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RULE OF LAW – AT THE CROSSROADS OF CHALLENGES

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Human history is not only the field of new recognitions but also the scene of adapting experiences gained from failed revolutionary novatory zeals to liveable practice and, thereby, the stage of the sobering test of their acceptability when their realisation, too, is assumed. After the euphoria of "We can achieve everything!" in the so-called honeymoon period – having grown from infantile disorder into the destructive plague by the French revolution – was over, the jurisprudent Portalis addressed the French National Assembly to present the *Code civil* as a first step on the path of consolidation of a balanced social progress under stabilised conditions, by words as follows: "In these modern times we were too much fond of changes and reforms. If the centuries of ignorance are the scenes of abuses as regards institutions and laws, then the centuries of philosophy and Enlightenment are perhaps much too often nothing else than scenes of exaggerations. […] Change is needed, when the most perilous of changes would be if we did not make the change. Because we must not fall prey to blind prejudice. All that is old was once new. The essential thing is, therefore, to put the stamp of stability and permanence on our new institutions, which ensures them the right to grow old. It is profitable to safeguard all that we do not have to destroy; the laws must spare habitudes, if they are not harmful."[1]

Well, our days' fashionable call-words and endeavours, channelling our everyday actions by commanding us to get along, are yet to be tested in practice. At present, it is not even clear if their vague terms are at all more than just random (or, consciously constructed) products of enlightened minds, issued from occasional constraints (or political calculations), which may have once been generated either by humility towards values or by professional intellectualism reduced to a mere parrotry of slogans.

All this notwithstanding, our subject can hardly be addressed otherwise than in a tone of respect and pathos. 'Rule of law'? A momentous concept implying dramatic human experience, a concept of great traditions and significance regarding its

[1] JEAN-ÉTIENNE-MARIE PORTALIS: Discours préliminaire. in F. A. FENET*: Recueil complet des travaux préparatoires du Code civil.* I. Paris: Videcoq, 1836. 11., 481.

theoretical foundations and historical dilemmas, implying both ambiguities[2] and heavily laboured responses fought through and out: a notion which refers to a similarly noble series of further concepts such as 'human rights', 'constitutionality', 'parliamentarianism', 'democracy', and so on. And yet – or, exactly for this very reason – we have to continue the train of thoughts commenced above. For all these call-words present themselves as if they spoke from the past. However, we cannot know for sure whether or not they always and everywhere convey indeed nothing but the message of the past, embodying an elementary search of humans for ways out from one-time tensions, with adherence to values and institutional paths of responding to challenges of the time, all crystallised through and at the cost of the hard experience of past generations. Although the words themselves may be rather old terms, what they imply are genuinely new strivings, and all we may realise about them is that we pursue them, but have no theoretical proof as to for what purpose exactly, and we do not even have a dim idea about the world that would emerge as exactly a result of them, as there is no one having experienced that so far.

On the European continent, for centuries the culture of *Rechtsstaatlichkeit* has stood for the statutory regulation of given fields with given enforceable guarantees by the prevailing law and order, i.e., under the protection of state power, while in the Anglo–American world the ideal culture of 'rule of law' has meant just the opposite to any rule by men, the ultimate guarantee of which is justiciability of any issue, that is, the availability of conflicts to subject them to the decision by judicial fora. Or, while in continental Europe we put our trust on the force of rules, the English-speaking civilisation relies upon the sheer independence of judiciary and the strength of undefined principles.[3] Now, the question has arisen: what has become of all this by today, amongst our circumstances called post-modern? Well, the tentative answer may hold that, on the final analysis, nothing but the cult of endless disputability has pervaded the scene when statutory law and order does not matter any longer – apart from providing opportunity for lawyers arguing according to the demands and at the money of their clients, and also for the growing number of those professional defenders of human rights, whose exclusive ambition is steadily shifting from making the rules observed to questioning the rules themselves, no matter how clear they are textually. For, as we may learn from the contextual dependence of premises in legal logic, any rule can be circumvented from both below and above. And it is by far not logic itself (taken as the mathematics of thinking, elevated sometimes into mythical heights in the absolutism of rationality) that is positioned either to challenge or counteract this – as logic in itself is faceless and mute, and can only be asserted through roles designed for it by those having a recourse to it –, but only an external power, seemingly melting away in our hands: the strength and culture of a commitment to

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[2] See, for the suitability of the very notion 'rule of law' for almost nothing except for mapping out routes to search for own solutions, and also for the impossibility of giving any adequate and exhaustive definition of it, the recent debate in the US as overviewed by RICHARD H. FALLON, JR.: »The Rule of Law« as a Concept in Constitutional Discourse. *Columbia Law Review* 97 (January 1997) 1, 1–56.

[3] Cf., CSABA VARGA: Varieties of Law and the Rule of Law. *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1, 61–72.

the respect for rules.[4] If this is missing or becomes a secondary consideration in the routinised handling of ordinary cases – only showing that a decision made upon the strict followance of a given rule was not in interference with any implied interest for the sake of which the rule would have been worth questioning –, the lawyer of our age may come up practically in any procedural stage at any time either to find a gap in law, allegedly blocking his proper adjudication of the case, or to recourse to constitutional review for the re-assessment of the rule's questioned constitutionality, in both cases only in order to justify the client's claim to reach a specific solution as necessarily concluding from the law itself. That is, the end-result of lawyering is the practical mockery of law in either case: the avoidance of the applicability of an otherwise applicable rule.

This abstractly dry formulation may seem hard to grasp for everyday thought, due to the harsh but concealed reality behind it. However, the point at stake is that law can at most sanction values which are, if at all, only approximated after they have been translated into the instrumental language of statutory texts. At the same time, even the most accurately drafted rules are inevitably exposed to the objection – no matter how strikingly artificial (and practically interest-driven) – that, given a gap in the law, they do not apply to the case. After all, neither the rule, nor its allegedly implied logic can help us decide whether we should opt for applying the rule, after having construed a similarity between the rule and the case, or just to the contrary, disapplying it because their dissimilarity is construed.

