16 Koskenniemi and the International Legal Argument as Founded in the Law's Ontology

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Finis juris *In the last place, they led me into still another very spacious lecture room where I saw a greater number of distinguished men than anywhere else. The walls around were painted with stone walls, barriers, picket-fences, plank-fences, bars, rails, and gate staves, interspersed at various intervals by gaps and holes, doors and gates, bolts and locks, and along with it larger and smaller keys and hooks. All this they pointed out to each other, measuring where and how one might or might not pass through. 'What are these people doing?' I inquired. I was told that they were searching for means how every man in the world might hold his own or might also peacefully obtain something from another's property without disturbing order and concord. 'That is a fine thing!' I remarked. But observing it a while, it grew disgusting to me.*

Perplexitas juris *Besides, I observed that all this science was founded upon the mere whim of a few men to whom one or another thing seemed worthy of being enjoined as a statute and which the others now observed. Moreover (as I noticed here), some erected or demolished the bars or gaps as the notion entered their heads. Consequently, there was much outright contradiction in it all, the rectification of which caused a group of them a great deal of curious and ingenious labor; I was amazed that they sweated and toiled so much upon most insignificant minutiae, amounting to very little, and occurring scarcely once in a millennium; and all with not a little pride. For the more a man broke through some bar or made an opening that he was able to wall up again, the better he thought of himself and the more was he envied by others. But some (in order to show the keenness of their wit) rose up and opposed him, contending that the bars should be set up or the gaps broken thus so. Hence arose contentions and quarrels, until finally separating, they painted each his case in his own way, at the same time attracting spectators to themselves.*

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J.A. Comenius, *Labyrinth of the World*, Amsterdam, 1663.[1]

Interstate law is a standalone discipline, separated from the laws of individual states, and they hardly share their exercise or underlying culture with each other or, for example, with canon law. Their occasional meetings, mostly occurring due to their common roots, methodological attitudes or fundamental concepts, thus often cause a surprise, and at the same time the realisation of something already suspected – and thus the promise of some kind of internal renewal. The already classic undertaking of Martti Koskenniemi is something like this:[2] it stirred up a global storm in both editions within its own academic circles, although, from the scholarly perspective of domestic law, it did nothing else but something that is already long accepted: it questioned itself in a theoretical manner. Yet, had it found a common field of understanding, it could be the start of a higher level of academic reformulation.

16.1 Position of the International Legal Argument

The author took the message of legal positivism seriously, and as part of it, the claim of international law[3] to implement, however imperfectly and with some fragmentation, what domestic state laws have undertaken to do since the birth of Europe: through the *formalisation* of the law, the possible mechanisation for establishing what the law in a given case is, and by this, to guarantee the legal certainty and legal assurance that can be achieved by predictability. At the same time, he admitted (and also made it rather strongly visible in his great work we are discussing right now) that it is a mere ideal, i.e. that at the most (and only in a fragmented way) only the external shell of the law can/could adjust to it. Because what is it that we can see? That, on the one hand – as fact – the basic instrumentation of the decisions made at all times in the name of the law, and in the process leading up to it the style idol of the actual argumentation's canon, and on the other hand – as a norm – the mentality bequeathed / being further bequeathed in the legal profession as professional deontology (i.e. the entire way of thinking, speaking and writing of the profession) render account to the unchanged insistence on adjusting to *this*, as a linking anchor and as an objective to be achieved.

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1 J.A. Komensky, *Labyrint světa a rág srdce*], chapter XV, The Pilgrim Observes the Legal Profession, www.oldlandmarks.com/lab15.htm.

2 M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Finnish Lawyers' Pub. Co, Helsinki 1989 as well as M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Reissued with a New Epilogue, Cambridge University Press, Cambridge & New York 2005.

3 Cf., e.g., H. Kelsen, The Law as a Specific Social Technique, *in* H. Kelsen, *What Is Justice? Justice, Law, and Politics in the Mirror of Science*, Collected Essays, University of California Press, Berkeley & Los Angeles 1960, pp. 231-256.

> The weakness of international legal argument appears as its incapability to provide a coherent, convincing justification for solving a normative problem. The choice of solution is dependent on an ultimately arbitrary choice.[4]

Namely, every conclusion of legal consequences is the outcome of an ultimately non-deductive *human choice* which is not based on any logical necessity. According to the author, the reason for it lies in the nature of basing something in conceptual terms.

> The idea that law can provide objective resolutions to actual disputes is premised on the assumption that legal concepts have a meaning which is present in them in some intrinsic way, that at least their core meanings can be verified in an objective fashion. But modern linguistics has taught us that concepts do not have such natural meanings. In one way or another, meanings are determined by the conceptual scheme in which the concept appears.[5]

However, in the absence of a natural meaning, it is thus obvious that no natural human/societal order stands behind the linguistic communication. In this case, anything that exists can only be an *artificial* – man-made – *product*, an 'experiment' that can be attributed to its creator.[6] According to this, no meaning independent from human intentions exists; even those we experience as existing are dependent on their human – cultural – environment and context.

These are classical findings of semantics – presented from a lay perspective but not enriched with the details or theoretical findings that could be assessed from a linguistic point of view. This parable, advancing his monographic reply, is at the same time original and hits the point itself with the intention of exploring. According to this,

> Had I responded to my superiors at the Ministry when they wished to hear what the law was by telling them that this was a stupid question and instead given them my view of where the Finnish interests lay, or what type of State behaviour was desirable, they would have been both baffled and disappointed, and would certainly not have consulted me again.[7]

Well, more theoretically, this parable can be summarised as, by its nature, international law is

4 Koskenniemi 1989, p. 48.
5 Koskenniemi 2005, p. 16.
6 Koskenniemi 2005, p. 560. 'in the absence of a natural social order every actual institution […] remains only an experiment.'
7 Koskenniemi 2005, p. 564.

> a complex argumentative practice in which rules are connected with other rules at different levels of abstraction and communicated from one person or group of persons to another so as to carry out the law jobs in which international lawyers are engaged.[8]

Namely, various levels of abstraction in a changing contexture; and all these in the interactive environment of a running communication process, in the dispute of arguments confronting each other; and what is more, it is not only said but also shaped as long as it results in a community in agreement. Of course, certain rules can be understood or worded correctly or incorrectly; however, they can never surpass the limits of their linguistic nature: their meaning is incessantly shaped in the practice of the users of the language, and increasingly diversified by the infinity of this practice. According to the author, the underlying reason for all this is that 'there never are simple, well-identified objectives behind formal rules. Rules are legislative compromises, open-ended and bound in clusters expressing conflicting considerations.'[9] Moreover, going even deeper, the linguistic formulation that seems to be general, objective, and independent from everybody/anybody is nothing else but falsehood, a kind of idealisation motivated by the instrumentation itself, since it can only be formulated by human beings – influenced by a particular situation and interested in resolving this in one way or another. Hence, *linguistic universality* covers a concrete *particularity*, which is already experienced or intended to be shaped.[10] The referenced terms – principles, rules, individual concepts – have no codified reference mark; as such, when they are invoked, they connect to each other freely and in a non-determinant way, but with more or less convincing power. The author paraphrases this as follows: 'there is no access to legal rules or the legal meaning of international behaviour that is independent from the way competent lawyers see those things.'[11] And this way we arrived at the questions posed by hermeneutics.

'No style is neutral' – states the work, rightly, adding that there is no hierarchy over everything that would allow for an assessment of the style or the implementation of the law. Not even a 'method' can be fitted easily to the law. Because, whatever we did, it would not create the standalone objectivity of 'the law' but the virtual possibility for its 'own

8 Koskenniemi 2005, p. 566.

9 M. Koskenniemi, 'What is International Law for?', *in* M. Evans (Ed.), *International Law*, 3rd ed, Oxford University Press, Oxford 2010, p. 41.

10 These are 'false universals', as 'behind every notion of universal international law there is always some particular view, expressed by a particular actor in some particular situation.' M. Koskenniemi, 'International Law and Hegemony: A Reconfiguration', *Cambridge Review of International Affairs*, Vol. 17, 2004, p. 199.

11 Koskenniemi 2005, pp. 568-569.

"realities"', the assessment of which again lacks an external/independent point of reference.[12] The explanation is simple: when we choose different methods for a subject that is nominally identical, indeed, we assume(d) different subjects to begin with, and between them there is a relationship where only this nominal sameness can be said to exist between them.[13]

The reality at the heart of the practical statement, when the profession believes that this or that is a 'good legal argument',[14] does not hang in the air and not even in the haze of notions, but in the factuality of a certain (and no other) practice. In nothing else but in the relative – and therefore reliable and more or less predictable – permanency of a set of correlations assembled from the momentary results of all the abilities playing a role in the practice at a certain time and location, in a certain profession. Otherwise this is what is customarily called, in contemporary English-American literature, a *canon*, which is a witty term but it loses its original meaning. Because the root of the theological and other actual canon[15] lies in the conscious set of norms by an established authority, and with a view to

12 M. Koskenniemi, 'Letter to the Editors of the Symposium' [*American Journal of International Law*, Vol. 93, 1999, pp. 351-361], reprinted *in* M. Koskenniemi, *The Politics of International Law*, Bloomsbury Publishing, London 2011, pp. 304 and 305: 'The methods create their own "realities".'

