

CSABA VARGA*

Legal Theorising

*An Unrecognised Need for Practicing the European Law***

Abstract. As a legal philosophical overview of the operation of European law, the paper aims at describing the mentality working in it by also answering the query whether the European law itself is to be regarded as the extension of some domestic laws or it offers quite a new and sui generis structure built upon all member states' laws. In either option, the connection between the European law and the composing national laws recalls the embodiment of post modern clichés, as the former's actual working (both purposefully and through its by-effects) exerts a destructive impact upon the bounds once erected by the latter's anchorage in the traditions of legal positivism. In addition, the excellence in efficacious operation of the European law is achieved by transposing the control on its central enactments to autonomous implementation and jurisdiction by its member nations. According to the conclusions of the paper, (1) the (post) positivism as the traditional domestic juristic outlook is inappropriate to any adequate investigation of the reality of European law. As part of the global post modernism itself, the European law stems from a kind of artificial reality construction (as the attempted materialisation of its own virtuality), which is from the outset freed from the captivity of both historical particularities and human experience, i.e., of anything concretely given hic et nunc. At the same time, (2) by its operation the European law dynamises large structures, through which it makes to move that what is chaos itself. For it is the reconstructive human intent solely that may try to arrange its outcome according to some ideal of order posteriorly—without, however, the operation itself (forming its construct and assuring its daily management) striving for anything of order (or ordered state and systemicity). This is the way in which the European law can be an adequate reflection upon the (macro) economic basis to which it forms the superstructure. Accordingly, (3) the whole construct is frameworked (i.e., integrated into one working unit and also mobilised) by an artificially animated dynamism. Concludingly, no national interest can be asserted in it without successful national self-positioning ready to launch it.

Keywords: philosophy of law; comparative legal cultures; the Westphalian heritage; legal pluralism; judicial methodology; grand-system functioning; order out of chaos; premodern, modern, postmodern

* Scientific Adviser, Institute for Legal Studies of the Hungarian Academy of Sciences, H-1014 Budapest, Országház u. 30.; Professor, Director of the Institute for Legal Philosophy of the Catholic University of Hungary.

E-mail: varga@jog.mta.hu

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1. Introduction: Queries in European and Global Perspectives

As far as challenges are concerned to find what place may Hungary occupy with her law and legal culture in the European Union after her accession to membership is concluded, first of all it seems to be suitable to trying to foresee the future in mirror of the development from recent past to the present, through a comparative historical analysis.

In accordance with this, the first item to examine is the foundational issue of the ways in which the European Union's common law issued uniformly to all its members, its administrative implementation under the promise of some well-balanced and co-ordinated uniformity, as well as its judicial application by its central law-adjudication agencies will be in the position to exert a decisive impact on either the long-term survival or the gradual withering away of the historical specificities and relative independence of the national legal systems involved. Or, as seen from the opposite side, the dilemma of partner states is in what exactly and to what extent this law of the European Union may become a genuinely and truly *sui generis* formation indeed. Otherwise formulated, how much its creation, administrative implementation and judicial ascertainment with feasible adaptation are to become captive of the giant partners fighting with one another within the Union to extend their respective (national) influence to the rest, in order that the English, German and/or French domestic traditions can eventually be transformed into one single all-European scheme. All this covers the prospects of standing divergence *versus* final convergence of the (continental) Civil Law and the (Anglo-Saxon) Common Law mentalities; the selection of the models for, as well as the techniques and future chances of, the common codification of European (private substantive and procedural, and further on) laws; the definition of the pattern(s) followed in law-adjudication exercised by the common judicial fora of Europe; and, altogether and taken as a basis, the mapping out of both the legal traditions of the participating states by delineating their historical groups and sub-groups (with past and present co-relations and changes of shift thereof) and of their chances of either ultimate preservation or perhaps sublation—in the process of and despite their continual self-adapting transformation, in the first place as to their respective sources of the law, their conceptuality, structure and problem sensitivity, as well as the techniques and judicial reasoning they use, including its canonised skills as well.

Such dealing with the above, if exhausted by filling up similar frames exclusively, would appear as suggesting some self-offer for servile copying, albeit the way open for all new-comers is by far not of one-sense in principle. For as members of equal standing by now, we cannot take as simply given from the beginning that, just as a token and independently of us as actors

(destined merely to watch the scene from a distance), in the Union's womb and through its complex chain-movement, law is getting continuously formed addressing us, too; while it is not to be taken as a self-propelling cause either that from all this some definite modification and continued change of respective domestic laws will ensue as the former's simple extension or mechanical conclusion, as in some reflex automatism. Or, just two-sensed and therefore also mutual and multi-actored this way is. Accordingly, the opposite pole of why to investigate effects will exactly be the issue, whether or not there are skills and chances hidden in our traditions, institutionalisations, particular solutions, experiences, or even practices of pressurisation, through the coming activation of which we can also assert our own interests within—and by contributing to—the European Union's common thought and institutional action in a truly creative manner and without disrespect to its overall ideality and functional complexity.

At the same time, we had better to be aware of the fact that we actually take part in the above mechanism of mutual influencing by far not exclusively with consciously pre-planned steps and patterns. For there is a brute fact, namely, the one of our relative Central & Eastern European impotence resulting from our specific historical conditions. For the region's Communist past, which spanned over nearly half a century to detach it from the daily Western European and Atlantic routine, has driven all those concerned to forced paths, diverting them from the very chance of any organic development. Or, this past made own practices developed and enforced throughout the West, against which we, Hungarians, for example, may now call back our own historical (and partly also nostalgic) remembrances (to former efforts at state-building, bourgeois revolution, liberal governance up to our involvement in the First World War, struggles between the two world wars, or, lastly, republican foundations during the short coalition period after the second worldwide catastrophe) at the most, which, however, inevitably and in the strictest sense, had also cut us off from contemporary Western European and Atlantic practices developed in their after-war recovery and afterwards, by having transformed our traditions into a historical *fore* pattern anchoring in their already distant past. That is, our ideals became in the meantime dated as mere remembrances rooted in the very past of Western civilisational patterns, forbidden and denied for us at their time, while we could hardly get own experience from their daily practices, evolved with them through nearly half a century. Therefore, eventually and in the last analysis, in both facts and ideals we are in a remarkable phase delay. For this very reason, the issue is also bound to be raised how much will our overall heritage—*nolens, volens*—affect our near future as an in-built impetus given.

Based upon own potentials, we are already both new members and constituent parts of—with shared ability also to contribute to—this unifying Europe. Therefore we are expected to answer the query for sustainability in a sensitive manner, namely, to rate what kind of future can be prognosticated for us in the dilemma of preservation mixed by mutual influences or assimilation under the pressure of overweighty partners, and also what kind of role traditions historically evolved may play in forming all this, defining its basic directions while transforming themselves into a conservative antipode in control of current adaptations, as main factors to strengthen internal forces needed so much for facing current challenges effectively and in an adequate manner.

Of course, plenty of researches have been carried out in Western Europe concerning various aspects of such and similar topics, even if in a rather isolated contexture. Neither panorama nor developmental perspective has been offered by them till now. As series of analyses within the reach of positive law and closed down in its well-established theoretical framework, they have been mostly building on their prevailing outlook as some ready-made recipe, without sensing the paradigmatic novelty of the total move which is going on anyway now with universal historical significance. Consequently, in want of own conceptualisation and methodological foundation, they have simply extended (insufficiently and by far not adequately, by the way) that what is anyhow prevalent as given in their everyday domestic routine. And still, own participation with own abilities necessitates own answers, specific of own challenges, as has ever been used in—and in a manner worth of—social sciences.

2. Basic Issues

2.1. *Human Refinement*

The European integration is one of the greatest victories of centuries, perhaps of millennia, as a development that may predestinate the mankind's overall fate for a long period of time. For such an institutionalisation of channels of international collaboration on a voluntary basis and launched in every step by co-operative participation is a hardly overvaluable advance in the *homo sapiens*' history. It is to note that not more than ten generations divide us from feudal particularism only, which presumed continuous group-fight with altering chances. It might result in some profit for occasional winners but it caused mostly lost (if not plain destruction) for nations and states concerned. In huge regions of the West of Europe where enemy in the proper sense (i.e., external power threatening our commonly shared civilisational values) had never menaced

survival, mostly also Christian princes, overlords sworn to the same God hankered for, or borne a grudge against, the property of their *similia*. Castles undamaged we admire in the Western hemisphere today as historical monuments are furnished with all imaginable defensive arts against those (yesterday perhaps still friend and fellow-in-arms neighbour) rounding on our life, property, spouse, and power equally, while we know that eventually no human artifice can save anyone arrived to the top on earth against the intrigue of others, aspiring with the same fighting spirit to the same arrival. Well, we may wonder at our still *prehistory* of a nearly recent past, how the refinement—or self-ennoblement—of human race proved to be relative for long centuries: scarcely less than two millennia later that the message of *Christianity* (in company of other world religions transmitting legacies basically concordant with the above) had become the common language of our predecessors.¹

Coming nearer to our present, just a bit more than half a dozen of generations' period separate us from the age when by force of his arms *Napoleon* aspired to found a Europe-like empire, and our parents still might live red, then brawn and yellow dictatorships that made efforts to form global empires by mere power. In history, the borders of causalities and coincidences often grow dim, since in a stage of constant and mutual expansion—in a modern state of *bellum omnium contra omnes*, later in variations of waging warfare and concluding peace treaties (making place to one another in a forecalculable sequence), and, as the achievement of our modernity, hardly cramped by the so-called international law either then or since then—every state actor experiments with optimising its situation legally, by setting in sheer power techniques and by making a defensive ideology out of its actually followed practice alike (putting it as a troubling issue to the posterity whether or not in the final analysis the catch words of the *Christianity*, ruled by the Church's adopted politics, or, later on, the ones of democracy—that is, the attention to be paid to and by the public opinion—had been confined to this); and, with the wisdom of posterity at the most and with no little resignation—most of all *post festam*—we take notice of the fact that, with some variations in resemblance but still coming from common descendance, the same spirit of the age has materialised in one

¹ It is worthwhile recalling the fact that sociological essays are used to report about re-feudalisation as a still strangely viable phenomenon also in Europe, in the very periphery of the European Union, whose stage of development is described most adequately in terms of Pierre Corneille's drama *El Cid*, reminding of the Iberian states during the 11th to the 13th centuries. Cf., e.g., Shlapentokh, V.: *Russia. Privatization and Illegalization of Social and Political Life*. Michigan State University, 1995.

of them and perhaps also in the other, maybe coming out as the winner of the given conflict.

Notwithstanding all this, it was in such a confrontation among nations that *international law* began to regain new strengths (together with its immensely considerable and varied professional branchings off by today), in line with and also resulting in the proliferation of international organisations, which were sometimes destined to become straightforwardly a legally circumscribed world state substitute, sometimes established to fulfil strictly delimited duties, considered as necessary; however, they had a common mark in that they were given a particular—and *sui generis*—legal status. Today's *American hegemony* has formed in the same way, in the world-wide interaction of giving and receiving, using all available potentials as defined by the actual challenge and the desirable response, which recontextualises also international law in a new paradigmatic situation.² Today this direction is coupled—if not identified with the former in its entirety, despite numerous interlocking it has—with the trend of globalisation, basically revolving around a world-economic interest. Filled with the taste of progressing in progress and bearing the purifying and self-recreating effect of the Enlightenment, not even these times might we answer otherwise the question once formulated by the Academy of Dijon, calling the farsighted vision of *Jean-Jacques Rousseau* about the ennoblement of morals, than by saying that: our instruments are constantly refined—although, and with returning generality, endeavours striving to reach the end have in the meantime become still more implacable, in result-maximalisation more inconsiderate, because by being capable of setting more refined technologies, they may envision a still by far more total effect.