Let us now return to the two basic legal cultures familiar to us. In the Anglo–American Common Law, the method of distinguishing among precedents, known for centuries, might have caused a judicial revolution or practical renovation of law on a daily basis, but it has not in fact, just because both the conservatism of the judiciary and the hierarchical structure of appeal were equally capable of controlling jurisprudence, keeping it in a tight check. In the Civil Law, built on the application of statutory texts as a logical ideal, in point of principle the legal instruments designed to fill gaps in law could also have resulted in a fluctuating judicial practice (with as startlingly discretionary solutions as, e.g., in Switzerland, where, in the last resort, the judge may openly and directly take over the role of a legislator[5]) yet actually they have not either, because the same professional pathos – here appearing under the aegis of the exclusivity of an ideally logical application, resulting in deductive conclusion – has eventually prevented the techniques (reserved for limiting or exceptional cases) from spreading and becoming destructive.

After all, what is given in law is nothing but techniques. True, certain limitation in the practical application of techniques can be achieved by other techniques. However, effective limitation can only be secured – instead of techniques themselves (that is, by rules institutionalising techniques through their linguistic formulation in the normative ordering) – by the entire culture operating and also substantiating law: primarily by the culture of the legal profession and secondarily by general social culture.

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[4] See, Csaba Varga: *Lectures on the Paradigms of Legal Thinking.* (ser. Philosophiae Iuris) Budapest: Akadémiai Kiadó, 1999. and Varga Csaba: *A jog mint folyamat.* (ser. Osiris könyvtár: Jog) Budapest: Osiris, 1999.

[5] *Schweizerisches Zivilgesetzbuch,* 1907. § 1.

(It is to be noted that the latter may counterbalance the former while the former may supersede the latter, for societal life is composed of the endless alternation of tensions and loosenings of such a kind. However, a variety and also a mutuality of segments, layers and sets of norms interacting in social integration have arisen in all societies just to provide for social identity, defining the framework of social reproduction, in a medium of tensions balanced amongst various challenges to preservation and change.)

"God is dead" – although doubt and negation in final issues had become trivial long before Nietzsche,[6] I wonder whether we have ever thoroughly reflected upon what a society knowing neither transcendency nor supra-human authority any longer would be like. Could it mean more than Ortega's rebellion of the masses[7] or the raving mob once cherished with enlightened intentions by *Viridiana*?[8] In a society, where the dignity of the person is replaced by the mere self-assertion of the individual, where the concern for a nation's destiny is substituted by the undoubted right to the free choice of domicile and marriage by occasional partnerships, where citizens are reduced to consumers and conscience gets cared for by sheer media control – well, in such a society, could there remain any bond other than merely procedural frameworks and rules of game arising from optional agreement, similar to contracts between individual parties but projected as universal (as hypostatised in the very idea of an underlying social contract)? Religion and morals are no longer in a position to support. Consequently, there are no duties any longer known, only rights. And the law itself (if at all formulated in a rule's structure) is less material than processual now, serving as a mere rule of the actual game not guiding any longer on the substance of what to do or what to refrain from, as exclusively the guaranteed procedural frameworks of how to proceed on are mapped out by it. Law is mostly reduced to the issue of how and with what legal claim we can act successfully when addressing either the state we have opted for or another self-asserting individual (e.g., when demanding material support by reference to some human rights after the only ascertainment of the bare fact that we as humans exist is made).

Since its conception as a discipline committed to social criticism, legal sociology has proven countless times how unfounded and illusive the lawyers' normativism embodied by their traditional professional mentality is, presuming law having strength by itself. It is only legal sociology to teach that the force of law is nothing but symbolic, in so far as it can at the most attach the additional seal of a particular social authority on tendencies already asserting themselves in society.[9] Indeed, in our post-modern era it seems as if common sense were replaced by simple-mindedness. Ideologically, we have endowed law with a mythical might and authority, while in fact we have emptied it. By tearing it away from moral and social traditions, we have detached it from its millennia-old exclusively organic medium, thereby depriving it

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[6] FRIEDRICH NIETZSCHE: *Thus spake Zarathustra* [*Also sprach Zarathustra,* 1883] trans. Thomas Common [1891] in http://eserver.org/philosophy/nietzsche-zarathustra.txt, Prologue, para. 2.

[7] ORTEGA Y GASSET: *La Rebelión de las masas.* Madrid, 1930.

[8] Luis Buñuel: *Viridiana* (1961).

[9] See, CSABA VARGA: Towards a Sociological Concept of Law. *International Journal of the Sociology of Law* 9 (1981) 2, 157–176.

of its only genuine foundations; what is more, we do not even respect it any longer, as a matter of fact. We only use it as a field of operations in our unscrupulous battle repeatedly re-launched with no end, transubstantiating brute force or substitutive pressure into so-called inventive legal reasoning.

Rule of law? When I am discussing here the role of society and societal culture in support of law, I do not mean only to allude to the facelessness of legal techniques taken in themselves. They are neutral in themselves indeed, as they can be used to serve different, moreover, conflicting values as well. Just as law is not simply a pyramidal aggregate of abstract rules, posited in a given hierarchy, but the living total of meanings and messages getting concretised one way or another at any time, it is neither backed simply by a hierarchical structure of values but by a sensitively changing compound of a huge variety of aspects and considerations of values. For it is always a responsible decision with a personal stand in pondering values and balancing amongst them that the formalism of the mere observance of rules in law disguises. After all, when we, giving official reasons for our decision, subsume facts under a rule through logical inference or reject a claim in want of subsumability,[10] actually we balance between values. Apart from few truly exceptional cases, usually we do not negate (or exclude from supporting) some specific value just in order to implement some other value(s) instead. Just to the contrary. Being skilled in the judicial 'art' (made up of empathy, intuition and ingenuity, among others), we strive to find solutions which may ensure the optimum realisation of values (by allowing to serve important values without the disproportionate detriment to other values), solutions which can be duly justified, as resulting from (with no similarly arguable alternative in) the given normative and processual contexture. By the way, this is exactly the reason why we are used to proudly recall the term '*ars*' used by ancient Romans when referring to law, denoting in Latin 'art' and 'craftsmanship' alike.

