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INERTIA OR PATTERN FOLLOWING?
Phase Lag of and Defiance by the Judiciary: A Central and Eastern European Overview

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ABSTRACT By the fall of Communism, also the past of Central and Eastern Europe is mostly hold eradicated, albeit it cannot but steadily survive in sublated mentality. On the field of law, this is expressed by the continuity of text-centrism in approach to law, with the law's application following the law's letters in a quasi-mechanical way. Consequently, what used to be legal nihilism in the Socialist regime has turned into the law's textual fetishism in the meantime. This is equal to saying that facing the dilemma of weighing between apparently contradictory ideals within the same Rule of Law, j u s t i c e has in fact been sacrificed to the c e r t a i n t y in/of the law in the practical working of the judiciary. Especially, constitutional adjudication mostly works for the extension of individual rights while the individuals' community, the state, is usually blocked in responding challenges in an operative manner. Situation in Poland, the Czech and Slovak Republics, Baltic Republics, as well as Croatia is surveyed through a series of case studies in order to show degrees and variations of worsening. Softening the law by activating juridical inventiveness was used to be pressed on the region during her preparation to accession, a practice that has now been counteracted by stiffening hard law anew. In either case, on the last resort, phase-lag of juridical mentality in the region may have been at stake, preserved at the stage what Western Europe could develop into when reconstruction after the end of WWII started. For post-war West's new joiners in approach and methodology—like (1) natural law considerations; (2) balancing among interests through assessing them in light of general principles and clauses, either of the law or implied by its underlying legal culture; as well as (3) constitutionalisation of issues—have remained mostly esoteric ideas, alien in mass to the region in question. The damage this condition may cause by cumulation is an added burden on the popular receptivity of catch-words heralded, among other ideals, by the Rule of Law.

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1. Past Sublated

The schemes of mapping legal families had to break with the continuation of a past with the Central and Eastern European region regarded as somewhat distinct and particular, when Socialism as a regime was eradicated from the European scenario. All this looked like a magical act: as if the political downfall of a dictatorship, instituted and sustained through a *Красная Армия* [Red Army] imperialist occupation, were able to generate an overall change. In any case, for the present-day mapper

> "The »socialist legal family« is dead and buried, and although it will take a long time to erase the traces of more than forty years of total subjection to political ideology, it seemed right to discard the chapters on socialist law."[1]

This is to say that one has started waiting for some miracle again, or, otherwise expressed, for a setting of mind usual in so-called „honeymoon periods", but now missing the traces characteristic of a revolution.[2] Such Utopianism is manifested by simplistic opinions, according to which, for instance,

> "Polish law belongs to the western legal tradition, its laws for historical and cultural reasons belonging to the Germanic and Romanistic legal families. This influence survives strongly to this day, notwithstanding a 50-year period of submission to the so-called »socialist family« [...]. For the last sixteen years the country's laws have been in a state of constant flux, first in order to divorce, practically overnight, its »socialist family« in favour of a marriage more proper for a market economy, and second, as soon as Poland's entry into the European Union became a feasible option, to meet the requirements of the *acquis communautaire*."[3]

Under such conditions, monographic overviews and historical outlines introducing text-books on the formation of institutions can pass over half of a century without further notice; quite as if there were nothing interfering with, or interrupting, pre-WWII development. Accordingly, local institutions may elegantly be traced back to their origination in Roman law, the French revolution or interwar events, with no mention of further possible determinants which can have survived from the practice just left behind yesterday, as a proper legacy. As items belonging to such a legacy, prime mention should be done to

[1] Hein Kötz 'Preface to the Third Edition' in Konrad Zweigert & Hein Kötz *Introduction to Comparative Law* trans. Tony Weir [1977] 3rd rev. ed. (Oxford: Clarendon Press 1998) xxvi + 714 pp., quote on p. v.
[2] For the term, cf. Pitirim A[leksandrovich] Sorokin *The Sociology of Revolution* (Philadelphia & London: J. B. Lippincott 1925) xii + 428 pp. {[reprint] (New York: H. Fertig 1965) 428 pp.}.
[3] Rafał Stroiński 'Report from Poland' *European Company Law* 3 (2006) 1, pp. 39 et seq., quote on p. 39.

the skill of the legal profession, thoroughly educated and socialised in the spirit of its time, that is, equipped with a mentality[4] fully interiorised and practiced.[5] This is to say that waiting for a miracle in such a way is hardly else than the symbolic re-assertion of discontinuation itself: the gesture of clearing away the past. Accordingly, the moment behind officially launching a "brave new" start is the very human act of artificially declaring breaking off any continuity.

No need to say that, from a theoretical point of view, such a stand is mistaken from the beginning. It presupposes mechanical understanding that reduces law to some positivated materiality or, at least, quasi-physicality (termed as 'res' in Latin or 'chose' in French).[6] For instance, it would presume the mere textual building of—by institutionalising one or two further principles and provisions in—an overall regulation, in order that it can represent a brand new S_1 system. It is as if law, as an instance of so called big organisations, were nothing but mere virtuality of notional aggregates, free to shape in a sheerly artificial environment, claiming treatment as a (quasi)axiomatic system. As to such breaking off continuity, only scrutiny will show that artificial eradication will have in fact used to serve nothing else than emphasising transition itself.[7]

Maybe Hungary is one of those rare countries in the region to have rendered, to a considerably depth, an account of ideological presuppositions of Socialism,

[4] Or, what is meant by *mentalité juridique* by Pierre Legrand, e.g., *Le droit comparé* (Paris: Presses Universitaires de France 1999) 127 pp. [Que sais-je? 3478].

[5] Rafał Mańko 'Is the Socialist Legal Tradition »Dead and Buried«? The Continuity of Certain Elements of Socialist Legal Culture in Polish Civil Procedure' in *Private Law and the Many Cultures of Europe* ed. Thomas Wilhelmsson, Elina Paulino & Annika Pohjolainen (Alphen aan den Rijn: Kluwer Law International 2007), pp. 83–103 [Private Law in European Context 10], p. 87.

[6] By the way, and accidentally in parallel, this is the meainstream US position since the global expansion of American patterns, criticised heavily when the move of legal transplantation to Latin American failed. Since then, it is usually qualified as ethno-centric legal imperialism —James A. Gardner Legal Imperialism American Lawyers and Foreign Aid in Latin America (Madison: University of Wisconsin Press 1980) xii + 401 pp.—, which, nurtured by local a-historicity and ignorance (feeding local belief of America's universalism), is not even conscious of what are exclusively American features of legal life, like transferring those issues that can divide the political constituency, to court decision. Cf. Csaba Varga 'Reception of Legal Patterns in a Globalising Age' in *Globalization, Law and Economy / Globalización, Derecho y Economía* Proceedings of the 22nd IVR World Congress, IV, ed. Nicolás López Calera (Stuttgart: Franz Steiner Verlag 2007), pp. 85–96 [ARSP Beiheft 109].

[7] As reproached by, e.g., Gábor Hamza—'Continuity and Discontinuity of Private (Civil) Law in Eastern Europe after World War II' *Fundamina* A Journal of Legal History, 12 (2006) 1, pp. 48–80, quote on p. 48—, magisterial overviews—like Paul Koschaker *Europa und das römische Recht* [1947] 4. Aufl. (München: Beck 1966) xiv + 378 pp. and Franz Wieacker *Privatrechtsgeschichte der Neuzeit* Unter besonderer Berücksichtigung der deutschen Entwicklung [1952] 2. neubearb. Aufl. (Göttingen: Vandenhoeck & Ruprecht 1967) 659 pp. [Jurisprudenz in Einzeildarstellungen 7]—"completely omitted the development of private-civil law in Central and Eastern Europe as though such regions did not exist in Europe". Although they did exist, and paradoxically, their new recognition is now mostly due to their formerly emphasised seclusion from the rest of Europe. For Viktor Knapp—'Comparative Law and the Fall of Communism' *Parker School Journal of East European Law* 2 (1995), pp. 525 et seq., quote on p. 532—, the cumulation of changes since then "does not mean that the former socialist countries do not form, at least temporarily, a geopolitical or legal-geographical unit. [...] The similarity, in turn, forms a new subject of comparative law, ie, the method of transformation or substitution of socialist law by new law."

inherent in both doctrinal notions[8] and theoretical approach to law as such,[9] drawing lessons from past developments.[10] For this past, with all its ideological implications defining a specific world outlook and serving as a framework of professional education and socialisation as well, was indeed being built in lawyerly thought process[11] as a factor of effective conditioning. For that matter, it cannot be left behind by an elegant gesture of changing clothes (in a "qualitative jump"[12]), that is, independently of any wish possibly to the contrary, its traces are carried on unavoidably.[13]

2. The European Union Defied

[8] András Jakab & Miklós Hollán 'Socialism's Legacy in Contemporary Law and Legal Scholarship: The Case of Hungary' *The Journal of East European Law* 11 (2004 [2006]) 2–3, pp. 95–121 / 'Die dogmatische Hinterlassenschaft des Sozialismus im heutigen Recht: Das Beispiel Ungarn' in *Jahrbuch für Ostrecht* 46 (2005) Halbband 1, pp. 11–40.

[9] *A szocializmus marxizmusának jogelmélete* [Legal theory of the socialism's Marxism] (Workshop of the National Scientific Research Fund project of T032156) ed. Csaba Varga & András Jakab [appendix in] *Jogelméleti Szemle* 2003/4 <http://jesz.ajk.elte.hu/2003_4.html> as well as, part of it, in 'Marxizmus és jogelmélet' [Marxism and legal theory] [ed. Csaba Varga] = *Világosság* XLV (2004) 4, 116 pp. & <http://www.vilagossag.hu/pdf/20041124144450.pdf>.

[10] By Attila Horváth, e.g., *Fejezetek a szovjet típusú szocializmus magyarországi alkotmánytörténetéből* [Chapters from constitutional history of the Soviet-type socialist Hungary] (Budapest: ELTE ÁJK & Szorobán K. 1992) 82 pp. [Magyar alkotmánytörténet 1 / A magyar államfejlődés nagy korszakai 3], 'Az emberi jogok sorsa Magyarországon a szovjet típusú szocializmus idején, különös tekintettel a gazdasági, szociális és kulturális jogokra' [The destiny of human rights during Soviet-type socialism in Hungary, with regard to social and cultural rights] in *Jogtörténeti tanulmányok* 8, ed. Gábor Béli et al. (Pécs 2005), pp. 205–224, 'A büntetőjog története Magyarországon a szovjet típusú szocializmus időszakában, különös tekintettel a koncepciós perekre' [History of criminal law during Soviet-type socialism in Hungary, with regard to show-trials] in *Ünnepi tanulmányok Máthé Gábor 65. születésnapja tiszteletére* ed. Barna Mezey et al. (Budapest: Gondolat 2006), pp. 193–224 [Bibliotheca Iuridica: Libri Amicorum 25], as well as Péter Csillik & Zsuzsa Elekes 'Helyi önkormányzatok a paternalista szocializmus időszakában' [Local self-governments during socialist paternalism] *Magyar Közigazgatás* X (1990) 9, pp. 839–848.

[11] Fleck Zoltán *Jogszolgáltató mechanizmusok az államszocializmusban* Totalitarizmus-elméletek és a magyarországi szocializmus [Law-enforcing mechanisms of state socialism: Totalitarianism theories and socialism in Hungary] (Budapest: Napvilág Kiadó 2001) 275 pp. [Critica].

