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Csaba Varga

Transition? To rule of Law?

KRÁTER

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TRANSITION? TO RULE OF LAW?

Constitutionalism and Transitional Justice Challenged in Central & Eastern Europe

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TOWARDS A TRANSITION TO RULE OF LAW

RADICAL CHANGE AND UNBALANCE OF LAW in a Central Europe under the Rule of Myths, not of Law*

1. Post-modernity Diagnosed

In contrast to the end of World War Two, when allied administration, avoiding implanting home democracy into an emptied space, resorted rather to orders: from above, from outside, for long years, from within the comfort of military administration and censorship, in order to re-educate people through imposing values upon them so as to make society prepared for being able to operate democratic machinery with optimum results, transition from Socialism as a democratic process from the beginning, building step by step (as marshalled by historical incidentalities of given moments) upon the instrumentality of the rule of law, was to base on the only legacy left: annihilation of the sensitivity to public affairs and communitarian interests, extinction of the very idea of a self-governing civil society, emptied morals, and whatever kind of authority shattered. Instead of an allied care for that dictatorship would be rejected without offering it the chance of transforming

* In its first version in Hungarian, 'A jogváltás paradoxonai' [Paradoxes of the change-over of laws] *Magyar Szemle* V (1996) 12, pp. 1186–1196, and in English, as commissioned by the Nagoya CALE for 2004, in *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 185–195, under the common title I gave to the project as 'Transition to Rule of Law: A Philosophical Assessment of Challenges and Realisations in a Historico-comparative Perspective'. In the research scheme, I promised (p. 185) that "The research is to focus on the nature of the transition after the fall of Communism in Central and Eastern Europe in general and in Hungary in particular with special emphasis on the issue of adequacy of ends and means in the process. The demanding complexity of both ends under limiting conditions and the available store of instrumental patterns are to be analysed in parallel. The aim is to show the emerging contrast between points of view which, on the final analysis, are defined by historical universalism, on the one hand, and historically bound particularism, on the other. The quest for open society, constitutionalism and human rights is also assessed on both philosophical and empirical grounds. On the final account, transition is shown as a test case for responding to several contemporary dilemmas of law which are more visible under the given (transitory) conditions than as closed into their otherwise everyday routine in the Atlantic world."

into our future alleged liberalism, the political and legal continuity of the past has by far not been broken from inside, as velvet revolution has only continued past legality.

Legal development has been channelled through pattern-borrowing and transplants, in the process of which unpreparedness, utopianism, fetishisation of abstract principles under the aegis of false constitutionalism as well as a lack of co-ordination in the practical shaping of the law have been mixed. No wonder therefore, if subsequent liberalisation may now damage community cause in want of established conventions or if a series of *ad hoc* departmental interference with overall domestic evolvement may produce situations next to chaos and anarchy, in want of any systematic plan with communitarian responsibility.

Own legal traditions are being formed in the process, notwithstanding. These are mixed, drawing mostly from both past Socialist routine and present-day civil law, common law & Atlantic inspirations, as well as European Union practices, upon the basis of a style and understanding of law surviving from our past barely transcended.

Resurgence of national traditions can be hoped for in the long run only. In the womb of the overall process, they are already in re-formation but can presumably take visible shapes only after the present acceleration of changes will have organised them into a more organic, coherent and thoroughly co-related unity.

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2. Radical Change with Radical Uniformisation

Radical changes in law are always dangerous.

Unpreparedness and the self-comforting feeling of security, inspired by what seems to be evidence to others, may create a vacuum of uncertainty, in which practically anything can happen.

When the wind of changes came to the Central and Eastern European region in the early '80s, every advisor, scholar and government expert—be it Eastern or Western, on the steppes or in the Atlantic world—suggested about the dialectics of the process of democratic transformation, in terms of which MARXism would be

right once again in that gradual accumulation of quantitative changes would lead to a new quality, and finally a complete change-over of entire social, political and economic systems would take shape from the limited possibilities of a "soft dictatorship".

The global euphoria ensuing from the unexpected collapse of the former regime has also strengthened the public belief that we just need to clean up what is left over from the past, and the West will simply extend its border over us.

The disillusioning truth is that nothing but arrogance and the effects of a beggar-stretch-of-hand by the big powers are what the nations concerned received, instead of a real help. Furthermore, the output was broken: unorganised, inconsiderate, and it was poor in both empathy and imagination. Lacking any creative energy, the West could only offer its exceedingly known everyday routine within its used-clothes-action, for it was naive and lazy enough not even to contemplate about some adaptation.[1]

Mentality, characteristic of intellectuals and journalists chewing on dropped bones, with an unscrupulous flourishing of false universalisations, hegemonistic ethno-centrisms, paradigmatic over-generalisations, as well as unjustified extrapolations—all these are oozing towards us from the international workshops of our post-modernity. As with self-inducting spirals of bad habits, such forces operate under the surface, demanding a constantly increased dosage in order to provoke some effects at all.

When I had the first opportunity in my life to travel abroad in the year of the Prague Spring, I was disappointed by what the utmost idol of my youth, *l'esprit français*, had given me through the courses of *la Faculté Internationale pour l'Enseignement du Droit Comparé* in Strasbourg. In response to my longing for an outlook of

1 Cf., e.g., first of all, Paul H. Brietzke 'Designing the Legal Frameworks for Markets in Eastern Europe' *The Transnational Lawyer* 7 (1994), pp. 35–63; by Gianmaria Ajani, 'La circulation des modèles juridiques dans le droit post-socialiste' *Revue internationale du Droit comparé* 46 (1994), pp. 1087–1105 & 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' *The American Journal of Comparative Law* XLIII (Winter 1995), pp. 93–117; as well as Ugo Mattei *Introducing Legal Change* Problems and Perspectives in Less Developed Countries [manuscript of an address to the World Bank Workshop on Legal Reform on 14 April 1997] (Berkeley & Trento 1997) 19 pp. Further on, cf. also, by the present author, 'Legal Scholarship at the Threshold of a New Millennium in the Central and Eastern European Region' in the present volume.

high-soaring mentality, I found self-conceit addled into narcissistic self-complacence. For even the cavalcade of legal cultures, proving the rich variety within human civilisation, has only served as a pretext to my French professors to chat about their favourite one, *la culture juridique française* in French, only to be admired by their foreign students. Later on, I could realise how much this was true for other fields as well. For instance, the famous American pragmatism has proven to be much rather an ordinary disguise for hiding nation-wide rootlessness deriving from the lack of historical knowledge, moreover, for transforming local deficiency into a virtue to be followed as a global pattern. I might have felt something similar when the usual US response to any burning issue was quite a ready-made panel, for instance, by comparing American constitutional patterns to communist claims of reforming their domestic law (taking Soviet verbalism for granted actuality),[2] or by proposing the Latin American, or later on, the Spanish model of democratic transition as a theoretical framework within which to explain the transformation in Central Europe from the Communist rule of dictatorship into Rule of Law.[3] This blindness, fooling itself with global tendencies, has become constant by now. The advisory help, well-intentioned initially, albeit motivated by self-interest, has degenerated into an apodictic ruling, knowing no doubts, no exceptions. Fashion products—from FUKUYAMA's Utopia on the liberal ending of history[4] to armchair-theories of Chicago-economists on the curative effect of free markets without control—are advertised both on intellectual markets and by international agencies (mostly used as the fora of exerting imperialistic influence), as if they were the embodiments of some ever-lasting universal truth.[5] The humble consumer can realise it only later that

2 Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

3 Cf. Juan J. Linz & Alfred Stepan *Problems of Democratic Transition and Consolidation* Southern Europe, South America, and Post-Communist Europe (Baltimore & London: The Johns Hopkins University Press 1996) xx + 499 pp.

4 Francis Fukuyama *The End of History* and the Last Man (London: Penguin 1992) xxiii + 418 pp.

5 Cf., as a case study, Stephen F. Cohen *Failed Crusade* America and the Tragedy of Post-Communist Russia (New York & London: Norton 2000) xiv + 304 pp., reviewed by the present author as 'Failed Crusade: American Self-confidence, Russian Catastrophe' in the present volume.

how much he has been tricked by resounding phrases. For it can happen that demolished fortresses and bombed churches are conserved in their ruins according to the Venice Charta on the protection of historical monuments,[6] and it would be a later (and sometimes also too late) realisation only that tourists will actually prefer and flood well-preserved countries and monuments, and not the ones which may have had a bad luck with a tourmoiled history. At this point, the addressee of others' thought, mainly in the once Soviet-dominated Central Europe, might then contemplate more deeply about the fact that maintenance workshops have all over Europe repeatedly changed every stone of medieval cathedrals while repairing them throughout the last half-thousand years—just as every cell of our body renews from time to time, so that our body can function properly.

The world is in process of unification and with the post-modern myth of and harsh demand for a global village, the newest call-word of universalism is also born. This leads our former local MARXists from their belief in historical determinism to some a-historical floating. For our intellectual elite chases the newest thought-products as if it was the case of philosophical devotion. They are not even afraid of introducing their own "class-rule" in order to implement and materialise them.[7] Now they dedicate their routine in ideological criticism (which MARX and ENGELS used in their *The German Ideology* to generalise everything particular) to convert their revolutionary intellectual radical illusion of "Anything is possible!" into practice. When, for instance, the intellectual elite in Hungary decided to make political use of the taxi-drivers' blockade in 1991, they were prepared to take any action at please and they actually threatened the government from the very beginning to neutralise and divert any measure it might have taken. Unfoundedly referring to the doctrine of "civil

6 *Charte Internationale sur la Conversation et la Restoration des Monuments* (Venise 1964).

7 E.g., György Konrád & Iván Szelényi *Az értelmiség útja az osztályhatalomhoz* (Paris: Európai Protestáns Magyar Szabadegyetem 1978) 212 pp. & (Budapest: Áramlat Független Kiadó 1985) 206 + xxi + 6 pp. {*The Intellectuals on the Road to Class Power* trans. Andrew Arato & Richard E. Allen (Brighton: Harvester & New York: Harcourt Brace Jovanovich 1979) xix + 252 pp.}.

disobedience",[8] they not only gave a false justification for the disorder caused by taxi-drivers, the specimens of the new entrepreneurship (with excelling communication and thereby also organisational facilities) in the country, but they also attempted to make the functioning of constitutional and public institutions, as well as the legality of the new rising law and order, the function of random intentions of casual mob guys.

The problem is by no means with anyone making mistakes but in the very fact that the new-born cult of total freedom lacks both communitarian empathy and responsibility, and also responsiveness. Rejecting participation and responsibility, only their blind selfishness is increasing, which is about to arrogantly turn against everything historical, local and traditional, that is, everything that derives from common sense, everything people have bitterly experienced over generations. To all this adds an atmosphere characterised by the exclusifying impatience drawn from the old times, over-engagement in politics and over-ideologising with discrediting any kind of doubt and ridiculing any new, truly creative independent thought. In the meantime, the demand for an open-chance debate, genuinely clarifying the basic situation and the underlying issues does not even occur. This is when the course of events may take a bad turn. Even taking the stipulations of the old law seriously can suddenly become a "witch-hunt". The most natural desire of searching for an own path on any third road (in the exclusive sense of challenging the mainstream) is laughed at as if it were something backward. In want of any creativity, our proud scholarship fails also in the recognition of the ancient wisdom, according to which whatever we long for, be it "external pattern" or "own path", actually a compromise between the two can be arrived at at the most.[9]

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8 Cf., by the author, 'Civil Disobedience: Pattern with no Standard?' in his *Transition to Rule of Law* On the Democatic Transformation in Hungary (Budapest: [AkaPrint] 1995), pp. 111–118, and the entire part focussing on the topic in it, »Skirmishes and the Game's Rule«, pp. 91 et seq. [Philosophiae Iuris].

9 Cf., by the author, 'Trumbling Steps of the New Constitutional State' in his *Transition to Rule of Law* [note 8], pp. 78–89, and 'A hagyomány talajáról' [On the soil of tradition, 1991] in his *Útkeresés* Kísérletek – kéziratban [In search for a path: Attempts unpublished] (Budapest: Szent István Társulat 2001), pp. 144–148 [Jogfilozófiák].

These hammerings in are located in a mentally emptied medium. Originality, ability of sizing up situations, sharing or respect for larger communities—certainly none of them is their virtue. One may recall the enormous burden of the post-war transformation in Germany and Japan, mainly born of the United States. Yet, all we tend to forget that the United States did not export its democratic tradition and the underlying rule of law with its military expedition overseas, but it concentrated its efforts to prove the culpability of the regimes it had to overcome. That is, when risking its own neck, even the United States had no scruples about experimenting something new and opportune. In addition, this was obviously right a choice, as this was the only secure means for the old practices and institutions to be discontinued in the doomed regimes. Consequently, the US military and occupying administration avoided implanting home democratic measures into a kind of abstractly emptied space, instrumentalities that could equally serve all imaginable players. They rather resorted to orders: from above, from outside, for long years, from within the comfort of a military administration and censorship, intervening with a power-display on an everyday basis. When the sheer force was not enough either, they invoked to the otherwise neglected natural law, so that the law and the legal continuity of the defeated should be broken from inside. All in all, occupying allied forces did not give the past the chance to grow into the future, and more importantly, they did not degenerate the law into a mere instrument, in terms of which anyone who handled it could use it for the legitimisation of past continuity. Although, the repeatedly damned National Socialism lasted for barely a dozen of years, and its replacement did not presume any change in the economic formation either.[10]

At the same time, on the ruins of the Soviet empire, the most stubborn effect of the devastation by long decades is not in the mere fact of dictatorship but in the destruction suffered by individual souls: annihilation of the very sense of public affairs, public interest and communitarian service; extinction of the very

10 For some treats of basic difference, cf. Claus Offe *Varieties of Transition* The East European and East German Experience (Oxford: Polity Press 1996) viii + 249 pp.

idea of a self-governing civil society; emptying morals, and shattering whatever kind of authority. Thus, there is nothing at stake in the process of changing our set-up in legacy afterwards: if we are only restricted to assure an equality of chances or declare rights at the mighty please of everyone (as in well-established democracies), then we obviously will not be able to restore the damages occurred over generations in public morals and community values. Instead of any curative effect, we can at the most deepen decomposition by mixing good and bad, and completing thereby the job of turning *les fleurs du mal*—or, CHARLES BAUDELAIRE's *Flowers of Evil*—into virtues. Yet, construction presumes constructive action through intervention (and not mere contemplation), its characteristic means being initiative, participation, selection, and preference (instead of resignation, indifference, or neutrality), that is, a kind of empathy and positive discrimination.[11]

*

3. Some Symptoms

Our future is being forged today. It is now that we are sampling its ideals, style and rites. The day's practice will grow into the next day's habits. We will find comfort in what we enjoy today. What we have done so far may already warn us by its varied lessons and infinite examples. In the following I will only rely upon the formulation of some characteristics and temptative conclusions.

11 For the contrast—never justified or made explicit but only tacitly assumed as the self-evident course of events—between the stands taken by the United States in 1944 and 1989, respectively, see, by the author, 'Transformation to Rule of Law from No-Law: Societal Contexture of the Democratic Transition in Central and Eastern Europe' *Connecticut Journal of International Law* 8 (Spring 1993) 2, pp. 487–505 and 487–593, revised as 'The Building up of a Rule of Law Structure on the Ruins of a Regime Based upon the Denial of Law in Central Europe' in *Law at the Turn of the Twentieth Century* International Conference Thessaloniki 1993, ed. L. E. Kotsiris (Thessaloniki: Sakkoulas 1994), pp. 213–233 & 'Complexity of the Challenge Facing Central and Eastern Europe' [introduction to Part V on »Transition to the Rule of Law«] in *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), pp. 415–424 [Tempus Textbook Series on European Law and European Legal Cultures I].

(a) Unpreparedness All we have proved to be mentally unprepared for recognising and proposing a solution to basic dilemmas. Our usual approaches are mostly unilateral and biased, satisfied by occurrences of partial formal truth. Imagining the prevailing totality as a self-reproducing and self-balancing functioning whole is to fall out of our sight. For instance, from the perspective of human rights, we do not hold adequate solutions for the protection of natives in the Baltic region against the hordes of Soviet subjects, devised at the time to settle there in order to overcome and finally de-nationalise them. Or: demolishing state borders and making them transcendable is a noble gesture indeed, yet qualifies as an inconsiderate step if in the meantime there is no legal way to implant a filter setting barriers to migration, and to keep the marginalised mob of the neighbouring former Soviet empire (decomposed and fallen apart into next-to-criminal gangs) away from own territory. Or: it is a feature of laudably high spirit that Hungary has abolished capital punishment, de-penalised economic crimes, and transferred the disclosure of the facts and sources of personal enrichment to the legally safe and sacro-saint private sphere. Yet, all this will mainly have damaging impact if not followed by a prison reform, capable of effective prevention, through punishing deeds that usually result from the gaps and weaknesses of legal regulation in transition, that is, degeneration into pillage, money laundering, Mafia crime, and black economy. This line of thought can be continued for long. Most eminently, the proportions in the relationship and priorities between the individual and the public, as well as rights and duties, are not clear either. However, the panacea for the degeneration caused by past dictatorship is surely not degeneration into the opposite extremity, i.e., anarchy. Finally, one can realise how much present debates are characterised by a disintegrated equilibrium. For usual reactions by intellectuals in the region seem to perceive it as an exclusively old-new threat if individual concerns are not given exclusive preference but are weighed in the light of tasks the nation may need to define for the survival of the community. Public debates on the freedom of press, privacy, "otherness" relevant to public morals (e.g., sexual behaviour), national security, public order, facing the

past crimes, taxation, effectiveness of and policing by the police, or government collection of data and official statistics—all these can therefore easily prove abortive under such conditions.

(b) Utopianism Our post-modern way of thinking is pervaded by the blindness and miracle-expectation of utopianisms when we resort to a sheer issuing of laws instead of the often bitter (but unavoidable) trouble of the care for carrying out radical reforms. We dedicate our efforts to texts (which already LENIN considered, if left alone, hardly more than an "aerial move"), not to genuine action. Taking an example from biology: although skeleton determines bodily structure, it cannot replace the complexity of our living self. For the same reason, we cannot simplify law to a randomly amassed aggregate of rules (or, continuing the above example, to somehow putting the skeleton together by cartilages, joints and tendons). Moreover, we can neither consider law as a set of partial units, in which (as in a car-type) every component is exchange guaranteed. For instance, we can freely translate foreign laws, yet they will hardly function properly in a new artificial environment without a proper practice (organically developed from the given cultural background) behind them. However, under the present conditions of political transition, simplified solutions (imposed from above, in a doctrinaire way, exhausted in declarations, by banning practical doubts about the prospects of their implantation)—no matter if they originate from international obligation or a domestic vote—can only be carried out to the detriment of public interest. Since, the improvement and constant control (with extension or restriction) in establishing practice with a balanced use of rights can only be afforded subsequently, after experience of enforcement is thoroughly considered in the course of long debates, through the assessment of jurisprudence in the light of statistical data. From the very act of putting together and/or transplanting alien substances we can hardly obtain a liveable law. Just as the constitutional status of the Queen of England is not constructed from some random laws but has for long been crystallised by a series of conventions in tradition, which on their turn have been drawn from historical

experience concluding debates by reaching compromise solutions, neither legal reform can be the exclusive concern of some conscript fathers who may vote according to political stands, but the concern of the whole society. Without traditions and conventions, practices and improvements exclusively suitable to give meaning and life to the rudimentary structure of a statutory skeleton, also legal reform is faced with the chance, if not backed by society, to turn easily inside-out. For instance, the freedom of press may give way to either anarchy or monopoly, the weak regulation to clumsiness discrediting any policing, and a deficient legal background to spasmodic undertaking only characteristic of early, primitive forms of capitalism.

(c) BIBÓ-syndrome In want of something better, a particular behaviour (nowadays becoming more and more typical in the region) is called BIBÓ-syndrome. Namely, instead of creative thinking, this behaviour imitates, sanctions and rigidly executes recipes, be they time-honoured at some place or not, by accepting them as the only feasible means. BIBÓ-syndrome is today's simplifying continuation of a practice rooted in historical experience, by the way tragic at its time. In our case, this fetishises Western clichés and everyday Atlantic routine on constitutional democracy and the rule of law, by diminishing own initiatives, imagination, and active problem-solving. For before the 1948 conclusion of the Peace Treaty in Paris, ISTVÁN BIBÓ's writings[12] had this only suggestion for Hungary under Soviet occupation: in the terrible duel between "Socialism" and "Capitalism", the primary

12 ISTVÁN BIBÓ (1911–1979), once a philosopher of law, soon became a political and historical analyst, whose debate with the then STALINist GEORGE LUKÁCS on democracy in 1948 ended for him in complete dismissal of any positions. For his oeuvre, cf. *Die Schule von Szeged* Rechtsphilosophische Aufsätze von István Bibó, József Szabó und Tibor Vas, ed Csaba Varga (Budapest: Szent István Kiadó 2006), »István Bibó«, pp. 9–77 [Philosophiae Iuris], on the one hand, and by István Bibó, *Democracy, Revolution, Self-Determination* Selected Writings, ed. Károly Nagy, trans. András Boros-Kazai (New York: Columbia University Press 1991) xiii + 570 pp. [East European Monographs CCCXVII / Atlantic Studies on Society in Change 69] as well as *Die Miserie der osteuropäische Kleinstaaterei* trans. Béla Rásky (Franfurt am Main: Neue Kritik 1992) 140 pp. & *Misère des petits États d'Europe de l'Est* trans. György Kassai (Paris: L'Harmattan 1986, ²1993) 462 pp., on the other.

task of the nation is not to opt for either alternative or to commit herself for a Third Road, but to do her best in implanting political culture, and drafting political programmes after thorough considerations, so that a choice can be quietly done when timely.[13] BIBÓ could draw this only conclusion from the Communist push for power, and so could the next generation now from the actual horrors of the Communist rule. And the memory of all this may have been burnt into the conscience of the following generation to guide their moral responsibility now, when the time has come—by setting the rules of this new socio-political game—to formulate the exclusive primacy of constitutional democracy and the rule of law. Obviously, the job cannot be fulfilled by merely servile copying or making a fetish out of any foreign pattern. That would rather prove spiritual poverty, characteristic of those having doubts, who compensate them by narrowing (while rigidifying) the path of their original thought. In fact, nobody wants fetishisation, and it would also be unworthy of human conditions. On the other hand, we know about the Rule of Law that it is merely an ideal: developed historically in our European legal and political culture, it lies basically in the truth won for that all technicalities notwithstanding, the dignity of the human person will eventually be respected in the world of law. Thus, it implies tradition open towards the future—instead of anything established, completed, closed, and codified as to its means. It assumes our inclination towards continuously re-considering and re-starting issues, therefore it is not to be confused with the enervation of being absorbed by someone else's far-away daily routine. For, Rule of Law itself is a struggle: with stages, experiments, results, all which have to be recurrently re-achieved, and responses that defy fewer ambiguities than "inasmuch as", "more or less", "from this or that perspective". Except for borderline cases, rare in practice, the very nature of the Rule of Law resists to answers reducible to an exclusive "yes" or "no", simplifications of a MANIchean dichotomy. For the world of law is formalised. Legal adjudication can only be given in the well-defined unconditional formulas of either "yes" or "no" (e.g.:

13 For the first reconstruction of BIBÓ's thought in the above sense, see Zsolt Papp 'Társadalomelemzés és politika' [Social analysis and criticism] *Kritika* 1980/11, pp. 11–15.

