLIAMS (1945), p. 184.

¹⁹¹ *Hobbs v. L. and S. W. Ry.* (1875) L. R. 10 Q. B. 111 at 121. Cited by WILLIAMS (1945), p. 184.

3.11. The Non-cognitive Dialectic of Normative Classification

Mere logicity, as it follows from what we have seen above, can neither explain, nor determine the intellectual operation which is to go on when facts and norms are being referred to by the judge in a legal process. For logicity, even if omnipresent in any kind of intellectual operation at any time, can only exert a function of control. Logic is one of the possible means of controlling that optimum coherency and consequentiality shall be met in the judicial decision-making process.

Similarly, cognition, too, is omnipresent in any kind of intellectual activity at any time, but, again, not for its own sake. In itself, by isolation, it cannot be taken as a factor of explanation or determination.

Evidently enough, both logicity and cognitivity are kinds of homogeneity. As specific domains, points of consideration, frames of reference, filters of thought, etc., they are disanthropomorphized, and also disanthropomorphizing, so that they can display connections of their subject according to their own nature, independently of the observer's particular point of view.

It is to be noted that law represents a specific kind of homogeneity. It is disanthropomorphized so that it can channel a decision to be issued as abstracted from the particular traits of the person issuing it. For the decision has to be presented as the unique possibility that is concluded from the system as logical necessity. Albeit, at the same time, it obviously has to correspond to values posited in the concrete sociological situation of the judicial event and also, simultaneously, to requirements of justification posited by the normative system.

In consequence, that which is called subsumption in logic is partly of a symbolic effect, partly of a substitutive character. It is of a symbolic effect insofar as it only expresses with formal emphasis that which is usually termed as the achievement of "the impracticability of doubt", "reflective equilibrium", or "hermeneutic

turning point".¹⁹² That is, it has the message that the reflection of the two sides, fact and law, on one another is over: it has been perfected by reaching a convincingly justifiable result. At the same time, it is of a substitutive character insofar as the evaluation (by itself a *sine qua non* element of the contents of the decision) is substituted by the formal necessity of logical conclusion.

It seems that we have recognized the presence of the cognitive element in the judicial process. What is more, we may even add that, by the advance of legal reasoning, there is an advance made in the cognitive process as well. Nevertheless, the genuinely intellectual achievement is being conducted in another direction in the legal process. And this is to channel both the evaluation achieved by the legal process and the justification of it into the pathways of rational argumentation. That is, to channel them into the system of law and its conceptual framework.

For, albeit it is only the cognitive element that is emphasized by legal ideology, actually each and every move of both so-called judicial cognition and the related judicial activities is in fact subordinated to the practical reaction issued by the legal order. That is, I may also say that law has the only vocation to justify, through its actualization, the way in which practical reaction can and will finally be made.¹⁹³

As I may formulate in another way, in the final analysis: judicial establishment of facts is nothing other than practical reaction resulting from an evaluative approach. It is one unit, in which two questions—one, How do I see an event, real by the way? and two, What components do I see that it is made up from?—are intermingled. The first question concerns the end result. The second

¹⁹² Cf., in the light of different approaches—HORVÁTH (1932), p. 130; RAWLS (1971), pp. 20–21, 48–51 and 120, referring to GOODMAN (1955), pp. 65–68; FIKENTSCHER (1977), p. 100—, *infra*.

¹⁹³ E.g. "By his statements of facts, the judge 'makes the statement' of something else than facts. In reality, his statements [...] are the acts of interpretation and of understanding of the meaning that legal institutions will attach [...] to human social activity." PETEV (1985), *passim*, particularly at p. 183.

question concerns the set of elementary facts inducing the end result, and also the way by which the quasi-cognitive process we speak about can be reconstructed from the end result. All this double composition can remind us of the way in which we have characterized elsewhere legal rule and legal case, as co-shaped into one single, common process.

In point of principle, all that we may say about the particularity of the structure of judicial decision, its argumentation, sham logicity, etc., is in fact related to the conceptual representation of reality, instead of reality itself.

In consequence, both the affirmative and the negative answer we may formulate in respect thereof "will always concern fundamentally the human wish that the being or non-being (including all intermediary steps) of a concrete just-so-being [*Gerade-so-Sein*] be established by practice, instead of the general nature of being as such or of its objectivity in a general sense". "For in practice, each and every moment is preceded by an alternative decision, preparing practice in a way that the acting man has to analyse out of his prevailing situation the 'question' which may determine his future action, and, then, he will have to 'answer' it. Due to the particularity of everyday life, and also the particularity of language which makes the feeling of the particularity of everyday life quite conscious, this 'answer' will in most cases be done in responding either affirmatively or negatively. In the apparently infinite and extraordinarily heterogeneous mass of decisions, this kind of outlook and self-expression is often crystallized by the dichotomy of 'yes' and 'no', and thereby there is an appearance made as if this were a suitable ground for overcoming the logical duality of definition and negation, 'positivity' and 'negativity'."¹⁹⁴ Or, as stated in another context, man "works with the combination of propositions and negations, which ordinarily conceals the genuine facts all they are about".¹⁹⁵

¹⁹⁴ LUKÁCS (1971) III, pp. 134 and 132-133.

¹⁹⁵ *Ibid.*, p. 195.

In accordance with what we have seen above, the apparently heterogeneous components of the legal process in general and the judicial establishment of facts in particular can only be treated as merely technical categories of classification, which, beyond the reach of law, have no directly interpretable reference or message whatsoever. Consequently, they cannot be transplanted quasi-mechanically into another system of values, either.¹⁹⁶ All this is to say that they do not represent anything in themselves that should or could be regarded as either good or bad under any legally non-specified respect.¹⁹⁷

3.12. Ascriptivity as End Result

The investigation of both the nature of facts and the embodiment of their approach in law by a normative-evaluative process may lead to a rather unambiguous conclusion. According to it, the judicial establishment of facts is by far more complex than a merely cognitive reflection (disanthropomorphized by its ideal) of the real events of the outside world.

It seems that even the use of language points to such a conclusion.

Within the frame of linguistic analysis, it is a commonplace to realize: when I say, "He did it" or "This is mine", I do something differing from what I mean when I say, "It's raining". Evidently, the latter describes a given part of reality, therefore my statement will necessarily be either true or false. But, in contrast, when I make the former statements, I act differently, explainable only in another context. For, fundamentally, the former statements are not descriptive, but ascriptive in character. That is to say, under certain

¹⁹⁶ "Moral predilections must not be allowed to influence our minds in settling legal distinctions." HOLMES (1882), p. 148. Similarly, see LUHMANN (1985b), p. 4.

¹⁹⁷ For a treatment of this dilemma in the light of "the fallacy of white or black", see THOULESS (1930), ch. 9. Cf. WILLIAMS (1945), *passim*, particularly at p. 82.

conditions, a certain institutional framework is attached thereby to a given act and/or actor, and thereby he/she or his/her act will be framed within a definite institutional position and judged according to a definite institutional quality (mostly: responsibility).

Consequently, the establishment of such an ascriptive institutionalization is logically dependent on accepted rules of conduct.¹⁹⁸ And all this is done by use of concepts that "are defeasible [...] to be defined through exceptions and not by a set of necessary and sufficient conditions whether physical or psychological".¹⁹⁹

The theory of the ascriptive action by the use of language has been widely criticized. One of the debated points was its linguistic paradigm: how could language be treated as a potentiality with many logically unrelated practical uses without developing its own structures which would correspond discretely to those uses?²⁰⁰ Another of the topics of discussion was its conceptualization: why was it brought about as a theory of "action" instead of having been built upon, e.g., responsibility?²⁰¹ In the final analysis, however, the debate has strengthened and reasserted the position according to which, *one*, such a statement is ascriptive, and *two*, because it is open textured,²⁰² its definition can at most be partial and imperfect. That is, it is irresistibly open to clauses like "unless" and "etcetera", and so on.²⁰³

¹⁹⁸ It involves the recognition that ascriptivity is not a linguistic function simply. Even if seen from a semantic aspect, it is praxeologically defined. This is why linguistic expression can be quite indifferent in itself, equally open to use in descriptive and ascriptive senses as well. Cf. FEINBERG (1964), p. 148.

¹⁹⁹ HART (1949), p. 189.

²⁰⁰ As contrasted to Chomsky's generative reconstruction of language, see "Jurisprudence" (1967), p. 189.

²⁰¹ E.g. GEACH (1960) and PITCHER (1960), as well as GIZBERT-STUDNICKI (1976), pp. 133–140.

²⁰² Cf. WAISMANN (1951), pp. 117–144.

²⁰³ Cf. HART (1949), p. 173 and *passim*.

All in all, it seems that the fundamental dilemma can only be answered through reformulating the old philosophical problem in a new context. "Imputation (*imputatio*) is [...] a judgment by which somebody is considered to be the author (*causa libera*) of an act, regarded thereby as fact (*factum*) within the range of the law; a judgment which turns into an imputation which is valid (*imputatio iudiciaria s. valida*), albeit it is only to be judged for the time being (*imputation diiudicatoria*)."²⁰⁴ Or, the key notion of normatively exerting an influence is imputation here. It is imputation that, by distributing normative roles in real life and by applying the abstract and general norm formulation to individual life situations, concretizes and actualizes this norm. That is, it is the ordering principle which, in the field of normative reference (built upon life events ruled by the law of causality), establishes links. Or, by selecting and naming links, it produces them and makes them visible.²⁰⁵

At the same time, this is the concept that shows in full both the normative embeddedness and the overall imputative determination of any understanding of facts in law and legal process. This can be seen from the above cited definition by Kant and from early formulations as well, telling much about the primitive idea in the very background. For instance, one of the first statutory drafting was worded as follows: "Every such [...] person [...] shall be adjudged a traitor, and his fact high treason." Somewhat later on, a report on parliamentary debates went on to say: "The fact of him who acts the Gardian, is imputed to the Co-gardians."²⁰⁶

It can be seen that ascription is particular just because and insofar as it occupies an intermediary position between fact and

²⁰⁴ KANT [1797], *Einleitung IV [III]*, pp. 31 et seq.; cf. *Kant-Lexikon* (1961), p. 621.

²⁰⁵ See, e.g., Kelsen [1950], the source and purity of which is highly discussed notwithstanding. Cf. Wilson (1986) and Steiner (1986), pp. 54–64, respectively 70–71.

²⁰⁶ Act 31 Hen I'III, c. 8 (1539), respectively Prynne (1643), quoted in *The Oxford English Dictionary* (1971), p. 947 [pp. 11–12].

norm. Evidently enough, it presupposes some facts—but it neither states them, nor describes them; at the same time, the interpretability of those facts is selected by the norm—but again, it neither states it, nor names it. “He has done something different from either of these two things: he has drawn a conclusion from the relevant but unstated rule, and from the relevant but unstated facts of the case.”²⁰⁷

Accordingly, establishment of facts in a judicial process is nothing other than one of the sides of the unity of fact and law, in which a given person and a given set of facts become attached to one another, in order that the normative mechanism—by starting the intellectual operation of legal reasoning which will range from the identification of legal relevancy to the meting out of consequences—can be put into action.

²⁰⁷ HART (1953), p. 10.

4. THE JUDICIAL ESTABLISHMENT OF FACTS AND ITS PROCEDURALITY

The special medium and context in which the process called "establishment of facts" is to take place is not usually given the importance it undoubtedly has in shaping the "establishment" of "facts" in a judicial process. Even institutional approaches characterize the internal complexity of the operation in question, as well as the intermingling of the selection and the determination of facts with those of laws, as two sides of the same unity, mutually presupposing and related to and shaped by one another, within a conceptual framework that takes into consideration the institutional character of the points of reference of the intellectual game involved, but it does so without institutionalizing the game, i.e. the practice of reference, itself. In consequence, whatever we claim to be judicial must necessarily be actually quasi-judicial. That is to say, the judge as an institution stands on the same footing as does the everyday user, student, doctrinal expert, or critique, of the law.

For what matters, law provides for not only to what conditions what consequences shall be attached but also the way how to establish that the condition is met.¹ Or, as it will be argued later on, in law as a system formalized thoroughly to the end, the artificial making of *how* will necessarily result in the artificial making of *what* and *why* too.

¹ Kelsen (1966a), p. 244.

4.1. The Constitutive Nature of the Establishment of Facts

Since "[t]he actual events [...] do not walk into court",² there is something in the procedure resulting in that, finally, "the 'facts' are what the judge thinks they are".³ This statement, being the recognition of the particular ontological character of law, has nothing to do with any pessimism, subjectivism or agnosticism. It is a statement of the fact that, by having formalized the operation in question, it has turned out that, no longer, is it "the 'pure facts' but rather the factual premises that are the conditions of a certain decision".⁴ Thereby the presence of facts is reduced to their statement, i.e. to their representation claimed by their statement, assuming tacitly that, in the final account, facts will be substituted by their statement. As a matter of fact, there is nothing new in it. As an underlying assumption, it has already been formulated by the analytical-doctrinal reconstruction of the system. "Only by being first ascertained through a legal procedure are facts brought into the sphere of law or do they, so to speak, come into existence within this sphere. Formulating this in a somewhat paradoxically pointed way, we could say that the competent organ ascertaining the conditioning facts legally 'creates' these facts." And it is so because "[i]t is only by the ascertainment [of the fact of a delict, representing an entirely constitutive function of the court] that the fact reaches the realm of law [...], it is for the first time created as such in law [...]. In juristic thinking the procedurally established fact replaces the fact taken in itself that in nonjuristic thinking is the condition for the coercive act. Only this ascertainment itself is a 'fact' [...]".⁵

² FRANK (1949), p. 15.

³ FRANK (1930), p. XVIII.

⁴ KLAMI (1980), p. 74.

⁵ Kelsen (1946), p. 136, resp. Kelsen (1960a), pp. 244, 245 and 246 [in the translation of Max Knight, cf. Kelsen (1960), pp. 239, 239 and 240, as corrected by Cs. Varga]. Cf. also, in the same sense, Kelsen (1979), p. 106. It is to be noted that this recognition could have sounded too revolutionary for the contemporary to an extent that, even several years later, the remarkable Swedish

In this way, the procedural medium and context are far from being features outwardly added to a process running its own way. Procedurality is a fundamental constitutive function. As a result of it, only that can be present which has been formulated by a procedural agent in a procedural situation. Even those models of procedural systems which formulate, and oppose each other, the ideals of formal justifiability and of material efficacy (conceptualized as subsumption-oriented and consequence-oriented approaches,⁶ as due process and efficient control models,⁷ or, within the realm of the establishment of facts, as fight and as truth theories⁸) are in the final analysis relativized in the sense that they are all only varieties within the basic institutional determination—all being based upon, instead of being opposed to, it. No matter how they are conceptualized, they are all procedural in a stronger or a weaker sense. Or, the definition of any one of their sides, in principle, applies to both of them. Any of them is constructed in a way that, within the process of efficiently reaching the material target, it "restricts procedure by in-built programmed conditions for justice in the interest of recognized values".⁹ That is to say that their specificity within their basic procedurality can only appear in the way and to the extent of limiting the process.

"An ideal procedure consists of a system of rules which tells us in precise and unambiguous language what to do from one moment to the next."¹⁰ Such a procedure is obviously ideal for guaranteeing the maximum of foreseeability and of reliability of the repetition of the operations involved. Unfortunately, a procedure like this is only

thinker dared repeat it only compromisingly: "In so far as [the facts] are covered by the judgment, they have, so to speak, been replaced by the judgment [...]. The judgement is now the relevant fact." OLIVECRONA (1971), p. 204.

⁶ E.g. ECKHOFF and JACOBSEN (1960).

⁷ E.g. PACKER (1964).

⁸ E.g. FRANK (1949).

⁹ LUHMANN (1972), p. 351, note 56.

¹⁰ KENDAL (1980), p. 58.

good for jobs with data to feed in and operations to be done entirely pre-codified, that is, a precondition which is seldom given. For in practice mostly either an externally defined alternative of decisions is to be built into the process or the program itself has to be transformed into a learning program which is able to use self-selection and self-determination in its adaptation to the nature of the job.

At the same time, by the definition of the procedure as a normative program, procedurality as a specific instrumental value will be built into the process. Consequently, the justifiability of the whole process and also its direction will be a function of, as defined by, the projections of the procedural order. This again turns up as a source of contradictions and inevitable discrepancies in view of the genuine issue of the process. On the one hand, each alternative decision is a switch that defines the direction of the whole process in a way that, by providing exclusive starting points for any further switch(es), it can, from the very start, determine the result of the whole process. This means that the very first switch can reduce the chances of realization of the original target to less than the minimum. (Let us take, for instance, the alternative offered by routine answers of service regulations which can, with equal procedural value, cover all possibilities—from an answer to the merit via the minimalization of the question, the channelling of the answer sideways, its rejection or negation, to the punishment of a mere formulation.) On the other hand, procedurality will filter all materially relevant factors (and considerations and standpoints), in order to accept as its own factors in procedure only those which it selects according to their procedurally evaluated and established conformity to the medium—which is a purely formal consideration, entirely alien to the materiality of the original target.

These are felicity conditions,¹¹ making the entirety of the process apparently arbitrary. Nevertheless, it is rather the otherness of the language, that is, of the medium in and by which

¹¹ Cf. AUSTIN (1955), p. 14.

we speak. And by speaking we do not tell (i.e. describe linguistically-logically) something here, but rather do something (i.e. establish an institution by the act, which is more specific than the act, of communication). In order for an institution to come into being by a performative utterance, some conditions are to be met. Notably, (1) "the convention invoked must exist and be accepted", and (2) "the circumstances in which we purport to invoke [this procedure] must be appropriate for its invocation".¹² Therefore, in contrast to the descriptive statements, either true or false, performative utterances can only be felicitous or infelicitous.¹³

Having in mind that the specific use of the performative utterance is to bring about something institutional, there is no relevance to interpreting it in a directly cognitive way. The only consideration that acts as a criterion in it is whether doing by the use of language is, in the function of the linguistic act and the entirety of its contexture, able or not to bring about the institution in question. Or, this is nothing other than the basic principle of procedurality: to render to function a purely procedural mechanism in order to select what statements claiming to point to the issue can and shall be involved in the procedure.

In consequence, if we are to describe felicity and truth as aspects crossing one another,¹⁴ we have to emphasize at the same time that these are criteria entirely independent from each other, with no

¹² AUSTIN (1961), p. 224.

¹³ Cf. AUSTIN (1961), p. 224. Or, "(A.1) There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances, and further, (A.2) the particular persons and circumstances in a given case must be appropriate for the invocation of the particular procedure invoked. (B.1) The procedure must be executed by all participants both correctly and (B.2) completely." AUSTIN (1955), pp. 14-15.

¹⁴ Cf. GIZBERT-STUDNICKI (1979), pp. 143-144.

		statement as object	
		true	false
statement as act	felicitous	→	
	infelicitous		

↓
 it does not
 matter

the only
 factor that
 matters

use of confronting them with one another. For felicity tells only and exclusively about the potentiality of a statement to establish it as an institution. Or, the other way round, it is in point of principle arbitrary for all other considerations. On the other hand, truth is purely epistemologically a criterion, ideally independent from any human institution. The independence of the standpoint is to be emphasized particularly in the present context as the institutionalized procedure may itself make use—as the judicial establishment of facts traditionally does—of the notions of truth/falsity. However, “truth” and “falsity” in the sense of institutionalized procedure can at the most be related only nominally to truth/falsity in the epistemological sense, as a kind of their ideological substitution. For any statement of truth/falsity in procedure is itself procedural in character, meaning and impact here. “What is said to be true by this procedure of the law is taken as an established truth for all the ulterior purposes of the law, unless and until it is quashed on appeal.”¹⁵ It is why procedure can be conceptualized as a “truth certifying procedure”¹⁶ only by assuming that what the procedure can, within

¹⁵ MacCORMICK and BANKOWSKI (1986), p. 129.

¹⁶ BANKOWSKI (1981), p. 265.

and for the sake of the same procedure, prove is nothing more than procedural truth.

All this is expressed by the random-like result of the procedure as well. For instance, the procedure is shaped along the lines of artificially introduced notional dichotomies;¹⁷ in contrast to the poly-valency of cognitive processes, it is ruled by a bivalent logic according to dichotomized conceptual classes mutually excluding one another;¹⁸ as a consequence, all motion and change are processualized in procedure, therefore "[a]ny failure to maintain the due form negates the whole process" in the same way as even the bare chance of the rejection of the procedural claim (e.g. "police [...] knowledge is based on facts, cogent enough for moral certainty, but lacking possibility of proof by legal standards") can block the initiative to take any action at all.¹⁹

It is necessary to conclude that, in the final analysis, truth in the epistemological sense is neither enough nor strictly necessary to establish truth in the procedural sense. What is more, we can merely say that it is only the procedural establishment of the falsity of a claim to state facts as a true statement of facts that excludes from the very start, and within the same process, the procedural establishment of truth of the same statement of facts. (And we can see that even the use of criteria of absence of defense and defeasibility,²⁰ instead of the ones of felicity and infelicity, could not challenge the issue either, as the rejection of ascription would also be founded not on any falsity in epistemological sense,²¹ but on its procedural establishment.)

¹⁷ E.g. LÉVY-BRUHL (1964), p. 33.

¹⁸ VODINELIĆ (1974), pp. 88–89.

¹⁹ E.g. SLATER (1961), p. 722.

²⁰ HART (1949), pp. 189–190.

²¹ As it is claimed by, e.g., LEGAULT (1977), p. 183.

4.2. Evidence and Procedurality

Evidence is a process in the course of which, if successful, brute facts are transformed into institutional ones by performing the action of "as a proven fact it has been established". One may assume that there has ever been some connection between the philosophical world concept and the system of evidence in law.²² Our arrangement of modern formal law puts a special emphasis on the whole series of its ideological foundations, including the cognitive model of its system of evidence.²³ As to its definition, from a legal point of view, "to prove is nothing else than to make the court know the truth of a statement of fact from which legal consequences are to be drawn,"²⁴ while, from a philosophical one, it is "an operation [...] guiding the mind to the acknowledgement of a previously doubted assertion in an indubitable and universally convincing manner".²⁵

Social embeddedness, psychological context and interpersonality are common features of evidence, to be found already in the elementary structure of taking a proof. And since the time of Charles Blondel it has been known that, instead of pure perception, one can at the most count with one as it is interpreted within an affective and social context;²⁶ furthermore, neither observation is anything other than processing the sensation in a social and intellectual process rooted in tradition.²⁷ In the final account, neither the judge can say anything more than "All that I know is that the witness said what he said"—and everything which he

²² Cf. *La preuve* (1963–1965) and *La preuve en droit* (1981).

²³ Cf., e.g., TRUSSOV (1960), ch. I; NAGY (1974), ch. II, par. 5; and, as a statement of principle, TWINING (1984), p. 269f.

²⁴ COLIN and CAPITANT (1948), No. 718, quoted by PERELMAN (1981), p. 357.

²⁵ LALANDE [1926], pp. 822–823.

²⁶ Cf., e.g., LÉVY-BRUHL (1964), p. 17.

²⁷ Cf., e.g., MACKIE (1952), p. 118.

derives therefrom in addition to it is based on his conventional reliance upon human fairness, precision and reliability, as well as on human conclusion.²⁸

Both historically and in its conceptual understanding, evidence is a practical procedure, as a function of both its set purposes and the character and quantity of information available and adopted in the process.²⁹

Or, as it was formulated decades ago, in a procedural context, evidence is aimed at "approving" the qualification of stated facts as legal facts, for "it is aimed at getting the approbation by the social group rather than at searching purely the truth".³⁰

At the same time, the implementation of laws and the enforcement of rights are only two of the series of the possible ends of the process. For in competition, and not necessarily in a way harmonizable with them, compromise, termination of conflict, redistribution of goods, focusing of public attention, political or legal change and many other ends can be equally set.³¹ This is to say that finding the truth is only one of the values to be realized simultaneously—a value that can be in conflict with other ones like speed, economy, public confidence, or ease in prediction and application.³² It is why "[j]udicial finality and legal evidence go hand in hand",³³ "[p]roof and truth being nothing but means to realize what is regarded as justice in the given society".³⁴

All this means that, running counter to traditional approaches considering evidence unequivocally and exclusively a process of cognitive nature and determination, legal evidence is only interpret-

²⁸ MacCORMICK (1978), p. 89.

²⁹ Cf., e.g., JOYNT and RESCHER (1959), p. 564, referred to by SHUCHMAN (1979), p. 17.

³⁰ LÉVY-BRUHL (1964), pp. 22 and 46.

³¹ E.g. TWINING (1984), pp. 278–279.

³² E.g. SHUCHMAN (1979), p. 60.

³³ FORKOSCH (1971), p. 1376.

³⁴ PERELMAN (1981), p. 364.

able within a deeply social and, at the same time, strictly legal, context from the very start, which thoroughly imbues its particularities and its particular determinations as well. Legal evidence is the component of a formally structured practical procedure, also sharing in its particularities. That is, both its targets, the context of its procedurality, as well as "the complex of fact and law" being apparently reduced to one of its aspects in the course of and for the sake of taking the proof, are normatively determined in it.

In consequence, "artificial [...] reason"³⁵ that makes law a practical instrument and which colours its ethos and draws the boundaries of its homogeneity, characterizes legal evidence as well. For instance, the law of evidence can institutionalize, as choices of fundamental strategic alternatives, procedures that could only qualify as the negation of evidence beyond the realm of law. It can permit a decision to be made without all-covering proof being taken;³⁶ that proof is taken with pieces of information filtered through the procedure in such a way that a possible reconstruction of the whole process could only reveal that the pieces retained could only have been in genuine play;³⁷ or that evidence is taken in a way that "seeks to find truth by a process of competitive lying".³⁸ It is also artificial reason that is present in the normative institutionalization of some specific aspects and ways of evidence (e.g. the burden of proof and the presumption), as well as in the bare fact that evidence is normatively regulated. The regulation of procedure has, in point of principle, nothing to do with any cognitive consideration; moreover, its canons and provisions are not valid or empirically interpretable.³⁹ Nonetheless, the fact that they are acognitive in their basic character is not a burden upon them; it is simply their underlying working principle.

³⁵ (1608) 12 Co. Rep. 65. Cf. also HOLDSWORTH (1931), p. 207, note 7.

³⁶ Cf., e.g., SANDERS (1987).

³⁷ Cf., e.g., SHUCHMAN (1979), pp. 40–41.

³⁸ MANNING (1974), p. 821.

³⁹ Cf. WRÓBLEWSKI (1973), p. 163.

Seen from this aspect, the law of evidence is a set of rules formulating a practical answer to basic life situations and conflicts of interests in order to make the realization of values and value-preferences possible through a formalized procedure functioning uniformly in situations of a mass application as well. In order to achieve this, it builds into its institutions and procedures both the value-preferences it seeks to realize and the constructions that are dictated by the requirement of mass application. As a practical category, its adequacy to the requirements of practice can be weighed ontologically and evaluated axiologically; however, its properly cognitive analysis would only be successful within the context of cognition, and not within its own medium. So it is by far not by chance to have the crying out: "the lawyers' rules in what is evidence are so fantastic that if a research worker were to follow them he would be rebuked for being silly and incompetent".⁴⁰ For whatever is being added from the invention and techniques of the law to the ideal of cognition, "this help is next to nothing. For procedural rules and legal science and judicial practice are all patterned upon a rather authoritatively oriented evidence, instead of a logical justification substituting to it".⁴¹

Its normative context is expressed not only in practical considerations prevailing in the process and thereby denaturing its cognitive character, but also in that no matter in what way its system of evidence is dedicated to facts and nothing but facts, it can only do so by operating the fact and law complex within a unified process, for each step in the procedure carries a meaning, defined normatively as one of the potentialities of the institutionalized procedure.

This is why there is no demonstration here, only argumentation, combined with logical operations.⁴² In such a way, in respect of the procedure and the evidence within it, it is the contingency of the paths followed and the results achieved, the homogenization of

⁴⁰ JACKSON (1964), p. 402, quoted by SHUCHMAN (1979), p. 16.

⁴¹ MARKÓ (1936), pp. 128–129.

⁴² Cf., e.g., PERELMAN [1959], p. 101 and WRÓBLEWSKI (1981), p. 355.

heterogeneous life situations (gained from their filtering through a normatively established conceptual framework, which can follow nothing but its own logic), and the expectation of a practical solution to a social problem that are, all at the same time, characteristic. It is the case when "testimony is constantly dissected and contradicted and reshaped toward partisan ends. That is the essence of a trial; it is not a scientific or philosophical quest for some absolute truth, but a bitter proceeding in which evidence is cut into small pieces, distorted, analyzed, challenged by the opposition, and reconstructed imperfectly in summation".⁴³

In consequence, even if one assumes that the end result is not too far alienated from scientific truth,⁴⁴ it is not simply an existential statement but rather something to be conceived of as "tools to solve legal problems"⁴⁵ that are involved, for, "in the final account, it is only the relationship between the judge's [...] cognitive and evaluative positions that will matter" in it.⁴⁶

4.2.1. The Question of "Certainty"

In theories of evidence, there has always been a strong temptation to formulate the ideological assumptions of the legal order as *sine qua non* postulates, gained through theoretical reconstruction. In contrast to some realistic approaches (terming what is accepted as, e.g., "probability next to certainty" [*eine an Sicherheit grenzende Wahrscheinlichkeit*] or that "against which no reasonable, i.e. practically essential, doubt can be raised"⁴⁷), theories often impute the categoricity of judicial decision to the one of judicial cognition. It is imputed to a "jump" from a given quantity into a new quality;

⁴³ MARSHALL (1966), pp. 94–95, quoted by SHUCHMAN (1979), p. 49.

⁴⁴ As it is assumed by WRÓBLEWSKI (1975), p. 31.

⁴⁵ WRÓBLEWSKI (1973), p. 166.

⁴⁶ WRÓBLEWSKI (1981), p. 355.

⁴⁷ ROEDER (1963), p. 139 and TSHELTZOW (1948), p. 259 respectively.

to an "objective" certainty; to the coherency of such a degree that makes any variety the "wonder of Eddington" (i.e. the case of the monkey producing a sonnet by operating on keyboard⁴⁸). However, Eddington's wonder is just the statistical random which, albeit not excluded on principle, has no kind of reasonable probability. And to claim it to be a new kind of objectivity is mere verballity, which postulates something non-existing as existing.