[12] This is FRIEDRICH ENGELS's term for the "quantitive" accumulation of changes able to equal for—by performing—a qualitative leap. Early 20th century Hungarian Communist Ervin Sinkó—*Egy regény regénye* Moszkvai naplójegyzetek (1935–1937) szerk. Bosnyák István (Újvidék: Fórum 1985), p. 320 [Sinkó Ervin művei] {*Roman eines Romans* Moskauer Tagebuch, trans. Edmund Trugly (Köln: Wissenschaft und Politik [1962]) 479 pp. / (Berlin: Das Arsenal 1990) 487 pp.}—protests primitive simplification arguing that "no matter how much something essentially new starts with qualitative change, with the carrier himself/herself the jump will carry on his/her individual and national past as well, for his/her own history will not remain left on the other side: inherently, past will in him/her be continued. Consequently, a new start can be done but with own past continued."

[13] Cf. Csaba Varga 'Legal Scholarship at the Threshold of a New Millennium (For Transition to Rule of Law in the Central and Eastern European Region)' *Acta Juridica Hungarica* 42 (2001) 3–4, pp. 181–201 & <http://www.ingentaconnect.com/content/klu/ajuh/2001/00000042/F0020003/00400027> / in *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot) = *Rechtstheorie* 33 (2002) 2–4: Sonderheft Ungarn II, pp. 515–531.

There is a polar dynamism in the development of the European Union, defining a reverse tension between its growing expansion and the deepening of integration achieved.[14] For communitarianism, equalling to dedicating some of our past property to shared purposes, necessarily induces reflexes and institutes mechanisms of s e l f - d e f e n c e . In everyday co-existence they may wane to a considerable degree but, with the trap of (or zigzagging between) conformism and non-conformism, they tempt at double-dealing, by-pass, and pretended implementation as well.

This means that harmonisation within the European Community is fulfilled at the level of domestic law drafted and posited, but in every further respect (i.e., proposals for reforming the Community, using its potential, implementing it in domestic administration, both public and of justice), separation, with own interests pushed in hardly veiled competition with the rest is steadily continued. At the same time the auto-operation of the European Union—which in itself is not co-ordinated or harmonised but randomly cumulated, so chaotic to a considerable depth, when it issues accidental masses of directives and judicial statements in daily repetition, which will be somewhat acknowledged and partly also implemented, but in endless variations, by the addressee member states—generates tensions to which those addressed will react in their own manner, that is, opting for an alternative covering their own interest as drawn from their own tradition.

As to the basic setting, superimposition of Community law upon domestic regimes is like the constitutionalisation of issues: both are to pave divergent paths with c o n c u r r e n t a n d p l u r a l i s i n g c h a n n e l s o f r e a s o n i n g . For

> "Directives [...] can always be invoked before national courts in order to produce a »concurring« interpretation of national law. Their provisions can be enforced against national law when they are sufficiently clear to be directly effective, but only *vis-à-vis* national authorities."

Moreover, "even where a real discretion has been allowed, the limits set to that discretion by Community law can in principle be invoked before the national courts."—considering the fact that "no discretion [...] can be exempt from legal review, each discretion having its limits". So, this is to say that "Indeed, Community law has to be applied by the national court, whenever it can be applied as a rule of law."[15]

Well, old partners of the European Community have since long signalled that with the Rule of Law criterion set by the German Constitutional Court (sticking

[14] Joxerramon Bengoetxea *The Legal Reasoning of the European Court of Justice* Towards a European Jurisprudence (Oxford: Clarendon Press 1993) xvi + 294 pp., in particular p. vii.
[15] C. W. A. Timmermans 'Directives: Their Effect within the National Legal Systems' *Common Market Law Review* 16 (1979) 4, pp. 533–555, quotes on pp. 554 and 555.

security in law, plain language, as well as guaranteeing legitimate civil expectations as a *sine qua non* minimum required as to fill what *Rechtsstaatlichkeit* presupposes[16]) applied, European law would have at once collapsed.[17]

European law is blamed to be vague and untransparent because of the random superimposition of new and new positivations (directives and decisions) without any clear internal system and hierarchy;[18] to undermine the coherence and prevalent systemicity of domestic private law regimes (i.e., their code regulations and background doctrines) by its *ad hoc* character,[19] as well as notional incoordination and elusive nature,[20] characteristic of the mass of incoming European interventions; to menace the stability of domestic legal regimes by the unendingly massive production of such interventions;[21] to transform its own self, by the unmanaged simultaneous complexity and rigour of the Community's normative production, into the drawback, moreover, the p r o b l e m itself, of any progress in economic development and the free movement of persons and goods, because, as established by the Commission in 1994, the hyperactive operation of the Union is blocking, by interfering with, the competitiveness of transactions performed within its reach.[22] What is more, by now disintegrative moments in, and tendencies of, the Community law and order to break it up, may overcome the impression prevailing for a half of a century,

[16] BVerfGE 5 No. 7, *Apothekenstoppgesetz*, 1956.

[17] "Luckily for all of us, the [German Constitutional] court did not repeat that particular heresy: transferred to the Community level, it would probably leave us with a very limited number of regulations that could pass the test." Tim Koopmans 'Europe and its Lawyers in 1984' *Common Market Law Review* 22 (1985) 1, pp. 9–18, quote on p. 15.

[18] Roland Bieber & Isabelle Salomé 'Hierarchy of Norms in European Law' *Common Market Law Review* 33 (1996) 5, pp. 907–930. The criticism is subsequently generalised in four directions such as "the evolutionary nature of the pillar system, the originality of the integration model, the lack of coherence in legislative production and the inaccessibility of European law." Roland Bieber & Cesla Amarelle 'Simplification of European Law' *Columbia Journal of European Law* 5 (1998) 1, pp. 15–37, quote on p. 19. Facing tensions, Jean-Claude Piris—'The Legal Orders of the European Union and of the Member States: Peculiarities and Influences in Drafting' *European Journal of Law Reform* 6 (2004) 1–2, pp. 1–14—proposes quantitative out-put reduction through a better quality of in-put work.

[19] P. Hommelhoff 'Zivilrecht unter dem Einfluß europäischer Rechtsangleichung' *Archiv für die civilistische Praxis* 192 (1992) 1–2, pp. 71–107, in particular p. 102.

[20] *Systembildung und Systemlücken in Kerngebieten des Europäisches Privatrechts* Gesellschafts-, Arbeits- und Schulvertragrecht, hrsg. Sten Grundmann (Tübingen: Siebeck Mohr 2000) xxxiv + 724 pp.; by Lajos Vékás, 'Polgári jogunk európajogi hátteréről' [The European law background of Hungarian private law] *Európai jog* III (2003. november) 6, pp. 3–15, in particular p. 4 and 'Magánjogi kodifikáció' [Codification of civil law] *Magyar Jog* 55 (2008) 7, pp. 449–456, in particular p. 451. Friedrich Kübler 'Traumpfade oder Holzwege nach Europa? Oder: Was wir uns von der Rechtsgeschichte wünschen sollten' *Rechtshistorisches Journal* 12 (1993), pp. 307–314 arrives on p. 307 at the sharpened statement that "the pointillistic character of such norm-generation is gradually ever more destructive of a concept of law based on the ideal of codification" [„der pointillistische Charakter dieser Normsetzung konfrontiert ein auf das Kodifikationsideal gegründetes Rechtsverständnis mit wachsenden Schwierigkeiten"].

[21] Bruno Oppetit 'L'expérience française de codification en matière commerciale' *Recueil Dalloz* (1990), Chronique, pp. 1 et seq., in particular p. 3.

[22] Tom Burns 'Law Reform in the European Communities and its Limits' in *Yearbook of European Law* 16 (1996) ed. Ami Barav & D. A. Wyatt (Oxford: Oxford University Press 1997), pp. 254–265.

namely, that the law of, and the integration within, the European Union go on hand in hand.[23]

(For the law of the European Union is like—as the legal historian MANLIO BELLOMO has symbolised[24]—the solar system: bipolar indeed, with sun and its planetary dependents in a mutual pre-disposition, in which any non-systemic action, if strong enough, can/could explode the whole system. Each sub-system reacts in its own way, but all that notwithstanding, the overall outcome of this characteristically big-organization will be o r d e r o u t o f c h a o s as a statistical average of the total motion considered. Accordingly, the mass of new impetuses the centre activates endlessly will have a definite impact with its eventually channelling and curative effect. Moreover, independently of how much all this is alien to the in-built spirit of domestic law, schemed after the past pattern of positivism, this heralds the new idealisation in sociology/anthropology as well. That is, breaking with the godly order—as generalised in NEWTON's (quasi-)causality, in which God's and humans' commands were issued and followed/transgressed in endless repetitions, now society is seen as the statistical end-product of individual moves and actions, atomised in the latter's individual contexture.[25] And like in case of so-called BROWNian motion, some orderliness will be seen in what is—microscopically observing—just mass anarchy.[26])

From old times in legal history it is known that such reconsiderations have been usually followed by periods of consolidation.[27] This new empiredom with five hundred millions of inhabitants in the European Union now seems to be an exception. True, there are momentous works in *re* of harmonisation and preparing ambitious projects directed to common codification, but their basic intention is just the opposite: instead of consolidating the law in force, they aim

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[23] Jo Hunt & Jo Shaw *Fairy Tale of Luxembourg?* Reflections on Law and Legal Scholarship in European Integration in <http://64.233.183.104/search?q=cache:F42D5KPUYG8J:www.sheffield.ac.uk/content/1/c6/06/90/87/Hunt%2> mentioning (p. 9) "fragmentation and disintegration", on the one hand, and "breaking the intuitive link between law and integration that had dominated much legal work until that point.", on the other. As a forerunning recognition, cf. also Jo Shaw 'European Legal Studies in Crisis? Towards a New Dynamic' *Oxford Journal of Legal Studies* 16 (1996) 2, pp. 231–253.

[24] Cf. Kenneth Pennington 'Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept' *Syracuse Journal of International Law and Commerce* 20 (1994), pp. 205–215 & <http://faculty.cua.edu/pennington/learned.htm>, developed into the present context by Csaba Varga 'Legal Theorising – An Unrecognised Need for Practicing the European Law' *Acta Juridica Hungarica* 50 (2009) 4, pp. 415–458 & <http://www.akademiai.com/content/p35847986r2w3ww8/> / 'The Philosophy of the Construction and Operation of European Law' *Rivista internazionale di Filosofia del Diritto* [Roma] LXXXVIII (2011) 3, pp. 313–344 / 'The Philosophy of European Law with "Chaos Out of Order" Set-Up and Functioning' in *25th IVR World Congress* Law, Science and Technology, Series B / No. 009/2012 <http://publikationen.ub.uni-frankfurt.de/frontdoor/index/index/docId/24867>.

[25] Noel B. Reynolds 'Rule of Law in Legal and Economic Theory' in *Law at the Turn of the Twentieth Century* International Conference Thessaloniki 1993, ed. L. E. Kotsiris (Thessaloniki: Sakkoulas 1994), pp. 357–376 on p. 373.

[26] Cf. <http://en.wikipedia.org/wiki/Brownian_motion>.