"guilty / not guilty", "did steal / did not steal", "qualifies / does not qualify as the seizure or stealing of property"), including the entire conceptual class so qualified. This is why legal disputes can only be settled by a valid decision (i.e., a final, procedurally irrevocable response, resulting in *res adiudicata*), and not by abstract reasoning. Therefore, such undeserved and self-destructing situations may come about in the sphere of strict legality [*summum ius*, *summa iniuria*] in terms of which, for instance, a concrete proposal for avoiding bankruptcy of the entire national economy may qualify unconstitutional within the rather limited perspective of the law, while the same law has no word against the actual declaration of bankruptcy: against an outcome when the government, getting tired of the failures of transition management, is finally to give up and actually lead the country into bankruptcy. It is the unavoidable formalism in law that requires the balance when processing cases in a humane manner, with a touch of communitarianism, and without considering the letter of the law a fetish; for not even such dilemma should be formulated in such strainedness. Or, in ultimate analysis, the Rule of Law is a culture of reconciliation amongst conflicting values, public and individual interests, all in terms of human dignity. In conclusion, it ought to serve own responsible initiatives in solving problems in harmony with tradition, instead of being simply referred to as a pretext to despise public affairs by using it as a hammer, or to block attempts against headwind in the cheapest (but apparently noble) way.

(d) Between the West – and the West We live in an exceptional but strange era, now that we have come to finally face our own problems after the Soviet empire collapsed. Looking out from our Moscow-imposed misery, so far we have found a standard in the West, a pattern for our future evolvement, by hoping some strength therefrom with the promise of a moral backing. Now, with the Iron Curtain fallen, we are suddenly taken aback by the full sight revealing itself before our eyes. We can feel it more and more deeply even in our everyday lives now what that we have received (mainly through American mediation) as a ready-made recipe for a post-modern understanding of the world will actually mean under

present Hungarian conditions. Among others, the "deconstruction" of the elementary units forming the tissues of any society, the liberalising "liberation" from all community-related ties, the sheer presumption of the existence of an "invisible hand" in the chaos resulting from the complete lack of any regulation: all these being asserted as unquestionable truths, in which the only absolute can be the negation of anything absolute. What is left on the scene then? Various kinds of minority and otherness: feminism, homosexuality, lesbianism, sects, refusal of military service, the cult of whatever types of watch-organisations with fragmented vested interests, and so on.

Although, thanks to Central European archaism, we are still aware of the old knowledge: this is just the cult of fragmentation—instead of the respect for the whole, and without realising that law preconditions a community framework with well-balanced interests in which deprivals are continuously counter-balanced and disintegrating pretensions rejected. All in all, only respect for the community can elevate growing liberalisation into anything more than the sheer phraseology of nihilism. For whatever kind of liberalising efforts we strive after, its justification can only be drawn from the given historical contexture. For instance, the appalling heritage from the past in the United States may justify positive discrimination as the recompensation to previous racial hatred and segregation, subjugation of women, or violence pervading personal relationships. Therefore, sheer imitation without self-justifying historical analogies could only be a damaging fad.

For law is based on justice, preconditioning (even in its most formal understanding[14]) the essentially similar treatment of essentially similar situations. To conceptualise them, law has to operate through conceptual inclusion and exclusion. When issuing a norm, we aim at deviance, and deviant means being opposed to—

14 According to the already classical stand of Chaïm Perelman—*Justice et raison* (Bruxelles: Presses Universitaires de Bruxelles 1963), pp. 11–26 [Université Libre de Bruxelles: Travaux de la Faculté des Philosophie et Lettres XXV], reviewed by the present author in *Állam- és Jogtudomány* X (1969) 3, pp. 441–443—, justice can only be formal and therefore identical with the demand to equality.

by defying—something. Whereas "otherness", according to any acceptable meaning, is not negation but cultural variety—among sets of thoughts, ideals and behaviours, the individual components of which are not inferior to but less widespread or more insecure than the others.

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4. Brave New Start with Tradition Left Behind

Too much ambition in legal borrowing is not only dangerous but risky as well. In history, most of the experiments have eventually been rejected as "fantasy-laws"[15] or become fully integrated into local contexture centuries after.

What is specific in our transition-process after all? It is mostly perhaps that (a) it has exerted an exclusively liberalising effect so far, (b) in want of established conventions, its reforming purport could only materialise through causing damage to the community, while (c) direct interference with local social processes was mainly partial, conducted for own sake, without being placed into any systematic overall plan with communitarian dimensions.

What can be found in the background of all this? First of all, a rather limited understanding of the Rule of Law, conceptualised as if it were the embodiment of the Ten Commandments, once given to Moses as carved into a piece of stone on the Mount of Sinai. Yet, Rule of Law is not a ready-made end-product but a lasting endeavour. It is not a godly gift granted for once and for all but continuous cultural effort at serving human dignity also by law. It is neither finished, nor rounded. It reflects challenges to which nations with classical history happened to afford tentative answers under by-gone conditions in response to their own time and conditions. Therefore in our search for the Rule of Law, we can only find past local initiatives, particular to the needs felt at their time in England, North America, the Netherlands, France, Germany or Italy, from behind the adorning veal of subsequent abstraction and

15 *'lois de phantasie'*, as used by Jacques Vanderlinden in his *Introduction au droit de l'Éthiopie moderne* (Paris: Librarie Générale de Droit et de Jurispruence 1971) 386 pp. [Bibliothèque africaine et malgache 10].

conceptual generalisation. That part of the rule of law and human rights which later on has become integrated into one common body with compulsory force is now international law. All this is to say that there is no other rule of law than the one characterisable exclusively by sheer tradition, endeavour, and partial results—on behalf of nations that tried to answer own questions on their own way within the framework of own particular experience. Therefore, when talking about rule of law we do generalise particularities which have been asserted in given space and time. As it is known, the idea of the Rule of Law has once been formulated in Western Europe under conditions differing from the ones now in Central and Eastern Europe. Gaplessly organic and balanced development, characteristic of the West, assisted the rising bourgeois middle classes in occupying a position favourable to shaping society through building those institutions of *societas civil* which could become the motive power of social dynamics with continuous internal development. Checks and balances were thereby created, with agents of initiation from within. For Rule of Law does not tolerate revolutionary endeavours, radical change or intention of disruption. It is not revolution but evolution that stands behind as subtle adjustment, therefore everyday compromises are characteristic of it. This is why it is high time to us to implant the rules of the actual social and political game so that such an outcome can be achieved. In order to do it, we need to clarify who we are, where we stand, what our gifts are, and what we want—in both the short and the long run. Starting from our own culture, tradition and experience in how to resolve and settle conflicts, we can only determine subsequently what and how we should learn and what we need to continue. As to those questions unanswered so far (which happened not to be risen or not in a comparable way in the historical cultures once having patterned the Rule of Law), we obviously have to search for answers within the general ethos and framework of what is known to be the varying cultures of the Rule of Law.[16]

16 Cf., as a cry for an all-societal care for building up a proper culture in the background, e.g., *Драма российского закона* [Drama of the Russian law] ed. В. П. Казимирчук (Moscow: Юридического Книга 1996) 143 pp.; Ewa Łętowska & Janusz Łętowski *Poland*

'Democracy', 'constitutionalism', and 'rule of law'—all these are words in themselves, that is, indications for a culture incorporated by historical answers, born locally at given particular place and time. This culture is continuous as suitable to serve human dignity also under modern and post-modern conditions. Therefore it demands value-assertion, devotion as well as modesty, by promising also long-term application under changing conditions. It can never be finished. Each and every new answer to it gives a new life to it. Instead—and, properly speaking, in lack—of any casuistics by a codified set of rules, it offers a cultural framework within which, when faced with new challenges, we can safely build on grounds inspired by its own tradition. So, it counts on active social participation. If we prove to be short of ideas and resort to servile copying, it is only ourselves that can be blamed. For in own initiatives, too, we have to rely upon own efforts and creative innovation.

Towards to the Rule of Law (Warsaw: Wydawnictwo Naukowe Scholar 1996) 176 pp. [Institute of Legal Studies of the Polish Academy of Sciences]; *Kiáltás gyakorlatiasságért a jogállami átmenetben* [Cry for practicality in the transition to rule of law] ed. Csaba Varga (Budapest: [AKAPrint] 1998) 122 pp. [A Windsor Klub könyvei II]. For a marked contrast, cf. also Jacek Kurczewski *The Resurrection of Rights in Poland* (Oxford: Clarendon Press 1993) xxi + 462 pp. [Oxford Socio-legal Studies].

Csaba Varga

LEGAL SCHOLARSHIP AT THE THRESHOLD OF A NEW MILLENNIUM
in the Central and Eastern European Region*

In a rather sensible position to start lecturing, this very presentation will focus on my embarrassment at the realisation that Central and Eastern Europe is in the process of dramatic change with Western Europe and the entire Atlantic hemisphere in the course of more dramatic a change. Obviously, there is a latent contradiction in such an embarrassment by simultaneously ascertaining that both parts of Europe run now one of the most promising success stories of their overall history. As it will be revealed in the paper, however, both are running their courses as permeated by universalism, a-historicism and over-rationalism, all standing for the growing sense of groundlessness and rootlessness in their backing cultures, by also negating our best self-defending conclusion drawn from MARXism as preserved from the time of Socialism, namely, historicity with respect to particularity. Then, what will cement and substantiate our future? My tentative answer within the framework of scholarship will be given in terms of suggesting to learn from the own past by grounding our theorising anew again.

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* Originally drafted as a festive speech at the session organised by the Institute for Legal Studies of the Hungarian Academy of Sciences on the very first occasion—on 4 November 1997—to commemorate the Day of Hungarian Scholarship. First published in English as 'Legal Scholarship at the Threshold of a New Millennium (For Transition to Rule of Law in the Central and Eastern European Region)' *Acta Juridica Hungarica* 42 (2001) 3–4, pp. 181–201 & <http://www.ingentaconnect.com/content/klu/ajuh/2001/00000042/F0020003/00400027>, & in *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot) = *Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn, pp. 515–531, and as 'Legal Scholarship at the Threshold of a New Millennium' in *Šiuolaikine filosofija* Globalizacijos amius [Contemporary philosophy: age of globalization] Monografija, red. Jurate Morkuniene (Vilnius: Lietuvos Teises Universitetas 2004), ch. V para. 3, pp. 287–307.

(Naivety from the Beginning) It is nearly unavoidable nowadays to start concluding anything without mentioning the cardinal facts of the political system change. Thus, some established claims may come to our minds, such as rule of law, human rights, pluralist constitutional parliamentary democracy, and so on. All these are also expressed by the need to re-define certain directions and subjects of legal scholarship: constitutional law, in place of 'law of the state'; public administration, with a more substantive meaning than sheer 'state administration', human rights, as eventually expressing more serious a care, and so on.[1]

The balance of Socialist legal scholarship is yet to be drawn up. Although we in Hungary might not have any reason to be ashamed of it, still less to reject it—it did its job as it could, becoming widely known as the exemplary workshop of the Socialist world, winning the attention of Western scholarship due to the professionally high level of its monographic elaborations and conceptual analyses, comparative outlook and sensibility to history—, yet, the entire range of its offerings were obviously born within its own medium, that is, within spiritual horizons drawn by contemporary battles against some Eastern demigods imposed upon it. No matter how creative Socialist jurisprudence may have been in adapting to the environment of its time, what it could display later on, in an entirely new spiritual neighbourhood, might prove distorted and one-sided. Thus, our legal scholarship yearns for theoretical foundations, preconditioning reconsiderations, by extending its interest on politico-philosophical deep structures within the overall constitutional framework, as substantiated by the contemporary presumptions and requirements of social sciences.[2] Naturally, we could have foreseen this earlier, at a time when no one would have dreamt about the subsequent collapse of the Soviet Empire and Western *Realpolitik*. However, consecutive to the

1 For the variety of aspects and particular features of the transition process in Hungary and the entire Central and Eastern European region, cf., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE Project on "Comparative Legal Cultures" 1995), 190 pp. [Philosophiae Iuris].

2 As to some pre-modern science-philosophical presuppositions of MARXism as confronted with the present stand of sciences, cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) 279 pp., especially para. 4.2.1, pp. 118–121 [Philosophiae Iuris].

changes, a considerable number of previously known facts struck us as new. For even if we were able to collect deep impressions on the everyday life of Western societies during repeated visits to their countries, the objectiveness and sharpness of our sight was still altered by an unintentional over-optimisation of our enemy's enemy. We may confess it today that, although unexpressed, yet we may have seen them as the embodiment of some ideals or utopianistic dreams, rather than the living carriers of patterned practices to be restarted by us in our everyday life practically from the scratch, in order to be repeatedly reassumed despite daily failures and hindrances—necessary to beginning from the very beginning. We were sensible and responsive to the fulfilment of the values denied to us there and then, instead of perhaps questioning the principles and ethos behind the apparently pleasant manifestations of the respective scene newly opened to the visitor, by inquiring about the sufficiency of their merely formal implementation or even the danger of their subsequent internal emptying.

Despite clear warnings,[3] we hardly noticed that Western legal orders which we had respected as the standards of normality were in the meantime undergoing a change in paradigms with social processes being growingly channelled towards a juridified path, while abandoning traditional legal positivism by taking the stand of a new, militant kind of social engineering, in which the jurist could take the role of a mediator at the most. At the same time, in the Western hemisphere the fora and the procedures requiring a judicial decision multiplied and increasingly became subject to the merciless rule of supra-national principles, decision-making bodies and pressure groups, to an extent that the outside observer might recognise, even in the slightest change of law, the sheer (internal) enforcement of some (external) pressure.[4]

3 For the most conspicuous examples, see Roberto Mangabeira Unger *Law in Modern Society* Toward a Criticism of Social Theory (New York & London: The Free Press 1976) ix + 309 pp. as well as Philippe Nonet & Philip Selznick *Law and Society in Transition* Toward Responsive Law (New York: Harper & Row 1978) vi + 122 pp. [Colophon Books], reviewed by the present author in 'Átalakulóban a jog?' *Állam- és Jogtudomány* XXIII (1980) 4, pp. 670–680.

4 For an overview of the contradictions emerging from the sectoral over-fulfilment of the institutional expectations towards the rule of law and leading thereby inexorably to a kind of

The system change and the gradual recognition of the very laws that actually govern the events in the outside world came as two processes mutually supporting one another. For the urge for overall reconsideration of our actual situation only strengthened the effects of the realisation of the changes gaining ground in the outworld and the consequences thereof.

Nevertheless, our foresight[5] turned out to be rather limited. At the dramatic time of transition, we construed our position in the following way: we are facing a learning process which we are expected to embark on with open hearts. As to my own stand, I arrived at a rather shocking and radical conviction according to which it is not simply a few unproved and unprovable theses from MARXism as a Socialist legacy that are present to draw us back to the past but the entire intellectual outworn structure upon which its approach, ethos, methodology and scientific-philosophical outlook were based. For each of us can easily deny or neglect any thesis at will, but the approach and presuppositions underlying MARXism could hardly be left behind without denying our former intellectual self or surpassing our previous inclinations.

One can realise now how naive we were to believe so persistently that the difficulties we had were the only ones. Although, as soon as we started to breath the same air with the European and Atlantic world, which let us down some half a century ago, a different picture began to take shape, far more complex than our former expectations. By now, the face of the surrounding brave new world has started slowly to show familiar features, reminiscent of our surpassed Soviet world: rational arrogance, enlightened utopianism, world-saving universal panacea—that is, all-curing patterns reminding of the French 18th century in the minds and the rule of abstract principles in practice.

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practical anarchy, cf., by the author, 'Rule of Law: Imperfectly Realised, or Perfected without Realisation' in the present volume and 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* [Mankind adrift] ed. Katalin Mezey (Budapest: Széphalom Könyvműhely [2000]), pp. 61–93, as well as 'Rule of Law – At the Crossroads of Challenges' also in this volume.

5 Cf., by the author, 'Trumbling Steps of the New Constitutional State: Everyday Constitutional Process' & 'Question Marks of Local Legal Tradition' in his *Transition to Rule of Law* [note 1], pp. 78–89.

And these are coming to us from the opposite direction this time. Their omni-present predominance, crushing theoretical arguments and self-imposing confidence (through a veritable army of experts and aid-programmes mobilised for us to be "civilised") can not only push the relevance of local practical experience once again into the background but, as a result of continuous pressure, even the scepticism, compulsory in scholarship, can be silenced for a while at least as well.[6]

Only wisdom may suggest that self-confident certainties often hide deep internal uncertainty. Indeed, nothing else can be taken for granted under currently changing conditions. For we may state[7] that both our actions and their theoretical backing have for a decade been pervaded by

(1) intellectual unpreparedness (notwithstanding the apparent certainty of measures still enforced in practice),

(2) blindness and miracle-expectation (through interventions imposed as a *deus ex machina*, hardly becoming the organic part of the overall process),

(3) the so-called BIBÓ-syndrome (that is, the attitude which, having experienced dictatorship bitterly, approves spasmodically and uncritically of every principle and procedure opposed to its gaining ground anew—even if the present lack of our ability to keep distance cool-mindedly would actually lead to some sort of practical anarchy),[8] and, finally,

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6 From the enriching literature, cf., first of all, Paul H. Brietzke 'Designing the Legal Frameworks for Markets in Eastern Europe' *The Transnational Lawyer* 7 (1994), pp. 35–63 as well as, by Gianmaria Ajani, 'La circulation des modèles juridiques dans le droit post-socialiste' *Revue internationale du Droit comparé* 46 (1994), pp. 1087–1105 & 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' *The American Journal of Comparative Law* XLIII (Winter 1995), pp. 93–117.

7 See, by the author, 'Radical Change and Unbalance of Law in a Central Europe under the Rule of Myths, not of Law' in the present volume.

8 ISTVÁN BIBÓ (1911–1979), philosopher of law and political essayist, was firstly silenced after the Communists took over in 1948, then imprisoned as the last Secretary of State in IMRE NAGY's government on duty when the Soviet invasion reached his office in the Parliament's building on 4 November 1956. Cf. his *Democracy, Revolution, Self-Determination* Selected Writings, ed. Károly Nagy, trans. András Boros-Kazai (New York: Columbia University Press 1991) xiii + 578 pp. [East European Monographs 317 & Atlantic Studies on Society in Change 69].

(4) the trap of choosing between the West – and the West (without any further consideration and reflection, due to the categorical imposition of quasi-axiomatic patterns).

The aim is by far not to take an attitude of scepticism questioning the results (maybe provisional, yet surely influencing our shifting points for the future) of these processes of accelerated change. Notwithstanding all these, we ought to understand (through establishing the fact and thinking its consequences over) that scholarship fails to fulfil its foremost task, that is, reflection, if it accepts the unreflected realisation of sheerly imported patterns. Thus, if a situation arises in which abstract principles, derived by others under different conditions at some distant time, are granted continuous priority over local experience and everyday knowledge, even the relatively best and, indeed, lasting message of all the humanities (including our past MARXism), namely, historicity might be betrayed. For no matter how contented we are to have universal principles declared and accepted, we should not forget that even the most global ideas with universal principles behind them were initially born under historically particular conditions to answer historically particular challenges in practice.[9]

Therefore, it is high time to put the question: is our scholarship truly prepared to make a survey of reality? Does it have the empathy, the ethos of service and the humbleness to speak on the basis and in the interest of such a survey of reality? Or, is it conceivable that all our naming and sets of concepts, our entire thinking and problem-sensibility, moreover, the thought pattern itself within the framework of which we raise our questions, are—in terms of methodology—eventually nothing but projections of Western thinking, that is, as to their origin and evolvement, products of differing cultures and life-conditions, experience and ideals, as well as expectations?

Obviously, it would be rather silly to search for any hidden justification of any opinion in the very process of inquiry. History

9 Cf., by the author, 'Law and History: On the Historical Approach to Law' in *Historical Jurisprudence* ed. József Szabadfalvy (Budapest: [Osiris] 2000), pp. 280–285 [Philosophiae Iuris].

as *magister vitae* speaks of the obligatory respect for everything what medieval and modern scholars could suggest for Europe in their metaphorical explanation on the functioning of both the universe and human society after the mechanical clockwork had been invented: 'brakes', 'checks & balances', 'demand & supply', 'feedback', and also *prudentia*. That is, humanely organised life is composed of nothing but continuous balancing, mutuality, and co-efficiency.[10] This was of course true there and then for God's world. Our present problem is different by its structure. In a set in which each component is evolving individually, their contact being slow and incidental—well, may we start the description of the whole from a self-imposing self-characterisation, calling itself (even if only in a world-economic sense) 'the centre', and its environment, just simply 'the periphery'? When admitting the facts of the global village, do we also undertake the gesture of unscrupulously expanding the centre's otherwise existing (political and financial, economic and social) hegemony into a scientific monopoly? I think that at the time when MARXism was instituted as a substitute religion in the Central and Eastern European region, our scholarship fought enough with fake universalisms and uncovered extrapolations so that now, when new temptations challenge us from a different direction, we should be able to know how we can fight them.

Do we own the resources, independence, and strong past so that when, having to choose between patterns in peripeteic times, with old conventions already outdated and the new ones not born yet, we can make the choice with the certainty of a thought carefully thought through?

Our faltering steps and over-certainties (implying uncertainty) might make us feel like babies over and over, starting everything from the scratch under new conditions, without making use of the experience of past generations and our earlier self. This can hardly satisfy us, and our scholarly past does not imply this either. It is only a side effect that a number of former products of

10 See Otto Mayr *Authority, Liberty and Automatic Machinery in Early Modern Europe* (Baltimore & London: Johns Hopkins University Press 1986) xviii + 265 pp. Cf. also, by the author, *Lectures on the Paradigms* [note 2], para. 2.3.3, pp. 83–97.

Socialist scholarship, especially legal sociology and ontology,[11] will be subsequently glorified by such a comparison. For in today's perspective, they could display a more exalted, responsible and responsive, rational and satisfying behavioural pattern and scholarly ethos, *sine ira et studio* proven in theory—as opposed to most of the fashionable (i.e., mainstream) ideals of the present era.

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If scholarship intends to take part in realising today's tasks and aims at participating in defining potentialities in development including also their day-to-day implementation, some further considerations should also be taken into account.

1. (The Limits of Law-modernisation) First of all, we must continue to proceed on on the path of our scholarly past. Scholarship ought to form opinions only by building on reliable philosophical grounds, supported by socio-theory and macro-sociology, taking the historical experience and traditional values of the own nation into account.