In proof in law, the case is not of objectivity but of decision, which is thoroughly practical and, in its alternatives, normatively pre-codified. That is, it is normatively patterned when the objective presence of facts can be established normatively (with reference to statements of facts brought before the court, processed through the judge's reasoning and reasserted as the judge's conclusion, within an individual procedure, in order that legal consequences aimed at by the procedure shall be drawn in procedure) and when it can be rejected. The bivalent polarization inherent in it—and I have in mind the prevalence of the principle of *Aut-aut, tertium non datur* here, notably the circumstance that the judge can only have the exclusive choice between two versions with the one completely negating the other—is certainly not drawn from our "undissolubly unconditional" certainty⁴⁹ on the given version of facts, but from the circumstance that we can only proceed in legal procedure along the homogenizing lines of the dichotomic conceptual structure of the law. For I can speak about "brute" facts dialectically, with reservations, considering another configuration of them in another context, or acknowledging their falsity if something improbable is the case. Nevertheless, as soon as they become "institutional" facts established in such a procedure, instead of dialectics I have the alternatives formally reduced to two: "he did / he didn't do", "he did that / he did something else", i.e., "he is guilty / he is not guilty", "he is liable / he is not liable". Bivalent formalization is carried through to the end in a way that even in case a dialectic finding

⁴⁸ An example by VODINELIĆ (1974), p. 97.

⁴⁹ Terms by VODINELIĆ (1974), pp. 89–93.

were forced out it should form a dichotomic establishment projected into some formal category (e.g. judging *in dubio pro reo* in cases without "certainty" on factual establishment).⁵⁰

"What is possible is almost limitless and what is real is strictly defined, for only one of the numerous possibilities can turn into reality. The real is but a special case of the possible, and therefore it is imaginable in other ways as well. Or, it follows therefrom that only by imagining the real in another way can we reach the realm of the possible."⁵¹ Well, if the real is too narrow a field within the only slightly limited field of the possible (with the paradox of cognition expanding without the knowledge of where and when has reality been specified by it),⁵² what is being expressed in the judicial decision?

"Due to the limited means of human cognition, nobody is in the position—not even when observing a process directly—to get absolutely certain knowledge of any set of facts. One can at any one time conceive an abstract possibility of set of facts in which this set is not given. Nobody who understands the limits of human cognition may assume any longer that he can get conviction about any process with the exclusion of any doubt and the bare possibility of any mistake taken. Therefore, in practical life, we sense the high degree of probability which we have gained with the possibly most exhaustive adequate use of the means of cognition as reality, and the consciousness of the high probability so achieved, as conviction about reality."⁵³ It means that not even the jurist may count with anything more than probability of conclusion in the judicial process. In consequence, the judge's gaining certainty on facts can only be interpreted as an operation aiming at a step by step approach to the point which has been

⁵⁰ Cf. ZIEMBINSKI (1963), p. 388.

⁵¹ DÜRRENMATT (1985).

⁵² "The truth is an end we can attain but we cannot know when we have attained it." NINILUOTO (1974), pp. 275ff. quoted by AARNIO (1977), p. 235.

⁵³ HELLWIG (1914), p. 86 as quoted by VODINELIĆ (1979), p. 72.

called, albeit in another context, “hermeneutical compression” by Fikentscher.⁵⁴ In the evidencing process, it is a two-way motion in two-directional senses that attempts, by weighing the pieces of information about facts, to increase the probability of one configuration of facts while, on the other hand, decreasing any counter-probability. In the application of norms, the process ends by arriving at the hermeneutical “turning point”. Here it ends by the possible maximum of believability, of fitting together and coherency achieved, when each and every kind of “reasonable doubt” becomes practically excluded.⁵⁵

In point of principle, even in the optimum case the truth of a judicial establishment of facts is nothing other or more than a hypothesis which, under the conditions given, has no competitive alternative. Thereby, having in view our personal commitment at least, we have reached back to the tradition implied by the original usage of the term “the truth”, standing for the notion of “plighted faith”.⁵⁶

4.3. The Role of the Force of Law

Properly speaking, “the legal rule does not say: ‘If a certain individual has committed murder, then a punishment ought to be imposed upon him.’ The legal rule says: ‘If the authorized court in a procedure determined by the legal order has ascertained, with the force of law, that a certain individual has committed a murder, then the court ought to impose a punishment upon that individual.’”⁵⁷ What is meant by “the force of law” here?

Originally, by touching upon the status of the individual, Ulpian argued that anybody who had been declared to be free [*ingenuus*]

⁵⁴ FIKENTSCHER (1977), pp. 198–200.

⁵⁵ E.g. MacCORMICK (1978), pp. 89–90 and MacCORMICK (1980), p. 50.

⁵⁶ *The Oxford English Dictionary* XI (Oxford: Clarendon Press 1933), p. 435f, as well as *S. O. E. D.* 3rd ed., p. 2375. Cf. also KENDAL (1980), p. 21.

⁵⁷ KELSEN (1967), p. 240.

by a judicial decision had to be regarded as free even if later on he would be revealed to have always been at liberty [*libertinus*] notwithstanding, because the thing that had been judged was to be accepted as true [*res judicata pro veritate accipitur*].⁵⁸ By having abstracted from the individuality of the case, the principle involved was soon re-established in Justinian's *Digests* as one of the *diversae regulae iuris antiqui*,⁵⁹ which, through the sequence of its reception and ensuing reinterpretation during the Middle Ages, set the basis of one of the foundational procedural institutions of modern formal law. And in terms of its actual working we have to realize that, in a system built up and made to function by the means of formalized procedures, anything that is material is at the same time procedural. This is also to say that, strictly speaking, it is the procedure that "legally 'creates' these facts" for the procedure. For "the function of ascertaining facts through a legal procedure has always a specifically constitutive character".⁶⁰

Or, as it is reflected by both its normative regulation and the logic implied by it, the procedure is built upon the assumption of some formal requirements according to which: (a) the judge is to make a decision within a reasonable and/or a fixed span of time; (b) his decision must involve a final and definite choice between one of the bivalent alternatives defined by the dichotomic categories of law (i.e. he must establish, as a fact, either that the case brought before him is a legal case, that is one defined by a normative category of the law or that it is not the case); and, finally, (c) the establishment in question will—either directly or indirectly, i.e., if there is an appeal institutionalized in procedure, by not appealing in time, or as this establishment has been re-established upon appeal—become authoritative, i.e. final, in the legal order, as long as it prevails.

⁵⁸ Cf. *D. l. 5. 25*.

⁵⁹ *D. 50. 17. 207*.

⁶⁰ KELSEN (1946), p. 136.

An order can only be based upon indubitable facts. These can either be axioms which are self-evident (as taught by Pascal and Descartes) or establishments forwarded by the order itself (and this is the reason why legal force has been institutionalized in law).⁶¹ At the same time, their difference in the foundation of an order is to be seen not simply in the fact of whether they lead to a "natural" or to an "artificial" order but in the difference between the one which only defines minimum conditions from the very start (without necessarily prejudicing the outcome) and the other which transforms any result otherwise concluded (with no respect of the qualities it features) into a final one. Thereby it short-circuits the whole process and transforms what can be a factor quite contingent upon any extra-procedural point of view into a factor also asserting itself in, and having an impact upon, extra-procedural life.

Considering the issue, it seems evidently not to be by chance that it is only legal formalism that has developed such an institution. It is not by chance therefore that in extra-juridical spheres, thus "in philosophy, there is no authority which would guarantee, to some of its theses, the status of *res judicata*".⁶² As a matter of fact, this cannot even be, for such an authority, instead of contributing to the clarification of the starting points, is only there to guarantee that the result achieved is to be freed from any doubt whatsoever. Its only job is to declare that the establishment in question belongs definitively to the normative order, that its status derives therefrom, and that it has the exclusive foundation on its being projected by, as a constitutive establishment within, the normative order (a feature that has become the proper form of existence of modern formal law both in its formation and functioning). And thereby it elevates irrevocably the establishment of facts (what could otherwise be a pure statement) to become a member of the realm of ought-projections.

⁶¹ PERELMAN (1959), p. 105.

⁶² PERELMAN (1966), p. 173 and, in the same sense, PERELMAN (1964), p. 75.

5. THE NATURE OF THE JUDICIAL ESTABLISHMENT OF FACTS

Facts as relational categories, conceptualizing the cognitive appropriation of nature (the first and the second nature alike, involving the self-appropriation of humankind as well), are the product of human intellectual activity.¹ In the cognitive-communicative praxis of man, fact is one of the instances of relative certainty the human actor can rely upon—needless to say: in the absence of anything better, while actualizing and thereby also reproducing his own set of paradigms.

To speak about social existence is tantamount to speaking about cognitive-communicative praxis. This is the reason why it can be stated without ascertaining it that there “are” facts in social practice. For “connections and relationships are component parts of social being. [...] [T]he unavoidable necessity of experiencing them as part of reality, as well as the necessity of reckoning with their facticity in practical life often necessarily result in their mental transformation into things”.²

5.1. As the Play of a Game

By themselves, facts are not given. No relative certainties acquired by human cognitive-communicative praxis transform automatically into facts in law, either. According to the law's

¹ Cf. VARGA (1990a).

² LUKÁCS (1978), p. 41.

formal requirements (exclusively referable to within the reach of the law) and to the law's professional ideology as well, facts can be transformed into facts in law only and exclusively through restating factual statements as statements in law, and thereby conveying upon them a specific meaning (that is, institutional significance and setting), while referring to the law's distinctiveness by declaring the whole operation to be within it. To be sure: what is called to be "distinctively legal" is obviously a partial system within the total social system. That is, all of us as actors are players of a particular game within the total social game.

In this process, formal closure will eventually prevail. For no rule taken from the outside can be asserted as valid in the game. Anyone wanting to participate in the game may play only and exclusively according to the rules of the game. The second of its rules says: anyone wanting to play is allowed to play only provided that he/she has facts in hand referred to as ascertainable in external reality. The third of the rules adds: the actuality of the facts referred to as facts also has to be proved. And taking evidence of them is already part of the game. Needless to say that evidencing may also only proceed according to the game's own rules.

In other words, the game's main rule stipulates: no one is allowed to break in in any way. Anyone wanting to enter the game is admitted to play only provided that there is a game's rule providing therefor. And the validity of the main rule cannot be challenged by any title claimed. That is, no claim referring to the novelty, importance, or relevancy, of any statement of facts is sufficient in and by itself. For facts can be taken into the play only and exclusively through their procedural communication. Anybody forcing his own (non-procedural) factual communication onto the play would spoil the game itself. Any forced break in the game would put an end to the game, just in the manner as if he/she had set fire to the house in which the game was played. And the game, if played on after having been spoiled, would already be another game. Anybody who imposes his/her own rule

upon the game will actually destroy the game.³ Anybody who implements any change into the game without being entitled to play another game within the game has actually started playing quite a new sort of game.⁴

The game about which I am speaking is characterized by its referring to what it is called "the" truth. It does so, albeit it accepts procedurally established "conviction" as the "proof" of what it calls "the" truth. In limited cases, i.e. in procedures in which the judge is expected only to observe the fight between the parties in conflict, it may occur that the parties mutually invalidate their respective proofs—without raising the question of their inner force and/or, even, relevancy.

From an epistemological point of view, we can only state that the game is basically defined by (1) its normative orientation and organization (for, either as a principle of selection or as a medium of its organization, everything that plays a role in it is subordinated, from the very beginning and without conditions, to some practical consideration differing, in principle, from the theoretical model of cognition), as well as by (2) its procedural closure (which, in addition to closing the process itself at a certain point, declaring the issue reached to be *res judicata*, predetermines the whole processing as well, determining its organization, the choice of paths and directions, and also its phases, deadlines and formalities from the start). Accordingly, the game's functioning can be characterized by the following features: (1) selectivity (for the process may proceed in any of the possible directions only provided that, and insofar as, the normative relevancy of the facts referred to has previously been established); (2) formality (for facts can be considered, no

³ As the commercial traveller, having previously agreed to play the game of a judicial process which eventually leads him to formulate a moral judgment, does by hanging himself in the metaphorical fiction by DÜRRENMATT (1965).

⁴ As Caesar does in his chess game with Jussuf, the pirate capturing him and forcing him to play by offering to allow him to go free if he were to win, when, to avoid checkmate, he moves beyond the board and enforces his new rule by snatching Jussuf's sword and stabbing him to death. KARINTHY (1957), pp. 27–30.

matter how relevant or important they are otherwise claimed to be, only provided that, and insofar as, the presence of some further properties is also proven—properties, by this I mean, the relationship of which to the merit of the case at hand may otherwise be quite artificial, external and incidental as well); and, finally, (3) proceduralism (for the issue of the game will be more a function of questions like “Who is it who is asserting anything? When and how does he/she do so?” than of ones like “What has finally been asserted?”).

In sum, the most that can be said from an epistemological point of view is that the process is hardly anything more and other than the utilization, in a practical context, of the rubble of cognition within a specific framework, wholly determined by homogeneously specified aims, methods, forms and procedures.

5.2. As the Precondition to Mete out a Legal Sanction

In a legal event, neither law nor fact can be identified in and by itself as standing for itself. I dare to venture the statement even if it sounds nonsense: properly speaking, law and fact are not even the components of the procedure, either. They only become parts of the procedure indirectly—in the form of and as mediated by a reference to an assertion, forwarded by the parties and/or accepted by the judge as one of the premises in his syllogism of decision.

In the same sense, one may also state: the legal order is not the “consequence” of norms⁵ but that of conventionalized social practice. (Or, to be precise indeed: legal order itself is conventionalized social practice.) As a matter of fact, legal order is the outcome of the practice referring to norms and making, at the same time, this reference recognized as conforming to norms. Certainly, it could also now be added that not even the world of facts judged in this practice is the “consequence” of facts, either.

⁵ As argued for in VARGA (1990b) and VARGA (1990c).

To be sure, we can state: facts in themselves are not legal phenomena at all. Only their statement may open up the way towards their becoming a legal fact. Namely, (1) a statement which is not a proposition of existence in an epistemological sense but the assertion of a practical claim for starting, or modifying, a legal process, by referring to a legally relevant fact the case of which can be or has been established. This very statement can only be transformed into an event of and within the law through (2) a competent authority accepting it in procedure as the basis, or component part, of its procedure.

In the formal reconstruction of the logic operating in modern law, fact figures as the precondition for (or: is important only in respect to) meting out legal sanction.⁶ In that matter, it may sound rather cynical. Albeit it is nothing other than the restatement of the specific logic of a specific functioning. (In the same way as, ontologically speaking, Lukács does,⁷ by stating that which is theoretical can only be relevant in practice because, and only to such an extent that, it is practical. And this means that opposing theory to praxis cannot be verified conceptually. Moreover, as contrasted, they do not really exist, for praxis is the only entity that exists. It is tantamount to saying that in practice, i.e., according to its real form of existence, "theory" is praxis, too. Still, as logic and mathematics are projected onto reality as systems of conceptual schemes artificially established by theory, theory obviously exists. It does exist, although, ontologically speaking, not as outwardly added to praxis but as a more or less thoroughly homogenized medium within it. At the same time, as a medium somewhat lifted out of the heterogeneity of praxis—alongside some homogeneous features of organization, structure and operation—it is also confronted with praxis as the yardstick of praxis. Clearly, it is the *raison d'être* of its being called into being.) Well, the basic message is the relativity of homogeneous spheres vis-à-vis underlying heterogeneity. At the

⁶ Kelsen (1960a), p. 245.

⁷ Lukács (1978).

same time, the relativity in question presupposes the development and self-assertion of particular principles of construction and functioning within this heterogeneity. It is the heterogeneity of everyday life that provides both the basis and framework, source and objective, above all, the genuine medium of any homogenization.⁸ And the homogeneous spheres, embedded in social heterogeneity, assert themselves through their own principles of organization and operation in the overall process of social reproduction.

Returning to the normative decision-making process: it would be faulty to assume (as the Cartesian myth⁹ did, and, in addition, it would also merge together different homogeneous spheres) that this is the case of, first, "cognition", and, then, subsequent "practical reaction". For the normative decision-making process is, from this perspective, basically a kind of practical reaction to some assertion of facts and, then, testing both this assertion and the reaction to it in a limited process.

Two conclusions can be drawn from it. *One*, no establishment of facts whatever within the normative order can be derived from either the event which occurred or its having been taken cognizance thereof in any way. The normative order makes it possible to establish, with reference to the same event, as many "cases in law" "constituted" by "facts" as many conclusions to legal consequences it allows to draw by offering justifiable bases of reference. *Two*, no statement of fact can start a procedure just because it is true. A fact and/or its statement can only be instrumental in starting a procedure because it has been done in a way suitable for starting a procedure. Consequently, its truth is relevant not from the point of view of law but from that of the practical chance of its being attacked by reference to its lack of truth. For the normative precondition of starting a procedure is not the truth of the alleged facts but its provability. The truth of the statement of facts and the requirement

⁸ For instance, even in the light of micro-analysis, there is nothing in the homogeneity of law which could not at the same time be also heterogeneous. Cf. VARGA (1985a).

⁹ Criticized by RYLE (1949).

that its alleged provability will be tested through procedural proof are actually nothing more than bases of reference established by the normative order and backed by the law's professional ideology. The only genuine limitation is that, at least in the name and within the reach of the law, they may not be refuted or negated overtly or explicitly. On the other hand, the law will qualify the result it finally reaches as "certainly provable", as "proved in procedure", and, finally, as "true". This way, all components being a function of normative procedure, I could summarize by way of a *reductio ad infinitum* that what is required by the law is, in the final analysis, not the truth but an actually unassailed assertion referring to truth.

5.3. As a Non-cognitively Homogeneous Activity

It seems that, actually, I am dealing with differing characteristics of differing homogeneous spheres, even though my approach to the processes in question is defined by assumptions standing behind the concepts elaborated by them and the operations taking place in them.

If I wish to investigate a subject, I use or create categories and concepts which reflect something of the motion of, and of the properties manifested by, it, in order to be able to conceptualize its parameters and principles of organization. These conceptual tools are definitions of existence. For their criterium is whether or not they reflect, and in which way, what is claimed to exist independently of them. At the same time, however, they do what they do by the force of my definition. So, in this sense, they cannot be but anthropomorphized. Nevertheless, they are also disanthropomorphized, at least to the extent that I shall behave, and will do everything within my power in order that I shall behave, in such a way that my presence or bare physical existence will be irrelevant in respect of what they actually reflect. At the same time, as further conceptual tools, I shall create types by and through them, in which cognitively characteristic configurations, forms of organization and limits of change are conceptualized—irrespective of whether or not they appear in the individual case at hand.

In a case where I wish to exert a practical influence on that which exists independently of me (providing that it is not done by mere physical force, grasping the subject, etc.), the only mediator to which I have access is language—just in the same way as if it were a case of cognition. And it is to be noted that “language expresses the processes it reflects in a reified form—and the more versatile it proves to be as a means of social communication, the more it is so”.¹⁰ As a consequence, every object, event and/or human communication represented by language is formulated in a quasi-cognitive manner, irrespective of the fact whether or not they display any cognitive feature. Of course, this may cause confusion. If my practical action is mediated by language, I can only proceed through naming behaviour and their context. For I can only influence others’ behaviour through predicting and inflicting consequences on it. Generally speaking, there are two alternatives for interfering. *One*, I may have obtained a global plan [*Gesamtplan*] which I am expected to break down in an axiomatic way. In this case, my effort will, at least partly, probably fail as a result of the discrepancies which necessarily arise, and also because it is real interests (instead of a logocracy’s ideological rule) that will expectedly force out solutions on the level of a mutually acceptable compromise at least. *Two*, I can also proceed by way of defining events, or aspects, in respect of which I stipulate that regulatory interference is needed. In the function of the choice taken, I commence conceptualization, *one*, either by naming: in this case, no material consideration will be relevant. Or, *two*, I can also proceed by setting the objective, and weighing the effects and side-effects which result from its realization: in such a case, it is the actual behaviour and its naming that remain irrelevant. Anyway, independently of the path chosen, I shall finally arrive at the formulation of type(s).

The type to be formulated will necessarily be random-like, i.e., arbitrary in principle. For it is nothing other than a tool, artificially

¹⁰ LUKÁCS (1976), p. 652.

made in order to be projected onto reality in the course and for the sake of practical interference with reality. It serves as a web for normative references. Consequently, it is, in spite of its disanthropomorphic appearance, also anthropomorphous. Or, formulating it the other way round: it cannot be conceived of as an entity reflecting reality for the sake of its cognition. Just the opposite, they are types that project onto reality an ideal ordering, defined by practical considerations of how to mould reality. Therefore, there is no kind of "objective reality" involved here, to which reality should correspond by (in an epistemological sense) adequately reflecting it. Indeed, what it does reflect and what offers itself as a criterion thereof are only and exclusively its interior domain, that is, what is "inside" it.

To be sure: this is the case with any human expression, objectivation and institutionalization in general. What they carry on can be traced back to subjective will or its social substitute. Nevertheless, no such reduction can lead to a result identifiable, interpretable or simply useful for further analysis.¹¹ The only entity that remains is its linguistic expression, that is, a certain text composed of a series of signs defined by social conventions, i.e., a vehicle carrying on the human message for which it stands. In this sense, the last identifiable, interpretable and analytically useful particle of it is its form of objectification. For, eventually, objectification is nothing other than the result of to what and in which way something non-identifiable, non-interpretable and in itself analytically non-processable has been objectified.¹²

In other words: it is an artificial creation like every means that reflects, instead of reality, the human objective aimed at reshaping reality.¹³ (Ontologically speaking, it is quite true that no humanly-

¹¹ Cf. VILLEY (1957), pp. 87-98; Kelsen (1960a), p. 307; Kelsen (1960b), pp. 209-230; OLIVECRONA (1970), pp. 73-77 and 268-270; VARGA (1981), pp. 96-98.

¹² Cf. PESCHKA (1983), pp. 6-19; PESCHKA (1988), ch. i, par. 2.

¹³ Cf. VARGA (1985), pp. 128 and 134.

set objective can ever be disrupted from reality or its cognitive—or quasi-cognitive—conceptual-linguistic representation. However, such a statement of the final ontological unity still does not provide an operational criterium for analysis, and is also irrelevant from the point of view of the specific operation of the partial complex in question.) In consequence, pigeon-holing various behaviour into an artificially established set of normative types is not cognition, either. Rather, it is rooted in, and exclusively defined by, the practical intention standing behind the wish for interference and its implementation.¹⁴

Consequently, even that which is apparently cognitive or quasi-cognitive is expressed here in a homogenized medium, too. What is expressed here is lifted out from the heterogeneity of everyday life—but in a sphere differing from cognition, subordinated to a different homogenizing mechanism, and displaying another kind of specificity and distinctiveness. Here, cognition is only relevant from the point of view of the classification to be performed, and it is only so to the extent that events have finally to be defined as actual cases of a finite number of ideal cases. In other words, judicial pigeon-holing aims at reducing some external event, called fact, to a kind of concrete actualization of the generality of a concept, defined normatively in a normative context. Accordingly, classifying generalization is not operated by the free (i.e. not codified, therefore infinitely diverse) means of setting up conceptual classes and logical categories in order to describe the subject with reasonable differentiation. Instead, it classifies events in a closed heap of classes, which is ready-made by having been set up and defined previously. In opposition to both cognition and non-institutionalized normative systems (like morals): having a free hand in breaking down and applying a conceptual system is neither conceivable nor reasonable in law. For, the very reason of why the specific homogeneity of legal superstructures has at all been developed lies in the nature of legal provisions being “applied” in

¹⁴ LUKÁCS (1971) II, p. 217.

practice. Logically, any normative “application” is only conceivable through ascribing some external event, qualified as the case of a normatively defined legal case, to the consequences that follow from the actualization of legal enactment(s).

This is to say that normative classification is a logical precondition of that that what is called the “legal consequence” could be meted out. It explains that, on the one hand, anything cognitive may have a role to play in this classification; however, on the other, nothing cognitive is in itself enough to constitute, substantiate, or substitute to, the act of normative subordination. Subordination is expected to be rational in the system of justification accepted, i.e., rational to a maximum extent. In practical terms, this means that it must be done in a way as if it were a logical conclusion, with no alternative to it. Albeit it goes without saying that, in the final analysis, it is a function of the will of subordination and the practical considerations behind it.

5.4. As the Reproduction of the Law as a System

What do I mean when I say: “I play a game”? Where are the limits of the game and of its playing? As we have seen above: by the very fact of playing, the game is reproduced. Or, just through the game, in the course and as a consequence of the game, the game reproduces itself in its normative context.

5.4.1. The Claim for Normative Closedness

How is all this possible? Well, participation in a legal event, i.e., performing a legal action, is qualified by its own reference to the legal system, declaring itself to be an event (or action) within the normative sphere of law, and also having this self-declaration accepted within the community. Analytically speaking, this is a series of performative actions taking place in an institutional context, in which events are constituting the law while they

reproduce the legal set-up in its continuity. Let us recall: "The legal system, too, consists only of communicative actions which engender legal consequences—it does not, for example, consist of physical events nor of isolated individual behaviour which no one sees or hears. It consists solely of the thematization of these and other events in a communication which treats them as legally relevant and thereby assigns itself to the legal system."¹⁵ In such a system, normative validity is transmitted step by step, from legal event to legal event, narrowing or extending the law's scope of action. That is to say, the law's practical action proceeds through its own reproduction, guaranteeing its continuity in time.

Law is nothing but conventionalized practice. It has no other form of existence; it has no physical property and no objective existence.

Social institutions as a function of human conventions can only exist communicatively, by way of exchange of meanings. Their existence is thereby derivative from social practice. "Every sign *by itself* seems dead. *What* gives it life?—In use it is *alive*. Is life breathed into it there?—Or is the *use* its life?"¹⁶ Obviously, institutions are the issue of practice that brings conventions to life and reproduces them in their continuity. With the advance of development, socialization will proceed not only as mediated by institutions but also as aiming at further institutionalization. One of its issues is that humankind, reifying its own practice, begins to be related to the conventionality of its own practice as to something given by nature. Institutions start to have their own life as backed by their continued feedback in practice, by the reifying effect of this practice and also by the reifying acknowledgement of all this in practice. And all that may eventually result in their becoming increasingly detached from the concrete-individual human and social medium which alone gave them life. In limiting cases and

¹⁵ LUHMANN (1988), p. 19.

¹⁶ WITTGENSTEIN (1953), par. 432, p. 128.

at the level of individual mind, "this abstraction has the same ontological rigor of facticity as a car that runs you over".¹⁷

Let me remark that being bound to practice is a *sine qua non* of every connection, relational in the sense that "if [...] its posited character comes into force, then simultaneously also a subject will be posited to it".¹⁸ In consequence, any phenomenon which is bound to practice is process-like from the very beginning. As a matter of fact, the conceptualization of reality as a process is a well-known methodological choice offered by ontologies.¹⁹ In the ontology of social being, it is its process-like character that provides the key for general understanding. Accordingly, to exist will for a system (or context or totality) be synonymous with that which will result from the totality of interactions taking place among its components.²⁰

The system is autonomous. Each and every unit which operates as an element of the system is constituted by the system. The system is both self-referring and self-constitutive. Accordingly, its existence lies in the institutional practice of self-reference made by factors performing operations in the name of the system—a practice that finally reproduces the system in both its identity and unity. This way, the system is also normatively closed. However, what is normatively closed is at the same time ("not as a contradiction but as reciprocal condition") open to its environment in order that the former can process the latter normatively.²¹ That is, its closed

¹⁷ LUKÁCS (1978), p. 40.

¹⁸ LUKÁCS (1965), p. 515.

¹⁹ E.g. WHITEHEAD (1929).

²⁰ Cf. LUKÁCS (1976) II, ch. 2 and III, p. 172.

²¹ LUHMANN (1986), p. 113. That in respect of which the system is open is, ontologically speaking, paramount to appropriation, namely to building it into the system's practice as a factor of this practice. Cybernetically speaking, this is openness for learning. It has nothing to do with any reflection of reality in an epistemological sense. In consequence, when LUHMANN (1972), p. 283 conceptualizes this duality as "normative closedness / cognitive openness", "cognitive" only stands for the functional differentiation usually made between

character will manifest itself in "normative control", i.e., in the way it accepts an event as a legal event and in the kind of self-reference with the help of which the system renders any event a constituent of itself. This way, I could even add: it is normative closure (manifested in normative control) that sets the framework for and limits of what is open. Therefore, I could also venture the statement according to which it is by way of closed self-reference and through a normative procedure that the system will carry over, into the sphere of law, all that it is open in and for. Indeed, this is the point where the selective effect of legal relevancy can be seen. This is the point whereby procedurality will determine the whole legal process by constituting its issue, and whereby facts become normatively transformed into a component of the legal domain.

Well, the statement according to which "even the ascertainment of the facts that a delict had been committed represents an entirely constitutive function of the court" gains its full meaning²² only in such a context. For the system is open to its environment only and exclusively in order to process it in a system-specific manner. In any other respect, the system is closed. That is, no response can substitute the system's own response. Nothing except the system's own stimulus can start a process or perform an operation in it. For the system functions as a "black box", observable only and exclusively in the normative declaration of that, *one*, the system takes its input from its environment and, *two*, its response with its output is calibrated by being addressed to its environment. Or, to put it another way, the legal event is entirely system-constituted. "In juristic thinking the ascertainment of the fact by the competent authority replaces the fact that in nonjuristic thinking is the condition for the coercive act. Only this ascertain-

"normative / cognitive expectations" in sociology. Cf. LUHMANN (1972), pp. 32-33; SESONKE (1956).

²² Kelsen (1967), p. 239.

ment is the conditioning fact.”²³ This statement entails that “what the system, at the level of its operations, regards as reality is a construct of the system itself. Reality assumptions are structures of the system that uses them”.²⁴ All in all, anything that exists objectively or occurs on account of causal or logical necessity may become an element of the system only provided that it has been posited by the system in a normatively closed (and externally non-substitutable) way.