[27] Cf. Csaba Varga *Codification as a Socio-historical Phenomenon* [1991] 2nd {reprint} ed. with an Annex & Postscript (Budapest: Szent István Társulat 2011) viii + 431 pp. & <http://drcsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>.

at expanding the Community law to growingly new terrains, not foreseen by the "pillars" of the founding Treaty of the European Union.[28]

Member states are helpless by the inconsideration of the legal machinery of the European Union, knowing and experiencing that

> "Both the drafted text and the implementation of the normative message of the Union's laws risk to generate a number of islands alien to the legal system of the receptive state; and, in consequence, they hazard the internal coherence of domestic law and the laws received, and thereby also the co-ordinated operation of the system itself."[29]

Interestingly enough, some years ago Hungarian literature urged the finalisation of the preparation (after deepened doctrinal elaboration achieved) of her new Civil Code[30] just as the last bastion to defend the national law's internal coherence from those constraints of the automatism of Community law implementation able to break it up, on an especially sensitive field of national existence and productive activity within the range of it.[31]

Albeit there is no express provision obliging member-states judiciary to follow the Community interpretation and to accept the direct force of the decisions of the European Court, the state is liable for violation of Community law, provided that domestic court decision is "in manifest breach of the case law of the Court in that matter".[32]

This is why it is so striking to consider the recurrent cases of the harsh openness of a member-state's self-protection, caring for national prestige and the weigh of domestic fora alike.

For instance, hardly four decades ago, one of the pioneers of the European Community idea, F r a n c e , nullified an administrative court ruling in a process initiated by her minister of internal affairs, based upon the own domestic statement on the state of laws according to which "Directives cannot be invoked by citizens only for helping with normative grounds their objection to an

[28] On the legally unjustified—and only by some member states' academic community activated—common codification (or of the latter's substitute by, among others, the famous Common France of Reference and other trivialities), see Csaba Varga *Jogrendszerek, jogi gondolkodásmódok az európai* egységesülés perspektívájában (Magyar körkép – európai uniós összefüggésben) [Legal systems, legal mentalities in the perspective of European unification: Hungarian overview – in an European Union context] (Budapest: Szent István Társulat 2009) 282 pp. [Az uniós tagság következményei a magyar jogrendszerre és a közigazgatásra] & [Jogfilozófiák] & <http://www.scribd.com/doc/85037925/varga-csaba-jogrendszerek-europai-egysegesulesben-2009>, Ch. V.

[29] Attila Harmathy 'Jogrendszerünk átalakulása és az Európai Unió joga' [The transformation of Hungarian legal order and the law of the European Union] in *Ius privatum – Ius commune Europae* Liber Amicorum: Studia Ferenc Mádl dedicata (Budapest: ELTE ÁJK Nemzetközi Magánjogi Tanszék 2001), pp. 125–134, quote on p. 128.

[30] Adopted on 11 February 2013, see <http://washington.kormany.hu/hungary-adopts-a-new-civil-code>; cf. <http://ptk2013.hu/> in Hungarian for both the text and history.

[31] Gábor Török & Lili Török 'Az új Ptk. a globalizáció tükrében' [The new civil code in the light of ongoing globalisation] *Jogtudományi Közlöny* LXIII (2008) 6, pp. 300–309, in particular p. 308.

[32] C-224/01 *Köbler* (2003) ECR I-10239, 56.

individual administrative act."[33] Moreover, such a preference of national supremacy to any Communitarian ethos was substantiated by a former *Conseil d'État* statement, ruling out of the "bloc of constitutionality" anything beyond the national law's boundaries, that is, beyond the criteriality exclusively relevant for assessment of norm conformism, inclusive of constitutionalism as well.[34] One decade ago, the same *Conseil constitutionnel* [the former's successor] rejected posterior constitutional adjudication of four laws transforming European directives into domestic law, by one single—concisely drafted—argument:

> "the transformation of any Community directive into national law concludes from a constitutional requirement that can only be denied by another, expressedly reverse provision of the Constitution. In want of such a provision, the Community judge has exclusive competition controlling that..."[35]

It is not by chance therefore that France is repeatedly and continually judged by the European Court for missing the transposition of Community directives into the domestic regime of the *Code civil*[36] and for deepening the stigma of "national disinterest".[37] This sensitive relationship is not cleared up to date; or, what is more, it is not faced in depth indeed.[38]

3. Surviving Practices in Central and Eastern Europe

[33] „Les directives ne sauraient être invoquées par les ressortissants de ces États à l'appui d'un recours dirigé contre un acte administratif individuel." *Conseil d'État* (22 December 1978) *Cohn-Bendit*. (Cf. *Le Monde* 22 December 1978.)

[34] 74-1954 DC (15 January 1975): „bloc de constitutionnalité".

[35] 2004-496 DC (10 June 2004), *considérant 7*; 2004-497 DC (1 July 2004), *considérant 18*; 2004-498 DC (29 July 2004), *considérant 4*; 2004-499 DC (29 July 2004), *considérant 7*. E.g., „Considérant qu'aux termes de l'article 88-1 de la Constitution: »La République participe aux Communautés européennes et à l'Union européenne, constituées d'États qui ont choisi librement, en vertu des traités qui les ont instituées, d'exercer en commun certaines de leurs compétences«; qu'ainsi, la transposition en droit interne d'une directive communautaire résulte d'une exigence constitutionnelle à laquelle il ne pourrait être fait obstacle qu'en raison d'une disposition expresse contraire de la Constitution; qu'en l'absence d'une telle disposition, il n'appartient qu'au juge communautaire, saisi le cas échéant à titre préjudiciel, de contrôler le respect par une directive communautaire tant des compétences définies par les traités que des droits fondamentaux garantis par l'article 6 du Traité sur l'Union européenne" in <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2004/2004-496-dc/decision-n-2004-496-dc-du-10-juin-2004.901.html>. Cf. John Bell 'French Constitutional Council and European Law' *International & Comparative Law Quarterly* 54 (2005) 3, pp. 735–744.

[36] C-52/00 *Commission c/France*, Rec. I-3827 (25 April 2002), then C-177/04 *Commission c/ France*, Rec. I-000 (14 March 2006).

[37] Cyril Nourissat 'La jurisprudence de la Cour de justice des Communautés européennes: Un regard privatiste à partir de l'actualité' in *Archives de Philosophie du Droit* 50: »La création du droit par le juge« (Paris: Dalloz 2007), pp. 245–259, quote on p. 246: „un désintérêt national".

[38] Claudina Richards 'The Supremacy of Community Law in France' *European Law Review* 31 (2006) 4, pp. 499–517.

It is relatively rear opportunity to have reports on changes in mentality and skill of courts, the legal profession, moreover, the jurisprudence of the part of ex-Socialism, now ordinary members of the European Union. Furthermore, such reports are mostly one-sided: either self-satisfied, prophesising complete transubstantiation with no problem encountered, or fully outraged, with new generations willing to speed up overcoming belatedness. The latter's exaggeration leads to, among others, voluntary advancement of the obligation of harmonisation to a date prior to actual accession, sharply criticising authorities' lawful reaction as dated antiquity when resistance is met.

There are, of course, states which are pathological of a soci(ologic)al setting: backward, and/or belated. These are i n s t a b l e themselves, positioned at the crossing of transitory paths. There is a variety of them: practice may detach from manifested principles; therapy may be needed in self-protection, by making authoritarian past elements to survive; as a by- or after-effect, original intention of what to cure by instituting Rule of Law may fade away. Anyhow, the dilemma has to be faced whether law is made up simply of normative positivations just projected into the air or it is the law's environment that enforces—by implementing its *dynamei*[39]—order in some way. If the first option is the case, the law's genuine force (its last reserve) is weakened; in the second one, there is a proper use of the law's genuine strength, sustained by ongoing social practice.[40]

3.1. Judicial Patterns, Pre- and Post-accession

Available descriptions are mostly superficial, but they do not necessarily depart from the anamnesis of a pathology, offered at a theoretical level as an ideal reconstruction a quarter of a century ago.[41] It is worthwhile considering some general features for that case-studies given in the present paragraph can be contextualised according to their proper place and message.

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[39] <http://wordincontext.com/en/dynamei>; that is, philosophically speaking, it stands for 'Möglichkeit' [possibility], inherent in the object's potential to become 'Wirklichkeit' [actuality]. Cf. <http://www.zeno.org/Philosophie/M/Plotin/Enneaden/2.+Enneade.+Abhandlungen+zur+Kosmologie+und+Physik/5.+Ueber+den+Begriff+von+»dynamei«+und+»energeia«>.

[40] Cf., e.g., Daiva Nazarovienė *Legal Culture in Post-soviet Lithuanian Society* Socio-cultural Analysis of Self-defence (Kaunas 2004) 19 pp. [Kaunas University of Technology Institute for Social Research] {Summary of Doctoral Dissertation}, in particular pp. 7–8.

[41] Cf. Csaba Varga '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), pp. 229–251, reprinted—as 'What is Needed to Have Law?'—in Csaba Varga *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] & <http://drcsabavarga.wordpress.com/2010/10/24/transition-to-rule-of-law-on-the-democratic-transformation-in-hungary-1995/>, pp. 38–61 / 'On the Nature of Law in Communism' *Central European Political Science Review* 12 (Spring 2011), No. 43, pp. 19–48.

Foundational role is usually attributed to the survival of l e g a l p o s i t i v i s m, mainstream organising idea that once transfigured from continental pre-WWII textual or rule-positivism into so-called Socialist normativism in the entire region. It is a syndrome called " t e x t o c e n t r i s m " that originates from it.[42] This is a continuation of the methodological legacy of German Pandectism, stiffened by the positivistic doctrinarism of the Muscovite style of MARXising achieved on the field of law.[43]

As to the role of judiciary, the dated approach treating justices as mere *Subsumptionsautomaten* is unchanged haunting. As an apodictic sentence testified to it four and a half decades ago,

> "The task of the judiciary is not creation but application of legal norms, to given social relations. This holds to all kind of judiciary, including the Supreme Court as well."[44]

This explains why general provisions of law using evaluative or flexible concepts—stated as principles, value-statements or clauses—have no much chance of being referred to by the courts in the region.

Tradition is always Janus-faced. Socialist legal policy rejected *Generalklauseln*—inserted in the German *Bürgerliches Gesetzbuch* (1896), for instance—as subversive *Kautschukparagraphen*, good only to hide "class contents" of the bourgeois law, but opening the gate for both unrestrained discretion and avoidance of the law.[45] Instead, it postulated "social co-existence" as a *sine qua non* principle,[46] requiring that rights are allowed to be used according to their socio-economic purpose only. Thereby the use of rights became a function of prevailing state ideology, changing by timely needs of political interpretation of what the "message" of MARXism–LENINism should be.[47] Or, political considerations were channelled into formal legal processes so as to be able to determine their outcome, opening gates to any option (by any arbitrariness) if needed.[48]

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[42] Ewa Łętowska 'The Barriers of Polish Legal Thinking in the Perspective of European Integration' in *Yearbook of Polish European Studies* I (1997), pp. 56 et seq.

[43] Rafał Mańko 'The Culture of Private Law in Central Europe after Enlargement: A Polish Perspective' *European Law Journal* 11 (2005) 5, pp. 527–548.

[44] Aleksander Wolter *Prawo cywilne* Zaryís częśći ogólnej [Civil law], wyd. 2 (Warszawa: Państwowe Wydawnictwo Naukowe 1968) 330 pp., in particular p. 64.

[45] E.g., Severyn Szer *Prawo cywilne* Część ogólna [Civil law], wyd. 3 (Warszawa: Wydawnictwo Prawnicze 1962) 317 pp., in particular p. 25.