13 See, e.g., Cs. Varga, 'Quelques questions méthodologiques de la formation des concepts en sciences juridiques', *Archives de Philosophie du Droit*, Vol. XVIII, 1973, pp. 205-241, http://drcsabavarga.wordpress.com/2010/10/24/varga-etudes-en-philosophie-du-droit-estudios-en-filosofia-del-derecho-1994/.

14 '[W]hatever else international law might be, at least it is how international lawyers argue, […] and this can be articulated in a limited number of rules that constitute the "grammar" – the system of production of good legal arguments.' Koskenniemi 2005, p. 568.

15 We presume the positivistic vision of law and the mechanistic view of its operation, when – making comparisons – we talk about the style of court decisions. Because what appears in a court decision, and the way it appears, is indeed not an optional choice from any way of expression but the manifestation of the actualisation of the law, from the potentiality of some *dynamei* into reality, and as such, necessarily the part of the law's ontology. By contrast, the *canon* as a 'rule' originally – *κανών* (*kanōn*, 'measuring rod, standard') http://en.wiktionary.org/wiki/canon – is nothing more than something that sets standards. It is therefore a criterion of the practice but not its coalescence or its outcome. The original notion of canon, *theological canon*, stresses its undisputable authority – D.G. Dunbar, 'The Biblical Canon', *in* D.A. Carson & J.D. Woodbridge (Eds.), *Hermeneutics, Authority, and Canon*, Wipf and Stock, Eugene, Or. 1986, p. viii: 'the idea of a canon is the outgrowth of salvation history and arises when God's people regard the process of revelation as complete or, at least, in abeyance.' – ; and the idea of its gradually identifiable source area builds on it – E.J. Schnabel, 'History, Theology and the Biblical Canon: An Introduction to Basic Issues', *Themelios*, Vol. 20, No. 2, 1995, www.biblicalstudies.org.uk/pdf/canon_schnabel.pdf, p. 16, 'The term "canon" is usually defined as "rule" or "norm". The Greek word, which has a broad range of meanings, was applied to the list of books regarded as authoritative for the churches' ["a straight rod", "level", "plumbline", "ruler" and, metaphorically, "criterion", 'standard', 'circumscribed {geographical} area'] – in order to delimit teachings that are to be taken as points of reference. However, the '*literary canon*' is the designation of a practice that is somewhat crystallised and singled out for conventionalisation. Its American version is of a protective nature: at first it became independent and separate from its English antecedent, while today it is broadening continuously: it is enriched with new items/titles as a result of self-criticism – Š. Bubíková, 'The Formation and Transformation of the American Literary Canon', www.phil.muni.cz/angl/thepes/thepes_02_03.pdf – ; and ultimately it becomes the mark of the momentary state of a never-ending transformation – for example, according to the author known from his speech act theory, J. Searle, 'The Storm Over the University', *The New York Review of Books*, 6 December 1990, www.ditext.com/searle/searle1.html, 'In my experience there never was, in fact, a fixed "canon"; there was rather a certain set of tentative judgments about what had

determine everything, pending its change/recall, foredoomed and quasi axiomatically (and therefore quasi automatically), in the area that it states as its own domain. By contrast, the canon of the legal argument is a concept like the *regola*-phenomenon of Roman law at its birth:[16] a posterior characterisation of an already established practice with the view to enable its example/experience/lessons to be transferred economically as a successful procedure to others/posterity.

The sign of the theoretical uncertainty is that the author's discussion transfers the responsibility, in its wavering argumentation, to the community of international law, and more precisely to the conflicts of interests, and by chance to exaggerations and abuses. According to this, 'the claim of indeterminacy here is not at all that international legal words are semantically ambivalent' but that the users of the language pursue contradictory objectives. Therefore, 'even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises.'[17] This is because its environment and the context itself, where it is invoked, interpreted or referenced, consists of intentions and motivations competing and denying each other; more precisely, of their linguistic concealments, and the general expression of the language that covers up everything. For example that

> 'sovereignty,' 'jus gentium,' 'property,' or indeed 'law' is dependent on the context where it is used – especially on what one intends to use it for or what one tries to achieve through it.

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importance and quality. Such judgments are always subject to revision, and in fact they were constantly being revised.' – up until becoming, in the resulting chaos, the expression of the ordering principle, the core content of the chaos. Cf., e.g. www.konyv7.hu/magyar/menupontok/felso-menusor/tematikus-lap/az-irodalmi-kanon-termeszetrajza. It is weird that total disintegration is exemplified by the legal doctrine, and in the context of an otherwise lucky thought: 'law school aims not to teach "the law" but to teach how to "think like a lawyer".' Because the pursuit of *political correctness* applies the 'canon' here to the totality of eight competing 'schools': legal realism, procedural approach, law and economy, law and society, critical legal studies, modern liberalism, feminist law theory, and critical race theory. D. Kennedy & W.W. Fischer III, 'Introduction; The Subject: "Legal Thought"', *in* D. Kennedy & W.W. Fischer III (Eds.), *The Canon of American Legal Thought*, Princeton University Press, Princeton 2006, http://press.princeton.edu/chapters/i8318.pdf, p. 1 and *passim*; similarly P. Goodrich, *Reading the Law: A Critical Introduction to Legal Methods and Techniques*, Basil Blackwell, Oxford, 1986, p. 75 and F. Cownie, A. Bradney & M. Burton, *English Legal System in Context*, Basil Blackwell, Oxford 2007, pp. 102-104.

16 *D.*50.17.1. (Paulus 16 ad Plautium): 'Regula est, quae rem quae est breviter enarrat: non ex regula ius sumatur, sed ex iure quod est regula fiat' ['A rule is what briefly sets out the matter in question; the law is not derived from the rule but the rule is made out of the existing law.'] Later it is confirmed by E. Bronchorst *Commentarius*, 1624, p. 4 as follows: '*Regula est generalis et brevis definitio* ac sententia, quando videl. plures casus similes brevi traditione concluduntur, non per specialem casuum expressionem sed ejusdem rationis assignationem.' ['A regula is a general and brief definition and statement, whereby, in a brief communicaton, many similar cases are summarised, not to give expression to a special case, but to convey the ratio of those cases.']

17 Koskenniemi 2005, p. 590.

Because ultimately

> it is possible to defend any course of action – including deviation from a clear rule – by professionally impeccable legal arguments that look from the rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret the rules in the context of evaluative standards.[18]

The law traces back the diversity and variability of the world into common and homogenised terms: it simplifies – reduces everything, which is infinite in its uniqueness, from its complexity to *a general scheme*[19] – and operates exclusively with these in every formal case processing.

> The form of law constructs political adversaries as equals, entitled to express their subjectively felt injustices in terms of breaches of the rules of the community to which they belong no less than their adversaries.[20]

Thus, his hands do something other than what he has in his mind, but in the meanwhile he makes us believe that it is only his hands that propel themselves – in the way the law orders. According to the author, the law indeed becomes self-propelled, a final authority without right of appeal. However, this can become harmful as well because, for example when fundamental human values are mass-infringed, such as in genocide, it destroys the self-evident moral commitment.[21] In one of his presentations, he resolved the secret of the

18 M. Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism', *Rechtsgeschichte*, Vol. 19, 2011, http://rg.rg.mpg.de/en/article_id/36, p. 166, and Koskenniemi 2005, p. 591.

19 Koskenniemi 'Letter…', 2011, p. 301. 'all legal argument is reductionist.' According to a living icon of the international legal procedure, decision-making processes 'need this *reduction* of the matter to a series of issues, distinct from the arguments supporting or attacking the parties' contentions, which issues call for decision by the Court; which list of issues is intended therefore to correspond to the list of decisions which will ultimately form the *dispositif* of the Court's judgment. This reduction, concentration, refinement, or processing (many expressions suggest themselves) of a case is also to an important extent to modify its character. It looks different from how it was before being reduced to, and embroidered in, the submissions. […] One very important element of the process is the interaction in the course of pleading of the parties' respective submissions; so that one can perceive in a party's changing submissions at each stage of the case refinements and clarifications resulting from the effect and influence of the other party's submissions.' R.Y. Jennings, 'The Proper Work and Purposes of the International Court of Justice', *in* A.S. Muller, D. Raic & J.M. Thuránszky (Eds.), *The International Court of Justice: Its Future after Fifty Years*, Nijhoff, The Hague 1997, https://books.google.hu/books?id=JUVqtrXjD7cC&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false, `pp. 33-34.