It goes without saying that the purely constituted representation of the environment by the system also applies to the “perception” of the environment by the system and its sensibility. That is to say, operative closure will apply to the whole process of becoming an input as well. In principle, even in ideal cases, “for any system, only what is accessible for its own operations is accessible.” This obviously reduces the (relative) totality of any event to its instrumentally transformed representation at the most. For “everything that ‘is’ is formed through complexity reduction” in the system.²⁵ The “black box” representing its functioning will display the same autonomy both in accepting anything as input and in issuing as output, for both of them are preconditioned by the structural coding of the system and the programming of its processes.²⁶

5.4.2. The Openness of the Communication about Facts

The basic fact that law, in principle, in no way differs from any other form of social existence, being reduced, in the final analysis, to the transmission of signs, i.e., communication, apparently seems to contradict what I have stated about the law’s autonomy and self-constitution. For social systems are reproduced by way of com-

²³ Kelsen (1967), p. 240.

²⁴ Luhmann (1988), p. 337.

²⁵ Luhmann (1988), p. 339.

²⁶ Cf. Luhmann (1985a), p. 45.

munication, and communication itself, by way of self-communication.²⁷ Therefore no matter how much functional specificity is displayed by communication within the law,²⁸ it can at most be a kind of particular communication within general social communication. That is to say, the properties of general communication (its conventionality, assumptions, paradigms and orientation, etc.) will apply to all of its variants as well. "And to imagine a language means to imagine a form of life."²⁹ Or, communication within the law preserves (even if somewhat sublated) the semantics, syntax, pragmatics, etc. of common language. At the same time, the whole set of social values and paradigms prevailing in social commerce also play their part in the huge community game which is language practice. And needless to say that the communication within any special homogeneous sphere is continuously fed back into the total language game. This way, notwithstanding their homogeneous particularities, all partial practices are, at the foundational level of underlying heterogeneity, constantly co-related and, to some extent, also intertwined.

In spite of the autonomy of, and the laws particular to, the individual homogeneous spheres, this makes them dependent on the various determinations by social practice, too. This is the way how they form what is called social totality. For, from an internal point of view, no matter how independent the activity of the subject may be in positing within, and thereby also reproducing, the system—ontologically, in the final analysis, the arbitrariness inherent in the system's indefiniteness is actually rather limited. "In one way or another, these subjects are from the beginning confronted (eventually: short of perishing) with the scope of action given to them in the total process at any time. Accordingly, a certain tendential unity will assert itself on every domain, without lending a kind of absolute unity to the process (in the sense of the old materialism or

²⁷ Cf. LUHMANN (1985b), p. 5.

²⁸ As demonstrated by, e.g., LUHMANN (1988), p. 340.

²⁹ WITTGENSTEIN (1953), par. 19, p. 8.

as a logical consequence following from Hegel's logic)." Basically, the freedom of the maker of instruments is meant here. Ontologically considered, however, there is no arbitrariness involved at all. "The formal closure of a system of arrangements of this kind may stand in an incongruent relationship with, as the reflection of, the material that has to be arranged, but certain of its actual essential elements still have to be correctly grasped both in thought and in practice in order that it is able to perform its regulating function." Thus the end result of the total interaction of social part movements and their apparent arbitrariness constitute a "tendentially co-related system" (here, again, exclusively in an ontological sense); just as "a certain tendential unity" will also result from the interaction of the individual homogeneous spheres.³⁰

To sum up, the dialectical interplay between progressive particularization (distinction and differentiation) and the re-assertion of prevailing totality is a basic feature of any social motion. In such an interplay, it is in terms of its own logic (i.e., in terms of conceptual categorization like "entailment", "conclusion", "attachment", "correspondence") that any (sub)system will separate itself from any other (sub)systems. In real operation, continued feedback and genuine interaction are to prevail. (This is called "cognitive openness" in theory.) Nevertheless, in actual functioning it is from inside that the system defines the operations performed and events taking place within it (independently of the possible motives which may have actually been in play in it), and thereby reproduces itself through self-constitution. (This is called "normative closedness" in theory.)

All the presuppositions enacted in procedural institutions, formulated by legal doctrines, and/or sanctioned by legal practice (no matter how ideological they are revealed to be) embody practical considerations, necessary for the law's proper functioning. They may involve a variety of claims. For instance, the judicial establishment of facts has cognition as its ideal; procedural

³⁰ LUKÁCS (1976) III, p. 296; LUKÁCS (1978), p. 127; LUKÁCS (1976) II, p. 217.

institutions are introduced to promote judicial cognition; judicial evidence and proof are cognitively constructed; reaching material truth is therefore a realistic objective; judicial cognition may elevate to the level of certainty those cognitive components that, separately, can at most be regarded as probable. In fact, all these assumptions are *sine qua non* parts, as professional ideology components, of a kind of law-application which, as a whole, has proved to be functional in social existence by properly channelizing actual social needs.

Such component parts may be, and actually are, needed for the proper construction and functioning of modern formal law—just to the same extent as do institutions enacted by the law and the lawyers' professional ideology do (setting the ideal of normativism, i.e. the possibility and desirability of social mediation through legal means).³¹ True, normativism in this sense speaks for rule of law, while the ideology outlined does so for the possibility and desirability of rule of facts—so that the rule of law can materialize with no interference from man's rule. That is, the rule of law proclaims the ethos of legal distinctiveness through institutionalizing normative closure, while the rule of facts proclaims a legal functioning embedded in facts as rooted in common sense evidence, backed by practical openness in its functioning. All in all, while the rule of law argues for the law's self-differentiation, the rule of facts ascertains why legal enterprise is notwithstanding the same which the heterogeneity of everyday practice and experience suggests it to be.

In the final analysis, I surmise that these two aspects are able only in supplementing one another to serve the common interest in making the law operate in a socially meaningful way. That is, they are to guarantee distinctively legal operation actually taking place, on the one hand, at a time when and under the conditions of which all its normative preconditions are fully met, on the other.

³¹ Cf. VARGA (1985), pp. 152ff.

Appendix I

KELSEN'S THEORY OF LAW-APPLICATION: EVOLUTION, AMBIGUITIES, OPEN QUESTIONS

Right from his first theoretical treatises, Kelsen had pretensions to formulate a comprehensive, great theory. His thinking follows its own path; at the same time the set of problems treated in his oeuvre as well as his whole theoretical activity are tinged throughout with constant problems. As a result, his life's work is composed—apart from a great number of volumes—of incredibly manifold essays and critical reflexions as well as of restatements. Still, this monumental theory lacks a proper doctrine of law-application. And the huge literature whether criticizing, appreciating or elaborating Kelsen's work, reflects in an apparently correct manner the actual situation, *viz.* that its pretension to a theory of law-application does not occupy any central issue in it.

Nevertheless, the present essay will attempt to unfold the still existing concept of a law-application theory from 1911 to the 1960s. Such a summary as an aggregate of the Pure Theory of Law and, in general, of his way of legal theoretical thinking, may in itself involve certain lessons. It may, however, be just as interesting from a methodological aspect, namely from the one of the strict discipline and consistency of theory-structuring on the one hand, at the same time—owing to the questions which have remained open—as a choice of the possible intrinsic developments, dilemmas, of disturbing or stimulating ambiguities, in the course of which even controversial conclusions often put a question mark to his own basic concepts and directions. The theory of law-application found in Kelsen's posthumous theory of norms is concerned mostly with a separate set of problems. Therefore a separate study is needed to process this from the perspective of a theory of the law-application.

1. "Hauptprobleme der Staatsrechtslehre"

Kelsen's first venture into the field of legal theory, entitled *Hauptprobleme der Staatsrechtslehre, entwickelt aus der Lehre vom Rechtssatze* (1911), forecasts later problems in many of their elements. Characteristically, it enables an eventual further development without major contradictions or breaches. The standpoint taken by him in this period can be ascertained from a conscious self-limitation in the treatment of problems and from what he remains silent about. At the same time, his system is rather taut and closed. His attitude towards the law-application can be deduced both from his ideals concerning the science of law and from his narrow interpretation of the concept of imputation which he considers as the central category of the normative sphere. To wit: legal science is the geometry of the formal presentation; thus the imputation's only factor consists of the norm. Accordingly, the application of law, while being indispensable, is merely an accidental factor, not a constituent part in the legal process.

As a consequence, he has little to say about the " 'application' of the norm". The *first* thing he stresses is a sharp differentiation between whether the norm is used as a basis of reference for mere comparison, or we apply it in a normative context with consequences.¹ Still, whether it is used as an accidental yardstick, or whether the norm leads to a (possibly vital) normative consequence,

¹ Kelsen (1911), pp. 15-17. When we limit ourselves to "merely comparing a concluded action with a norm, and to proving its harmony with the norm in an objective manner", then the "norm will merely serve as the indifferent object of such comparison", and only "as a yardstick of that which has already happened". Obviously, here no "volitive relation" will be present. "When judging whether a mountain is high or low, or a motion is swift or slow, the rules we employ possess no norm-generating meaning." *Ibid.*, p. 15. However, a different situation may also occur. "That judgment which states the correspondence of a given action with a given norm, or the lack of such correspondence, may be linked with the *approval* or *disapproval* of the action by the person who is judging." *Ibid.*, p. 16. That is the field of the normative application of norms.

Kelsen sees no difference, no specific trait deserving further examination.² The *second* tenet is the requirement of the applicability of a proposition of the law to individual cases,³ and the *third* is the possibility of institutional applicability by the court, as essential features of the law.⁴ Accordingly, merely the factual possibility of judicial application would be needed; neither the actual process of application, nor its way or outcome could add any essential surplus element to law.

² Moreover, as will be clear presently, only the differentiation is necessary: viz. that criterion of the existence of the norm should be linked to its normative application, more precisely, through the mediation of the latter, to the ought-component present in any elementary norm-unit. "The essence of the norm lies not in its being a rule of adjudication, but in being such a rule which shall be considered by the *adjudicated* as an affirmative or disapproving judgement." *Ibid.*, p. 17. But that will transfer the criterion of the norm from its meaning to circumstances inherent in the use of language. From a structural point this is the same as when he—later on—proves that validity should be considered as a precondition of the concept of norm: "By the word 'validity' we designate the specific existence of a norm." KELSEN (1960), p. 10. With this, as we know, he has involved himself in contradictions, as well as in the necessity of artificial explanations. The doubts that arise hereby are: Is it a norm which is applied not as a norm? What changes will ensue in a norm upon the acquisition and the loss of its validity? Or else, when its original validity is being replaced by a different validity? Is the law's validity a function of a human will, actually and concretely backing it? As to the juxtaposition of the so-called expressivist concept which finds the criterion of the norm in the human act of prescription, and the so-called hyletic concept accepted by modern norm theories, finding the criterion in its conceptual meaning (i.e. in the operator transforming description into prescription), cf. BULYGIN (1985).

³ "The precept of a customary law will differ from the *moral law* in that the former is *applied* for an individual case even when it is not *complied with*, just in a case when it is not complied with." KELSEN (1911), p. 35.

⁴ "The court—symbolizing an external organization—is so important for the law that, from among all the norms by which a legal community is governed, and which are followed by that community, only those may be recognized as *legal norms*, which are actually *applied* by the court (or, in a more complex statehood, by other state bodies as well)." *Ibid.*, p. 236.

Of course, Kelsen could not state anything different in the context of his theory. In fact he considered the imputation as the only determinant of the norm.⁵

Incidentally, he had already stated that the science of law—as “the geometry of the entire phenomenon of law”—treated the law as a formal category;⁶ therefore its manifestations should be examined from formal points of view, while the probing of its actual content should be left to other sciences.⁷ Looking at it from the aspect of theoretical consistency, Kelsen is undoubtedly right. For if we consider the operation of law from the aspect of its formal manifestation, then the implementation of the law is nothing more than the application of a complete, ready-made law to an individual case. That would not change the proposition of the law in any way; on the contrary, it would merely validate it in a given case, thus reconfirming it. From the formal aspect, the law itself professes this of itself; the entire structure, institutional system and ideology of modern law suggest this.⁸ And even approaching the question from the other side: should any shaping of the law be included in these processes, that does not show on the formal side; accordingly, the formal manifestation cannot consider it in any way. As it is, it could be rightfully supposed that any content concealed behind the formal façade is simply indifferent unless it is reflected in the form; just like the

⁵ “[I]mputation rests solely and exclusively on the *Ought*, i.e. the norm.” *Ibid.*, p. 75.

⁶ “In view of its formal character, the legal science too may be designated (by a not in every respect fitting analogy) as the geometry of the total legal phenomenon.” *Ibid.*, p. 93.

⁷ “The legal science will only consider the form of such a phenomenon, the substance of which should be dealt with by the sociology and the historical and political disciplines [...]. Owing to its specific cognitive tools, the science of ‘law’ can only approach one side of this ‘legal’ phenomenon.” *Ibid.*, p. 92.

⁸ VARGA (1981b), par. 2, pp. 52 et seq.

definition of a sphere cannot take into account that which is inside.⁹

In this way, the tenet presumed by the law's institutional-ideological structure (and confirmed by its procedure) is that the application of law is nothing more than the restatement of a proposition of the law with reference to (and in the mirror of) individual cases. If such a tenet were necessary for any reason, it was possible to formulate one—ignorant of the actual contents lying behind it. Let us recall, Kelsen himself had pointed at such contact points where social pressure resulted in law, where "being" was converted into "ought". However, in order to maintain the consistency of his system of thought, he had to induce the said transitions from outside, as an external phenomenon, into the system of law while stressing that it could not be grasped within the law, or with the help of its own construction: from inside it was impossible either to define or to explain or to confirm it.¹⁰

2. "Allgemeine Staatslehre"

One and a half decades later (1925), in the summary of his General Theory of the State, Kelsen had to offer a more detailed treatment.

⁹ "It would be a similar methodological fault to take into consideration the material which the spheric shape, in the given case, conceals." KELSEN (1911), p. 93.

¹⁰ "How a lastingly unapplied precept of law ceases to be a norm, or how the breach of an obligation lasting several years leads gradually to the loss of its character, i.e. how an 'ought' becomes destroyed owing to the 'being', or vice versa, all this is a situation not to be grasped by a juristic construction, or juristically, it is a mystery." *Ibid.*, p. 334. Or: "There must be a point where the process of social life encroaches in a recurring manner on the body of the State; a transitory area where the amorphous elements of society are crystallized into the solid form of the law and State. That is the area where custom and morals, economic and religious interests, are being turned into legal precepts, into the substance of the State's will, and that area is the legislative act. This is the great *mystery* of the law and State [...]" *Ibid.*, p. 411.

In accordance with the thematic enlargement, administration no longer appears simply as one of the State's duties,¹¹ but as a strictly legal and juristic activity.¹² Consequently, administrative discretion (i.e. the right of free weighing of pros and cons) in the realm of administrative action, too, appears as a question of law-application. Ultimately, on the overall theoretical plane, law-application will become an operation vested with an autonomous importance and content. At the same time, the formality of explanation was to remain intact. Earlier, Kelsen had conceived the law-application solely as a means of imputation on the basis of norms, and only subject to the given norm. Presently, law-application itself had turned into a kind of law-making. In this way, Kelsen did not give up either his formal approach, or the tenet of normative imputation; it is merely that he extends the norm-basis of imputation—formerly conceived as law-making—with the act of law-application.

His new standpoint can be summarized in the following few theses. *First*, law-application is the medium, in which the general, abstract norm takes on an individual, concrete form.¹³ *Secondly*, law-application in this respect is not just an implementation, but rather the creation of an individual norm on the basis of the general norm.¹⁴ *Thirdly*, all this is not merely the repeated declaration of

¹¹ The *Hauptprobleme der Staatslehre*, within an overview of "the legal obligations of the state organs" (ch. 19), treats the set of problems of public administration (and, in it, the free weighing)—not touching upon the administration of justice and law application proper.

¹² The *Allgemeine Staatslehre* deals, within an overview of the "establishment of the state order", both the part entitled "Administration as law-application" (KELSEN (1925), § 35, par. C) and the one entitled "Legislation and application of law: two steps in the process of the creation of law" (§ 33c, par. F).

¹³ "Without the judgement the abstract law would be unable to take on a concrete shape." KELSEN (1925), p. 233.

¹⁴ "Therefore the judgment [...] is nothing but an individual legal norm; viz. the individualization or concretization of an abstract or general legal norm." *Ibid.*, p. 233. "Accordingly, the act of law-application is just as much a legal enactment, law-making, establishment of law, as is the legislative act; either of them is just one of the two steps in the process of creating law." *Ibid.*, pp. 233–234.

the enacted law, but also the constitution of something added to it.¹⁵ *Fourthly*, the so-called free weighing (*viz.* the possibility of *discretion*) being admitted in the decision-making process is not a degeneration of the administrative activity (nor is it a characteristic trait thereof), but a property of law-application theoretically present in every case.^{16, 17} *Fifthly*, since law-making cannot be complete, cannot encompass the entire content, but can merely attempt a relative definition, law-application will, of necessity, gain an autonomous significance in the legal process.¹⁸

¹⁵ "The judgment of the court is called 'declaration of law', *jurisdiction*, as if it would merely pronounce that which was already law—in the general norm." *Ibid.*, p. 233.

¹⁶ "Just as there must be a substantive difference between the abstract notion and the concrete concept, likewise there must be a necessary difference between the higher and the lower grade of law-concretization, and that difference is the so-called 'free weighing'." *Ibid.*, p. 243.

¹⁷ Kelsen declares this in an ultimate and unequivocal manner in a resumed (but this time concise) summarization: "If we take into consideration that the *three* traditional functions: legislative, judicial and executive, can be essentially reduced to *two*, since the judicial and the executive one can be equally included in the concept of the execution of laws, then we will realize that the contrast of law-making and law-application which would be expressed by the contrast between the legislation and execution—*legis latio* and *legis executio*—is by no means absolute but a very much *relative* one, expressing—as it does—merely the relation of two consecutive grades of the law-creating process [...]. The tenet, according to which execution, as applied by the public administrative bodies, should *principally* be different from the judicial execution because of the 'free weighing' of the former, is untenable, since more or less *every* act of execution is subject to the free weighing of the executing body, because the general norm can never *fully* determine the legal act called to individualize it; while such a legal act is only possible on the strength of a general norm somehow determining it." Kelsen (1946), pp. 65–66 and 71.

¹⁸ "Any law-application, i.e. any concretization of the general norm, any transition from a higher level of law-making to a lower level, is nothing more than a filling-in of a frame, nothing more than an activity within the limits enacted by a higher-level norm. The higher grade can never fully determine the lower one; at the lower grade such substantive elements will always be present which had not been present on the higher level, as in fact, no further steps could come about in the process of the unfolding of the law: every further step would be superfluous." Or,

In contrast with the former theses characterizing law-application as a one-way, non-autonomous process, lacking a particular operation of its own, this new explanation suggests a multi-chanced, a somewhat dynamic process, showing a certain grade of independence. Still, it does not affect the basic formalism of Kelsen's view on law. According to Kelsen, the normative basis of imputation will still be determined by the legislator. What is merely admitted is that law-application is nothing more than a frame which—from the aspect of the law-maker, but only from the law-maker's aspect—will freely be filled up by those who apply the law. Thus, in the groundwork providing the norm for the imputation, the law-applier will become associated with the law-maker. More precisely, considering the concrete procedural choices of the players who may actually enter the game of imputation, the law-applier will replace the law-maker in a direct manner. It is interesting to note (and considering the theoretical sources and contexts, it is no mere chance) that Kelsen discovers and explains this essential feature of the law-application in connection with the so-called free weighing (i.e., discretion) in the chapter dealing with the executive power, more precisely with the administrative activity.¹⁹ According to Kelsen, law-application does not generate an unlimited or indeterminate autonomy. The autonomy manifests itself only through adhering to the legislative enactments, within the

expressed in the context of administration and law: "He who applies the law, will judge according to the law, bound by the law. That process can freely ensue within the limits set by the legal norm; this is free compliance with the State's purposes within given legal limitations." KELSEN (1925), p. 243.

¹⁹ Even more interesting is that at this point he does not say anything more or anything different about discretion than what he had already stated in the *Hauptprobleme der Staatsrechtslehre*: "Neither the terms under which the State acts, nor the character and manner of its action are ever exhaustively determined in the legal precepts [...]. The free weighing by the state bodies is nothing but the inevitable difference between the abstract will of the State and the concrete actions of the State as expressed by the administration." KELSEN (1911), pp. 504 and 506. Thus, we are faced not with the application of new theses but with the linking of problems that had seemed to be separate, i.e. the recognition of the common essence of law-application and public administration from the aspect of formal legal rationalization.

frame of implementing the former. Thus, the autonomy of law-application is only a relative one: it does not affect the primacy of the law. Consequently, it does not change the ideological picture of the operation of modern formal law: the legislator, instead of providing a final specification in determining the legal processes, has to be content with providing a framework which, when it comes to specifications, will inevitably admit alternative solutions.

It is worthwhile noting the openness of this theory, despite its apparently closed character; merely starting from its own tenets, how it could be developed in opposite directions. As it is, the multi-step process of law-making could be interpreted in a restrictive manner, as a specification; on the other hand, it can also be interpreted as a set of choices, recurring in time, progressing through its changes—just as it indeed manifests itself in the legal cultures based upon case-law, following precedents in judicial practice. Obviously, Kelsen had attempted to build up his theory of law-application in the former direction, i.e. within a normativist framework; yet, theoretically speaking, he might have chosen a non-normativist, sociological path, too.

3. "Reine Rechtslehre"

In the period of drafting the Pure Theory of Law, Kelsen incorporates his earlier assessments on the theory of law-application into his new theory as self-evident, obvious elements. These are, at the same time, consolidated as Kelsen widens their theoretical basis.

This applies, first of all, to his *Stufenbautheorie*, or theory of gradation. This construction was conceived back in 1925, when speaking about the steps of creation, Kelsen had referred to the subordinate structure of the state functions, when presenting the role of the Constitution;²⁰ by now it has become the fundamental

²⁰ KELSEN (1925), ch. VII: The grades of bringing into existence. § 36: The Constitution. A: The subordination, not coordination of the state functions: The theory of gradation.

principle in the set-up of positive law and of the order established by the latter, and provides its theoretical explanation at the same time.²¹ In the light of the theory of gradation, positive law's order shows a hierarchic construction in which, starting with the basic norm, up to the last, individual act of enforcement or legal transaction, each component represents a stepping stone leading from the abstract general towards concretization and individualization. Thus, law-application is essentially a long-lasting, step-by-step process; it can no longer be considered as the actualizing counterpole of an abstract norm. In the said hierarchic structure each intermediate step shows a dual face: it implements the superordinated norm as a law-applying concretization/individualization of the former; at the same time, in the process of further concretization/individualization it functions as law-making for the lower level.

In this way the constructive contribution by law-application becomes manifest. Kelsen not only stresses the interdependence and successive intertwining quality of law-making and law-application (as opposed entities)²² but he also finds an open parallelism between the judicial law-application (implementation) and the actual legislation, referring to the character, the limitations, and the logical openness of the normative breakdown at each level.²³ In a similar way, the creative possibilities and relatively wide room for manoeuvre of law-application is further

²¹ KELSEN (1934), p. V. "The legal order and its graded build-up."

²² "The opposition of the creation or making of the law, on the one hand, and the execution or application of the law, on the other, is far from being as much absolute as is attributed to it by the traditional jurisprudence for which the said opposition has a high significance." *Ibid.*, p. 82.

²³ "The task of obtaining a correct judgment or correct administrative act from the law, is essentially identical with the task of creating correct laws within the framework of the Constitution [...]. To be sure, there may be a difference between the two but it is a quantitative and not a qualitative one. The difference merely lies in the fact that the legislator's constraint in questions of substance is much less than that of the judge; the legislator enjoys relatively more freedom in law-making than the judge does." *Ibid.*, p. 98.

confirmed in that public administration is, as far as the legal nature and limitations of norm-application are concerned, treated on the same level with judicial law-implementation. More precisely, while in 1934—owing to the novelty of this appreciation—he emphasizes the essential unity of the two in an emphasized manner;²⁴ by 1946, in the American edition of the *General Theory of Law and State*, he restates the relevant theses from the aspect of the theory of state;²⁵ by 1960, in the revised and enlarged second edition of the *Pure Theory of Law*, the said statements are treated as simply common knowledge.²⁶ As can be read from his references, Kelsen treats any kind of implementation of any kind of legal norm as law-application, and after briefly stating this, he has nothing more to say about the unity.²⁷ As a result of this, the entire problem of discretion—which had been regarded by both the European and the Anglo-American legal literature as the source of the freedom (even arbitrariness) of public administration—has become a most specific issue of law-application.

²⁴ "Like jurisdiction, so also the administration manifests itself [...] in the individualization and concretization of laws [...]. In such a way [...] the judicial sentence and the administrative act—through which individual norms are being stated—both manifest themselves as the execution of the law." *Ibid.*, pp. 80 and 83.

²⁵ Part Two, par. II. G.b. The powers or functions of the State: legislation and execution: "By the executive as well as by the judicial power, general legal norms are executed; the difference is merely that, in the one case, it is courts, in the other, so-called 'executive' or administrative organs, to which the execution of general norms is entrusted. The common trichotomy is thus at bottom a dichotomy, the fundamental distinction of *legis latio* and *legis executio*." KELSEN (1946), pp. 255–256.

²⁶ E.g. KELSEN (1960a), par. 45, changing the wording of KELSEN (1934), par. 32, so that it will mean just that.

²⁷ "The administrative authorities [...] have to apply general legal norms prescribing sanctions and these functions differ from the jurisdiction of courts not in their content, but only in the nature of the functioning organ." KELSEN (1960), p. 263.

Finally, the imputation had to be revised in view of this new outlook. It still remains a key concept which, in the peculiar order of "ought"-projections, links a given behaviour with its consequence. However, it is no longer a simple projection of the enacted norm resulting from the application of the norm (as it had been in 1911), nor is it a concretization born in the two-step creation of law (as in 1925), but the completing arch of a multi-step, composite process. One pillar of this arch rests on the—merely hypothetical—source of its validity, it then arches over the generalized-abstract enactments and their step-by-step concretizing-individualizing breakdowns, in order finally to arrive at the actual, normative consequence drawn for the given case. Thus, the concept of imputation will gradually become farther and farther removed from its original application specifically anchored in law; instead it becomes a principle based on causality (but no longer governed by it), i.e. a principle expressing the fundamental connections of the man-made, artificial world of norms.²⁸

3.1. Theory of Gradation

The theory of gradation, projected onto the Kelsenian understanding of law-application, yields two consequences.

The first is the relative unity of the processes of norm-making and norm-application.²⁹ This means *ab ovo* that the unfolding of the norm is not a logical necessity or an unequivocal process, but

²⁸ "The principle [...] that we apply when describing a normative order of human behaviour, may be called imputation [...]. 'Imputation' means a normative relation." *Ibid.*, pp. 76 and 90.

²⁹ "Application of law is at the same time creation of law. These two concepts are not in absolute opposition to each other [...]. It is not quite correct to distinguish between law-creating and law-applying acts. Because apart from the borderline cases [...] between which the legal process takes place, every legal act is at the same time the application of a higher norm and the creation of a lower norm." *Ibid.*, p. 234.

rather a creative contribution: i.e. one admitting of several alternatives and lifting these to the normative level; it is merely one grade in a multi-graded process. At the same time it must be seen that when we speak of law-making and law-application in the conventional and historically approved manner (by treating these as different activities of bodies fulfilling different functions) and, subsequently, we explain law-application as law-making, then we will have differing concepts overlapping each other. Namely, analytical concepts will be projected onto descriptive ones.³⁰ The result of the analysis will merely be restricted to some essential aspect of the given process (an aspect which may be common to another process as well and thus not warranting the differentiation under this aspect); nevertheless, that result cannot bring into dispute the demarcation of law-making and law-application as socially institutionalized functions and activities, thus it will not vitiate the grounds of such demarcation.

The other Kelsenian conclusion relates to the hierarchic nature of the gradual construction of law and of the legal order. According to this tenet the entire normative process is displayed between two extreme points; these extreme poles being the foundation of the normative order's validity by means of a hypothetical basic norm [*hypothetische Grundnorm*] and the causal realization of the consequence attached to the given behaviour in the normative order. Within these two extreme points, the normative process is nothing but a gradually narrowing normative breakdown in which an abstract-general enactment becomes gradually and continually

³⁰ Kelsen himself is aware of this. At least in describing the philosophy of the division of powers, he states: "The common trichotomy [of the legislative function and of the executive and the judicial functions] is thus at bottom a dichotomy, the fundamental distinction of *legis latio* and *legis executio*." (Or, in the title: "Legislation and Execution".) KELSEN (1946), Part Two, par. G.b., pp. 255-256. With that, he does not dispute the validity of trichotomy elsewhere, inasmuch as they are "in the course of the shaping of positive law, particularly outstanding or otherwise politically important resting points of the process of law-making". KELSEN (1926), § 51, p. 46.

concretized until it is reconstrued in the casual event.³¹ Accordingly, while the first mentioned conclusion stresses the presence of creation in the process of application, the second conclusion places the implementing (applicative) creation in a broader context, designating its place in the process of the individualizing breakdown of the general legal postulate.

Although Kelsen designates the normative subordination of the "lower norm" as a metaphorical term, yet he declares the legal order built along the mediation of validity to be a hierarchical system.³² In the said hierarchical system, law-application is nothing more than the creation of an individual norm through the implementation of a general legal norm. Kelsen regards the application of the general legal norm as being of paramount importance—brooking no exception—so much so that he even presumes the existence of a general legal norm behind a decision based on an ambiguous provision of law.³³ He professes the same presumption whenever a case-related judicial decision is used as a precedent,³⁴ in fact behind any decision using the fiction of "a general,

³¹ "[T]he process that begins with the establishment of the Constitution [...] and leads to the execution of the sanction [...] is a process of increasing individualization and concretization." KELSEN (1960), p. 237.