[46] See, e.g., J. Nowacki 'Niektóre zagadnienia zasad współżycia społecznego' [Some issues of social co-existence required] *Państwo i Prawo* XII (1957) 7–8, pp. 99 et seq. In Soviet law, it was termed "Socialist co-existence".

[47] Szer *Prawo cywilne* [note 45], p. 25 claims that "All these principles defining human relationships in a socialist society are based on postulations of socialist morality. Or, both socialist law and socialist morality are drawn from the same basic source. Their common substance lies in relations of socialist production with shared ideological root in MARXism–LENINism."

[48] Six decades ago, the Polish Supreme Court rejected the claim of a private owner against a state enterprise whose interest should be given priority. ŁC 495/50 (9 May 1950), cf. *Państwo i Prawo* VI (1951) 2, pp. 327 et seq.

Over-politicisation of law was built in both the education and socialisation of the judiciary, made to harmonise with—as concluding from—their basically positivistic spirit. As a conclusion, no judge was either encouraged or prepared to thinking in principles and conflicted interests, or balancing among contrasted values. Over-politicisation as external force met the participants' internal need of individual self-protection and their pressurised self-submission in perverted forms of mechanical jurisprudence: applying law according to its letters.[49] Such mentality pervaded administration of justice as a whole. All in all, transition from somewhere to somewhere else has remained for long just a lip service, only good for rhetorical (self-justifying) use.[50]

As an effect, the sense of institutional autonomy, on the one hand, and the one of the responsibility to be borne for the decision made, on the other, equally evaporated. Soulless mass servicing in a daily routine was to substitute to the skill of balancing. Almost automatic exacting of the law became the fashion of the day, with no readiness for facing the pressure of actual challenges or use feedback channels. Outer observers, especially those sensitive to transparent forecalculability in business affairs, were only shocked to experience that with some (whatever) reference to any (relevant/irrelevant) legal provision made, decisions can be "concluded" with no convincing argumentation or justification to the depth presented; accordingly, with no indication of what exactly the normative basis for and framework of a given judgment were.[51] Or, it has to be realised again that formalism is a two-edge weapon, used also to both covering up and instigating absolutism, perhaps lurking untroubled behind.[52]

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[49] Frank Emmert 'The Independence of Judges – A Concept often Misunderstood in Central and Eastern Europe' *European Journal of Law Reform* 3 (2001) 4, pp. 405–409, in particular p. 409.

[50] The first post-socialist ombudsman Ewa Letowska (co-authoring with Janus Letowski) warns us—under the heading of 'The State of Law Is Not a Gift' in their *Poland* Towards to the Rule of Law (Warsaw: Wydawnictwo Naukowe Scholar 1996) on p. 10—that "The belief that in order to change the world one must first and foremost change regulations and then the rest will automatically take care of itself is an expression of similar thinking based on a belief in the magical force of the law. We have a state of law in the constitution, and so we irrevocably will also have one in life. Nothing of the kind... Even the program for creating a real state of law in Poland in the fullest possible form still has not been drawn up, while its implementation does not have to end in success."

[51] Emmert 'The Independence of Judges' [note 49], p. 408.

[52] Ildikó Bartha and Mátyás Bencze 'Az európai jog alkalmazása a magyar bírói ítélkezésben 2004 és 2007 között' [European law in jurisprudence in Hungary between 2004 and 2007] in *Európajog és jogfilozófia* Konferenciatanulmányok az európai integráció ötvenedik évfordulójának ünnepére, szerk. Paksy Máté (Budapest: Szent István Társulat 2008), pp. 319–345 [Jogfilozófiák] emphasises (on pp. 344 and 345) that often "the source of law most approximate to the case will be referred for decision making" while the gap between "the formal legal argument and the decision made in the case will be freely bridged by the judge". Curiously enough, but concluding from the genuine context of the underlying setting, it is already shown that the over-formalistically logified style of the French *jurisprudence* is expressly calling for judicial novation, to be covered by the decisional style, which simply reiterates the general terms of the relevant regulative provision, with the awareness that the judge who novates is and will be responsible to the parties of the case only. In a counterposition, the Common Law judge is strikingly free in principle but bound by own responsibility to be borne for the future, his/her case being a potential binding precedent. Cf. Bernard Rudden 'Courts and Codes in England, France and Soviet Russia' [*Tulane Law Review* 48 (1974), pp. 1010 et seq.] reprinted in *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], pp. 375–393.

Janus-facedness? In law? In Hungary, the hyper-activism of the formative era of constitutional adjudication may have been favourable for generating such a situation. As a matter of fact, the idol of formal legal certainty triumphed over all considerations on justice: both components (i.e., »law« and »to be ruled by«) of 'the rule of law' became emptied of morals and values,[53] to institute in latter's place extreme zigzagging between legal nihilism and textual fetishisation[54]—the former denied as Socialist past, but transubstantiated into the latter as full embodiment of what they understood by "the rule of law". The result was a helpless dead-end, and a speedy rush for it at the same time. Like in America, wishing more and stricter regulation,[55] albeit one has to drown in what is at disposal already.[56]

Over-politicisation was maybe believed to be surpassable by reducing rule of law into autotelic, self-serving formalism. The official guardianship of constitutionalism simplified the law's basic ethos to the rudiment of *Das Recht ist das Recht* in Hungary. In consequence, and especially when in-built interest was provided (especially in financial matters persecuted as economic crimes), practical lawyering degenerated into search for gaps in the law. Whenever there was none, it was juridically constructed. There was no invocation to law [*ius*] but to *the* law [*lex*] instead; the new "rule of law" culture exhausted in finding the law, disadvantageous to the party of the case, either full of gaps or too general to get applied, and therefore unconstitutional. After a quarter of a century since the fall of Communism this might serve as the symbol of the victory of anything standing for the Rule of Law in Hungary. It ensued in effective administration and policing becoming wishful Utopianism. Any state action was rigidly made a function of some prior specification in the law. Irresponsibility for common good and evaporation of the sense of duty were to replace any organic arrangement, albeit every actor claims to this day to be busy with nothing but "defence of rights".[57]

(Albeit the meaning of 'law' itself is at stake, in terms of constitutionalism traced back to 'constitutional rule-of-law', to 'division of powers' and finally to

[53] Cf. Csaba Varga 'Bondage of Paradoxes, Or Deadlock at the Peak of the Law we have Created for Ourselves' in his *Transition? To Rule of Law?* Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe (Pomáz: Kráter 2008) 292 pp. [PoLíSz sorozat könyvei 7], pp. 251–261.
[54] Cf. Csaba Varga 'Creeping Renovation of Law through Constitutional Judiciary?' in his *Transition? To Rule of Law?*, pp. 117–160.
[55] Cf. Csaba Varga 'Legal Mentality as a Component of Law: Rationality Driven into Anarchy in America' *Curentul Juridic* [Tirgu Mures] XVI (2013) 1, No. 52, pp. 63–77 & <http://revcurentjur.ro/arhiva/attachments_201301/recjurid131_7F.pdf>.
[56] Between 1990 and 1998, 894 parliamentary, 1635 governmental, and 2331 ministerial acts (all in all on 51.104 printed pages)—complemented by 501 constitutional court decisions—were issued in Hungary. Attila Harmathy 'Codification in a Period of Transition' *University of California Davis Law Review* 31 (1998) 3, pp. 783–798, in particular p. 790.
[57] Cf. Csaba Varga 'Rule of Law: Imperfectly Realised, or Perfected without Realisation?' in his *Transition? To Rule of Law?* [note 53], pp. 50–58.

well-operated 'checks & balances',[58] the above situation can be characterised as the former's practical negation: atomisation of the state's institutional network, with each partner's self-starring in rivalry for extending their relative weight and self-conceited competence, excelling by neophyte over-doing with no consideration to the merits of overall social effects, establishing, under the aegis of professional homogenisation accompanied and covered by full social and political irresponsibility, anarchy with public goods unrepresented. Accordingly, and for a while, national interest became unheard of and the nation, as such, defenceless. As to its style, mechanistic know-how technicism was to shadow the past memory of judicial *Weisheit* with the classical HOLMES' wisdom on that "The life of the law has not been logic; it has been experience."[59] forgotten.)

Well, the British vision on how much the German *Rechtsdogmatik* is alienated a doctrine[60]—like GOETHE's

> "all theory is grey, and green
> The golden tree of life."[61]

—prognosticates the enmity by which even a German-type constitutional adjudication is received: sheer product of doctrinal erudition, where professional excellence is marked by neophytism, that is, by one master outreaching the other, and which, freed of practical considerations, will be unable to perceive the socially harmful excesses it reaches, thanks to mere intellectualism. What is lost is anything of empiricism, experience, and historical sense. In such a setting, perception of facts and contextures will have from the beginning been classified in pre-conceptualised schemes: whatever experience, intuition, sense, or emotion can only be imagined as a simplified replica of what has already been imagined and, as such, preserved in the individuals' or their generations' mental storehouse. With law, missing human environment conditioning—and conditioned by—it, justice disfigures as law-automaton, impracticable to any purpose. And a law-automaton will allow to be posited within it exclusively that

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[58] Cf. Roberto Toniatti 'Constitutional Democracy, Checks and Balances of Separated Institutions of Government, and Non-Majoritarian Safeguards: The Role of Constitutional Adjudication', a lecture presented at the international conference on *Europeanization and Judicial Culture in Contemporary Democracies* held at the »Lucian Blaga« University Faculty of Law at Sibiu on 11 October 2013.

[59] Oliver Wendell Holmes, Jr. *The Common Law* (Boston: Little, Brown & Co. 1881), p. 1—<http://www.general-intelligence.com/library/commonlaw.pdf>—, followed by explaining that „The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

[60] Sir Basil Markesinis 'French System Builders and English Problem Solvers: Missed and Emerging Opportunities for Convergence of French and English Law' *Texas International Law Journal* 40 (2004–2005) 4, pp. 663–689.

[61] „*Grau, theurer Freund, ist alle Theorie, Und grün des Lebens goldner Baum.*" Johann Wolfgang von Goethe *Faust* (1806/1831), Mephistopheles, 12038–12039.

what offers axiomatic proof within it: what allows to be deduced from its notional web, called *Rechtsdogmatik*.

The intellectual landscape is like the one of PORTALIS, drafter of the *Code civil*. When having shocked by the spirit of coming revolution, he went in exile and started sensing the danger of anti-life doctrinarism of his compatriots: outstanding intellectuals called philosophers, representing—shaping and professing—*res publica*. Well, what was in Germany? Small circles, neutralising one another in rivalry. In France, in contrast, salon-figures of Paris agitated, competing unendingly with one another in abstractness and excessiveness. And after all, the intellectual storm they had engendered cumulated in untempered heroes' mob actions.[62] That is, according to his realisation already made, intellectualism with no responsibility can lead to whatever direction and cul-de-sac.