What and how will be precipitated in our legal thinking and in our theorisation on law from all this? According to the shortest reply: much and little at the same time. Theoretical reflection seems to be always retarded. This is as if our earlier conditions were too forceful, since the possibilities within the prevailing frameworks are almost limitlessly able to pursue the old paths undisturbed, by adapting the known ones, and open for cautious developments. Nearly this is what we can learn from explorations into the historical logic of scientific

² Gooding, R. E.: Toward an International Rule of Law: Distinguishing International Law-breakers from Would-be Law-makers. *The Journal of Ethics* 9 (2005) 225–246 raises the straightforward issue that the claim of »rule of law, not of men« formulated within a state has been changed to »rule of law, not of states« in relations among states (227); however, in case of the overdominance by a superpower there is hardly any guarantee for voluntary and one-sided moderation—beyond the hope that international co-operation will be effective enough to “really internalize the settled rules governing relations between »civilized nations«.” (229).

development. Namely, advance is carried on within the frame of paradigms already formed; theorising upon new recognitions is achieved by gradually dissolving the tensions which are faced in this body of knowledge undertaken unchanged from the earlier period, and, this way, also mitigating them in consideration of its future; and it is only somewhen, at certain historically exceptional periods, that all this may turn to be over the limits of tolerability—moreover, most frequently not even as the necessary effect of circumstances that cannot be explained otherwise in epistemology than as the issue generated by trout-fly, secondary, merely coincident phenomena, or by external forces, or after a chance of breaking through is recognised—when, perhaps, a new paradigm will be born.³

Moreover, in law, the practicing of and theorisation on which is unchangedly cultivated mostly as closed within state boundaries and predisposed of the own cultural inveteracy, we ourselves seldom become cloven and duplex. Instead, we expand rather our suitable practices and habits to new territories—simultaneously as test and experiment—for that we may carry on chasing what is already *well-known* (by its further analytical exploration, synthetic re-definition in larger contexts, as well as reaffirmation in extrapolations), proceeding on on ways that are made safe thereby. It is in this sense that the present haunts. For we are inclined to see pretence, opportunity, and new experiment of extending ourselves—our past and experience—in this new European reality, rather than trying to sense, recognise and theorise it as a *sui generis* actuality, with both readiness measured by and approach adequate to it.

2.2. *The Westphalian Heritage of State Law and International Law*

Anyway, there is some implicitness dominating our jurisprudential thought, functioning as sieves of professional socialisation, on the one hand, and as the filtering agent of verification, on the other. It may serve as an aggregate of habitual criteria on both sides of the input and the output, defining primarily what can be thought of law.

For us, interestingly here and now, such implicitness is forwarded first of all by taking the so-called *Westphalian duo*—that is, dividing up the law's world to nation-states, ruled by domestic regimes, on the one hand, and international law, serving as the governing principle amongst such states, on the

³ Kuhn, Th. S.: *The Structure of Scientific Revolutions*. Chicago, 1962; cf. also vom Dietze, E.: *Paradigms Explained*. Rethinking Thomas Kuhn's Philosophy of Science. Westport, Conn. 2001 & Marcum, J. A.: *Thomas Kuhn's Revolution*. An Historical Philosophy of Science, London–New York, 2005.

other—as a basis. In conformity with the latter’s underlying origin, nature and operation (despite huge efforts anyway), international law is until today pulpy and fluid, rugged in all its components as forming day to day, since due to its occasionality and weakness in centralisation, it is not summed in reliably comprehensive and completed doctrine.⁴ This is why now—à propos the “*international rule of law*”—great feelings of its defect are formulated, recognising the need of determined steps to overcome it through various forms of promotion.⁵ Since it is a common experience that as soon as international power balance is split (by the practical dissolution of the League of Nations in the late interwar period or the end of bipolarity after the fall of the Soviet Union now), hegemonic interest is to prevail again (visibly *vis-à-vis* others),⁶ as backed by the standing and well-known celestial solemnity of references made to superb and unchanging principles.

In turn, national laws are used to be seen in the duality of the continental Civil Law and the Anglo-American Common Law (or, in triality, as complemented to by the so-called mixed regimes), when their established technicalities, institutional networks, or firm foundations in basically developed doctrines (or doctrinal outlines) are considered. Here and now, it is not their actuality that may be seen as problematic but their unproblematic reception as something given from the outset as an exclusive natural fact. For it has some imperialistic undertone when the process of ongoing globalisation, sheltering behind all present moves, is also taken into account; when it ignores the broadening of the topics of investigations devoted to social formalisms by social theories since the beginning of the 20th century; when it features up the standing imprints of Euro-centrism or ethno-centrism. Since the epoch of *Eugen Ehrlich* and *Max Weber*, so-called non-state laws as well as the cases of legal pluralisms, deriving from some parallel and/or concurring predominance, have also called the undivided attention of jurisprudential (legal sociological and anthropological) research.⁷ Or, when we are invariably footed in the so-called Western Law, we

⁴ Nevertheless, for its demand, see, e.g., Jääskinen, N.: Back to the Begriffshimmel? A Plea for an Analytical Perspective in European Law. In: Prechal, S.–van Roermund, B. (eds.): *The Coherence of EU Law. The Search for Unity in Divergent Concepts*. Oxford–New York, 2008, 451–461.

⁵ Cf., e.g., Koskenniemi, M.: The Politics of International Law. *European Journal of International Law* (1990) 4–32.

⁶ Cf., e.g., as a cry out, by Phelan, D. R.: *It’s God we ought to Crucify*. Fiesole, 1992.

⁷ For basic issues related, cf., by the author: Jogelmélet – jogi néprajz, avagy a népszokásvizsgálatok teoretikus hozadéka [Theory of law–legal ethnography, or the theoretical fruits of investigations into legally relevant folkways]. *Társadalomkutatás* 26 (2008) 3, 275–298 & <<http://akademiai.om.hu/content/v778k4q3p4061h56/fulltext.pdf>>.

are tempted to attribute low relevant significance to legal traditions far from us and named simply as “others”, lived and living almost undisturbedly in the greater part of our globe, that is, to traditions which we consider mostly as parts of their religion but which are often the indistinguishable and by far not definitely unsuccessful parts of a comprehensive world-outlook, working well in their own traditional environment and medium. And this narrow-minded focus may have proved to be persistent with us at a time when we actually have not yet developed any truly general or, in the strict sense of the word, *universal legal theory*⁸—unless we count as such with such caricatures as afforded by *Kelsen’s* positivism (as to a European continental version), or the analytical trend (as to the British pattern), in addition to (as the historical predecessor of all jurisprudence ever undertaken) the catholicos claim for universality as offered by the philosophy of natural law.

2.3. *The Place of European Law*

Where can one find the place of European law? For that what may be seen from the representations of European legal literature as a synthesis is of quite uncertain contours without theoretical message, even if spiced with historico-political arguments occasionally, mostly covering or substituting to national interest pressed. Even in monographies the cacophony of incidental remarks can only assure some perspective, namely, from outside. The nationally diversified normative stuff will remain separated, perhaps with the sole exception of doctrinal propositions to prepare some common codes of the European Union. They, in turn, seem to reincarnate the idea having once prevailed in conceptual jurisprudence,⁹ with abstract notionalty defined within an established systemicity that is backed by the professionally shared belief in the creative force of human rationality. This is completed by the hope that constructions thusly gained will embody final rationality.

We can perhaps get a more sensitive picture by also counting with the fact that „Forging a legal Europe and post modernism are just complementary to one another.”¹⁰ For in this case, too, the multiple mediations through which the

⁸ As a demand for it, cf., by the author: *Összehasonlító módszer és jogelmélet* [Comparative method and legal theory]. [1973] In: *Útkeresés. Kísérletek – kéziratban* [The search for a path: unpublished manuscripts]. Budapest, 2001, 97–101.

⁹ Cf., by the author: *Leibniz und die Frage der rechtlichen Systembildung*. In: Mollnau, K. A. (Hrsg.): *Materialismus und Idealismus im Rechtsdenken*. Geschichte und Gegenwart. Stuttgart, Wiesbaden 1987, 143–121.

¹⁰ Arnaud, A.-J.: *Pour une pensée juridique européenne*. Paris, 1991. 300. [„Élaboration d’un Europe juridique et post-modernisme vont de pair.”]

formalisms in the operation of European institutions are filtered—with priority guaranteed to common institutional manifestations (directives and decisions) while, on the other end of the operational mechanism, a through and through filtration will be achieved by the national agent interpreting all these (just enabling us to conclude that, after all, neither “supranational monism” nor „centrality of domestic law” taken separately but a compromise reached by both simultaneously shall prevail¹¹)—push us back from the *illusory hope of certainty* to the *mere facticity of uncertainty*.

From the perspective of methodological thinking, we may perceive the same transformation process already realised in social sciences at an early stage of the 20th century, when the notional purity of rule- or statutory positivisms was corroded by sociologisms also entering the field, that is, by the positivism of facts.¹² Nurtured by earlier expectations (and not without firm grounds), all this had first imprinted minds with the fear of genuine anarchy; getting gradually replaced by a functionalist view of society, which could only take a more or less solid theoretical form after long debates on the issue of priority and attempts at final subjection, by the second half of the century. On its turn, this new concept was from the beginning based on plural actors and the endless series of social interactions, changing the mythical definitivum of some primary act, or creative intervention and final determination, to the functional interdependence of partial complexes in *actual co-operation*. This has resulted in the dissolution of legal positivism¹³ while arriving at a new, relatively well-balanced state.¹⁴

¹¹ La Torre, M.: Legal Pluralism as Evolutionary Achievement of Community Law. *Ratio Juris*, 12 (1999) 2, 182–195 on 192.

¹² For the debate in *Archiv für Rechts- und Wirtschaftsphilosophie* during the years 1916 and 1917, see Paulson, S. L. (ed.): *Hans Kelsen und die Rechtssoziologie*. Auseinandersetzungen mit Hermann U. Kantorowicz, Eugen Ehrlich und Max Weber. Aalen, 1993.

¹³ Cf., e.g., by the author: What is to Come after Legal Positivisms are Over? Debates Revolving around the Topic of ‘The Judicial Establishment of Facts’. In: Atienza, M.–Pattaro, E.–Schulte, M.–Topornin, B.–Wyduckel, D. (eds.): *Theorie des Rechts und der Gesellschaft*. Festschrift für Werner Krawietz zum 70. Geburtstag. Berlin, 2003, 657–676 and—exemplifying the positivism’s dissolution in a case-study—Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada). *Acta Juridica Hungarica* 44 (2003) 21–44 & <<http://www.akademai.com/content/x39m7w4371341671/?p=056215b52c56447c8f9631a8d8baada3&pi=1>>.

¹⁴ Cf., by the author: Macrosociological Theories of Law: From the ‘Lawyer’s World Concept’ to a Social Science Conception of Law. In: Kamenka, E.–Summers R. S.–Twining, W. (eds.): *Soziologische Jurisprudenz und realistische Theorien des Rechts*. Berlin, 1986, 197–215.

Once the certainty of all the uncertainties inherent in the state of post modernism is reflected upon the complex of European law, one can reach some points of orientation. First of all there is a striking common experience in that everything even in a loose connection to it seems to have been permeated by a kind of “missionary zeal”.¹⁵ This is characterised by both its weight and extraordinariness, formative of the future of European history, and the fact that it lacks any strictly circumscribable subject. For today “a reactive, event-driven and context-dependent approach to EU legal studies” is the mainstream,¹⁶ considering the fact that the “European Community law represents more evidently perhaps than most other subjects an intricate web of politics, economics and law. It virtually calls out to be understood by [...] an interdisciplinary, contextual or critical approach.”¹⁷

The medium itself in the womb of which all this is to happen is the fluid state of ceaseless being something and becoming something else as well, since “The EU, after all, is a polity in the making”.¹⁸ The European law as it is at any given time is the first of those factors shaping the commonness in Europe at any time; and what is known presently as the European Union is the prime factor to form the European law—in an interdependence and with a mutually conditioning force that, beyond the dynamics of their mutual effects and self-sustaining output, there is almost no fix(ed) point to relate to them in the manner of *Archimedes*. Therefore one may state it without sheerly rhetorical overestimation reaching a dead-end that “there is simply no single answer to questions such as: what is the legal constitutional nature of the EU, and what is the role of the law in the governance of the EU?”¹⁹ For all this is about the specificity of the European law’s ontological nature and its self-determination through the mutual definition of the forces working in its just-so-being. Just in the way as the European law’s criterial component “conditionality attached to supremacy is not a temporary aberration, but a permanent feature of the EU constitutional order.”²⁰—since it is also to show those apparently (self-)contradictory features that can at all be interpreted within the dynamism of the total

¹⁵ Walker, N.: Legal Theory and the European Union: A 25th Anniversary Essay. *Oxford Journal of Legal Studies*, 25 (2005) 481–601 at 586.