Our scholarship already warned us to be cautious under Socialist conditions in relation to modernisationist legal reforms. In its relevant manifestations, it consistently

(a) emphasised the framework-creating nature of the otherwise prevailing social normativity and its primordial role in determining social processes;

(b) put the possibility and demand of organicity (i.e., suitability to get interiorised, instead of being imposed

11 As to a legal philosophical foundation, see KÁLMÁN KULCSÁR's sociological studies on modernisation through the law as well as the message of GEORGE LUKÁCS' posthumous *Ontology of the Social Being* on the irreversibility of the effects of institutionalised social acts, on the one hand, and the preservative significance of communitarian memory, on the other. For the former, cf. Kálmán Kulcsár *Modernization and Law* (Budapest: Akadémiai Kiadó 1992) 282 pp., and for the latter, by the present author, *The Place of Law in Lukács' World Concept* [1981] (Budapest: Akadémiai Kiadó 1985, reprint 1999) 193 pp., especially ch. VI as well as 'Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács' Ontology)' *Rivista Internazionale di Filosofia del Diritto* LX (1983) 1, pp. 127–142, reprinted in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE Project on "Comparative Legal Cultures" 1994), pp. 375–390 [Philosophiae Iuris].

upon externally as a mere artefact) at every step in the limelight;

(c) rejected presuming that elitist actions initiated to influence the overall social movement (by means of political stands, legal decisions and press campaigns) can be plannably effective with lasting effects on the long run. Therefore, it treated regulatory intervention in law and through the law as primarily a symbolic confirmation and sanctioning of the direction movements otherwise ongoing (organised or spontaneous) were taking;

(d) warned of the damages caused by any adventurous (utopianistic, uncovered, unserious or fake-reform) policy in that they are bound not only to fail but also to necessarily discredit even the idea of change itself, by destroying the prestige of the state's legal instrumentalities. Therefore, as the utmost consequence, it

(e) kept asserting the priority of a systematically planned, consistent, convincing, pragmatic and all-comprehensive social programme, as opposed to the temptations by world-curing intentions, exhausted in limited elitist group-actions, involving the risk of sudden pressing forward in alternation with quick tiring, supported solely by intellectual arguments.

2. (The Need of Scholarly Reconsideration) As a consequence of the fortunate changes in our conditions, the new undertaking of Europeanism gives our scholarship a reformatory task in laying theoretical foundations and providing methodological clarification, revealing also its hidden presuppositions. Some preparatory work has already started on the law's terrain but, being the "first sparrows", we may speak of them only as of temporary ones.

Although the goal is not only to reformulate scientific-philosophical and methodological presuppositions, we have to critically survey the new results born in the Western world subsequent to WWII, rethinking their exploitable trends and filtering them through the tradition inherent in our domestic

scholarship. We must consider reconstruction from the philosophical, socio-theoretical, historical and comparative foundations in both public and private, criminal and economic laws, involving their respective procedural schemes and even interstate legal orders, which task must obviously be complemented by the rebuilding of the entire legal-conceptual system (from the very bases of law to sectoral legal dogmatics), never performed before. We must also pay our debts to the theoretical-legal scholarship of the local past, discontinued and neglected for more than half a century.[12] We have to reconsider the genuine bases of both *Staatslehre* and constitutional theory. We should be able to reformulate the law of interdisciplinary areas, thus the legally justifiable demands of policing, national security, national defence, as well as the ways of how to handle with emergency and exceptional situations. We ought to provide scholarly backing to practical tasks, for instance, legislation. We also must reconsider the relationship between law and morality, as well as the ethics of the legal profession, and other areas in legal practicing.

12 Cf., from Hungary, e.g., Sándor Loss [et al.] *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből* [Portrait-sketches from the history of Hungarian legal philosophical thought] Pulszky, Pikler, Somló, Moór, Horváth, Bibó (Miskolc: Bíbor Kiadó 1995) 310 pp. [Prudentia Iuris 3]; Bódog Somló *Jogbölcsészet* [Felix Somló: Juristische Grundlehre, self-trans. {1917}] ed. Péter Takács (Miskolc: Bíbor Kiadó 1995) 160 pp. [Prudentia Iuris 1]; Felix Somló *Schriften zur Rechtsphilosophie* ed. Csaba Varga (Budapest: Akadémiai Kiadó 1999) xx + 114 pp. [Philosophiae Iuris]; József Szabadfalvi *Moór Gyula* Egy XX. századi magyar jogfilozófus pályaképe [Julius Moór: The oeuvre of a 20th century Hungarian legal philosopher] (Budapest: Osiris-Századvég 1994) 199 pp. [Jogtörténet]; Julius Moór *Schriften zur Rechtsphilosophie* ed. Csaba Varga (Budapest: Szent István Társulat 2006) xxii + 485 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Bibliotheca Iuridica: Opera Classica 3]; by Barna Horváth, *A géniusz pere* [The trial of the genius] [1942] 2nd ed. (Budapest: Pallas–Attractor 2003) 264 pp. [Bibliotheca Juridica] and *Az angol jogelmélet* [English legal theory] [1943] 2nd ed. (Budapest: Pallas–Attractor 2001) 616 pp. [Bibliotheca Juridica] as well as *The Bases of Law* [1948] ed. Csaba Varga, append. István H. Szilágyi (Budapest: Szent István Társulat 2006) liii + 94 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae Iuris / Jogfilozófiák]; by István Losonczy, *Abriß eines realistischen rechtsphilosophischen Systems* [1948] ed. Csaba Varga (Budapest: Szent István Társulat 2002) 144 pp. [Philosophiae Iuris] & *Jogfilozófiai előadásainak vázlata* [Outlines of lectures in legal philosophy] [1948] ed. Csaba Varga (Budapest: Szent István Társulat 2002) xvi + 282 pp. [Jogfilozófiák]; *Die Schule von Szeged* Rechtsphilosophische Schriften von István Bibó, József Szabó und Tibor Vas, ed. Csaba Varga (Budapest: Szent István Társulat 2006) 246 pp. [Philosophiae Iuris: Excerpta Historica Philosophiae Hungaricae].

3. (Rebuilding the Social Contexture of Law) The general demand to re-found scholarship cannot make us forget about the compelling necessity of revealing some timely social problems. For in a process of system change, some things cease to exist, their place to be taken by others, but new unbalances are also born as by-products. The one-sided and distorted things of Socialism are thereby getting replaced by other one-sided and distorted outcomes.

The foundational principles of community organisation (with keywords in Western laws such as 'public interest', 'public order', 'public security', as well as 'national security' and 'national defence') have all been shaken and finally emptied by political and media intellectuals, moreover, by a widening strata of population as well, for they can hardly offer a call-word any longer if they degenerate to depend merely on opinion and personal preference. The rich Western literature expressing communitarian concerns and assertion of interests[13] has had almost no echo in our part of the world whatsoever.

The previous balance between rights and duties has been broken. The law of the Western hemisphere has recently been deprived of its moral support. The political elite, entrepreneurs, tax-payers, minorities conscious only in demanding, furthermore, even criminals remember only the pieces of regulation that meet their particular interests. Shamefully, neither lawmakers nor law-administrators do support the overall achievement of law and order but, following some prevailing trends, they concentrate on detached elements. There is no extensive social policy, nor a uniform legal policy. National legal protection and interest safeguarding activity do not consider it as own task to assume these. Furthermore, press publicism, substituting the scholarship numb in these matters, usually strengthens the tendencies of disintegration without providing theoretical explanation.

13 See, e.g., as a classic Hungarian foundation born in emigration, by Vera Bolgár, 'The Public Interest: A Jurisprudential and Comparative Overview of the Symposium on Fundamental Concepts of Public Law' *Journal of Public Law* 12 (1963) 1, pp. 13–52, 'L'intérèt général dans la théorie et dans la pratique' *Revue internationale de droit comparé* XVII (1965) 2, pp. 329–363, as well as 'The Concept of Public Welfare: An Historical-comparative Essay' *The American Journal of Comparative Law* 8 (1959) 1, pp. 44–71, 'The Magic of Property and Public Welfare' *Inter-American Law Review* II (1960), pp. 283–316 and 'The Magic of Freedom' in *XX*th *Century Comparative and Conflicts Law* Legal Essays in Honor of Hessel E. Yntema (Leyden: Sythoff 1961), pp. 453–462.

The idea of human rights, once created as an ideology to restrict arbitrary power by setting limits to authoritative action, has, through their extensive positivation, turned into a multi-faceted and multi-functional weapon, under the banner of which individuals' battles against each other or the state (by this time made a public enemy by these fighting groups) can be fought successfully. At the time of its conception, the idea of human rights had served for social integration through raising the oppressed, but today one can already use it also for disintegration and self-deconstruction. At a time when rights were scarce, scholarship in criticism of totalitarianism was rather busy to condemn the alleged over-assertion and abuse of rights. At present times, built upon the extension and rather aggressive assertion of abstract constitutional principles (taken in short-cut as rights), legal scholarship keeps on stubbornly silent (despite the fact that the principle of *summum ius*, *summa iniuria* was, already back in ancient times, used to emphasise the virtue of soundness).[14]

4. (Following Alien Patterns) In the meantime, the contradiction wedging Socialism from inside was replaced by another contradiction wedging it again from inside, and this is nonetheless problematic.

Up to the nearest past, in Socialism, according to its official ideology, jurisprudence was still dominated by rule-positivism, with the rule of brute facts only complementing it. Accordingly—and reminding somewhat of the dual-structure institutionalisation of law and order under the regime of National Socialism[15]—, the enforcement of own interests could go on freely (with brutal force, through unlawful interference with or even by silencing the law), while in neutral areas of mass application the petty-minded rule of regulations prevailed. In contrast, today's worldwide practice is dominated by abstract principles, somewhat balanced out by

14 Recognising the destructive effects of the boundless yearn for justice is one of the basic features of early legal cultures. For the anthropological treatment of *shalom* in Jewish and Islamic legal cultures as well as of the Chinese and Japanese ideals of law, including *Michael Kohlhaas*' story by HEINRICH VON KLEIST, cf., by the author, *Lectures on the Paradigms* [note 2], para. 2.3.1.8, especially at pp. 169 et seq.

15 Cf. Ernst Fraenkel *The Dual State* A Contribution to the Theory of Dictatorship, trans. E. A. Shils (New York: Oxford University Press 1941) xvi + 248 pp.

the rule of facts.[16] For law has come to overwhelming predominance, becoming the mastering power of this entire autonomous social sub-system. Yet, it became emptied of moral support and sterilised into a sheerly procedural pattern, offering nothing but a juridified framework for the individuals' free competition and subordination games. The result is some sort of anarchy under the cover of all-encompassing rationalisation.[17] Freely available rights can now easily be torn to pieces and scattered in all directions by those most capable of self-assertion. Both avoiding and abusing the law have turned into a pattern rewarded by society, without limits as to its misuse or over-use. No scholarly voice speaks of the ones who have broken the law and gain rights notwithstanding, for instance, by humiliating repeatedly their past victims through the privileges the new rule-of-law conditions grant to them by reinforcing the criminal regime's statutory limitations and, thereby, the legality of past totalitarianism (as the *sine qua non* of a so called 'constitutional' criminal law construed by Hungarian constitutional justices).[18] "Nobody can profit from his wrong!"—the legal maxim once commonly accepted during the "dark age" of Europe seems to be already doomed to the trash-bin by new conditions.

In Socialism, at least the regulation was somewhat own: the product of the own Parliament, the expression of the own autocracy. Ever since there has been a flood of new fashion products, invented by others some other time, under some other conditions in

16 Cf., by the author, 'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44 & <http://www.akademiai.com/content/x39m7w4371341671/?p=056215b52c56447c8f9631a8d8baada3&pi=1> & <http://www.akademiai.com/content/x39m7w4371341671/fulltext.pdf>.

17 Cf., e.g., by Pierre Schlag, *Laying Down the Law* Mysticism, Fetishism, and the American Legal Mind (New York: The New York University Press 1996) x + 195 pp. and *The Enchantment of Reason* (Durham: Duke University Press 1998) 176 pp., as well as P. F. Campos *Jurismania* The Madness of American Law (New York & Oxford: Oxford University Press 1998) xi + 198 pp., reviewed by the present author as 'Joguralom? Jogmánia? Ésszerűség és anarchia határmezsgyéjén Amerikában' [Rule of law? mania of law? the encounter of rationality and anarchy in America] *Valóság* XLV (2002) 9, pp. 1–10 & <http://www.valosagonline.hu/index.php?oldal=cikk&cazon=326&lap=0>.

18 Cf. *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub könyvei II].

another environment, yet imposed upon us ready-made, without any adaptation whatsoever.

We must be aware that there has always been legal transplantation, and what we are concerned about today is only the silence of scholarship, maintaining the illusion of not encountering any problems. What is added to it today in our respective regions is a loss of conventions, with a process of self-emptying. For changes have occurred so unexpectedly and stormily, and happened without any commonality in action and conviction, that they could neither generate any organic process, nor build out proper foundations nor be supported by established principles of organisation.

Therefore, it is no surprise if no social order is created either from isolated actions running against each other, mutually weakening or neutralising each other's effects—not becoming an organic entity as a common order of values embodied by coherent practice (beyond meeting the requirements of one single formal procedural rule, namely, all of them being issued by a pluralist constitutional parliamentary democracy)—, or from various manifestations of the law (statutes, judicial decisions, local governmental decisions, commissioners' standpoints, *ombudsman* opinions, or procedures lost in the maze of endless processual relevancies), pushed through by Parliament debates and outside pressure. If law-enforcement is not secure and foreseeable, the outcome can only be practical anarchy under the aegis of an alleged rule of law.

Obviously, these are all professional issues: questions of the unity of social and legal order, of legal coherence[19] and, at the same time (and this makes it particularly interesting here and now from a theoretical point of view), ones of conventionalisation as well. Nevertheless, researches in legal sociology, philosophy and methodology have supported it clearly even in Socialist times that

(a) the relative independence of law can only be asserted with the previous acceptance of the universal and

19 Cf., e.g., Kálmán Kulcsár 'A konzisztencia problémája a jogi rendszerben' [The problem of consistency in the legal system] in his *Gazdaság – társadalom – jog* [Economics, society, law] (Budapest: Közgazdasági és Jogi Könyvkiadó 1982), pp. 123–139.

homogeneous applicability of its technicality.[20] Filling it with any contents or actually making use of it can only be done on the exclusive ground of established social practice as part of the realm of general social values and conceptualisation, sensibility and tradition, culture and learned abilities, thus sharing somewhat its fate.[21] Therefore,

(b) in the medium of the social normativity prevailing anyhow in the last resort, the official sources of the law as its most spectacular components are nothing more than tips of icebergs, which can only indicate any reasonable (interpretable) direction together with further and mostly informal components of legal functioning. Legal professionals' morals, ethos, willingness and skill to work, professional style, public conviction built upon prevailing doctrines, and the ways to proceed on, if at all, within the framework of reasonable and officially acceptable procedure(s)—well, all these may crucially shape practice which, according to its underlying

20 This is equivalent to the law's autopoietic self-reproduction, that is, to the binary response of 'lawful' and 'unlawful' or the bipolar formalism of exclusive options between 'yes' and 'no' (which I have once described as the MANIchean negation of dialectic). Cf., for the former, Niklas Luhmann 'The Coding of the Legal System' (Florence: European University Institute 1985) 63 pp. [EUI Colloquium Papers, Doc. IUE 342/85, Col. 94] as well as, by the present author, 'Judicial Reproduction of the Law in an Autopoietical System?' [abstract] in *Law, Culture, Science and Technology* In Furtherance of Cross-cultural Understanding (Kobe 1987), pp. 200–202, and [text] in *Technischer Imperativ und Legitimationskrise des Rechts* ed. Werner Krawietz, Antonio A. Martino & Kenneth I. Winston (Berlin: Duncker & Humblot 1991), pp. 305–313 [Rechtstheorie, Beiheft 11] and in the author's *Theory of the Judicial Process* The Establishment of Facts [1992] (Budapest: Akadémiai Kiadó 1995) 193 p., especially para. 5.4.1 at pp. 157–161, and, for the latter, by the author, 'Legal Logic and the Internal Contradiction of Law' in *Informationstechnik in der juristischen Realität* Aktuelle Fragen zur Rechtsinformatik 2004, ed. Erich Schweighofer, Doris Liebwald, Günther Kreuzbauer & Thomas Menzel (Wien: Verlag Österreich 2004), pp. 49–56 [Schriftenreihe Rechtsinformatik 9].

21 Cf., by the author, 'Comparative Legal Cultures: Attempts at Conceptualisation' *Acta Juridica Hungarica* 38 (1997) 1–2, pp. 53–63—in its first version as a comment in *Changing Legal Cultures* ed. Johannes Feest & Erhard Blankenburg (Oñati: International Institute for the Sociology of Law 1997), pp. 207–217 [Oñati Pre-publications–2]—, and, for a wider selection of examples, *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996) xviii + 567 pp. [Tempus Textbook Series on European Law and European Legal Cultures I].

ideology, can be established exclusively from and as materialisation of the law's official sources.[22] As a result,

(c) despite the fact that the casual steps of legislation give a boost to legal development, the medium and contexture in which law gets applied in practice is still composed from a huge mass of conventionalisations. Commonly shared behaviour assisting to the law's actual implementation, formation of tacit agreements and actually enforced customary ways providing an organising force even in lack of laws, as well as the legitimising effect of professional and social consent standing behind them—all these allow us to state: there is, for instance, constitution in England, although not a written one, and the legal status of the Queen is clear, although not posited; and, for the same reason, we may realise that, for instance, within the same formal setting, legal practice has undergone a change in direction (let us say, in case of divorce unequally for the parental genders).[23] Consequently,

(d) when this substrate is hurt and turns to be incapable of fulfilling its conventionalising job to standardise everyday

22 Cf., on the logical necessity of implied presuppositions, by Leszek Nowak, *Próba metodologicznej charakterystyki prawoznawstwa* [Methodological essay on the nature of legal knowledge] (Poznań 1968) 205 pp. [Uniwersytet im. Adama Mickiewicza w Poznańiu — Prace wydziału prawa 38] and 'De la rationalité du législateur comme élément de l'interprétation juridique' in *Études de logique juridique* III, publ. Chaïm Perelman (Brussels: Bruylant 1969), pp. 65–86 [Centre Nationale de Recherches de Logique]; on interrelations between the social and the legal, Kálmán Kulcsár *Jogszociológia* [Legal sociology] (Budapest: Kulturtrade 1997), ch. VII, pp. 259–287, as well as, by the present author, 'Logic of Law and Judicial Activity: A Gap between Ideals, Reality, and Future Perspectives' in *Legal Development and Comparative Law* ed. Zoltán Péteri & Vanda Lamm (Budapest: Akadémiai Kiadó 1981), pp. 45–76 (and also in his *Law and Philosophy* [note 11], pp. 257–288).

23 Regarding its ultimate effects at deteriorating the law's own prestige, the situation is the same if constraining considerations taken from the outside are used for competing with and also eventually replacing the law as, for instance, the variable yet strictly enforced set of requirements (restricting the freedom of thought, speech and education) of political correctness does in the disciplinary practice of the American orders of profession (in media, *academia* and *universitas*, publishing and public services). Cf., e.g., Paul Hollander 'Political Correctness is Alive and well on Campus Near You' *Washington Times* (December 28, 1993), p. A19.

legal practice, chaotic situations may emerge. In a process of system change, into which some atomised pieces of legislation (eventually, encouraged by some external pattern without any prior domestic precedent, experience or training) are being wedged as *deus ex machina* gestures, a divided social substrate, missing any definite direction and with no genuine standardising support may be the outcome, a conflux that can hardly lead to a better result. Eventually,

(e) some sort of loss of direction, temporarily becoming constant, is bound to end the process, just as the transitory legitimisation of zigzags arising from unregulated individual and group influences, capable of controlling and exploiting unclear situations. Although as a side-effect, but through the accessory dysfunctions undoubtedly asserting themselves in the long run, all of this (even without any concrete grievances) can preserve and actually forecast the destruction of the law's own ethos, the shattering of confidence and, as the only viable response from wide strata of the population, an option for either the avoidance of law or the transposition of popular hopes into a new reforming movement to be launched by the central power with the necessary re-emergence of a new fetish of statism, once believed to have been surpassed for ever.

5. (Want for Clarification) In Socialism, legal thinking has done a lot to make the institutional functioning of the state and law more humane and liveable within the given frameworks, at the same time trying to make it serve some common social goals. How much does our scholarship assume of the tasks accumulated ever since?

Under new circumstances, the clarification of the necessary preconditions has arrived at recording just impressions in publicism, as if investigation into fundamental issues had stopped at the analyses carried out under Socialism. At present, there are no answers either to the limits of transplantability of legal

technicalities or to the natural barriers to the universalisation of ideas and techniques.[24]

In the meantime, foreign literature is flourishing, remembering the unsuccessful American export of law to Germany after WWII,[25] of the shameful billions of dollars committed to Latin America (sacrificing them to social modernisation undertaken in the name of "scientific" social theory),[26] or arguing with the World Bank in terms of abstract rationality:[27] putting questions, expressing doubts, giving voice to the unchanged and unchangeable validity of some ancient truths, furthermore, providing us with new realisations. Well, in these days, when international legal export is at its peak, and on the ruins of collapsed socialisms, salesmen and tradesmen of the law's technicality are circulating as self-nominee experts, it seems that the scholarship in the target countries remain stubbornly silent and shyly turn its respective heads. Is it possible that right in these moments its students feel the urge to live or rejoice over their total academic freedom, uncontrollable by anyone?

The caravan of legal renovation is following its own route ever since, even though none of us knows what balms to use when and under which conditions. How can we establish the conditions of well-balanced functioning? What does historicity mean in today's post-modernity? What are the features of the global village? What can theoretically justify a process in which patterns born

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

25 Cf., e.g., 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, pp. 467–488.

26 Cf., e.g., James A. Gardner *Legal Imperialism* American Lawyers and Foreign Aid in Latin America (Madison: The University of Wisconsin Press 1980) xii + 401 pp.

27 Cf., e.g., Ugo Mattei *Introducing Legal Change* Problems and Perspectives in Less Developed Countries [manuscript of an address to World Bank Workshop on Legal Reform on 14 April 1997] (Berkeley & Trento 1997) 19 pp.

under historically particular conditions and in specific places are recorded in the first round, then the results are exported as a universal and timeless panacea, to finally announce it with the gesture of *car tel est notre plaisir*[28] to be universally valid for every conceivable human condition?

The road of cognition and conceptualisation from the initial problem sensitivity to its institutional solution is extremely complex. Subsequent practical actions must necessarily deal with both more variety and more local specialities.[29] Let us recall here the experience of the recent past:[30] in this century, even the most successful ventures of legal borrowing have proven very limited validity and sphere of authority;[31] others have failed very early on due to local resistance;[32] the attempts of the WWII victors could only count on moderate and temporary success from the very beginning, specifically because of the political pressure inherent in them.[33]

So, what is the basis of our miracle-expectation? Naivety, ideological character, vested interest, foolishness, or simply the self-emptying of the historical memory? Alternatively, perhaps,

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28 "*quia tale est nostrum placitum*", meaning "for this is our will".

29 Cf., by the author, 'Institutions as Systems: Notes on the Closed Sets, Open Vistas of Development, and Transcendency of Institutions and Their Conceptual Representations' in *Acta Juridica Academiae Scientiarum Hungaricae* 33 (1991) 3–4, pp. 167–178 (and also in his *Law and Philosophy* [note 11], pp. 413–424).