³² "The relationship between the norm that regulates the creation of another norm and the norm created in conformity with the former can be metaphorically presented as a relationship of super- and subordination. The norm which regulates the creation of another norm is the higher, the norm created in conformity with the former is the lower one. The legal order is not a system of coordinated norms of equal level, but a hierarchy of different levels of legal norms." *Ibid.*, p. 221.

³³ Where "the interpretation implicit in the decision assumes the character of a general norm". *Ibid.*, p. 250.

³⁴ "The judicial decision of a concrete case gives direction to the decision of similar cases in that the individual norm which the judicial decision represents is generalized. This generalization, that is, the formulation of the general norm, may be done by the court that created the precedent; but it can also be left to other courts bound by the precedential decision." *Ibidem.*

even though not a positive, norm of material law",³⁵ whenever such a decision declares not a dismissing (negative) sentence but—having the necessary powers thereto—deals with the disputes issue at its discretion, on its merits.³⁶

Thus, the theory of gradation outlines on the one hand a pyramid standing on its foot, since the entire legal process is built on a single hypothetical basic norm. On the other hand, it also shows another pyramid placed on its peak, superimposed on the former, since in the course of the final individual acts of execution the general-abstract validity, expressed by the basic norm, receives its concrete shape. At the same time, we should keep in mind that the graded building and its hierarchical structure have a normative character. In other words, the structure is normative not just because it is composed of norms, but also because the very structuring principle rests on normative expectations.

Nevertheless, if we take seriously Kelsen's undertaking³⁷ to answer the question, "What is law and of what kind is it?"—then we must at once voice our reservations. To wit: it is one question to consider the definite character and direction of structuring as a desirable issue, and another question to follow this tenet in the practice of creating those individual norms. This difference is all the more important since, as it will be revealed later, whatever our opinion is on whether an enactment has been complied with or not, our judgment must rest "on a specific, more precisely normative,

³⁵ "[...] a general, even though not a positive, norm of material law". *Ibid.*, p. 244.

³⁶ "It is usually said that the court is authorized to function as a legislator. This is not quite correct if by 'legislating' is meant the creation of general legal norms. For the court is only authorized to create an individual norm, valid for the single, present case. But the court creates this individual norm by applying a general norm which the court considers 'juste' or desirable—a norm which the positive legislator failed to create. The court-created individual norm is justifiable only as application of such a not positive, general norm." *Ibidem*.

³⁷ KELSEN (1934), p. 1.

interpretation".³⁸ As to the normative interpretation, in the following we shall see that it cannot stand alone: it can only exist in a normative context. In other words, only an authority proceeding within its jurisdiction and powers can constitute the result of normative interpretation. Moreover, we must state as a matter of principle that in the graded construction the relation between norms of various levels—i.e. conditioning and conditioned ones—is not necessarily a hierarchical relation. It can also be a relation of interrelated priorities, in which merely the sequence, the origin and the foundation of validity are manifested.³⁹

Similarly, one might raise the question: Is it warranted or at all necessary to use the gradation theory in a dual way in the Kelsenian oeuvre? Is it necessary that the dialectic interrelation of law-application and law-making should be explained in the official hierarchy of the sources of law going from the top downwards? Is it inevitable that the theory of gradation should become the only possible theoretical model for the foundation of validity? Putting it another way: Is the hierarchical mediation and the vertical deduction of validity the only way by which the unity of legal order can be demonstrated? For Kelsen, his own choice of a natural paradigm might have appeared obvious. Nevertheless, it has resulted in the survival of such models of thought which had become worn out even by him. As it is, a chain of validity based on a hypothetical basic norm which would deduce the validity from an external and superior, yet all-embracing source is, ultimately, a transcendental presumption. It is nothing but "a secularized form of natural-law concepts based on religious, respectively theological considerations", which illustrates the law as the aggregate of hierarchically super- and sub-ordinated determinations—although, in reality, in the case of a state-organized legal system it is rather "a system, without a centre and without a peak".⁴⁰

³⁸ KELSEN (1960a), p. 4.

³⁹ KRAWIETZ (1984), p. 266.

⁴⁰ *Ibid.*

3.2. The Constitutive Character of Law-application

The theory of gradation has little to say about law-application itself; it rather designates its place, its points of attachment within the juridical process. Nevertheless, in an indirect manner, it has staked out the conceivable understanding of law-application.

The most important conclusion that can be drawn from the gradation theory of law can be summarized in that law-application—in contrast to the traditional meaning suggested by the term *jurisdictio*—does not declare but constitutes the law. Although Kelsen fails to give a general definition to enable the production of theoretical principle, yet his standpoint is unequivocal: law-application is every bit of a “constitutive character”, and the body entrusted with it has a “constitutive function”. The contribution of law-application manifests itself in various ways in the different stages of the process.

The first step is the identification of the existence of some general norm, as a valid norm of the law.⁴¹ In Kelsen's view this serves a dual purpose: a valid, applicable norm is the natural precondition for law-application; at the same time—on a higher level—that would create the legal relevance, viz. that in the concrete case a legal situation should evolve.⁴²

If the identification and choice of the norm have an equally constitutive character, then this also applies to the legal definition of facts that constitute a case. Kelsen explains this, second, grade of constitutivity in a protracted treatment, not devoid of certain contradictions. Accordingly, the question would immediately arise, whether it is an indispensable element of the legal order that, when a fact becomes qualified under a normative aspect, it will (or

⁴¹ KELSEN (1960a), p. 243.

⁴² “Only by the ascertainment implied in the judicial decision that a general norm, to be applied by the court, is valid [...] does the norm become applicable in the concrete case, and thereby a legal situation is created for this case which did not exist before the decision.” KELSEN (1960), p. 238.

should) also designate both the agency and its procedure exclusively empowered to qualify the given fact as a fact in law? Despite Kelsen's positive answer⁴³ it seems that this is in fact a practical question which could freely be regulated in the course of legislation, merely because in the absence of a regulation (or some kind of procedural formalization) a fact could be declared to be a fact in law by anybody, anytime, and so the said person could rank as an official agent applying the law. Incidentally, Kelsen himself had recognized this, although in a different period and different context.⁴⁴ Accordingly, some degree of formalization of the procedure seems, in general, necessary, but it will in every case be the legislator who will decide on its terms, degree, and manner under practical considerations. In itself, it seems equally convincing when Kelsen considers the official cognizance of a fact as the only means towards the establishment of a fact in law;⁴⁵ so much so that in his reconstruction he states this to be an element of the norm attaching a sanction to the fact.⁴⁶

⁴³ "If a legal order attaches a certain consequence to a certain fact as a condition, then this order must also determine the organ who and the procedure by which the existence of the conditioning fact is to be ascertained in a concrete case." *Ibid.*, p. 239.

⁴⁴ In his posthumous work he writes: "1. Every man should keep one's promise made to another. 2. Maier has to keep his promise to pay 1000 to Schulz." In connection with these norms, "[t]he validity of the second norm is based on the validity of the first norm, no matter who had enacted it. For this norm does not determine who has the power to enact the second norm. Everybody is empowered to enact the second norm." KELSEN (1979), pp. 214-215.

⁴⁵ "[E]ven the ascertainment of the facts that a delict had been committed represents an entirely constitutive function of the court [...]. It is only by this ascertainment that the fact reaches the realm of law; only then does a natural fact become a legal fact—is it created as a legal fact." KELSEN (1960), p. 239.

⁴⁶ "This is so because the legal rule does not say: 'If a certain individual has committed murder, then a punishment ought to be imposed upon him.' The legal rule says: 'If the authorized court in a procedure determined by the legal order has ascertained, with the force of law, that a certain individual has committed a murder, then the court ought to impose a punishment upon that individual.'" *Ibid.*, p. 240.

At the same time we must immediately put a question mark behind the statement that here, essentially, and in every case, we are dealing with the act of a natural fact's being transformed into a normative fact. For if we take into consideration all the circumstances and situations which may bring into dispute the officially established fact being identical with the actual fact, moreover when we recall the finalizing effect of the legal force of a judgement, then it will become immediately apparent: in the formalized proceedings the actual fact is replaced by the allegation of the fact—i.e. the formal and official declaration of its being the case.⁴⁷ This, however, both in principle and according to its actual structure, contradicts the claim according to which the official establishment of fact, although it is “not a way of taking cognition of the law, but of creating it”, yet it shows a parallel with the cognition of natural facts.⁴⁸

The third domain in which the constitutive character of law-application manifests itself is the creation of the individual norm by filling the framework which the general norm determines, in a discretionary manner. As Kelsen himself has stated with increasing force since the 1930s: the legislative determination is never an exhaustive one. Accordingly, the recourse to discretion is inevitable with regard to the components, thus, the applicable law is never merely a definition but also involves a framework freely to be filled in.⁴⁹ At a later date, Kelsen himself—speaking about legal inter-

⁴⁷ “In juristic thinking the ascertainment of the fact by the competent authority replaces the fact that in nonjuristic thinking is the condition for the coercive act. Only this ascertainment is the conditioning ‘fact’ [...]” *Ibidem*.

⁴⁸ KELSEN (1960a), p. 247.

⁴⁹ “This definition, however, can never be complete. The higher-grade norm cannot bind the act by which it is executed, in every direction. There must always remain a space for free weighing, with a wider or narrower space for manoeuvring, so that the higher-grade norm, in relation to the act executing it [...] has always the character of a framework to be filled in by the former.” KELSEN (1934), p. 91. Further: “But even in the case in which the content of the individual legal norm to be created by the court is predetermined by a positive general legal norm, a certain

pretation—would specifically state: the filling of the framework within the legal limits drawn by the applicable general norm is entirely free. At the same time the said freedom is not identical with free weighing of pros and cons, nor is it a discretionary power permitting prevention of an action, nor is it empowered to permit or deny something; it simply means that within the limits of a basic, existing regulation, the details not affected by the regulation can be concretized in an unbound manner. (Concretization in this case means at the same time a legally valid regulation, i.e. a determination.)

3.3. Theoretical Question Marks

The stress on the constitutive character of law-application is understandable. At the same time, Kelsen's work does not clear up the non-negligible question: What is the theoretical significance of all this? Of course, we must immediately remark: in the arch of Kelsenian thinking it does not appear as a gap. As it is, in his picture of the law, the entire legal process consists of volitive acts, all these acts having a law-making significance—with the exception of the last, concrete-individual act of execution. Whether we agree with this view or not, we may state that the said explanation is not fitted to prove, from the point of view of underlying constitutivity, the homogeneity of the various components and reflexions of the law-applying process. Nor does it enable it to apply demarcations.

The said constitutivity simply cannot be homogeneous. For instance, as regards the discretionary filling of the normative framework, it has been shown that this is a result of the decision made. It is, therefore, a result to which cognition can merely provide the basis; however, cognition alone does not provide the result. That, however, means that the specific process of law-

amount of discretion must be reserved for the law-creating function of the court. The positive general norm cannot predetermine all the factors which make up the peculiarities of the concrete case." KELSEN (1960), pp. 244–245.

application is the only channel for producing the result (not only because the result is vested with a specific normative quality, but also in view of its entire structure and mechanism). In other words, the constitutive function will directly come about through the shaping of actual content.

On the other hand, we may reflect on the question: Where is the constitutivity when one has to decide about the validity of the applicable law, or when a fact must be established in a legal way? Undoubtedly, in these situations we do not deal merely with a pure cognition, since it is entirely different when, for instance, the doctrinal study of law treats law or the relation between the facts and the law, from the case when the law itself provides distinctions, i.e. when a competent authority—proceeding in its own formal way—not only narrows down the result but excludes from the beginning an open discussion of the result. We might choose the answer by saying that in the last two cases we are faced with the direct inclusion of the result within the law, i.e. fitting it into the law's rules of the game. Looking at it from the external aspect we might say: this is a procedural formalization—in other words, a formal gesture is being completed in, procedurally, due time and due manner. In other words, it is an act which—regardless of any cognition—can provide a surplus, namely that it starts a motion within the normative order by generating a formal proceeding, thus evoking, in a direct manner, the process of imputation. Thus, its constitutive significance is, primarily, a procedural one.⁵⁰

⁵⁰ At times, Kelsen seems to admit (for instance when he describes the judicial establishment of facts as being parallel to their cognition, cf. KELSEN (1934), p. 247) that the said procedural constitutivity merely means a cognition possessing the surplus of the legal character of the final result. However, this picture does not take into consideration that this type of the so-called establishment of fact is done in terms of classifications according to models offered by the positive law. It is, thus, inextricably intertwined with qualification which is a normative process with unconditional, absolute ending, primarily carried out under aspects and for purposes different from cognition. Cf. PERELMAN (1961), p. 271; VARGA (1973) pp. 50–54; VARGA (1981a), pp. 465–468. At the same time, it is characteristic of the entire reasoning that in its fundamental definition it uses practical aspects demarcating it

3.4. The Theory of Interpretation

Kelsen's theory of interpretation illustrates the character and complexity of the constitutive function of law-application, as well as from fresh aspects.

Primarily, he differentiates between the cognitive (e.g. scholarly, jurisprudential) interpretation and the authentic interpretation carried out by the law-implementing body. The cognitive interpretation of the law identifies the frameworks offered by the applicable law, i.e. the possible meanings and the various options for decision. Normative interpretation will choose one of the former as the individual norm to be used in the concrete case of law-application. Thus, the first is a cognitive act, the latter—as the creation of an individual norm—is an act of volition.

Kelsen stresses that the filling of the framework determined by the general legal norm in the course of law-application is no longer bound by the law,⁵¹ further that any normative influence on the

from the theoretical one; namely that instead of unfolding the features inherent in the subject, it is directed towards the desired classification (pigeon-holing and submission) within the set of concepts defined within the normative system. While logically this endorses the form of subsumption, yet the system which claims the pigeon-holing classification is practice-oriented instead of being governed by epistemological considerations. The very process, in the course of which the juristic classification of the subject takes place, is dominated by the assessment of the social desirability of the normative consequences to be attached to the result of classification. Thus, any epistemological approach can involve an instrumental significance at the most. Cf. VARGA (1985a), ch. 5, par. 4, pp. 145 et seq. Meanwhile it seems that the correspondence between the natural language and the normative one at some optimum level, as well as the requirement of coherence, consequentiality and social backing in the socio-juristic practice of normative classifications, are by now one of the preconditions of the entire normative process. All this is so deeply anchored in the social existence of the law that it appears to some theoreticians to be the "inner morality" of law. Cf. FULLER (1964), ch. II and VARGA (1985b) p. 444.

⁵¹ "From an aspect focussing solely on positive law, there will not ensue any criterion on the basis of which the one possibility available within the frames of the applicable law could be preferred to the other [...]. It would be a futile effort to try to provide the legal basis of the one by excluding the other." Kelsen (1934), p. 96.

process of filling the frames could only take place through the free use of meta-juristic norm systems.⁵² Consequently, anything that ensues in the course of the said frame-filling was no longer a question of legal theory but that of legal policy.⁵³

It is questionable, therefore, whether can it be termed as interpretation at all? The answer to this widely debated question is mostly rather sceptic, running against the Kelsenian view.⁵⁴ While the contemporary critical answers had all originated from Kelsen and may have been true within their own logic, they all failed to recognize the essential duality of the legal process, a duality that can be traced all along Kelsen's expositions and never explicitly denied. Namely, that according to the presuppositions providing the foundations of the official ideology of law and of the operation of its institutional set-up, the processes ensuing in law show an analogy to the process of cognition; moreover, apparently, they may not even be distinguished from the latter. In respect of law-application, we have been made to see as such the "judicial

⁵² "Inasmuch as—in the course of legislation—beyond the necessary definition of the framework within which the act is to be determined there is space for the cognitive process, then the latter will not relate to the cognition of the positive law but to other norm which may eventually lead to the creation of law. These are the norms of morals, fairness, further: social value judgments, usually labelled as welfare, public interest, progress, and so on. The positive law has nothing to say about their validity and ascertainment. From this aspect, any definition can only be characterized from the negative side: these are, then, definitions not originating from the positive law proper." *Ibid.*, pp. 98–99.

⁵³ *Ibid.*, p. 98.

⁵⁴ Sacco explained that "the continued mixing up of interpretation and application" was untenable [SACCO (1947), p. 131], since Kelsen had merely spoken about "the most convenient choice of the method of law-application" (*Ibid.*, p. 118, note 6). Losano disclosed that the Kelsenian concept of law-interpretation was a distortion of the concept of interpretation. As it is in the case of authentic interpretation, Kelsen replaced the concept of interpretation based on the structure of cognitive interpretation, by a concept relying on a single function of interpretation. Ultimately, Kelsen designated the individual norm-creation as interpretation [LOSANO (1968), pp. 213–215].

establishment" of the validity of the applicable law and the facts of the case. Further, in addition, the cognitive interpretation which, according to Kelsen, first reveals the legal framework of the decision, whereupon it only necessitates a volitive act, viz. the decision resulting in an authentic interpretation. In reality, however, judicial interpretation (owing to its normative environment and practical determination) shows hardly any common feature with the scholarly interpretation. Another argument against the common character is that it is the interpreter himself who will qualify judicial interpretation as such, achieving this with reference to its officially declared function. Meanwhile its actual structure does indeed demarcate it from any kind of interpretation.

Notwithstanding the above, it was just the ideologically declared community of purpose and the apparent similarity of structure that enabled it to be admitted as being analogic to cognitive interpretation. We will qualify it as interpretation because we were made to accept it as the ideal expression of its ideal operation. Moreover, it is qualified as interpretation because revealing and defining meaning is one of its real features. In other words, whatever the outcome of the normative interpretation, revealing and unfolding a meaning must be necessarily included, even with a selective effect. It boasts, therefore, the same status as does the logic in law: the ontological definition of law makes their presence inevitable (a presence that appears for us determinative), whilst the actual incongruencies will, just as inevitably, induce the law's operation of a differing homogeneity.⁵⁵

While the scientific interpretation of the norm starts from the norms themselves, and has the purpose of unfolding its substance, in the normative interpretation all this merely constitutes a passing, intermediary medium, in order that a proper practical answer can be reached by referring to that norm, by invoking its authority. Putting it in another way, the norm is never the purpose or aim but

⁵⁵ Cf. VARGA (1985a) par. 5.3.2 and 5.4.2-3.

a means to be shaped and providing a form, in the process of normative interpretation.

3.5. A Procedural View of Law?

In the textual environment of the *Pure Theory of Law*, there is an apparently inorganic reflexion to be found. Whether or not this reflexion can be incorporated into the Kelsenian doctrine of law-application, may stand the test of the consistency, of the freedom from contradictions of the entire Kelsenian oeuvre. According to the said reflexion, in the course of an authentic interpretation, the choice is not necessarily made from the various alternatives unfolded by the cognitive interpretation. It is also possible that the individual norm thus found should be independent from the former. And if the given decision obtains a force of law,⁵⁶ this latter norm will become final in the legal order, too.

The dilemma is obvious. If we accept the basic doctrine of the *Pure Theory of Law* in the theory of gradation (i.e. the concept of individualization and concretization through the breakdown of the general norm), then the authentic interpretation will narrow down—unequivocally—to a category within the cognitive interpretation; the only task of authentic interpretation being the choice among the possible varieties unfolded by cognitive interpretation. If we accept the possibility of choice from beyond these varieties, then this will not narrow the norm but rather extend it; such a choice will employ an external solution instead of the alternatives limited by the cognitive interpretation; it will thus violate the interpretative character of authentic interpretation. It rests,

⁵⁶ "By way of authentic interpretation of a norm by the law-applying organ not only one of the possibilities may be realized that have been shown by the cognitive interpretation of the norm to be applied; but also a norm may be created which lies entirely outside the frame of the norm to be applied [...] as soon as the validity of this norm cannot be rescinded, as soon as this norm has gained the force of a final judgment." KELSEN (1960), pp. 354–355.

therefore, on a misunderstanding, since it declares that it sets aside the norm which it professes to be applying.⁵⁷ On the other hand, if we focus in the theory of gradation on the dialectics of law-making and law-application, viz. when we only perceive the possibility of creation at any point in the normative process and its constitutive significance, then the cognitive interpretation will be reduced to a mere ideal-typical, descriptive category, accompanied by a volitive act, which, as Kelsen himself states,⁵⁸ will demarcate the authentic interpretation from any other type of interpretation. Putting it in another way, this means that the volitive contribution within the authentic interpretation shows a specifically constitutive aspect which, in its turn, provides the possibility that, eventually, even the contingency mentioned by Kelsen might ensue—under the guise of norm-application.

It is to be noticed that although in the text of the enlarged, second edition of the *Pure Theory of Law* the above reflexion may seem merely inconsequential, haphazard and even irrelevant, yet it is not quite alone in the Kelsenian oeuvre, though we suspect that the author did not wish to consider it in a manner consistent to its weight. As it is, in the American edition of the *Pure Theory of Law*, i.e. the *General Theory of Law and State*, after outlining his concept on law-application (included in the set of problems relating to the hierarchy of norms, where he also touched upon the issues of the judicial act, of the applied norm, of the gap of law, and of the judge-made "general" norm), he unfolds his tenet as a "conflict between the norms created at different levels". He cites his classic American source (which is also a citation): "Bishop Hooley has said: 'Whoever hath an *absolute authority to interpret* any written or spoken laws, it is he who is truly the Law-giver to

⁵⁷ Losano writes thus: "is based on an ambiguity", "does not apply" [LOSANO (1968), p. 531]. However, he too would force the analogy of cognitive process on normative decision-making. That is why he blamed Kelsen that while cognitive interpretation was also interpretation according to its structure, authentic interpretation was only so according to its function.

⁵⁸ KELSEN (1960a), p. 351.

all intents and purposes, and not the person who first wrote or spoke them'; *a fortiori*, whoever hath an absolute authority not only to interpret the Law, but to say what the Law is, is truly the Law-giver."⁵⁹ As it is, Gray, Kelsen's source, had made his conclusions in too simplistic, short-circuited a manner,⁶⁰ and that is what evoked Kelsen's condemning criticism and the entire exposition supporting the latter. Meanwhile he fails to notice that he merely restates in a theoretical manner that which Bishop Hoadly had already stated.⁶¹

Now Kelsen's problem is the following: the foundation of the validity through the superior norm presupposes that it corresponds with the superior norm. However, the establishment of this correspondence (i.e. whether or not it exists) can be effected, with a legal relevance, only with a law-applying decision. All this, therefore, presupposes a determined process of a determined body, i.e. the formalized result of a formal proceeding: its constitutive contribution. Since, however, after the decision has become final by having gained a force of law, it can no longer be disputed whether the constitutive contribution involved by the act of law-application had expressed "real" and "actual" components in a formalized result, there will be no absolute guarantee as to the "reality" and "actuality" of the said correspondence.⁶² After the possibilities of appeal or legal remedies have

⁵⁹ GRAY (1909), p. 102.

⁶⁰ "The courts put life into the dead words of the statute." *Ibid.*, p. 125.

⁶¹ "It is difficult to understand why the words of a statute which, according to its meaning, is binding upon the courts should be dead, whereas the words of a judicial decision which, according to its meaning, is binding upon the parties should be living." KELSEN (1946), p. 154.

⁶² "The lower norm belongs, together with the higher norm, to the same legal order only insofar as the former corresponds to the latter. But, who shall decide [...]? Only an organ that has to apply the higher norm can form such a decision. Just as the existence of a fact to which a legal norm attaches certain consequences can be ascertained only by an organ in a certain procedure (both determined by the legal order), the question whether a lower norm corresponds to a higher norm can be

been exhausted, excluding any further legal action in the case, the logic of the postulates of the legal order will irredeemably assert itself and become all exclusive. Thus, the logical reconstruction of the sequence yields the following result: "The law-applying organ has either, authorized by the legal order, created a new substantive law, or it has, according to its own assertion, applied pre-existing substantive law."⁶³ This logic, as a fundamental feature of the existence and operation of the legal order, is entirely sealed, self-sufficient and self-reproductive. So much so that even the harshest facts of life cannot encroach upon it, unless the law itself provides the possibility of legal transformation (i.e. the transformation of the given facts into legal ones and their being contested as such), at least as long as the legal order prevails as such. Incidentally, that is suggested by a Kelsenian example elsewhere. According to the said statement, any legislative enactment must be considered constitutional until the contrary is proven. Approaching the problem from the other side, this means that inasmuch as the creation or the contents of a legislative act are unconstitutional, but the declaration of its unconstitutionality cannot be legally made, then the constitutional provision responsible for the "conflict" should be regarded as merely being a proposal.⁶⁴

As we have seen, Kelsen had noted these ideas. However, he did not unfold them as a doctrine of law-application; he did not

decided only by an organ in a certain procedure (both determined by the legal order)." *Ibidem*.

⁶³ *Ibid.*, p. 155. "The decision of a court of last resort cannot be considered to be illegal as long as it has to be considered as a court decision at all. It is a fact that the question whether there exists a general norm which has to be applied by the court and what the content of this norm is can legally be answered only by this court." *Ibidem*.

⁶⁴ "If a statute enacted by the legislative organ is considered to be valid although it has been created in another way or has another content than that prescribed by the Constitution, we must assume that the prescriptions of the Constitution concerning legislation have an alternative character." *Ibid.*, p. 156.

amplify the theoretical possibilities inherent in them, and failed to follow their thread till the end.

In light of these ideas, the foundation of validity no longer seems unambiguous. Though Kelsen's entire work is based on the consistent separation of "being" and "ought to be", his exposition suggests that—progressing downwards in the graded structure of the legal order—it is the application of the superior norm that mediates the validity of the legal order to the lower norm (created by the individualizing-concretizing act in the course of application) and thus lends the norm its legal character. At the same time, the connexion between the said norms is characterized by the apparently ontological relationship of "being" between those "ought"-enactments. The superior norm will "define", will "lend a framework to", or will offer "alternative interpretations", while the lower norm will "correspond", will provide an "interpretation option" "within the framework". Here, a general philosophical-methodological question could be raised (the answer being a task of legal ontology): Whether these inter-norm relations are existential ones? Whether the relations between the "ought"-enactments are "ought"-relations? In that case, they could not even be interpreted or determined by means of the model of existential relationships between beings? But the question may also be put in a narrower context. And that is the essence of the Kelsenian concept. How can this relationship be unfolded, identified or defined so that it could be relevant for the law? At this point, Kelsen's answer is unambiguous: only by the determined act of the determined organ; and the result of the said process, Kelsen affirms, is not of a declarative but of a constitutive character. Yet constitutivity—as we have seen—shows a dual face, dual aspect. As to its contents it means that the said result could not come about without the given process (e.g. through a simple cognitive process), as a necessary conclusion. From the procedural aspect that means the following: whenever the legal order fails to designate a body which could contest it, or when such a body has already exhausted its legal remedies, then the result will become final within the legal order. It may be that on the social plane sharp debates will develop,

revealing its contradictions, or even unmasking its perfidy, yet as long as the legal order prevails, the only answer accepted by and governing for the law will still be that result.

At this point, however, the entire line of thought becomes reversed. If all that is true, namely, the normative regulation may ascribe definite requirements to definite behaviour, it may designate definite organs and procedures to be followed by them, and the normative process may show a structural and/or functional correspondence, parallelism or analogy with the cognitive process—nevertheless, even if these are essential, inevitable elements in the legal process, it is not these that will appear directly for the law in a relevant manner, but rather those official, formal institutional declarations which report on the faultless “compliance”, “fulfilment” or “realization” of the norms. More precisely, the elements of the legal process, whether deriving from the existential sphere of factual reality (i.e., from the “Is”) or from the sphere of the normative regulation (i.e., from the “Ought”), they will not appear by themselves (*in se*) in the legal process but only and exclusively as referred to in procedure. That is, when (1) the law’s regulatory system provides a procedure in which the said elements can be referred to, and (2) the reference to them ensues in a procedural way, i.e. in due course, at the time and in the manner determined by the regulation. Now, we know that as soon as this procedurality has ensued, the said elements will be relevant solely as components of the procedure, i.e. their presence in and relevancy for the law will depend exclusively on their being established in procedure. Recalling the above points we might say that the original qualities of the said elements may only be interesting inasmuch as there exists a procedural possibility, in the course of which their procedural conformity can be contested in procedure. However, as soon as this process is closed, i.e. from the moment when the natural fact is transformed into a legal fact with the finality of *res judicata*, the formerly mentioned original qualities will become at once for all uninteresting, irrelevant in law. It can be seen that, although the positive law does not usually declare the identity of the legal force and the quality of lawfulness, yet the doctrinal reconstruction of

procedural provisions will yield a tacit *presumptio iuris et de iure*, according to which that which is *res judicata* shall also be deemed lawful.⁶⁵ This is where formalism governs legal processes. As it is, any data or consideration can only obtain a role in the legal process in a formalized way. And once it has obtained that role, it will—to all intents and purposes—become firmly incorporated into the system, in its formalized establishment.

This sequence of deduction will push the entire Kelsenian theory towards a procedural approach. According to its logic, the legal system possesses a specific, ideal motion. For that motion, in determining its direction and in designating its ideal, the legal enactment provides the driving force. That driving force, however, cannot operate unless in a procedural medium, within formal-procedural frameworks, and the degree of formalization is such that this procedural mediation will ultimately become autonomous and—on the plane of the final criteria of the system of fulfilment, characteristic of the legal order—it will gain an exclusive significance.

3.6. Self-transcendence of the Pure Theory?

Kelsen makes us see that in the legal processes there are no guarantees either in respect of their correspondence with the legal norms, or to their consistency. The legal process merely ensures the sealing and termination of the procedure, where the last possible and/or applied normative qualification is being finalized. That which qualifies as “correspondence”, “consequence”, or “consistency” according to the estimation relevant in law, need not necessarily receive the same qualification outside the legal order, i.e. either according to a professional (legal-doctrinal, legal-political), or according to a social, lay estimation. Does all this point to the possible arbitrariness or anarchy in the law? Theoretically, it does. Yes, at least until the destruction of the order, when,

⁶⁵ VARGA and SZÁJER (1988).

upon the fading away of its effectiveness, its validity will also become pointless.⁶⁶ At the same time, we have pointed out that this was not a doctrine elaborated by Kelsen; it was merely a single sentence from the enlarged second edition of the *Reine Rechtslehre* (Pure Theory) (1946) and its only precedent could be found in a short excursion from the line of thought of the *General Theory of Law and State* (1960), for the sake of criticizing the Common Law tenet on the exclusivity of judge-made law. This seems to be confirmed by the fact that his thinking, up to the end of the Second World War, had been captured by an implicit trust in the natural meaning of words; so much so that he could not even imagine doubting the lawfulness of legal acts; his semantic premises always show a static standpoint.⁶⁷ While he accepts that the choice among the various meanings should be subject to the context, yet he rejects the possibility of the dynamic aspect of the meaning.⁶⁸ At the same time it must be pointed out that Kelsen apparently had to reckon consciously with the chances of a theoretical opening, issuing from this productive ambiguity. If no sooner, then by the time he last revised his *Pure Theory of Law*. As it is, when that happened (in 1965–66), he did not touch upon the part in ques-

⁶⁶ "A legal order is regarded as valid, if its norms are *by and large* effective (that is, actually applied and obeyed) [...]. Effectiveness is a condition for validity [...]." KELSEN (1960), pp. 212 and 213.