¹⁶ *Ibid.*, 583.

¹⁷ The first time by Snyder, F.: New Directions in European Community Law. *Journal of Law and Society*, 14 (1987) 167–182 on 167.

¹⁸ Hunt, J.–Shaw, J.: *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%20>>, 5.

¹⁹ *Ibid.*, 21.

²⁰ *Ibid.*, 14.

whole, taken as a process. Even the constitutional foundations of its structure can be best described in the enigmatic but reliable language of legal and political philosophy—in the way, for instance, that the relationship between the Union and the domestic national orders is “pluralistic rather than monistic, and interactive rather than hierarchical”.²¹

In the evergreen polemics of legal theory whether it is the rule that makes the law (as suggested by the transformation of *regola* into rules with the ancient Romans and by the axiomatic conceptualisation in early modern continental Europe) or the law’s presence, with the quality of juridicity, will only be revealed through the judicial event (as ever professed by the experimental pragmatism of the Anglo-Saxon wisdom), there is a new contribution to the underlying issue by the conclusion, maybe shocking for the first time, according to which “The European Union’s legal system has become the most effective international legal system in existence, standing in clear contrast to the typical weakness of international law and international courts.” For all this is nothing but the outcome of the fact that in the political processes of the European Union the European Court(s) of Justice and the national courts have become co-actors in imposing a common will, called European law, on the governments of member states.²²

3. Analogies

3.1. Solar System with Planets

There is a methodologically inspiring symbolic expression provided by the metaphor of “solar system with planets”, based on the various forms of interaction and interdependence between the intellectual tradition embodied by the *ius commune* as the once European jurists’ law, on the one hand, and its local applications, on the other. According to a learned author, “*Manlio Bellomo—L’Europa del diritto commune* 6th ed. (Roma: 1993) 205-206—has used the imagery of the *Ius commune* as the sun and the *iura propria*, the legal norms of kingdoms, principalities, and city states as the planets to explain the relationship of the *Ius commune* and *iura propria*. The metaphor is perceptive and accurate. The sun is not an inert mass, without energy or gravity that does

²¹ MacCormick, N.: *Questioning Sovereignty*. Law, State, and Nation in the European Commonwealth. Oxford–New York, 1999.

²² Alter, K. J.: *Establishing the Supremacy of European Law*. The Making of an International Rule of Law in Europe. Oxford–New York, 2001.

not exercise any influence on the planets. To describe the sun as a great theoretical star in the sky that has no real life or influence of its own would be silly. On the other hand, the planets have their own conditions, forces, norms that regulate their self-contained worlds. Each planet has a different set of rules, but each is affected in different ways and from a different distance by the energy of the sun. No planet would reject the sun; it would be folly and unthinkable. The result would be chaos for the planet's system. My conclusions can be stated succinctly: The *Ius commune* was not bookish law, was not the law of the greats, to be read, savored, and returned to the shelf, was not learned law in contrast to real law. It was the cauldron from which all European legal systems emerged."²³

Such a metaphor, I guess, can serve as a convincing analogy to describe the simultaneously centrifugal and centripetal, unending moves characteristic of the cases of legal pluralism, and most of all, the actualisation/implementation of the European law as *unity in principle*, showing certain *diversity of practice* at the same time. Otherwise expressed, this means that once some depth is actually reached by the process of European integration, there will also be some inertia and gravitational force in work as well, which may ensure that its law, independently of how it operates in fact, will also be able to exert its continued impact, feeding back, of course, the challenges it is to respond to, even if mostly in a rather indirect manner.

As it will be cleared up in the following paragraphs in more details, it is the pluri-directional move by plural actors (with the overwhelmingly massive force that is to be formed anyhow in the womb of such movements) that will specify the particularity of the operation of European law.

3.2. Pre-modernity, Modernity, Post-modernity

The amalgam that the operation of the European Union is, exhibits a variety of features ranging from premodern, through modern, to postmodern.

Premodern, insofar as it genuinely reverberates with echoes of the *Ius commune* tradition.

Yet, at the same time, European law exhibits features of *modernity* as well. It carries on with the tradition of legal positivism, yet at the same time, we recognise the process of the classic nation-state being transposed rigidly into the rather different setting of the succeeding new age, in tandem perhaps with

²³ Pennington, K.: Learned Law, Droit Savant, Gelehrtes Recht: The Tyranny of a Concept. *Syracuse Journal of International Law and Commerce*, 20 (1994), 205–215 & <<http://faculty.cua.edu/pennington/learned.htm>>.

the potential stigmas attached to being out of date, and showing signs of being artificially produced—a result of the forceful nature of the process. Efforts and attempts aimed at producing European common law have thus far been located along more or less exclusive codification strategies, and have attributed primacy to the systemic idea,²⁴ and subscribe to the notion of law being susceptible to being fixed in a chosen form onto the skeletal structure provided by the formulae of rules.

Additionally, the air of *postmodernity* also permeates this sphere. This becomes tangible through the way the innumerable directives (that are not only capable of creating internal tensions among one another, but even of completely cancelling the effects of each other) are to practically overwrite the body of rules comprising European law. The fundamental cause of this reversal is that these rules are only enforceable through actualisation by the courts, that is, via adjudication governed by value judgments and the weighing of conflicting interests, which are essentially authoritative proclamations produced in decision-making scenarios.

This is a postmodern construct, accepting the primacy of principles over rules to the extent that, for example, the equality of languages natively dissolves in the cacophony of regulations that which (although in and of itself can be perceived as merely text) may nevertheless no longer be monocultural even in its simple textuality, since it is floating above the individual culture specific languages of all member states. Also to the extent that the community actions are—intentionally, due to one of the most fundamental principles determining the nature of this construct—subjugated to the various specific interpretations (arbitrary choices) produced by member states based either on powers afforded by a status of local autonomy or other powers exclusive to the given jurisdiction. Also to the extent that, by extending the freedom of the choice of the law, it gives rise to the coexistence of competing national forums, which combined with the freedom of contract and of enterprise ultimately gives way to a certain favoured legal system (or systems) gaining monopoly status along with the other (or others) becoming hollow from a practical perspective (since even their remaining degree of sovereignty is thusly rendered inconsequential). In other words, also to the extent that although the powers of the national (as in member state) entities are theoretically preserved, nevertheless, in the practical realm, a continent-wide globalisation has (already) been put into motion by practically almost fully liberalising the marketplace of initiatives and allowing freedom of choice among the various relevant legal regulations. Consequently,

²⁴ For their variegated adventure, cf., by the author: *Codification as a Socio-historical Phenomenon*. Budapest, 1991.

the potential outcome of this process could be that in fact the status of the state may soon become largely nominal indeed—because of the freedom of enterprise and of commerce. The reason for this is that in the case of giant commercial enterprises comprised of freely constructed concentrations of influence that are the most successful in the battle to acquire the largest market share, the *de facto* force upholding order increasingly resides with the players themselves, as their legal agreements tend to designate as arbitrators of their potential legal wrangling certain agencies commissioned to act as forums producing rulings on their disagreements. When the relevant provisions are composed with an appropriate level of sophistication, it is even possible to create a legal construct, whereby even the courts of the European Union may end up having a rather limited practical influence over these paralegal or non-legal procedures.

4. The Structural Pattern of the European Law

4.1. Legal Culture of the European Union

Well, using a multi-tiered image of the potential wholeness of law,²⁵ it is possible to distinguish three different layers:

<i>law</i>
<i>surface level</i> (legal rules, case law, etc.)
<i>legal culture</i> (legal concepts, general principles, lawyer's methodology)
<i>deep structure</i>

and strange as it may sound, our conclusion is that so far the legal setup of the European Union appears to have reached only the first level.²⁶ To put it differently, the culture and core structure of European law, i.e., its conceptual, theoretical, and methodological assets, and its doctrine (in the sense of a

²⁵ Tuori, K.: EC Law: An Independent Legal Order or a Post-modern Jack-in-the-Box? In: Erikson, L. D. et al. (eds.): *Dialectic of Law and Reality*. Readings in Finnish Legal Theory. Helsinki, 1999, 397–415 at 403.

²⁶ Wilhelmsson, Th.: Jack-in-the-Box Theory of European Community Law. In: *Dialectic of Law... op. cit.* 437–454 at 449.

Rechtsdogmatik) have not been fully formulated, its wholeness has not been attained by far.

Truly, that which is commonly referred to as the *objectification of law*²⁷ has been present for quite a long time, and it has materialised in the form of a solid amalgam block of a rather chaotic composition. The contracts concluded with the European Union, the directives and other positive sources of law emanating from the representative and governmental bodies representing the European Union, furthermore, the corpus of its own juridical rulings—beyond the transposed and adopted elements, i.e., in addition to the body of *acquis*—has objectified the law. Nonetheless, to this day no palpable certainty or generality has evolved out of this: neither do we see an already crystallised form of legal conceptualisation, nor do we notice a strategic construction happening along a set of principles producing a balanced construct, and even whatever could be understood as being a more-or-less consensual methodology is lacking from the process.²⁸ And certainly, in the absence of all of these obviously no genuine doctrine exists, unless we consider this term to cover even those compendia released by authors (which are subject to being revised or rewritten with perhaps daily frequency), that seem to report every single development structured in whatever form of a grouping, and which tend to be rather void of genuine thought regardless of being produced under the guise of bona fide science.

Still, the stuff comprised of accumulated normative materials resembles at best—even with the best of intentions—the critical mass produced by the layers of deposits formed on top of each other left behind by a long tradition of Anglo-Saxon case-law. So it resembles an incomprehensible heap that can only be penetrated via the use of some method of creating subgroupings based on typification, which then has the effect of reducing the apparently inherent, native chaos. This can be achieved by identifying certain precedent-blocks that do in fact exhibit truly significant differentiating features when examined from a specific perspective; yet we are well advised to keep in mind that no one such structural construct should be considered absolute or exclusively valid in its given form, nor is it in any way predestinated, because using a different set of principles or method in trying to create/perceive order can produce another reasonable breakdown of interconnected units. Consequently, it would be just

²⁷ Cf., by the author: *Chose juridique et réification en droit: contribution à la théorie marxiste sur la base de l'Ontologie de Lukács*. In: *Archives de Philosophie du Droit* 25 (1980) 385–411.

²⁸ See, by the author: *Law and its Doctrinal Study (On Legal Dogmatics)*. *Acta Juridica Hungarica* 49 (2008) 3, 253–274 & <<http://akademiai.com.hu/content/g352w44h21258427/fulltext.pdf>>.

as misguided a self-deception to call this an order or a system²⁹ as it would be to recognise some sort of correlation in the very formal deductive thinking applied some time ago by *Leibniz* when attempting to form the corpus of the perfect language, the total conceptual system, and the finalised knowledge (the ghost of which also resurfaced in connection with the attempted configuration/treatment of law by scientific methodology as a system in *David Hilbert's* axiomatism-ideal³⁰ as being the test of genuine scientific value), which mandated that all individual components be attributed the prestige of an axiom,³¹ due to what in reality was a complete lack of theorems, while with all of this would merely create the trap of self-destruction because our procedure would in fact cause the notion of axiomatics *per se* become totally senseless.

If we dared even to arrive at any conclusion based on this negation and finding of incompleteness, then our first one would obviously be that the developmental process as it stands today can only be understood as being *partial*, because in our view even its already established would-be foundations and its superstructure to be occupied are lacking: we perceive the presence of only coordinated intentions and actions, rather than that of an actually unified community.³² We consider as the next relevant observation the notion that there is a remarkable absence of a fully developed common legal culture, which results in numerous further *retardations*, thereby multiplying the amplification of its own effect. And finally—as our third, although somewhat quietly whispered observation—we would like voice our increasingly strongly held belief that in European law—a giant conglomerate of uncertain generality (due to all of its components being fragmented by special as well as conflicting interests)—the specific details of common desires and commitments can be *overwritten by partial aims that appear to show an increasing level of independent existence*. And in this we can expect a result no better than something *improvised*: a step-by-step progress, predictable planning by default hampered by compromises,

²⁹ Cf., by the author: Law and its Approach as a System. *Acta Juridica Academiae Scientiarum Hungaricae* 21 (1979) 295–319.