30 For a summary, see, by the author, 'The Law and Its Limits' in his *Law and Philosophy* [note 11], pp. 91–96.

31 In Turkey, the local version of the *Schweizerisches Zivilgesetzbuch* exerted influence mainly within its metropolitan environment, despite the consistent and decades-long efforts at transplanting it from the roots. Cf. June Starr *Dispute and Settlement in Rural Turkey* An Ethnography of Law (Leiden: Brill 1978) xvi + 304 pp. [Social, Economic and Political Studies of the Middle East XXIII].

32 E.g., in Ethiopia and Iran. For the former, cf. Jacques Vanderlinden *Introduction au droit de l'Ethiopie moderne* (Paris: Librairie Générale de Droit et de Jurisprudence 1971), especially pp. 212ff [Bibliothèque africane et malgache 10], and Heinrich Scholler & Paul Brietzke *Ethiopia* Revolution, Law and Politics (Munich: Weltforum Verlag 1976), pp. 80ff [IFO-Institut für Wirtschaftsforschung München: Afrika-Studien 92], as well as *Transplants Innovation and Legal Tradition in the Horn of Africa* Modelli autoctoni e modelli d'importazione nei sistemi giuridici del Corno d'Africa, ed. Elisabetta Grande (Torino: L'Harmattan Italia 1995) 403 p. [Non Solo Occidente / Studies on Legal Pluralism 1].

33 E.g., in Germany and Japan. For the former, see Höland 'Évolution' [note 25], passim, as well as Wolfgang Friedmann *The Allied Military Government of Germany* (London: Stevens 1947) x + 362 pp. [The Library of World Affairs]. For the post-WWII dilemmas in general,

common sense in the world of various rationalities organising into something irrational, with the shameful loss of credit of lived-through human experience and their replacement with post-modern clips of new idols?

Speaking of ourselves, we can only say that after the collapse of the Socialist world system and amidst the immense internal diversity of the Central and Eastern European region, as a uniform demand, attempted endeavour and partly traversed path, we can meet new endeavours at building law and order institutions everywhere. Rule of law and consistent enforcement of the maximum of human rights after the disintegration of past social and legal order: this is a programme that here and there (especially in Central Europe proper) gave way to considerable institutionalisation and traditionalisation, already building itself into actually self-reproducing socio-political processes. At other places with weaker and less stable developmental background, this same deconstructing construction has in fact led to the increasing predominance of the stronger and the more unscrupulous, to the intertwinement of Mafiosi and the state, and to a practical anarchy reminding of the weak and atomised Western European statehood having existed a thousand years ago.[34]

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see John D. Montgomery *Forced to be Free* The Artificial Revolution in Germany and Japan (Chicago: The University of Chicago Press 1957) xiii + 210 pp.

34 Materials prepared to think-tanks in international security policy on the nature and dangers of a Russian variant to "rule of law" are rather pessimistic, depicting the recalled conditions as reminiscent of the 12th–13th centuries' Europe with weak statehoods and disintegrated, unorganised powers (using Pierre Corneille's *El Cid* as an exemplary description). See, e.g., by Vladimir Shlapentokh, *Russia* Privatization and Illegalization of Social and Political Life (Michigan State University Department of Sociology: 25 September 1995) 44 pp. [CND {NATO: Chris Donelly} (95)459] and *Decentralization of Fears* Life in Post-Communist Society (1997) 5 pp. [CND {NATO: Chris Donelly} (97)026]. For its historical components and their unbroken continuity, see also M. A. Smith *Russia's State Tradition* (Camberley, Surrey: Royal Military Academy Sandhurst, June 1995) 12 pp. [Conflict Studies Research Centre E78], Tim McDaniel *The Agony of the Russian Idea* (Princeton, New Jersey: Princeton University Press 1996) x + 201 pp. and Stefan Hedlund *Russian Roots of the Russian Crisis* Return to an Anti-modern Society (Uppsala: September 1999) 26 pp. [Department of East European Studies: Working Papers 49]. In the light of statistical data (five times more frequent occurrence of robbery and murder, six times more frequent incidence of theft and violence, a quarter of million cases of both corruption and economic crimes, etc.), see Igor Ilynsky 'Law and Order' in *Russian Society in Transition* ed. Christopher Williams, Vladimir Chuprov & Vladimir Staroverov (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), pp. 219–240. For an ultimate account, see Stephen F.

6. (New Unorganic Components) Our legal scholarship has always been aware of its triple linkage, even in Socialist times, and has successfully striven for standing all conceivable demands of its tasks. Firstly: it immersed in the country's problems; secondly: it fought with the overall questions of our region (the Socialist block at the time) responsibly; and thirdly: it proved successful in providing theoretical generalisation by searching for answers to global concerns or responding international dilemmas.

At the end of the millennium, the world itself is changing. Its global village, both on the European continent and in the Atlantic region, is announcing the formation of a new law, legal style and culture. Yet, our spiritual choices do never stand in and of themselves: they imply practical consequences, which are naturally seldom thought through by our intellectualising inclinations.[35] Thus, the contextuality of our problems may be primordially spiritual in inspiration, yet real in practical consequences (effectiveness and cost implications).[36]

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(Past Legacy in Legal Experience and Scholarship) At the threshold of a new millennium, when our nation is at a crossroads again and must constantly choose from a variety of patterns, techniques and tools, with actual choices influencing the shifting points of the future, we have to provide answers to a number of

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Cohen *Failed Crusade* America and the Tragedy of Post-communist Russia (New York: Norton 2000) 305 pp. and, as an admission-*cum*-criticism, also Stephen Holmes 'Transitology' *London Review of Books* 23 (19 April 2001) 8, pp. 32–35. We hold less knowledge regarding farther regions, e.g., the nature of the Kazakh, Tche-Tchen or Uzbeghistan variant to "rule of law".

35 As refreshing examples, see *Western Rights?* Post-communist Application, ed. Katharine Lauer & András Sajó (Dordrecht: Kluwer 1996) 386 pp. and, by the author, 'Codification at the Threshold of the Third Millennium' *Acta Juridica Hungarica* 47 (2006) 2, pp. 89–117 & 'La Codification à l'aube du troisième millénaire' in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan et al. (Bruxelles: Bruylant 2004), pp. 779–800.

36 See, for example, the comparative analysis of American and Japanese ways of policing, where the ethos developed from individualism, respectively communitarianism, with differences in techniques, actually resulted in the poorness of efficacity despite immense invested sources in the first case and the optimum effects despite low costs in the second one. Denis Szabo *Intégration normative et évolution de la criminalité* [manuscript] (Paris: [Institut de France] 1995) 51 pp.

further questions. Is the nation a *tabula rasa* to be filled with contents at will? Did it have, does it have values, sensibilities, skills, ties, practical successes at all, from which extra strength can be gained to build more securely, daringly or decidedly?[37]

We ought to know a lot more: things that we did not know yesterday or do not know today. The historical prospects in legal scholarship are deficient, rhapsodic, and superficial even about yesterday. Our past is next to missing, unrevealed and non-assumed to a huge part. Bibliographies on legal literature in Hungary are available only for the last sixty years. Serial editions (historical compilations of sources like decrees, central and local decisions as well as initiatives and bills), which may fill up entire rooms throughout the legal history of luckier European nations, were not elaborated yet in our case—except for the *Corpus Juris Hungarici* and some other rather fragmentary compilations. There are no plans, no scientific policy, no money, nor any individual initiative to at least launch this work which has not been done for about a century. Neither are there any chances to start this compilational work, or to publish them at least in fragments, since a new generation is yet to grow up, which has a proficiency in Latin, is prepared to research the sources (available exclusively in Latin all through until the mid-19th century in Hungary) and has the resources and ambition necessary to prepare the foundational work and is able to undertake the survey of the sources in Hungarian legal history and legal tradition. Otherwise how could this incidental fragmentary elaboration be put together to give one uniform picture? How researches could be organised to launch an accounting worthy of the Humanities or an evaluation requiring juristic creativity of local processes and performances (legal styles, methods, and individual local juristic *trouvaille*s)? How an elevated spirituality could be born, which would provide insight,

37 Between the two rounds of the first free election in Hungary (1989–1990), as a staff member to the European Academy of Legal Theory in Brussels, I have conducted memorable talks with Professor BOAVENTURA DE SOUSA SANTOS, a legal sociologist from Coimbra. Both in his quality of a MARXist social scientist and social democratic politician, he formulated almost personal concern towards integrating particular local traditions, values and memories of past successes into one scheme of launching and substantiating a new political, social and economic start as a kind of psychological support able to ease the complex transformation process leading to it.

argumentative force, intellectual delicacy, joy, and spiritual excitement beyond the dry facticity of events—similarly to, for instance, English legal history-writing always promising some vibrating spiritual recharge?

What can be learned from the tying force of history, tradition, organicity, and feeling at ease, if nobody cares about them? When have social theory, legal philosophy and socio-history addressed tradition for the last time as the foundation of processes of organic human practice? Or its mediatory capacity, its role in handing down experience accumulated throughout generations, its integrative ability and exclusive potentiality to merge various movements and subtle changes into one enormous move?[38] Or, about tradition and reason complementing each other? Or the non-subsidiary nature of rationality and everyday experience,[39] especially the theoretical function of rationality in the logic of justification and the ontological function of practical experience in the logic of taking a decision?

MARXism was only a compulsory garment. A lot of us could not make peace with its science-philosophical presuppositions, simplifications and unjustified extensions. Yet, it was still liveable,

38 True, all these considerations have already been widely developed in MAX WEBER's rationality-theory. Cf., e.g., Jerzy Szacki *Tradycja* Przegląd problematyki [Tradition in oulines] (Warszawa: Państwowe Wydawnictwo Naukowe 1971) 290 pp., Carl Joachim Friedrich *Tradition and Authority* (New York, Washington & London: Praeger 1972) 144 pp. [Key Concepts in Political Science], Edward Shils *Tradition* (Chicago: University of Chicago Press 1980) viii + 334 pp., Martin Krygier 'Tipologia della tradizione' *Intersezioni* 5 (1985), pp. 221–249; and, as applied to law, also Martin Krygier 'Law as Tradition' *Law and Philosophy* 5 (1986), pp. 237–262. A new light is shed on the entire range of problems by H. Patrick Glenn *Legal Traditions of the World* (Oxford & New York: Oxford University Press 2000) xxiv + 371 pp., especially those chapters introducing and closing his arguments. Cf., in a wider context, by the present author, 'Comparative Legal Cultures? Renewal by Transforming into a Genuine Discipline' *Acta Juridica Hungarica* 48 (2007) 2, pp. 95–113 & <http://www.akademiai.com/content/gk485p7w8q5652x3/?p=92d3ae5b793d45919c7d1b935a9389e1&pi=1> & <https://commerce.metapress.com/content/gk485p7w8q5652x3/resource-secured/?target=fulltext.pdf&sid=54jelq45> & <http://www.akademiai.com/content/gk485p7w8q5652x3/fulltext.pdf>.

39 Cf., e.g., Michael Oakeshott *Rationalism in Politics* and Other Essays (London: Methuen 1962) vii + 333 pp., especially at pp. 1–36; and, in a practical context, Jeane J. Kirkpatrick *Dictatorship and Double Standards* Rationalism and Reason in Politics (New York: Simon & Schuster 1982) 270 pp., in particular the paper on 'Sources of Stability in the American Constitution', pp. 215–235.

allowing the respect for history. In want of anything better (since we could at the time not use a different conceptual framework), we could still make use of it to serve life as a *magister vitae*.

It may be destructive if abstract principles in a universalised ahistorical context are conceptualised now again. For the mind can thereby be well emptied and systematically detached from its everyday substrate, that is, from human experience and practice.

As a final statement, I can conclude but one: we ought to talk about messages worthwhile to be messaged, and about what only vanity makes us message we may as well remain silent.[40]

40 For the variety of components, layers (in function of varying approaches), and chances of contradictions in the undifferentiated use of a mainstream notion, cf., as an exemplary case study, Richard H. Fallon, Jr. '»The Rule of Law« as a Concept in Constitutional Discourse' *Columbia Law Review* 97 (January 1997) 1, pp. 1–56. For the complexity of problems involved in transition, cf. also *On Different Legal Cultures, Pre-Modern and Modern States, and the Transition to the Rule of Law in Western and Eastern Europe* ed. Werner Krawietz & Csaba Varga (Berlin: Duncker & Humblot [2003]) xi + 139–531 pp. [*Rechtstheorie* 33 (2002) 2–4: II. Sonderheft Ungarn].

Csaba Varga

RULE OF LAW: Imperfectly Realised, or Perfected Without Realisation?*

1. Declarations

"Communal values should have their social prestige restored in the civilian society of Hungary.

The perfection and inviolability of the rights of men should not overshadow the citizens' simultaneous respect for their moral obligations towards their community, to their allegiance and legal responsibility as well as the unquestioned assumption of the latter.

Social and economic activity has to be governed by the full consciousness of the law's value and the impact public rules may exert in any societal game.

Rights have to be referred to in order to resist despotism, to redress and prevent actual grievances. They are not meant to be invoked for just tyrannising others by misusing own superior position or exploiting others' inferior situation, or to strengthen supremacy or financial position by the unscrupled over-use of the legal machinery.

Public life and the legal arrangement marking out its framework have to be governed by a mentality that encourages the natural rewarding of honesty and the observance of rules.

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* 'Milyen a jog egy felelősen politizáló kormányzat alatt? Kérdések Dávid Ibolya miniszter asszonyhoz' [A Professzorok Batthyány Köre ülésének előkészítéséhez, 2000 januárjában] ['What is the law like under an administration committed to responsible policy-making? Questions to Minister of Justice Ibolya Dávid {in preparation to the session of the Batthyány Circle of Professors in January 2000}, in its first version in *Ítélet* (A PPKE JÁK lapja) [Newsletter of the Faculty of Law of the Péter Pázmány Catholic University of Hungary] III (March 24, 2000) 3, pp. 10–13 and *Magyar Nemzet* [Hungarian Nation – a daily] LXIII (April 8, 2000) 83, p. 8, pre-published as 'Jog és erkölcs harmóniája: otthon a társadalomban' [The harmony between law and morality: being at home in society] *Napi Magyarország* [Hungary Quotidien – a daily] IV (March 1, 2000, Saturday) in »Nézet«, p. 21.

We have to achieve that our country really serves as a homeland, offering the sense of familiarity for the honest majority of the fellow compatriots. Therefore, the civic virtue respects law and order, supports the feeble, while it is benevolently tolerant towards the forms unfolding personal talent and self-realisation. However, thereby it is not to relinquish national past, present and future, tradition and habits, as well as proven experience with the knowledge accumulated throughout generations, for the sake of ephemeral fads, meagre and modish ideas, individual or collective initiatives dividing society or breaking up the ties binding together the community.

Showing openness to others, to the particular features of otherness in opinion or attitude, is implied in civic tolerance, without limiting the community's natural right to preserve and strengthen its own identity.

The reforms civic tolerance supports must not threaten the basic structure of society and, in the guise of any principle or principled attitude, must not promote self-profiting from gaps in law or trickery difficult to defend community interest against on legal fora, but have to encourage the shared building of our future for what we shall bear undivided responsibility.

Aware therefore, that law and morality operate differently on differing fields, this is not an excuse for any of them to be played off against the other.

No rule of law can be based upon cynical and self-centred individual attitudes hardly refraining from the open trampling of common good: rule of law is simply inconceivable without the very idea of social solidarity, imbued with the collective ethos of and interest in co-operation.

Therefore, it can neither be built on ethically intolerable or unjustifiable foundations, nor serve aims considered morally repulsive or unacceptable by the social majority.

Freedom is not anarchy; it is not designed either to encourage the uninhibited fulfilment of inferior instincts.

Just like human dignity, freedom is also built on order and in order.

In the delicate balances cementing social order, proper consideration must be given to the lawful desire for the respect of public interest in preserving law and order, for the clear definition of the law's institutional frames and for the responsibility to be taken for its foreseeable functioning.

Accordingly, rights shall not be asserted to the detriment of common good and public interest but, just to the contrary, in order to serve law and order at a higher level.

The difference between victims and victimisers, that is, between those who suffered and those who benefited from causing undue sufferance, must not be obscured.

The technicality of legal proceedings and the overall extension of social care cannot be taken as a pretext for diminishing personal responsibility to be taken by individuals and their collectivities in shaping their own fates.

Common goals, frameworks encompassing large portions of society, the mutually complementing interaction of law and morality, furthermore, security, foreseeability and calculability of institutional operation, as well as the encouragement of personal and collective initiative in harmony with the overall ethos of common good in one order of shared values—all these are worthy of support in order to reactivate forces dormant in society and to overcome apparent lethargy.

This is what successful nations had inherited from their ancestors and they also owe their luck to the ability of its continuous building.

This is exactly what Hungarian history teaches us and what had nourished social harmony and speedy development in course of the nation's consolidation following the Great Depression as well as the post-WWII economic and intellectual recovery and the glorious days of 1956."

The manifestation above was my own formulation in October 1997 to express my professional concern and anxiety within the Batthyány Circle of Professors, which finally issued a *Declaration on Responsible Policy-making and Governance* on 1 December 1997. It formulated, among others, that

"We share the liberal principles of parliamentary democracy. We think that the principle according to which the liberty of any individual can exclusively be limited by the liberty of others shall be fully taken as a guiding principle in societies where the traditional ethics of obligations is respected by the great majority. For the perfection of individual liberty is to be complemented by the care for and promotion of the collective traditions of society.

In the civic society of Hungary, the esteem of common good has to be restored. The inviolability of individual rights should not overshadow the citizens' moral and legal obligations towards their collectivity. An ethos based on the observance of applicable laws is a prerequisite for a society in which security for the honest majority is guaranteed by law and not by force.

Corruption, hypertrophied »black« and »grey« economies, criminality and social lethargy may excel in destabilising law and order, especially if they are not adequately addressed by the law. For, actually, corruption is not faced to the depth by the law, the law-enforcing machinery fails in controlling crime effectively, and the society is helplessly exposed to criminals.

The citizens of Hungary want order and security in terms of civic equality. In order to reach it, a government committed to public interest, an effective policy of law enforcement, a machinery of justice with reliable and expeditious functioning, able to eliminate mafia-type social operation, are all needed. Those having unduly allotted or expropriated public property and public funds are to be called to account."

More than two years have passed since. At that time, parliamentary elections were imminent, and now, half of the mandate of the then incoming government had almost expired. Well, how much can we be satisfied if faced with those concerns now? Are they solved? Do they have a solution at all? Have our expectations been founded at all or have they been taken away by utopianism or sheer desires?

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2. Question-marks

What is the value of constitutionality, democracy and rule of law, if they are accompanied, even a decade after their re-establishment, by social disorder, the wasteful management of resources, the segmentation of the country and its exposition to external forces, the reluctance to fulfil rightful expectations, the devaluation of millennial values of morality and justice in the name of some allegedly supreme principles of, and the unscrupulous domination of private motives stealthily creeping in through the well-designed gaps in, the law, demoralising and intimidating the rest of the community?

What is the purport of constitutionality, democracy and rule of law, if they are accompanied by the growing impotence of the state's institutional machinery (which is the actor primarily responsible for social order, for the concentration of the nation's forces, wealth and resources, as well as for the available social balance), while they are mostly used to, heralding the brave 'new world' of our 'global village', uncritically applaud whatever individual and collective deviance?

Where can the ideal of law lead us if, deprived of millennium-old foundations, it does not commit itself to genuine values but transforms traditional virtues of moral ennoblement into a function of momentary reactions by faceless masses, and degrades law and order to the merely procedural framework of *bellum omnium contra omnes* again, thereby proclaiming the scrupleless, merciless and tireless specialists of fighting, the new heroes of law?

When shall we reach an epoch of constitutionality, democracy and rule of law, ready to consider (in addition to its own abstract and universal self-projections) the very basics of the operation of our world as well, namely the genuinely (cultural-anthropological, historical, demographic and sociological) preconditions of its overall reasonable desirability as well as the depth of complexity it is to mediate in, with both empathy to the values of human associations (families and nations) and readiness to balance if they are in conflict? Is it too daring to hope for a genuine constitutionality, democracy and rule of law, in which

honesty is usually awarded and whose privileges are not designed to be firstly benefited by either political murderers and torturers or looters of the nation's fortune?

Is there law and order where anyone may feel encouraged, with reference to some abstract entitlement, to dispute his/her duties instead of fulfilling them as they are due? Is the new-old anarchy that results from the limitless self-assertion of the individual able to offer us a genuine perspective for the future? Is it good for the nation if everyone has to be given but not to give, if rights as freed from the burden of duties abound unlimitedly (for ambitious rights-protecting activity may generate practically anything and anything else at wish out of mere words)? Or, is order not emerging as a delicate balance between rights and duties? Is it not necessarily to be paid by someone if any right is narrowed or extended? For everything has a price on this Earth. Can a right be asserted without charging others with its cost?

What will remain for the individual to live in, if the public disappears from behind? What will law and order be reduced to, if there is no community supporting it? What is the measure for the individual, if there are no longer "common good", "public interest", "public order", "public security", "public morality" in law that could serve as a framework? Can smaller nations (national entities) be successful in fighting for their collective legal personality to be recognised, if they simultaneously excel themselves in liquidating anything public?

What has the noble ideal of human rights been degraded into, if the martyrdom of a hundred of millions is treated with the cynicism of double standards, while it serves as an invocation justifying individual and group aggressivities demoralising existing communities? May the alleged protection of rights prevent the lawful resolution of actual situations? May rewarding the lack of honesty, of inactivity, or parasitism or a criminal way of life (at the cost of a by-chance neighbourhood) be qualified as a protection of rights? May those intervening at the cost of others without own responsibility to take be genuinely called as defenders of rights? Whose rights do we advocate when we, in our enlightened zeal, just watch the fight between victim and victimiser, investigator and

criminal, law-enforcement agencies and jail-birds impartially as if they were optional roles in, say, a sports-match?

Are we expected to glorify what just crops up to prevail? Is the current state of domestic law at the same time also necessarily unchangeable? Why is it not made apparent, which ideals with what consequences are fomented by the various political clubs?

Why is there no governmental programme available to enlist practical shortcomings and failures with feasible responses both in the short and the long run, recording actual gaps, errors and miscalculations in regulation, whether due to legislation or constitutional adjudication, especially if they can be cured within governmental competence or simply with majoritarian vote? Why are we resigned to the legislator having once neglected his duty to interfere? Abuses in privatisation, smuggling covered by banking consolidation, globalised profiteering, tax-exemption for foreign financiers and entrepreneurs, value-added-tax-frauds, corporate fraudulence, industries based on car- and metal-stealing and manipulations with wine-production and oil business may proliferate without anyone ever openly declaring whether regulatory blindness, lack of determination, or governmental complicity have allowed them to "flourish" for a time undisturbed.

Are we ready to sacrifice the future of our nation for the mere sake of abstract principles, instead of striving for decent and prosperous civic life? Is it, for instance, constitutionally unconstruable that the legality of enrichment should be proven by those who make a fortune strikingly quickly? Is it inevitable that illicitly obtained properties cannot any longer be questioned in law? Is it inevitable that murderers and torturers remain unnamed as exempt from any proceedings just because they could maintain their terror long enough for that the period of statutory limitations can pass and be eventually over? Is it tolerable that those having formerly operated the dictatorial regime (excelling also in denouncing and looting) are now given the opportunity to become masters of the new regime, designers and teachers of an allegedly democratic attitude? Is it necessary that—from among the sufferers of the grievances of the 20th century—only the victims of socialism are neglected among those offered some remedy?