20 Koskenniemi 'What is International Law for?', 2010, p. 45.

21 According to this, sometimes – which is, on the author's behalf, the non-recognition of the most proprietary function of the law, and it is weird that he undertook it at all – is 'the application of formal legal language about it not only irrelevant, but positively harmful.' 'The harm lies in the suggestion that law – in any of its stylistic formulations – may condemn evil, however massive, only if legal technique allows this.' Koskenniemi 'Letter…' 2011, p. 302. So, Kelsen's reconstruction of the logic of law specifically emphasises that the law,

relationship between the aspiration to enforce interests and the lawyers' neutrality with the following example:

> The relation between international law and politics is the same as the relation between a duck and a rabbit *[here he shows it scribbled on a piece of paper]*: The rabbit and the duck are just in your head! So stop asking yourself whether this is a duck or a rabbit – it is the politics and the international law at the same time.[22]

Is it true then that 'Although international law is highly structured as a language, it is quite fluid and open-ended as to what can be said in it'?[23]

It seems, from his remarks that are less disciplined and deeply reflect regular, rather impressionistic every day practice, that he arrives at a kind of statement that can be assessed theoretically. According to this, where there is no real tie, a conclusion inevitable under the rules of logic, there is *discretion*, which can be filled in with a freedom that is not influenced by the framework at stake. So, as he already explained, in international practice, all parties fight to enforce the version fitting their own interests as to the reply of the law; the possibilities for this, however, are confined by the fact that this is the only possible reply by the law, which can be justified, and this justification can take place only under the terms of the law, by derivation from them, in accordance with established (canonised) practice.[24] As such, there is always

> the inevitability of political choice, thus seeking to induce a sense that there are more alternatives than practitioners usually realise, that impeccable arguments may be made to support preferences that are not normally heard; that

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in its intrinsic nature, does not penalise *because* the act is bad but *by* attaching a sanction to the establishment of that act by a competent authority, in a procedurally defined procedure. Cf., Cs. Varga, 'A bécsi iskola' [The Vienna school], *in* Cs. Varga (Ed.), *Jogbölcselet: XIX–XX. század, Előadások* [Philosophy of law, 19th to 20th centuries: Lectures], Szent István Társulat, Budapest, 1999, pp. 60-68.

22 M. Milotic, 'The Famed Finnish Law Professor Martti Koskenniemi Visited Ljubljana', (Embassy of Finland, Ljubljana, News, November 23 2012), www.finland.si/public/default.aspx?contentid=263396&culture=en-US.

23 Koskenniemi 2005, p. 567.

24 Koskenniemi 2005, p. 570. And – J. von Bernsdorff, 'Postscript – On Kelsenian Formalism in International Law', *in* J. von Bernsdorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, Cambridge University Press, Cambridge 2010, pp. 233-271 recalled in – Hans Kelsen was already conscious of the trap of '*Entscheidung des Unentscheidbaren*' (i.e. deciding the undecidible, as termed by N. Luhmann, *Das Recht der Gesellschaft*, Suhrkamp, Frankfurt am Main 1993, p. 317) in his *Reine Rechtslehre* published in 1934; therefore he has no theory of interpretation because he considered this as law-creation, and he did not push it out from the law into politics, because he already denatured it by restricting it in the context of a legal regulation.

> if this seems difficult through the more formal techniques, then less formal techniques are always available – and the other way around.

It follows from this – as a kind of *regressus ad uterum*, by returning to an original state – that even a 'literal' application is always a choice that is undetermined by literality itself. There is no space in international law that would be free from decisionism, no aspect of the legal craft that would not involve a 'choice' – that would not be, in a sense, a *politics of international law*.[25]

Thus, independently from legal clarity and determination, there are various routes and channels for interpretation.[26]

Back then, Hans Kelsen, exactly to enable the separation of *Rechtswissenschaft* from *Rechtspolitik*, emptied out any content from its logically constructed ideal image;[27] however, a confrontation of this kind is forced by way of circumvention. Specifically, in resolving international conflicts, there is no

> end-point of a hegemonic process in which some agent or institution has succeeded in making its position seem the universal or 'neutral' position. There is no 'centre', no pragmatic meeting-point existing independently of arguments that seek to make a position seem 'central' or 'pragmatic' while casting the contesting positions as 'marginal' or 'extreme'.[28]

It is still there as a risk, therefore it is essential to avoid it.[29] Because in any conflict there are only two paths that can be taken: threatening violence as the 'right' of the stronger, or shifting the dispute onto a neutral common foundation.[30] Despite this terrain, invoking

25 Koskenniemi 2005, pp. 591 and 596.

26 'The problems of treaty interpretation lie deeper than in the unclear character of treaty language. They lie in the contradiction between the legal principles available to arrive at an interpretation.' Koskenniemi 1989, pp. 298-299.

27 Koskenniemi 2005, p. 597. Indeed, according to H. Kelsen, 'Juristischer Formalismus und Reine Rechtslehre', *Juristische Wochenschrift*, Vol. 58, No. 23, 1929, off-print, p. 9, '[i]f there is any point where one can take a stance outside the realm of power, it is science.'

28 Koskenniemi 2005, pp. 597 and 597-598. After this idea, he continues as follows: 'Hermeneutics, too, is a universalization project, a set of hegemonic moves that make particular arguments or preferences seem something other than particular because they seem, for example, "coherent" with the "principles" of the legal system.'

29 That is why C. Schmitt – *The Concept of the Political*, University of Chicago Press, Chicago 2007, p. 54 – warns against too broad references: 'To confiscate the word humanity, to invoke and monopolize such a term probably has certain incalculable effects, such as denying the enemy the quality of being human and declaring him to be an outlaw of humanity; and a war can thereby be driven to the most extreme inhumanity.'

30 This is the stake for all laws. In this alternative, the role of choice is shown especially sharply, for example, by the re-invention/reception of the Roman law in the Bologna of the new age, and this was shown by the initial credo and self-preservation of the Hungarian constitutional judiciary born after the fall of Communism: they could not decide between the fundamental values and so the dispute has been depoliticised.

the rules can be a *hegemonic* technique, because by enforcing preferences as universal the domination of one of the parties may occur.[31] Seeing these uncertainty factors, the final conclusion of the author is nothing else but *to have the personal characters make undertakings.*

> If the practice is not determined by an interior structure or vocabulary, then it cannot be reduced to an automatic production of such a structure of vocabulary either. The decision is made, and its consequences are attributable not to some impersonal logic or structure but *to ourselves*.[32]

Therefore, different *alternatives* are given in the law, out of which only one can reach the point of being phrased as the law's reply. In this way every decision is like setting a switch;[33] the direction set will be the starting point for any later decision-making. However, the ultimate reason for a certain (and not a different) setting of this switch cannot be explained from the law itself, although this is hidden behind the dispute that goes on in the legal terminology. Arguments, interpretations and techniques can fight but in the end only one can win, the one leading up to a certain (and not to a different) reply, while there could have possibly been a different choice as well, leading up to an obviously different reply. It seems therefore that the law itself produces a result from the law – although, when it is examined closely, it is born from the chosen technique.[34] That is why the author's remark is important, according to which purely

> Each of […] techniques is […] indeterminate. None of them explain why *this* argument was held relevant, why *that* interpretation was chosen. The decision always comes out as […] a genuinely political act, a choice between alternatives

31 As 'distinguished from unilateral assertions of power […], the European appeal to "rules" […] would appear as a hegemonic technique through which Europe would only seek to regain some control by inscribing its preferences […] as universal.' M. Koskenniemi, 'International Law as Political Theology: How to Read Nomos der Erde?', *Constellations*, Vol. 11, 2004, p. 506. Later – M. Koskenniemi 'International Law in Europe: Between Tradition and Renewal' *European Journal of International Law*, Vol. 16, No. 1, 2005, p. 117 – he writes: 'European generals may no longer lead invasion forces, but European lawyers in the ICC may always prosecute American generals who do.'

32 Koskenniemi 2005, p. 615.

33 The opportunities underlying changes in the society and their concealment were presented by Max Weber as setting a switch: in his sensual metaphor, as soon as the train starts, it can move forward to a set of points, where it can also choose only a single direction further – and so we will know nothing about those unchosen directions, because nobody ever discovered them.

34 In the law, the available techniques to begin with are dichotomic argument couples; and choosing one of them causes a certain consequence while choosing the other one excludes that consequence; cf. Cs. Varga 'Judicial Black-box and the Rule of Law in the Context of European Unification and Globalisation' *Acta Juridica Hungarica* 49 (2008) 4, pp. 469-482, https://www.researchgate.net/publication/250978808_Judicial_black-box_and_the_rule_of_law_in_the_context_of_European_unification_and_Globalisation.

> not fully dictated by external criteria. It is even a *hegemonic* act in the precise sense that though it is partial and subjective, it claims to be universal and objective.

Then is it possible that the determinant is not the one that claims to be so? And as it is reflected by the law itself? Now here is the witty reply: 'The law is instrumental, but what it is an instrument for cannot be fixed outside the political process of which it is an inextricable part.' What's more, it is not a simple pretence but a nearly hopeless attempt that still needs to be made to ensure that the parties in the dispute between the conflicting interests use a common language, and in this restricting environment to align the representation of their conflicting interests with the importance to preserve the community that joins them.

> In the absence of agreement over, or knowledge of, the 'true' objectives of political community – that is to say, in an agnostic world – the pure form of international law provides the shared surface – the *only* such surface – on which political adversaries recognize each other as such and pursue their adversity in terms of something shared, instead of seeking to attain full exclusion – 'outlawry' – of the other.