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When I am speaking about historical experience, truth and justice fought out through the lives of generations, I mean testing by everyday practice. Nevertheless, it has to be remarked that accepting the test of everyday practice as a criterion was theoretically far more honest and demanding than today's a-historical neo-primitive absolutism, growing into the present mainstream of Atlantic thought. For Marxism, by emphasising the moment of *praxis*, the principle of historicity and the role of *hic et nunc* particularity in the overall complex of historical (self-)determination, made a standard out of actual practice itself, taken as an accumulation of human experience and self-reflection. As opposed to it, the current time-spirit replaces responsible human actions with the forging of hectic programmes, offering hardly anything more than feeble life-substitutes, ready to present even immature whims and varieties of otherness (sometimes bordering on deviance) in an a-historical universality. Well, it is known from reconstructions from the history of ideas that rule of law, human rights, constitutionalism, parlia-

[10] For a reconstruction, cf., Csaba Varga: *Theory of the Judicial Process. The Establishment of Facts*. Budapest: Akadémiai Kiadó, 1995.

mentarianism, as well as democracy – all these are equally products of endeavours, recognitions, successes and failures accumulated through thousands of years, to which meditative pagan Antiquity, the Christian Middle Ages, as well as modern and contemporary times (striving for anthropo-centrism) may have equally contributed. And the fact notwithstanding that they may seem relatively completed and solidified as abstracted in a series of theoretical statements from the Enlightenment up to the present age, they are in a constant process of refinement and further shaping. It is exactly the Christian tradition that had laid the foundations for all these, with the transcendence of divine law and the human commitment to values, by substantiating the inviolable and unquestionable dignity of the human person. More importantly, it is also Christian tradition that marked out the dependence of human institutions (as mute instruments in themselves) upon a given destination designed for value-implementation.[11] This is the reason why Christianity has set internal barriers for these institutions to prevent them from growing self-centredly predominant, that is, from growing into an independent power with the eventual chance of turning against man himself, by destroying the rest of his dignity.

In the Western hemisphere – or, in the North (to use the term of financiers regularly convening in Davos) –, mankind has commenced writing a new history since post-war reconstruction. What are the characteristics of this? Self-confidence, success, devaluation of human labour (as if it were a post-modern correction of the burden of labour to be carried by humans since their Expulsion from Paradise upon the Divine punishment), haughtiness of learning, the rule of reason and abstract planning with guarantees of calculability and predictability: all in all, trends disregarding God, trying to substitute Him by the individual self and also burying Him more and more vociferously and provocatively day to day. And here is the Individual entering the scene, in company of a few billion fellows, with each and every one representing their selves as the centre and last meaning – i.e., the axiomatic zero point – of the Universe, moreover, as a key to its hermeneutics and, in their ephemeral lives, also as the immoderately unrestrained consumer using up whatever goods to be found on Earth. Now his incidental pleasure constitutes the exclusive criterion of values. His rather shapeable psychical disposition is the gauge for the existence of whatever institution. 'Rule of law', 'human rights', 'constitutionalism', 'parliamentarianism', as well as 'democracy' – just like the once revolutionary thought of *res publica* itself – serve from now on as the framework of random motions (maybe sometimes pulled in idiotism pouring on us from the media) for these few billion creators of world as plenipotentiary carriers and users of the ever growing catalogue of nothing but rights, and also as the guardians sanctioning the momentary state of this world, finalising or further shaping it.

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[11] Cf., CSABA VARGA: Buts et moyens en droit. in ALDO LOIODICE–MASSIMO VARI (ed.)*: Giovanni Paolo II. Le vie della giustizia: Itinerari per il terzo millennio. Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato.* Roma: Bardi Editore – Libreria Editrice Vaticana, 2003. 71–75., enlarged and adapted: Goals and Means in Law. in www.thomasinternational.org by *STEP* (Saint Thomas Education Project) Budapest Conference on *Thomistic Understanding of Natural Law as the Foundation of Positive Law*.

A future for Hungary? The outcome into which the sublime ideas of the rule of law, human rights, constitutionalism, parliamentarianism, as well as democracy became (de)formed since the Atlantic revival after World War II (and especially in hands of radical leftist anarchists, marking the generation of 1968) is becoming visible just nowadays, showing in full blossom the apotheosis of irresponsibility, the cult of unworthiness with chanceless chances; for, strictly speaking, eventually no one can any longer fail, since by the very biological fact that we are born as humans, now we may start reclaiming full catalogues of rights for ourselves with no obligation to return anything. Our ideals are still floating in the air, challenged but not shaken now, when the Atlantic world starts facing the outcome. Now, when the underlying societal texture has fallen apart, the hearth of families has cooled out, and citizens thoroughly programmed have become alternative robots and media-controlled consumer-units, everyone fights against everyone an endless battle in the name of law – with women snarling at men, minors turning against their parents, those infatuated with the same sex incited against those attached to the other one –, loathing in common the State and the Church as public enemy, from a cloud of daze. Indeed, has there been anything left to be respected in anyone who still dares set standards and values, moreover, who longs for adhering to them? We do not know yet what tomorrow's Western world will be like if irresponsibility, environmental destruction, human sinning without punishment, glorification of licentiousness and life-substitutes offered by simulated virtual worlds will have already grown to global proportions as they are going to in our day, by half-time of our near future.

We do not know either how much and how far our everyday sense and experience, having proven unfailing so far in our human history of thousands of years, will be able to adapt themselves to this world, when its reserves will exhaust, and what final impetus will, if at all, provoke humans to revolt for re-taking their human dignity. For, enthused by the success story of the Atlantic world, we may have scarcely realised that the uninhibited universalisation of rights is not only a gesture by own enlightenment but also a burden which we mostly generously (but effectively) pay at others' cost.