Is it due to incompetence, past burdens or some mysteriously obscure principle that quite a few affairs, falling within state competence and financing, are now channelled away to segmented self-governing bodies, and with responsibilities vanished? As known, oppositional leftist veto has blocked the subordination of the Attorney General's office (and, with it, the monopoly of criminal charge) to government's responsibility. The machinery of the administration of justice is now governed by a self-generated self-governing body, dedicated mainly to own interests (even questioning others' right to query about the state of and access to justice, the respect of procedural deadlines, the uniformity and consequentiality of judicial practice, the level of actual indifference to political interests) in our country today. Research is mostly administered and controlled by self-nominees within the Academy of Sciences. Public health and institutional education are for the time being within governmental competence, but public opinion is marshalled by irresponsible commercial media. The official safeguarding of citizens' rights is institutionalised to a hypertrophied extent, not resembling any longer its original pattern, the single *ombudsman*.

Given the present conditions, what are the genuine factors we are ruled by within this rule of law? *Quis custodiet ipsos custodes?*

With the first period of eight years behind us, our constitutional justices have switched recently over from their hyperactive interventionism (suggested by the "invisible Constitution" they hypothesised) to the proper enforcement of constitutional provisions. As to the Court's first period, enforcing anything in law without prior adequate entitlement and competence is usually considered sheer arbitrariness in a constitutional state. Were they ever once empowered to infer decisions with effects dramatic upon the actual purport of the entire transition process and the paths of law beaten in Hungary from either their own discretion or foreign standards, instead of keeping silent in cases when the Constitution itself fails to provide suitable guidance?

Policing and crime control are also rather discretionary. In itself, the violation of a rule is often not enough for measures to be taken and proceedings to be instituted, albeit the very fact that

further substantive reason has to be given for persuading the agent of law to react does encourage corruption. Moreover, law in action may vary from branch to branch in central government and from county to county, district to district in local government, and finally also from agent to agent. Measures are eventually taken (if at all) also in consideration of convenience, fashion and routine, easy and guaranteed ending—as if legal officials took it for granted that only a tiny minority can afford formal proceedings confronting their arbitrary selection.

After all, should our legal ideals be taken as a sheer constraint imposed upon the populace from above, or as a way rather helping us to become more noble, sophisticated and gentle, that is, more mediated and patterned, in our handling of human affairs and social management? Do they indeed help us in achieving our professed goals, or are they simply wedged in as external limitations, alien to the respect for the *Natur der Sache* and detouring us therefrom? Are they indeed designed for us or rather for someone's "world spirit" imposed still upon us, after we have already experienced the ignominious and bloody adventure, ending in a crushing defeat, of some other contemporary ideologies? Should our nation not also be involved—as an interested partner—into this noble venture, by giving it a share in its blessings, too? Or, do those presumptuous minds have the faintest idea that people judge practice by facts of practice, instead of taking part in sheer intellectual adventurism?

RULE OF LAW – AT THE CROSSROADS OF CHALLENGES*

(Law: Values & Techniques) Human history is not only the field of new recognitions but the scene of adapting experiences gained from failed revolutionary novatory zeal to liveable practice and, thereby, also 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,

* In its first version, presented in Hungarian as the closing address to the workshop on "Nation and the Rule of Law", organised by Sándor Lezsák, MP, and Professor Tibor Király, of the Hungarian Academy of Sciences, in the Kossuth Klub in Budapest in 2001—'Jogállamiság – kihívások keresztútján' *Valóság* XLV (2002) 4, pp. 28–39 & <http://www.valosagonline.hu/index.php?oldal=cikk&cazon=351&lap=0>—, and published in English in *Iustum, Aequum, Salutare* [Budapest] I (2005) 1–2, pp. 73–88 and, in an enlarged version, presented in English at both the "Saint Thomas Education Project" [Step] Conference at Palermo in 2005 and the International Symposium on "State, Social Transformation and Legal Reform" in Nagoya in 2006.

> 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 notion implying dramatic human experience, a concept of great traditions and significance regarding its 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. For although the words themselves may be rather old terms, what they imply are

1 Jean-Étienne-Marie Portalis 'Discours préliminaire' in F. A. Fenet *Recueil complet des travaux préparatoires du Code civil* I (Paris: Videcoq 1836), pp. 11 and 481.

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, pp. 1–56.

genuinely new strivings, and all we may realise about them is that presently and with all our efforts, we do 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 and 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 the '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 enacted rules, on the very fact of the issuance of rules, the English-speaking civilisation relies upon the sheer independence of the judiciary and the trust on the strength of undefined principles,[3] as its historical experience may have built a chain of confidence reposed on processes themselves, if operated by good will and socialised within a network duly fed back.[4] Now, the question may arise: 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 practicing 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 otherwise. For, as we may learn from the contextual dependence of premises in legal logic, any rule can be circumvented from both below and

3 Cf., by the author, 'Varieties of Law and the Rule of Law' *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1, pp. 61–72.

4 Within a revealing context, cf., as classic, Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* [1885, 8th ed. reprint] (London: Macmillan 1923) cv + 577 pp. & *Lectures on the Relation between Law and Public Opinion* in England during the Nineteenth Century [1905, 2nd ed.] (London: Macmillan 1926) xciv + 506 pp.

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 the respect for rules.[5] 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 following 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 at any procedural stage at any time either to find a gap in the law, allegedly blocking the 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 accidental claim to reach a specific solution, as if it would necessarily conclude from the law itself. That is, the end-result of such 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.

5 See, by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris] and *A jog mint folyamat* [Law as process] (Budapest: Osiris 1999) 433 pp. [Osiris könyvtár: Jog].

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 long periods, might have caused a judicial revolution or practical renovation of law on a daily basis and frequency, 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[6] 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[7]) 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 situations of exceptional cases) from spreading and becoming destructive.

After all, what is given in law is nothing but a set of 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. (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

6 Cf. the revolted echo even to the news of its draft by Benjamin N. Cardozo *The Nature of the Judicial Process* [1921] (New Haven: Yale University Press 1961), Lecture III, in addition to the ones by RUDOLF STAMMLER, EUGEN EHRLICH or HERMANN KANTOROWICZ in Germany.

7 *Schweizerisches Zivilgesetzbuch* (1907), § 1.

social identity, defining the framework of social reproduction, a complex network of regulations with mechanisms of check & balance, in a medium of tensions balanced amongst various challenges to preservation and change.)

"God is dead"[8]—although doubt and negation in final issues had become trivial long before NIETZSCHE, 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[9] or the raving mob once cherished with enlightened intentions by *Viridiana*?[10] 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 mere consuming units and conscience gets cared for by sheer mass 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 rules' 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

8 Friedrich Nietzsche *Thus spake Zarathustra* [Also sprach Zarathustra, 1883] trans. Thomas Common [1891] in <http://eserver.org/philosophy/nietzsche-zarathustra.txt>, Prologue, para. 2.

9 José Ortega y Gasset *La Rebelión de las masas* (Madrid: Revista de occidente 1930) 315 pp. {*Revolt of the Masses* authorized trans. (London: Allen & Unwin & New York: Norton 1932) 204 pp. & trans. Anthony Kerigan, ed. Kenneth Moore (Notre Dame: University of Notre Dame Press 1985) xxxi + 192 pp.}.

10 Luis Buñuel *Viridiana* (1961).

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 attach the additional seal of a particular social authority to tendencies already asserting themselves in society at the most.[11] 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.[12] By tearing it away from moral and social traditions, we have detached it from its millennia-old exclusively organic medium, thereby depriving it 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 n e u t r a l 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 in one way or another at any time, following generations' efforts at both refining them so as to build them into a systematic dogmatics and transforming them into liveable practice by filtering them through conventionalisations contextualising

11 See, by the author, 'Towards a Sociological Concept of Law' *International Journal of the Sociology of Law* 9 (1981) 2, pp. 157–176.

12 Cf., reviewing Paul F. Campos *Jurismania* The Madness of American Law (New York & Oxford: Oxford University Press 1998) xi + 198 pp., by the author, 'Joguralom? Jogmánia? Ésszerűség és anarchia határmezsgyéjén Amerikában' [Rule of law? mania of law? on the merge of rationality and anarchy in America] *Valóság* XLV (2002) 9, pp. 1–10 & <http://www.valosagonline.hu/index.php?oldal=cikk&cazon=326&lap=0>.

formal regulation in the materiality of practice, 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 taken 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,[13] actually we do 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,[14] denoting in Latin proper 'art' and 'craftsmanship' alike.

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(Human-centeredness and Practical Orientation) When I am speaking about historical experience, i.e., 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 is theoretically far more honest and demanding than today's a-historical neo-primitive absolutism, growing into the present mainstream of Atlantic thought. For even MARXism, among others, 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, has made a

13 For a reconstruction, cf., by the author, *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp.

14 "*ius est ars boni et aequi*" Celsus in D 1.1.1. pr. Ulp I Inst (Pal. 278).

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 in the history of ideas that the very notions of rule of law, human rights, constitutionalism, parliamentarianism, as well as democracy—all these are also 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 the Christian tradition that marked out the dependence of human institutions (as mute instruments in themselves) upon a given destination designed for value-implementation.[15] This is the reason why Christianity has set internal barriers for these institutions to prevent them from growing self-centredly predominant, that is, from getting elevated to a self-definingly independent power with the eventual chance of turning against man himself, by the eventual risk of destroying the rest of his dignity.

15 Cf., by the author, 'Buts et moyens en droit' in *Giovanni Paolo II* Le vie della giustizia: Itinerari per il terzo millennio (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato) a cura di Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75, enlarged and adapted as 'Goals and Means in Law' in *Jurisprudencija* [Vilnius: Mykolo Romerio Universitetas] (2005), No. 68(60), pp. 5–10 & <http://www.mruni.lt/padaliniai/leidyba/jurisprudencija/juris60.pdf>, & as presented at the Saint Thomas Education Project Conference in Budapest in 2005 <http://www.thomasinternational.org/projects/step/conferences/20050712budapest/varga1.htm> as well.

In the Western hemisphere—or, in the North (to use the term of financiers regularly convening in Switzerland at 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.

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 Two (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 alternatingly 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 the number one 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 our own enlightenment but also a burden which we mostly generously (but effectively) pay at—mostly—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

in Europe), 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.[16] This may be a vicious circle, for the richer a nation, the more resources it can spend to meet the 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, if they are self-destructive and counter-productive beyond a certain extent; however, it is by far not worth risking our own modest existence (in the small states of the Central European region) with no giant reserves in this game. Strategic planning is mostly undertaken by big countries, 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, pushed by the misery in a number of wrecked societies in either our neighbourhood or major parts of Asia and Africa. Or let us think of the additional obligations arising from the necessity widely felt as vital to re-socialise parts of the Roma population here.

Nowadays it is popularly held among those considering themselves enlightened that the state is growingly losing ground.

16 Cf., by the author, 'Law, Ethics, Economy: Independent Paths or Shared Ways?', presented at the Saint Thomas Education Project Conference in Barcelona in 2005, <http://www.thomasinternational.org/projects/step/conferences/20050920barcelona/varga1.htm>.

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.[17] 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 genuine 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 is 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 the 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 moral commitment, 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.

The assumption of responsibility, personal commitment and the inevitability of making decisions do not

17 Cf., e.g., Arthur Fridolin Utz *Zwischen Neoliberalismus und Neomarxismus* Die Philosophie des Dritten Weges (Cologne: P. Hanstein 1975) 184 pp. [Gesellschaft, Kirche, Wirtschaft 8] {*Entre le néo-libéralisme et le néo-marxisme* Recherche philosophique d'une troisième voie, trad. Morand Kleiber (Paris: Beauchesne 1975) 206 pp.} and Taketoshi Nojiri 'Values as a Precondition of Democracy' in *Democracy* Some Acute Questions [The Proceedings of the Fourth Plenary Session of the Pontifical Academy of Social Sciences, 22–25 April 1998] ed. Hans F. Zacher (Vatican City 1999), p. 105 [Pontificiae Academiae Scientiarum Socialium Acta 4].

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 on 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.[18] It is obvious that the responsibility for any choice and decision has to be shared by those who make the law and also by those who just apply it.

One and a half decades ago, after the collapse of Communism in the middle part of Europe, 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 law-exporters themselves rejected these fears in outrage.[19] 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.[20] And after their "Law and Development" programme,

18 Cf., e.g., by the author, *Lectures*... [note 5], and 'Búcsúírás' [Farewell writing] in Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Kar *2003-ban végzettek évkönyve* [Yearbook of the class graduating at the Faculty of Law of Pázmány Péter Catholic University in 2003] ed. Emese Boros & Nóra Ohlendorff (Budapest: Alumni 2003), pp. 119–122.

19 "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 [note 1], pp. 466–467. As one of the case-studies, see Stephen F. Cohen *Failed Crusade* America and the Tragedy of Post-Communist Russia (New York & London: W. W. Norton & Company 2000) xiv + 304 pp., reviewed by the author, 'Failed Crusade: American Self-confidence, Russian Catastrophe' in the present volume.

20 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 14 April 1997] (Berkeley & Trento 1997) 19 pp.; Paul H. Brietzke 'Designing the Legal Frameworks for Markets in Eastern Europe'

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[21]) and also in Albania.[22] (Meanwhile, in the heart of the Hungarian 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.[23] 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.

The Transnational Lawyer 7 (1994), pp. 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, pp. 467–488; Gianmaria Ajani 'La circulation des modèles juridiques dans le droit post-socialiste' *Revue internationale du Droit comparé* 46 (1994) 4, pp. 1087–1105 & 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' *The American Journal of Comparative Law* XLIII (Winter 1995) 1, pp. 93–117.

21 Cf., by the author, 'Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisations (The Experience of Lithuania)' in the present volume.

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

23 "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 Janusz Łętowski] 'Poland: In search of the »State of Law« and Its Future Constitution' in their *Poland: Towards to the Rule of Law* (Warszawa: Wydawnictwo Naukowe Scholar 1996), p. 11.

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.[24] We should, hence, be aware that no reference to outside authorities can substitute for own decision on principle. Being necessarily partial and selective as conceived within differing paradigms, such references are unsuitable to replace a personal stand to be taken.

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).[25]

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(Theological and Anthropological Foundations) As an axiomatic starting point, it has always been obvious that

24 Cf., as a global overview with theoretical backing, by the author, [abstract] 'Reception of Legal Patterns in a Globalising Age' in *Law and Justice in a Global Society* Addenda: Special Workshops and Working Groups (IVR 22nd World Congress, Granada, Spain, 24–29 May 2005), ed. J. J. Jiménez, J. Gil & A. Peña (Granada: International Association for Philosophy of Law and Social Philosophy – University of Granada 2005), pp. 96–97 & [text] 'Transfers of Law: A Conceptual Analysis' in *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 21–41.

25 Cf. also—reviewing H. Patrick Glenn's *Legal Traditions of the World* Sustainable Diversity in Law (Oxford & New York: Oxford University Press 2000) xxiv + 371 pp.—by the author, 'Legal Traditions? In Search for Families and Cultures of Law' [abstract] in *Law and Justice in a Global Society* [note 24], p. 82 & [text] *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 & <http://www2.law.uu.nl/priv/AIDC/PDF%20files/IA/IA%20-%20Hungary.pdf>.

> "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."[26]

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*,[27] 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[28]—through collective experience and traditions with a commonly shared vision of future and an ethical world-view;[29]
- 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

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26 "*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), p. 168.

27 "But it must not be imagined that authority knows no bounds […]." *Pacem in Terris* Encyclical of Pope John XXIII [1963], 47.

28 "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." Encyclical Letter *Centesimus Annus* issued by the Supreme Pontiff John Paul II [1991], 41.

29 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), chs. 1–3. It is to be noted that the same objection is formulated in criticism of the new doctrine in formation on the practice of precedents. For a theoretical context, cf., by the author, 'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' *Acta Juridica Hungarica* 44 (2003) 1–2, pp. 21–44, para. 1 & <http://www.akademiai.com/content/x39m7w4371341671/?p=056215b52c56447c8f9631a8d8baada3&pi=1>.

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;[30]

- 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 all his potentials (that is, for his conduct in private, in family and professional life, as well as in his larger communities);[31]
- as a result of the inviolable dignity and undiminishable responsibility of the human person, rights and obligations go hand in hand.[32] Otherwise, reciprocity and balance would be unthinkable,[33] and the *societas* as

30 "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.«" Pius XI *Quadragesimo Anno* [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." John XXIII *Pacem in Terris* [1963], 35.

31 Michel Schooyans has termed—'Droits de l'homme et démocratie à la lumière de l'einseignement social de l'Église' in *Democracy* [note 17], pp. 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 genuinely democratic thought.

32 "[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." John XXIII *Pacem in Terris* [note 27], 44.

33 "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.

a whole would fall apart.[34] 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[35]—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.[36]

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

34 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]}, as based upon the research by D. H. BAYLEY. For a Central European stand on the complementarity of rights and obligations, cf. Alfonsas Vaišvila 'Legal Personalism: A Theory of the Subjective Right' in *Ius unum, lex multiplex* Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy) ed. István H. Szilágyi & Máté Paksy (Budapest: Szent István Társulat 2005), pp. 557–573 [Philosophiae Iuris / Bibliotheca Iuridica: Libri amicorum 13].

35 For one of its latest formulations, see, e.g., Robert Grant *Oakeshott* (London: The Claridge Press 1990), p. 63 [Thinkers of our Time].

36 "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

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,[37] which—even if heralded mostly in the majestic robe of the defence of constitutionalism[38]—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 by—maybe, just a legalistic—war.

Let us contemplate: if the ideal of the rule of law as developed in the European continental (or German) idea of *Rechtsstaatlichkeit* preserves at its focal point the maintenance of law and order by means of statutory regulation (and, in

disguised totalitarianism." John Paul II *Centesimus Annus* [note 28], 46. It should be remarked that Schooyans [note 31], pp. 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 a genuine 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*, i.e., an image of God. And man practically becomes incapable of survival when his own reason and will are eliminated.

37 Cf., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] as well as 'Legal Scholarship at the Threshold of a New Millennium in the Central and Eastern European Region' in the present volume 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—, *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub] and 'Creeping Renovation of Law through Constitutional Judiciary?' in the present volume, as well as, as a diagnosis of the problems of our age, 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' [Man elevating himself? Dilemmas of rationalism in our age] in *Sodródó emberiség* Várkonyi Nándor: Az ötödik ember című művéről [Mankind adrift: About Nándor Várkonyi's work »The Fifth Man«] ed. Katalin Mezey (Budapest: Széphalom [2000]), pp. 61–93.

38 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

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 in a classical way, is hardly able to operate functionally and efficiently any longer? That is, how can it react to the power (or sheer monopoly) 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 assistance of the state, asserting themselves increasingly arrogantly with no responsibility, on a field 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[39] 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 printing press hand-operated by the heroes of classical liberty like

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Oregon: Hart Publishing 2003) xx + 217 pp. [Human Rights Law in Perspective] and, in reflection of outer—Western—criticism of the political over-activism of the first, founding period of Hungarian constitutional adjudication, by the present author, 'Creepeing Renovation...' [note 37].

39 Although focussed mostly on considerations of legal policy in present-day Hungary, Béla Pokol *Médiahatalom* Válogatott írások [Media Power: Selected writings] (Budapest: Windsor Kiadó 1995) 198 pp. 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 of the US, 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 lead of 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) xiv + 382 pp.

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, a 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.[40] 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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(An Irreplaceably own Task) 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 have 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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40 Reference to the artists' colony at Szolnok, actually born in result of a nostalgia-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 later on inviting also his friends to this end point of 'Far East'—for 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. Cf. *Die Szolnoker Malerschule* (Wien: G. Gistel [1975]) pp. 126 + 40 and Christine Strasser *August von Pettenkofen* Die Szolnoker Bilder (Salzburg 1983) 185 pp. [Salzburg Universität, geisteswissenschaftliche Dissertation].

(Recapitulation) 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.

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 a legal exception),[41] 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; in consequence, (2) no civilisational achievement has its value in itself (i.e., even democracy is only valuable through the values implemented and

41 Cf., first of all, by the Hungarian scholar in exile, 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, pp. 13–52.

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 do 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 the genuine foundations of 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.[42] It costs a lot, requires sacrifice, and may involve the potential of errors in addition to its demand of time, which is another timely source of short-run disillusionment.

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(A Final Remark in Comparison) 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 certain, yet though 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 fatal and tormenting dilemma, to be decided unambiguously anyway in

42 Cf., as theoretical synthesis in general, Utz [note 17], passim, and as one of the applied fields in particular, Chantal Millon-Delsol *Le principe de subsidiarité* (Paris: Presses Universitaires de France 1993) 127 pp. [Que sais-je? 2793], also put by him in a historico-comparative context in his *L'État subsidiaire* Ingérence et non-ingérence de l'État: le principe de subsidiarité aux fondements de l'histoire européenne (Chicago, London & Toronto: Encyclopaedia britannica 1992) 232 pp. [Léviathan].

this superhumanly dramatic choice faced by both the politicians and the relevant general staff?[43] Not too far away in time, let us continue our reconsideration with the example of the termination of World War Two 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 formers' own costs and by risking their own human lives. Therefore, actually 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 foreign power 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.[44]

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 differently. Could any

43 Cf., from the literature, Peter Weyden *Day One* Before Hiroshima and After (New York: Simon and Schuster 1984) 414 pp., on the contexture, *The Atomic Bomb* The Great Decision, 2nd rev. ed. Paul R. Baker (Hindale, Ill.: Dryden Press 1976) viii + 193 pp., Len Giovannitti & Fred Freed *The Decision to Drop the Bomb* (New York: Coward-MacCann 1965) 348 pp. and *The Atomic Bomb* The Critical Issues, ed. Barton J. Bernstein (Boston: Little, Brown 1976) xix + 169 pp., with archives' background in Barton J. Bernstein & Allen F. Matusow *The Truman Administration* A Documentary History (New York: Harper & Row 1966) viii + 518 pp. and Louis Morton 'The Decision to Use the Atomic Bomb' in *Command Decisions* ed. Kent Roberts Greenfield, Office of the Chief of Military History (Washington: U.S. Army 1960) viii + 565 pp.

44 Cf., by the author, 'Transition to Rule of Law: A Philosophical Assessment of Challenges and Realisations in a Historico-comparative Perspective' in *Hungary's Legal Assistance Experiences* [note 24], pp. 185–214 in general and '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, pp. 487–505 in particular. 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) xiii + 210 pp. and Wolfgang Friedmann *The Allied Military Government of Germany* (London: Stevens 1947) x + 362 pp.

decision-maker have nearly two 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 to be 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.

RULE OF LAW
Or the Dilemma of an Ethos: to be Gardened or Mechanicised*

I

One of the post-dictatorship models for transition is exemplified by total defeat with military administration and jurisdiction, breaking past continuity through preventing local practices to re-organise, while re-educating for democracy, as patterned by the allied powers after WWII in Germany, Italy and Japan, and quite another of them at the other extreme is just to declare a full pledged rule of law scheme, put in operation from an artificial zero point on, as made Central Europe to practice it after the fall of Communism. Almost opposite are the costs and benefits of either ideals, on behalf of both the party having generated the given solution and the party whom it was generated to.[1] And the fact notwithstanding that the legacies of bygone regimes—with their successors' task of selecting out one of the above ideal starts to implement upon them after their predecessors' fall—are hardly comparable to one another, the philosophical considerations (together with the relevant politico-cultural and anthropological pre-assumptions) that underlie the selected paths are already close to appear and actually work as mutually antagonistic.