The paper obviously phrases a goal-and-instrument relationship as a basis for it: this process takes place in a space penetrated by the desire for justice, but there is only one single – though imperfect – instrument available: the posited law. It follows from this that

> The judgment is always insufficiently grounded in law, just like positive law is always insufficiently expressive of justice. In the gap between positive law and justice lies the necessary (and impossible) realm of the politics of law. Without it, law becomes pure positivity, its violence a mere fact of power.[35]

The law is unable to operate in and by itself. It fulfils its function by positing rules, then enforces them with human participation. This participation is not simple automatism. The operator must concretise/actualise the norm to the situation, by adapting it from the general to the particular. However – adds the author – this necessarily diverts attention from the content of the original rule to the way of its adaptative recreation and the process of this recreation. This is a new idea taken specifically from international law practice. Namely, from the one that

35 Koskenniemi 'What is International Law for?', pp. 48, 43, 48 and 49.

> in most fields of international law […] the rules are both overtly indeterminate and riddled with large exceptions so that the constraint felt may actually be minimal. The conclusion might have been […] that it is lesser the law's substance than the fact that it is the law that is being invoked that is important.

It refers to the homogeneity of fulfilling a function as the medium for discussion. Because

> Law's civilizing mission is less related to its substance than its status as law, and as such, its claim to be something other than the mere preferences of whoever is speaking.

It is therefore a further functional treat of a legal process that private manifestations are transubstantiated and projected to a higher level because

> Law's power and attraction lie in its offering what appears a universal point of view, its ability to raise mere opinions onto a status of what is (universally) right.[36]

Well, as widely known, 'International law revels in conflict.'[37] International law itself is the battlefield, where the opposing parties battle their interests. The battle therefore is switched, from personal conflicts to a higher level, since 'in law, political struggle is waged on what legal terms […] mean.'[38] It takes place as follows:

> Law is a surface over which political opponents engage in hegemonic practices, trying to enlist its rules, principles and institutions on their side, making sure they would not support the adversary.[39]

The entire conceptuality of the law serves this purpose.[40] This is to mean that following the pattern of classical rule application, first the facts are established and then they are classified into the actual concrete version of the general normative pattern.

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36 M. Koskenniemi, 'The Mystery of Legal Obligation', *International Theory*, Vol. 3, No. 2, 2011, www.helsinki.fi/eci/Publications/Koskenniemi/MKMystery of Obligation_IT 2011.pdf, pp. 323, 324 and 324.

37 M. Koskenniemi, 'International Law in the World of Ideas', *in* J. Crawford, M. Koskenniemi & S. Ranganathan (Eds), *The Cambridge Companion to International Law*, Cambridge University Press, Cambridge 2012, p. 47.

38 Koskenniemi 'International Law in Europe' 2005, p. 119.

39 Koskenniemi, 'International Law and Hegemony' 2004. (Quoted from www.helsinki.fi/eci/Publications/Koskenniemi/MHegemony.pdf, pp. 1-24, p. 4).

40 '[D]ichotomies cannot be thought of as "problems" to be resolved but that they define the field within which "international law" is played out as a social practice. Without such oppositions, and the way they provide a thematic for international legal "speech", there could be no international law in the first place.' 'Historians

> When I worked with the foreign ministry, I often felt that this was precisely what was expected of the lawyer. For the politicians, every situation was new, exceptional, crisis. The lawyer's task was to link it to what had happened previously, a case, a precedent, tell it as part of a history. The point of the law was to detach the particular from its particularity by linking it with narratives in which it received a generalizable meaning, and the politician could see what to do with it.[41]

In what other form could the law appear? It needs to be objective. In order to become independent from the uncertainties lying in reliance on natural justice, it *specifies* the content of the regulation somewhat; but, in order to make it a measure separated from the particular conduct, by the same stroke it increases its *general* normative force.[42] Being a contradiction, in practice this entire building collapses: one of the above annuls the other, since strengthening either of them leads to the other one becoming weaker.[43]

> The wider the laws grasp, the weaker its normative force. Until, finally, one becomes unable to distinguish between the gunman and the policeman, the regime of corruption from the regime of contract.[44]

All in all, law enforcement is at the same time the recreation of the law – however, for international law, from a wider catchment area than for domestic law.[45] As soon as we test the law as something to be applied in practice, the discrepancy between the rules and the case comes to light: inevitably, the rules either contain too much or too little.[46] It causes a

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involved in *Begriffsgeschichte* know very well that political and legal words are expressed in contexts and that their meaning depends on what claims are made by them in respect to other claims.' M. Koskenniemi, 'A Response', *German Law Journal*, Vol. 7, No. 12, 2006, www.germanlawjournal.com/pdfs/FullIssues/Vol_7_12.pdf, pp. 1104 and 1106.

41 Koskenniemi, 'International Law in Europe' 2005, p. 120.

42 'To show that international law is objective – that is, independent from international politics – the legal mind fights a battle on two fronts. On the one hand, it aims to ensure the *concreteness* of the law by distancing it from theories of natural justice. On the other hand, it aims to guarantee the *normativity* of the law by creating distance between it and actual state behaviour, will, or interest.' M. Koskenniemi, 'The Politics of International Law' *European Journal of International Law*, Vol. 1, No. 1, 1990, p. 7.

43 Ibid., p. 8, adding that this is the source of the 'dynamics of international legal argument.'

44 M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', *The Modern Law Review*, Vol. 70, No. 1, 2007, p. 23.

45 '[B]oth Kelsen and Ross view legal interpretation an act of norm-creation rather than deduction, motivated not only by the "objectified sources", but above all by the "free factors", as Ross calls them', that is, 'as "free-standing imperatives" that constituted the raw-materials from which legal professionals constructed their arguments and decisions.' M. Koskenniemi, 'Introduction: Alf Ross and Life Beyond Realism', *European Journal of International Law*, Vol. 14, No. 4, 2003, www.ejil.org/pdfs/14/4/437.pdf, pp. 656-657.

46 'Any rule with a global scope will almost automatically appear as either over-inclusive or under-inclusive' – wrotes Koskenniemi 'The Fate of Public International Law', 2007, p. 9.

contradiction in the process, because the abstract formality of the rule is immediately overruled by the interpretation, which relies on the existing/prevailing.[47] According to this, as we have seen, the norm is not perfect: it needs to be clarified and specified/updated. But who is going to do this? And in whose favour or at whose expense? This is the paradox of linguistic mediation, of the law's ability to fulfil its function. This is because one of the basic truths of the law is that as soon as the addressee is involved in the finalisation of the law's content, its normativity is lost.[48]

16.2 Reception

What caused international law to be a science, that generated such great interest and condemnation among its followers with this concept presenting its real operation? The author recalls from his early university studies, as an impression, that as he knew it international law is a 'little more than an unorganized mélange of natural law abstractions, juristic common-sense and a bourgeois conviction about the rightness of one's most banal political beliefs.'[49] He insists on his views on it ever since, as 'a hopelessly old-fashioned repertoire of formalist argumentative dicta', lacking questioning and theoretical depth, and its ambition is not more than repeating the contrast between formalism and realism.[50] It appears routinised, without clarifying its own presumptions.[51] Well, on final analysis it suggests to an outsider that there is a determinate clarity in the fundamental values of international law that makes the profession believe that it is an undisputable reality. Because every actor works in this and at most they have to deal with occasional deviancies, practice is interlocked with normative standards. Indeed, what is called the philosophy of international law by the profession is mostly the philosophical history of ideas taken from its moral roots.[52] It seems that the sense of safety experienced by the community would exclude raising any bias, and the fear from the effects causing uncertainty excludes any dissection of the presumptions.

47 Koskenniemi 'The Politics of International Law', 1990, p. 31.

48 'An obligation whose scope is left to the free appreciation of the obligee, so that his will constitutes a legally recognized condition of the existence of the duty, does not constitute a legal bond' – states H. Lauterpacht, *The Function of Law in the International Community*, Clarendon Press, Oxford 1933, p. 189. This is summarised by Koskenniemi 'The Mystery of Legal Obligation', 2011, p. 323 as follows: 'a rule that lets its addressees freely determine its content is somehow inconceivable as part of a legal institution.'

49 Koskenniemi 'Introduction', 2003, pp. 653-654.

50 'Where was complexity, the fusion of horizons, *Vorverständnis*, indeterminacy or social critique?' – added Koskenniemi 'Letter…', 1999, p. 297.

51 'One of the problems with modern international law has been its routinization, the absence of reflection by the profession of its embedded preferences.' Koskenniemi 'A Response', 2006, p. 1107.

52 This is exactly what the subsequent volumes of the *Journal of the Philosophy of International Law*, Vol. I, 2006, https://www.electronicpublications.org/catalogue.php?id=47 suggest.