For sexual licentiousness is also a budget and social capital item (just like AIDS) in the households of nations, and an economy based on free labour market squanders the resources just as the retirement at the meridian of life does at the cost of offsprings born in a decreasing number. The global division of labour (when even toothpicks may be produced within transcontinental co-operation), too, imposes a tremendous burden on the energy-household of the Earth, just like dumping prices resulting from the rivalry of airlines competing for the market of leisure do. This is to say that rights, too, cost. As the extension of the sheltered sphere of privacy results in increasing costs and decreasing efficiency in the maintenance of public order, also massive malpractice litigation implies costs rocketing in health and social care.[12] This may be a vicious circle, for the richer a nation, the more resources it can spend to meet the

[12] Cf., Csaba Varga: Law, Ethics, Economy: Independent Paths or Shared Ways? in www.thomasinternational.org by *STEP* [Saint Thomas Education Project] Barcelona Conference on *Law and Liberty: Ethics and Politics for the XXIth Century.*

standards set by its own enlightenment. However, the more unlimitedly it provides rights, the more reserves it has inevitably to spend on overall societal reproduction.

It may be intellectually exciting an experience to watch from a distance the game of some wealthy nations, even if they are self-destructive and counter-productive beyond a certain extent; however, it is by far not worth risking our own modest existence with no giant reserves in this game. Strategic planning is mostly undertaken by big states, because there is more for them to win or lose by predicting the future. Conversely, nevertheless, smaller states run a relatively bigger risk, because it is their sheer existence with their chance for survival what is eventually at stake. For they not only risk a relatively greater part of their financial chances (or channel it on a forced track) but may thereby also seriously risk their moral reserve and future prospects as well. Let us contemplate, for instance, the disproportionately huge costs to be borne by Hungary, due to her geographical location, to enforce the internationally renowned high standards of human rights to manage her part in the global migration. Or let us think of the additional obligations arising from the necessity widely felt as vital to re-socialise parts of the Roma population.

Nowadays it is popularly held among those considering themselves enlightened that the state is growingly losing ground. Whereas, the operation of the rule of law, human rights, constitutionalism, parliamentarianism and democracy presume the unquestioned operability of the state. Although the state of the future may not be a powerful one, it ought not in the least to be a weak one either; it shall be an organisation strong enough despite its relatively modest extent.[13] Anyway, what else is being built for decades now under the aegis of the United Nations, the North Atlantic Treaty Organisation, or the European Union? And what else is the political game all about? Well, any of our large-scale decisions requires a firm conception, and as soon as mental anticipation is replaced by resolution, a readiness to act is also required, so that deeds can no longer be prevented by any further hesitation. For any administrative action to become effective, determination is needed, which in turn presupposes smoothly functioning communication channels to spread information. It is firmness and readiness to act that are a *sine qua non* for the maintenance of public order. The pre-requisite of administering justice is a sense of responsibility, mature enough to morally face the consequences of a decision.

Now, let us examine from the other – positive – side all what our call-words must not degenerate into. We have to serve the dignity of the human person with humility and morality, striving for justice and equity, aware of the truth of our belief in the basic honesty of man as filled with a sense of responsibility, in a way that our behaviour can serve as a pattern for others. We have to serve human dignity to be able to live in a social community, in the natural bonds of family and nation, with equal sensibility for rights and responsibilities, building law and order invested with all authority as may be needed.

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[13] Cf., e.g., ARTHUR FRIDOLIN UTZ: *Zwischen Neoliberalismus und Neomarxismus. Die Philosophie des Dritten Weges.* (ser. Gesellschaft, Kirche, Wirtschaft 8) Cologne: P. Hanstein, 1975. and TAKETOSHI NOJIRI: Values as a Precondition of Democracy. in HANS F. ZACHER (ed.): *Democracy.* Some Acute Questions. (The Proceedings of the Fourth Plenary Session of the Pontifical Academy of Social Sciences, 22–25 April 1998.) (ser. Pontificiae Academiae Scientiarum Socialium Acta 4) Vatican City. 1999. 105.

The assumption of responsibility, personal commitment and the inevitability of making decisions do not apply for everyday life-situations only. Even if we should find ourselves to have no spouse, or to be childless, jobless or homeless, or, let us say, find ourselves to have no honesty or self-control, we should not act as vegetative beings, resorting to accusing others, trying to find excuses and raise pity for ourselves as innocent victims of some social disease, easily identifiable anywhere at any time in principle. Well, one of the most noble objectives of training lawyers now is to convince future generations of the inevitability of personal commitment and of the necessity of the acceptance of one's own personal fate when defining and undertaking our individual life-missions. It is obvious that the responsibility for any choice and decision has to be shared by those who make and also by those who apply the law.[14]

One and a half decades ago, after the collapse of communism, there were only sporadic voices warning against the possible damages by a purely mechanical extension of the patterns taken from the Western routine of the rule of law, and the Western exporters themselves rejected these fears in outrage.[15] By now it has become obvious that our vast Euro–Asiatic region of Central and Eastern Europe, spanning from Vladivostok to Tallinn to Dresden to Ljubljana, was reduced to a field of experimentation by the rhetorical champions of tolerance, imbued by merciless uniformisation and theoretical arrogance.[16] And after their "Law and Development" programme, propagated and implanted as a panacea by the wishful American liberal doctrines had failed all through Latin America, they now decided to test it again against a by far more difficult terrain, on the ruins of communist dictatorial regimes. What a wonder, this missionary zeal has all but aggravated the bankruptcy in a number of ex-Soviet countries (maybe except partly for the Baltic states[17]) and also in Albania.[18] (Meanwhile, in the heart of the Hun-

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[14] Cf., e.g., Varga Csaba: Búcsúírás. in Emese Boros – Nóra Ohlendorff (ed.): *Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar: 2003-ban végzettek évkönyve.* Budapest: Alumni, 2003. 119–122.