⁶⁷ Cf. KELSEN [1942], particularly ch. VIII, in which the assessment of lawfulness of a court decision was simply regarded as a consequence of the applied norm.

⁶⁸ In his posthumous effort of resumption-summarization, Kelsen writes: "It stands undisputed that the wording of a norm can be interpreted in several ways. However, it is not opportune to interpret this fact in a way like WRÓBLEWSKI [(1964) p. 265: 'since the context of the understanding and applying of the legal norm is changing, the norm in question changes its meaning'.] does. The norm does not 'change' its meaning, it merely has several different meanings (or senses)." KELSEN (1979), p. 221, note 1. For a dynamic theory of interpretation, cf. WRÓBLEWSKI (1959), pp. 151 et seq.

tion.⁶⁹ Yet, if there is a theoretical possibility for arbitrariness, for anarchy, one might justly ask: What prevents the law from a final decadence or, simply, from falling apart? What holds it together at all? Kelsen did not even arrive at putting this question. Accordingly, it cannot be our task, here, to provide a theoretically developed answer. Rather to offer a kind of indication in which, by determining the global effectiveness as a condition of the validity of the legal order, Kelsen had already staked out the direction.

So what is the essence of such a theoretical opening? The legislator legislates, the law-maker makes law. The state administration administers on behalf of the State and the judiciary administers justice. How this peculiar world comes about, how it operates—that is, what qualifies as a legal organ, what is the jurisdiction of such an organ, and what procedure it will follow —, all this is determined by positive law, at least in our legal and institutional culture. In a like way, the positive law will determine the frames serving as a model of the decision to be taken in the course of the said organ's proceedings. Whether the act of an organ qualifies as that of a "legal organ's legal act" is identical to the question, whether such an act's formal-procedural features—and also its merits—correspond to the definition of the positive law. That question can be decided—with a legal relevancy—only in the course of the legal operation of a legal organ. This establishment is primarily and directly entrusted to the organ about to proceed. In order to enable the repeated weighing of the decision of the first organ having proceeded in the case—i.e. the repeated weighing whether the first organ's autonomous qualification about its own decision (*viz.* that the latter did correspond, both formally and in substance, to the provisions of the positive law), the law may create institutional possibilities of appeal, recourse or revision. In the course of this second procedure another legal organ will, through its own legal act, either confirm or reject the correspondence. Meanwhile this second organ will

⁶⁹ ERNE (1984).

also declare of its own decision that it corresponds to the provisions of the positive law, both formally and in substance.

The legal order may allow the repetition of such a revision and the subsequent confirming (or rejecting) justification through several instances. All this, however, will not change the finality, the closure of the legal process. It will not change the fact that a body, by declaring its own proceeding as lawful, will at the same time declare its decision as being in accordance with the law also on its merits. In the case when the said decision is (1) either undebatable (because there is no legal possibility to contest it), or (2) undebated (where there is a possibility but those legally empowered to do it failed to avail themselves of this possibility in due time, manner and form)—then the said decision, being a legal decision, will be unassailably embodied in the normative order of the law, with all the consequences thereof, viz. its intrinsic qualifications, and the normativity resulting from the latter. Its legal validity will thus become undebatable. The normative enactment will maintain this quality as long as it is not replaced by another normative enactment released by the correct level organ empowered to do it; while the normative qualification will be safeguarded as long as the legal order prevails (that is the case of the force of law).

As we have seen, the facts and their interrelations, by themselves, are not components of the law's normative framework. They will become legally relevant and referable (i.e. fit for serving as a basis of normative conclusions) only when a legal organ, in the course of its procedure ending in a legal act, i.e. officially and formally, states their existence. And that applies both to those natural facts, to the judicial establishment of which the positive law attaches a legal sanction, and in the context of correspondence between the applied normative enactment and the normative rule born through the application. It is independent and irrelevant what those extraneous to the legal procedure think of it (independent of the fact whether these persons and bodies, not privy to the procedure, are political or social movements, journalistic media, scholars—including jurisprudents—or even a lawyer acting as a

private individual, citizen, or moralist). It is immaterial whether, in connection with the law's self-qualification, there is a consensus, or whether an outcry is raised against it, unmasking it as an abuse.

3.7. Who Watches the Watchman?

To the classic question of "*Quis custodiet ipsos custodes?*"⁷⁰ the law did not—because it could not—provide an answer. The only possibility available to law is to outline patterns of behaviour, procedure and decision-making, with the help of language. When treated as components of a uniform order, these will enable the creation of the institutional, ideological and doctrinal set-up of the legal order. Linguistic mediation is a mediation with the help of signs, while their meaning is governed by metalinguistic media. As it is a meta-juristic question whether the law is availed of, and complied with, similarly the law has no direct responsibility in how it is being interpreted. The interpretation of the law is the product of the social environment adopting and applying it (measurably by sociological means) just like the pure fact of implementation or non-implementation. The said medium is the "audience" to which reference is made by the modern theories of argumentation, by the logical, semantic and praxeological reconstructions—as a presumed postulate, point of reference, and sociological reality determining the entire process. The life of everyday language—as is well known—is a complex, based on the social practice of communication which reproduces itself through continuous feedback. Well, as far as its normative interrelationships go, we have to conceive law as an autonomous product, yet in actual life it is embedded in general social practice. Since the linguistic objectivisation consists of a mass of signs (which gains its social reality for us thanks to their meaning), so also the law's system of signs will become a social factor owing to its meaning.

⁷⁰ JUVENALIS *Satura*, VI, 347. Cf. RHEINSTEIN (1947), pp. 589 et seq.

The meaning, however, is not a self-identical definition, or an encoded phenomenon, but a living and uninterrupted continuity. It is generated through the practice of the society which accepts it as such and by accepting also renders it conventional.

However autonomous the legal meaning has become, its autonomy must be fed from the standard, colloquial everyday language, and can only continually reproduce itself in a constant relation with the latter. Thus, its autonomy, or self-sufficiency, is a relative, even secondary one. Accordingly, the normative components of the legal action stand under the constant control of Mr. "Everyman". By the said components we refer to the self-qualification made by the organ qualifying the facts and the underlying normative enactments, whereby qualification itself is said to follow from the norms and thereby to base a normative appreciation. This is what the everyday man will check on the basis of the cognizance of the norms and interpreting them according to everyday language conventions. Nevertheless, the law's language is not merely a self-sufficient entity, not one simply related and attached to common language. There is a certain logic in its self-sufficiency, where a certain continuity and consistency manifests itself. And what is more important, this logic, its distortions and flaws, will not remain within the closed circle of the law and the legal profession. All these may be observed, controlled from the basis of common language. At least in their major lines or trends, since—in the long run—the political intentions of the state behind the continuity or breach of the law will become manifest. Politics, to which we are referring, may drive the law into inconsistencies, it may force it into artificial deductions and justifications; nevertheless, whether it be guided by any kind of intention or by the inevitable bankruptcy, it cannot wantonly waste away the minimum of social support. It cannot squander the minimum of conventional common language, or the mere possibility of communication. As soon as these minimal thresholds are overstepped, the ruling position expressed in and carried by the law will necessarily fall apart. In the latter case what remains is a chaotic confusion of compulsive actions showing the features of a gradually isolated and reckless anarchy. At this point the legal order will have

lost its organizing power (whether this power has been inhuman, even genocidal, so at times in our century), without even showing a certain degree of organization providing the necessary points of attachment.

The procedural character of the legal event means that nothing can become an inherent component of the legal order unless a legally-recognized authority has lifted it, in a determined manner, into the law. From that there follows the admission that the normative breakdown, the concrete shaping of the conclusion and coherence (i.e. the actual formation of the normative interrelations) will be dependent upon the organs acting in the name of law. Of course, only theoretically and within certain boundaries; these boundaries are, however, defined by the social implementation practice of the law and its event—i.e. by the social practice having indirectly accepted them. That is, it is not the law that designates them. Arbitrariness is thus not excluded. However, even if we have positivized a fixed system of rules, it is up to the conventionalizing practice of society to decide what qualifies as arbitrary in the law's application. The society must decide on how far this remains within the boundaries of law, i.e. within the frames of the "realization" of the law. These questions touch upon normative relationships. Thus their social cognition and valuation may not turn into criteria; at the same time, they provide the general (one might say: the ontological) basis of the entire process.

Appendix II

JUDICIAL REPRODUCTION OF THE LAW IN AN AUTOPOIETICAL SYSTEM?

There is an antagonism between two kinds of opinions characterizing the judicial decision-making process. Decision is either seen as completely defined by actual facts and legal texts or, quite to the contrary, its novelty and creative nature are emphasized, independently of actual facts and legal texts. Both opinions have their own message and roots. Mechanical jurisprudence reflects the millenia-old dream about regulatory completeness, covering, at the same time, the ideal and official ideology of the functioning of modern formal law, while the concept of free-law stands for the ideal of judicial autonomy, as unbound by any law.

In recent times, several trends of thought have come to compete with each other in criticism of both these extremes. They argue in terms, to name but a few, of the limits of formal determination by the law,¹ of the fuzziness of legal language and of the inevitability of jumps and transformation in legal argumentation,² or, in view of the whole process, of its institutional dependency and the series of ensuing interdependencies.³ Nevertheless, there is an underlying idea common to both the extreme stands and their critiques, formulated either as an assertion, or as realization of the absence, of something that can be termed quasi-logicity and quasi-epistemologicity. This is the idea of the possibility of an established relationship between two norms on equal or differing levels, set as

¹ Cf. PERELMAN (1980).

² Cf. PECZENIK and WRÓBLEWSKI (1985), respectively.

³ Cf. MacCORMICK and WEINBERGER (1986).

a relationship to be treated logically and patterned epistemologically. It is the idea underlying our language patterns as well, describing this relationship as a norm or decision "resulting, following from", "in consequence of", "in conclusion drawn from" other norms and, consequently, being in a relationship of "entailment", "consequence", "correspondence", "contradiction with" those norms.

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The concept Kelsen formulated on the normative decision-making process in the works leading to and embodied in his *Pure Theory of Law*⁴ could be summarized as follows: for juristic activity, the hierarchical order of the positive law suggests as an exclusive pattern the deductive norm-application in a process gradually breaking down the law. Between the end-points of the hierarchy of legal order, i.e. the primary creation that founds the legal order and the last application that stipulates the execution of a sanction, juristic activity is an act of creation within an act of application. Law-application is creative in filling in the framework defined by the higher hierarchical levels of positive law. It is creative, since there is no further limitation or stipulation that could legally influence the filling in of this framework. Juristic activity is at the same time also of a constitutive effect in all its moments and aspects. It is constitutive in two senses. *First*, the existence of both facts or norms *and* relationships between facts and facts, facts and norms or norms and norms can only be acknowledged within the law by establishing them through their statement in a legal act. *Secondly*, there is in law no guarantee that any such establishment of the existence of facts or norms and/or of their relationship corresponds to any assessment concerning the same existence or relationship, made beyond the sphere of law. Of course, any such establishment may be made a function of criteria outside the law (e.g. of "truth" or "justice"), but even such a stipulation can at most provide a title for further

⁴ Cf. KELSEN (1934).

procedure on the same issue (e.g. revision), instead of offering any genuine guarantee. For no stipulation can modify the basic feature of the construction of normative systems, processing everything taken beyond them through their own institutional context and procedurality. As a consequence, it cannot challenge the impact of the procedure resorted to ultimately, which is going to be the only one that matters within the system. And provided that the last decision receives the force of the final judgement (and it does so if it can no longer be, or has not actually been, appealed against), this last decision turns out to be definitive in the legal order.

In final analysis, the theoretical message of the reconstruction of the basic principles of the working of normative systems, exemplified by law as one of their most developed variants, reads as follows: eventually only what has been transformed into a component of law as the effect of the law is to be considered legal—at least as long as law as a system continues on to prevail. Or, this is to say that (a) only what is within the law is to share the quality of the distinctively legal; (b) only what has been posited by the law as its own element can be within the law; in such a way, (c) positization falling into the exclusive domain of law, it cannot be either substituted for or enforced by any other act; in sum, (d) conceiving of law both as a process and as an outcome, it seems from the very beginning to have been controlled from within by the criteria of the quality of the “distinctively legal”, which points from the “inside” out towards everything “outside”.

An understanding of this message needs some preliminary questions to be considered: (1) When speaking about normativity, what do we mean to be normative on the whole range of the normative sphere? (2) When speaking about “inside” and “outside”, what do we mean by anything penetrating into the normative sphere? Or, more precisely, what is done and with what when we declare, let us say, that something has been “established” as a legal “fact”?

[Ad 1.] In the function of the development level of civilization and of the kind of legal culture and arrangement, normativity can in

point of principle be attached to (or, figuratively speaking, carried on by) any agent whatsoever, ranging from human behaviour and human objectivisation to anything else that can be sensed and observed in the world. For normativity is a product of social practice, issuing from institutionalized convention. It comes into being when, in the course of standardizing mutual expectations, we define their conditions and, thereby, make it possible for anybody taking part in our convention that he/she relates any behaviour (falling within the domain of the convention) to the given expectation as expected within the convention. Or, relating a behaviour to a given convention presupposes the definition of its conditions and, thereby, the attachment of conventionality to the agent defining its conditions.

The most such an agent can undertake to do is to carry signs. To carry signs is important to such a degree that, at a relatively early stage of development, a special kind of normativity had had to develop. This was instrumental normativity, aiming at the preservation of identity of the sign-carrying behaviour or objectivisation when its reproduction was executed. Normativity of this derived kind can take the form of the ritualization of behaviour or the normative treatment of the objectivisation in question. It goes without saying that the preservation of identity of both the signs-carrying agent and its actual signs-carrying is ultimately not destined for its own end. It is called into being in order to protect the message it mediates as much as possible from any noise or change while the message is mediated. For the main function legal arrangement is expected to serve is to guarantee that the normative message is mediated and reproduced unbroken in the course of normative mediation.

As to its elementary units, present and observable in social communication, normativity is an aggregate of sets of continuously restated meanings, attributed to propositions of and operations with norm-objectivisations, belonging to the given domain. As it is known, the connection between sign and meaning is only based on convention, which is in no decisive way a function of the attributes of either the sign or the meaning. To a limited extent, meaning is usually pre-codified. However, having no strict boundaries, it spans

from cores of meaning to penumbra areas of distant applications, of interferences and marginal cases, and is also defined by the context of communication.

That is to say, meaning does not stand by itself. It is with us and within us, as abstracted at any given time from our practice of communication. Of course, through the reconstruction and interpretation of practices of communication, historical meaning can be described retrospectively. However, description cannot be identified with predetermination. For meaning at all times is defined in a complex process with open chances and alternatives. Obviously, former patterns and understandings may have a role in its determination. However, former patterns and understandings having a role in its definition are themselves casually reconfirmed in the process of definition through their having actually exerted an influence on the definition. In sum, there is no meaning coded once and for ever, and there is no meaning in abstract generality. It cannot be but actual; it cannot be but actualized. Meaning is that to which and in respect of which actualization has been made.

[Ad 2.] The transformation into "inside the law" of something "outside the law" is best represented by the normative process of "establishing" a fact as a "legal fact". In plain contrast to the question of normativity, where the meaning we have defined as the embodiment of normativity cannot be a transformation of any meaning into the normative sphere, because there is nothing given independently of the process defining that meaning that could be transformed into the normative sphere, fact seems to exist independently of whether or not it has been established by any process.

However, in spite of apparent similarities between cognitive and judicial processes (both of them claiming to "prove" what is "the truth" in the "description" of their subject), the normative "establishment" of a fact as "legal fact" is not a statement about reality. Instead, it is the normative stipulation of a fact the existence of which will, by force of its being stipulated, be regarded as proven in the process. Hence, the actual existence of the fact is not a criterion here; properly speaking, it simply has no relevance. For, in

law, any "establishment of fact" obtains a normative quality by being constituted in the normative process. Or, being qualified as "establishment of fact" is nothing other than the normative acknowledgement that the operation recognized by the normative order as "establishment of fact" has taken place in due form and order in the normative process. (The question of whether or not it is backed by actual facts may at the most be raised as one of the contents requirements formulated by the normative order, defining the criteria of what will be acknowledged as "establishment of facts" in the normative process. But the mere existence of any fact or its establishment could only interfere with and have an effect in the normative process, if it were in a position to become a "legal fact" or its "establishment" without any process having previously posited it as a legal moment. However, this is not the case.) In the normative order, the normative process exclusively can produce normative results, from which normative conclusions may be drawn as "following on from" in that order.

To put it in another way, this is the procedural nature of normative processes the realization of which excludes the relevancy of any epistemologico-logical approach to the problem. According to it, what has been constituted by the normative procedure has its sole justification in its being constituted. This circular closedness is the touchstone of the understanding of the specificity of normative processes. For the whole enterprise of normative processing is meant to gain normative qualification. For the quality the establishment of which is the only outcome of the normative process is not a consequence of an already-existing quality; it is exclusively the product of the normative process. (Again, of course, we must see that the normative order may stipulate what kinds of otherwise existing qualities are to be proved as present in order that a normative qualification may be reached. However, as we have seen above, each and every stipulation in the normative order is understood as being translated into procedural language. And in terms of procedure it can only mean that evidence in view of them shall be taken and balanced, that legal fact shall not be established except when proven, and that the evidence shall be sufficiently substanti-

ated in the reasons adduced; but it does not follow therefrom that the mere existence of any quality will induce, and its absence block, any respective qualification.)

This is the point to realize that all the conclusions I have formulated above—claiming, *first*, that normativity can only be carried and mediated by meanings attributed to texts and textual operations and, *secondly*, that the statement of anything can only become a component of the normative sphere if procedurally built into the normative sphere by the normative sphere—are but aspects of the same character, complementing one another. Notably, this is the point to realize that even what is called “establishment of facts” is not only a procedural product; it is a question of meaning as well. (For instance, how can and will the meaning of the judicial establishment of facts constituting a legal case be extended to and interpreted in a next procedural, for instance, appellate, phase?) One could even say that procedurality has the only function to mediate meaning in a communicative process. Or, to formulate it the other way round, in a normative context, meaning can only be defined in a procedural way. This is so because the normative process is of a constitutive effect. Only what has been normatively constituted has a legal relevance. For components and processes which, though they may have contributed to the determination of meaning without themselves being normatively constituted, can at the most have a relevance as sociological factors in the decision-making process.

Procedurality in the constitution of both facts and meanings is interpretable within a normative order only. At the same time, the normative order is nothing more than an abstraction, conceptualizing a given set of normative expectations and normative results. Or, procedurality is only interpretable as a set of procedures organized into a unity. More precisely, a unity is preconditioned of which individual procedures organize themselves to become a component. As there is no external unity which could organize procedures into a normative unity, only a circularly closed unity is conceivable that is continually constituted by the individual procedures through their constituting facts and meanings for the normative sphere in the

normative sphere. Needless to say that the system brought about in this way has no constitution and life of its own. This is a system called into existence through making reference to the system within the system, in order to make it possible that further references to the system within the system shall be made in the continued practice of the system. It is to say that the system is self-referential. A system can be constituted self-referentially in a way that any given agent acting in the name and referring to the norms of the normative order shall qualify itself, as well as its procedure and procedural outcome, as the agent, respectively the procedure and the act, of this normative order. In the course of time, a highly complex network of further agents, procedures and acts can be brought about, which all refer to the normative order, and thereby also qualify and confirm each other as, respectively, agents, procedures and acts, of the same order. In the final analysis, it is the sum total at any given time of the references through self-references, effecting self-regulated self-reproduction through self-organization, that at any given time creates the unity of the normative system.

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No matter how original such a development seems to be, it is traceable back to Kelsen. As a matter of fact, the theoretical legacy of the last version of his *Pure Theory of Law* offers two competing alternatives for further development, explicit and implicit, which clearly exclude one another. For his *Stufenbautheorie*, projecting a hierarchical system, which is vertically broken down from superior norms to subordinate ones in foundation of and inferring their validity, is not compatible with the perspectives of a procedural theory, that he also suggested when he emphasized what constitutive a contribution the judicial process had in establishing facts, declaring a law valid, and applying this law to established facts through its own judicial norm, on the one hand, and in the institution of the force of law [*res judicata*] of the final judgment as the only moment that was able to establish (i.e., to produce, in a way which is, normatively, exclusively relevant) normative relationship, on the

other. From this perspective, normative practice is specific (i.e., imputation-oriented) communication through normative references (i.e., by making and confirming references as normatively system-compatible ones); and, in its turn, normative relationship between norms, or norm and fact, is an outcome only achieved from a normative process. For the only relationship that stands for any relevance within the legal system is that that has been established through the process of that system.

In point of fact, most of the theoretical attempts at describing how judicial decisions are taken,⁵ provide us with normative modelling rather than ontological reconstruction. To be sure, normative modelling and ontological reconstruction are, instead of antagonistic, rather points of view which complement one another. For in point of principle, only ontological reconstruction can offer the explanation of the general framework of socially-practiced practice, within which the question of how law works and how it ought to work can be raised at all. Or, in the analysis of normative "black box" operations with many inputs issuing in one single normative output, it is ontological reconstruction only that can aim at explaining, in the final analysis, what issues in a normative output, how, in what conditions, with what alternatives and what competition there are among them.

Some of the points to be assessed by a possible reconstruction are as follows: 1. fact or relationship can "exist" in law in none but a procedural way; 2. to "exist" procedurally means that (a) there has been in law, as institutionalized by the law, a way of making a reference, (b) a reference has actually been made, by referring it to law as an in-law-referable and in-law-referred reference, and that (c) it has also been reconfirmed as in-law-reference in law by other references and also through the non-rejection of the system; 3. any disputation of "facts" or "meanings" "established in law", or any characterization of something "inside the law" as "unlawful" from

⁵ Including the magisterial works by ALEXY (1978) and DWORKIN (1986) as well.

"outside the law", can at the most be a merely sociological fact so long as law is successful in reproducing itself as such, and it can only turn out to be of a constitutive effect in law when it makes the law's further self-reproduction impossible; 4. the conditions of what discrepancy of what components in what fields can hinder the law from reproducing itself is not determined in the system. It is a function of the social totality made up by the interactions of part-totalities at any given time as an end result; and, in the light of all what has been said, 5. even the unity of the legal system is hardly more than specific conceptualization of the incessantly fed back chain of normative references made to the same text(s), as taken in its social, as well as professional, acceptance.

All this is to suggest that the legal system is a whole that is continuously reproduced within the total motion of the social total system. It is a system the individual components of which are made components of the system through the continuous self-reproduction, by the same components, of the system. Or, in view of self-regulated self-reproduction through self-organization, it is autopoiesis itself, of which Maturana invented the name, developed the theory, and forwarded the definition as "systems [...] that (1) recursively, through their interactions, generate and realize the network that produces them; and (2) constitute, in the space in which they exist, the boundaries of this network as components that participate in the realization of the network".⁶

Accordingly, the legal system is a dynamic social continuum, in respect of which 1. only the end result of its self-reproduction, as given in its self-referential practice, can be tested and foreseen, while 2. its boundaries and elements, as well as the regularities asserting themselves and the roles played by individual components in the self-reproduction process, themselves become defined through the same process.

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⁶ MATURANA (1981), p. 21.

Who watches the watchmen? How is judicial reproduction of the law embedded in social practice in general and in normative practice in particular? What does conventionality mean in that context? What are the external limits and safeguards of self-reproduction, and what motive powers and breaks are being built into these processes?

It goes without saying that more questions than answers are formulated in a first approach. Albeit questions like these point far beyond specific approaches, the methodological idea of autopoiesis has some promises of offering one of the foundations of a theoretical reconstruction, which can contribute to a social science theory of the legal process.

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An Investigation into the Nature of THE JUDICIAL PROCESS*

The Investigation

An analysis of the judicial process can only be conceived of today as part of a comprehensive scholarly enterprise that attempts to investigate the fundamental questions of law in the mirror of the recognitions of science philosophy reached in the 20th century. Only such an approach, aided by realisations in language philosophy, may lay our legal thought on renewed modern foundations, in conformity with the philosophical assumptions and methodological perceptions of natural sciences today. Meanwhile, based on the cultural anthropological considerations of our age, we must make efforts to examine the legal phenomenon no longer exclusively within the bounds of national cultures but by resorting to genuine scholarly generalisation, that is, by relying on comparative experience as well.

Accordingly, the investigation, focussed on the law's judicial actualisation, will attempt to reconsider the nature of language, concept and logic; the connection between 'having a

* For the first version, prepared on the basis of the author's theses for the academic degree of "doctor of jurisprudence" by the Hungarian Academy of Sciences [*A bírói ténymegállapítási folyamat természete* {The nature of the judicial process in establishment of facts} (Budapest: no editor 1990) 17 pp.], see 'A jogalkalmazás kutatásának szemléleti kerete – ma' *Magyar Jog* 38 (1991) 2, pp. 65–71 & *Jogtudományi Közlöny* 47 (1992) 9, pp. 389–394, and as 'A bírói folyamat természetének kutatása' *Jogtudományi Közlöny* XLIX (1994) 11–12, pp. 459–464. For the first English-shortened-version, see in *Auf dem Weg zur Idee der Gerechtigkeit* Gedenkschrift für Ilmar Tammelo, hrsg. Raimund Jakob, Lothar Philipps, Erich Schweighofer & Csaba Varga (Münster, etc.: LIT Verlag 2009), pp. 177–184 [Austria: Forschung und Wissenschaft – Rechtswissenschaft 3] with abstract in <<http://www.univie.ac.at/RI/IRIS2006/papers/varga.pdf>>.

meaning' and 'giving a meaning' [*avoir un sens & donner un sens*]; the relation of cognition to practical action; and, last but not least, the specificity of legal activity, distinguished from both the heterogeneity of everyday life and the kinds of homogenisation in domains outside the law.

Therefore, an examination like this may have a good chance of pointing out dilemmas and posing questions in areas thus far acknowledged as unproblematically obvious, such as: What does the judge do when he decides? What does he actually rely on when he claims to be relying on facts and norms? In addition: When and how will he have arrived at facts and norms? Or, formulated otherwise: In what way will a decision arise from facts and norms? And finally: What does he transform into what, and with what necessity, when he concludes that his decision exactly "follows" from the facts of the case and the norms of the legal order?

In starting such research, analysis of facts established in law and an investigation into the nature of the judicial operation directed at establishment of facts seem to be the very first steps. In this case, the investigation is aimed at ascertaining whether those facts as well as their establishment may have any cognitive value at all, and if they do, wherein it lies. As the following step, we have to ask: To what extent does that which we label as cognition play a criterion-like role in this process?

Well, research summarised in the present paper has had an ontological result in showing that social practice is continuous, and its reliability manifests itself through its continuously being fed back to and within its own continuity. In other words (and without relinquishing either critical reflection or our faith in the reasonableness of the world or perhaps our human search for certainty in some ultimate transcendence), we have nothing to trust but our human practice, taken as the framework of human existence in its historical tendency. Neither cognition nor the human search for ideals is conceivable separately from it. There-

fore, we have good reason to develop some sort of confidence in the basic form of our existence. By virtue of its permanence and its being never-endingly tested and re-tested, we all may by right even feel encouraged to raise the issue of whether or not, and to what extent, practice is able to generate a criterion.¹

And yet, no matter how conclusive all this appears, an answer based on such assumptions cannot be regarded as self-sufficient. In addition, we have to realise that it is not specific, either, because all the diverse explanations in social theory tell us as some ultimate wisdom that when we agree with each other on this or that matter, the community [*auditoire*, in a sense CHAÏM PERELMAN gave to it²] in the background of our social practice will emerge as the very source of our understanding.³ Nonetheless, this answer marks a decisive shift in our efforts so far, as it definitely points beyond our previous hypotheses. And in this respect, it is suited in itself to show a direction of research for social theory as well, this time in a methodological guise.

What Kind of Path has been Covered?

Nearly three and a half decades ago, when I started to explore problems related to the law's conceptual definition,⁴ I set myself the methodological task of attempting to detach the scholarly

¹ Cf., by the author, 'Judicial Reproduction of the Law in an Autopoietical System?' in *Technischer Imperativ und Legitimationskrise des Rechts* ed. Werner Krawietz & Antonio A. Martino & Kenneth I. Winston (Berlin: Duncker & Humblot 1991), pp. 305–313 [Rechtstheorie, Beiheft 11] & *Acta Juridica Academiae Scientiarum Hungaricae* XXXII (1990) 1–2, pp. 144–151.

² Chaïm Perelman *Logique juridique* Nouvelle rhétorique (Paris: Dalloz 1976) 193 pp. [Méthodes du Droit].

³ This became, in an embryonic form, obvious for me from the developments of György Lukács in his *A társadalmi lét ontológiájáról* [Zur Ontologie des gesellschaftlichen Seins] I–III (Budapest: Magvető 1976), written in his advanced years and published only posthumously.

approach from the image formed by the subject about itself (that is, in our case, the law from its ideological and normative definitions). In so doing, by eliminating the various cultural, ideological and political dependencies and connotations I tried to ensure that the answer to be gained will be a general one indeed, and, thereby, also theoretically verifiable and commensurable with other results. By separating the subject and its self-image in scholarly description, my goal also was to provide a possibility for independent examination in case of subjects having a definite ideological self-characterisation about themselves (in our case, through the law's normative positivation or official expectations).