The science of international law created its proprietary culture. Beyond the historic analysis of international relations, it might not feel the need for any additional support. And this work, indeed covering a vast range of literature, received extraordinary praise: it is classified into nearly all significant schools of recent philosophy. And the author can only apologise himself that hid did hardly any more than what is expected from an academic work in this discipline.[53] Indeed, narrow-mindedness is reflected in the way it was welcomed as a finally born professional sociology of international law[54] or praised as the reformulation of Wittgenstein's language game theory.[55] Of course only when the birth of this work as a former dissertation is not recalled, which gives the current benevolent critics the right to consider it as an earlier eccentric childhood disease, to overlook it,[56] to sense it as finger work above others,[57] or to detect a method in its approach, just to sneak it in as one of the new challengers to the already competing *mainstream* 'methods.'[58]

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53 Since its purpose is not legal philosophy/legal theory but the 'clarification of practice and discourse of international lawyers.' E. Jouannet, 'Koskenniemi: A Critical Introduction', *in* M. Koskenniemi, *The Politics of International Law*, Hart Publishing, Oxford 2011, pp. 1-32, www.univ-paris1.fr/fileadmin/IREDIES/Contributions_en_ligne/E._JOUANNET/Jouannet-Koskenniemi.pdf, p. 4. Because, as he states – Koskenniemi 2005, p. 1 – 'This is not only a book in international law. It is also an exercise in social theory and in political philosophy.'

54 '[H]e is not essentially an international law scholar. He is, rather, a *sociologist of the profession* of international law' – as stated in [Kenneth Anderson], 'Martti Koskenniemi (Theory)', *in Kenneth Anderson's Law of War and Just War Theory Blog*, 21 December 2004, http://kennethandersonlawofwar.blogspot.hu/2004/12/martti-koskenniemi-theory.html.

55 E.g., A. Carty, 'Language Games of International Law: Koskenniemi as the Discipline's Wittgenstein', *Melbourne Journal of International Law*, Vol. 13, No. 2, 2012, pp. 859-878.

56 The best examples are the compilations dedicated to his work, such as J. Petman & J. Klabbers (Eds.), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*, Brill & Nijhoff, Leiden 2003 as well as J.L. Dunoff, 'Engaging the Writings of Martti Koskenniemi: Introduction to the Symposium', *Temple International and Comparative Law Journal*, Vol. 27, No. 2, 2013, pp. 207-214, www.temple.edu/law/ticlj/fall2013/Dunoff_EngagingtheWritings.pdf (together with the full material of the symposium). Such works are – amongst others – I. Scobbie, 'Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism', *British Yearbook of International Law*, Vol. 61, No. 1, 1991, pp. 339-362, http://bybil.oxfordjournals.org/content/61/1/339.full.pdf+html; P.-M. Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi', *European Journal of International Law*, Vol. 16, No. 1, 2005, pp. 131-137, www.ejil.org/pdfs/16/1/281.pdf; J. Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues', *Temple International & Comparative Law Journal*, Vol. 27, No. 2, 2013, pp. 417-435, www.temple.edu/law/ticlj/fall2013/Klabbers_TowardsaCultureofFormalism.pdf.

57 D. Kennedy's 'Theses about International Law Discourse', *German Yearbook of International Law*, Vol. 23, 1980, pp. 351-391, www.law.harvard.edu/faculty/dkennedy/publications/ThesisInterntnlLaw1980_20100618165429.pdf is considered as source of inspiration by J. von Bernstorff, 'Sisyphus was an International Lawyer: On Martti Koskenniemi's "From Apology to Utopia" and the Place of Law in International Politics', *German Law Journal*, Vol. 7, No. 12, 2006, www.germanlawjournal.com/pdfs/FullIssues/Vol_7_12.pdf, p. 1020, n. 17.

58 The 'Symposium on Method in International Law', *American Journal of International Law*, Vol. 93, No. 2, 1999, pp. 291-423 intended to restrict it to the same methodological line as a challenger, within the realm of international law, to positivism, the science of politics, legal process analysis, international relations, feminism, law and economy, critical legal studies; cf., A.-M. Slaughter & S.R. Ratner, 'The Method is the

Because all these only rip off its essence, that at last there has been an author in international law who has questioned *in what* and *how* this law exists. Not as a fashionable method that could be freely chosen in this or that way (since, as he writes, it is not a market or department store);[59] and not as transition between general/particular (as if it were structural linguistics)[60] – since the language is a carrier medium for the law but not its explanation – but what we can indeed understand under the existence of something like international law.

The discussions in *From Apology to Utopia* were seen by some as serving as a verification of the infinity of the disputability,[61] and others expressed their scepticism of this[62] as a 'panic-stricken reaction' by admitting that international law had become an ordinary game, with assigned roles.[63] Again, others sensed, with the demands of professionalism, the perpetuated switch between particularity and normativity,[64] and between the factual lack of meaning and forced decisionism.[65] Finally, some suspected ulterior motives by the author, a kind of trap, and kept repeating the questions: 'what follows from it?' and 'what does he want to say?' – then immediately gave an answer: the political environment of international

Message', pp. 410-423, www.princeton.edu/~slaughtr/Articles/Method.pdf. To this Martti Koskenniemi only sent a message that labelling it a misunderstanding – 'Letter…', 1999 – but from the above line he noted the absence of the streams of ethics, natural law and anti-colonialism.

59 Koskenniemi 'Letter…', 1999, p. 295. For this 'shopping mall approach', providing it could be raised at all, 'some overarching standpoint' would be the precondition of interpretation, which does not exist and is not available either.

60 J.L. Dunoff, 'From Interdisciplinarity to Counterdisciplinarity: Is There Madness in Martti's Method?', *Temple International and Comparative Law Journal*, Vol. 27, No. 2, 2013, www.temple.edu/law/ticlj/fall2013/Dunoff_FromInterdisciplinaritytoCounterdisciplinarity.pdf, pp. 310, 311 and 337: 'to understand and justify particular decisions in universal terms' via 'turn to linguistic and structural analysis', in order to see the simultaneity of 'the particular in the universal' and 'the universal in the particular.'

61 '[T]he interminability of legal argument is the subtle secret of its success.' D. Kennedy, *International Legal Structures*, Nomos, Baden-Baden 1987, p. 294.

62 O. Gerstenberg, 'What International Law Should (Not) Become: A Comment on Koskenniemi', *European Journal of International Law*, Vol. 1, No. 1, 2005, www.ejil.org/pdfs/16/1/280.pdf, p. 126: 'internal skepticism.'

63 'As such, the international legal discipline becomes much like a sport, with professional players (lawyers), supporters (clients, students, the public), rules of the game (the discipline's own language and grammar), friendly exhibitions (conferences), competitions (trials), training facilities (law faculties), and referees (arbitrators, judges).' M. Prost, 'Born Again Lawyer: FATU as An Antidote to the "Positivist Blues"', *German Law Journal*, Vol. 7, No. 12, 2006, www.germanlawjournal.com/pdfs/FullIssues/Vol_7_12.pdf, pp. 1041 and 1043.

64 'This oscillation between concreteness (what the author casts as an "Apology") and normativity (that is the "Utopia") arguably quells the objectivity of international legal argument. In that sense, International Law is inescapably indeterminate and its objectivity is a mirage.' J. d'Aspremont, 'Uniting Pragmatism and Theory in International Legal Scholarship', *Revue québecoise de droit international*, Vol. 19, No. 1, 2006, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1265510, p. 354.

65 'International law now has to steer a course between the Scylla of Sisyphean meaninglessness and the Charybdis of cynical decisionism.' Bernstorff 'Sisyphus…', 2006, p. 1034.

law is not a novelty, this stripping it bare by the author however makes any positive development impossible, at least to anybody who takes international law seriously.[66]

It seems that the epoch-making significance of this work, or its importance at all, was only noted by a few. At most they could see in it the point of 'a critical view of international law as an argumentative practice that attempts to remove the political from *international relations*.'[67] However, knowing that this is theoretically impossible, it could not seek anything else but to go for a Sisyphus-like '*anyway*' sublated solution.[68]

Can it be true at all? And after all, as a consequence, is it true that this entire undertaking has failed?

16.3 Foundations in the Law's Ontology

The issue raised is a fundamental issue in every law. The author analyses this, based on his own experience and his quests for theoretical responses, by rethinking the sub-issues of the international law's terrain, relying on an unusually wide range of theoretical-legal considerations – however without arriving at an answer of legal philosophy. Mastering the vast knowledge, literature, and significant problems of his own discipline, he keeps thinking on their topics, therefore his work can provide exceptional lessons to the legal philosophical perspective of the basic dilemma. The English–American analytical traditions offered him a vast source of knowledge – Austin from the 19th century, Hart from the second part of the 20th century, and Dworkin, working to his death these years – while in the meanwhile the surprising reviews kept attacking reconstructive thinking, from the side of American authors, who, as an example, approached from the hermeneutics of legal comprehension,[69] presented the trap of safety to believe in a rules-based world,[70] or tore

66 It is 'a fair question to ask what follows', 'a serious question as to where its method permits one to go afterwards', for it offers a 'meta-theory [which] does not specify outcomes at the normative level'; moreover, 'that whole discussion suffered from a peculiarity in that it was never exactly news that international law was also international politics.' And, thereby, this is 'simply a critique, one that not only could not generate a positive project, but one which undercut the very idea of a positive project, at least within the formal terms of international law'. http://kennethandersonlawofwar.blogspot.hu/2004/12/martti-koskenniemi-theory.html.