³⁰ “I believe that all that can at all be an object of scholarly thought is, by achieving its maturity for theory-building, suitable for axiomatic elaboration and thereby also for mathematisation.” Hilbert, D.: Axiomatisches Denken. *Mathematische Denken*, LXXVIII (1918) 415 [reprint in William Bragg Ewald (ed.): *From Kant to Hilbert. A Source Book in the Foundations of Mathematics*. Oxford, 1996].

³¹ Cf., by the author: The Quest for Formalism in Law: Ideals of Systemicity and Axiomatisability between Utopianism and Heuristic Assertion. *Acta Juridica Hungarica* 50 (2009) 1–30 & <<http://www.akademiai.com/content/k7264206g254078j/>>.

³² Just as one signal, as to sociological foundations, see De Schutter, O.: Europe in Search of its Civil Society. *European Law Journal*, 8 (2002) 198–207.

because what could otherwise be conceptually coherent progress can easily be (and predominantly is) overwhelmed by *ad hoc* answers produced with daily regularity. In other words, we have what is an institutionally well-formed giant structure, which has been filled with meaning and is furthermore operated by a well-established bureaucracy, where nonetheless we notice that the hands have been taken of the steering wheel. Consequently, individual agents are doing whatever they feel most appropriate with their powers. And unless this actually leads to some serious unexpected malfunction (materialising in a scandal as an eventual political outcome, and in a breakdown or loss of confidence in terms of the institutional operation), then we can be certain that daily management shall cover and smooth this over by keeping in or pushing into the limelight whatever current affair topic arising from the latest conflict happens to be the most appealing to the public's interest.

So *everything here is a derivative*; no single part is actually original yet—since it is not self-generating, rather all of it is generated. Or, as it is quintessentially expressed: “The law of the EU is not the »European legal culture« but the product of the European legal cultures.”³³ So however hard we try we are at this time unable to locate a „common legal grammar”³⁴ that would be comprised of common concepts, thinking, and of uniform attitudes toward law. The sense of absence in this regard is felt across the entire community of European legal scholars. So it is no wonder then, that those turning disillusionment into positive energy (most often) tend to transpose their desire and sense of longing for wholeness into work done toward the preparation of a common European codification. This is the form in which the much-desired common law's complexity materialises, involving the fact that the foundations are unclear and the American experiment with private (model) codes and unofficial restatements of the law is untested. Mostly the path by codes, that is, the imposition of a common body of law as centrally enacted is longed for. Leeways are also searched for and the Dutch solution with the idea of (national, or individual, that is, case to case) optionality is widely proposed. Even the “Common Frame of Reference” is seen as a Trojan horse, substituting to codification while advancing its continental conceptuality and systemicity, albeit in a way deficient of working democracy. All this seems to be hold on; the fact notwithstanding that mere principles without the commonality of the underlying cultures in the

³³ Visegrády, A.: Legal Cultures in the European Union. *Acta Juridica Hungarica* 42 (2001) 203–217 on 216.

³⁴ Zimmermann, R.: Roman Law and the Harmonisation of Private Law in Europe. In: Hartkamp, A.–Hesselink, M.–Hondius, E.–Joustra, C.–du Perron, E.–Veldman, M. (eds.): *Towards a European Civil Code* ed. 3rd rev. ed. Nijmegen–The Hague, 2004. 21–42 at 41–42.

background cannot guarantee legal security. And although contracts are the most technical field of all relationships within the bonds of the private/civil/business law, what is hitherto elevated to a community level is mostly the chaos of casualism. All that notwithstanding, however, gradual convergence in a kind of frameworking regulation can be surely foreseen.

The situation is similar in case of the common judiciary as well. The roles and mixed styles of, as well as the various interpretations by, the European Court of Justice are overviewed so that conclusion as to the nature of pluralism and alleged juristocracy characteristic of legal operations of the European Union can be drawn. Roles in substitution to both the European Union constitution and internal law harmonisation, extended to penal law, representing the entire European Union law and order and working in the law's silence as well, undecided whether in a casual or precedential manner but striving for sensitive institutional balance all through, while testing a new large-organisation operational structure, are all at stake here.³⁵ Style is French-type decision making complemented to by English-type general-advocating intervention. Interpretation is complex in methods, plurilingually based, fertilising general principles with dubious certainty and foreseeability of the law in end result, as fed back by the variety of national reactions and autonomously actualising implementations eventually.

Naturally, the question may be raised, how could a fresh culture in a developmental state have its own tradition.³⁶ Well, as much as this kind of an observation is proposing a sensitive excuse, it is just as much based on a misunderstanding, since culture is not a matter of time period. So in culture we ought not merely look for the length of time continuum as the sign of having been canonised by a sense of tradition, it is not the mere fact of a period of time having elapsed, rather what we find more crucial is that the concept that we characterised as culture be permeated—as a native feature—by the intent to *pass tradition on*.³⁷ However improvisational the present state of the European

³⁵ Cf., by the author: Szerepfelfogások és stílusok az európai bíraskodásban [European judiciary: Roles and styles]. *Allam- és Jogtudomány*, 49 (2008) 281–315 {reprint in his *Jogrendszerek, jogi gondolkodásmódok az európai egységesülés perspektívájában* (Magyar körkép – európai uniós összefüggésben) [Legal systems, legal mentalities in the perspective of European unification: A Hungarian overview – in an European Union context]. Budapest, 2009. [Az uniós tagság következményei a magyar jogrendszerre és a közigazgatásra] & [Jogfilozófiák] & in <www.eulegal-administr.hu>, ch. VI}.

³⁶ E.g., Van Hoecke, M.: European Legal Cultures in a Context of Globalisation. In: Gizbert-Studnicki, T.–Stelmach, J. (eds.): *Law and Legal Cultures in the 21st Century* Diversity and Unity, Warszawa, 2007. 81–109 at 83.

³⁷ Cf., by the author: Legal Traditions? In Search for Families and Cultures of Law. In: Moreso, J. J. (ed.): *Legal Theory / Teoría del derecho*. Legal Positivism and Conceptual

law is, by applying this method, theoretically we may be able to recognise those places of more intense concentration that do in fact point in this kind of a direction, and which therefore are undoubtedly identifiable as being present. Of course, the awareness of tradition building is not enough. For, as it is widely expressed, “But the European Union, like any state, needs symbols, memories and myths that can be the foci or catalysts of emotional attachment.”³⁸ However, from another perspective—that of the nations adopting the common rules—it is worth pondering the fact that the instruments of European law tend to just be *tossed mechanically* onto the pre-existing traditional body of law without being organically integrated, or at least an attempt being made at their successful integration. For the “European rules are literally copied and inserted into domestic legislation, without even any attempt to *integrate* them into a new coherent whole.”³⁹ And this holds the fact notwithstanding that the genuine effects shaping domestic laws can be characterised as depending upon factors on the merge of the extra-legal as all “it is less a matter of positive law than of *legal culture*.” Consequently, the supposed interaction taking place in the cultural context, which is in fact defined as being based on mutual relations, will be void of plurality, and will just lead to unilateralist isolation. Furthermore, this is taking place within the framework of a process that we have to identify as something being governed by the supranational within the national as a “currently undergoing *legal acculturation*”.⁴⁰ Yet, this gives us the same sense of hope we have just referred to above, because it is easy to imagine that the series of national acculturations occurring due to the “shock of globalization” shall eventually feed back into the slow formation of the whole structure. In other words, these immensely elaborate complexes include certain hidden potentials of wiggle room and influence exerting mechanisms, which are hardly discoverable in advance, yet at the same time are capable of acting counter to the forecasted directions and already settled issues to a decisive degree.

Analysis / Postivismo jurídico y análisis conceptual. Stuttgart, 2007, 181–193 & [as a national report presented at the World Congress of the Académie internationale de Droit comparé] in <<http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf>> & *Acta Juridica Hungarica* 46 (2005) 177–197 & <<http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf>>.

³⁸ Cotterrell, R.: Images of Europe in Sociolegal Traditions [2005] in his *Living Law. Studies in Legal and Social Theory*. Aldershot–Burlington, Va. 2008, 145–164 on 159.

³⁹ Van Hoecke: *European Legal Cultures... op. cit.* 87.

⁴⁰ Garapon, A.: French Legal Culture and the Shock of ‘Globalization’. *Social & Legal Studies*, 4 (1995) 493–506 at 493.

In sum, culture is defined as a community pattern, a collective programming of minds. Legal culture, differentiated from mere uses and skills and attitudes, is also defined as a pattern of thinking (in construction and reconstruction continued) with a pre-selective force which, as part of the law's genuine ontology, gets shaped by each and every of us within the given culture, even if majored mostly by legal professionals. Many objectifications notwithstanding, the European Union's legal culture is deficient, reduced to surface manifestations, stimulated by mostly borrowed components. With a variety of available typifications within the Union, the issue can also be raised which of the national laws' components are getting unified and what is to remain from participating national legal cultures if their organic unities are atomised as freely selectable elements.

4.2. *Implementing a Grand-System Functioning*

So what we may notice then is that all of our legal knowledge acquired so far has been rendered senseless, since it has been overwritten by the way European law has been functioning. So we now have a new order, which is developing as an *open system*. Certainly, there are given cornerstones, such as values, principles, and quite a lot of rules. Nevertheless, all of these are transformed into appreciable order, and more significantly, a system with foreseeable future developmental stages programmed in advance only by their actual contemporary interpretation. Still, none of the components constituting this functioning unit are capable of serving us as a point (or points) of departure—as axioms—when attempting to describe the general nature of the range of its systemic reach, its structure, future processes launched in its name, and normatively referenced correlations thereof. In essence, this is such⁴¹ that each and every element of it is natively contextualised and pre-positioned, that is, it in and of itself does not possess a definitive force, so it is only in some sort of flexible and transient (i.e., specifically actualised) conjunction with the others that it is capable of exhibiting definitive force. But its contextualisation and positioning are provided by its actual environment at any given time, that is, its openness toward the exterior, its strategic and tactical choices in taking on the challenges posed by the real world as its surroundings. In other words, internally it disciplines

⁴¹ For the first, intuitive attempt at the deconstructive reconstruction of how the law is structured, see, by the author: Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context. *Acta Juridica Hungarica* 43 (2002) 219–232 <<http://www.akademiai.com/content/r27863g6u01q777u/fulltext.pdf>> & in Moréteau, O.–Vanderlinden, J. (eds.): *La structure des systèmes juridiques*. Brussels, 2003. 291–300.

according to what is concurrent, because it deals with the questions to be answered within its relatively closed system, but mostly not in any way that would result in achieving any degree of authoritative certainty, that is, exclusivity or singularity without alternatives. It activates with the tools of forum, scope of power, and decision, with which it always closes off (reseals) its system within the realm of the here and now at any given time; however this then does not in and of itself become the root of the same or other forums, scopes of power, or decisions belonging to the consecutive phase, so the only real derivative is that the carriers of today's processes shall—theoretically and according to the notion of what is expectable—be founded on the previous system's state of systemic self-closure. This is because these cornerstones themselves are divergent: they are facing various different directions while carrying different potentials as well, that is, in and of themselves they are of significance, but they do not form a closed system, therefore its particular interpretation on any given day is always (in)formed by their continuous balancing based on unending updating.

Therefore we believe that envisioning any sort of counter-posed or perhaps antagonistic bipolar relation would be fundamentally off-target, it would precisely deny the basic idea of the European Union itself. The reason for this is that we do not see this as a case of the European entity facing off with all the national ones, rather the former is a central (directly and exclusively communal) forum existing along with those of the member states', and making decisions regarding their affairs (at least in an indirect way), while the latter are all European entities themselves. As it is being stated nowadays, the judges of national courts themselves are (or, in fact should be) obliged to conduct even the more intimate/internal affairs as European judges, in essence keeping in mind the principles governing a Europe that is becoming increasingly more integrated.⁴²

4.3. *With Legal Pluralism?*

Legal pluralism is the case especially of the European Union,⁴³ “when it contains inconsistent rules of recognition that cannot be legally resolved from within the system.”⁴⁴

In order to contain and set a final limit to the process of pluralisation that had been becoming increasingly arbitrary, the European Court of Justice has

⁴² Slaughter, A.-M.–Stone Sweet, A.–Weiler, J. (eds.): *The European Court and National Courts. Doctrine and Jurisprudence: Legal Change in its Social Context*, Oxford, 1998.