And when I started, in connection with the definition of the law's self-identity in continental law, to deal with the socio-historical descriptions and theoretical assumptions of the phenomenon of codification,⁵ the intention that had previously been only latent as a methodological conjecture became decisively significant. I could hope that, as a result of independent scholarly examination, the law's theory might – leaving behind all self-restricting determiners – rise above the cultural presuppositions, ethno-centrities, positivations and ideologies that separate the various national legal systems from one another in variations differing in space and time. I wished to serve the same goal by attempting to apply a historico-comparative approach in the theoretical explanation itself.

The requirement for jurisprudence truly to seek to characterise law in a theoretical generality has become obvious

⁴ Cf., by the author, 'Quelques questions méthodologiques de la formation des concepts en sciences juridiques' *Archives de Philosophie du Droit* XVIII (Paris: Sirey 1973), pp. 205–241 & *Algunas cuestiones metodológicas de la formación de los conceptos en ciencias jurídicas* trad. Hortensia Adrianza de Casas (Maracaibo: Instituto de Filosofía del Derecho LUZ 1982) 38 pp. [Cuaderno de trabajo 32].

⁵ For the summary of the research from 1969 on, see, by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp.

today. It is a commonplace by now that the generality of scholarly description will suffer if the particular position and viewpoint of certain systems or families of law, or of legal traditions, selected from the outset and actually preferred, overwhelms the characterisation of law as such. But anything like this can only be prevented by encouraging, with each and every theoretical step we take, the evolution of a universal theory of law.⁶ In the past, we could see countless deplorable instances of scholarly debates having degraded to something like a dialogue of the deaf by the French, American or Soviet approaches, simply by extending – *via* extrapolation – one particular viewpoint to universal dimensions as a result of chauvinism, ignorance or prejudice, or, to use a current mainstream American expression, of ethno-centrism. Because, we might ask, what else could we call a situation in which it is but the arrogant one-sidedness of approaches that prevents them from conveying real messages by excluding the chance of joint thinking that might have led to a mutually useful lesson.

Earlier, I had been trying to elaborate a legal philosophical outlook that could be assumed to be modern indeed, by re-considering the methodological perspective of GEORGE LUKÁCS' late social ontology.⁷ The novelty of this, with respect to legal the-

⁶ It was in the spirit of such a methodological ideal that I started to write beginning in the early 1970s, on a comparative basis, about the necessity that a "general (universal) theory" of law be worked out. Nevertheless, having felt the practical impossibility of defending the underlying idea against the aversion of the socialist academic community of the era, I left the paper in manuscript. Cf., by the author, 'Összehasonlító módszer és jogelmélet' [Comparative method and legal theory] in his *Útkeresés Kísérletek – kéziratban* [Searching for a path: Unpublished essays] (Budapest: Szent István Társulat 2001), pp. 97 et seq. [Jogfilozófiák].

⁷ Cf., by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985) [2nd reprint ed. (Budapest: Akadémiai Kiadó 1998)] 193 pp. and 'Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács' Ontology)' *Rivista internazionale di Filosofia del Diritto* LX (1983) 1, pp. 127–142 & in *Filosofía del Derecho y Problemas de Filosofía Social* X, coord.

ory-building, was that it could already set for itself as an explicit objective that the various legal ideologies (professional ethos, such as the continental legal normativism or the ENGELSian *juristische Weltanschauung*, and other expectations alike) should be explained as components of the ontological significance of a given legal set-up, even if not posited. So my aim was to present, in a theoretical description of the law's construction and operation, the ideologies, ethos and professional expectations characteristic of various cultures, not merely as contingencies or externalities but as specific features themselves that make up – as parts of – the subject, i.e., the ontological reality of the law. (It may be worth mentioning that, theoretically speaking, it is this very requirement that emerges in the conceptual expression of games, too. That is, in order to describe a game, the rules of the game themselves also need to be taken into account as constitutive elements.)

How can we Get Closer to a Feasible Answer?

The linguistico-philosophical approach to facts⁸ allows them to be construed in the context of human practice from now on. Accordingly, we can realise that these are relational concepts. Not only or simply the mark of reality is asserted in and through them, but the actuality and the entire set of interrelations of our relationship to such reality is also asserted. The partial totality at any time manifests itself in them as part of the overall totality at any time, representing the whole. This way, the actuality of how and in what manner people also get (or got) in contact with the marks of reality conceptualised as facts in their practice (as guided by their practical interests) is asserted in the notion of “facts” (or,

José Luis Curiel B. (México: Universidad Nacional Autónoma de México 1984), pp. 203–216 [Instituto de Investigaciones Jurídicas, Serie G, Estudios doctrinales, 81] & <<http://www.bibliojuridica.org/libros/3/1051/20.pdf>>.

⁸ Cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

more precisely, in the identification of those marks of reality as 'facts'). Well, the components of the judicial process are not an exception to this, either. The judicial establishment of facts is apparently objective. It is objective, because we believe it to be independent of any human volition and free from subjectivity. However, nothing can isolate it from the laws – i.e., necessities – governing human practice in general.

The theory of speech acts distinguishes between brute facts and institutional facts. This distinction also allows us to reconsider our query regarding the nature of the judicial establishment of facts from the perspective of social ontology. Well, according to present-day cognitive sciences, the establishment of facts is a function of human practice. As a consequence of this, both cognition and the conceptual expression of its outcome turn out to be, in reality and in the final analysis, agreed upon, that is, *c o n v e n t i o n a l*. This indicates again that the entire process is (in a weak sense) of a *n o r m a t i v e* character from the outset. That is, on the whole, it also depends on human practice. So, each of the concepts applied in our everyday interactions (in either cognition or the judicial solution of legal problems) turns out to be of an institutional character, or to depend on some institutional definition at least.

As soon as we recognise the comprehensive extent to which institutionalisation and the conventionality itself that lies at its basis are decisive generators of our particular social existence, we can get closer to understanding the character of the so-called second nature built up in our social practice around our social existence, and, thereby, also to being able to explain the nature of social existence in a more suitable way than we had previously.

However, together with the above assumptions we also have to accept the methodological considerations and approaches stemming from the same roots as they do. These include, above all, a totality approach to elementary perception; a decisive moment of analogy and relevance in element-

ary cognition; inseparability of the descriptive function from any other function in those homogeneous human activities that do not exclusively describe positivations (such as morality, law and the arts); the unavoidable presence of mental transformation and jump (i.e., the necessary break in the reconstructible logical sequence and conclusion by a purposeful human act of will, manifested by classifying generalisations, through assigning membership as a result of classification, as well as the role of non-cognitive dialectics in every intellectual operation). Yet, in addition, recognition is included in the above of the nature of the various interconnected complexes in which fact and case, fact and value, factuality and normativity, can only be asserted and referred to in the mutual presupposition of both, that is, in their final unity as ontologically inseparable parts. It is also a fact that we may indeed rely, even in our formalised actions (e.g., in science, law or theology), on our otherwise imperfect cognition and on its exclusive linguistic expression (even if proven vague and indefinite). And by far not of the least importance, it is a fact that the way in which we arrive at a problem solution becomes analytically separated from the way we ascertain its ultimate acceptability (justification) in all our processes of argumentation. And finally, it is a fact that the functions of cognition and judgement become divided, even within the same, possibly indistinguishable linguistic expression.

As a result, a glimpse behind the apparently merely cognitive and descriptive surface stage of the establishment of facts perhaps allows us to reveal what is in fact taking place here. After all, this is nothing other than our act of attributing some mark, feature (etc.) to something. From a linguistic perspective, this is the function of *a s c r i p t i v i t y*, and from the aspect of community building, this is the function of attribution, that is, of *i m p u t a t i o n*.

We have to bear in mind that the object of reality itself we may refer to in law, and in a number of normative fields, mostly prevails only *c o m m u n i c a t i v e l y*, that is, in

and through its being communicated. Therefore, regarding its actuality, the language with the help of which we analyse is the same as the language we may analyse. Thus, it is we who separate that which we analyse from that by which we analyse it within the same (otherwise undifferentiated) language.

When thinking, we may often fall into a trap, as the subject of and the means to its cognition (its medium, the prejudices surrounding it, etc.) can only be distinguished in and through analysis. So, for example, in law ideological presuppositions of a merely instrumental role may come to the fore to the extent that they eventually obscure the difference between the subject and the preliminary judgement related to it. Such is, for instance, the separation of the “question of fact” and the “question of law” or, in case of the judicial interpretation of normative texts, the distinction of so-called common words (in no need of being defined legally) from the professional terms (requiring legal definition). Or, a mode of formulation depending solely on our pre-assumptions may take the form of a theoretical distinction, in which the essential identity of the possible answers, arranged into various separate groups along those theoretical assumptions, will fade. And finally, such is the dilemma whether law application has to be characterised as a logical conclusion (subsumption) or, just to the contrary, as a logically somewhat arbitrary subordination.⁹

A similar type of problem emerges when, investigating the set of normative interrelations in the application of norms, we realise that the normative framework as set by the relevant norms has (and can only have) a message in some actualised particular context at the most; that the language of norms (as is true of any other language) is vague and indefinite even in the best case; that there is no genuine logical inference in the normative sphere; and that, at the same time, the application of norms itself – irrespective of the need for normative frame-

⁹ Cf., mainly, Arthur Kaufmann *Analogie und »Natur der Sache«* 2. Aufl. (Heidelberg: Decker & Müller 1982) xiii + 88 pp. [Heidelberger Forum 12].

works to be set to channel it – also depends on basically practical interests.¹⁰ We know that, according to its official ideology, the application of norms is aimed at rational persuasion. Its results are, however, determined to a great extent by circumstances arising from the mostly artificial and by-chance conditions of the concrete situation of the given application of norms and its particular social medium and institutionalised channels. Consequently, the breaking down of a normative system is always double-faced because, due to its inherently given potentiality, it is multi- or two-directional at least in principle; the distinction made between a general norm and an individual one is merely relative; the moment of deductivity is at the most exclusively symbolically present in it; and the propositions providing the official foundation of the decision (with those pieces of factual and norm-information that can be formally disclosed by the judge) are in fact insufficient to provide a genuine logical conclusion for such a decision; the dilemma of whether the regulation is exhaustively complete or, on the contrary, perhaps insufficient, emerges on principle in every case (remaining logically unanswerable); the arguments that may be brought forward are rather pre-selected and defined by the tacit conventions shared in the given community, and depend more on the sociological situation of the law-application than on the so-called logic of the so-called system of norms; the logic of how one arrives at a decision differs from the logic of how one subsequently justifies that decision; when we recognise our decision as valid within (as concluding from) the law, actually we do rely – in addition to our references, which must be considered as logically diffuse – primordially on the reciprocity of similar decisions that are mutually recognised, taken by judicial fora at

¹⁰ For an early clarification, cf., by the author, 'On the Socially Determined Nature of Legal Reasoning' *Logique et Analyse* (1973), Nos. 61–62, pp. 21–78 & in *Études de logique juridique* V, publ. Ch[aïm] Perelman (Bruxelles: Établissements Émile Bruylant 1973), pp. 21–78 [Travaux de Centre National de Recherches de Logique].

similar or even lower levels; and finally, the persuasion based on rational grounds and its argumentative inference from those general standards in reference are always intertwined in practice.

As a result of all this, the fundamental nature of the judicial process will eventually be determined by circumstances originally treated as auxiliary. These circumstances include, among others and above all, the ontological role filled by lawyerly formalism, the fact the law has become a distinctly homogenised medium in societies of an articulate structure (as expressed by the '*Ausdifferenzierung des Rechts*' in the sense NIKLAS LUHMANN gave to it¹¹), as well as – and not less importantly – the paradox inherent in the autotelism of the law's systemic operation.

Investigating the so-called judicial establishment of facts – that is, fact-finding through procedural definition in a legal context – may cast some light on the question of what sort of an inner logic is at work in the construction and operation of modern formal law. The critical transcendence¹² of HANS Kelsen's approach in his *Pure Theory of Law*¹³ offers us the possibility, in theory, of identifying each and every element of the acts taken within the legal process as having a c o n s t i t u t i v e force. As a result, in its final outcome the judicial procedure will have ended with legal force declared for the case and, thereby, the decision, being officially and irrevocably integrated into the legal order (as concluding from it), becomes criterion-like, with a force determining the entire process. However, we

¹¹ Niklas Luhmann *Ausdifferenzierung des Rechts* Beiträge zur Rechtssoziologie und Rechtstheorie (Frankfurt am Main: Suhrkamp 1981) 456 pp.

¹² Cf., by the author, 'Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions' *Acta Juridica Hungarica* 36 (1994) 1–2, pp. 3–27.

¹³ Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik (Leipzig & Wien: Deuticke 1934) xiv + 236 pp. and *Reine Rechtslehre* Zweite, vollständig neu bearbeitete und erweiterte Auflage (Wien: Deuticke 1983) xii + 498 pp.

know already from a wider-range examination that in addition we need to conceive of the underlying nature of the proof – with the so-called judicial “certainty” expressing its result – in a similar procedural context, for these equally refer to features, all of which are corollaries of the internal logic at work in modern formal law. And due to the criterion-forming significance of the latter, the judicial procedure will necessarily be distinct from any other similar act (thus, from both our everyday procedures and theoretical cognition alike), even if differences recognisable from the outside are not indicated.

Finally, evaluating the examination into legal logic and cognitive sciences from the aspect of game theory we may eventually also clarify that systemic-logical interconnections are in fact the constitutive foundations of whatever institutionalised formalisation. This can by now, by defining the place of formal organisations in our societal processes, contribute to an explanation on the level of social ontology as well.

The Range of Problems in Connection with Facts

Both in the German and the Hungarian languages and in their philosophical underlying cultures, it is well accepted as self-evident that the ascertainment of a *Tatsache* (i.e., ‘fact’) is alleged by the use of a substantive verb. That is, the fact is “something” that “is”, “exists”, or “subsists” or “prevails”. A fact is so much considered in these cultures to represent some materiality or reified event that our question could rather be, what actually distinguishes a ‘fact’ from other pieces of reality. In contrast, in both Latin-rooted cultures and English-language civilisations, there is no approach resorting to such a distinction. That is, as suggested by both the notion of *factum* used only as a participle (e.g., “*res factum est*”) and the permitted use of ‘fact’ in English (e.g., “it is established as a fact that [...]”), a fact is not what we allege or posit to be but that which we allege or posit is what we do as a fact. So, what remains now as an open issue is how we select from the ontologically undivided totality of incidents

those “relations” that, as a result of our cognition, we shall accept and also express conceptually as ‘fact’.¹⁴

We have two alternatives for a possible answer. One is the path covered by GOTTFRIED WILHELM LEIBNIZ. He attempted to express the complexity of the world in a conceptual-logical way in simple forms and, enchanted by the Latin linguistic correctness, he posited everything he supposed to prevail as at all thinkable as element(s) of axiomatised sets and sequences. Yet, as we know, his experiment did not result in any directly verifiable or utilisable outcome.¹⁵ However, his idea remained so methodologically attractive that even LUDWIG WITTGENSTEIN tried to re-consider the same tradition of positivistic presuppositions in his early great work on *Tractatus logico-philosophicus*.¹⁶ Well, his aim was to provide for the conditions of formal logico-mathematical modellability. Therefore, he first posited the world as a set of elementary components, and then reconstructed it as the whole of molecular organisations, out of atomic basic units. Contrary to all eventual ontological allegations, he did not actually perform an ontological experiment: he only made a proposal for resolution of the paradox of cognition. This is the reason why he posited the world as a fact. And this is how the world became utterly value-free in his approach. At the same time, we can also realise from the context of his expositions that it

¹⁴ “Therefore, from statements like »it has been established as a fact that [...]« we can definitely learn that (1) there is something with which we have entered a cognitive relationship, and (2) we have posited it as an element of cognition.” Csaba Varga *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], on p. 125.

¹⁵ Cf., by the author, ‘Leibniz und die Frage der rechtlichen Systembildung’ in *Materialismus und Idealismus im Rechtsdenken* Geschichte und Gegenwart, hrsg. Karl A. Mollnau (Stuttgart: Franz Steiner Verlag Wiesbaden 1987), pp. 114–127 [Archiv für Rechts- und Sozialphilosophie, Beiheft 31].

¹⁶ Ludwig Wittgenstein ‘Logisch-philosophische Abhandlung’ in *Annalen der Naturphilosophie* [Leipzig, hrsg. Wilhelm Ostwald] 14 (1921), pp. 185–262 {& in English <<http://www.gutenberg.org/files/5740/5740-h/5740-h.htm>>.

is a complex conceptual idea of *Sachverhalt* [atomic fact], *Tatsache* [fact] and *Sachlage* [situation] that is at stake here (although in a contradictory and unresolved way), in which, through the posited facts, the situation itself can render a statement true.

At the same time, we have to understand that it is an elementary contextualisation that incessantly takes place in our intellectual manifestations. This is usually referred to as “situation”, “context” or “evaluation” in psychology and cognitive sciences, because even if we only say “it is raining”, there is contextualisation taking place. Out of some elementary, unorganised, undivided and hence unrelated acts of perception, such a contextualisation forms a basic unit of information that is already formed from now on, for it has a structure and is related to preliminaries and background knowledge. We might as well say that this basic unit of information is already selected and moulded. To put the concept otherwise, it is no longer a simple imprint of the subject in the senses but also the product of a creative human contribution. And it is this entire process that can from now on be referred to as cognition.

The framework (with its volume and structure) within which facts – facts of a case – are conceivable at all is defined by the given point of view and by the relevance to be reached within our tacit cultural conventionalisation. Unless we start out from WITTGENSTEIN’s standpoint, described above (according to which there exist elementary facts, on the one hand, and the world is composed of the totality of these, on the other), we rather have to say that, although the set of facts and the availability of their ascertainment is doubtless not unlimited and not unrestricted, neither the diversity of their possible aspects and configurations, nor the variety of their approaches can be pre-defined or foreseen.

In our social existence, it is a fundamental fact of an ontological significance that every social role, including the judicial position, is always filled by a human being, to

be conceived of in his or her entirety both psychically and sociologically. This means that also the role-holder's positional actions are always preconditioned by the totality of his or her social determinations. It is, therefore, a commonplace in social sciences that every role-playing is somewhat pre-determined by the individual's balancing amongst interests and values – independently of whether or not there is an institutional environment to provide a formal filter, or the differing expectations are only mediated and communicated by the relevant ethical ego at any time.¹⁷ Reverting to law, today we may take it as proven that, although the various legal cultures offer the standards of their own logic of justification as the gauge of judicial functioning, the formalised procedure itself will still rather be a merely formal expression, compared to the possibilities that are available in the logic of problem solving (equally known with a high degree of similarity in different legal systems and in fact also observed through various roundabout routes).

Theoretical Advance

Under the influence of the positivistic worldview's hitherto almost unquestioned predominance, jurisprudence has, up to the present day, mostly been concerned with formulating – both as theoretical starting points and as end results – the same propositions that were also asserted in modern formal law as the ideology of the lawyerly profession.

Accordingly, it suggested emphatically judicial decision making be considered as a process consisting of two elements, operating with facts and norms. Moreover, these two elements are claimed to be separated

¹⁷ For the explication of the final conclusion, cf., by the author, *Lectures...* [note 12], and, for its proof through a set of case studies, *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1].

clearly, as facts have to be established, and the legal provisions have to be applied. Thus, the essence of the decision making process is seen as projecting, upon the basis of the cognition of reality, normative value-positions onto this reality. As a consequence, the process itself is conceived of as consisting of nothing but cognitive and evaluative activities, imposed upon each other. Therefore, the theoretical moment becomes decisive, as is seen in such an understanding of the process. For it is the fact that must be cognised first. This launches the procedure. And the knowledge of what the ascertained fact is like pre-selects and pre-determines the kind of judicial procedure and even the decision to be made in the procedure, too. This is how it might have been concluded that, within the procedure itself, the judicial ascertainment of facts substitutes for cognition of facts in question. And, from all this, such a theoretical vision could also conclude that the judicial action within the procedure is not limited by any other consideration except the pieces of information made officially available on facts and norms. Consequently, the far-from-incidental circumstance that the judicial procedure is taking place in a well-regulated way within the bounds of a formal procedure is only of an auxiliary character. Its role is only to keep the judicial cognition in control, by ensuring that it comes to an end within a reasonable time and with a definite decision.

Well, on the other hand, the ontological explanation of the judicial procedure does not dispute at all that the assumptions outlined above do constitute the overall official basis of the institutional structure of modern formal law. However, due to its ontological reconstruction, it does also indicate that the assumptions in question are only ideologically posited and, therefore, their validity can only be supported and sanctioned in an ideological way through mainly ideological means.

Accordingly, ontology proves that a fact – when we philosophically comprehend it or posit its presence – is only an expression of the human act that we have, in our practice, become attached to as some aspect of reality, thought to be existing. And the circumstance that our practical attachment is expressed in such a dysanthropomorphised masque disguises our very human relation to, i.e., getting into anthropomorphic touch with, that aspect of reality. But we know also from *Gestalt* psychology that every human manifestation testifies to h u m a n e n t i r e t y in the fullness of being – in the same way as human action, too, can only be homogenised upon the very ground of the heterogeneity of everyday human existence. Accordingly, the judicial decision making process has to be regarded as a practical procedure that attempts to assert requirements formulated by everyday life in a homogenised system, through complying with a homogenised network of justification. Consequently, as an actual process, judicial decision-making always appears as the u n i t y of diverse sides, aspects and relations intertwining. It is asserted as a unity within which these partly heterogeneous sides, aspects and relations can be separated only and exclusively in a given analytical circle, solely in the context and for the sake of the given justification of the analysis in question. Or, the judicial establishment of facts differs from theoretical cognition. Considered separately, both judicial establishment and theoretical cognition are homogenised human actions that, at the same time, build up in a criterion-like way according to the conditions exclusively characteristic of them, that is, in respectively differing manners.

In consequence, revealing the genuine nature of the process actually taking place behind the ideological facade of the judicial process takes us closer not only to an understanding of the very nature of judicial action. By presenting the genuine meaning and interrelations of facts, facts that make a case in law, norm-interpretation, law-making and law-application, as well as other components, in new contexts, it also makes it

possible for us to seek the actual contents behind the ideologically laden conceptual expression. At the same time, it also encourages research to start investigating the real basis of our apparent trust in conceptual expression (for it seems as if the discrete nature of facts, facts that make a case in law and factual propositions reflected the actual separation of those respective – and referred to – objects of reality, and as if linguistic distinctions were conceptual reflections of the actual separation inherent in reality, and so on), namely, regarding the constant feedback of our everyday practice, while maintaining such a conceptual security and continuity.

An ontological reconsideration like this may provide new ideas to solve further problems in jurisprudence, as well. It may, for example, help explain the range of problems regarding the nature of relevance and of those facts that make up a case in law. It may present categories, still not properly clarified, in contexts that have so far remained unrevealed both conceptually and in their conceptual relations, such as the categories of, among others: analogy; concept and type; descriptivity, prescriptivity and ascriptivity; normativity; what it means to prevail as a fact and to establish something as a fact; what it means to have a meaning and to give a meaning; how to qualify and to be qualified; belonging to a class and being classified in/as a class; quality of anthropomorphism and dysanthropomorphism; ideological and symbolic functions; heterogeneity and different homogeneities; constitutivity, *res iudicata* [legal force] and procedurality in law.

And not least, we have to see that the ontological explanation of the presuppositions that pre-condition our thinking and practical activity may themselves prove to be a product and also a generator of a paradigmatic shift regarding our understanding of the nature of law, its conceptual definition and our entire attitude towards it. Now the issue is no longer simply whether the law consists of norms and how it is related to the supreme authority in society. We rather have to ask how we should understand the fact that law is embodied

in and by definite objectifications (e.g., in texts formally issued by the state through formal procedures) and whether such objectifications will be exhaustive of the law or whether the law may at most posit and shape those objectifications, which have to serve as bases of reference in the given structure in order to justify the decision arrived at finally.

The ontological reconstruction presents the legal phenomenon as a process constantly being formed from a sequence of intellectual operations building upon each other, conceived of as a series of events. And exactly because its existence is *process-like*, the reconstruction does not reduce it to mere forms of objectivation or similarly artificially developed system(s) of formal(ised) requirements. Moreover, from the viewpoint of processuality it becomes obvious that, contrary to the traditional world-view of legal positivism, law does not control us primarily by means of physical force or coercion through some externally graspable objectivity. Rather, it conditions us by *becoming embedded in our social tacit agreements*, as built into our social interactions through its conventionality.

As time goes by, problems continue to emerge that all need to be faced. Yet we have to be aware at all times that our responses to various dilemmas – including the issue of how to implement the ideal of the rule of law, how the conceptual-procedural discipline within the law's formal system develops, as well as how we can strengthen our lawyers' professional ethos and commitment most effectively – are in the final account pre-disposed by the dilemma whether or not we should base our legal world-view on the conceptual framework provided by legal positivism or, rather, perhaps on some more suitable scheme, transcending the above at least to some extent. After all, tragic experiences from HITLERISM to STALINISM have taught generations of Central and Eastern European lawyers that although a simplifying world-view (seemingly offering easy explanations to everything with the warmth of familiarity and protection by

the powerful mainstream) can be very attractive indeed, it may expose us as defenceless when, due to the irony of fate or the forced path of history, one is left alone through being expelled out of everyday routine. For at such times one is ruthlessly compelled to make a personal choice by making a responsible moral decision.

The safety offered by the world-view based on such an ontological explanation is surely neither uni-factoral nor one-dimensioned. But just because only social practice with re-tested feedback included can promise any kind of safety at all – as its background consciousness becomes formed through the practical experience of society throughout epochs and civilisations as based on an endless sequence of tacit social conventions and (re)conventionalisations continually re-asserted and re-adjusted in practice¹⁸ –, it is not so easy to shake it off either, when things are not going well. For we know, too, that social understandings and the various institutional conventionalisations are always carried by exactly as many players as those who take part in the total social game that regenerates those understandings and conventionalisations – the total sum of which is society itself. From this it clearly follows that the final substance of experiencing social existence with the prevailing law and order is nothing other than playing this game itself.

¹⁸ This again raises the dilemma of the deductive or inductive foundation of the theoretical formulation of human knowledge and the ensuing practice (in either theology, moral philosophy or law), or otherwise expressed, respectively, of its logical inferability from an axiomatised systemicity or its continuous shaping and further shaping (through a series of re-contextualising actualisations) as based on human experience at any time. Examples for the latter can be found in the historical prototypes of ancient Jewish and Islamic law, as well as in the continuity of the Anglo-Saxon approach, which has until now always successfully avoided the trap of declining into the degeneration of dictatorship, although we do not know whether it has ever been due to its methodology or owing to mere historical accidentalities.

WHAT IS TO COME AFTER LEGAL POSITIVISM IS OVER?

Debates Revolving around the Topic of
»The Judicial Establishment of Facts«*

“The puzzle arises because what is decent is just, but is not what is legally just, but a rectification of it.

The reason is that all law is universal, but in some areas no universal rule can be correct; and so where a universal rule has to be made, but cannot be correct, the law chooses the [universal rule] that is usually [correct], well aware of the error being made.

And the law is no less correct on this account; for the source of the error is not the law or the legislator but the nature of the object itself, since that is what the subject-matter of actions is bound to be like. Hence whenever the law makes a universal rule, but in this particular case what happens violates the [intended scope of] the universal rule, here the legislator falls short, and has made an error by making an uncodificational rule.

Then it is correct to rectify the deficiency; this is what the legislator would have said himself if he had been present there, and what he would have prescribed, had he known, in the legislation.

Hence what is decent is just, and better than a certain way of being just – not better than what is unconditionally just, but better than the error resulting from the omission of any condition [in the rule].

And this is the reason why not everything is guided by law. For on some matters legislation is impossible, and so a decree is needed.

* Originally prepared as a postface to the re-edition in Hungarian of my *A bírói ténymegállapítási folyamat természete* [jav. 2. kiad. (Budapest: Akadémiai Kiadó ²2001, ³2003), pp. 177–196] and also presented at the workshop on *natura iuris* at Miskolc in 2001. First published English in *Theorie des Rechts und der Gesellschaft* Festschrift für Werner Krawietz zum 70. Geburtstag, hrsg. Manuel Atienza, Enrico Pattaro, Martin Schulte, Boris Topornin & Dieter Wyduckel (Berlin: Duncker & Humblot 2003), pp. 657–676.

For the standard applied to what is indefinite is itself indefinite, as the lead standard is in Lesbian building, where it is not fixed, but adapts itself to the shape of the stone; likewise, a decree is adapted to fit its objects."

Aristotle *Nicomachean Ethics*
trans., introd. & notes Terence Irwin [1985] 2nd ed.
(Indianapolis & Cambridge: Hackett Publishing 1999), 1137b, pp. 144–145.

"Denn der Wegcharakter des Denkens ist allzu einfach und darum unzugangbar für das herrschende, in eine Unzahl von Methoden verstrickte »Denken«. Schon allein die Herrschaft der Dialektik jeglicher Art verstellt den Weg zum Wesen des Weges."

Martin Heidegger *Denkerfahrungen*
hrsg. Hermann Heidegger
(Frankfurt am Main: Klostermann 1983), p. 179

(*Natural Law and Legal Positivism*) Today, the duality of the terms 'natural law' and 'legal positivism' is meant to indicate, historically, a sequence of early modern theoretical development and, in our present debates, a set of common denominators defining the framework and directions within which diverging scholarly trends and stands are classified and interpreted in a way acceptable for most of the parties involved, rather than anything still suitable actually to launch debates or pose challenges. Their primitive orthodoxy might even mislead us today, as natural law, too, strives for positivation, and legal positivism, in its turn, for codifying values taken as natural presuppositions. Nevertheless, in our modern approach, no law appears any longer as something given, ready-made, nor in some kind of physical existence, but as a process in continuous formation, in the form of a relationship defined and a mission fulfilled as the outcome of some formal proced-

ure. Our reasoning in the present paper will focus on a minor segment of this comprehensive topic, first of all reflecting on to what extent contemporary science-philosophical considerations may find any response in legal theorising.