[15] "Laws [...] were made for people and not people for the laws; and they have to conform to the character, the customs and situation of the people for which they were made; [...] and it would be absurd to indulge in the absolute ideals of perfection, in things that are only suitable to realise the relative good [...]." Portalis in Fenet I. 466–467. As a case-study, see Stephen F. Cohen: *Failed Crusade. America and the Tragedy of Post-Communist Russia.* New York – London: W. W. Norton & Company, 2000., reviewed by Varga Csaba: Kudarcot vallott kereszteshadjárat: Amerikai önbizalom, orosz katasztrófa. *PoLíSz* (December 2002–January 2003), No. 68, 18–28.

[16] See, e.g., Ugo Mattei: *Introducing Legal Change. Problems and Perspectives in Less Developed Countries.* [Manuscript of a lecture delivered at the Session of World Bank Workshop on Legal Reform in Washington D. C. on April 14, 1997.] Berkeley – Trento, 1997.; Paul H. Brietzke: Designing the Legal Frameworks for Markets in Eastern Europe. *The Transnational Lawyer* 7 (1994), 35–63.; Armin Höland: Évolution du droit en Europe centrale et orientale: assiste-t-on à une renaissance du »Law and Development«? *Droit et société* (1993), No. 25, 467–488.; Gianmaria Ajani: La circulation des modèles juridiques dans le droit post-socialiste. *Revue internationale du Droit comparé* 46 (1994) 4, 1087–1105. or By Chance and Prestige: Legal Transplants in Russia and Eastern Europe. *The American Journal of Comparative Law* XLIII (Winter 1995) 1, 93–117.

[17] Cf., Csaba Varga: Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisations. (The Experience of Lithuania.) *Acta Juridica Hungarica* 46 (2005) 1–2, 10–29.

[18] See, e.g., Vladimir Shlapentokh: *Russia. Privatization and Illegalization of Social and Political Life.* (Michigan State University Department of Sociology: September 25, 1995) 44. [CND (95 459)].

garian capital and as housed in the building of the one-time communist National Planning Office, the so-called Central European University was established with a missionary dedication to theoretically promote abstract universalism in the entire former socialist bloc.)

Since the euphoria of the transition's honeymoon period in Central Europe is over, public opinion (fed-back by accumulating practical experience) is already more critical concerning the adoption of ready-made recipes and wonder-working gestures, miracle-expecting attitudes and the like.[19] More importantly, those in Parliament and government are more about to realise as a truth of our landmarking present that simplistic and rapid methods, smuggled from somewhere by elitist groups as showing the exclusive road, have most probably no potential to become organically integrated into ongoing social processes and can therefore scarcely serve our own interests with the optimum effectivity in the long run. No need to say that foreign models can be useful as raw material, as an emphatic notification about solutions developed elsewhere by others at another time, maybe and mostly even under different conditions, only provided that there and then they operated with reliable success. We should, hence, be aware that no reference to outside authorities can substitute for own decision, in principle. Being necessarily partial and selective as conceived within differing paradigms, such references are unsuitable to replace a personal stand to be taken.[20]

No matter how such international fora and world powers may represent 21st-century Atlantic civilisation (self-closing in its underlying individualistic ideology and therefore by far not safe from the threat of a crisis some day), it is just their absolutising universalism that makes them not only dated but reminiscent of the ages before modern science. For in their underlying approach, they mistake the edifice of (any) society, continuously rebuilding upon traditions, convictions, collective and personal beliefs, for a primitive system made up of interchangeably ready-made, mechanically connected elements (like, e.g., standard engine-blocs of a motor-vehicle).[21]

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As an axiomatic foundation, it has always been obvious that "all the balance of the Christian thought is based on two antinomic statements. On the one hand, the person is prior to society. On the other, public good is superior to personal goods."[22]

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[19] "The State of Law is Not a Gift" – this is how the first ombudslady of Poland summarised her sobering experience half a decade after the expiry of her office term. Cf. EWA ŁĘTOWSKA [with husband]: Poland: In search of the »State of Law« and Its Future Constitution. in EWA ŁĘTOWSKA – JANUSZ ŁĘTOWSKI (ed.): *Poland: Towards to the Rule of Law.* Warszawa: Wydawnictwo Naukowe Scholar, 1996. 11.

[20] Cf., as a global overview with theoretical backing, VARGA CSABA: Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező. *Állam- és Jogtudomány* XXIII (1980) 2, 286–298. and CSABA VARGA: Reception of Legal Patterns in a Globalising Age. in J. J. JIMÉNEZ – J. GIL – A. PEÑA (ed.): *Law and Justice in a Global Society.* Addenda: Special Workshops and Working Groups. (IVR 22nd World Congress, Granada, Spain, 24–29 May 2005.) Granada: International Association for Philosophy of Law and Social Philosophy – University of Granada, 2005. 96–97.

[21] Cf. – reviewing H. PATRICK GLENN: *Legal Traditions of the World. Sustainable Diversity in Law*. Oxford – New York: Oxford University Press, 2000 – CSABA VARGA: Legal Traditions? In Search for Families and Cultures of Law. in JIMÉNEZ – GIL – PEÑA: ibid. 82.

[22] "Tout l'équilibre de la pensée chrétienne tient dans deux affirmations antinomiques. D'une part, la personne est antérieure à la société. D'autre part, le bien commun est supérieur aux biens particuliers." PIERRE BIGO: *La doctrine sociale de l'Église. Recherche et dialogue.* Paris: Presses Universitaires de France, 1965. 168.