67 http://en.wikipedia.org/wiki/Martti_Koskenniemi.

68 'This interpretative choice [between "Apology" and "Utopia" as described in *From Apology to Utopia*] cannot be controlled by legal science or by the legal concepts themselves. Interpretation boils down to hidden political choices between central conceptual schemes leading to opposing yet equally valid outcomes.' Bernstorff 'Sisyphus…', 2006, pp. 1019-1020.

69 E.g., J.B. White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*, Little, Brown, Boston 1973; cf., also J. Gaakeer, 'Interview with James Boyd White', *The Michigan Law Review*, Vol. 105, No. 7, 2007, pp. 1403-1419, https://www.law.umich.edu/historyandtraditions/faculty/Faculty_Lists/Alpha_Faculty/Documents/James_White/interview_with_james_boyd_white.pdf.

70 E.g., by F.F. Schauer, *Playing by the Rules: A Philosophical Examination of Rule-based Decision-making in Law and in Life*, Clarendon Press & Oxford University Press, Oxford & New York 1991 as well as *Thinking like a Lawyer: A New Introduction to Legal Reasoning*, Harvard University Press, Cambridge (Mass.) 2009.

apart the myth of a rationality controlled world, in connection with legal argumentation[71] or the lawyer mentality itself.[72]

The question indeed is not new; I have been dealing with it since I finished my university studies,[73] as a correlation between the language and rhetoric of the law, and its logic as suggested ideologically and as reconstructible posteriorly.[74] However, the author knows best that such a question has not been formulated in his terrain, and the issue what the international law has not reached in this regard has been discussed for more than a century at a very high standard in the theory of national laws.[75] At the time of national codification, and in particular in the age of exegesis in the early 19th century that reduced the legal ideal itself to positive law,[76] no doubt that the written law in itself was self-sufficient could be raised. The thought that applying the law adds value to the legal process was contemplated by the end of the 19th century, in the medium of reinterpretation of the law forced by the changes in the economic-societal environment, when the Free Law movements started.[77] And it was formulated in the first third of the 20th century that this addition itself *is* a further step in creating the law.[78] It was a turning point, since it declared the process of law creation to be a multi-staged process.

However, it is the reconstruction of the ontological nature of law that transforms this observation into an issue of the law's very existence. It is about the essence of 'social/societal existence': something that is not given as a physical reality – such as institutionalisations, conventionalisations, ideologisms and many other things. These are not pure fantasies because they are indeed present with us. Well, something that has an effect exists in social terms. As soon as we accept this, the law is not simply a language, a text drafted in linguistic terms (and so on), but is a multilinear and continuously changing living process – in numerous terrains, with the creative involvement of numerous actors – as one of the creators of our social existence, as its shaper and driver. The progress of the cogitation inter-

71 E.g., P. Schlag, *The Enchantment of Reason*, Duke University Press, Durham & London 1998.

72 E.g., P.F. Campos, *Jurismania: The Madness of American Law*, New York Oxford University Press, 1998; cf., also Cs. Varga, 'Legal Mentality as a Component of Law: Rationality Driven into Anarchy in America', *Curentul Juridic*, Vol. XVI, No. 1[52], 2013, pp. 63-77, http://revcurentjur.ro/arhiva/attachments_201301/recjurid131_7F.pdf.

73 Cf., Cs. Varga, 'A magatartási szabály és az objektív igazság kérdése' [Rule of behaviour & the question of objective truth] [1964] in his *Útkeresés* Kísérletek – kéziratban [Searching for a path: Unpublished essays]. Szent István Társulat, Budapest 2001, pp. 4-18, http://drcsabavarga.wordpress.com/2012/12/26/varga-csaba-utkereses-kiserletek-keziratban-2001/.

74 Cf., Cs. Varga, 'Remembering a Jurisprudent's Life under Communism', *Pázmány Law Review*, Vol. 1, 2013, pp. 197-209, http://jak.ppke.hu/uploads/articles/311739/file/PLR_2013_1.pdf.

75 Just a single example: K.G. Wurzel, *Das juristische Denken: Studie*, Verlag Moritz Perles, Vienna, 1904.

76 As to the relationship of *ius* and *lex* and the subsequent reduction of the former to the latter, see Cs. Varga *The Paradigms of Legal Thinking*, 2nd ed, Szent István Társulat, Budapest 2012, www.scribd.com/doc/85083788/VARGA-ParadigmsOfLegalThinking-2012.

77 See K. Kulcsár, *A jogszociológia problémái* [Problems of legal sociology], Közgazdasági és Jogi Könyvkiadó, Budapest 1960.

78 H. Kelsen, *Allgemeine Staatslehre*, Springer, Berlin 1924.

rogating the nature of the law's existence explains that these days we count already the ideology (deontology) of the legal profession as part of the law looked at in ontological terms in the same way as its law operation-concretisation activities.[79]

The basis of this *ontologicum* is simply the nature of the law: it is a linguistically expressed *mental representation* that can be interpreted only as part of a *communicative* process. Its linguistic medium has been the subject of learned interest for many centuries, since the historic cross-reference of the Bible interpretations substantiated the hermeneutic approach in the texts. The communicativity of its approach however has become a topic in and to legal science only a couple of decades ago (although ever since only peripherally).[80] Its root is a simple recognition that, in the world of semantics, i.e. of the meanings – and it must be noted that there is no component in our social reality that is not dependent on comprehension – there is no *noumenon* or *Ding an sich*. Everything lies in the *process of a comprehension tradition*, and this is in constant transformation in its given state by further bequeathing it in a series of subsequent particular acts. Not around something or because something is enlarged, and not due to the preservation of this something due to its expiration (*Aufhebung*/sublation). This comprehension gets into a process in its momentaneousness and becomes a new momentaneousness in the next process. Using a metaphor, it is like a chain letter: everybody continues the previous one, but every continuation constitutes a new start at the same time. Ultimately, its reconventionalisation depends on the human decision that chooses from the cosmos of options.[81] All this constitutes the recognition that

> in the societal world of humans only those environmental influences that appear in societal continuity can create reliability. These are delimitations that make the receiving human undertake and reply to things that seem to be readily

79 By Cs. Varga, *The Place of Law in Lukács' World Concept*, 3rd ed, Szent István Társulat, Budapest 2012, http://drcsabavarga.wordpress.com/2012/03/13/the-place-of-law-in-lukacs-world-concept-19852012/ as well as 'Jogfogalmunk változása (Jogbölcseletünk az utóbbi évtizedek tükrében)' [Changes in the understanding of law (The last decades of legal philosophising in Hungary)], *Iustum Aequum Salutare*, Vol. VII, No. 3, 2011, pp. 93-100, http://ias.jak.ppke.hu/hir/ias/20113sz/10.pdf (paper) & http://ias.jak.ppke.hu/hir/ias/20113sz/17.pdf (abstract in English).

80 E.g., F. Studnicki, *Przeplyw wiadomosci o normach prawa* [The flow of messages on legal norms], Kraków 1965; in a theoretical context, see A.N. Allott, *The Limits of Law*, Butterworths, London 1980, critically reviewed by Cs. Varga, 'The Law and its Limits', *Acta Juridica Academiae Scientiarum Hungaricae*, Vol. 34, Nos. 1-2, 1992, pp. 49-56, http://drcsabavarga.wordpress.com/2010/10/25/varga-law-and-philosophy-––papers-in-legal-theory-1994/.

81 R. Dworkin, *Law's Empire*, Fontana, London 1986, pp. 228-232; S. Fish, *Doing What Comes Naturally: Change and the Rhetoric of Theory in Literary and Legal Studies*, Duke University Press, Durham & London 1989, pp. 87-119; C.M. Yablon, 'Law and Metaphysics', *The Yale Law Journal*, Vol. 96, No. 3, 1987, pp. 613-636.

> received from the previous generations, either via communication with their counterparts or inherited from their predecessors.[82]

Returning back to Koskenniemi's work, not only the mixing of 'word' and 'concept' as synonyms is incorrect in it,[83] but also that it is not the ambivalence/ambiguity of our words but the different objectives of the users of those words that unavoidably cause policy to penetrate back into the law. Because it is obvious that every use of a language is always a new context, and so is the original ambivalence of the semantics, at least since the overruling of the lexical semantic theory.[84] It became clear half a century ago that the law cannot be understood as something of a *res*, an existing subject, after the philosopher of legal logic showed that 'having a meaning' is only a simplified expression of 'provides a meaning.'[85] Consequently, we are not talking about the particular issue of law, or even less of international law.

The particularity of our problem lies in the fact that law uses a formalised language: it is carried by a posited text drafted in normative terms;[86] moreover, the text itself is a criterion for its completion,[87] therefore it needs to be made concrete in order to be projected to the actual facts of a case. Whatever this *text* looks like, it does nothing more than *setting* a *framework*: it needs to be filled in, which can take place exclusively in the second phase of the 'two incremental phases of the law creating process', in the so-called law-application, i.e. judicial/authoritative decision making.[88] It has the same logic as discretion: it is not a call/licence for arbitrariness, but only the recognition of the obvious fact that no *normativum* as textual corpus can provide more normative guidance.