And indeed, nowadays, by the worldwide non-specified over-use of 'rule of law', it has s e l f - e m p t i e d, unable to serve as an operative term any longer,[63] on the one hand, standing for (as opposed and made unavailable to common sense public reason) some mysterious a r t i f i c i a l r e a s o n, decipherable only by those initiated from the beginning, i.e., professionals of some elite whose background interest may not converge with the one of any democratic majority constituency.[64]

The basic situation is further complicated by the fact that besides ordinary judiciary (which, after WWII in Central and Eastern Europe, petrified textual positivism that had ruled Western Europe before WWII) also

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[62] Jean Carbonnier 'Le Code Napoléon en tant que phénomène sociologique' *Revue de la Recherche juridique* Droit prospectif 1981/3, pp. 327–336 describes how JEAN-ÉTIENNE-MARIE PORTALIS takes refuge in Northern Germany, encounters pietists, admires PASCAL and MONTESQUIEU, and ends with summarising his intellectual conclusion in *De l'usage et de l'abus de l'esprit philosophique durant le XVIII^e siècle* [1797/1820] I–II, 3^e éd. (Paris: Moutardier 1834) {facsimile: préf. Joël Bénoît d'Onorio (Paris: Dalloz 2007) lxii + 404 pp. [Bibliothèque Dalloz]}. According to his characterisation, the well implemented *esprit philosophique* is to be found in his exile home Germany: small universities, closed circles with no external radiation, so ideas are not arousen, consequently they cannot degenerate into social disease themselves. In contrast, the French revolutionary spirit is symbolised by salons in Paris: the philosophical idealisation of systemicity, so intellectualism strives for its perfection/perfectuation in all directions. Radiated through, it seduces at both exaggeration of and irresponsibility for the outcome—the fact notwithstanding that it has the potential to materialise in living praxis, re-channelling the destiny of big nations as well. Cf. Csaba Varga *Codification as a Socio-historical Phenomenon* [1991] 2nd {reprint} ed. with an Annex & Postscript (Budapest: Szent István Társulat 2011) viii + 431 pp. & <http://drcsabavarga.wordpress.com/2010/10/25/varga-codification-as-a-socio-historical-phenomenon-1991/>.

[63] Cf., in the mirror of domestic and international—diplomatic, economic, jural, etc.—masses of its use, Varga *Jogrendszerek, jogi gondolkodásmódok...* [note 28], pp. 16–28. Cf. also, as to its use in the United States of America, Richard H. Fallon, Jr. '»The Rule of Law« as a Concept in Constitutional Discourse' *Columbia Law Review* 97 (1997) 1, pp. 1–56.

[64] 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. Cf., in the present context, Csaba Varga 'What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of »The Judicial Establishment of Facts«' in his *Theory of the Judicial Process* The Establishment of Facts, 2nd {reprint} ed. with Postfaces I and II (Budapest: Szent István Társulat 2011) viii + 308[64] & <http://drcsabavarga.wordpress.com/2012/03/13/varga-theory-of-the-judicial-process-the-establishment-of-facts-19952011/>, Postface II, pp. 271 et seq.

constitutional courts were instituted: an activist super-forum with chances of mixed legal and political interventionism, ready to deduce a systemic network of principles from abstract terms of the constitution in order to build their own optional "invisible constitution", which is used as a freely floating meta-level law serving as a criterion in control of law-making and law-applying as well.[65] In Hungary, the constitutional court has duelled with both the parliament and the supreme court of justice in its claim of superiority, a struggle that has failed fostering either interaction or cooperation to date. This is how the supreme (in practice, the exclusive) guardian of the Rule of Law can degenerate into the factual rule of some—free floating over anything of the positive law[66]—tyranny itself.

Czech constitutional judiciary claimed exclusive competence in deliberation on legal abstractions where international human rights instruments were at stake, by expressed fear of interference on behalf of ordinary judiciary,[67] as if there was one single national body to defend—from the rest—those international interests; as if even the bodies that made such interests relevant at all in their respective country would menace the said interests. Otherwise speaking, this is the dichotomy of CARL SCHMITT's *Freund-/Feind-Untersuchung* antagonising We/They duality:[68] "ordinary" sources of the law to be treated by "ordinary" courts, while "non-ordinary" sources by "non-ordinary" (constitutional) courts.[69] One consequence is granted to take: in such places, European law remains alien to ordinary courts.

Albeit the European Court of Justice stated four decades ago that

> "where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provisions in question are

[65] Cf. Varga Transition... [note 41] and especially his *Transition? To Rule of Law?* [note 53], passim.
[66] Imre Vörös in [as interviewed by] Gábor Halmai & Csaba Tordai '»kevesebb lesz az elegáns röpködés a jogrendszer fölött«' [»There will be less elegant flying to and fro above the legal system«] *Fundamentum* 1999/2, p. 68.
[67] 403/2002 Sb. (25 June 2002); for its criticism, see Zdeněk Kühn & Jan Kysela 'Je Ústavou vždy to, co Ústavní soud řekne, že Ústava je?' [Is the constitution the one claimed by the constitutional court?] *Časopis pro právní vědu a praxi* 10 (2002) 3, pp. 199–214.
[68] Cf., e.g., Béla Pokol 'A politika logikája Niklas Luhmann és Carl Schmitt megközelítésében' [The logic of politics at Luhmann and Schmitt] *Világosság* 44 (2003) 7–8, pp. 57–65.
[69] Zdenek Kühn 'Application of European Law in Central European Candidate Countries' *European Law Review* 28 (2003) 3, pp. 551–560 at p. 557.

> capable of having direct effects on the relations between Member States and individuals."[70]

Accordingly, in this case it was echoed that once the last resort domestic court denies control by the European one on interpretation or consideration, it may be construed as unconstitutional, with no proper judge/judging allowed.[71]

3.2.1. Poland

There have been ongoing debates in Poland on the autonomy of the judiciary in general and the law-making contribution of its decision-making in particular, this latter being unchanged denied in principle albeit tolerated in practice. As to the past, there was once a supreme court guiding decision[72] that specified state liability for a civil servant's culpable act, not provided by the then valid Civil Code Article 417. Thirty years passed, and the constitutional court, without any entitlement either, overwrote it.[73] The addressee supreme court reacted to such encroaching assistance by commenting that

> "Albeit interpretation of legal norms by the constitutional court has no binding force for the judiciary, it can be conceded in the present case that there is no reason why to doubt the interpretation given by it."[74]

Clauses enacted during the time of Socialism—such as social co-existence and proper use of rights—have not been revocated or replaced, only simply re-interpreted as some normal continuation against changing times, with minor changes of shift in adaptation.[75] Moreover, the outcome was heralded as "fundamental principles of ethical and worthy attitude", "expressing the idea of equity in law and human liberty".[76]

The Polish style of judicial decision-making is seen as intermediary between the French and the German ones. It can be characterised by short and categorical formulations; an establishment in which there is no distinction between

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[70] C-41/74 *Yvonne van Duyn v. Home Office* (1974) ECR 1337, 12.
[71] E.g., Michal Bobek *Porušení povinnosti zahájit řizení o předběžné otázce podle článku 234 (3) SES* [Violation of the obligation to initiate procedure concerning preliminary question] (Praha: C. H. Beck 2004) 195 pp., in particular pp. 46–66, quoted by Zdenek Kühn 'The Application of European Law in the New Member States: Several (Early) Predictions' *German Law Journal* 6 (2005) 3 & <http://www.germanlawjournal.com/pdfs/Vol06No03/PDF_Vol_06_No_03_563-582_Articles_Kuhn.pdf>, pp. 563–582 at p. 575.
[72] III CZP 33/70 (15 February 1971).
[73] SK 18/00 *Romuald K et al. v. Poland* (2001), OTK Zbiór Urzędowy 8, 256.
[74] IV CKN 178/01 *Zbigniew S. v. Skarb Państwa et al.* (2001) OSNC 7–8, 114, 117.
[75] With the exception of Marek Henryk Safjan 'Klauzule generalne w prawie cywilnym (przyczynek do dyskusji)' [General clauses in civil law] *Państwo i Prawo* XLV (1990) 11, pp. 54 et seq.
[76] E.g., STANISŁAW DMOWSKI in Stanisław Dmowski & Stanisław Rudnicki *Komentarz do kodeksu cywilnego* [Commentary to the civil code] ks I: Ogólna, wyd. 4 (Warszawa: Wydawnictwo Prawnicze LexisNexis 2002) 416 pp. [Komentarze Wydawnictwo Prawnichego], in particular p. 30.

questions of fact and questions of law; and doctrinal issues involved are either simplistically short-cut (like the French one) or treated in the light of scholarly opinions and previous decisions (mostly of the supreme court), analysed in order to arrive at general conclusions (like the German one). The analysis of jurisprudence is done selectively and summarised in abstract conclusions—with no interest whatever in the very facts of the given case (unlike the English one)—, serving as an *alibi* illustration to the decision made.[77] From those rare references to past law (or occasionally to the French or the Italian civil codes), genuine comparison is missing. The judgment is seen as standing for *the* official response, excluding any idea of an alternative solution and, of course, any dissent. Therefore justice and law are identified, concluding from the procedure itself, which is deductive, legalistic, and magisterial.[78] Or,

> „the attitude of courts is to represent a conclusion derived from the content of legal rules. The domination of arguments *pro* over arguments *contra* is one of the characteristic features of this style."[79]

Accordingly, „one has the impression of reading the pleading for the prevailing party rather than a balanced opinion that takes all arguments into account."[80] Its language is professional, and its conclusion is reached through lawyers' logic, with dogmas superimposed upon one another, in a depersonalised style, representing an authoritative state act and suggesting that „the law should give only one correct answer for every situation". There are some new moments, notwithstanding. For instance, „Referring to ethical and economic reasons, and to the rules of rationality or social consequences, is a popular practice."[81] At last but not least, some more continuity in time is proven by the fact that Latin maxims are unchanged willingly quoted in judgments.[82]

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[77] E.g., stating in judgment that "Extending deadlines in such a manner is considered widely accepted in professional literature." (2004) OSNC 7–8.

[78] Mańko 'The Culture…' [note 45], pp. 540–541.

[79] Lech Morawski & Marek Zirk-Sadowski 'Precedent in Poland' in *Interpreting Precedent* A Comparative Study, ed. D. Neil MacCormick & Robert S. Summers (Ashgate: Dartmouth 1997), pp. 219–258, quote on p. 225.

[80] Mańko 'The Culture…' [note 45], p. 541. Cf. also Łętowska 'The Barriers' [note 42], pp. 67 et seq., as well as Maciej Szpunar *Członkostwo Polski w Unii Europejskiej a polski system prawny* (Warszawa: Podiplomowe Studium Prawa Europejskiego Uniwersytet Warszawski 2003) 32 pp. [Zeszyt Naukowy Podyplomowego Studium Prawa Europejskiego 2003/3], in particular pp. 27 et seq.

[81] Morawski & Zirk-Sadowski 'Precedent' [note 79], p. 226.