*

(Legal Positivism and its Logic) One and a half decades have passed since I attempted – in a continuation of earlier investigations into the law’s objectification and rationalisation as well as the ontological foundations of law and its arrangement – to reformulate in a monographic synthesis the basic issues relating to the relationship between fact and norm as mediated by language and to the nature of so-called jumps and transformations in the logical reconstruction of legal reasoning, this time based upon WITTGENSTEINIAN reflections as combined with the lessons drawn from speech-act theories, among others. The underlying work itself¹ – along with a few chapters previously published,²

¹ Csaba Varga *Theory of the Judicial Process* The Establishment of Facts [Hungarian ed. 1992] (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

² Csaba Varga, ‘The Fact and its Approach in Philosophy and in Law’ in *Law and Semiotics* 3, ed. Roberta Kevelson (New York & London: Plenum Press 1989), pp. 357–382; ‘Changing of Paradigms in the Understanding of Judicial Process’ *Rechtstheorie* 26 (1995) 3, pp. 1–10; ‘The Judicial Process: A Contribution to its Philosophical Understanding’ in *Sources of Law and Legislation* Proceedings of the 17th World Congress of the International Association for Philosophy of Law and Social Philosophy [Bologna, June 16–21, 1995] III, ed. Elspeth Attwooll & Paolo Comanducci (Stuttgart: Steiner 1998), pp. 206–219 [ARSP-Beiheft 69]; ‘The Non-cognitive Character of the Judicial Establishment of Facts’ in *Praktische Vernunft und Rechtsanwendung* XV. Weltkongress der Internationalen Vereinigung für Rechts- und Sozialphilosophie [Göttingen, 18. bis 24. August 1991] 4, hrsg. Hans-Joachim Koch & Ulfrid Neumann (Stuttgart: Steiner 1993), pp. 230–239 [ARSP-Beiheft 53]; ‘The Mental Transformation of Facts into a Case’ *Archiv für Rechts- und Sozialphilosophie* LXXVII (1991) 1, pp. 59–68; ‘Descriptivity, Normativity, and Ascriptivity: A Contribution to the Subsumption/Subordination Debate’ in *Theoretische Grundlagen der Rechtspolitik* Ungarisch-österreichisches Symposium der Internationalen Vereinigung für Rechts- und Sozialphilosophie 1990, hrsg. Peter

some preparatory studies³ and earlier papers in theoretical generalisation⁴ – has had the reception usually expected in the case of books of a similar kind. There were just a couple of critical reviews⁵ and a few more treatments focussing on its merits, accompanied by their authors' reconsideration of the entire topic in light of their reflections,⁶ but the mainstream thinking has since continued stubbornly along on its own tracks although these have already been covered, taking

Koller, Csaba Varga & Ota Weinberger (Stuttgart: Steiner 1992), pp. 162–172 [ARSP Beiheft 54]; 'The Judicial Establishment of Facts and its Procedurality' in *Sprache, Performanz und Ontologie des Rechts* Festgabe für Kazimierz Opalek zum 75. Geburtstag, ed. Werner Krawietz & Jerzy Wróblewski (Berlin: Duncker & Humblot 1993), pp. 245–258; 'On Judicial Ascertainment of Facts' *Ratio Juris* 4 (1991) 1, pp. 61–71 and 'La nature de l'établissement judiciaire des faits' *Archives de Philosophie du Droit* 40 (Paris: Sirey 1996), pp. 396–409.

³ Csaba Varga, 'Judicial Reproduction of the Law in an Autopoietical System?' in *Technischer Imperativ und Legitimationskrise des Rechts* hrsg. Werner Krawietz, Antonio A. Martino & Kenneth I. Winston (Berlin: Duncker & Humblot 1991), pp. 305–313 [Rechtstheorie, Beiheft 11] as well as 'Kelsen's Theory of Law-application' *Acta Juridica Academiae Scientiarum Hungaricae*, 36 (1994) 1–2, pp. 3–27, as also included in the first edition's annex.

⁴ Csaba Varga, 'The Context of the Judicial Application of Norms' in *Prescriptive Formality and Normative Rationality in Modern Legal Systems* Festschrift for Robert S. Summers, ed. Werner Krawietz, Neil MacCormick & Georg Henrik von Wright (Berlin: Duncker & Humblot 1994), pp. 495–512, 'Law, Language and Logic: Expectations and Actual Limitations of Logic in Legal Reasoning' in *Verso un sistema esperto giuridico integrale* ed. C. Ciampi, F. Socci Natali & G. Taddei Elmi, I (Padova: Cedam 1995), pp. 665–679 and 'A bírói folyamat természetének kutatása' [Investigation into the nature of the judicial process] *Jogtudományi Közlöny* XLIX (1994) 11–12, pp. 459–464, as well as *Lectures on the Paradigms of Legal Thinking* [Hungarian ed. 1996] (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

⁵ Laurence Dumoulin in *Droit et Société* (1997), No. 35, pp. 225–228 (characterising the work as whose "ambition at a crossroads of legal philosophy, philosophy of science and linguistic philosophy is – even if not a theory of law completed – to lay at least its foundations in the footsteps of as glorious forerunners as HANS Kelsen, NIKLAS LUHMANN, GEORGE LUKÁCS, or JOHN RAWLS", p. 225) and Massimo Vogliotti in *Revue Interdisciplinaire d'Etudes Juridiques* (1997), No. 38, pp. 235–237 (evaluating it as a "fertilising interdisciplinary approach", p. 235); in

hardly any notice at all of the new developments.⁷ As also appears from a representative recollection of personal positions,⁸ our era is still dominated by a specific positivistic attitude in legal philosophising – in addition to the undoubtedly solidifying presence of both social-theoretical and sociological reconstructions as well as axiological approaches, sometimes inspired or coloured by the doctrine of natural law. Rule-positivism and the logical perspective inherent in it seem to be compelled to give up part of their earlier hegemony. What they are replaced by, however, either in the British–American type of linguistic or logical analysis (with a rather strong conceptual criticism) or in the European style of doctrinal study and reconstruction of the law (or, in so-called institutional theories linking these in one way or another), is, in the final analysis, nothing but a new type of positivism, that is, a *c o n c e p t u a l p o s i t i v i s m*,⁹ renewed in its position and partly also in methodology. True, the common feature of

addition to Eduardo Silva-Romero in *Archives de Philosophie du Droit* 47 (2003), pp. 491–496, reviewing my *Lectures...* [note 4].

⁶ E.g., Tecla Mazzarese ‘Cognition and Legal Decisions: Remarks on Bulygin’s View’ in *Cognition and Interpretation of Law* ed. Letizia Gianformaggio & Stanley L. Paulson (Torino: Giappichelli 1995), pp. 155–175 [Analisi e Diritto 18]; Miklós Szabó *A dogmatika előkérdéseiről* [Preliminaries to legal dogmatics] (Miskolc: Bíbor 1996), ch. X: »Tény-alap« [Factual basis], pp. 223–244 [Prudentia Iuris 6]; Massimo Vogliotti ‘La bande de Möbius: un modèle pour penser les rapports entre le fait et le droit’ *Revue Interdisciplinaire d’Études Juridiques* (1997), No. 38, pp. 103–172.

⁷ E.g., Christian Atias *Science des légistes – Savoir des juristes* (Aix-Marseille: Presses Universitaires d’Aix-Marseille 1991) 118 pp. – a celebrated author of, among others, *Épistémologie juridique* (Paris: Presses Universitaires de France 1985) 222 pp. [Collection Droit fondamental: Droit politique et théorique] – devotes nominally an entire chapter (pp. 31–82) to facts, without wasting indeed one single word for the underlying range of genuine problems.

⁸ *The Law in Philosophical Perspectives My Philosophy of Law*, ed. Luc J. Wintgens (Dordrecht, Boston, London: Kluwer 1999) xix + 272 pp. [Law and Philosophy Library 41], collecting nine leading legal philosophers’ creed of the contemporary world.

all such various present-day realisations is that they replace the old questions of “wherefrom” and “what” by the new ones of “in which direction”, “whereto” and “how”. Nevertheless, in doing so, they do not (yet) concentrate on human practice, which ensures the continuity of traditions and cultural regeneration through its constant renewals while responding to varying challenges, that is, on praxis, which has ever proven to be the safest and, as regards its explanatory capacity, perhaps also the most reliable, factor of social ontology. On the contrary, these realisations do regard it as indisputable and invariable, as a kind of something culturally given, to start out exclusively from within the bounds of such a conceptual positivism, focussing on the repetition of those merely semiotic and semantic signs and marks, pragmatic justifications and hermeneutical processes, that is, on the description (and thereby partial prognostication) of those recurrent chains of arguments that lead us to find and also to substantiate the response that may then be justified as inherent in the given culture as the exclusive right answer (or, for want of anything better, simply as one feasible answer): if not also inferred as a deductive conclusion but still practically justifiable with no alternative, strong enough to compete.

Only this can explain why legal logic (with the positivism of analytical legal theorising) is necessarily roused to attack, as its only chance, when confronted with today’s questions raised by the deepening study of reasoning and discourse, as well as semantics and hermeneutics in law, at a time when leg-

⁹ Now it is being called – as turned inside out – “legal socio-positivism”, in which “law embodies a kind of polycentrism by its »inter-normativity« that mediates – through its network of many actors – between law and the axiology of extra-legal (social, economic, ethical, etc.) norm-systems invokeable.” Csaba Varga ‘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) 1–2, pp. 21–44 at notes 70 and 73 {&<<http://www.akademiai.com/content/x39m7w4371341671/fulltext.pdf>> }.

al logic is no longer in a position to explain adequately the conclusions actually reached in law, after having abstracted or transcended them from its routinised answers (claiming that these conclusions are nothing but the fruit commonly created by additional realisations achieved through supplementary methods, that is, in fact mere accessories, contributing almost merely aesthetically to the overall result). For the questions raised in this confrontation are increasingly closer to eventually challenging the defensibility of the autonomous domain of, and role played by, legal logic, which has been an exclusively predominant and protected area so far. Thereby, such questions do have a potential that just threatens to undermine exactly this logical edifice, considered to be the utmost foundation for several centuries, and with it, also the myth that has since offered the legal profession both convenience and practical irresponsibility, as well as an apparently absolute and self-protecting indifference towards the underlying social processes and also towards the practical consequences of judicial decision making, elevated to the mystical heights of a de-personalised professionalism. This way, these questions degrade in fact the entire European juristic world-concept [*juristische Weltanschauung*, as ENGELS once termed this normativism] into a theoretically complementary – albeit ontologically active – background role. Or, legal logic provokes confrontation, unmasking the traditional concept of juridical normativism or legal positivism with an old-new face now becoming visible: a kind of archaic “realism”, nurturing rather absolutistic ambitions, which Kelsen had already definitely transcended and expressly denied as well as early as almost seventy years ago.¹⁰

(*Autopoiesis in Praxis*) Well, it may be this is the sole reason for the fact that although the reader of both my expositions and all the innovative attempts at a new philosophical and

¹⁰ Hans Kelsen *Reine Rechtslehre* Einleitung in die rechtswissenschaftliche Problematik (Leipzig & Wien: Deuticke 1934) xiv + 236 pp.

methodological reformulation may tend to accept individual elements of this way of thinking and the intellectual reconstruction implied by them (or, at least, find them somewhat familiar), as soon as these elements add up to a systemic conclusion forming a (counter)theory, he or she will be almost inevitably startled and perhaps even deterred from accepting the final result, which is nothing but the reliance of human practice on experience and continuity, on tradition with its uninterrupted re-conventionalisation, as the basic fact of any social-ontological foundation. This is because most contemporary jurists are still not ready to imagine any conceptualisable world order other than the evidence of something absolute, that is, other than the reassuring effect of a direct and straightforward external definition based on the alleged objectivity of facts and the logification of the very wording of the law, superseding any personal (professional, moral or social) responsibility, that is, an external definition that the positivistic idea of a world, compounded of “facts and norms”, has, no doubt, so far readily offered to the lawyer and the legal philosopher. In consequence and s e c o n d l y , only this may explain why the methodological idea of the *autopoiesis* of social existence (taken as a process and meant to serve as a socio-ontological description and at the same time as a partial explanation)¹¹ continues to be imperceptible and incomprehensible and, therefore, also utterly inconceivable for many. The reason for this is exactly that *autopoiesis*, describing the actual process of cognition and thereby also shaping our social existence as its exclusively available reconstruction, elevates what we usually regard as epistemological to an ontological status – representing social existence itself as a process. Therefore, and t h i r d l y , for the same reason and in the same respect, any position that would in the last analysis rely on – instead of any traditional reference borrowed from naive realism¹² through the symbolic use of the father-complex re-invented in the American

¹¹ Cf. with the titles in notes 3 and 4.

psychoanalytic approach to law¹³ – human praxis, on the feedback manifesting itself time and again in everyday practice and, within all this, on experience (i.e., tradition continuously being built through the repetitions of reflected human action and learning, thereby also contributing to its re-generation), may impress this imperturbable silent majority as constituting the outrage of elevating mere facts into the sphere of norms.

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(Formalism and Antiformalism in Kelsen-interpretation) At the third symposium on Kelsen held in Siena in May 1991, for instance, what one of the leading legal logicians of our time, EUGENIO BULYGIN, thought could be concluded from the message of the Kelsenian oeuvre in his keynote presentation, which amounted to just the following: legal facts are optional (and, therefore, from the beginning arbitrary) creatures of judicial authorities, produced as utterly artificial duplications of natural facts (in fact, superfluous and only designed to conceal the moment of intuition¹⁴ implied by the judicial procedure); in conclusion, in so far as the authoritative decision is final, it necessarily also implies in theory an official declaration of the infallibility of the judge, in order to alienate the law from its impersonal yet standardising definition by the official maker of the law.

So, BULYGIN strived to point out that “facts are what they are and not what judges and other officials say they are”.¹⁵ If one takes into consideration that the procedure aims at noth-

¹² Cf. Varga *Lectures...*[note 4], ch. 4, especially para. 4.2.2.

¹³ Jerome Frank *Law and the Modern Mind* [1930] (Garden City: Doubleday 1963) xxxv + 405 pp.

¹⁴ Cf., for the term's history, Charles M. Yablon 'Justifying the Judge's Hunch: An Essay on Discretion' *Hastings Law Journal* 41 (1989–1990) 2, pp. 231–279, especially on pp. 231–244.

ing but “a fact-finding procedure which consists of determining the truth of certain empirical (factual) sentences”,¹⁶ then one is forced to conclude that “[t]here is no legal murder besides the natural one.”¹⁷ The logician’s final conclusion could therefore be nothing but the following:

“A failure in the determination of truth – as long as it is exceptional – does not invalidate the decision of the judge, which is regarded as lawful and produces all its legal effects. This is the price that law is willing to pay for the sake of social security and peace, i.e., for being able to settle social conflicts within certain temporal limits. But if judges were to base their decisions as a rule on false statements of fact, the whole system of law would be perverted.”¹⁸

¹⁵ Eugenio Bulygin ‘Cognition and Interpretation of Law’ in *Cognition and Interpretation of Law* [note 6], pp. 12–35, especially at p. 22.

¹⁶ *Ibid.*, p. 21.

¹⁷ *Ibid.*, p. 20.

¹⁸ *Ibid.*, p. 22. – It is ironic to realise how doctrinarian such a view proves to be when it intends to formulate a universalistic stand from the heights of logic, even as compared to pragmatic positions usual in textbooks, like, e.g., “[t]o qualify is to establish a relation of belonging together between a factual situation and a certain type of situation designated in the hypothesis of a legal provision. However, it would be a mistake to suppose a transition between the concrete and the abstract here. Because if there was any, the entire operation would be logically impossible. In effect, the real-life situation, alleged to be concrete, is only qualified after having been reduced to a system of mental nets that is not a bit less conceptual – therefore not less abstract – than the hypothesis in the provision itself. [...] In order for the judgement enunciating the qualification to avoid the logical error of incongruity, the judgement has to establish an exact congruence between the conceptualisation of the subject – the real-life situation – and the related hypothesis in the rule – taken as a predicate. [...] In order for the two conceptual sets to be able to cover each other [...], it is necessary, just like in case of making alterations to a garment or carpet, to clip, once one of them, then again the other one.” „Qualifier c’est établir une relation d’appartenance entre la situation factuelle et un certain type de situation {*Tatbestandmerkmale*} désigné dans l’hypothèse de la règle de droit. Mais il serait erroné de croire qu’il s’agit d’un passage du concret à l’abstrait. S’il en était ainsi, l’opération serait logiquement impossible. En effet, la situation de vie, le prétendu concret, n’est qualifié qu’après avoir d’abord été réduit à un système de lignes qui

Well, it is easy to see that BULYGIN's understanding is based on a concept of truth and justice taken as exclusively absolute. It ignores both the relative autonomy of the game played throughout in the name of law and its system-dependent autotelism (conditioned by both the presence of positive law and its *hic et nunc* effective functioning in the given societal culture). Furthermore, his concept of fact is naturalistic-logical to a surprising extent, reflecting a kind of simplifying objectivism, characteristic of naive realism. It seems not to have taken notice of the bare fact that speaking about the 'judicial truth' of 'legal facts' is not a mere phraseology of self-concealing professionalism within the legal process but a very ontic (speech-act) component of the legal game. Moreover, the concept does not take into account the fact that, exactly because the game is controlled in principle by the overall game of law, i.e., standing jurisprudence, some "tendential unity" among the judicial and the other (above all epistemological and pragmatic) understandings of 'truth' – unavoidably referred to both in legal and everyday practice, indispensable for the practical reasonableness of these very games – has to be established and continuously preserved within the game itself. Or, otherwise speaking, this "tendential unity" cannot be postulated as the game's internal criterion and external definition at the same time. In other words, it would be no use to assume the correspondence of legal postulates with social demands and the actuality of such a correspondence as a merely theoretical criterion. Just to the contrary: actual operation is a *sine qua non* ontic component of social existence; therefore, a law can be viable and able to survive in the long run only

n'est pas moins conceptuel, et donc abstrait, que l'hypothèse de la règle. [...] Pour que le jugement énonçant la qualification régitte au vice logique d'incongruité, il faut qu'il établisse une exacte adéquation entre les concepts du sujet – la situation de vie – et ceux du prédicat – l'hypothèse de la règle pertinente. [...] Pour que les deux ensembles conceptuels puissent se fondre [...], il faut, comme lorsqu'on ajuste un vêtement ou une tapisserie, tirer tantôt d'un côté, tantôt de l'autre." François Rigaux *La loi des juges* (Paris: Odile Jacob 1997) 319 pp., quotation on p. 51.

when, by the effects it exerts, it corresponds by and large to the prevailing social motion, sanctioning and thereby symbolically re-ascertaining and legitimating it.

After all, it is paradoxical to see how a thinker like BULYGIN, who had survived the cruel rule of generals in Argentina, could remain so sensitive when confronted with the inhuman manifestations of their brutality and, at the same time, impoverished (albeit once exiled from the great famine's sovietised Ukraine), with no theoretical defence in face of another regime – namely, one upheld by mere lies, thoroughly fictive, therefore, withstanding any reasonable interpretation or genuine understanding in the exclusive terms of its own institutional and legal formalisations. At the time of my encounter with the Argentinean legal logicians,¹⁹ they were convinced that the “logic” of facts (as mediated by their true cognition), being unbiased and impregnably paramount, was in the last analysis stronger than any imaginable weapon of brutal force. Meanwhile I, having experienced Soviet-type socialism directly, was convinced of just the contrary. That is, when examining formal institutional systems, I thought that a perspective has to be found based on the concept that the law's self-definition, even if deceptive or mendacious in every respect, remains part of the necessary optionality (or discretion) within the boundaries of the internal game of the system. That is to say, in principle no formal self-definition can master and substitute for the sociological description (focussed on the truth of cognition as resulting in a theoretical-conceptual generalisation) of the actual structure and operation of a given system. More precisely – universalising the issue philosophically and concretising it politically at the same time – , my experience for several decades of the inherently deceptive nature of the institutional system of “actually exist-

¹⁹ My first conversation in depth on the topic with professors BULYGIN and CARLOS E. ALCHURRÓN took place at Turku in Finland in 1983. Cf. Csaba Varga *Útkeresés Kísérletek – kéziratban* [The search for a path: early unpublished essays] (Budapest: Szent István Társulat 2001), pp. 151–152 [Jogfilozófiák].

ing” socialism, along with the so-called socialist law it had erected has inspired me to work out an ontological approach, while treating and integrating the epistemological perspective as part of, and within the overall ontic of, social existence. This approach gave rise to an aspiration (which I actually pursued later on for decades) to search for the chances and limits of “tendential unity” (taken as the minimum of correspondence between Is and Ought) in the relative totalities of complexes and processes actually operating in social existence, thereby granting our preoccupations with the real world a genuine personal touch, human significance and at least moral responsibility.²⁰

Consequently, it is not by mere chance that the majority of those taking part in the said debate saw – in addition to having understood the positions elaborated by Kelsen as a presentation with at the most metaphorical value and meaning²¹ – the specific constitutive force of the judicial establishment of facts only in the concealment of some eventually inevitably ensuing transformative intellectual jump (i.e., the break of the logicised sequences of deduction and their replacement by a volitional – purely discretionary – decision),²²

²⁰ Cf. Csaba Varga – expressly denying even the legal quality of socialist law in terms of ontological criteria, due to its rejecting any genuine mediation – ‘Liberty, Equality, and the Conceptual Minimum of Legal Mediation’ in *Enlightenment, Rights and Revolution* Essays in Legal and Social Philosophy, ed. Neil MacCormick & Zenon Bankowski (Aberdeen: Aberdeen University Press 1989), ch. 11, pp. 229–251 {reprinted in *Marxian Legal Theory* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1993), pp. 501–523 [International Library of Essays in Law & Legal Theory, Schools 9]} – and, in philosophical foundation – Csaba Varga *The Place of Law in Lukács’ World Concept* (Budapest: Akadémiai Kiadó 1985; [reprint] 1998) 193 pp.

²¹ Bruno Celano ‘Judicial Decision and Truth: Some Remarks’ in *Cognition and Interpretation of Law* [note 6], pp. 141–153, especially at p. 144.

²² “The conferral of normative meaning »transforms« and translates into a juridical fact that which had previously been expressed in the language of *kausale Deutung*.” Lucia Triolo ‘Normative Interpretation and the Doctrine of the Ascer-

and recognised any limitation only in that they could not regard any longer the official decision as an “epistemological unit” (to be exclusively characterised by either truth or falsity) in the manner of a cognitive statement.²³

All in all, eventually one minor additional (and peripheral) statement found a forum in which to formulate a somewhat independent and critical attitude. According to it,

“[i]ndeed, many phenomena which count (or, precisely, are labelled) as facts in the assessment of a *quaestio facti* neither are nor can be convincingly reduced to empirical data.”²⁴

That is, all expressions of intentions, value-laden notions and empirical findings [*Erfahrungssätze, massime d’esperienza*], all relations we may establish in an inductive way,²⁵ and also even institutional performatives, are axiologically defined. For these, only a “*sensu stricto* justification” is available, and the exclusive feasibility of justification instead of verification can only mean that reasons sufficient in the given cultural and normative context were found for them.²⁶

tainment of Fact: Reflections on Kelsen’s View’ in *Cognition and Interpretation of Law* [note 6], pp. 177–201, especially at p. 187.

²³ Francesco Viola ‘Judicial Truth: The Conception of Truth in Judicial Decision’ in *Cognition and Interpretation of Law* [note 6], pp. 203–216, especially at p. 203.

²⁴ Mazzarese ‘Cognition and Legal Decisions’ [note 6], p. 162.

²⁵ “[W]hen, in order to establish a fact by way of induction from another fact, the judge uses general notions of common sense, which are or may be stated in evaluative terms.” Michele Taruffo ‘Value Judgments in the Judgment of Fact’ *Archivum Iuridicum Cracoviense* 18 (1985), pp. 45–57, especially at p. 47.

²⁶ Jerzy Wróblewski ‘Verification and Justification in Legal Sciences’ in *Argumentation und Hermeneutik in der Jurisprudenz* hrsg. Werner Krawietz, Kazimierz Opalek, Aleksander Peczenik & Alexander Schramm (Berlin: Duncker & Humblot 1979), pp. 195–213, especially at p. 200, quoted also by Mazzarese ‘Cognition and Legal Decisions’ [note 6], p. 166. It is worth considering the Argen-

Let me give an example of the two extreme poles to try to indicate the lack of willingness to renew attitudes that was quite evident at the mentioned symposium. Well, BULYGIN, in his pursuit for clarity in his conceptual reconstruction, simply asserted:

“[w]hether a law is constitutional does not depend upon what the Constitutional Court might say, and a law which was not issued by a competent authority remains unconstitutional even if the Court says the opposite. But it is the Constitutional Court’s pronouncement which determines the applicability of a law. If (wrongly) the Court says that the law is constitutional, then the law is applicable, notwithstanding the fact that it is not valid in the system.”²⁷

As to the other pole, the aforementioned author, who had declared adherence (as against the prevailing mainstream tendency) to the constructed nature of facts, might have felt compelled to apologise when he ventured to take another stand, as follows:

“Contrary to such rationalist prejudice, as it were, it is worth emphasizing that arguments contrasting the widespread and often acritical use of traditional epistemological concepts and/or logical tools in legal practice do not necessarily amount to giving up any demand for rational control over what legal officials do. To be sure, rational control, in order to be effective, has to be aware of the difficulties faced: however, to ignore or to disregard their real import does not help to solve them.”²⁸

tinean logician’s tautologism in sharp contrast with the sensitive view exposed above, when he states: “A judicial decision is justifiable according to the law if it follows logically from legal norms and the description of the case.” Bulygin ‘Cognition and Interpretation of Law’ [note 15], p. 25.

²⁷ Eugenio Bulygin ‘Algunas consideraciones acerca de los sistema jurídicos’ *Doxa* [Alicante] 9 (1991), pp. 257–279, especially at p. 267.

²⁸ Mazzaresse ‘Cognition and Legal Decisions’ [note 6], p. 165, note 28.

Everything considered, it seems as if we have leaped more than one and a half centuries back – that is, back to the era before the free-law movement (confronting pressing timely interests with the historical wording of the law) had been launched in the 1860s – , when the masters of so-called judicial exegesis – basing their thoughts upon the French *Code civil* (freshly promulgated in 1804) without bothering about and forecasting the eventuality of a creative jurisprudence – could dream about the permanence of the law’s actual practice as coagulated and rigidified by codified law and about the availability (through the ideal of a mechanical jurisprudence) of a transparent, stable and controllable order afforded by the solely codificational, positive definition of the law.

(*On Facts*) Now, let us examine again: what is a f a c t ? Well, the two-century-old classical creed of philosophical and scientific positivism – as its founding father once expressed it: “only facts need to be considered, since they do not depend on who is observing them”²⁹ – continues to live its own life with imperturbable obstinacy (sometimes perhaps in the form of various reminiscences but invariably ignoring the artificially constructive, generative role of both theoretical and everyday cognition, inevitably both embedded and rooted in actual human practice).³⁰ Furthermore, even an attempt to re-

²⁹ August Comte *Cours de philosophie positive* I–VI [1830–1842], I (Paris: Vrin 1974), p. 31.

³⁰ E.g., “We do not ‘have’ an observation (as we may ‘have’ a sense-experience) but we ‘make’ an observation.” Karl R. Popper *Objective Knowledge An Evolutionary Approach* (Oxford: Clarendon Press 1972) x + 380 pp. at p. 342. – “[I]t is impossible to know the whole truth about anything. [...] Knowledge is produced in particular chosen contexts.” John Jackson ‘The Concept of Fact’ in *The Jurisprudence of Orthodoxy* Queen’s University Essays on H. L. A. Hart, ed. Philip Laith & Peter Ingram (London: Routledge 1988), pp. 61–84, quotation on p. 74. – “The empiricist has a let-the-facts-speak-for-themselves attitude. [...] Remember, a scientific theory is never a slavish imitation of certain features of reality, a dead, passive replica. It is essentially a c o n s t r u c t i o n which to a degree reflects our own activity.” Friedrich Waismann ‘Verifiability’ in *Essays on Logic and Language* ed.

construct the law's practical working, considered pioneering by its critics, ended in declaring that the conclusion of his investigations was:

"Facts, then, are never evident in themselves. They never thrust themselves upon the jurist ready to receive the application of a legal rule. They need first to be 'formatted' in such a way that they become compatible with the discourse of law. This formatting is achieved via a system of institutions which, so to speak, have an existence at one and the same time in reality and in law. This is the starting point of the formatting process."³¹

Accordingly, he seemed to be suggesting that we have to understand facts as something given from the outset, as are the things and events in our material world. Actually, only when acting as jurists, we have to do something more as well with these, namely to transcribe them into the law, in the language of law.

Similarly, a Hungarian monographic elaboration gave – perhaps guided by the intention to discern the fact as something “constructed” from the thing “given in itself” – cause for simplification (or, at least, misunderstanding) in one more aspect. For its author held that

“the difference between the thing »as it is« and the fact »as we establish it« undoubtedly results from human participation. [...] In addition to the thing itself, the fact includes also the s e n s e of this thing or the sense a t t r i b u t e d to it. [...] [Because] the »existence« of a thing is, in itself, not enough for the thing to become a fact [...]. For if interpretation is nothing but the transcription of a text, then the es-

Antony Flew (Oxford: Blackwell 1951), pp. 117–144, quotation on pp. 141 and 142. Similarly, see also Claudio Pizzi ‘Oggettività e relativismo nella costruzione del fatto: riflessioni logico-filosofiche’ in *La conoscenza del fatto nel processo penale* ed. G. Ubertis (Milano: Giuffrè 1992), pp. 195–214.