⁴³ See primarily La Torre, *passim*.

⁴⁴ Barber, N. W.: Legal Pluralism and the European Union. *European Law Journal*, 12 (2006) 306–329 on 306.

declared and has had it declared three times that it has primacy and supremacy. For, according to its founding charter, it “is entitled to definitively answer all questions of European law”⁴⁵ and, as concluded by the doctrine based on its own jurisprudence, “is entitled to determine what constitutes an issue of European law”⁴⁶ and “has supremacy over all conflicting rules of national law”⁴⁷—without all this being by far not yet sufficient to in and of itself capable of guaranteeing that no overlapping and inconsistency occur.⁴⁸

This is exactly the root of the hope-filled desire that if we could somehow interpret the entire European legal system’s structure—and within it the ongoing dynamics created by omnipresent, unavoidable conflicts, and the *ad-hoc* system of providing the resolutions thereof—within the framework of the perspective of *limited pluralism*, then the end result could be a more controllable overall scenario. As the proposition forwarded suggests, “the pluralist model provides a comprehensive framework within which these inconsistent claims can coexist. Provided that the practical conflict within this model remains potential, and actual disputes are avoided, this can provide a stable, even a long-lasting, form of settlement.” By the force of this, “It encourages the Court of Justice to interpret European law in a manner that will be palatable to national courts, and, at the same time, discourages national courts from blindly insisting on the primacy of national rules. In short, the competing supremacy claims may serve to create an atmosphere of cooperation between the courts, where each side has an incentive to strive to respect the position and tradition of the other.”⁴⁹

Well, we have every right to view—at first sight—these kinds of (and similar) attempts to find a solution as arising from a sense of paralysis, and characterise it as a valiant yet laughably Utopist; after all, it is a rather rare occurrence in history that a large structure would purposefully hinder its own process of attempting to reach what would otherwise be a state of perfection in relation to its desired rule of rationality, by incorporating structural components that create confusion and impede its own progress. But as soon as we take it for granted that the European Union—as it exists today—could only have been formed from its predecessor formations and the latter’s deformities in such a way that it created its unity from the *inter-national* and the *national* (derived from the entities that are the member states) —where the former enjoys primacy, but the latter maintains the right of updating vis-à-vis itself—with only a limited

⁴⁵ Quoted *ibid.* 323, with reference *EC Art. 234 (ex Art 177)*.

⁴⁶ C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost* (1987) European Court Reports 4199.

⁴⁷ C-6/64 *Costa v. ENEL* (1964) European Court Reports 585.

⁴⁸ Barber: *op. cit.* 323.

⁴⁹ *Ibid.*, 328 and 328–329.

number of guarantees used as the glue, then we are forced to apply a dose of reality and be grounded in our thinking. And this then is the confirmation of the fact that this is a machine that is far from being able to guarantee smooth operation; yet it is exactly due to the structure affording its inherent forces (which are at the same time of a centripetal and centrifugal nature) a large degree of free flow and play, that an uninterrupted dynamism is present, which advances or may advance the cause of the common Europe through the contemporaneous processes behind unity and diversity—that is, those of partial autonomies grouped under the umbrella of a single overriding dominion—and through the temporal chain of solutions dissolving conflicts arising from them.

But if this is so, then it follows from this that we pose the question: *can we truly call pluralism* what we are talking about here. If it is religious commandments or ethical rules, territorial customs, mercantile *ususes*, sets of professional expectations or self-regulations of associations that fall within the system of referential gravitational pull of law, then the right of pluralism to exist is truly legitimate, because it is independently existing and operational dynamic entities that find themselves on a common platform on an *ad-hoc* basis, and here it is indeed the law (the formal positing by the status of statehood) that happens to do the referencing; but that which is being referenced, nevertheless, is contributing / may contribute its own essence and criteriality—in an unchanged state. However, European legal order—as we saw earlier—has a certain multipolar nature, whereby a few of the European Union’s institutions of “»mixed« authority”—in which “the power-sharing composition [...] does not [...], in practice, work in a clear way”⁵⁰—do in fact carry on with their legislative, executive, and judiciary tasks, but they will only be able to apply the end results thereof in a precarious structural position (addressing mostly the state institutions and citizens of the member states), where these *national* state agencies on the one hand adopt these results in one way or another (or refuse to do so by the means of some technical manoeuvre), but on the other hand, subsequently the adoption of these *community* norms become target for challenge (based on the method of adoption or the shortcomings of the adopted norms) either by other state agencies or individual citizens (or some organised group formation thereof) in front of either the national courts of the same member state, or some community level forum. So, on the one hand then, the community-level entity has no true independent life, since its only task and *raison d’être* is the represen-

⁵⁰ Torma, A.: Közigazgatás – Európai Unió – európai közigazgatás [Public administration, European Union, European public administration]. In: Szabadfalvi J. (ed.): *Facultas nascitur*. 10 éves a jogászképzés Miskolcon. Miskolc, 2001, 493–526 at 522.

tation and management of the community interlinking the member states. On the other hand, all that is derived from all this member state officialdom is not simply a reflex or projection of the centrally posited, but inevitably creative weighing and adaptation as well, which among themselves (and especially within the sphere of these acts layered on top of each other), and in conjunction with interpretations by other member states, and naturally, also in light of the general community perspective, provide a fertile ground for a series of possible conflicts to occur.

Yet still, the legal order of the European Union has no other life than the *dynamism* inherent in this. And this then, including its tensions and resolutions, continuously results in both solutions and repeated accumulation of conflicts within the institutional manifestation of what is, after all, a communal existence.

It is this complexity, and the slow and uncertain organic integration similar to the theoretical solution mentioned above (or more precisely: from the inherent *order-out-of-chaos philosophy* that is ultimately the hidden core here), that may be the reason why—until this day—it remains practically unmentioned that one of the European Court of Justice’s prime function would be to foster the process of the European legal order becoming internally more coherent and functioning harmoniously, which task and the latter’s completion, however, “remains under-theorized, [...] remained relatively unaffected by the rich legal-philosophical literature on adjudication”.⁵¹

5. Theoretical Model of the Operation of European Law

5.1. Multipolarity with Centripetality and Centrifugality

The metaphor of the solar system as a sub-systemic part of the galaxy describes such a relational sphere of the masses inside—which are moving along their path amidst the relevant physical forces—that is derived from their mutually relative positioning during their continuous movement, and the organising principles and facts connected to energy, mass, and position (as basic attributes) of which are depicted by our human culture of the modern era through the laws of physics.⁵² The paths of these masses are at once centripetal and

⁵¹ de Búrca: G.: Introduction. In: de Búrca, G.–Weiler, J. H. H. (eds.): *The European Court of Justice*. Oxford, 2001. 1–8 at 3.

⁵² For the development of the history of relevant ideas, cf. Needham, J.: Human Law and the Laws of the Nature [Hobhouse Lecture at the Bedford College in London, 1951] in his *The Grand Titration*. London, 1969, 299–332 as well as—for a comprehensive overview—

centrifugal—as they are at all times balanced—and are defined by interrelations derived from the given quantitative characteristics of the given positions. In the realm of sociality, with the metaphor applied to *ius commune*, we can see a different equation, where we have polyphony resulting from the centrifugal forces gradually forming national separations (started by towns, princes, etc.) within the monophony of a Christian Europe, with these forces eventually overwhelming the counterbalancing exerted by the centripetal nature of the culture justified by and justifying through the common tradition.

The legal reality of the European Union is derived from its *bipolar* structure, because when its centrally posited rules are locally integrated into practice (which is defined by the sovereignty of the nation state), this is done under circumstances whereby (and while) even law posited autonomously by the sovereign nation state is subjugated to that posited by the European Union, since the former may not go against the latter due to the latter having direct force and validity (thusly primacy); and so we get what is a somewhat altered metaphor of the solar and planetary system. In this tailor-made metaphor we have a centrifugal aspect that is merely a reaction to the (f)act of having joined the process of European integration, that is, we see a process of divergence based on the fact that even though having to give up certain blocks of sovereignty is a well-known prerequisite of joining the European Union, nevertheless, the national interest now within the European framework is making attempts at a sort of *optimal* harm-reduction aimed at rendering the effects of partially lost sovereignty *minimal*. And in this case the centripetal force is represented not by the (canon law of) “Roman” tradition of the club of Christian nobility or any other common ideology, rather it is exerted by the *uninterrupted flow of texts* composed in the row of working languages and background cultures.

It is exactly due to this *divisionalisation of sovereignty*—as this sort of structuring is derived from a constitutional level, since its source is the treaty (treaties) establishing the Union—why the theoretical possibility of *discrepancy* is natively present in even the conceptualisation of this solution. It is rather rare that we see overt attempts at finding out just exactly how far the boundaries of discrepancy lay, how much farther the walls can be pushed outwards, and neither is it common that we see a player pronouncedly rejecting these—this being against the rules. But covertly the governments and judiciaries of member states do this all the time, in a way finding an outlet for their need to experience their national independence. This is primarily so, because their constitutions

Daston, L.–Stolleis, M. (eds.): *Natural Law and Laws of Nature in Early Modern Europe*. Jurisprudence, Theology, Moral and Natural Philosophy. Farnham–Burlington, VT, 2008.

define these truly national institutions as genuine national agencies—a definition connected to the relation of the executive and the judiciary being of a subordinate nature to the legislative. Their legal status as well as the body of law to be applied by them is provided from the single source of the legislation working within the framework of statehood. Consequently, they have a centuries-old intimate relationship with their own national law, since this is their natural habitat. And since their professional activity is subordinated to the legislative body of their own homeland, even such a scenario is possible where, in a borderline situation, is actually rooting for his or her own case, so to speak, in opposition to his or her own law.

Yet they receive the body of European Union law as (well, let us say) a mere *extra task*, a sort of chore, which merely multiplies what is an already ample body of domestic sources of law. So they usually treat these similarly to how an English judge would treat statutory instruments when simply following their own tradition: with distrust, as a sort of hampering, almost a illegitimate meddling that should best be avoided. And if this external intrusion is unavoidable, then the judge shall respect it only to the extent that he or she absolutely has to.

So to summarise: although law-making and law-application in their polarised dichotomy manifest as an external obligation for the judge, still he or she treats and respects the domestic law as his or her own, because it *is* in fact his or hers. This is in contrast to the European law, which the judge only experiences as something arriving on his or her bench in a whimsical fashion from distant outside powers beyond his or her reach, and coming in forceful and unpredictable waves, with blatant disregard for their own level of integrability. While a judge is continuously contributing to the building of the body of law formulated by his or her legislator, because the judge feels that he or she is in fact part of the process of dogmatic refinement, rejuvenation based on actualisation, with the European law the judge is not very much exuberant about the possibility of contributing to progress—among other reasons, because his or her chance to contribute is at best limited, perhaps even practically nonexistent. Therefore his or her perspective remains that of the domestic law—regardless of what happens to be the premier background of his or her particular procedure.

In any case, the model of the legal order of the European Union has, so to speak, spread the process of “law-provision” over *different tiers*—with almost as much conscious determination as *Hans Kelsen* once had, when in 1922 he revised his original stand from before WWI on law-application and imputation/ascription as a mere consequence calculation and validation, by declaring that for the *Rechtserzeugungsprozess* to actually occur, there are at least two stages needed, since the actualised (i.e., case specific) application of the

future-bound—and therefore general-abstract—posited can only take place in the context of the given specific.⁵³

5.2. *Order, Out of Chaos*

Until the 20th century practitioners of our social sciences (including our legal science) could hardly imagine that law or any somewhat objectified normativity could in fact be effective without a positivism that treated its subject with clear definition existing behind it—so without support being provided by such an assumption of an operational order being present, which would be able to provide the state judiciary, the professional discipline, the teaching church (etc.) with grounds allowing it to clearly translate into the language of practice—and enforce with its sanctioning mechanisms that which is posited by the given normative order. It presented its operation as being mechanised in its ideology: sort of as a truly *ausdifferenziert* homogeneity (following Niklas Luhmann's terminology of *Ausdifferenzierung*), thus lifting the procedures performed in the name of the above-mentioned entities above general everyday heterogeneity. So what did it do then? It lifted a conceptual order above the everyday, it has rendered itself reified, and in a somewhat alienated form it (relying on secret knowledge incomprehensible and enigmatic for the everyday person) promoted into the status of brutally unquestionable consistency and necessity that which appeared, with good reason, to the excluded layperson to be not only without convincing power, but also even an indecipherable and randomly cruel twist of fate.⁵⁴ In short: it chased chaos away in order to see order in its place. Because chaos and order are in this approach antinomies, and when faced with them, we either pick the one or the other.