[82] The *Temida Lex* electronic data base is processed by Witold Wołodkiewicz 'Łacińskie paremie prawne w orzecznictwie sądów polskich' in *Lacińskie paremie w europejskiej kulturze prawnej i orzecznictwie sądów polskich* ed. Witold Wołodkiewicz & Jerzy Krzynówek (Warszawa: K. E. Liber 2001) 287 pp. [Monografie wydzyału Prawa UW], in particular p. 22, referring to the date 1 February 1999. Frequence of uses of those maxims is the following: *Lex retro non agit* (76) [this Latin formulation is of a Polish origin from the end of 19th century as detected to by Witold Wołodkiewicz 'Lex retro non agit' in *ibidem*, pp. 153 et seq.], *In dubio pro reo* (50), *Nullum crimen sine lege* (25), *Pacta sunt servanda* (20), *Superficies solo credit* (20), *Nemo plus iuris ad alium transferre potest quam ipse habet* (19), *Clara non sunt interpretanda* (13), *Ignorantia iuris nocet* (12), *Ne bis in idem* (10), *Exceptiones non sunt extendendae* (8), *Ubi eadem legis ratio, ibi eadem legis dispositio* (7).
It is to be noted, however, that the maxim *Clara non sunt interpretanda* (equalling to saying that *Interpretatio cessat in claris*) is by far more than simple principle. Invented by Jerzy Wróblewski—*Zagadnienia teorii*

Preparation for accession was a hard time to all new member states involved, with mixed success. For instance, contemporary criticism mentions

> "(often incorrect and careless) translation of directives [...] often [...] word for word, thereby introducing concepts which are not known to the Polish legal system. Alternative options are omitted—even when a Directive requires a choice between them."[83]

Ordinary higher courts, however, started taking into consideration of both constitutional foundational principles and international law,[84] even if a supreme administrative court decision (2000), quoting a European law "as the additional ground for the judgment", criticised the practical want of the harmonisation of domestic law at a preparation time when European law was not to gain legal force in Polish domestic law.[85] All that notwithstanding, the constitutional court stated early enough, in *re* of gender equality in civil service, that

> "Of course, EU law has no binding force in Poland. The Constitutional Tribunal wishes, however, to emphasize the provisions of Article 68 and Article 69 of the {Polish Association Agreement} [...]. Poland is thereby obliged to use »its best endeavours to ensure that future legislation is compatible with Community legislations« [...]. The Constitutional Tribunal holds that the obligation to ensure compatibility of legislation (borne, above all, by the parliament and government) results also in the obligation to interpret the existing legislation in such a way as to ensure the greatest possible degree of such compatibility."[86]

As a next step, soon after association had been performed, the constitutional court rejected the criticism of election to the European Parliament based on the

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wykładni prawa ludowego [Outlines of the theory of the people's law] (Warszawa: Wydawnictwo Prawnicze 1959) 525 pp. at Łódz as based upon KAZIMIERZ AJDUKIEWICZ's conviction of the possibility of a text's "direct understanding"—it became the symbol of the "derivationist" school of interpretation, opposed to the "clarificationist" one, to which the underlying principle is *Omnia sunt interpretanda*, as the challenge from Poznań—Maciej Zielinski *Wykładnia prawa* Zasady, reguły, wskazówski [Interpretation of law: principles, rules, guidance] (Warszawa: LexisNexis 2002) 333 pp. / wyd. 6 (Warszawa: LexisNexis Polska 2012) 360 pp. [Podręczniki LexisNexis: Teoria i Filozofia Prawa]—claimed. For the debate and the reassessment of the courts' interpretational power, cf. Maciej Zieliński & Marek Zirk-Sadowski 'Klaryfikacyjnosc i derywacyjnosc w integrowaniu polskich teorii wykładni prawa' [Clarification and derivation in the integration of the Polish theory of the interpretation of law] *Ruch prawniczy, ekonomiczny i socjologiczny* LXXIII (2011) 2, pp. 99–111 and Marek Zirk-Sadowski 'Interpretation of Law and Judges Communities' *International Journal for the Semiotics of Law* 25 (2012), pp. 437–487. (It is Professor ANDRZEJ GRABOWSKI to have been kind enough to call my attention to this quarrel in Cracow, October 2013.)

[83] Władyslaw Czapliński 'Harmonisation of Laws in the European Community and Approximation of Polish Legislation to Community Law' in *Polish Yearbook of International Law* 25 (2001), pp. 45 et seq., quote on p. 54.

[84] Anna Wyrozumska 'Direct Application of the Polish Constitution and International Treaties to Private Conduct' *Polish Yearbook of International Law* 25 (2001), pp. 5 et seq.

[85] SAC *Senago* (13 March 2000), trans. in *Polish Yearbook of International Law* 24 (1999–2000), pp. 217 et seq., quote on p. 219.

[86] K. 15/97 in *Orzecznictwo Trybunału Konstytucyjnego* (1997) 19, 380. és köv. & in *East European Case Reporter of Constitutional Law* 5 (1998), pp. 271 et seq., quote on p. 284.

objection of unconstitutionality of the relevant Community regulation, considering the fact that the unchanged Polish constitution grants voting rights to Polish citizens exclusively. Excluding any construction of priority or conflict between competing legal regimes, the court considered domestic constitution as "applicable directly to those structures of the Polish state exclusively through which the realisation of the interests of the republic is asserted"; stated that "domestic interpretation needs to keep the constitutional principle of assisting the European integration process and co-operation among states in mind"; paying attention to that "Instead of generating or aggravating conflicts, the law's long standing social function is their resolution."[87]

Well, political needs may easily head best fora for swampy and risky area as well. Alibi reasons could be continued for long and without limitation, equally justifiable through the rabulism of similarly forceless and vulnerable arguments. For such evasion is in fact nothing but avoidance of the law. But it risks of destroying the law's ethos and thereby doing more harm in the long run as compared to some apparent tactical gain, collectable in the short run.

3.2.2. The Czech and Slovak Republics

According to critics, the once Czechoslovakia was unblended with the spirit of "revolt against formalism";[88] her getting stuck at the Austrian exegesis of the end of 19th century[89] meant passing by general principles of law and the express prohibition of judicial law-making. In general, "the interpretation of law was always presented as a simple cognitive operation [...and...] was always either a right or a wrong solution", that is, conclusion was reached in a static manner and as an exclusive alternative.[90] Not even implementation of human rights shaken those simplistic patterns repeated through decades and generations.[91] "Unfortunately, since the fall of Communism the old philosophy of bound decision-making still continues to govern the judicial discourse and has even

[87] K 15/04 (31 May 2005): 1 & III.2 in *Orzecsznictwie Trybunału Konstytucyjnego* Zbiór urzędowy, A, 5, 47, 655–668: 34, 10; 34, 9; quoted by Kühn 'The Application...' (2005), pp. 573–574.
[88] Mauro Cappelletti *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press 1989) xxxiii + 417 pp., in particular p. 9.
[89] Save cases of political retorsion, when the framework of criminal legislation as left premeditatedly in wide ambiguities and generalities could be filled in at whatever way. For a case-story, cf., e.g., Václav Havel 'Kicking the Door' trans. Tamar Jacoby *New York Review of Books* 26 (22 March 1979) 4 in <http://www.nybooks.com/articles/7867>.
[90] Zdeněk Kühn 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement' in *The American Journal of Comparative Law* 52 (2004) 3, pp. 531–567, in particular pp. 540–542, quote on p. 543.
[91] Pavol Hollander 'Kognitivismus versus decisionismus v judiciální aplicaci Listiny základních práv a svobod' in *Deset let Listiny základních práv a svobod v právním řádu České republiky a Slovenksé republiky* ed. Bretislav Dančák & Vojtěch Šimíček (Brno: Masarykova univerzita v Brně, Mezinárodní politologický ústav 2001), pp. 95 et seq., quote on p. 96–97. Cf. as well his 'Kognitivismus versus Dezisionismus in der Gerichtsanwendung der Charta der Grundrechte und Grundfreiheiten' *Rechtstheorie* 34 (2003) 4, pp. 487–504.

strengthened its formalist features." For "Too often it seems that post-Communist judges hesitate to go into the merits of a case, preferring to dispose of the case on formal grounds."[92]

Only their constitutional court challenged the underlying situation—in a struggle with the country's supreme court,[93] by the way—, nullifying a normative act, for instance, as it was "proven to be shiningly contradicting (owing to over-formalism) the principle of justice".[94] As if constitutional adjudication as such was to transmit a message to administration of justice by ordinary courts, claiming that they are not

> "absolutely bound by the literal wording of a legal provision, as they can and must deviate therefrom if such a deviation is demanded by serious reasons of the law's purpose, the history of its adoption, systematic reasons or any principle deriving from the constitutionally conforming legal order. [...]. In doing so, it is necessary to avoid arbitrariness; the court decisions must be based on a rational argumentation."[95]

Accordingly, if wrongs are to be cured, then all it has to mean that "legal enactments cannot be interpreted so dogmatically and non-conformably to the constitution as to *de facto* give rise […] to new injustices."[96] Otherwise speaking, it presupposes, while also concluding therefrom, that "legal enactments do, and must always, include within themselves the principles recognized as part of the democratic states governed by the rule of law".[97] Otherwise, it cannot be but a case of "mechanical application of the law [...that...]—whether disregarding the rationale and meaning of the legal norm intentionally or by ignorance—makes from the law an instrument of alienation and absurdity".[98]

The president of the republic himself emphasised the need for a value-centred judicial decision-making. In the senate, at the occasion of the procedure for a constitutional judge nomination, he reclaimed that that what is now prevailing

> „is mechanical, I would like to say senseless, application of law, which almost becomes an object of some cult. [...] It is an approach toward the application of law which does not permit any control by ordinary common sense; nor does it allow for any consideration for the law's sense, meaning or circumstances, any consideration of the probable legislative intent or even the core of law's value in a hard case.

[92] Kühn 'Worlds Apart' [note 90], pp. 550 and 555.
[93] Cf. Zdeněk Kühn *The Judiciary in Central and Eastern Europe* Mechanical Jurisprudence in Transformation? (Leiden & Boston: Martinus Nijhoff 2011) xxii + 311 pp. [Law in Eastern Europe 61], pp. 233–240.
[94] *ÚS* 15, 17, III. dec., *ÚS* 224/98.
[95] *ÚS* 7 (1997), 87, Pl. dec., *ÚS* 21/96, quoted by Kühn *The Judiciary*... [note 93], pp. 200–201.
[96] *ÚS* 3 (1995), 227, IV. *ÚS* 215/94 (ibid., p. 202).
[97] *ÚS* 6 (1996), 249, IV. dec., *ÚS* 275/96 (ibid., p. 201).
[98] *ÚS* 9, 399, Pl. dec., *ÚS* 33/97 (ibidem).

> Although the law is a human product, it attains almost metaphysical authority."[99]

Such was the basic situation the fact notwithstanding that the preparation to association was unprecedented in its rush ahead. Preceding the obligation of direct Union law application, for instance, the Olomouc high court rejected the *Skoda Auto* motion ignoring the European competition law regulation by declaring that

> "free market and especially antitrust law are [...] usually enriched by external law, which is an absolute necessity in the perspective of the harmonisation of laws of the European Community and the Czech Republic."[100]

As a next step, the constitutional court re-affirmed the identity of values and basic principles of both the European Union Act of Accession and the own constitution.[101] Within some years—before the association had been performed and with direct reference to a European Court decision[102]—it was confirmed that

> "Primary Community law is not foreign law for the Constitutional Court, but to a wide degree it penetrates into the Court's decision making—particularly in the form of general principles of European law."[103]

At the same time, however—applying correctly the domestic law in force, half a decade before the European law should have had direct force—the supreme court declined reconsidering a contractual issue upon the plaintiff's reference to good faith, as understood in Western Europe and the European Community. As it was explained,

> "validity of the agreement made [...] must be decided according to the then valid law, as both lower courts did. In contrast, laws and directives valid in the countries of the European Community are not applicable, as the Czech Republic was not (and still is not) a member of the Community, and that is why the Czech Republic is not bound by these laws. The binding force of the rules to which the appellant refers cannot be inferred from any provision of the {Czech Association Agreement}, as the court of appeal concluded. The question of harmonization of legal practice of the Czech Republic with legal

[99] VÁCLAV HAVEL in *ČTK* (14 March 2002) & in <http://www.senat.cz>, quoted by Kühn *The Judiciary*... [note 93], p. 227.
[100] 2A6/96 (14 November 1996) in *Právni rozhledy* 5 (1997) 9, pp. 484 et seq.
[101] III. *ÚS* 31/97-35 in *Sbírka nálezů a usnesení* 8, p. 149.
[102] C-179/90 *Merci convenzionali porto di Genova SpA v. Siderurgica Gabrielli SpA* (1991) ECR I-5889.
[103] 410/2001 Re *Milk Quota* in <www.concourt.cz>, cited by Kühn 'The Application' [note 71], pp. 567–568.