Not only recognitions based upon natural law – drawing conclusions, in addition to connections obvious for common sense, also from theological truths – but also insights drawn from social sciences (based on anthropological, psychological, sociological, as well as criminological investigations and empirical data) are growingly definite in concluding that

– *ordo*,[23] that is, human order in society, is inconceivable without the agreed-on practice based upon the acknowledgement of some kind of authority, and this authority has to be founded – unless it contents itself with a new fist-law, ensuing from actual anarchy and deviance, tolerated as normal by now, disguised with some minimum and superficial maintenance of public order[24] – through collective experience and traditions with a commonly shared vision of future and an ethical world-view;[25]
– any way of life accepted with procedural techniques in society has to be based on values originating from the unalienable entirety of human person. Therefore, not even democracy is able to embody values without genuine eternal values to implement, that is, on the sheer foundation of ethical neutrality and the total relativisation of values;[26]
– dignity and responsibility are inseparable from one another, because the former arises from the autonomy of the person, and the latter, from the freedom of man. Therefore, no form of social care or generous provision of rights can reduce the minimum responsibility to be irrevocably borne by the person for his decisions and actions and for the development and exploitation of his potentials (that is, for his conduct in private, in family and professional life, as well as in his community);[27]

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[23] "But it must not be imagined that authority knows no bounds […]." Pope JOHN XXIII: *Pacem in Terris.* (Enc.) 1963. 47.

[24] "A person who is concerned solely or primarily with possessing and enjoying, who is no longer able to control his instincts and passions, or to subordinate them by obedience to the truth, cannot be free." Pope JOHN PAUL II. *Centesimus Annus.* (Enc.) 1991. 41.

[25] Most expressly – first of all, from the aspect of social psychology and sociology – see, e.g., ROBERT NISBET*: The Quest for Community.* San Francisco: ICS Press, 1990., ch. 1–3.

[26] "With regard to civil authority, LEO XIII (in the Encyclical on the *Condition of Workers,* 1891. 48.), boldly breaking through the confines imposed by Liberalism, fearlessly taught that government must not be thought a mere guardian of law and of good order, but rather must put forth every effort so that »through the entire scheme of laws and institutions […] both public and individual well-being may develop spontaneously out of the very structure and administration of the State.«" Pope PIUS XI: *Quadragesimo Anno.* (Enc.) 1931. 25. "Hence, before a society can be considered well-ordered, creative, and consonant with human dignity, it must be based on truth [...]. And so will it be, if each man acknowledges sincerely his own rights and his own duties toward others." Pope JOHN XXIII: *Pacem in Terris.* (Enc.) 1963. 35.

[27] Michel Schooyans has termed – MICHEL SCHOOYANS: Droits de l'homme et démocratie à la lumière de l'einseignement social de l'Église. in ZACHER, *ibid.* 50–51. – the process by which newer packages of human rights are acknowledged (and, then, responsibility for them is shifted upon the state) through global lobbying and pressurising via international organisations as a "tyranny of consensus" which, due to its positivistic voluntarism and by trampling on the principle of subsidiarity itself, results in an end to any democratic thought.

– as a result of the inviolable dignity and undiminishable responsibility of the human person, rights and obligations go hand in hand.[28] Otherwise, reciprocity and balance would be unthinkable,[29] and the *societas* as a whole would fall apart.[30] Therefore, in the last analysis,
– our social achievements are – as human freedom itself is (if valuable at all) also a historical achievement and not simply the product of a mere declaration of right[31] – by no means built on the sand randomly formed by momentary taste, delight and fancy, but upon the awareness of the cognisability of our world and upon the belief that a sensible order can be developed in it, at the heart of which one finds the vocation of man to both recognise the values dormant in him and then carry them into effect in his environment.[32]

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[28] "[M]an's awareness of his rights must inevitably lead him to the recognition of his duties. The possession of rights involves the duty of implementing those rights, for they are the expression of a man's personal dignity. And the possession of rights also involves their recognition and respect by other people." Pope JOHN XXIII: *Pacem in Terris.* (Enc.) 1963. 44.

[29] "Since men are social by nature, they must live together and consult each other's interests. That men should recognize and perform their respective rights and duties is imperative to a well ordered society. But the result will be that each individual will make his whole-hearted contribution to the creation of a civic order in which rights and duties are ever more diligently and more effectively observed. Ibid. 31.

[30] See, for the comparative criminological analysis of the individualistic, resp. communitarian backgrounds of the policing in the USA, resp. Japan, concluding in a dazzling difference between the expenses invested and the results achieved, DENIS SZABO*: Intégration normative et évolution de la criminalité.* {Lecture at a conference on value, behaviour, development, modernity, or the cultural factors of development and backwardness in development, as organised by the *Institut de France* [Paris] on September 16–17, 1995. [manuscript]}. For a Central European stand on the complementarity of rights and obligations, cf. ALFONSAS VAIŠVILA: Legal Personalism: A Theory of the Subjective Right. in ISTVÁN H. SZILÁGYI – MÁTÉ PAKSY (ed.): *Ius unum, lex multiplex. Liber Amicorum Studia Z. Péteri dedicata. Studies in Comparative Law, Theory of State and Legal Philosophy.* (ser. Philosophiae Iuris / Bibliotheca Iuridica: Libri amicorum 13) Budapest: Szent István Társulat, 2005. 557–573.

[31] For one of its latest formulations, see, e.g., ROBERT GRANT*: Oakeshott.* (ser. Thinkers of our Time) London: The Claridge Press, 1990. 63.

[32] "Authentic democracy is possible only in a State ruled by law, and on the basis of a correct conception of the human person. It requires that the necessary conditions be present for the advancement both of the individual through education and formation in true ideals, and of the »subjectivity« of society through the creation of structures of participation and shared responsibility. Nowadays there is a tendency to claim that agnosticism and sceptical relativism are the philosophy and the basic attitude which correspond to democratic forms of political life. Those who are convinced that they know the truth and firmly adhere to it are considered unreliable from a democratic point of view, since they do not accept that truth is determined by the majority, or that it is subject to variation according to different political trends. It must be observed in this regard that if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism." Pope JOHN PAUL II: *Centesimus Annus.* (Enc.) 1991. 46. It should be remarked that SCHOOYANS, ibid. 55–56., sees our days' developments – maybe in sign of an impending Apocalypse – as the beginning of a "total war waged against man", because the so-called "anthropological revolution" (p. 53) – (de)grading man from person to sheer individual utterly free to choose any truth, value and ethics he pleases to – eradicates from the human being exactly what is Divine in him, depriving him from his being an *imago Dei*. And man practically becomes incapable of survival when his own reason and will are eliminated.