It was with the arrival of 20th century sociology that we see the reformulation of the descriptive vision of society. The previous understanding of society as the conglomerate of manmade reified structures in self-propelled motion was replaced by a model that was not based on a one-way mechanicalness (as is the case with the definition above), rather, it was focusing on the spontaneous motion of concurring simultaneities, and on the continuously occurring social practice within them, on the statistical result of the motivational-battles of individuals, on interactions occurring in actuality. And surprisingly—although

⁵³ Cf., by the author: Kelsen's Theory of Law-application: Evolution, Ambiguities, Open Questions. *Acta Juridica Hungarica* 36 (1994) 3–27.

⁵⁴ Cf., by the author: *Lectures on the Paradigms of Legal Thinking*, Budapest, 1999 and A. Conklin, W. A.: *The Phenomenology of Modern Legal Discourse*. The Judicial Production and the Disclosure of Suffering. Aldershot, 1998.

its descriptions of the micro were recording nothing but chaos (a continuous floating and state of in-between within the perpetuity of attractive and repulsive forces)—still, thanks to the development that in all of this it was, nevertheless, always and determinately searching exclusively for signs of order being created (including the details of how, along what avenues, principles, perspectives, and with what chance of success), in its descriptions of the macro it could arrive at the logical conclusion of the potential for and fact *of order out of chaos*, that is, one originating from, borne out and derived from chaos.

And it is important to note here that the theoretical notion of macro-order originating and eventually manifesting from micro-chaos is what laid the foundation of the general perspective of modern economics; modern sociology is also rooted in this perspective; and this is the theorematic fundament eventually settled on by the deconstructionist aspect of today's jurisprudence, and this latter—incidentally—is a branch of scholarship with much older theoretical foundations and developmental span than the former ones.⁵⁵

Today's social analysts call our attention to the fact that according to the “normativist model” of the early 20th century—from *Émile Durkheim* to *Talcott Parsons*—“society after society was depicted primarily in terms of the consistency, regularity, and continuity of its system of rules and of the power of these rules to bring about behavioral conformity”.⁵⁶ It was only later that the recognition has been formulated according to which “The essence of human life did not lie in following rules and in being rewarded by one's virtue but in making the best use of rules for one's own self-interest, depending on the situation”. From this time on, social theories are changed in that “rules are seen as ambiguous, flexible, contradictory, and inconsistent; [...] they serve as resources for human strategies, strategies that vary from person to person and from situation to situation... Order is never complete and never can be”.⁵⁷

Well, this has the realisation serving as its foundation deeply rooted in social theory, according to which we have absolutely no criteria available to us for providing proof of “differentiating at an ontological level” among the various branches of social sciences. Jurisprudence too is comfortably floating on being propelled by its concept of normativity (the force of normative enactments, and so on), while it has absolutely no social scientific affirmation

⁵⁵ Cf., by the author: *Theory of the Judicial Process. The Establishment of Facts*. Budapest, 1995.

⁵⁶ Reynolds, N. B.: Rule of Law in Legal and Economic Theory. In: Kotsiris, L. E. (ed.): *Law at the Turn of the Twentieth Century*. Thessaloniki, 1994. 357–376 on 373.

⁵⁷ Edgerton, R. B.: *Rules, Exceptions, and Social Order*. Berkeley, 1985. 13 and 14.

that it could point to for support.⁵⁸ And this may result in cynical, apparently relativising attitudes—with the dry constation, for instance, that “the making of rules and social and symbolic order is a human industry matched only by the manipulation, circumvention, remaking, replacing and unmaking of rules and symbols in which people seem almost equally engaged”⁵⁹—, unless we are cognisant of the fact that this description originates from the classic author of cultural anthropology: relying on a diagnosis of standard human behaviour exactly so that she could somehow be enabled to demonstrate the nature of the eventual order rising out of the chaotic nature thereof.

Well, it is as if early on the deconstructionism of legal science seemed to have dethroned the professional tenet of legal positivism, voiding it with critique that was exposing it for what it was and irreversibly (destructively) overwriting it. In the long run, however, this seems to have produced the result of the previous static vision of order—whereby everything is rendered reified with mechanical simplicity—being replaced by the potential for *order being described as a process*, through / understood as / traced back to the attribute of the ceaseless dynamism of *fluctuating motion*. In terms of the methodology of fermenting this train of thought, it was perhaps *Ludwig Wittgenstein*, then on the one hand, the speech-act theory (as the consequence of the auto-transubstantiation of the positivist philosophy of science), and on the other hand, the cognitive sciences that played the most decisive role in contributing. As a new systemic concept this could then become the point of departure for imagining a self-organised entity that would be constructed through *autopoiesis*—that is, through a process whereby the systemic end-result features solid and confident self-identity, despite its internal governing principles having been formed along the way through a variable and protracted process. It was the English–American movement of Critical Legal Studies⁶⁰—which, functioning perhaps as an *agent provocateur*, was questioning the underlying ideology and offering new methodology at the same time—that reshaped the landscape most effectively and to the most radical extent, yet the final conclusions were drawn (concurrently, and in terms of partial result perhaps even ahead of it) by a new legal ontology.⁶¹

⁵⁸ Luhmann, N.: *A Sociological Theory of Law*. London, 1985, 13, noting on 20 that “Until today there is not a single notable beginning to a sociological theory of the positivity of law.”

⁵⁹ Falk Moore, S.: *Law as Process*. London–Boston, 1978.

⁶⁰ Cf. <http://en.wikipedia.org/wiki/Critical_legal_studies>.

⁶¹ Cf., by the author: *Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács’ Ontology. Rivista Internazionale di Filosofia del Diritto [Roma] LX (1983) 127–142* {& in *Filosofía del Derecho y Problemas de Filosofía Social X*, coord.

The reason for this was that the latter could raise the level of discourse onto a higher level in terms of social scientific significance, as it managed to place both the external ideological criticism (which, based on an epistemological approach, was attacking from a counter-position and aiming at revealing hidden weaknesses) and the criticism of the methodology applied by lawyers when establishing their visions of the world inside the *process-description of the actual operation of law*, thusly it could analyse the components discovered therein as true ontological entities. Since it characterised the overall social complex as it exists at any given time as it is measured by the status of self-affirmative exertion (at any given time) manifesting in the interaction of partial-complexes of natively relative autonomy that eventually form some sort of final (tendential) unity resting on an identifiable trend. And hidden inside of this we have—even as far as the operation of law is concerned—what is an obligatory prerequisite for today's economy-centred mainstream materialism: the *conflict of interests* embedded in the collision of different manifestations of legal formalism, and in those scenarios where abstract positive legal rules are applied in specific cases conjuring discrepancies in practical implementation. Nonetheless, it is exactly the legally constructed formulation of conflict-resolution and conflict-settlement within the legal professional methodology's process-reconstructions that fill the gap between—on the one hand—the lack of a truly unbroken chain of logic, and—on the other hand—the specifically unique nature of an adjudication situation (in which the adjudicator fills an irrevocably personal role of a constitutive character with an irrevocable and non-transferable personal responsibility attached to adjudicator's participation).

In all of this we can find the explanation (in terms of the legal organisation of the European Union) for what which we have introduced as the *bipolar* structure comprised of—on the one hand—the production and releasing of law by the European Union as a supranational entity, and—on the other hand—the reception and conversion thereof by the member states, and—thirdly—as the *simultaneity of randomly colourful motion* propelled by centripetal and centrifugal

José Luis Curiel B. (México: Universidad Nacional Autónoma de México 1984), 203–216 [Instituto de Investigaciones Jurídicas, Serie G, Estudios doctrinales, 81] & <<http://www.bibliojuridica.org/libros/3/1051/20.pdf>>} as well as—in a systematic treatment—his *The Place of Law in Lukács' World Concept*. Budapest, 1985 [reprint: 1991], particularly Part Two, 69 et seq. For a present-day summary, cf., also by him: 'Contemporaneity of Lukács' Idea to Modern Social Theoretical Thought (The *Ontology of Social Being* in Social Science Reconstructions—with Regards to Constructs like Law)' [a closing lecture at the *III Seminário Internacional Teoria Política do Socialismo on Lukacs e a emancipação humana* organised by the Universidad Estadual Paulista, Faculdade de filosofia e ciências (Marília, Brasil), 17–21 August 2009].

forces, which nonetheless has the *net result of creating order with its overall cohesive critical mass*. So which of these forces is of a *creative* nature in this precariously balanced (balancing) structure? Well, according to the above, these are, on the one hand, the explicit legislative activity of the whole of the representative institutions of the European Union, and that of its agencies empowered to produce and put law into force (manifesting in the power to enter treaties, release directives, and produce court rulings), as well as its tacit legislation (which demands recognition under the aegis of *acquis communautaire*), and, on the other hand, the reception given to all of these by the member states at their organisational-institutional levels (e.g., how they carry their validity into further spheres, how they adapt and implement them). And the *final product* of all of this is no other than something nobody has attempted to describe thus far, although this could be a sort of a The State of the Law of the European Union similar to what is recurring practice of the State of the Union in the United States.⁶²

As we know from *George Lukács'* gigantic socio-ontological undertaking,⁶³ man's conscious identifications of aims always tend to get realised differently from the original target, as they end up being either relatively more or less, or they may simply get realised as something entirely different. And as we know also from him: this is not merely a sign of divergency, a margin for error, a human failure, a lack of a valiant effort, or perhaps that of futility, rather a fundamental fact of socio-ontology, and as such, it is the starting point of any praxis-philosophy understood as a system of social theory capable of providing/venturing to seek an actual description of practice. So the order that—in *concerto*—happens to be produced out of all of this, is exactly whatever could possibly evolve at all as the result of the free-flowing and fixed forces active in the system. Observing it at any given time, its corresponding state is then such a characteristic, in the framework, on the ground, and from the origin of which—exactly as just-so-being [*Gerade-so-Sein*] in the exclusive ontological actuality—all subsequent movements are taking place.

It is strange for us to recall today about *Engels*—who attempted to apply *Hegel's* methodological notions to the philosophy of science of his times—just how much his multifaceted concept of dialectics (which, despite its dogmas and certain erroneous components, included at least the potential for some sense of openness in terms of prospect), rigidified, and subsequently became

⁶² Cf., e.g., <http://en.wikipedia.org/wiki/State_of_the_Union_address>.

⁶³ By Lukács, G.: *The Ontology of Social Being* Hegel's False and his Genuine Ontology. London, 1978, Marx's Basic Ontological Principles. London, 1978 [reprint: 1982]), and Labour, London, 1980, as well as Benseler, F. (ed.): Prolegomena, I–II, Darmstadt, 1984–1986.

the scene of brutally irrefutable and inexorable (perhaps best described as automatically predestined) social processes in the Soviet version of *Marxism*, as a materialistic theology of a kind of order, which possesses such a sense of superiority, perfection, and completeness (derived from having been successfully finalised), which is equal in measure exactly to the degree of to which it is free of contradiction at any given time. It also brings a smile to our face when we recall that it could have actually been the dilettantism of the Chinese Socialist dictator, *Mao Tse-Tung*,⁶⁴ when it came to his dabbling in philosophy (which incidentally also relied on elements of Eastern wisdom), that may have opened the eyes of the then already Sovietised Central and Eastern European region to the notion that to rebut, that is, *contradiction*, is no antonym of order. It is not anarchy, not rebellion, not counterrevolution; thusly it is neither a matter of state security. Because it is in fact not a sign of rejection (through statements), rather it is a natural sign of life, as such is the true lifestyle of any organism that is in fact actually functioning; or to use *Lukács*-speak once again: it is the phenomenal form of the quality that anything that *can* operate is performing its operation along the aforementioned line, this being a fundamental fact of existence, opposite to which there can be nothing but the denial of life (i.e., motionlessness or death).