With differences characterised by the following scheme, they are common in that both of them simply introduce a new regime

* A paper presented at the international conference on global law transfers at Umeå in 2007—[abstract] in <http://www.jus.umu.se/RoLconf/Csaba.pdf>—, forthcoming in its proceedings as to be ed. Per Bergling & Jenny Ederlöf (Uppsala: Iustus Förlag 2008).

1 For the above's first description in a context suggesting that there must be an explanation to why the United States of America changed in the meantime the patterns it offered, see, by the author, '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, pp. 487–505.

never met and heard before, from the next moment on when the replacement of power control has been exacted.[2]

US w/ Allied Powers after WWII	**US w/ global forces after collapse of Communism**
via military victory & occupation through brutal force of facts	*via full-pledged Rule of Law* through mere declaration & institutionalisation
military administration	experimentation
intervention imposed upon – instead of democratic mobilisation	no genuine transitory period
military justice (Nuremberg/Tokyo)	past unfaced
discontinuation of the past w/ dissociation, dissolution & annihilation	continuation of past getting re-organised, re-patterned & re-legitimised
re-education for genuine democracy	quasi (defect) democracy as lived through since

Their most striking difference is perhaps the in-built cynicism and utopianism (with reminiscences of some a-historical all-mightiness, known mostly from revolutionary honeymoon periods,[3] by the way) that predominates the solution adopted world-

2 Cf., e.g., Wolfgang Friedmann *The Allied Military Government in Germany* (London: Stevens 1947) x + 362 pp.; Eli E. Nobleman *American Military Government Courts in Germany* Their Role in the Democratization of the German People (Ft. McPherson, Ga. 1950) x + 261 pp. [U.S. Provost Marshal General's School, Camp Gordon]; John D[ickey] Montgomery *Forced to be Free* The Artificial Revolution in Germany and Japan (Chicago: The University of Chicago Press 1957) xiii + 210 pp.; *The Occupation of Japan* Impact of Legal Reform [The Proceedings of a Symposium] ed. L. H. Redford (Norfolk, Va.: MacArthur Memorial 1977) 212 pp.; Dieter Waibel *Von der Wohlwollenden Despotie zur Herrschaft des Rechts* Entwicklungsstufen der amerikanischen Besatzung Deutschlands, 1944–1949 (Tübingen: Mohr 1996) xx + 410 pp. [Beiträge zur Rechtsgeschichte des 20. Jahrhunderts]; *Zwischen Kontinuität und Fremdbestimmung* Zum Einfluss des Besatzungsmächte auf die deutsche und japanische Rechtsordnung, 1945 bis 1950 [Deutsch–Japanisches Symposium] ed. Bernhard Diestelkamp (Tübingen: Mohr 1996) ix + 398 pp.

3 For the expression, see Pitirim A[leksandrovich] Sorokin *The Sociology of Revolution* (Philadelphia & London: J. B. Lippincott Company 1925 {reprint by New York: H. Fertig 1967}) xii + 428 pp. [Lippincott Sociological Series].

wide today. The very fact that genuine transitory period is denied from this dramatic change in both theory and practice and that a full-pledged rule of law scheme is just declared to have rightly been introduced from one moment to the next,[4] will inexorably result in a basically counter-productive effect. Namely, the new regime—certainly with abundance in limitations and scarcity of authorisations, and without being equipped with instruments of safe operation, suitable exclusively to develop through new conventionalisations while facing everyday conflicts in practical implementation, that is, in a course demanding rather long periods of time—will on the final analysis only re-state its own negated past: though in new form and under new legitimacy but with the resurgence of huge a many power relations, networks and connections, waiting in the silent background exclusively for getting re-organised, in order that after a while they can step by step re-pattern and eventually also take the lead over the overall political and socio-economic process. Otherwise speaking, the likely outcome will be a dialectical *Aufhebung*, by sublating the past (in reminiscence of the HEGELian triad of negating / preserving / transcending its subject). This is why and how the past may have turned into present in a kind of presence able to define further on as well the timely history of the region.

All this is to mean that diverging historical incidentalities in why and under which conditions the challenge is to face may predetermine the approach to, with the ideologisation and the overall effect of, the whole transformation process as well.

Accordingly, military threat with the imperative of self-defence majored in the first case and profiteering from a given situation while extending control over the target countries was the prime motive in the second case, even if the long-voiced

4 Compare with the declaration of the Hungarian Constitutional Court's first (founder) president, LÁSZLÓ SÓLYOM, messaging in sharp terms—as intervened to *Constitutionalism in East Central Europe* Discussions in Warsaw, Budapest, Prague, Bratislava, ed. Irena Grudzinska-Gross (Bratislava: Czecho–Slovak Committee of the European Cultural Foundation 1994), p. 51—that "I am upset and irritated by the term »transition«: for how long are we going to be in transit?! Three years is a very long time in a historic era of rapid change. From a legal point of view, transition was accomplished [...] on October 23, 1989 [...]. Hungary must be considered to have been a law-governed state since that time [...] so from a legal angle there is no further stage to transit to."

longing for returning to institutional Europe proper[5] had from the beginning offered a general framework (patterned by the European Economic Community and fore-patterned by the North Atlantic Treaty Organisation) for the latter, with the aim of getting assimilated into this larger scheme by gradual steps.[6] All in all, the twisted interest shared by at least one over-weighty side of the main partners in transformation is perhaps the main factor to explain why and how quite a plain artificiality of the entire setting has had to characterise the latter model of transition up to the depth.

own lives to be lost being at stake	*taking control over target countries in power vacuum & amidst their financial dependence being at stake*
imposition of actors & acts	lead by ancient régime survivors
military regime w/ military measures taken	adoption of ready-made schemes taken from EU and/or being on sale[7]
no issue of domestic national interests	almost dispreference of domestic national interests
thorough change provoked	***change-over of nothing but power techniques on final account***

After all, it has led mostly to the well-known scene re-arranged while almost the same play and assertion of interests were bound to be continued, with a partial replacement of the involved partners. The rather urging time-schedule as speeded up during the transformation itself with the felt need to re-join also formally

5 The countries concerned in Central Europe have in fact belonged to Europe/West (instead of the East) for the last thousand of years, even if political deals may have manoeuvred them to get subjected to powers of Europe/East, as it happened the last time as an issue of the Yalta Treaty in 1945. For the whole span of a historical overview, see Jenő Szücs 'The Three Historical Regions of Europe' *Acta Historica Academiae Scientiarum Hungaricae* 29 (1983) 1–2, pp. 131–184 {in parts reprinted in *European Legal Cultures* ed. Volkmar Gessner, Armin Hoeland & Csaba Varga (Aldershot, Brookfield USA, Singapore, Sydney: Dartmouth 1996), pp. 14–48 [Tempus Textbook Series on European Law and European Legal Cultures I]}.

6 Cf. 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, pp. 467–488.

7 Cf. Ugo Mattei *Introducing Legal Change* Problems and Perspectives in Less Developed Countries [World Bank Workshop on Legal Reform in Washington, D.C. on April 14, 1997] [intervention, manuscript] (Berkeley & Trento 1997) 19 pp.

Europe proper again conditioned huge masses of foreign normative materials to be simply implanted without either the proper care of or the sheer ability to adaptation and refinement made. The rule of law framework that had developed at a relatively early period of transformation (by, literally speaking, preceding the total collapse of Communism and thereby also the start of any rule of law scheme coming into genuinely full operation) with the overwhelming legalistic view and the accentuatedly juristic treatment of the process itself (in reaction to former legal nihilism, imbued with any dictatorship, and in response to the widely voiced popular longing for putting an end to the over-politicisation of any daily issues, characteristic of the Communist era) could only contribute to a timely outcome that after one or two terms of free-elected parliaments and governments heralding both the change-over and the foundational change of the past regime, old-new forces of basically the *ancient régime* may now take the lead again with renewed and seemingly legitimate call-words but in fact exposing the country to the free market of the global capital without due (or duly negotiated) consideration to local interests to be anyhow asserted and protected.

Or, on final analysis, reverse was the sense and the *ratio* of relative costs in investment and benefits gained therefrom also in terms of which side was to take the burden for all this and had the most likely chance of profiteering from such a fore-planned situation.

	huge costs of military intervention	*almost no costs of control*
in short-term perspective	no issue of impact upon after-war living standards	decreasing living standards & loss of national fortune
in long-term perspective	radical renewal w/ success in return	uncertainty about future w/ hopes & uncovered promises

In a broader historical perspective, all this may have had repercussions on the changing ways Rule of Law has been understood and in fact implemented then and now, resulting in crucial crossroads, too, as far as the science-philosophical and science-methodological issue of how to conceptualise a historical idea evolved in mission to play a fermentative role in channelling legal practice as an ultimate ideal (to be equally cultivated intellectually and treated as a part of the very ontology of social existence)[8] is concerned. For quite opposite presuppositions can be reconstrued from those having prevailed as its two historical instances then and now, of the transition-to-the-rule-of-law process.

concrete-historical understanding of the Rule of Law	**abstract-absolutistic understanding of the Rule of Law**
as if CARL SCHMITT:[9] history w/ideals is unique, bound to conditions	universalism from the outset
as if EDMUND BURKE: achievements must have been fought for & through	a case of nothing more than mere will, determination & proclamation
as if sociologism: we, individuals & society are all culturally rooted products	as if mechanical (quasi biological) determinism: for any society under any times & conditions

8 For the ontological status and significance of *juristische Weltanschauungen* [lawyerly ideologies] in the law's existence, see, by the author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985 {2nd reprint ed. 1998}) 193 pp.

9 Cf., by the author, 'Change of Paradigms in Legal Reconstruction (Carl Schmitt and the Temptation to Finally Reach a Synthesis)' in *Perspectives on Jurisprudence* Essays in Honor of Jes Bjarup, ed. Peter Wahlgren (Stockholm: Stockholm Institute for Scandinavian Law 2005) [= *Scandinavian Studies in Law* 48], pp. 517–529 & *Rivista internazionale di Filosofia del Diritto* [Roma] LXXXI (ottobre / dicembre 2004) 4, pp. 691–707.

Such a sharp difference in underlying presuppositions is to explain why in the former case a true and, in many features, original democratic arrangement was the outcome while for the time being at least, a sham and from the very beginning defected politico-legal culture is on the way of getting established in the latter case, just as if it was to exemplify nothing but the nivelling down of values when being drifted by streams at hand, accompanied by low efficiency in quality selection (prophesised by the once "revolution of the masses" described by ORTEGA Y GASSET almost eighty years ago[10]).

II

Practice in Central & Eastern Europe is varying in terms of whether or not the Rule of Law is conceived of as a set of expectations to be considered categorically absolute as quasi exhaustively ready-made and gaplessly codified, or it is taken as a most respectable ideal having once developed in response to particular challenges in given cultures under given historical conditions, that is, as an art of how to balance amongst differing, moreover, conflicting values and interests within its own ethos or, otherwise speaking, a strive never to end and close indeed, as it is nothing more ambitious than a never-to-stop learning process itself: a compound of various viewpoints and shifts, layers and levels, which surfaces new features re-repeatedly, once the field of everyday routine in either typical situations or mostly used solutions is left, for new challenges it is to meet.[11]

10 José Ortega y Gasset *La Rebelión de las masas* (Madrid: Revista de occidente 1930) 315 pp. {*Revolt of the Masses* authorized trans. (London: Allen & Unwin & New York: Norton 1932) 204 pp. as well as trans. Anthony Kerigan, ed. Kenneth Moore (Notre Dame: University of Notre Dame Press 1985) xxxi + 192 pp.}.

11 For the perception of how much that what is now clearly seen—even if wrongly—as an unprecedented historical exception in a local (or regional, but in any case: epoch-making) context, can be transposed into a modality further adapted from—when allegedly copying—a past exception made somewhere else, a modality which had already been amalgamated and pacified into routine, cf. Eric A. Posner & Adrian Vermeule 'Transitional Justice as Ordinary Justice' *Harvard Law Review* 117 (January 2004) 3, pp. 761–825 & in <http.//www.law.uchicago.edu/academics/publiclaw/resources/40.eap-av.transitional.both.pdf>.

Accordingly, the duality of understandings as portrayed just above is to repeat itself here.

Rule of Law as historically particular an ideal	**Rule of Law as abstract-universal claim**
own achievement in response to own challenges	recipe once ready-made somewhere as closed & perfected by someone
"not a pact of collective suicide"[12]	to be just enforced at whatever price
part of the culture specific for us	a minimum condition to be meted out
to be cultivated creatively & responsively in order to be suited to be lived with	to be respected unconditionally as number one criterion of survival in membership of a given club

Warning against the type of a "honeymoon period" a-historicism which is also to refute scholarly achievements of the last century especially regarding the legal sociological and anthropological analysis of the classical cases of transplantation and of their well-developed *Rezeptionslehre*[13]—concluding to that

12 "The Rule of Law is not, and cannot be taken as, a collective pact of suicide"—as taught by JOHN FINNIS in Budapest on 19 February 1990, at an international conference on "Rule of Law / *Rechtsstaatlichkeit*" convened by the political party FIDESz (now the strongest in opposition to the old-new Communists in the parliament), referring to the consideration above as practically the sole and exclusive message our region (under quite new conditions never met before, as facing transition from a subversively brutal and lasting dictatorship) may draw as reasonably useful from the library-wide Western literature on the Rule of Law. For a background, see his *Natural Law and Natural Rights* [1980] (Oxford: Clarendon Press 1988), particularly on p. 175 [Clarendon Law Series]. For the context, compare also with, by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris].

13 Cf. primarily Kálmán Kulcsár *Modernization and Law* (Budapest: Akadémiai Kiadó 1992) 282 pp. as well as András Sajó *Társadalmi-jogi változás* [Socio-legal change] (Budapest: Akadémiai Kiadó 1988) 211 pp., and the long series of case studies like, e.g., June Starr's *Dispute and Settlement in Rural Turkey* An Ethnography of Law (Leiden: Brill 1978) xvi + 304 pp. [Social, Economic, and Political Studies of the Middle East 23] and *Westliches Recht in der Republik Türkei* 70 Jahre nach der Gründung, ed. Heinrich Scholler (Baden-Baden: Nomos 1996) 174 pp. [Arbeiten zur Rechtsvergleichung 181].

mere acts of will (i.e., of power imposition) cannot end in kinds of borrowance that could organically integrate into the working body of the law in a way suitable to exert an impact upon it as comparable to the efficiency of its functioning in its original context—, only very few researches have had the vocation to call scholarly attention to the facts of the past, extremely rich in historical messages.

One trend of them was to relate on-going processes and their ideologisation to the criticism formulated on the "Law and Modernization" movement,[14] to the major factors of why it had been bound to (more overall than partial) failure in a mostly Latin American context,[15] and also to its survival, moreover, transposition in *renaissance* in the conceptualisation and methodological preparation of the changes to be provoked by now in a new terrain, that of Central & Eastern Europe;[16] mostly and significantly because of its embeddings in a kind of ethno-centrism, standing for the abstract-universal view of global approaches, looking at societies as ones without own past and tradition, and therefore apt for being treated in a quasi mechanical manner.

Another trend tried at reconstructing what the need for a Rule of Law could at all be in history, where and how and as a result of what challenges it has evolved, ending by responding to the dilemma whether it is a cultural ideal to be aspired for, through measuring pros & cons and weighing and balancing amongst its

14 Cf., as an early monographic criticism upon it, James A. Gardner *Legal Imperialism* American Lawyers and Foreign Aid in Latin America (Madison: University of Wisconsin Press 1980) xii + 401 pp.

15 For the main pieces of criticism, cf., e.g., David M. Trubek 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' *Yale Law Journal* 82 (1972) 1, pp. 1–50; Thomas M. Franck 'The New Development: Can American Law and Legal Institutions Help Developing Countries?' *Wisconsin Law Review* 12 (1972) 3, pp. 767–801; David M. Trubek & Marc Galanter 'Scholars in Self-estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States' *Wisconsin Law Review* (1974) 4, pp. 1062–1102; John Henry Merryman, David S. Clark & Lawrence M. Friedman *Law and Social Change in Mediterranean Europe and Latin America* A Handbook of Legal and Social Indicators for Comparative Study (Stanford: Stanford University Press & Dobbs Ferry, N.Y.: Oceana 1979) xvi + 618 pp. [Stanford Studies in Law and Development].

16 Cf., as a most telling example, Juan J[osé] Linz & Alfred Stepan *Problems of Democratic Transition and Consolidation* Southern Europe, South America, and Post-Communist Europe (Baltimore: Johns Hopkins University Press 1996) xx + 479 pp.

conflicting aspects even if never attainable in an airily full completion or, as arrived at present-day conditions with well-established standards both internationally and domestically, whether it is just a pre-set set of clearly formalised normative requirements which are to be simply abided by, strictly and formally, and under any conditions.

Mitigation in-between was perfected by a third direction, casting light on the basic differences in underlying *mentalités juridiques*[17] between the two main historical manifestations of the same root idea,[18] namely, in the Rule of Law proper, developed in cultures of the Common Law, on the one hand, and in form of *Rechtsstaatlichkeit* in arrangements of the Civil Law, on the other. For justiciability with open ending if due process of law is also encountered stands for the former, whilst formal security of/in law trusted in mere enactments for the latter one. Paradoxically, albeit completed perfection of the law as enacted without gaps and waiting for nothing in addition to quasi mechanical an application spirits the latter,[19] mostly the former is being used now in global mass transfers as a closed set of requirements codified almost up to the smallest details.[20]

17 An expression by Pierre Legrand, e.g., in his fabulous stand to be taken nonetheless seriously in his 'European Legal Systems Are not Converging' *The International and Comparative Law Quarterly* 45 (January 1996) 1, pp. 53–81 and as synthetised in his *Le droit comparé* (Paris: Presses Universitaires de France 1999) 127 pp. [Que sais-je? 3478].

Although hidden in reconstruction (by the example of German and English languages) of how differing terminologies as coming from differing word uses and cultural understandings are to represent Civil Law and Common Law respectively, cf. the pioneering characterisation by Peter Sack 'Law & Custom: Reflections on the Relations between English Law and the English Language' *Rechtstheorie* 18 (1987), pp. 421–436.

18 Cf., by the author, 'Legal Traditions? In Search for Families and Cultures of Law' in *Legal Theory / Teoría del derecho* Legal Positivism and Conceptual Analysis / Postivismo jurídico y análisis conceptual: Proceedings of the 22nd IVR World Congress Granada 2005, I, ed. José Juan Moreso (Stuttgart: Steiner 2007), pp. 181–193 [ARSP Beiheft 106] & *Acta Juridica Hungarica* 46 (2005) 3–4, pp. 177–197 & <http://www.akademiai.com/content/f4q29175h0174r11/fulltext.pdf>.

19 Cf., by the author, 'Varieties of Law and the Rule of Law' *Archiv für Rechts- und Sozialphilosophie* 82 (1996) 1, pp. 61–72.

20 See, by the author, 'Reception of Legal Patterns in a Globalising Age' in *Globalization, Law and Economy / Globalización, Derecho y Economía* Proceedings of the 22nd IVR World Congress, IV, ed. Nicolás López Calera (Stuttgart: Franz Steiner Verlag 2007), pp. 85–96 [ARSP Beiheft 109].

III

As it has since long been established by legal sociology, and then, by legal hermeneutics as well, a legal system in operation is by far more than a mere skeleton made up of formal enactments. In fact, it is a working unit of formal and informal components, upon the basis of some legal culture, with an adequate tradition in the background.[21] As it has been argued for exactly by Scandinavian legal realism,[22] rules, either enacted or casually reconstru(ct)ed, are sheer indicators of kinds of underlying normativity already in operation,[23] from which they can surface as icebergs' visible tops at the most. All in all, transfers and impositions risk of being wedged in a contexture having been and maybe also unchangedly remaining alien to them, either detaching themselves from—as an external interference with (and as cast out of)—the target system or decomposing the system itself, by re-routing its further development on an artificial (forced) path, rended off the system's original culture and tradition.

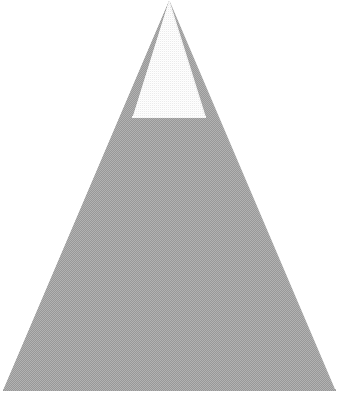
The illustration below clearly shows that no approach to a working legal system can be reduced to a given quantum of enacted rules as mappable out from any formal doctrine on the sources of the law. Or, rules provide only basic guidance and mark mere directions, specifying the terrains and channels of what would follow in judicial weighing, argumentation and reasoning. This is the average condition for all well-developed legal arrangements stabilised and also crystallised in practice, even if not apparent for the first look. Consequently, at dramatic times when enacted rules are changed over because of a revolutionary new start or mass law-import, underlying social practices as well as skills & sensitivities

21 Cf. *Comparative Legal Cultures* ed. Csaba Varga (Aldershot, Hong Kong, Singapore, Sydney: Dartmouth & New York: The New York University Press 1992) xxiv + 614 pp. [The International Library of Essays in Law & Legal Theory, Legal Cultures 1].

22 For a local overview (with some texts reproduced for text-book use), cf. *Scandinavian Legal Realism / Skandináv jogi realizmus* ed. Antal Visegrády (Budapest: [Szent István Társulat] 2003) xxxviii + 160 pp. [Philosophiae Iuris / Jogfilozófiák].

23 For the latest theory on the core of juridicity, cf. Enrico Pattaro *The Law and the Right* A Reappraisal of the Reality that Ought to be (Dordrecht: Springer 2007) xxxiii + 457 pp. [A Treatise of Legal Philosophy and General Jurisprudence I].

& adaptations in/through judicial practice will also loose ground, while conventions and conventionalisations destined to both filling their gaps and making such a skeleton of rules socially liveable are to gain ground in years—perhaps decades and long series of decades[24]—until the working legal system can be said to fit to rightly expectable expectations.



In the meantime, anything can happen on behalf of those who are determined enough to take advantage of any chance to avail, only provided they are endowed with less scruples.[25] Partly the overall tragedy of Russia after the fall of Communism can also be attributed to the shakening of the regulation on the top and thereby to the collapse of the old regime which all its Byzantic–Asiatic/ Mongolian–Bolshevik complexity notwithstanding, may well have been rather meagre but in any case in a position to assure the mere survival of the populace on a basic level.[26]

24 Meaning centuries, in case of a solid status in law, e.g., of the monarch in England, is reached.

25 Cf. also as mirrored by a Lithuanian case-study, by the author, 'Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisations (The Experience of Lithuania)' and 'Rule of Law – At the Crossroads of Challenges', both in the present volume.