This being the case, would it not be acutely necessary to reconsider what follows therefrom in terms of state organisation? And shouldn't we, responsible citizens, try to find answers to our concerns through this realisation, instead of just relying (with vacuous idleness, by shifting responsibility on others) upon patterns devised by others under differing conditions, which can only result in a failure for us? By claiming this, I do not mean alone anomalies, excesses and disproportions (by, e.g., one-sided extension of rights and competencies, which can only lead to dysfunction and irresponsibility, moreover, to irradiating chaos), recurring abundantly in our transition process,[33] which – even if heralded mostly in the majestic robe of the defence of constitutionalism[34] – are only apt to eventually shake the foundations of collective order, undermine its reliability and cohesive force, shattering its foreseeability and, on the final analysis (even if sometimes dragged out of the cloak of constitutional justices or ombudsmen), subjecting it to the "logic" of fist-law, where only the stronger, the more persevering and uninhibited of us are awarded, those who resort to the arbitrament of war.

Let us contemplate: if the ideal of the rule of law as developed in the continental idea of *Rechtsstaatlichkeit* preserves at its focal point the maintenance of law and order by means of statutory regulation (and, in supplementation, through judicial decision-making guided by principles), binding those governing and those governed alike, and if the smooth and safe realisability of this is the purpose of the separation between the (executive) power of the government, the legislative (regulatory) power of the Parliament and the (decisional) power of the judiciary, both latter controlling the former, then how can our present scheme of the rule of law respond to challenges, regarding which the classical system of checks & balances, developed nearly two centuries ago, is hardly able to operate functionally and efficiently any longer? That is, how can it react to the power of printed press and electronic media, the pressure by big organisations, the financial extortion by the international agents of globalisation and the crime organised without frontiers – acting sometimes with statal assistance, asserting themselves increasingly arrogantly with no responsibility, on a field

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[33] Cf., Csaba Varga: *Transition to Rule of Law. On the Democratic Transformation in Hungary*. (ser. Philosophiae Iuris) Budapest: ELTE "Comparative Legal Cultures" Project, 1995.; Csaba Varga: Legal Scholarship at the Threshold of a New Millennium. For Transition to Rule of Law in the Central and Eastern European Region. *Acta Juridica Hungarica* 42 (2001) 3–4, 181–201. and in Werner Krawietz–Csaba Varga (ed.): *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe.* (ser. *Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn) Berlin: Duncker & Humblot, 515–531. and, focussed on one single issue – concealing in the guise of constitutional principles the politically motivated rejection of coming to terms with the past in criminal law by constitutional justices as legally irresponsible professional defenders of abstract constitutionalism in Hungary – Csaba Varga (ed.): *Coming to Terms with the Past under the Rule of Law. The German and the Czech Models*. Budapest: Windsor Klub, 1994., and, as a diagnosis of the problems of our age, Varga Csaba: Önmagát felemelő ember? Korunk racionalizmusának dilemmái. in Katalin Mezey *(*ed.): *Sodródó emberiség. Várkonyi Nándor »Az ötödik ember« című művéről.* Budapest: Széphalom Kiadó, 2000. 61–93.

[34] As a case-study, cf. Catherine Dupré*: Importing the Law in Post-communist Transitions. The Hungarian Constitutional Court and the Right to Human Dignity.* Oxford & Portland Oregon: Hart Publishing, 2003.

practically freed from whatever regulation but actually assisted by world-wide economic trends and newest high-technologies? Well, the classical regime of the rule of law offers neither regulation nor ideas[35] to control the interference on behalf of such new powers, weighing down heavily on our future. Even by a benevolent comparison, all that is available does not even reach a fraction – say, one thousandth – of the European regulation standardising, e.g., the size of holes in cheeses. And since we keep proudly and imperturbably thinking in terms of stubborn principles, our eyesight still not reaches farther than the hand-operated printing press of heroes of classical liberty like Mihály Táncsics (preparing in Hungary the bourgeois revolution by means of mass journalism from the 1830s), or the channels of communication between Pest, then alone the capital, and Szolnok, the town by the river Tisza in the Great Plain, hardly a hundred kilometres from the capital, a distance that could be run in a post-chaise muddling through marshes, often threatened by highwaymen, yet allowed, at times of good weather, by carrigeable trails to reach its destination within some two to three days in the 1860s.[36] So, it is little wonder if we are not able to rise above the shortest re-assertion of the freedom of press by a total lack of its regulation.

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If such is the case, what are we to do? We are not likely to serve with a solution here and now. The most our message can convey is that we have to contemplate about history; and if we already know what we want, we have to look for paths, draw lessons from human experience, take responsible decisions, and go along the road we have chosen. No one shall take decisions instead of us, and whatever we once sowed, it will be us who shall have to reap it. We have to assume responsibility for our people, our age, our fate, our conviction and our rule of law in the undivided collectivity of mankind, but also individually, for the talent entrusted to each of us, for which we are accountable in person.

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To summarise the issue, the relationship between rights and duties cannot be but logically complementary. They necessarily supplement each other. As none of them can be posited without the other, no one is entrusted to select only rights from them.

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[35] Although focussed mostly on legal policy considerations in present-day Hungary, BÉLA POKOL: *Médiahatalom. Válogatott írások.* Budapest: Windsor Kiadó, 1995. is a refreshing exception in this respect. Another remarkable fact is that a professor once at Yale, constitutionalist and not long ago the acting Attorney General, identifies two main moments as having lead to the present-day situation in the United States of America, notably, the liberal re-interpretation of the Constitution, undertaken by the Supreme Court, and the limitless destruction by television (having also brought about virtual illiteracy as a side-effect). ROBERT H. BORK: *Slouching towards Gomorrah. Modern Liberalism and American Decline.* New York: HarperCollins, 1997.