So tension, conflict, or the fact that resolutions of issues are reached via difficult processes at any given time are not signs of dysfunction, rather these are the functionality of any truly operational system. No manifestation of a lack of order, rather it is exactly the unavoidable prerequisite for and the way of the reconstruction/reaffirmation of order (theoretically always at a higher level), which is a naturally occurring and necessary process from time-to-time, as order has to be able to provide answers to the challenges facing it and has to withstand when practical (compromise) solutions are reached at any given time, storms of expectations as well.

5.3. *Practical Continuum in a Standing Flux*

It is this kind of kinetic-dynamism into which we have the structuring solution for the problem that a serious portion of the European Union's legal manifestations are of a soft, rather than a hard nature integrated, that is, this law can hardly be interpreted within the static framework of formalism containing such plain polarities as obligatory / not obligatory, can be applied / cannot be applied, or valid / not valid. So all of this presents us a flexible image (i.e., a kind actually

⁶⁴ Mao Tse-tung: *On Contradiction*. Peking, 1952 & *On Practice and Contradiction*. London–New York, 2007.

not binding through its formal character) of law (allowing for ever-changing conclusions being drawn from case to case, based on the various interpretations of cases and standards dependent on context or the criterion of what is purposeful), which is an exact denial of both the classic legal positivism characteristic of our Continental yesteryears as well as that of our Socialist European yesterday,⁶⁵ since it overwrites the possibility of imagining a law of “a purely domestic character”.⁶⁶ Because what it offers instead is merely *continuum*.⁶⁷ It is the most that we could discover today through an ontological reconstruction as a final truth behind the formalism and discipline-obligation of the kinetic processes of law.⁶⁸ Our supplementary factor here is, however, that those classic form-structures that have been relied on by the individual nations have by now mostly been weakened by having been integrated into the legal order of the European Union; and the professional deontology implied as its own recommends a kind of concentration (which is deconstructive in the formal sense, as it is destroying even the remaining legal homogeneity) on expressly substantial (i.e., one merely referred by the legal normative expression, but not contained therein, thus heterogeneous) contents.

In addition to the continuous presence of and reliance on the *teleological*, the other element that has also been serving as the foundation of this was the juridical formulation of the doctrine of “direct application”⁶⁹ and “indirect effect”⁷⁰ as early as a quarter century ago. However, characteristically of the professionally formulated obscure speech of the European Union, this burst

⁶⁵ It is to be noted that the kind of regulation known as *Aufgabe-Normen* [task-norms] in the East-German regime that used law as an effective means of organisation was all through criticised by the official Soviet and satellite legal policy and scholarship alike, because they set (of course) objectives without defining pre-/pro-scription and sanction.

⁶⁶ Berger, K. P.: The Harmonisation of European Contract Law: The Influence of Comparative Law. *International and Comparative Law Quarterly*, 50 (2001) 877–900 at 887.

⁶⁷ Kühn, Z.: The Application of European Law in the New Member States: Several (Early) Predictions. *German Law Journal*, 6 (2005) 563–582 & <http://www.germanlawjournal.com/pdf/Vol06No03/PDF_Vol_06_No_03_563-582_Articles_Kuhn.pdf>, 579.

⁶⁸ Cf., by the author: On the Socially Determined Nature of Legal Reasoning. *Logique et Analyse* [Leuven] (1973) 21–78 [Travaux de Centre National de Recherches de Logique], as well as *Theory of the Judicial Process* (1995) and *Lectures on the Paradigms of Legal Thinking* (1999).

⁶⁹ “The validity of a Community measure or its effect within a Member State cannot be effected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.” C-11/70 *Internationale Handelsgesellschaft* (1970) European Court Reports 1125, 3.

⁷⁰ C-14/83 *Von Colson v. Land Nordrhein-Westfalen* (1984) European Court Reports I-1891.

into the legal order thereof in such a way, that it, on the one hand, has left it unclear to this day exactly what, when, and under what circumstances (i.e., in the presence of what fulfilled conditions) can the centrally posited overwrite that by the national legislation; and, on the other hand, it continued to maintain the national legal orders on the polar opposite side, while leaving the task to the national side to adapt or exchange the nationally posited for anything originating from the community; a process that has thusly continued to be based on domestic application, that is, on the discretion of local contemplation and interpretation. Since no other conclusion could indeed be drawn than the one according to which “the Member States’ obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the Courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national Court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter.”⁷¹

It is easy for us to see, that it was the entire legal perspective of the European Union which was turned into a *pragmatic-instrumentality* instead of the primacy of any legal dogmatism in this way, being true to its ever more openly acknowledged *mobilising* function, rather than being true to its regulatory function in the classic narrow sense.⁷²

It is well known that in the large structure itself, which is being built during the process of operation, beyond the directives influencing only certain limited areas, it is undoubtedly the court rulings (which also take on the task of securing the entire legal order and constitutionality) that set the milestones; with a huge number of consequential results that often set even the vision of the role of the community courts on new paths, and these results can occasionally be more dramatic than even the founding treaties concluded with the utmost formality. Consequentially in this process, as a result of the liberating effect of these factors, the authors of the European law continue down the slippery slope and tend to keep upping the ante by proposing ever-bolder ideas, thereby further eroding this *formlessness*. They draw legal conclusion from trends and

⁷¹ C-106/89 *Marleasing SA v. La Commercial International de Alimentation SA* (1990) ECR I-4135, 8 (with reference to the case of *Von Colson* quoted above).

⁷² For their antagonism in conflict periods or in succession, cf., as a case-study by the author: Lenin and Revolutionary Law-making. *International Review of Contemporary Law*. 29 (1982) 47–59.

facts of institutional developments, while the only framework provided for any of this kind of activity (regarding the role of the judiciary, the alleged dissolution of any formal-doctrinal discipline, the ultimate ideal of the pragmatic ambition capable of penetrating just about anything) is the overgeneralisation of other authors. Moreover, it is as if nobody was bothered by the fact that (whether it be a community act, or the generalisations of a free-floating intellect that we are talking about) even the bare minimum of what was regarded as a *sine qua non* even in the Socialist doctrine is absent: laying the foundation of whatever is the target of their eventual intervention with first doing preparatory work, case-studies and debates on cost/benefit analysis, and with the identification and affixing of the actual cornerstones.⁷³ Yet they keep skipping these steps, since we can only find a limited number of pointers about the underlying basic issue whether a precedent-type law is in fact alive or is in the process of development inside the womb of the European Union (and if so, then which type of it, which *sui generis* version of it); these pointers being certain judicial decisions of unclear status themselves, which are not overtly identified as possessing the quality of precedent, and where this quality is only identified a personal interpretation of the author, based on self-referential clues, or on consequences drawn from other clues. But if all that intuitive reconstruction can decipher out of any such signal is that—along certain fundamental material values and procedural principles, and with the insertion of certain forums—it is the *efficiency of reaching target* that is of premier importance, then we have indeed returned to reliving⁷⁴ the excitement-filled historical time of the “revolutionary honeymoon period”.⁷⁵ Since this means that the state of things is such that the main area of action is the mobilisation for self-propelled social activity and the encouragement of *autocatalytic processes* (akin to grass-roots initiatives), in an atmosphere where each player is stopping the building of new boundaries at their own doorstep; a building process that, incidentally, is continuously breaking down the previously demarcated ones.

Consequently, these kinds of complex movements, including divergent motions, discernible in the legal reality of the European Union simply represent

⁷³ E.g., the Act XI (1987) of the Hungarian People’s Republic on Law-making.

⁷⁴ Within the scope of his own research, cf., by the author: ‘Lenin and Revolutionary Law-making’ and—regarding its variation during the Chinese “cultural revolution”—*Codification...*, especially 239–242, as well as—in view of our subject here—‘Jogi kultúránk – európai és globális távlatban’ [Our legal culture in a European and global perspective]. In: Paksy, M. (ed.): *Európai jog és jogfilozófia*. Tanulmányok az európai integráció ötvenedik évfordulójának ünnepére. Budapest, 2008, 13–42.

⁷⁵ For its first description, see Pitirim A[leksandrovich] Sorokin: *The Sociology of Revolution*. Philadelphia–London, 1925.

a certain state, that of being alive, and, moreover, as a necessary actualised form and consequence of its consciously designed multipolarity. Naturally, from an analytical perspective, ultimately it is not the presence of these factors that is of interest, rather it is the longitudinal tracking and observation of whether or not the totality of these motions exhibits the character of a singular trend when evaluated at the end of their respective time period, and if such uniform (tendential) trend is in fact identifiable, then what is the nature thereof. In other words, how does the end result likely to manifest measure up against the one that had been ideally expected at the outset; is there a need for intervention to correct the course, that is, is it called for that the future course of these be reset with the tools at hand, and if so then in what direction.

It also follows from the above that it can only be considered wishful and rather simplified ideological thinking (bordering on the Utopian), based on which the statement could be made that, based on what is undoubtedly a level of integration getting higher by the day, both the European Union and its law shall eventually reach a uniform or unified state, so to speak. Because this would not result in the coming of some *End of History*⁷⁶—so that an eschatological synthesis could then bless our everyday reality—since never in history have we actually witnessed, as a socio-ontological reality, humankind reaching a final state of rest longed for in the form of a transcendental final arrival. So whatever is taking place now is actually not a process eventually terminating in a final uniformity, not convergence, not a final resolution, and neither is it an ultimate coming together of all the contributors in a projected future Golden Age at the end of a single path. Instead, we should likely say that in the current structure of the European Union the discrete parts (existing at any given time) preserve their state of *standing apart* while and via being diverging *components of partial units* constantly restated/reaffirmed at ever higher levels. Accordingly, the discrepancies necessarily regenerated at any given time are not so much contradictions based on the denial of something, rather they are variations forming with a relative independence on top of a principal thesis that is merely implicitly expressed (because these variations—just as in the repetitious fugal structure—express the main theme in their fragmentary quality).

5.4. *Activated by Nations*

However, at the same time, several further consequences result from the recognition of the above. Since in this sort of complex kinetic scenario only that gets actually realised in practice, which is effectuated and enforced.

⁷⁶ Fukuyama, F.: *The End of History and the Last Man*. New York. 1992.

Yet, it is important for us to see here that whatever we identified as bipolarity in the way the European Union's legal system is structured, carries relevance exclusively from the perspective of legal imputation/ascription, referencing, and (validity-)enforcing; but it has no real existence in terms of the sociological, and neither does it have an independent existence discernible from a disciplinary perspective of the theory of power/officialdom. Since just as in the League of Nations or in the United Nations, it is the aggregate of the constitutive member states that is the actor in acting in the name and through the institutional system of the given international entity (showing that multiplicity had by then been transformed into a common will), this has been observed as happening the same way in the history of the evolution of the European community thus far. While whatever is produced as European law in the regulatory or adjudicatory institutions of Brussels, Strasbourg or Luxembourg provides the foundation for a legally independent source of validity, one that, nevertheless, has no existence without the constitutive states. Not only because (legally) there would be no entity on the receiving end, but also because whatever even actually does appear as European law could not (sociologically) be forged without them. It is merely as consequence of the series of its establishing treaties that we can even talk about the existence of the European Union, of its institutional system, of citizenship expressing inclusion therein, and of any other. While the operative character of the nation state is a sociological reality, the European communal conglomeration of national operations is just a *legal derivation and reference*, a normatively treated conceptual web, in which the only additional reality is represented by the presence of conformity (the bare fact that conduct is in functional correlation with the posited), and behind it, it is the ideology of being European that represents an additional psyche, which can be described as prevailing (since it lands itself to being described as operational). While the Union's administration, its activity as a unit is just the *treaty-based projection of a given grouping of national entities*, however, lacking anything that was not already present in the composing national frameworks. We have all contributed to the construction of its buildings, it was us who recruited its functionaries, we continue to provide its funding. It, thusly, has nothing beyond what is ours. Its projections too are just whatever we ourselves have transferred to it via empowerment provided by our association. So it is the wholeness as a relative total manifested in them, each and every consent and fulfilled desire, in a peculiar transformed state, once the compromises reached as a result of cooperation allow it. And this is so even if, as result of the neophyte attraction of our time we can now locate a growing number of individuals in Brussels, in Strasbourg or in Luxembourg, as well as in international law offices who—due to having been artificially programmed or because of a personal conviction—are loyal or attached

to no nation, but to the entity that generates they themselves: the European Union. Their individual-psyche, however, is no ontological category until such a functioning psyche does not manifest as a force exerting palpable influence on our social existence, that is, until it does not appear as an independent social factor.