³¹ Geoffrey Samuel *The Foundations of Legal Reasoning* ([Maastricht: METRO] 1994) 346 pp. [Ius Commune], pp. 212–213.

tablishment of facts is necessarily the transcription of the past in the present – from the aspect of the future.”³²

Although this position does not expressly state a parallelism between things and facts, it suggests it throughout the entire context notwithstanding; that is, their respective conceptual volumes are equivalent: facts are nothing but things to which we have attributed human meaning. More precisely, it presumes that a given fact will arise out of a given thing as a result of human contribution and, likewise, a second fact out of a second thing and a third fact out of a third thing, and so on. Or, the notional *e x t e n t s* of what we conceptualise either as a thing or as a fact do coincide with one another. It is only the conceptual *c o n t e n t* of what we construe out of a thing as a fact that gets enriched when we claim *t h i n g s* $A(t), B(t), C(t) \dots X(t)$ to be *f a c t s* $A(f), B(f), C(f) \dots X(f)$. For, in the course of their mental processing, things will gain, from a mute existence in and by themselves [*Ding an sich*], an existence for us [a kind of *Ding für sich*], by having human meaning added and attributed to them. Or, in contrast to the foregoing,³³ I was just trying to prove throughout my

³² Szabó *A dogmatika...* [note 6], pp. 229, 231 and 237.

³³ Szabó *ibidem*. also cites a further idea. According to it, “The event is what makes the break in order for there to be something intelligible; the fact is what fills up in order for there to be a statement of meaning.” Patrick Nerhot *Law, Writing, Meaning* An Essay in Legal Hermeneutics, trans. Ian Fraser (Edinburgh: Edinburgh University Press 1992) 198 pp. [Edinburgh Law & Society Series] at p. 39. – In an undeniably witty, even if not too productive attempt, SZABÓ tries to deduce the legal reconstruction of the past from its historiographic reconstruction through merging the time planes of past, present, and future. This approach is strikingly new in several respects. Even for me, its biggest shortcoming seems to lie in just what it conceals, because that which is apparently nothing but an epistemological issue of hermeneutics proves to be an ontological conclusion as to its exclusive social existence – only provided that we also prove that there is no other or more directly graspable social reality than the one we artificially construct and incessantly further shape for ourselves, through the continuous re-conventionalisation of traditions. And in this totality, the triad of past, present and future is no longer just a mere potentiality but (as the only chance, and taken also as a cri-

work the moment of human selection from the cosmos of total (cor)relation and interdependence as a definition that may, although artificial, yet be one of the core elements of human practice, born out of humanly reflected human interests, material or intellectual, as rooted in actual praxis.³⁴ Accordingly, the configuration of things or events established as facts selects out – as guided by practical interests embedded in the given paradigmatic culture – aspects and correlations chosen and designated exactly in view of the fulfilment of such interests, out of the in-itself undifferentiated whole (as out of a cosmos, immense in depth), by separating and arranging (or, in up-to-day terminology, re-constructing) them in given sets.

Well, without going further, let me refer to the apparently unpretentious, almost simplistic statement, according to which the ‘facts’ are, in the final analysis, nothing but intellectual constructions.³⁵

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terion) the expression in time planes of what human practice is directed at.

³⁴ A terminological uncertainty prevails in everyday legal life the fact notwithstanding that the depth of the dilemmas involved is also actually perceived. According to the French decision in *Cass.* (2^e chambre), 20 décembre 1976, *Pas.*, 1977, I, 445, “the accused, if acquitted by this judge, can no longer be tried for the same fact, even under a different description”, from which François Rigaux – ‘The Concept of Fact in Legal Science’ in *Law, Interpretation and Reality* Essays in Epistemology, Hermeneutics and Jurisprudence, ed. Patrick Nerhot (Dordrecht, Boston, London: Kluwer 1990), pp. 38–49 [Law and Philosophy Library 11] – concludes both that “to the seemingly indivisible unity of the fact there is opposed a plurality of descriptions” (p. 45) and that, at the same time, the fact in law “is inseparable from the single legal description that necessarily belongs with it.” (p. 46)

³⁵ Lon L. Fuller *Legal Fictions* (Stanford, Ca.: Stanford University Press 1967) xiii + 142 pp. on p. 134.

(*Fact and Law*) Nevertheless, facts as such do not manifest themselves in law just as they are or are claimed to be. One of my reviewers summarises this in sharpened terms.

“The criteria of *r e l e v a n c y* constitute, therefore, the filter that allows anything outside the law to enter its own territory. This way, there is no place for ‘descriptive facts’ or, more precisely, ‘existential statements’ in procedure. For the procedure is not a mirror reflecting approaches, but a linguistic game metabolising the signs introduced. Consequently, it is the language of the law that produces its own reality through the duality of its speech acts, in compliance with the practical purposes pursued in law.”³⁶

In its turn, all this raises again the duality of the question of *f a c t* and question of *l a w*. In a first approach, an amazingly original statement reads as follows:

“although every piece of legal discourse wants some facts to be »brute«, the very brutality of these facts turns out, on detailed scrutiny, to be instituted by legal discourse and its narrative”.³⁷

Accordingly, this paradoxical expression implies, firstly, that the circle of brute facts becomes extremely narrowed down with the expanded progress of socialisation and, secondly (though not yet realised in my earlier explications), that those so called brute facts may have perhaps never even existed: it is only the advance of institutionalisation that hypostatizes them out of a purely analytical interest, as a counterpoint to any progress of institutionalisation. Anyhow, we have to conclude from this a newer paradox, in terms of which, after all, “[i]t is not »institutional facts« which are problematic, but »brute

³⁶ Vogliotti ‘La bande de Möbius’ [note 5], p. 236.

³⁷ Bert van Roermund ‘The Instituting of Brute Facts’ *International Journal for the Semiotics of Law* IV (1991), No. 12, pp. 279–308, especially at p. 279.

facts». ”³⁸ For facts and norms, practical considerations and evaluations intertwine with planes penetrating and twisting into each other as in a MÖBIUS-strip,³⁹ with the further consequence that the final determination of which is actually which after all in this complex, and what any of these is indeed at all, depends eventually on “the fiction I surround it with”.⁴⁰

Going further in surveying present-day mainstream theorising, there are authors who identify the motives of a decision (inevitably already inherent in the very act of selecting and formulating its premises) in a methodological way, declaring that the judge considers every chance openly and only complements the merits of his final decision with his own findings of facts and law *a posteriori*, as a merely accessory logical confirmation, and not *vice versa*. Accordingly,

“the selection of the premises assumes a debate in every case, within which no premise is accepted without the simultaneous assessment of the opposite premise – and the conclu-

³⁸ Neil MacCormick in Neil MacCormick & Ota Weinberger *An Institutional Theory of Law* New Approach to Legal Positivism (Dordrecht, etc.: Kluwer 1986) [Law and Philosophy Library 3], p. 102.

³⁹ E.g., Vogliotti ‘La bande de Möbius’ [note 6], *passim*. [“MÖBIUS band: The one-sided surface with a single edge that is obtained by giving a strip of paper one twist and gluing the ends together. It is of interest in topology as being the simplest way of constructing topological spaces that have unfamiliar or unexpected properties (e.g. a cut round the band does not separate it into two pieces).” Robin Gandy in *The Fontana Dictionary of Modern Thought* ed. Alan Bullock & Oliver Stallybrass (London: Fontana & Collins 1977), p. 393.]

⁴⁰ “nach der Erdichtung mit der ich es umgebe” in Ludwig Wittgenstein *Philosophical Investigations* [trans. G. E. M. Anscombe] (Oxford: Blackwell 1972), p. 210. For a systemic exposition of the mutual qualification and relational self-definition of roles and positions, moreover, also of apparently logical categories in law, cf. Csaba Varga ‘Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context’ in *La structure des systèmes juridiques* [Collection des rapports, XVI^e Congrès de l’Académie internationale de droit comparé, Brisbane 2002] dir. Olivier Moréteau & Jacques Vanderlinden (Bruxelles: Bruylant 2003), pp. 291–300.

sion is only reached after its opposite was also pondered and the choice between the two feasible reasonings was made.”⁴¹

Strictly interpreted, this implies hardly more than what we have established – as two equally conceivable reconstructions of the same process actually taking place – to be the difference between the logic of *d e c i s i o n* and the logic of *j u s t i f i c a t i o n*: the *a c t u a l i t y* of problem-solving with conflict-resolution, on the one hand, onto which an *i n f e r e n c e* (or conclusion) dictated by the requirements of practice at any time as justified by the prevailing logifying forms is built, on the other, in order to render the latter’s inclusion in the system (i.e., its declaration to be the sole decision available in the law) feasible as well and thereby finalised in the process in question. Yet, true, this realisation says more, compared to what I earlier suggested, in so far as it also demonstrates this duality analytically, as bound to relatively separable forms (or successive phases or stages) of activity.

And this seems indeed to explain the ambition decades ago to offer a logic of *c h o i c e* as a genuine *l e g a l l o g i c*,⁴² for – according to the classical tradition of rhetoric – it may be traced back to the one-time doctrine of *ordo iudiciarius* of YVES DE CHARTRES, in which fact was from the very beginning integrated in legal hermeneutics, that is, in the argumentation prevailing in the given community within the overall process of persuasion.⁴³

⁴¹ J[ean]-L[uc] Bergel *Théorie générale du droit* 2^e éd. (Paris: Dalloz 1989) 342 pp. [Méthodes du Droit], p. 272.

⁴² Gidon Gottlieb *The Logic of Choice* An Investigation of the Concepts of Rule and Rationality (London: Allen & Unwin 1968) 188 pp., which stops – as Jerzy Wróblewski notices it critically in his ‘Comments’ *Logique et Analyse* XIII (1970), No. 51, p. 382 – at outlining the doctrine of normative interpretation of the so-called principled choice.

⁴³ Alessandro Giuliani ‘Le rôle du »fait« dans la controverse (à propos du binôme »rhétorique–procédure judiciaire«’ *Archives de Philosophie du Droit* 39 (Paris: Sirey 1995), pp. 229–237.

Or, as is well known, the jurists of Rome were already thinking in terms of words of the law exclusively as imbued with the reason and purposefulness of – to be sensitively detected out of and also implemented from – the same law.⁴⁴

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(Inseparability within the Prevailing Totality) Facts in law? Law in the fact? Everything in everything, as relative sets of one given unity?

Their i n s e p a r a b i l i t y is by now accepted as a nearly trivial truth,⁴⁵ which is also to state that

“the inclusion or exclusion of certain facts on the basis of their relevancy or irrelevancy may lead to the application of different rules of law or to different interpretations of the same rules. Conversely, different rules of law may lead to different classifications of the facts as being relevant or irrelevant.”⁴⁶

⁴⁴ “*Scire leges non hoc est, verba earum tenere, sed vim ac potestatem.*” Celsus in *D.* 1, 3, 17.

⁴⁵ Of course, only in academic writings dedicated to the topic exclusively. Mainstream literature is so much split in two, specialising in either norms or facts, that the factual side is mostly ignored by both standard British–American textbooks – e.g., *The Blackwell Guide to the Philosophy of Law and Legal Theory* ed. Martin P. Golding & William A. Edmundson (Oxford: Blackwell 2005) ix + 355 pp. [Blackwell Philosophy Guides], *A Companion to Philosophy of Law and Legal Theory* ed. Dennis Patterson (Oxford: Blackwell 1996) xii + 602 pp. [Blackwell Companions to Philosophy] and *Philosophy of Law and Legal Theory* An Anthology, ed. Dennis Patterson (Oxford: Blackwell 2003) viii + 424 pp. – and continental syntheses of the present stand of scholarship – e.g., Giovanni Sartor *Legal Reasoning* A Cognitive Approach to the Law (Dordrecht, etc.: Springer 2005) xxvi + 844 pp. [A Treatise of Legal Philosophy and General Jurisprudence, volume 5] – equally.

⁴⁶ Julius C. Cueto-Raz *Judicial Methods of Interpretation of the Law* (Louisiana State University Paul M. Hebert Law Center 1981) xix + 508 pp., quotation on p. 32.

Or, speaking in terms of language use,

“When the anomalous case appears, its inclusion or its exclusion under the scope of reference of the word under consideration is not determined by the linguistic uses in force. Whether it is included or excluded is a matter controlled by considerations of a different nature.”⁴⁷

The following can be read in a recent British judicial decision as applied to the English doctrine of precedent:⁴⁸

“what constitutes binding precedent is the *ratio decidendi* of a case, and this is almost always to be ascertained by an analysis of the material facts of the case – that is, generally, those facts which the tribunal whose decision is in question itself holds, expressly or implicitly, to be material”.⁴⁹

⁴⁷ Genaro Rubén Carrio *Algunas palabras sobre las palabras de la ley* (Buenos Aires: Abeledo-Perrot 1971) 93 pp. on p. 23. – It is to be noted that clichés are used to start producing further clichés. Thus, for instance, we are informed from Oxford that “what makes a case an instance of a rule is an interpretation conferred upon the rule through the act of judgment.” Martin Stone ‘Focusing the Law: What Legal Interpretation is Not’ in *Law and Interpretation Essays in Legal Philosophy*, ed. Andrei Marmor (Oxford: Clarendon Press 1995), pp. 31–96, quotation on p. 64. Or – as the editor also discloses his personal view – “Interpretation is required only when the formulation of the rule leaves doubts as to its applicability in a given set of circumstances”. Andrei Marmor ‘No Easy Cases?’ *Canadian Journal of Law and Jurisprudence* III (July 1990) 2, pp. 61–79, quotation on p. 79. Actually, by such a simplification he arrives at a conclusion which is just the opposite of his intention, notably, to deny “simple” cases; for the practical lack of doubt arises from the fact of decision making having become routinised and not from the inherent properties of a rule.

⁴⁸ Which is thoroughly casual from the very beginning in that “It is a form of argument by analogy which does not commit the arguer to a position beyond what is needed for the case at hand.” William Twining ‘Narrative and Generalizations in Argumentation about Questions of Fact’ *South Texas Law Review* 40 (1999) 2, pp. 351–365 at p. 365.

⁴⁹ Lord Simon in *FA & AB Ltd. v. Lupton* [1972] A.C. 634, 658. Cf. Samuel *The Foundations...* [note 31], pp. 140–144.

At the same time, as formulated in theory with a logical rigour (which also casts light on why, until the reception of the analytical approach to law as decidedly launched by H. L. A. HART in the United Kingdom,⁵⁰ logic and the very idea of “application” were certainly topics alien to law),

“[i]n the logician’s sense, however, it is possible to draw as many general propositions from a given decision as there are possible combinations of distinguishable facts in it. By working at the facts it is impossible l o g i c a l l y to say which are to be taken as the basis of *ratio decidendi*.”⁵¹

All things considered, it will yield hardly different results if, as we consider the matter from the opposite aspect, it is established that

“the rule can be abstract and general only because the facts it is intended to regulate can be reduced to a common type”.⁵²

All this is to explain why, properly speaking, there are no concepts but only narrative signs and nominal marks in English law. Statutory instruments, too, exist mostly to describe and point or refer to, without, however, providing a conceptual net or systemic framework for classification or logical inference. Even compilations can offer a substitute for order and transparency through indexes of the words used exclusively. Otherwise expressed, legal concepts are not the fruits of the law but

⁵⁰ Cf. Csaba Varga ‘The Hart-phenomenon’ *Archiv für Rechts- und Sozialphilosophie* 91 (2005) 1, pp. 83–95.

⁵¹ Julius Stone *The Province and Function of Law* Law as Logic, Justice and Social Control: A Study in Jurisprudence (Sydney: Associated General Publications Pty Ltd 1950) lxi + 918 pp. at p. 187.

⁵² Patrick Nerhot ‘The Law and its Reality’ in *Law, Interpretation and Reality* [note 31], pp. 50–69, quotation on p. 56.

products of English legal scholarship, in a rather floating co-relationship with the normative sources of English law.⁵³

The recognition of *c o m p l e x i t y* and final *u n i t y* will, as a result of epistemological clarification, inevitably re-assert the totality approach – if not otherwise than as the (re)discovery of the moment of structure, taken as a component of the prevailing totality.⁵⁴ Or, as scientific methodology suggests,

“[i]t would be false to believe that in every domain the epistemological attitudes are to be reduced to an alternative: either the recognition of totalities with their structural laws or an atomistic composition of elements [...]. Now, beyond the atomistic group schemes and those of emergent totalities, a third position exists, which is that of operative structuralisms: this is where, from the beginning, a relational attitude is adopted according to which what counts is neither the element nor a whole imposing itself as such [...] but the relations between the elements, in other words the procedures and composition processes (according to whether one is talking of intentional operations or objective realities), the whole being only the resultant of these relations or compositions whose laws are those of the system.”⁵⁵

Despite its in-depth scientific backing, this ontological summation of so-called philosophical structuralism is just a more recent – imperfect as well as simplifying – anticipation of the *t o t a l i t y* approach elaborated by GEORGE LUKÁCS, as adap-

⁵³ Cf. Csaba Varga ‘Rule and/or Norm, or the Conceptualisability and Logifiability of Law’ in *Effizienz von e-Lösungen in Staat und Gesellschaft* Aktuelle Fragen der Rechtsinformatik (Tagungsband der 8. Internationalen Rechtsinformatik Symposions, IRIS 2005) hrsg. Erich Schweighofer & Doris Liebwald & Silvia Angeneder & Thomas Menzel (Stuttgart, München, Hannover, Berlin, Weimar, Dresden: Richard Boorberg Verlag 2005), pp. 58–65.

⁵⁴ E.g., Samuel *The Foundations...* [note 31], p. 154.

⁵⁵ Jean Piaget *Le structuralisme* 9^e éd. [*Structuralism* trans. C. Maschler (London & New York 1971)] (Paris: Presses Universitaires de France 1987) 127 pp. [Que sais-je? 1311] at pp. 9–10. Cf. also his *L’épistémologie génétique* 4^e éd. [*The Principles of Genetic Epistemology* trans. W. Mays (London 1972)] (Paris: Presses Universitaires de France 1988) 126 pp. [Que sais-je? 1399].

ted from HEGEL and posthumously internationally accepted. As a matter of fact, in the case of LUKÁCS (and his polemical relationship to – as built by his consciously construed misunderstandings in order to isolate himself from – HEIDEGGER, HUSSERL and other contemporaries) it is clear that, according to a modern ontological formulation, it is only totalities (relative to and mutually reinforcing each other in interaction) that we may encounter, and it is only through their (“internal” and “external”) motions that both their (more) elementary components and the laws of their mutual interactions are to be revealed. This way, dynamic, active parts become visible, in which they all are incessantly being formed, and from which it will also appear what is being shaped into what and how. Therefore, if we say a bit sarcastically that “everything influences everything, and vice versa, too”,⁵⁶ we are far from exaggerating, but leave exactly the essential point unmentioned. That is, we can hardly say anything more or else but we have, after all, to realise that the dramatic import of our human existence is exactly defined by the fact that, all in all, we cannot but derive the individual “components” of the natural and human being and their specific “motion” from one and the same uninterrupted and indivisibly intertwined total motion.

Finally, as far as the objectivity and consequence of the facts established by the judicial decision that was eventually taken are concerned, the criteria probably point far beyond the formalisability of what can be conceptualised at all. For what can be grasped at all from them for purposes of cognitive reconstructive reason follows not so much from the official norm-statements of positive law but – even if seldom formally declared as such – from their becoming hermeneutically *e m b e d d e d* back into our everyday practice. Hence, it can be concluded from what usually emerges (recurrently and prevailingly, i.e., paradigmatically) as a whole from all of

⁵⁶ This deliberate exaggeration with a caricatured simplification is done by Dumoulin [note 5], p. 227.

this in our everyday practice, even in case of their most principled processing. Let us illustrate this by one statement:

“In a free evidentiary system as generally accepted today, everything suitable for the official establishment of those facts that constitute a case in law through the shaping of judicial conviction can be used as a proof. Hence, nothing presents itself as an unambiguous point of reference regarding this process of weighing and pondering [...]. The evidentiary instruments may be suitable for establishing those facts either by themselves (upon the basis of their narrative credibility or realistic features or probability) or as compared to one another (upon the basis of their coherence or incoherence).”⁵⁷

Hence, we can say either this or that way, or, eventually, quite another way. For society with its own law first ties the social actors' hands in the name of discipline, rationalisation, foreseeability and impersonality – in brief, of normative controllability –, so that they can measure and select at all. Then, assessing the historical accumulation of such acts of measuring and selection, it will tacitly assume that, properly speaking, it may have hardly promised any definition of criteria for those

⁵⁷ Szabó *A dogmatika...* [note 6], pp. 240–241. And the questions involved are not even ones of degree in case of which any definite response without assuming responsibility for a personal decision is logically excluded from the outset. Or, “characteristic of the matter of degree is that it is recognized that it can be »correctly decided either way«.” William Wilson ‘Fact and Law’ in *Law, Interpretation and Reality* [note 31], pp. 11–21, especially at p. 21. – An English judicial decision is quoted to reason in the following way: “Lord DIPLOCK [...] referred to cases where the dividing line might be a very narrow one. There are many cases where the dividing line is pretty well EUCLID’s line, having no thickness of any description at all, and one might easily come down just either side of the line.” Justice Watton in *Bird v. Martland* (1982) S.T.C. 603 at p. 608. – It is to be noted that contemporary semiotics replaces from the outset the very notion of “correspondence” (of facts to norms) by “narrative coherence” – Bernard S. Jackson *Law, Fact and Narrative Coherence* (Merseyside: Deborah Charles 1988) x + 214 pp. [Legal Semiotics Monographs 1] – or “isomorphies” – Geoffrey Samuel *Epistemology and Method in Law* (Aldershot: Ashgate 2003) xxvi + 384 pp. [Applied Legal Philosophy], ch. 5 – between the imageries constructed upon both facts and norms.

acts of measuring and selection at all. All it can provide for is the continuity of practice, which can at most be influenced and actually shaped by the finite instruments of repeated control through cross-references, that is, above all, by the appeal(s) made available (until the finalising stamp of legal force [*res iudicata*] is rendered), i.e., a practice continuous indeed in certain directions at given times.

*

(*Answers in Deconstructionism*) Paradoxically enough, there is only one single essay I have encountered that attempts to intellectually (re)construct the realm of facts and law within one theory, namely one from the domain of so-called critical legal studies, starting out from the phenomenological analysis of the (in MARX's sense) ideology-laden effects of alienation and false consciousness.⁵⁸

Some of its staggeringly severe statements, however, reveal kindred realisations.

“An individual's concrete experience is recognized in the legal discourse of a modern state at the cost of the concealment of the experience itself. The legal discourse belongs to the knower of a very special vocabulary and grammar, and juridical agents isolate special terms from this vocabulary. In this way, the indigenously experienced harm of a non-knower is re-presented by signs which only the knower can claim to know. It helps that the knower belongs to a profession which carefully controls who can claim to know the legal signs. [...] The sign which represents the winning doctrine of ‘fact’ becomes »magical« in such a network, although the sign may have little signification for the non-knower since the web of special signs is usually configured

⁵⁸ William A. Conklin *The Phenomenology of Modern Legal Discourse* The Judicial Production and the Disclosure of Suffering (Aldershot, etc.: Ashgate 1998) xii + 285 pp., preceded, as a case study, by his ‘Human Rights, Language and Law: A Survey of Semiotics and Phenomenology’ *Ottawa Law Review* 27 (1995–1996) 1, pp. 129–173.

in a manner which denies the knower's active role in constructing a cognitive object."⁵⁹

Or, in brief, there is a dominant ideology that endows law with "a life of its own like an overbearing machine". And this affects all the players of the overall social game in order to cause them to be socialised within a framework, in which "[c]ontemporary legal discourse [...] is permeated with the belief that juristic agents are constrained by posited facts and posited texts."⁶⁰ Meanwhile, we are aware of the fact that law is the outcome of social conditioning, projected onto the outward world as a reified power.⁶¹ For

"[t]he objectivity of »the facts and circumstances of the case« breaks down because of the professional knower constructs, during his or her interpretation, a metaphysical order which hides his or her own experiences. This metaphysical order, which also conceals the non-knower's meanings, cannot explain the interpretative act of the professional knower. As does the non-knower, the interpreter intends a

⁵⁹ *Ibid.*, p. 27.

⁶⁰ *Ibid.*, pp. 44 and 125.

⁶¹ "No constitution, no legislature, no founding fathers found a particular legal order. Professional training assimilates the future lawyer into tacitly accepted norms, standards, evidentiary criteria and assumptions which the lawyer takes as natural and universal. Shared experiences reinforce what is a good legal argument, what is compelling and who is a reasonable person. [...] The lawyer interprets a text from the assumptions, needs and purposes of the genre within which a lawyer acts." Nevertheless, law is usually portrayed in both education and literature as DESCARTES once did, contrasting soul and body symbolically: "out there, posited, objective, practical, the »is« of the legal order, beyond the control of the agent." *Ibid.*, pp. 51–52 and 123. – It is to be noted that the formation of scientific positivism in the early 19th century coincided in time with the age of so called juridical exegesis in legal practice (as a dominant method of judicial interpretation), giving also rise to legal positivism (as a theoretical approach to law). Cf. Csaba Varga, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp., in particular ch. V, para. 5 and *Lectures...* [note 4], especially para. 4. 2.

meant object. What the knower takes as objective and independent of the knower's experience is really what HUSSERL calls an objective correlate of the knower's meaning conferring act."⁶²

*

At this point, we may reflect in our case as well: where did new thoughts actually originated from and at which point?⁶³ As we are presumably bound to return to our earlier starting points again and again, we may as well even now immediately re-start our reflections in the hope of being able to find further inter-connections.

⁶² Conklin *The Phenomenology...* [note 58], p. 131. Later he adds: "Legal discourse hides the social within it. The reason why the social lies within, rather than external to, the discourse lies in the phenomenon of the displacement of meanings." *Ibid.*, p. 237.

⁶³ Similar, remarkably advanced and precisely described recognitions, exactly related to the present context, can be found in a treatise published by an Austrian author one century ago and thought to have long been forgotten, discussing extensively the subject. According to him, "every concept [...] has its central image and beside it a zone of transition gradually vanishing into nothingness. [...] The existence of this transition to twilight zone is not to be removed by any definition, no matter how circumstantial, because there can be no definition except by means of more concepts." "We are likely to draw consequences of the most opposite kind from the same facts, without becoming conscious that at the very moment of applying one significant term or the other we were determined in part by a certain arbitrariness, a function of the direction of our will, and not simply by our power of cognition." "Every fact is to be understood in connection with the whole remaining world of facts. If this environment of facts, e.g., economic conditions or ethical attitude of society, is changed, then a fact, although apparently identical, has also become different, because it now has an entirely different relation to the surrounding circumstances. It is therefore quite possible for it to be subsumed at one time and not to be subsumed at another, without the necessity of calling to one's aid some special conception such as projection." Karl Georg Wurzel *Methods of Judicial Thinking* [Das juristische Denken (Wien: Verlag Moritz Perles 1904)] trans. Ernest Bruncken in *Science of Legal Method* Selected Essays by Various Authors (Boston: The Boston Book Co. 1917 [reprint 1969]), pp. 286–428, the quotations on §15, p. 342; §21, p. 372; §23, pp. 385–386.

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„Situé au carrefour de la philosophie juridique, de la philosophie des sciences et de la philosophie du langage, cet ouvrage se fait remarquer par son ambition. L'auteur lance en effet un lourd pari théorique: il s'agit sinon de présenter une théorie achevée du droit, du moins d'en poser les fondements — à la suite de glorieux prédécesseurs tels que HANS KELSEN, NIKLAS LUHMANN, GEORG LUKÁCS ou JOHN RAWLS — et ce, à partir d'une réflexion sur le processus d'établissement des faits prenant place dans le processus de prise de décision judiciaire. [...] En nommant, le langage donne corps à la chose, il la fait exister et c'est pourquoi les faits ne sont pas des faits en soi, mais bien plutôt des énoncés de faits. Les faits établis sont linguistiquement fixés, à tel point que l'on peut dire que l'énoncé des faits devient les faits. [...] La procédure a donc un double rôle de création et de validation des faits. [...] La vérité est définie comme «une hypothèse qui, dans des conditions données, n'a pas d'alternative concurrente».”

Laurence Dumoulin
in *Droit et Société* (1997), No. 35, 225–228

„Ce livre [...] a au moins un double mérite. Tout d'abord, celui de développer une réflexion sur un thème comme l'établissement judiciaire des faits, qui souvent n'a pas trouvé, dans la communauté des théoriciens du droit, tout l'intérêt qu'il aurait pourtant mérité. En second lieu, cet ouvrage est aussi remarquable en ce qu'il aborde cette »soeur Cendrillon de l'Exégèse« avec une féconde approche interdisciplinaire. C'est ainsi qu'on peut retrouver, parmi ses outils méthodologiques, ceux de la philosophie du langage post-WITTGENSTEINienne, de la philosophie de la science, de l'herméneutique et de l'ontologie sociale de LUKÁCS. Des incursions dans le domaine de l'»anthropologie interprétative« ne sont pas non plus négligées. [...]

C'est ainsi que le »fait«, loin d'être un étant qui existe *in se et per se* dans la réalité et qui attend seulement la lumière d'une raison qui le dévoile (vérité comme *a-letheia*), apparaît plutôt comme un construit, un hybride résultant d'une sélection préalable, opérée par une sphère homogène à l'intérieur de l'hétérogénéité de la vie quotidienne. L'image de la réalité qui en résulte n'est plus, alors, celle d'un donné avec des confins déjà tracés, mais plutôt celle d'un projet à accomplir à l'intérieur d'un horizon socio-culturel, qui plonge ses racines dans l'humus de la tradition. Notre représentation du monde ne peut que s'inscrire, donc, dans une forme de vie (WITTGENSTEIN) ou bien dans un paradigme (KUHN) qui fournit le cadre conceptuel (précompréhension d'après la terminologie de GADAMER) au moyen duquel nous »lisons« la réalité. La perception des événements serait caractérisée ici par une normativité au sens faible du terme. [...]

Les critères de pertinence (*relevancy*) du droit représentent le filtre par lequel ce qui est à l'extérieur du droit peut entrer dans son domaine. Sur la scène du procès, donc, il n'y a pas de place pour des »faits descriptifs« ou, mieux, pour des »propositions existentielles«. Le procès n'est pas un miroir qui reflète ce qui s'approche de lui, mais un jeu de langage qui métabolise les signes qui y ont été introduits.”

Massimo Vogliotti
in *Revue interdisciplinaire d'études juridiques* (1997), No. 38, 235–237