[36] Reference to the artists' colony at Szolnok, actually born in result of a nostalgy-tour in 1851 by an Austrian officer of the Emperor's army, after the defeat of the Hungarian bourgeois revolution of 1848. The officer, painting as an amateur (August von Pettenkofen), had been so much enchanted by the landscape of the Hungarian Great Plain that he started inviting also his friends to this end point of 'Far East' – namely, this was then the farthest South-East reachable at all by railroads on the European Continent at the time, changing over the then rather inconvenient land communication.

What we have claimed about the role of legal culture in general also applies to the law's practical action. Notably, most decisive changes in the law's life may take place amazingly often through considered (re)interpretation, without the slightest modification of the law's posited wording. Only such silent (yet practically irresistible) shifts, e.g., in prevailing ideas, can explain how the ordering concepts of 'common good', 'public interest', 'public order', 'public security', 'public health' (etc.) that had once set the boundaries of rights provided for by basic codes to the individual from the early 19th century on (serving as a general basis of interpretation and also as general clauses in limiting cases, restricting or refusing the enforceability of rights in given situations, thereby justifying an exception),[37] seem to have step by step disappeared from our juridical discourse. For what my generation used to learn (back in the mid-sixties in both Western Europe and socialist Hungary) as a joint heritage of European civilisation, has all of a sudden become dated, referred to in fact by no one any longer. And this has resulted in a dramatic change for relations between the public and the individual, too. In our new cult of nothing but rights, public affairs can at most take hold in the periphery of, or gap in-between, our increasingly expanding individual entitlements.

Albeit in its social teaching, aware of the danger of such dubious age-dependent fashions, the Church has been declaring its stand more and more firmly from the third third of the 19th century on, according to which (1) also secular institutions have to be built on the recognition and in service of the person; consequently (2) no civilisational achievement has its value in itself (i.e., even democracy is only valuable through the values implemented and materialised by it); (3) the dignity of human person presupposes the undertaking of responsibility through the unity of rights and duties, among others. Rule of law, human rights, constitutionality, parliamentarianism and democracy? No achievement of Western development, however sublime and enlightening they may be, is free from criticism: their given form and output (as a few papal encyclicals remind us) may suffer from infantile disorders with various excesses, that is, from mistakes and false emphases as well.

In addition, also the principles of (4) representation and (5) participation are to be mentioned, particularly to understand democracy. For democracy in a Christian view is not something just happening to us but rather a chance of getting realised through true representation and participation. It costs a lot, requires sacrifice, and may involve the potential of errors in addition to its demand of time, which is another source of short-run disillusionment.

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Let us consider the issue once again, this time by recalling the dilemma of the American supreme command in 1944, when the deployment of the first atomic bomb in warfare had to be decided. For the radical ending of WWII in the Far East by such a bombing would have forecast and did also actually involve a certain, yet though

[37] Cf., first of all, by the Hungarian Vera Bolgár: The Public Interest: A Jurisprudential and Comparative Overview of the Symposium on Fundamental Concepts of Public Law. *Journal of Public Law* (Emory University Law School) 12 (1963) 1, 13–52.

immense but limited number of civil and uniformed victims on the enemy side. In case of any other option, destroying the enemy in a protracted jungle war would have inevitably presumed a far huger number of victims both on the enemy and the own side, in a number and time-schedule both uncertain and unlimited. Well, which option is more humanitarian, which one should have been resorted to in this dilemma, to be decided anyway in this superhumanly dramatic yet unambiguous choice faced by both the politicians and the relevant general staff?[38] Not too far away in time, let us continue our reconsideration with the example of the termination of World War II which, dividing the world into defeaters and defeated, burdened the task of pacifying the latter to the shoulder of the former. The naive question may arise whether or not this has perhaps meant that the victors' democracy was just extended to the liberated one? We know the answer: not in the least. For it would have been at the former's own costs and by risking their own human lives. Therefore they chose the continued use of their armed forces. And that what followed included in fact military occupation, suspension of basic freedoms, occupying administration with unlimited intervention, reckoning with the past through military tribunals by the suppression of principles of the rule of law and finally also a forced "re-education to democracy" process which was originally designed to span about one decade of transition before anything like democracy could be implemented.[39]

We may have realised by now that in the Central and Eastern European region, transition after the downfall of red dictatorship (distinguished favourably by the Western mainstream double measure from the brown one) took place otherwise. Could any decision-maker have one and a half decades ago presented an alternative to the democratic jungle-war, to its tiresome roughness, pitfalls, costs, and even its disillusioningly meagre and counter-effective self-prolonging performance? Everything considered, it seems that there has been no genuine alternative. So this is to be taken by us as acquired and fought through as our way, fate and mission. And the sequence of generations to come has to assume the task of incessantly caring for, protecting and eventually perfecting it within the given frameworks but not without the sight of the once contemplated ends.

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[38] Cf., from the literature, PETER WEYDEN: *Day One. Before Hiroshima and After.* New York: Simon and Schuster, 1984., on the contexture, PAUL R. BAKER (ed.): *The Atomic Bomb. The Great Decision*. Hindale, Ill.: Dryden Press, 1976[2]., and LEN GIOVANNITTI – FRED FREED: *The Decision to Drop the Bomb.* New York: Coward-MacCann, 1965., with archives background in BARTON J. BERNSTEIN – ALLEN F. MATUSOW: *The Truman Administration. A Documentary History.* New York: Harper, 1966., and LOUIS MORTON: The Decision to Use the Atomic Bomb. in KENT ROBERTS GREENFIELD *(*ed.): *Command Decisions. Office of the Chief of Military History.* Washington: U. S. Army, 1960.

[39] Cf., CSABA VARGA: Transformation to Rule of Law from No-law: Societal Contexture of the Democratic Transition in Central and Eastern Europe. *The Connecticut Journal of International Law* (Hartford) 8 (Spring 1993) 2, 487–505. For the background, see, e.g., JOHN D. MONTGOMERY: *Forced to be Free. The Artificial Revolution in Germany and Japan.* Chicago: The University of Chicago Press, 1957. and WOLFGANG FRIEDMANN: *The Allied Military Government of Germany.* London: Stevens, 1947.