It is indeed openness – from the perspective of the law's particular homogeneity; this is however not arbitrariness, however eventual it seems in formal terms, but determination

82 Varga *The Paradigms…* 2012.

83 Cs. Varga, 'Rule and/or Norm, or the Conceptualisibility and Logifiability of Law', *in* E. Schweighofer et al. (Eds.), *Effizienz von e-Lösungen in Staat und Gesellschaft: Aktuelle Fragen der Rechtsinformatik (Tagungsband der 8. Internationalen Rechtsinformatik Symposions, IRIS 2005),* Richard Boorberg Verlag, Stuttgart 2005, pp. 58-65, https://www.researchgate.net/publication/250978896_Differing_mentalities_of_civil_law_and_common_law_The_issue_of_logic_in_law.

84 See Varga *The Paradigms…* 2012, chapter 5.

85 C. Perelman, 'Avoir un sens et donner un sens', *Logique et Analyse*, Vol. V, No. 20, 1962, pp. 235-250.

86 See – lately – Cs. Varga, 'Jog és nyelv? Gondolatok egy alapvetéshez' [Law and language? Outlines of a foundation], *Glossa Iuridica*, Vol. I, No. II, 2014, pp. 85-100.

87 This is what George Lukács in his posthumous *Zur Ontologie der gesellschaftlichen Seins* termed as *Verfüllungssystem*, i.e. the law's own system of fulfilment. Varga *The Paradigms…* 2012, chapter 5.

88 Kelsen *Allgemeine Staatslehre* 1924, p. 243. 'zwei aufeinanderfolgenden Stufen des Rechtserzeugungsprozesses', followed by claiming that 'Any law-application, i.e. any concretisation of the general norm, any transition from a higher level of law-making to a lower level, is nothing more than a filling-in of a frame, nothing more than an activity within the limits enacted by a higher-level norm. The higher grade can never fully determine the lower one; at the lower grade such substantive elements will always be present which had not been present on the higher level, as otherwise, in fact, no further steps could come about in the process of the unfolding of the law: every further step would be superfluous.'

– i.e. social self-determination of the actual process, from the point of view of community conventionalisation.[89] This is not only suggested by formal-linguistic reconstruction: the essence of the communication approach is identical. Its issuance as a norm is only the start of the law's lifecycle; the arch of its course lasts up to its completion, in the *tendential* unity of *law in books* and *law in action*.[90] This explains why we *argue* in it using the tools of *practical argumentation* (rather than completing a *demonstratio* that resembles mathematics),[91] and the same is repeated when – forgetting about its softer way and also concealing it – in the official statement of reasons of a delivered judgment it is not the logic of *problems solving*, but only the logic of *verification/justification* that can be caught.[92] In other words, we do not arrive at a logically closed, strict conclusion that necessarily delivers a result, but the version from the available versions that looks the most convincing. The situation of law-application is always an individual situation. In its legal case processing, the law always appears, as a false assumption as expected in the ideology of the profession, as something '*internal*', compared to which everything else is '*external*'; however, it resolves this in its procedure until the point where the homogeneity of the law *dissolves back* significantly into the heterogeneity of the external world, as well as the law into the policy of law, and the professional face of a legal practitioner into the real world of his/her actual identity/personality.[93] It is obvious that all this is not about the faulty/irresponsible operation of any component/composer, and even less about the consequence of the participants' ulterior motives. Similarly to any kind of societal institution, this is the only option of the law, as a construct created by humans that depends always upon human control, despite

89 Cs. Varga, 'On the Socially Determined Nature of Legal Reasoning', *in* C. Perelman (Ed.), *Études de logique juridique*, V, Établissements Émile Bruylant, Brussels 1973, pp. 21-78, http://drcsabavarga.wordpress.com/2010/10/25/varga-law-and-philosophy-–-papers-in-legal-theory-1994/ and, as a pioneering statement, K. Kulcsár, 'A szituáció jelentősége a jogalkalmazás folyamatában' [The significance of situation in law-application process], *Állam- és Jogtudomány*, Vol. XI, No. 4, 1968, pp. 545-571.

90 By R. Pound, 'Mechanical Jurisprudence', *Columbia Law Review*, Vol. 8, No. 8, 1908, pp. 605-623 and 'Law in Books and Law in Action', *American Law Review*, Vol. 44, No. 1, 1910, pp. 12-36.

91 A.R. Jonsen & S. Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning*, University of California Press, Berkeley 1988.

92 G. Pólya, *How to Solve It: A New Aspect of Mathematical Method*, Princeton University Press, Princeton 1945. Cf., also Cs. Varga, *Theory of the Judicial Process: The Establishment of Facts*, 2nd ed, Szent István Társulat, Budapest 2011, http://drcsabavarga.wordpress.com/2012/03/13/varga-theory-of-the-judicial-process-the-establishment-of-facts-19952011/, Para. 3.1.

93 J. Wróblewski, *Zagadnienia teorii wykladni prawa ludowego* [Problems of the theory of interpretation of people's law], Wydavnictwo Prawnicze, Warsaw 1959), pp. 151 *et seq.* As to the underlying issue, cf., by Cs. Varga, 'Domaine "externe" et domaine "interne" en droit', [trans. F. Ost] *Revue Interdisciplinaire d'Études Juridiques*, No. 14, 1985, pp. 25-43, http://drcsabavarga.wordpress.com/2010/10/24/varga-etudes-en-philosophie-du-droit-estudios-en-filosofia-del-derecho-1994/ as well as 'Für die Selbstständigkeit der Rechtspolitik', *in* M. Samu (Ed.), *Die rechtstheoretischen Probleme von der wissenschaftlichen Grundlegung der Rechtspolitik*, Igazságügyi Minisztérium Tudományos és Tájékoztatási Főosztály, Budapest 1986, pp. 283-294.

its objectification (with growing reification/alienation) and substantiated – formalised – operation.

In contrast with international law, where basic societal and linguistic philosophical clarifications took place to an even lesser extent, in the domestic law it is not only showed that, on the final analysis, the actual level of *renovation of law through the judiciary* is not dependent on the openness of the relevant authorisation, but also that the renovation of law through the judiciary is the most frequent and at the same time the least responsible where it can hide behind the quasi automatic (reified) play by and through the impersonal mass of formal rules. There, where it can complete it without saying it, because it is not accepted either, but it relieves itself from responsibility in the guise of the necessary of *actualisation* while the law's application.[94]

The argued presentation of all these in the terrain of international law is not only very convincing and constitutes a new development for the entire theoretical legal discipline (since it describes the differences characterising this area and argues on its traditions), but at the same time he can make the understanding of the entire legal process even deeper and more substantiated by his theoretical considerations and practical examples.

Well, the transition of the heterogenic language to the homogenic one is usually called a *jump* and a *transformation* in the linguistic-logical reconstruction of the domestic law's operation, when we classify the facts of a case as stated/collected/proofed in object-language to those of the *facts of a case* codified in the meta-language of the law. The legal theory analysis concluded that this is not a knowledge theory operation (to be understood in the epistemological dichotomy of the true/false) but an ontological act (presenting itself as *subsumptio*, but actually completing a *subordinatio*) – i.e. a classification, a practical act representing a decision-making will.[95] At the same time it is also a *transformation*, which

94 See, e.g., B. Rudden, 'Courts and Codes in England, France and Soviet Russia', *in* Cs. Varga (Ed.), *Comparative Legal Cultures*, Dartmouth & The New York University Press, Aldershot & New York 1992, pp. 375-393 – which shows uninhibited novation in the quasi-axiomatic French judicial style, over against the British one which only provides example setting, but responsibly and rarely as a novator – as well as the further titles collected in the same compilation that argued for the defense of the law-protected legal certainty from the loophole-filling section in the Swiss Civil Code (1907), 'Article 1. The Code applies to all legal questions for which it contains a provision in its terms or its exposition. If no command can be taken from the statute, then the judge shall pronounce in accordance with the customary law, and failing that, according to the rule which he as a legislator would adopt. He should be guided therein by approved precept and tradition.' – ; however, this section became one of the least applied options ever.