26 Stephen F. Cohen *Failed Crusade* America and the Tragedy of Post-Communist Russia (New York & London: W. W. Norton & Company 2000) xiv + 304 pp. Compare also with its essayistic reviewing by the present author in his 'Failed Crusade: American Self-confidence, Russian Catastrophe', also in the present volume.

More to the point are some examples taken from Hungary's recent history. Namely, by the forceful push of a doctrinarian libertinist course during the early years of the first free-elected government after the fall of Communism, police was intimidated to use arms in fact, so it happened more than twice that young policemen on night duty were killed by thieves of old cars of extremely low value otherwise.[27] – The legalistic overtone had pervaded government to such a depth that after half a century of Soviet occupation it had no effective means of controlling national security, for instance, starting by officially asking any of the Hungarian diplomats, army and police generals in service whether or not they had ever been and/or continue being an agent of any of the network of, say, Soviet secret agencies. – And over-enrichment without legal title that might justify its volume could go on uncontrollably all through and practically up to our days, as all the successive bills presented till now to wedge at least posterior measures guaranteeing minimum transparency in the process of so called privatisation (ending, by the way, in the loss of two-thirds of the national fortune without due return in direct financial assets or indirect economic benefits) were equally rejected through an over-activist constitutional adjudication.

It is much telling about the differences of the underlying *mentalités juridiques* in play that instead of the continental manner of approaching any issue as a problem to be solved directly in and just through the law, the most useful American suggestion ever addressed to my government on my query[28] was exactly to evade searching for direct paths and especially ones formulated in and through the law. Only to mention two instances: instead of posterior cleansing, the introduction of a physical fitness test was advised to

27 Especially in small towns at the dawn, probably by criminals coming from our Eastern neighbourhood, where used *Zhiguli*s of a current Hungarian value of hardly more than US$2000 had still a good market.

28 When in addition to my positions at the *academia* and *universitas* I was to serve as a member of the Advisory Board to the Prime Minister of the Republic of Hungary between 1991 and 1994, such and similar were the most sparkling ideas we got during our frequent visits from our partners at the US Embassy in Budapest or, mostly, the US Department of State, the Head of the Joint Chiefs of Staff as well as the National Security Council in Washington.

somewhat rejuvenate those in the highest army and police ranks with dubious past loyalty, on the one hand, and the US-modelled use of questionnaires in re of so called national security sensible positions, that is, voluntary self-offering provision of all data needed to enable human resources management to begin on the relevant field was conceived as solving the problem outlined in the former paragraph, on the other.

Well, all this is standing for the following realisation: while substantively formulated paths may easily be found as problematic, procedural ways are by far more openly neutral as withstanding and excluding any questionability. Otherwise speaking, in cases at hand as those exemplified above, Civil Law methodology mixed with practices known in Common Law may prove to be by far more practicable and smoothly functioning than just facing the issue as a challenge to anyone's right to be either extended or limited. That is, the same problematisation in the pragmatism of an object-language as transposed into the law's normatively frameworked meta-language may feature up and, in fact, serve the most diverging, moreover, even antagonistic characters, respectively, goals, in function of the (substantive & procedural) directions and (institutional) channels chosen and used, thereby pre-selecting the legal technicality mastering the given field.[29]

IV

Whether or not the new language happens to be predominantly American, i.e., formulated in one of rights and human rights, and how much the borrower's peculiar technicality and procedural approach segmentalises and departmentalises, or even dissolves, the common responsibility once born for the *res publica*'s sake even vivid under the old regime, is another issue that needs to be examined alongside the scholarly treatment of the

29 For the transforming magic built in law, cf., by the author, 'Theory and Practice in Law: On the Magical Role of Legal Technique' *Acta Juridica Hungarica* 47 (2006) 4, pp. 351–372 & <http://www.akademiai.com/content/j4k2u58xk7rj6541/fulltext.pdf>.

movements of Law & Development, Law & Modernisation, as well as within the scope of globalised legal transfers.

Accordingly and most importantly for the region, a new reality risks of having become the mainstream under the aegis of the new demands of the rule of law after the fall of dictatorship, and this is the rivalry amongst state institutions. Under their new legitimacy, parts and branches in exercise of state power—Parliament and Constitutional Court, Government and the Supreme Court, as well as the series of Ombudsmen—are even now (after almost two decades past) to fully accomplish to the farthest extent (by over-exhausting what is inherent in) their legal status while step by step also extending their respective competences up to the point they can reach at all, with an exclusively sectoral and eminently narrowed view of their own chances and availabilities, but without any intent of either sensitively safeguarding overall common (i.e., national) interests or entering into co-operation with any other branches of the state machinery for such a (legally less definable and posteriorly less accountable) purpose. Having this solitary attitude in mind, the disappointing outcome cannot be but a kind of practical anarchy, casting a disfavourably ambiguous light on the popular understanding of what the Rule of Law is and can at all be for, by now starting to be more liking to the once Communist myth and propaganda about a better future than to what it appeared to be as serving for two decades ago, when it had become the call-word as a counter-symbol by which the ultimate unsupportability of all forms what we had once known as the "actually existing system of Socialism" could be provingly shown.

Eventually and in any case, as far as the way of mastering (or the caring for humility toward) the instrument is concerned, a choice has finally to be made between the attitudes of a circus trainer and a gardener.

This very option concerns most directly the final conclusion by which the criticism upon the main relevant American trends has ended in its due deliberation. Notably, ethno-centrism and cultural imperialism have been just two instances of the key-words to cover this a-historical new utopianism which is just expressive of the contemporary tendencies at globalisation through all-thorough

universalisation.[30] Or, the critical mass of papers collected by World Bank bibliographies is alternating in a basic choice to be made between two directions when taking a final stand: either the pattern of a circus trainer in an abstract understanding of the Rule of Law, transmitting and enforcing his/her own will as previously determined and decided, because taken from his/her home, or the example of the gardener in a historically particular and locally singular understanding of the Rule of Law, a gardener who is (1) in respect of the target culture as given (by cultivating its soil and planting its plants); therefore is (2) to assist its particularities to further develop (instead of any of his/her fixed idea or experiment/experience he/she mediates as made/gained by others at some other place at another time, to be simply transferred and imposed upon); in conclusion of which (3) the Rule of Law as a scheme cannot be more than a continued learning programme for all those involved (that is, equally for once pioneers of having historically formed it and past students having grown in the meantime to become masters themselves in equal status with the former) at the most.

V

In any case, and especially in Central Europe with active constitutional adjudication now, there is a temptation at substituting past nihilism of the rule of law[31] to a kind of

30 For the basic criticism upon the trends of "Law & Development" and "Law & Modernization", cf. note 20.

As to the tendency of globalisation through universalisation as a specific mentality inherently characteristic of the United States of America as an imperially big country, therefore by far more sensitive to core issues than to small-size subtleties, cf., by the author {reviewing Paul F. Campos *Jurismania* The Madness of American Law (New York: Oxford University Press 1998) x + 198 pp.}, 'Joguralom? Jogmánia? Ésszerűség és anarchia határmezsgyéjén Amerikában' [Rule of law? mania of law? on the verge of rationality and anarchy in America] *Valóság* XLV (2002) 9, pp. 1–10 & <http://www.valosagonline.hu/index.php?oldal=cikk&cazon=326&lap=0>.

31 Cf., by the author, 'Liberty, Equality, and the Conceptual Minimum of Legal Mediation' in *Enlightenment, Rights and Revolution* Essays in Legal and Social Philosophy, ed. Neil MacCormick & Zenon Bankowski (Aberdeen: Aberdeen University Press 1989), pp. 229–251.

fetishism of the same rule of law,[32] which may further strengthen the dependence of target countries on pattern-following, and thereby weaken their creative forces and sense of self-esteem and self-responsibility, vitally needed for their successful recovery.

After all, in present-day societies, the variations to the ideal of the Rule of Law as described in the first two paragraphs in characterisation of post-WWII developments can be best typified by the illustration below. No need to emphasise that this very typification is centred on the transition-to-rule-of-law understanding of the Rule of Law as a most purist and formalist, simplistic and excessive—neophyte—type exemplified by the path the Constitutional Court of Hungary had chosen in as unilaterally enforced upon the country, which is then compared to the by far more matured and balanced master type formed in the wake of transiting to rule of law after WWII, demonstrable by the jurisprudence of the Constitutional Court of Germany.

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32 In acknowledgement of both the Central & Eastern European lawyerly nostalgic ideal of the rule of law as reflected back to its respective pre-war past and the practical want of any impact upon it by the after-WWII continental (Western) developments in both judicial style and patterns of reasoning, in respect of both the latter's ways and sources of inspiration (as exemplified particularly by the coming into fore of reasoning by principles; a renewed sensitivity towards the demands of natural law, especially in its form of "the nature of things"; and the growing constitutionalisation of issues), cf., in addition to the author's contributions—'Development of Theoretical Legal Thought in Hungary at the Turn of the Millennium' in *The Transformation of the Hungarian Legal Order 1985–2005* Transition to the Rule of Law and Accession to the European Union, ed. Péter Takács, András Jakab & Allan F. Tatham (Alphen aan den Rijn: Kluwer Law International 2007), pp. 615–638, on the one hand, and 'Meeting Points between the Traditions of English–American Common Law and Continental-French Civil Law (Developments and Experience of Postmodernity in Canada)' *Acta Juridica Hungarica* 44 (2003) 1–2, 21–44 & <http://www.akademiai.com/content/x39m7w437134167l/?p=056215b52c56447c8f9631a8d8baada3&pi=1> & <http://www.akademiai.com/content/x39m7w437134167l/fulltext.pdf>, on the other—, Zdenek Kühn 'Worlds Apart: Western and Central European Judicial Cultures at the Onset of the European Enlargement' *The American Journal of Comparative Law* 52 (2004), pp. 531–567.

As to the conflicted role played by the Hungarian Constitutional Court, at the same time having arbitrarily stipulated what the Rule of Law had to stand for in Hungary, and then, making its own unchallengeable but usurpated outcome transubstantiated into an ultimate goal and *sine qua non*, cf., by the author, 'Creeping Renovation of Law through Constitutional Judiciary?' in the present volume.

German Constitutional Court	Hungarian Constitutional Court
balanced caring for basic constitutional values	past nihilism changed over by fetishism
bound to nothing but its Basic Law	"elegantly flying to and fro above"[33]
coming from below in respect of expectations	partisan forum edicting on ultimate choices & values
multilateral democratic participation w/ profession included if feasible	*unilateral* democratic participation w/ profession excluded on principle
legitimacy searched for incessantly	legitimacy drawn from mere status
past discontinued	past continued
law is seen in totality of its working in implementation & adaptability	suggesting pattern-following w/ weakened creative forces in adaptation

Accordingly, on the one hand, in the after-WWII mature type, the idea of the Rule of Law comes—symbolically speaking—to the fore from the grass, as the outcome of a widely felt and consented need from below, on the bottom. Therefore it preserves all through a rather sensitive relationship to the populace, in the widened sense of democratic participation. Or, under the aegis of the rule of law anything can be done in realisation—and, concludingly, only provided—that vivid practicing is a function of its continued popular support. Or, its smooth functioning is inherently preconditioned by moving in parallel with rightly felt popular expectations, in the sense at least that the Rule of Law is not to become a self-conceited partisan forum of pre-determining political paths and national policies, of reforming morals and edicting on values, but will remain cautious,

33 Quoted from one of the Constitutional Court Justices of the first term reporting on their activity's fruits, Imre Vörös in [as interviewed by] Gábor Halmai & Csaba Tordai '»kevesebb lesz az elegáns röpködés a jogrendszer fölött«' [»There will be less elegant flying to and fro above the legal system«] *Fundamentum* 1999/2, p. 68.

neutral and well-balanced by being bound solely to its Basic Law—not owned by the country's Constitutional Court but respected as the ultimate foundation stone for the life-span of all the citizen's common Republic—when decisions are to take. Therefore the guardian of constitutionality does not dissociate itself either from the people and/or from the relevant profession(s).

On the other hand, the after-Communism type as favoured mostly by Open Society specialists and forces of globalism has unequivocally opted to formalism and strict rule-positivism whenever refuting interpretation against its creative innovation is at stake. For instance, early enough to pre-defining the entire course and end-result of transition, the Hungarian Constitutional Court took a stand in what was an artificially erected contradiction between so called legality and justice,[34] in terms of which it preferred foreseeability as the sole guarantor of *formale Rechtssicherheit*—arriving from formal security in/of law also to rule-of-law continuity with a past based upon total denial of anything of the rule of law—to the detriment of any material or substantive value. Therefore and in a rather unforeseeable way, it used to concluding to the unconstitutionality of several dramatic issues (bills & laws) based upon nothing but its imagined virtual "invisible constitution", or false references to solutions adopted by "civilized nations" or, if any constitutional clause was named and identified as a source at all, the mere self-description of the Republic of Hungary as "an independent, democratic state under the rule of law."[35] Such a way it could certainly become the marshalling power

34 For differing solutions reached by neighbouring contries, cf. *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub].

35 Constitution as the Act XL (25 June 1990), Article 2, Section 1.

It is to be noted that the Hungarian Constitutional Court treated this clause as well, as the basis to derive whatever argument for its politically activist and interventionist arguments from, the fact notwithstanding that the "rule of law" notion defies any legally unambiguous definition.

For the Court's nine starting years of marshalling the frameworks and paths of transition, see the preceeding note. For the relative openness of anything of the Rule of Law both as an ideal and as a given solution, only weighable within individual balances *hic et nunc* and *in concreto* in a given legal arrangement as a whole, see Richard H. Fallon, Jr. '»The Rule of Law« as a Concept in Constitutional Discourse' *Columbia Law Review* 97 (January 1997) 1, pp. 1–56.

of after-Communism transition in Hungary, forecasting its degeneration into unconditional continuity, which could after all solidify old political forces to come back as new ones endowed also by its new rule-of-law legitimacy now.

Amidst changing times and political preferences in governance, such an approach to the Rule of Law did never strive to popularity or participation in democratic processes. It was too contradictory to be able to convince anyone or to have its voice heard as one of the series of positive feedback, out of which a nation's destiny can be formed. In many cases constitutional adjudication took a course running counter majorities in the public sector such as the parliament, government, political parties, as well as the *academia* and the *universitas*, in full consciousness of only one single fact: it is not subjected to any control, as its decisions are of a constitutional force *eo ipso*, so its unilateral acts are made unquestionable from the outset.

Or, the very idea of the Rule of Law is reduced here to the all-mightiness of the Court's uncontrollably discretionary power. For instead of caring for common advance and destiny of a people, such a constitutional adjudication sufficed itself edicting its positions as if it were to hammer on row materials, acting in a fore-granted security that the kind of constitutionality it presents as the last value for a nation's survival is from the very beginning inherent in and embodied with it.

Under such conditions,[36] rebirth of the vitality of DICEY's thought about public opinion as the ultimate support of any progress achieved in law[37] is a lesson still to be learned; the fact notwithstanding that all various forms by which the idea of the Rule of Law have till now been institutionalised do themselves display a strong civilisational value.

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36 The issue of whether or not conditions developed do allow consolidation of a democratic setup is analysed in broader social science terms by Kálmán Kulcsár 'The New Political System and Hungarian Reality' *Angewandte Sozialforschung* 24 (2006) 3–4 [»Asphyxiation«], pp. 187–200.

37 By Albert Venn Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan and Co. 1885) vii + 407 pp. & *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan and Co. & New York: The Macmillan Co. 1905) xx + 503 pp.

THE BURDEN OF THE PAST

WHY HAVING FAILED IN FACING WITH THE PAST?*

Taking a look in general at the progress of your professional life, one can see that it has been steadily advancing ever since. You have achieved almost every peak in scholarship in your own field of study. Mastering several languages you have taught and conducted research in Australia, in Japan, in Scotland and America. As an active member in various scholarly associations and author as well as editor of a great number of publications, you are a regular participant at international congresses. You are a professor at the Faculty of Law of the Pázmány Péter Catholic University of Hungary and the director of its Institute for Legal Philosophy.

How would you describe the family background, the school and the intellectual milieu that have contributed to this outstanding accomplishment? How did you endure the decades of Communist rule?

My father shifted from the family tradition of manufacturing coaches to the construction of cars, earning professional, human and social authority in the fields of automobilism, motor sports and both civil and military aviation. I was born into a harmonious, hardworking family with a responsibility for the public as well. When the Communists took power in Hungary, I was a young child going to elementary school. Church schools were liquidated and then our family company fell victim to nationalisation. Under the Communist regime I got to know primitivism and blinded narrow-mindedness. Our commitment to the nation's fate with the cause of Catholicism and the fact that we could, even amidst the

* In its first version, 'Miért maradt el a múlttal szembenézés, az újrakezdés beteljesülése?' [Why have we still failed to face with the past and missed a restart?] [Interview of Anna Banovits] [shortened] *Magyar Nemzet* LXVI (December 13, 2003, Saturday) 290, »Magazin«, p. 24 and [in full] *PoLíSz* (June–July 2004), No. 77, pp. 3–8 & <http://www.krater.hu/site.php?func=polisz&file=cikkek&cnr=290> & <http://www.krater.hu/pprint.php?print=290>.

persecutions, help others who were even more miserable than us, gave our life a deeper meaning, a feeling of integrity. I certainly met impressive people at school, but it was first of all my stubborn resistance that determined my development. My early interest in technical construction was soon replaced by defiant self-expression, primarily in writing poems and aphorisms. Having finished secondary school, I could not choose but spend thirteen months working as a miner in the neighbourhood of my native town, if I wanted to get to university at all. This was the only way to "pay the penalty" for the "sin" of having belonged to the 'exploiting class' (according to the stigma of the age). Just by the time when I could manage at last to get back from the far-away Faculty of Mine Engineering of the Technical University in Miskolc to my hometown, the Faculty of Law at the University of Pécs, a political police action was to be launched against the *Regnum Marianum* clerical community dedicated to the education of the youth. Priests were unlawfully arrested on trumped-up charges of alleged "adulteration" of the youth and complot against the state and social order of the peoples' democracy. As part of the action, the secret police started to threaten and harass also me, continuously: I was subjected to interrogation, accused of 'subversive activity' aimed at 'overthrowing' the socialist order. What they longed for was obviously a spectacular lawsuit. Such a conflict with the authorities of the Ministry of the Interior, of course, rendered it inconceivable for me to remain at the university after completion of my studies. Fortunately, help arrived soon, in the person of Professor KÁLMÁN KULCSÁR who used to lecture at Pécs at the time and was an acclaimed authority in legal sociology which, as a subject also in Socialism, he had re-founded recently. He rescued me from my desperate situation by offering me a position in the stronghold of Socialist jurisprudence, the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences, where genuine scholarship was cultivated (in contrast with the mediocre provincialism of universities) by an excellent staff at a level also competitive by international standards. Of course, due to my intellectual disposition, I encountered some hardships there too,

but the unconditional respect for performance by my director, Academician IMRE SZABÓ, helped me through them all.

As a member of the Advisory Board of Prime Minister JÓZSEF ANTALL from 1991 to 1994, you extended your intellectual work to the field of politics in practice. What inspired you, as a theoretical professional, active basically in the field of legal philosophy, to such a step? As far as I know, you have not engaged in politics ever since. Back at that time, you worked on the legal foundation of one of the issues affecting society most deeply, that is, on how to face with past injustices. How far have you got on this issue personally?

Theoretically, I have always been interested in the potential of law, in its possibilities and limits. This may manifest itself first of all in the legal handling of exceptional situations, differing from social normality and therefore unforeseeable by the legislator. Having examined the efforts at facing with the past on the ruins of dictatorships abolished after World War II, necessary to found any future, I have contemplated the tasks ahead of law following Communism, the other greatest evil of the 20th century. I had to realise that although many of the answers offered by law are of a merely symbolical force (laying down an ideal without changing anything directly), they are able to launch or legalise dramatic social changes of directions. This may be one of the reasons why historical justice could become a key issue for us—above all, as the symbol of a new start concluding the past. The realisation that no future can be built out of such a criminal past was declared by the Allies at the end of the World War II. What their "white doves" brought to Germany and Japan was not parliamentarism, constitutionalism and rule of law but armed occupation, military occupying administration, censorship, abolishment of working institutions, breaking with earlier local authorities, dissolving prevailing social ties and enclosing the past into penal sentences. The allied powers tried to create normality by "education to democracy" planned for decades, in order to make any democratic arrangement workable at all. And as one of the primary tasks of jurists is to ensure consistency in justice and in the social order

alike, I had to ask myself: is there any rational explanation for the difference between the transitions following the various (brown and red) dictatorships, or had it been some unspecified vested interest in the background that has now compelled the Atlantic world to forbear from acting in the considered way it once did in the past, after World War II?

So this is how far you got in thinking?

To apply the institutions of the Atlantic world directly onto a society deformed by nearly half a century of Soviet rule was a naive idea, to say the least, especially after the attempt at adapting American law to Latin America had failed less than a decade ago before. But what else could you expect from a country influenced by ideologies to the depth that even a few years before SAMUEL HUNTINGTON's prediction of the clash of civilisations was formulated, any reference to the difference between historical cultures had been denounced with the label of social determinism as the negation of liberalism?

What legal obstacles prevented the fulfilment of the natural social demand to close down the past in a reassuring way? Why were the bills aimed at facing with the past rejected in Hungary?

We have to recall, in connection with the efforts of MP ZSOLT ZÉTÉNYI, that neither Lord KIRKHILL, recognised then as a leading legal authority of the Council of Europe, nor HANS-HEINRICH JESCHECK, the great representative of continental criminal jurisprudence (and intellectual mastermind of all established criminal lawyers in Central Europe as well), nor the American professor CHERIF BASSIOUNI, having pioneered in eventually setting up international criminal jurisdiction, nor SIMON WIESENTHAL, internationally respected for having fought for facing past crimes, perceived any circumstance preventing the actual settling of accounts in the fact that a dictatorship allows prescription to pass its period without prosecution. Lapse of time, no doubt, does actuate prescription. However, with a sound sense of law, it can

hardly be said that the merely mechanically measured time in a physical sense is meant by statutory limitations. Law being a conventionally coded expression of social practicality, the result will be contrary to the very idea of law in a cynical and self-destroying way if the authority sees no legal relevance in the circumstance that the Socialist statehood had not only degenerated to a perpetrator's role but also left common crimes (murder, torture, and so on) unpunished all along; moreover, it had punished exactly those initiating prosecution by reminding jurisdiction of its legal obligation.

In 1992, during a conversation you were of the opinion that society would spontaneously stigmatise—by casting out—the perpetrators who had operated the dictatorship. This might have been a slow process but not even it has in fact taken place. In the meantime, the Constitutional Court declared the prescription passed and the deeds untouchable in law any longer. Thereby also accountability has become restricted and made in fact almost impossible.

Now the old criminal regime may even establish its innocence. All what our new regime of the rule of law is capable of is the indirect encouragement of future dictators: if they can keep their positions at any price until their deeds pass the period of limitations, then the succeeding constitutional state can no longer have anything to say about their atrocities. Meanwhile it is known that the sentences of Nuremberg and Tokyo have, exactly half a century ago, already shaken this kind of anti-human positivistic narrow-mindedness.