> practice of the European Community is gaining in, but this cannot change anything in the outcome of this case."[104]

Before accession—and, conformingly, "considering the present phase of the European integration"—Slovakia's supreme court also resisted the direct application of a European directive.[105]

3.2.3. The Baltic Republics

Critical overviews report on judicial practice narrowly and inflexibly following the letter of the law.[106] Free market could not have a place under their all-Soviet sun;[107] the law's subsequent change occurred in a gradual and somewhat belated way; and there was no place for active judicial mentality, sensitively weighing and balancing, as well as complementing and adapting the law.

For instance, the Estonian civil code (1965) had no clause of good faith. As a matter of fact, it was only introduced by the 1st Paragraph, Article 108, of the new code's general part—in force from 1 September 1994—as a provision tentatively generating new jurisprudence step by step, which became visible by the turn of the Millennium only.[108] At the same time, unjustified enrichment is not posited in the code, so there is no *caveat* referring to it either. Not even their supreme court is toiling with general principles of law, so—as a typically American commercial lawyer was led to remark that—what prevailed there was "an extreme form of legal positivism [...which...] may result in unjust rulings or even a complete denial of justice."[109]

As to the relationship between European law and domestic law during the pre- and the post-ascension phase, it is reported that judicial fora in Lithuania took into consideration, as an instance guiding judicial interpretation, European provisions regarding competition and copyright law well before her association. At the same time, however, the normative foundations of direct application have not been cleared up enough. Accordingly, pre-accession practice has continued

[104] 25 Cdo 314/99 (12 December 2000) in <www.nsoud.cz>. In a commentary on 11 Cms 231/96, the regional justice of Brno Boris Filemon—*Vynuttelnost práva a právni praxe* (2000) 4–5, p. 34—blamed this type of abstainment as "»Czech« isolationism unaware of the significance of comparing laws". Quote by Kühn 'The Application' [note 71], pp. 569 and 570.
[105] 76/2000 (25 August 1999) in *Zbierka stanovísk Najvyššieho súdu a rozhodnutí súdov Slovenskej republiky* 4 (2000), pp. 55 et seq.
[106] E.g., Frank Emmert 'Administrative and Court Reform in Central and Eastern Europe' *European Law Journal* 9 (2003) 3, pp. 288–315, in particular pp. 295–296.
[107] Irene Krull 'Legal Integration and Reforms – Innovation and Traditions' *Juridica International* Law Review [University of Tartu] V (2000), pp. 119–123.
[108] Ibid. p. 122.
[109] Emmert 'The Independence of Judges' [note 49], p. 406.

further on more or less unchanged, transforming the earlier pattern into a retroactive one.[110]

As to Estonia, the supreme court is said to frequently deny both preliminary questions to be addressed to the European Court[111] and the European law to be applied in constitutional adjudication. In that respect, a formal justification is usually forwarded and in a most logical manner, according to which there is no domestic competence for doing so, regarding that neither the constitution nor the European community law has any relevant provision.[112]

The situation in Latvia and Lithuania is even more clear-cut as European statistics have not known about preliminary questions forwarded from these new member states.

3.2.4. Croatia

Croatia is self-characterised as a specimen of legal culture expressedly positivistic and formalistic, identified with the pattern within which (instead of using it as an instrument) law is conceived of, and treated as, a self-fulfilling end to be taken in itself.[113]

It is striking even in a Central European perspective that courts there have never raised the issue of the laws' constitutionality; judgments are not published; case law is unknown; and in want of any form of law-reporting,[114] past and present judicial decisions are not reflected or commented upon by anyone.[115] Concludingly, those taking part in the everyday administration of justice do not consider themselves either professionally or sociologically competent to role-play an expert offering *de lege lata* or *de lege ferenda* opinions merging on law in force, as if there were not, and could not even be, reverse link from law-application to law-making.[116]

[110] Yvonne Goldammer & Elzė Matulionytė 'The Application of European Union Law in Lithuania' *European Law Review* 31 (2006) 2, pp. 260–270, in particular p. 270.
[111] 3-2-1-4-16 *Gulf International Lubricants v. Gulf Oil Estonia* (30 March 2006) [processed as a civil law case] and 3-3-1-33-06 (5 October 2006) [processed as an administrative law case].
[112] 3-4-1-1-05 (4 November 2006), quoted by Carri Ginter 'Constitutional Review and EC Law in Estonia' *European Law Review* 31 (2006) 6, pp. 912–923, in particular p. 919.
[113] Tamara Ćapeta 'Courts, Legal Culture and EU Enlargement' in *Croatian Yearbook of European Law and Policy* I (2005), pp. 1–21, in particular pp. 8 and 20.
[114] According to an interview in early 2004, case law was not published in Romania either. Kühn *The Judiciary...* [note 93], p. 191.
[115] Ćapeta 'Courts...' [note 113], pp. 9–10.
[116] Ibid. pp. 15 and 21. According to Lord Goff—in *Woolwich Building Society v. IRC (No. 2)* (1992) 3 All ER 737, 760–761—, "although I am aware of the existence of the boundary, I am never quite sure where to find it. Its position seems to vary from case to case".

Before a case is decided on the last resort—a chance that may take several years in consequence of chronically long delays[117]—any public word on them would qualify, as undue interference, a specified crime.[118]

At the same time, however, the Croatian constitutional court is rather active in enforcing the European Convention of Human Rights. Domestic law conflicting to whatever international agreement is sanctioned as a violation of the principle of the rule of law, henceforth the very idea of conflict is rejected as it could only qualify as unconstitutional.[119]

True, professionals in Croatia know that any option for an accelerated path of development needs certain caution. For, especially in law, instruments and institutionalisations can prove to be a two-edge weapon. The very personality of justices who are "liberated" from traditional professional limitations through the reduction of their old patterns of rigorous argumentation and justification to a licence of creative invention at please, may have negative repercussion that, in want of sufficient tradition in the background, will remain hard to control by sheerly normative regulative means. Gospić town court, in a genocide case, established the fact, for instance, that "Serbs have happened to murder Croats for half a millennium."[120] Well, such a legacy is obviously setting back the development of judicial ingenuity, a circumstance that, as a counter effect, may give a place to the upvaluation of practical lawyers' skill and ingenuity, especially in hard cases.

Phases lag? Belatedness? All this may at most be relative, a function of the adopted point of view. As a by-effect, they can easily turn to become expressedly positive, by preserving skills and sensitivities which may be especially useful at a time when other cultures will leave them behind. For instance,

> "Thus, paradoxically, the positivism and formalism of Eastern European judges may sometimes make them »good European judges«, i.e. judges who faithfully apply Community law."

—in contrast to present-day mostly standardised Western European practice which is apt to question (as an issue of validity or effect) the basis, legitimation, or field of operation, of the provisions to be applied of the European law.[121]

[117] Perhaps some one million and a half, stated by Alan Uzelac 'The Rule of Law and the Judicial System: Court Delays as a Barrier to Accession' in *Croatian Accession to the European Union* 2: Institutional Challenges, ed. Katarina Ott (Zagreb: Institut za Javne Financije 2004), p. 105.
[118] Croatian criminal code, 309. § (*Narode novine* 110/1997, resp. 111/2003).
[119] U-I-920/1955 and U-I-950/1966 (15 July 1998) (*Narodne novine* 41/1998) and Siniša Rodin 'Main Accents in Practice of the Constitutional Court (1991–2001)' in *Croatian Judiciary* Lessons and Perspectives (Zagreb: Croatian Helsinki Committe for Human Rights & Netherlands Helsinki Committee 2002), pp. 219–268.
[120] No. I KŽ 862/03-8 (29 January 2004).
[121] Ćapeta 'Courts' [note 113], p. 16.

4. Dual Captivity Continued

The variety of practices relating to the new—once Socialist—members of the European Union[122] induces reconsideration. For the association agreements themselves (taken *de lege lata*, i.e., without a critical—*de lege ferenda*—view of the chance of their improper preparation) have in no case foreseen h a r m o n i s a t i o n of domestic and EU laws to be enforced when justice is administered preceding the time of the legal act of actual joining, so all those divergences notwithstanding, their variety may have rightly covered the original intention of both parties. Moreover, enforcing anticipatory harmonisation of the normative grounds of domestic judicial decision-making with no due authorisation in its underlying (valid) law could only be a neophyte over-fulfilment within the process of association, with the negative side effect (overshadowing the short run gain of early adaptation) that it may have in fact impaired the *sine qua non* absolutism of the very idea of the Rule of Law and, as a part of it, legal certainty, thereby also debilitating, in a paradoxical manner, the idea of constitutionalism, too, which had once been expected to substantiate the entire undertaking as the upmost reason for change at all.

This overview could of course be extended by a thorough inquiry into the Hungarian practice,[123] representative instances[124] and signals of the weakness of

[122] Cf. also, e.g., Michal Bobek 'A New Legal Order, or a Non-existent One? Some (Early) Experiences in the Application of EU Law in Central Europe' *Croatian Yearbook of European Law and Policy* 2 (2006), pp. 265–298 and Erik Evtimov *Die Rezeption des Europarechts in Mittel- und Osteuropa* Erfahrungen und Perspektiven in Bulgarien (Bern: Stämpfli 2004) xlii + 388 pp. [Schriften zum Europarecht 24].

[123] E.g., Bartha & Bencze 'Az európai jog alkalmazása' [note 52], passim.