95 A. Peczenik, 'Non-equivalent Transformations and the Law', *in* A. Peczenik & J. Uusitalo (Eds.), *Reasoning on Legal Reasoning* Vammalan Kirjapaino Oy, Vammala 1979, pp. 47-64 and A. Peczenik & J. Wróblewski, 'Fuzziness and Transformation: Towards Explaining Legal Reasoning', *Theoria*, Vol. 51, No. 1, 1985, pp. 24-44, as well as, by Cs. Varga, 'Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives', *in* Z. Péteri & V. Lamm (Eds.), *Legal Development and Comparative Law*, Akadémiai Kiadó, Budapest 1981, pp. 45-76, http://drcsabavarga.wordpress.com/2010/10/25/varga-law-and-philosophy-––papers-in-legal-theory-1994/ and 'An Investigation into the Nature of the Judicial Process', in R. Jakob et al. (Eds.), *Auf dem Weg zur Idee der Gerechtigkeit: Gedenkschrift für Ilmar Tammelo*, LIT Verlag, Münster 2009, pp. 177-184, https://www.researchgate.net/publication/269275947_ON_THE_NATURE_OF_THE_JUDI-

can be observed in international law, although by a logic similar to the above, but in a particular manner. I mean the shifting emphasis, which, as the author writes, takes place when the particularity of the content of the norm and the requirement for the regulation to be normative extinguish each other, and the final outcome is that the fact of regulation will seem to be more important than its merit, since this is the medium where the *homogenisation of the heterogeneity* of a real life conflict takes place, reducing the latter's complexity to the law's simplifying scheme, together with the *depolitisation* of the conflict. It is already the paradox of every substitutive human procedure that, as soon as the law was successfully removed from the scope of purely political moves, we will again find its mover(s), a political elite within the law (by climbing back through the window, instead of the door), because there is a new opening for (re-) entry here. Since, from the mixed and diverse examples of the procedures at the Constitutional Courts,[96] the domestic law harmonisation of the accession states to the European Union[97] and the analysis of the practical working of human rights claims[98] all show that legal effects can arise from whatever statement of the law – i.e. from the virtual (but conventionalised) adoption (practical recognition) of its prevalence as a fact – without being posited/enacted in the homogenous world of law. Is it already postmodernism itself? I would think it is not, because it is not a new development; however, our understanding became mature enough to accept this acknowledgement by now.

As the author demonstrates, the reality behind such a transformation is nevertheless that the encouragement and purpose-rationalising force arising from heterogeneity in practice remains unchanged all the way through. Its only new feature is that once it is homogenised, it becomes expressible only in its medium. In other words, the outcome is a kind of magic trick show: it cannot present its dichotomy *de jure* but performs it *de facto*. The outside world and posterity exclusively can see the substituting symbols of the *concealment* that takes place during this.[99] This will be seen as the determining factor, as a premise of the decision made, which was indeed the form of its selling point. In this sense we can

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CIAL_PROCESS. It is to be noted that this is what G. Klaus – *Einführung in die formale Logik*, Deutscher Verlag von Wissenschaften, Berlin [Ost] 1959 – called, separated from the descriptive statements and their logic, the rules of a game as 'artificial human construction' [*künstliche menschliche Konstruktion*] in general.

96 Cf., Cs. Varga, 'Creeping Renovation of Law through Constitutional Judiciary?', *in* Cs. Varga, *Transition? To Rule of Law? Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe*, Kráter, Pomáz 2008, http://drcsabavarga.wordpress.com/2010/10/25/varga-transition-to-rule-of-law-–-constitutionalism-and-transitional-justice-challenged-in-central-and-eastern-europe-2008/, pp. 117-160.

97 Cf., Cs. Varga, 'Inertia or Pattern Following? Phase Lag and Defiance in Central and Eastern Europe', *in* M. Guțan & B. S. Guțan (Eds.), *Europeanization and Judicial Culture in Contemporary Democracies*, Editura Hamangiu, Bucharest 2014, pp. 50-77, https://ppke.academia.edu/CVARGA/Papers.

98 E.g., Cs. Varga, 'Az emberi jogok problematikája' [The problematics of human rights], *Társadalomkutatás*, Vol. 32, No. 2, 2013, pp. 1-15.

99 Cf., e.g. W.E. Conklin, *The Phenomenology of Modern Legal Discourse: The Juridical Production and the Disclosure of Suffering*, Ashgate/Dartmouth, Aldershot & Brookfield USA 1998.

say that law is not what it says with its positivation/enactments, but a medium by reference to which, when it needs to be manifested, a competent agent (acting in its legal powers) will manifest a response which will be attributed to, as derived from, this law.

The mechanisms (structure and operation) of inter-state laws and domestic law are very close to each other. Their common feature is the formalisation of what follows/does not follow, as well as the options of the official procedure that decides in it. In domestic law, we consider that the actual manifestation of the law takes place in the official proceedings – in the *judicial event*, which completes the legal process, since in this the communication tests itself as an act –, unlike the international law, where the common updating, i.e. *actualisation* and/or conflict resolution is typical. Then the actors give it form; with the law's transformative force; in a less clearly delimited and formalised normative hierarchy. In this way the life of international law comes from the fact of who and in what way they argue for how 'the law' is comprehended.

This argumentation, the fight for ruling the legal dispute here, produces the notion of hegemonism/imperialism [i.e. *imperium*/*empire*, rooted in *imperāre* 'order']. Because here there is no equivalent to the state of the domestic law: the peak of the hierarchy of legal sources cannot be anything else than the totality of the organisations/entities recognised as states. These are all equal in their respective legal homogeneity, while the only meaning to their life is the representation of the interests of those behind them. On the one hand, the fact of ruling, and, on the other hand (as a negation of the ideal), the need to strive to reach a balance become key concepts. In the meanwhile, it is scarcely noticed that all this is a mere abstraction of processes: the freezing of the movement at the given time, in a momentaneous state of a transitionary time section.

Furthermore, the argumentation of the work openly shows the basically *autopoietic* nature of the legal process.[100] Since, according to this, the law develops in its own process; chaotic and seeking hegemony at the same time and, incidentally, as a function of the compromise arising from the parties' changing steps. The international legal profession mostly undertakes this openly, while those dealing with domestic law still treat it as a fixed normative pattern for ensuring predictability.[101] In the shifting of emphasis presented above – the stake is shifted from the content of the regulation to the existence of the regulation, as a discussion medium disciplined to homogeneity – we have to recognise the current trends in the law's communication theory approach.[102] This sees the regulative

100 See, by Cs. Varga, 'Judicial Reproduction of the Law in an Autopoietical System?', *in* W. Krawietz, A.A. Martino & K.I. Winston (Eds.), *Technischer Imperativ und Legitimationskrise des Rechts*, Duncker & Humblot, Berlin 1991, pp. 305-313 as well as *Theory of the Judicial Process…* 2011, chapter 5, http://mek.oszk.hu/14400/14490/index.phtml.

101 Classically, L.L. Fuller, *The Morality of Law*, Yale University Press, New Haven 1964.

102 E.g, M. van Hoecke, *Law as Communication*, Hart Publishing, Oxford & Portland (Or.) 2002 as well as A.B. Поляков [A.V. Polyakov], *Коммуникативное правопонимания: Избранные труды* [The communicational understanding of law: Selected works], Издательский Дом "Алеф Пресс«, Санкт-Петербург [Sankt-

role of the law in setting the frames for society's communication network and the basic patterns for discussion. Legal pluralism, which is seen as a latent characteristic of theoretically every legal system, taken from the prehistory of legal anthropology/legal sociology,[103] is something in its structure in international law which manifests as fragmentation.[104] Their shared essence is that – following various ordering principles in national law, and in the absence of a coherent, comprehensive and conflict resolving hierarchy of legal resources in international law – the priorities freely chosen from all those available can be taken into account as an authoritative legal basis.[105]

Our age is an era where research projects already emphasise, on the track of new scientific results, the significance of the common approach, the common experience summarised from partial lessons learned; in a word, interdisciplinarity. This lesson in theory appeared long ago in numerous domestic law research studies, integrated with legal history and legal theory investigations, and the general social science perspectives applied in them. I believe it to be a common expectation that the fertilising research can start in either direction, at least on issues of philosophy and methodology, between these two great fields of the law, normative settlement within states and between states.

Petersburg] 2014 and M. Antonov, A. Polyakov & I. Chestnov, 'Communicative Approach and Legal Theory', *Rechtstheorie*, Vol. 45, No. 1, 2014, pp. 1-18.

103 Cf., from the periodical *Journal of Legal Pluralism and Unofficial Law*, Vol. 19, 1981 to the overview in B.Z. Tamanaha, C. Sage & M. Woolcock (Eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, Cambridge University Press, New York 2012; in a theoretical context, Cs. Varga, 'Theory of Law – Legal Ethnography, Or the Theoretical Fruits of Inquiries into Folkways', *Sociologia del Diritto*, Vol. XXXVII, No. 1, 2010, pp. 82-101, https://ppke.academia.edu/CVARGA/Papers.

104 'Functional differentiation in the international society creates more or less autonomous rationalities – law, politics, morality, economics, science, culture, and so on – each expressing a particular preference but expressing itself as universal. Alongside general law, today we have human rights law, international trade law, international criminal law, international environmental law and so on, with the general law breaking into particular principles and institutions with conflicting procedures and preferences.' M. Koskenniemi, 'International Legislation Today: Limits and Possibilities', *Wisconsin International Law Journal*, Vol. 23, No. 1, 2005, pp. 61-92, http://hosted.law.wisc.edu/wordpress/wilj/files/2012/02/allott.pdf, p. 81.

105 According to the example given by Koskenniemi 'The Fate of Public International Law' 2007, p. 6, n. 24 – *The Queen (on the application of Hilal Abdul-Razzaq Ali Al-Jedda) v. Secretary of State for Defence* Judgment of 12 August 2005, Case No. CO/3673/2005, [2005] EWHC1809 (Admin) at [104] – the British High Court delivered a judgment by prioritising security considerations rather than human rights ones, although it acted under the *Human Rights Act* (1998).