However, the ontological significance and practical exclusivity of the member state status grants a practically exclusive significance to the only possible forms, intensity and effectiveness of national *participatio*, that is, the optimality measured against the given nation's wiggle room in the framework of all players.

Consequently, all nations have to plan their path with conscious preparatory groundwork, including the forms and methods they wish to rely on when attempting to influence community life, while taking into account all that has already transpired in terms of strategies and tactics applied successfully/unsuccessfully within the dynamics of the total structure, and also regarding theoretical and procedural methods, value and interest related trends, and ways of national adaptation and implementation; doing all this by way of conducting prudent comparative studies (applying criteria such as whether or not the particular instance under scrutiny was a singular or historically proven solution, while also paying attention to identifying what are and are not the established notions of nationhood and tradition in the European sphere of argumentation). Naturally, as a feature of *national participation*, member states represent themselves in the European Union based in part on their successive governments, and in part by their representation in the European Parliament, the nature of which in any given term is also determined, although indirectly, by the political makeup of their national legislative body. And regardless of how deep the domestic political divisions may be in this respect, these two national sides obviously must—using a term borrowed from *Lukács* once again—manifest in a tendential (as in governed by a common trend) unity, otherwise it is inevitable that the common national interest will suffer as result of their pugnacious and narrow-minded approach missing the big picture.

And this sheds a particularly important light on the phenomenon we tend to refer to as *phase-lag* in our own Central and Eastern European legal universe as an inherited piece of reality surviving from the Socialist political system, which we have been forced to endure. In particular, this means that since WWII we have not been able to get to know directly, and consequently have not been able to familiarise ourselves with, and master the connected practical skills related to certain significant developments that have occurred in Western European and Atlantic law, as well as in the legal implementation of natively (directly) societal considerations (such as the use of referring to natural law by taking into consideration “the nature of things”; the argumentation and persuasion resting on principles and stipulated clauses; the speech

in terms of human rights and with the constitutionalisation of issues; and the open contest of values that are to be safeguarded (based on weighing the one against the other); similarly to how have been left out of the changes that have occurred in terms of how the juridical function has evolved from being a mere dispenser of official pronouncements to being the venue and tool of resolving multiplayer societal problems.⁷⁷

And the inexorable conclusion arising from this is that from the trichotomous typology of premodern and modern followed by postmodern outlined earlier, the potential carried by the latter, i.e., the *postmodernism's instrumentality*, has essentially remained *unused* in the juridical practice of formerly Socialist Central and Eastern European member states. Consequently, our room for play has been limited to however much is afforded by modernity, which obviously results in our relative uncompetitiveness, which is a sort of innate handicap on the common European legal marketplace. So until such time that we will have reached a state of complete equality of methodology, we shall continue to be the cause of the limited nature of our own effectiveness and curtail the protection of our national interest, or we can be the (indirect) cause of these efforts being limited (or perhaps even practically defeated) by exterior forces.

6. Conclusions for the European Law as Practiced

6.1. *The Ethos of the Tasks*

If, and to the extent, our strategy followed so far has been determined by *unconditional integration*—as if the lack of such total integration would prevent us from enjoying the desired benefits of our new member state status—then (after the initial years of “junior” membership spent rehearsing our new role) we will inevitably have to supplement this view and bring it to a more sophisticated state, and then we have to organically reintegrate it into this new totality, by way of doing prudent work in particularly significant areas, such as the channels, procedures, methods and routines of protecting national interests. Above all, we would be well advised to get proficient at the new culture of sensibility, the command of which frees us from the tie of what is otherwise an unavoidable necessity of the legally consequential, and whereby, instead of a straight subordination, we could also engage in a *practical dialogue* therewith, and thusly maximise its potential advantages, and, at the same time, minimise certain of its aspects that may *hic et nunc* appear disadvantageous

⁷⁷ For these new forms, ways and paths, cf., by the author. ‘Meeting Points...’ (2003).

for us, or in the best case scenario, whereby we could turn it into the source of newly discovered advantages (using it as a sort of *anabasis*, as in the Greek dramas).

Because behind all that, in general, we find the internal intellectual struggle of the European legal thinking of our time—namely, for example: the dilemma, significance and stake, and even the sheer likelihood of convergence of the Continental and the Anglo-Saxon approach to legal regulation; the interrelation of the national-domestic and the intra-European international; the details of (voluntary and involuntary forms of) legal harmonisation and the chance for common codification; the contest of the various national heritages and their respective fixed “styles” both in common juridical work and in the creation of a new legal tradition; and also the way in which a *par excellence* independent and genuinely European legal scholarship can develop; and finally, based on which the designing of the internal structure and the generation of the substance of a European legal education has been occurring (along the line of the equivalency criteria)⁷⁸—manifested in an (internal) contest, which—although occurring hidden in the shadow of the abstract regime of academic jurisprudence—is, in a final evaluation, a field of *competitive struggle*. Yet, we would be well-advised to be cognisant of the fact that, even on the marketplace of doctrines it is not merely the ideas themselves that are on offer; the issue of whether or not they are destined to eventually become widely recognised and accepted as consensual concepts is dependent on their overall depth (sophistication of their background), which is obviously a feature of exclusive privilege, afforded only to those national entities that have larger and more robust scientific institutions, and also, behind this, on the power of the familiar, the habitual, and also that of (special) interest covertly/indirectly reinforcing these longitudinal constants almost unnoticeably generating a sensation of comfort, as the foundational discussions themselves are also “for the most part, firmly based in national and local contexts”.⁷⁹

6.2. *For Reaching an Own Future, Thanks to Own Efforts*

Because, as we could see, the European colossus currently referred to as the Union is being building in the hope of putting the enormous energy potential of our continent to use, in what appears to be an unprecedentedly liberated

⁷⁸ Exactly such topics are treated by the author’s *Jogrendszerek, jogi gondolkodás-módok... op. cit.*

⁷⁹ Cotterrell: *op. cit.* 158 in re of debates on European constitution making, remarking that no genuinely ‘European’ opinion could be heard then.

new European intellectual sphere, which has been riddled, so to speak, of historical and national restrictions. So the key players continue to be the still fallible historical particularities, since it is not spiritual ideals leading the way, rather we are still guided by the same old familiar actors, namely statehoods which have previously ended up fighting (by choice) or having to fight (due to the external will of other forces) many wars in the name of protecting their individual interests during their millennia of common history. Consequently, their separate interests even now continue to be identified in their own self, regardless of the fact that now these happen to be wrapped (sublimated) in the encapsulation format designated by the community life identified as the “European Union”. What used to be a bloody conventional physical battle fought with arms has by now reached—at least in its appearances, on the surface—the more (post)modern, currently acceptable form of democratic participation, while the whole dynamics have, not surprisingly, remained unchanged, and it is still a battle of interests that is the immediate context of this reality.

These interests are largely national. Yet now these can be neutralised, altered, or rebalanced/reconstituted by local and regional (including cross-border regional, in the case neighbouring states) interests, which, from time to time, are even capable of circumventing/substituting/overtaking that which would otherwise not have appropriate form if attempted to be formulated from (within) the regular framework of nationhood. Beyond the tipping point, these traditionally structured interests (characterised as partial, fragmented, or particular) can easily find themselves on the polar opposite of the critical mass of these newly constituted gravitational centres; and these characteristically global-economic trends of cosmopolitan pervasion focused on global empire-building aspirations and the amassing of wealth, which by now have occupied a position antithetical to the once Westphalian achievement, and propose a future for Europe that is going to surpass the notion of nation-statehood (as a way of existence defined as the one distinguished from the inter-nationalist way)—doing all this under the pretext of advancing integration, but also (and in reality) under the spell of a bureaucratic (decision-making) powerhouse of a superpower, envisioning a comfortably conducive environment for the effective control of preferred market positions; doing all of this on a heap of rubble that had in its previous state been the democratic ideal (now rendered the democratic deficit), and the social concern that had once upon a time also been a basic promise, and as such, potential of the envisaged Europe.

Legal cultures are standing side-by-side in this complex. In legal terms, nation by nation they are all—individually—equal as member states, yet their chance of survival (i.e., their potential for either gaining further strength or losing significance altogether) in a historical sense, is measured by their ability to

exert influence based on their innovating power.⁸⁰ Whatever academic pathos surrounds the guesswork involved in attempting to size up the chance of European continental Civil Law and Anglo-Saxon Common Law traditions eventually fusing or continuing to exist side-by-side, the prospect of convergence, obviously, shall not be determined by its internal factors, rather it will be the net result of the individual abilities for survival, the outcome of the battle of competing intellects pitched against each other. The preparatory work of the harmonisation and codification of European common law is registered by its cultivators everywhere as academic research, in abstract vehicles, under the aegis of the principle of the universality-concept of science; while and at the same time we must also recognise that these processes occur in reality as vehicles of the direct application of legal methodologies, skills and usages, and value systems native to national background cultures, that is, as inherent part of, or serving the cause of, national expansion. Finally, the particular nation states are not merely recipients and ultimate interpreters of the central case-law produced as the output of European juridical work, but additionally—through their strategic and tactical choices applied to their official commentaries and preliminary questions and inquiries submitted—they themselves can potentially become participants in, or even movers of the processes, and thusly the constituent determinants of the future of the community.

This is because the Union's Europe is about dynamism. For almost at least two decades we have been witnessing what is apparently the relentless seething of a *laboratoire vivant* fed by a certain *jacobinisme* activism.⁸¹ In this process we have the decisive force of the *raison économique* driving integration, which is supplemented, as *raison symbolique*, by other features as well, which are all derived and adopted from the spirit of the times, as, for example, the case may be with human rights in our situation, which in this scenario are serving as the background for the body of rules governing free trade and the free movement of goods, that is, features that function as props on the stage arranged according to the requirements of postmodern democracy.⁸² And let us not miss the point that both of these legal tiers directly effect our future: they hold the key to what is the true meaning of our membership in the European Union, thusly they have a lot to do with the chain of consequences defining

⁸⁰ To note: in the posthumous *Towards the Ontology of Social Being* by Lukács, social existence presumes the ability and factuality of exerting influence in the social total complex.

⁸¹ Arnaud: *op. cit.* 293.

⁸² *Ibid.* p. 294.

the framework of our life. For—as termed by one of the past presidents of the European Court—„Qui participe à la Communauté épouse son droit”⁸³.

So the final outcome of our analysis is that there is no natively *European law*. So far we have member state nations, and currently it is only their cyclically renewed consensus (which is ideally reached via mutual compromise) that can produce the European law. They can do this in a community of nations in which each and every participant is nominally equal. Yet in practice, however, their particular size, economic wealth, and, last but not least, their level of sophistication in terms of being cultured (well versed, fluent) in the ways of Europe renders (promotes or demotes) them players with differing chances of success amid the continuity of challenges and contests. Their skilfulness, endurance, focus, and tactical affinity are being tested all the time. There are of course no losers *per se*, only players whose interests are forced from the fore. Those statehoods and nations behind them are destined for such less favourable track, which have proved to be less proactive in terms of keeping even their own dynamism alive. Or, it proves to be true and concludable in all its feasible directions to claim that “If the »new legal order« is to have reality and full meaning it cannot be simply the extension of any one constituent system to a broader field of application.”⁸⁴ Instead, what we have here is the sum total of all parts, wherein only that gets included which had previously been released into the common stream of the common procedure with appropriate care and determination.⁸⁵

⁸³ From the speech of President *Robert Lecourt* (1967–1976) in celebration of the 20th year of the Declaration by *Robert Schuman* in Brussels on 5 May 1970.

⁸⁴ Mitchell, J. D. B.: *British Law and British Membership. Europarecht* 6 (1971) 97–118 at 98.

⁸⁵ A research partly carried out and translated thanks to and within the Project K62382 financed by the Hungarian Scientific Research Fund.