[124] For instance, in want of further normative instructions and as a counter effect of the abuse made during the Socialist past, clauses to good morals and the like may have devoured courts by fear as they have not been encountered so far, whilst "[t]he task [...] to bridge the gap between the pre-World War II period and modern private law" has remained a call for future duty to be performed. Attila Menyhárd 'Contract Law in a Changing Society – Hungarian Experience' in *Private Law and the many Cultures of Europe* ed. Thomas Wilhelmsson, Elina Paulino & Annika Pohjolainen (Alphen aan den Rijn: Kluwer Law International 2007), pp. 105–121 [Private Law in European Context 10], quote on p. 115. It is to be noted that before the accession, the Hungarian Constitutional Court preferred domestic constitution to Community law, sometimes even by misinterpreting the latter's nature. E.g., by reference to the case 30/1988 (June 25), see János Volkai *The Application of the Europe Agreement and European Law in Hungary* The Judgment of an Activist Constitutional Court on Activist Notions (Cambridge, Mass.: Harvard Law School 2000) 40 pp. [Harvard Jean Monnet Working Paper 8/99] & <http://www.jeanmonnetprogram.org/papers/99/990801.html> and Imre Vörös 'The Legal Doctrine and Legal Policy Aspects of the EU-accession' *Acta Juridica Hungarica* 44 (2005) 3–4, pp. 141–164, in particular pp. 149–151; and, by referring to the case 17/2004 (May 25), András Sajó 'Learning Co-operative Constitutionalism the Hard Way: The Hungarian Constitutional Court Shying away from EU Supremacy' *Zeitschrift für Staats- und Europawissenschaften* 2 (2004) 3, pp. 351–371. According to the review by Vanda Lamm & Zoltán Fleck—'Az igazságszolgáltatás újabb 10 éve: Mit akart és mit ért el az igazságszolgáltatási reform?' [Ten further years of administration of justice: What was targeted and what was achieved by its reform?] in [Miniszterelnöki Hivatal & Magyar Tudományos Akadémia {Prime Minister's Office & Hungarian Academy of Sciences}] *Stratégiai kutatások* 2007–2008: Kutatási jelentések [Reports on strategic researches] ed. Januszné Banczerowski et al. (Budapest 2008), pp. 415–428, in particular p. 424—, the domestic sanctioning of the European Court of Human Rights case-law is fully by chance, exceptional to the instances where the want of care, ignorance, denial of the primacy of Community law, or express negation, are at stake.

our institutional-organisational preparation[125] as well; however, it could not add an iota to the underlying overall message. For it cannot but ascertain a foundational realisation, namely that the European Union is marching on and further on in time as a characteristic b i g o r g a n i s a t i o n after our region's accession as well. Accordingly, it seldom recourses to issuing directly applicable and enforceable provisions and detailed regulations drafted within some well-ordained normative framework, save specific emergencies. In average cases, it entrusts the progress of effective integration to the workings of its big structure and t o t a l m o t i o n, as well as the m u t u a l i t y between the EU and its member states, which, well-tried, already has stood the test of time, that is, the skill of how to manage tensions and their resolution, which are necessarily to form in the process. That is, the organisational idea, apparatus and technicality conceived of as the chance of having an "o r d e r o u t o f c h a o s" has been proven the most successful enterprise the humanity has ever erected and experienced in its long—and known—history.[126]

To continue on our overview, the European law—alongside with the overwhelming mass of the *judicial acquis communautaire*[127] —gains normative force for the countries joined from the Central and Eastern European region from May 2004 on; this is clearly stated by the Act of Accession (Article 2) and sanctioned by the European Court: „From the date of accession".[128]

There is a moment of impatience and subjective exaggeration in the fact that local professional literature treats the issue of pre-accession observance/non-observance of European law by local domestic courts in term of p e r s u a s i v e f o r c e[129] (traditional in the American precedential regime, used to distinguish the former from the precedents' expressedly binding force), only in order to vilify the genuinely law-abiding pattern of those judicial fora which reject mixing, in their legal procedure, what is considered to be law and what is simply non-law (or, perhaps the promise of some future law at the most) at a given place and time,[130] criticising, for instance, cases where preference is given to the application of the official law as "directly effective" valid normative ground,

[125] András Grád—'A hazai igazságszolgáltatás felkészülése az európai uniós tagságra, avagy rövidesen kiderül: amit hallunk vészharang-e, vagy csak az utolsó kört jelző csengő' [Preparation of the judiciary to European Union membership] *Európai Jog* III (2003. július) 4, pp. 37–42— reports that up to the paper's time, all in all thirty-five Hungarian justices learned Community law; not even the supreme court of justice had an expert bureau specialised in Community law (albeit there is one dedicated to human rights, and such European law bureaus were strongly proposed for higher courts of justice to have as well); and with its recommendation 2003/1, the National Judicial Council of Hungary expressly discouraged any continuing education, independently of whether or not specialised in European Union law.

[126] Cf. Varga *Jogrendszerek, jogi gondolkodásmódok*... [note 28], passim.

[127] Cf., e.g., Tamara Ćapeta 'Judicial acquis communautaire' in *EU Adjustment to Eastern Enlargement* Polish and European Perspectives, ed. Anna Zielinska-Glebocka & Andrej Stepniak (Gdansk: Uniwersytetu Gdanskiego, Fundacja Razwoju 1998), pp. 80–95.

[128] <http://eur-lex.europa.eu/en/treaties/dat/12003T/htm/L2003236EN.003301.htm>.

[129] E.g., André Tunc & Suzanne Tunc *Le droit des États Unis d'Amérique* Sources et techniques (Paris: Dalloz 1955) 527 pp. [Les systèmes de droit contemporains 6].

[130] Kühn 'The Application...' [note 71], pp. 567–568.

instead of something airy—at least, to some, persuasive, according to personal tastes—soft law.[131] Albeit all such instances, bourgeoning in the region in question, can only exemplify on the final analysis nothing else than disintegration of discipline, bounds and traditions of the legal profession, moreover, at a momentous time when its underlying legal culture is to face inorganic transfer of a mass of external laws.[132] For, as it is known, in cultures of Civil Law exclusively what is made normative (formally valid) by a directly effective source of the law (and promulgated accordingly) can at all be enforced in the name of law. And what can be termed 'persuasive'[133] is simply non-law in a Civil Law system, knowing no precedents and no softening processes either, able to replace—by breaking through—the idea of systemic building in both deduction and justification.

To arrogate as binding anything at most 'persuasive' is *contradictio in adiecto* from the beginning, far from "isolationism" in itself, with which it is far too often accused.[134] For the situation is clear: the legislator could do anything but refrained actually from doing that. Its odium, if there is one, must not be transferred to the judiciary. It is ironical to teach, in a process of transitioning from a dictatorship, without scruples again that in a state where courts are powered to entitle themselves to initiate any path to take, independently of whether or not their initiative is covered—justified and legitimated—by the law, well, that such unbound discretion will necessarily turn to become creative in all directions, generating legal uncertainty on borderline of sheer despotism. This is next to j u d g e o c r a c y *stricto sensu*, where any genuine "check & balances" within the division of powers is already waned away.[135] Thereby such instances of pioneering post-modernists' fundamentalism, also derived by the mainstream catch-word "c o n s t i t u t i o n a l i s m", raises doubt in that whether constitutionalism has at all a definite meaning, usable as an operative term, or not.[136]

As is known, not even Community law provides express ordering for the topic. Three decades ago, the European Court stated in general (and in a way

[131] V. Týč 'Czech Republik' in *Handbook on European Enlargement* A Commentary on the Enlargement Process, ed. Andrea Ott & Kirstyn Inglis (T. M. C. Asser Press 2001), pp. 229–238, quote on p. 231.
[132] Cf. Varga 'Reception of Legal Patterns...' [note 6].
[133] The reference work—Patrick H. Glenn 'Persuasive Authority' *McGill Law Journal* 32 (1987) 2, pp. 261–298—is simply an (over)generalisation based on comparison of various fields of Common Law jurisprudence.
[134] In a Czech quote, used as a term of degradation, by Kühn 'The Application...' [note 71], p. 570.
[135] In the region, this is the expression of president Václav Klaus in *Soudcokracie v ČV* Fikce nebo realita? [Judgeocracy in the Czech Republic: fiction or reality?] ed. M. Loužek (Praha: CEP 2006); cf. also <http://www.klaus.cz/clanky/1470>. In a context of the division of powers, see András Zs. Varga 'Beyond Rule of Law' *Iustum Aequum Salutare* IX (2013) 2, pp. 117–127 & <http://ias.jak.ppke.hu/hir/ias/20132sz/07.pdf>. For the phenomenon too well known and criticised in the USA/UK daily press as well, cf. <http://www.nationalreview.com/corner/165150/re-end-judgeocracy/mark-krikorian> and <http://www.spiked-online.com/newsite/article/6857#.UkHFUn-1s0M>.
[136] As to 'rule of law', such self-emptying process through the term's globalised political over-use is analysed through examples of, and literature devoted to, it in Varga *Jogrendszerek, jogi gondolkodásmódok*... [note 28], pp. 16–28.

irrelevant for those in the process of association still) in *re* of a somewhat analogical issue that

> "Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected"[137]

And, to be sure, Community law has no category of „those awaiting, and preparing for, association" or „those learning, and preparing for, the EU law". In addition to their specific Act of Accession, common regulation concerns their activity as well. Accordingly, one may state that that what is particular and also detrimental in the region's contemporary development is by far not revolving around whether or not transition process is hustle and runs ahead, passing over limitations set by domestic law, but the region's overall belatedness, that is, its too late detachment—providing that it has happened at all and has been crowned with success at all—from the Soviet-type Communism once imposed upon it.

This is also to say that in addition to individual success by which a sophisticated or crude variety of „dictatorship of the proletariat" subdued the particular legal regime to follow imported patterns (over-politicising the issues through direct political interference with the law's homogeneous working, randomly counter-balanced by "Socialist normativism" as variant to old textual positivism),[138] what really matters is the added—secondary—effect: the phases-lag of judicial methodology. For, while Muscovite MARXism petrified "bourgeois" legal positivism of the first part of the 20th century, the countries in question became necessarily deprived of Western professional re-orientation in the meantime: (1) post-WWII moral renaissance, (2) criteriality of natural law (with the "nature of things"), (3) fertilisation of practice by general clauses and principles, as well as with concern for human rights, and (4) the constitutionalisation of issues. Accordingly, the gap to be bridged is not so much the one "between the pre-World War II period and modern private law"[139] but the one between own past, preserved in professional memory, of last pre-WWII democratic achievements and post-WWII Western continental judicial patterns and methodologies, reshaped in the meantime.

This haunts today and will continue haunting in our near common future as well. The realisation of some discrepancy, dysfunction, torsion, disfiguration or distortion is its phenomenal form. Concludingly, for a given (and presumably sensitive) period the region's legal culture will feature some otherness within the

[137] C-98/78 *Racke v. Hauptzollamt Mainz* (1979) ECR 69, 20 at 86 & Case 99/78 *Decker v. Hauptzollamt Landau* (1979) ECR 101, 8 at 111. Cf. also François Lamoureux 'The Retroactivity of Community Acts in the Case Law of the Court of Justice' *Common Market Law Review* 20 (1983) 2, pp. 269–296, in particular pp. 269 and 282.
[138] Cf. Varga 'Liberty...' [note 41].
[139] Menyhárd 'Contract Law' [note 124], p. 115.

European Union. Moreover, as adapted locally, also Community law and integration will have, in local adaptation/materialisation, some r e g i o n a l d e t e r m i n a t i o n .

All this comes true without the law of the European Union (either in general or at a level addressed to the region) would foresee or authorise anything like to occur. But the path to be covered is a great challenge indeed, and it is only viable if backed by proper dedication. Also it is to be remembered that any exigency of following external patterns may be accompanied, as usual corollary, by both l o n g i n g f o r p e r f e c t i o n (as eminency of either neophytism or in copying)[140] and i n e r t i a , keeping the organicity of local pasts somewhat alive—with the chance of l a z i n e s s as well, with remnants traceable also in big moves.

Or, eventually, there is one job to perform: transcending past by both bringing its h i s t o r i c a l a c c o u n t and p r o m i s i n g p e r s p e c t i v e s for such a venture. It should not to be a *l'art pour l'art* programme nor mere praying-mill repetition of a mantra, able to generate magic effect somehow. There is a common future to be built in common, with all professions involved. Providing that it would fail, added burdens might dislocate the process. It could deprive the whole process of perspectives, bringing down participation in one common Europe a sheer formalism.

[140] E.g., Bartha & Bencze—'Az európai jog alkalmazása' [note 52], in particular pp. 325–326—is critical of any judicial conclusion if not conclusive with no alternatives but turns to be permissive once the sphere of action of the Community law is extended, independently of whether it is just unjustified, illegal, or despotic.