Your book on Transition to Rule of Law *published in Budapest in 1994 considers a number of issues raised in the process of transition from quite unusual aspects. One of the remarkable ideas is, for instance, the obligation of collective deliberation with open chances, together with all the likely benefits and pitfalls. What does this mean? Can classical principles of law be questioned? Can*

anyone claim to be entitled to dispute the role played by the law in the maintenance of order?

The Hungarian response to the Socialist nihilisation of law is the equally destructive fetishisation of the law. In international comparison, we have become the pitiable model of a kind of helplessly self-destructive doctrinarism. With more experience, maturity and balance, the German Constitutional Court has for example always regarded the Rule of Law as something which must not only be waved above our head as some stick. As the mediator of social order, the culture of what is known as "the Rule of Law" is also nourished by the people's elementary sense of justice, therefore widely held rightful expectations should not be trampled upon.

Law is not an inanimate object but something that operates through its institutional interpretation, and this is a function of all-social culture. By the way, this is the reason exactly why different practices can be built upon the same text in differing cultures. The reason why it is doubtful whether or not National Socialism or Bolshevism can be easily transcended is exactly that such regimes may have completely re-educated society by dictatorially extorting adjustment in almost every sphere of life, having formed, in addition to legal texts, background cultures as well. Now, by the push of such fetishisation, we tend to attribute demiurgic power to the letter of the law although it is us—starting with our own interpretation—who carry a creative capacity. Just let me ask: has the law suddenly changed in the US after 11 September 2003 or has the shock, mediated and even enhanced by the media, resulted in a re-interpretation from which an America differing in principles is being formed by now?

The dilemma with the ensuing debate around the very meaning of the transition is more passionate than ever and the social anxiety has not abated at all. New personal and social tragedies are being revealed day by day. Questions emerge and are still to be answered, because, as you also think, law cannot be abstracted from the practice of everyday life.

Law may though be formalised, impersonalised through its linguistic formulation, extended even to whatever culture. However, as OLIVER WENDELL HOLMES once construed, its life is still not logic alone by far: law is not merely an abstract conceptual act. We, humans, have devised law as an autonomous mediator, and now we are trying again and repeatedly to isolate it artificially. But we are not living for the sake of complying with sheerly abstract formulas. The reason why we have law is the same why we have culture and, in it, morality: we wish to filter contingencies of everyday life arising at the spur of the moment, through standards we have established according to our values. With culture and morality in it, law is seriously considered and mostly respected in the same way and for the same reason how and why our self-discipline is. It is foolish to turn the instrument at one's disposal against oneself, but it is even more foolish to blame the instrument then. The English say law can only transform into a collective pact of suicide in a society which is suicidal anyway. Professionals of the abstract defence of human rights were already horrified at the thought of calling to account when the Argentinean junta collapsed. Due to them, the want of any sensible resolution and its irradiating side-effects have since grown to global proportions, thus the rhetoric of GEORGE SOROS' human rights watchers is also getting more refined. While earlier they used to view any attempt by the successive government at probing into the affairs of its predecessor with suspicion of infringement upon human rights from the start, now they tend to regard the successor to be bound to initiate even criminal proceedings if human rights violations on behalf of the predecessor are detected on a massive scale. Our path of transiting to democracy might have been more beneficial and also more convincing to the local populace had those civilisators become enlightened earlier.

Perhaps an "enlightenment" like this may need some time, don't you think so?

From the very outset, the external marshalling of all the key events of our transition was unfortunately a thoroughly theoretised

and ideologised act of political influencing, guided by own interests pre-determining the outcome, instead of unbiased problem solving. This is why it would be vital for society to recognise its own strength in both thought and action, in order to neutralise missionary self-interest in professional human rights activism.

In your recent books, you call attention to the fact that there is very little literature on the legal handling of post-dictatorship situations. As far as I know, the legality of the Nuremberg trials has also been raised recently. What do you think today of this all?

Did the Belgians act in the proper way when they refused to sentence their king for usurpation of power according to the letter of their constitution, for having preserved the occupied country's legal continuity in exile during the world wars, thus necessarily omitting certain formalities, and greeted him as the nation's saviour and legalised posteriorly his procedure as a gap in law? The Nuremberg sentences may be questioned indeed. Actually this is a professional issue for the most part. Indisputably and all that notwithstanding, its direct message is that back in those days people had the courage to face questions posed by their times, forging out some kind of an answer which they deemed optimum ideal.

Law gets again monopolised by political power everywhere. For every regime in history has in fact interpreted its rules according to its understanding, adapting and/or deforming them so as to serve primarily as its own instrument. What can remain for us from the respect for law at all?

Like anything else, laws and rights, too, can be used and misused, that is, overused and abused. There is no "royal path" in law either. Any formal question can be answered by either 'yes' or 'no', but this is just the surface, the formal ending of a responsibly and carefully creative proceeding by searching for balance in the whirl of rules, principles and considerations running against or

even extinguishing each other. This is why the classical Jewish and Arabic as well as the Anglo-Saxon legal mind focuses so little on sheerly formal logicism in decision-making; for genuine legal culture arises exactly from the sensitivity and relative openness of this search for a balance, from the realisation that such a search may ensure re-consideration and even change within a relative legal permanence.

If the prevailing law and order is not protected by guarantees of the rule of law, what can the individual and the society expect?

When they meant 'rule of law', the English did not put their trust into dead letters but into the disciplining force of public opinion instead. This is why English legal disputes are usually not only more edifying for the soul, more responsible and more disciplined, but also burdened by fewer contingencies. They are focussed on the issues themselves and associate (by adapting) their legal considerations to these. They know that whatever is socially assumable, its legal form with proper justification can be designed too. They do not suggest that law is something that hovers above us readily available. In a maturely developed culture, the assumption of responsibility by humans for human concerns is to ensure that words have a weight and deeds have consequences.

Your reconsideration is not intended exclusively for lawyers: the purport of the issues surveyed extends well beyond the bounds of the legal profession. The questions it investigates are still unanswered, constantly generating strains. The negative effect of the way past and present are permitted to interact and interpenetrate in our present day transition permeates our everyday lives. We have still not come to terms with the past and it will take a long time before we can reach the desired equilibrium.

Postponing action aggravates the problem. In critical times, even a tiny error may cause shifts leading to forced paths whose effect will be felt for generations to come. This is why we still feel compelled to reconsider, as a thought-inspiring drama, the

American dilemma of bombing or further fighting Japan in the final period of the war. Man's greatest enemy is no one else but his cowardly self, if incapable of thinking and of determination, lost in uncertainty. At the best, we can cling with our psychical father-complex on nothing else but whatever we generate out of ourselves, our culture and morality. Lawyers carry huge responsibility in setting standards. Even more so if they under- or over-perform. We should recall that in the Middle Ages, often condemned as "dark", the virtue had to go hand in hand with temperance, moderation and proportion.

So what can the society do for the future? And what can law do?

We live in a world controlled in a strange way. The debates we have scarcely started presently lost already their topicality when the intention of political transition was born. Being over-zealous in adopting externally patterned models, we used to ponder solutions which were in fact formulated by others at their places and times to respond to their troubles—as if no particularity could survive our brave new world's universality. In consequence, we smoothly ignore dilemmas and/or chances which these canons, imposed upon us as ready-made, leave unanswered. We should realise at last that insensitivity and lack of independence in thought and action will not lead us out of our problems. The resolution, the willingness to take a risk by efforts at beating a new track in the jungle is needed to find the path we hoped to.

CREEPING RENOVATION OF LAW THROUGH CONSTITUTIONAL JUDICIARY?*

1. Transitions in the Age of Globalisation Having arrived at the 21st century, we live in the age of legal transfers that tend to be increasingly uni-directional as aimed practically, by countries playing a primary role as central agents of globalism, at societies exposed to the latter's influence and temporarily proving to be open in orientation. Just as in case of the United Nations, this uni-directional legal effect is primarily brought about (i.e., initiated, effectuated, and also rewarded) by large worldwide international institutions and organisations along their own goals (of world banking, of free trade, of human rights and/or others), to which various regional structures are associated (at their own levels but with not negligible comprehensive force), as, for us (from Iceland to Portugal, having also in mind Israel and Turkey, as well as the successor states of the one-time Soviet Union), basically the European Union itself as well as the great powers destined for playing distinctive roles in a classical sense (at least in their areas), as today the United States of America in world dimensions or, in their continental environments or broader neighbourhoods or geo-political zones of influence, Japan,[1] Germany or Turkey,[2] to mention just few examples. Those great legal effects starting out from the Atlantic world—be it a *par excellence* American or quite

* In its first version, as commissioned by the Nagoya CALE [note 1] for the year 2005, published as 'Legal Renovation through Constitutional Judiciary?' in *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 287–312.

1 See the state-financed program of the Nagoya University Centre of Asian Legal Exchange, aimed at renewing by rebuilding the destroyed traditional laws of the Asian successor states of the Soviet Union (Azerbaijan, Kazakhstan, the Kyrgyz Republic and Uzbekistan) as well as of Cambodia, Iran, Laos, Mongolia, Thailand and Vietnam. Cf. *The Role of Law in Development* Past, Present and Future, ed. Y[oshihasu] Matsuura (Nagoya: Nagoya University 2005) viii + 113 pp. [CALE Books 2] and *CALE* (Nagoya: Nagoya University Press n.y.) 14 pp.

2 In addition to the numerous higher education institutions of the Turkish Republic of North Cyprus, see the Turkish universities in Azerbaijan and Kazakhstan with their proper legal aid effect.

an international initiative on globalism with a centre in New York or Washington, or just Swedish governmental supports in legal assistance—are today being criticised growingly sharply in general and not quite without reason.[3] Because in most cases it is merely universalistic projections that take place under the aegis of transferring legal patterns, on the one hand, and solely mechanic insertion of texts as acquisition in reception of legal patterns, on the other—and often without proper efficiency and the slightest effort by either of the two sides, at coping with the delicate yet lengthy and tiresome job of their internalisation, through rendering those patterns organic as adjusted to local conditions, that is, with the task of accommodation day by day. It should be noted, however, that such a criticism may though be precise and verified by experience, yet it is far from being complete, as it lacks a comprehension of the whole process as well as proper distance in time and perspective, too. In itself, it can scarcely express the impact *en masse*, namely, that such a transfer, having become a daily occurrence, solely by virtue of its mere quantitative proportions, may still prove to be effective. For all the failures in individual details notwithstanding, it may perhaps be effective indeed in the specific way in which—as contrasted to German and English fighting styles in WWII (built on the professional excellence and mental preparedness of the fighters) or to the Soviet one (based singly on the massive number of those exposed to the destruction)—the American type of warfare may have been: relying in every respect on the mass-scale deployment of military techniques put into action, while protecting to the utmost its human staff (rarely characterisable by individual excellence). For it was characteristic of exactly that type that the Americans first demolished everything they could with air force and armoured troops and, then, invaded the area at a time when not so much the

3 Cf., e.g., by the author, 'Reception of Legal Patterns in a Globalising Age' in *Law and Justice in a Global Society* Addenda: Special Workshops and Working Groups (IVR 22nd World Congress, Granada, Spain, 24–29 May 2005), ed. J. J. Jiménez, J. Gil & A. Peña (Granada: International Association for Philosophy of Law and Social Philosophy – University of Granada 2005), pp. 96–97 & 'Transfers of Law: A Conceptual Analysis' in *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 21–41.

defeat of the resistance was at stake any longer as rather the organisation of its territorial control only. That is, in principle it is conceivable that the process (or, obviously, the lack) of these legal effects getting internalised could only be drawn up as a failure in the mirror of individual case analyses. However, on the whole and taken as an aggregate regarding their mass effect, those legal transfers may perhaps still have brought about a kind of irreversible change and may thus have proven profitable from the financier's aspect in a pure cost & benefit analysis.

It seems as if it were just the reproduction of the above global trend that took place with merciless consistency under the aegis of so-called constitutional (re)building in the classical Central European and Balkan region of the once Socialist empire in general, as well as on the core territories of the classical Russian empire in particular, primarily through an economic and financial policy urged by American economic exploitation[4]—with a difference that struck us as strange (and which was somewhat frightening already then, alluding revelatively to our present-day knowledge in an embryonic form). Notably, the very same network of experts and institutions, the same staff of specialists could also be seen in our neighbourhood, which network and staff had started "social-scientific" law-modernisation in Latin America decades ago, only to fail miserably afterwards, due to their ethno-centric blindness and liberal universalism, having thought to fulfil the mission of their "Law & Development" movement just through the simple transfer and/or extension of their mere American domestic daily legal routine. Hungary was no exception to this either. Of course, it may take years or decades until we can establish the reason with scholarly certainty, why it was exactly us—despite having beaten paths of pluralism which once required courage in Socialism, and despite having belonged to the vanguard by developing a state-of-the-art economic and financial system and an adequate legal structure, with an advanced scholarship that also

4 Cf., e.g., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] as well as—in the mirror of experiences recapitulated abroad—*Kiáltás gyakorlatiasságért a jogállami átmenetben* [A cry for practicality in transition to the rule of law] ed. Csaba Varga (Budapest: [AKAPrint] 1998) 122 pp. [A Windsor Klub könyvei II].

adopted Western results of the time, and despite having been perhaps the first among the first with our network of economic-political relations rather open even in worldwide comparison—who happened to fall back, within few years' time, into the fatigue of the lack of perspective and hopelessness, facing the threat of the practical loss of the nation, resulting from the country's selling off and the consequently pursued policy of surrender, that is, to fall back into the self-generating spiral of indebtedness, dependence and helplessness, into the drab, cheerless and monotonous toil of day-to-day drudgery for sheer individual and community survival. Our path is scarcely exemplary and—as we know for years now—it is far from being attractive to the surrounding world.

The reasons are presumably mostly political, sociological and to be found (in addition to international contexts) certainly in our particular socio-psychological state above all. But all these do have their legal aspects as well, either inherently or as a consequence. As the first of these—namely, idealism—, I suspect that our practical formation of the law was achieved along idealised conceptions and principles as call-words, with an academic doctrinarian purism and unrestrained resolution, which the actors involved thought to be a simple reception of Western patterns and constructions. Meanwhile they had so to speak no thorough knowledge of the everyday life and the practical action of the law of Atlantic societies and the deep structure and real components thereof: neither of the actual sources of the latter's occasional successes, nor of what self-examination, attempts at re-start and uncertainty the latter may have felt in result of the by far not infrequent domestic failures. Therefore, our present is mostly the product of idealists, reminiscent of belated revolutionary utopians having lost ground, who operated with ideals thought to be real and actuated them as a panacea, while the people relied on hopes for a more liveable and viable future, promising also moral entirety, as contrasted to the revealed immorality of the past.[5]

5 It is so to say comical to see how the programme of the president of the Hungarian State Radio lionises the first president of the Constitutional Court. For at the end of the report it turns eventually out that there is in fact not one single point on which they could agree. Namely, the reporter as a non-professional in law understands by rule of law the practical implementation and factual reality of the encounter of "state" and "law" surrounded by a

Secondly—as fragmentation of responsibility—, I see another factor of a similar significance in the circumstance that, with the downfall of dictatorship when the first free parliamentary elections were made, the institutional representation of the responsibility to be taken for the country as a whole practically ceased to work. For just like in feudal particularism, the country actually fell apart, exactly in a dramatic period determining its future. All this is to mean that what was going on—along principles like the separation of powers and other ideals and practices—was nothing in fact but the totalisation of partial interests and competences (etc.) through expanding one's political authority to the detriment of others, in diverse fora (mostly of the state) in constant competition with one another in over-representation and fight for self-assertion. As if everyone had been against everyone, no one acted aware of one's irreducible responsibility for the whole: for the country's future, for the actual cause or—in co-operation with others—for the sake of a common purpose at least. Constitutional court, ombudsmen, as well as agents of the public order from police via the public prosecutor to courts (often extinguishing the effect of each others' efforts), human rights activists and others were all busy just to realise themselves and their particular agenda, instead of co-operating as parts of a shared whole. All may have acted in the name of and through the Republic of Hungary but hardly for it, for a new Hungary, successfully coping with her difficult tasks of transition. Some behaved as if they had existed in another world, failing to recognise that the actual impact of their actions would also be worth of their attention, and apparently forgetting that also in possession of previous knowledge of what actual operation could be expected from the country's overall institutional system, they should have nevertheless acted in practice to the benefit for the country. The Constitutional Court as the otherwise unapproachable judge of the legislature, for instance, instead of developing some humility presumable in common causes, only expected the

certain level of perceptible safety, while the latter, finding this earthly expectation lay and petty, means by it a mere structural principle of the organisation of the state that cannot be held accountable for anything else, say, public good, that is, anything what is good for average man too. Katalin Kondor *Névjegy 2* Válogatás Kondor Katalin műsorából [Name card: selection from the programme of Katalin Kondor] (Budapest: Masszi Kiadó 2005).

Parliament and the government (in most cases preparing the bills) to set up additional offices, designed exclusively to try to still detect the allegedly deep and mostly hidden motives that there might perhaps be behind the otherwise inscrutable action of constitutional judiciary.

Thus, taking international trends into account, it is no mere chance that the issue of global legal effects has produced a particular literature of its own. And the first decade (crucial to defining the character, prospects and limitations of the transition) of the Constitutional Court of the Republic of Hungary has become one of the key instances for it, as a unique example in the history of legal transfers of thousands of years. For it was in fact a legal importation without authorisation (therefore, in a legal sense, definitely arbitrary), executed by a constitutional court so to speak tacitly and stealthily (that is, activating resources solely identifiable from a subsequent external analysis of its products), through the conscious use of its enormously extended sphere of competence, that is, within the scope of a power with no institutionalised appeal against and thus practised without control, excluding any responsibility whatsoever in either a legal or a political sense.

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2. Constitutional Assessment: the Hungarian Way It indicates good senses for choosing a self-marketing subject therefore, if a career-starter young researcher attempts writing a monograph[6] on the peculiarity of this very species of legal transfer, in order to raise scholarly interest in the challenging topic. And for us, Hungarians, this might be very edifying indeed, as it is in any case to be noticed if one is closely approached from the outside through thorough analysis. And even if the case is of an inexperienced first experiment at interpretation, it is obviously the own French (Western European, so, more broadly: Atlantic)

6 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) xx + 217 pp. [Human Rights Law in Perspective].

worldview of the author that provides a filter, and therefore the mirror she offers will doubtlessly extend a remarkable value-judgement upon us.

According to her basic point of view, the Central and Eastern European transitions were characterised by an "unprecedented level of exportation and importation of law" in general and the "law importation was a deliberate strategy carried out by the Hungarian Court" in particular (p. i). The circumstance that "although the Constitutional Court used the language of globalisation or *ius commune* the law it imported was more specific" (Colin Harvey 'Series Editor's Preface', p. vii) even enhances the peculiarity of this all, as "the background of the importers determined the choice of German case law" (p. i). Well, it is this realisation that will from now on serve as a starting point for the whole elaboration, as it provides us genuinely with "a unique field of experimentation and of reflection" (p. 62) in the examination of the complex multitude of present-day legal transfers and effects. Within this, it is taken as a widely known fact that academics are mostly "eager to test their hypotheses and to extend their empirical field of studies" (p. 3), even if they are in want of specific experience and background knowledge on the field of such an expanded new experiment. Accordingly, at the most they are guided by some presuppositions they are to inflict (extrapolate) on new fields—instead of the humility of getting to cognise the given *hic et nunc*[7]—, so it is no mere chance that "[c]ountless experts […] flooded Eastern Europe" at the time (p. 50).[8] As to the contemporary widespread opinion, Hungary was the best and earliest prepared for transition,

7 As an especially telling example, see, among others—and as the extrapolation of Latin-America-experts—, Juan J[osé] Linz & Alfred Stepan *Problems of Democratic Transition and Consolidation* Southern Europe, South America and Post-Communist Europe (Baltimore: Johns Hopkins University Press 1996) xx + 479 pp.

8 As a Hungarian spectator ironically observes, "Allegedly, planeloads of frustrated Western law professors brought to Eastern Europe their pet private draft codes that had been ridiculed back home. These were sold to the new democratic regimes as inevitable." András Sajó 'Universal Rights, Missionaries, Converts and »Local Savages«' *East European Constitutional Review* 6 (1997), p. 45. And as an early perception, R. Dorandeu — 'Les Pélerins constitutionnels' in *Les politiques du mimétisme institutionnel* La greffe et le rejet, ed. Yves Mény (Paris: L'Harmattan 1993), p. 83—remembers that salesmen toured Central Europe with catalogues of "flat pack constitutions" offered for the price of US$250.000 (Dupré, p. 51).

thus she could be the first to embark on an own path. For this reason, it is all the more puzzling how all this could be reverted into a negative or even counter-example and whether any international intention could play any role in this. Because even the author holds it as commonly known that we in the whole Central and Eastern Europe were in the focus of the world community, as "[n]ever before in history had the drafting of constitutions and the adoption of national legal systems attracted so much attention from outside the countries concerned." (p. 10)

What distinguishes Western (American-type) interventionism or decisive interference from the Eastern (Soviet-type) imperialism is definitely the way it takes place: instead of direct or indirect military or police-controlled occupation, the former creates an economic and/or financial situation to be exploited by it. That is, it applies control by the capital which is—if at all—very rarely noticeable in the language of the applied rhetoric even in the most obvious cases of a dictate.[9] True, reassuringly nice words were also told back in that time, addressed to the whole region, for example by LAWRENCE S. EAGLEBURGER as US Deputy Secretary of State as early as in 1991 at the annual conference of the US Export-Import Bank, messaging that "One thing we in the West should not do is sit in judgement on our East European friends, or attempt to dictate choices which are theirs to make." Of course, he also added at once, for the sake of clarity (as always, both before and after Iraq and Iran) that

> "However, there are certain things which the West, particularly we in the United States, can do to help ensure that the difficult economic transition on the way does not destabilise either the fragile new democratic institutions or peace in the region as a whole".[10]

9 As an edifying case-study concerning the ex-Soviet Union, see, by the author, 'Failed Crusade: American Self-confidence, Russian Catastrophe?' in the present volume.

10 Quoted by A. G. V. Hyde-Price 'Democratization in Eastern Europe, the External Dimension' in *Democratization in Eastern Europe* Domestic and International Perspectives (London: Routledge 1994), p. 245 (Dupré, p. 51).

The author also considers it as a fact that "As a result of the external involvement in the reconstruction [...], these countries were flooded with advice and guidance" (p. 10), and in this the European Union, the Council of Europe, the International Monetary Fund as well as the World Bank played equally cardinal roles (p. 11) even the more so as "the universalistic liberal ideal was used as a yardstick to judge the preparedness of the new democracies to join first the Council of Europe, and then the European Union."[11]

In connection with such an unprecedentedly powerful mechanism of influencing and direct or indirect international interference, the Hungarian Constitutional Court became worthy of the international professional community's attention, itself having proven to be a tacit legal importer. For it acted within its own competence, that is, under the pretext of constitutional adjudication and thus, albeit not authorised to creeping legislation or constitution-writing, yet exploiting the consequences of the fact to the utmost that their founding constitutional statute placed no forum of control or appeal above it and, consequently, each and every act taken by it would become built into the Hungarian constitutional order inevitably with legal (or, more precisely, constitutional) force; otherwise speaking, in want of any legal possibility to be held responsible politically or legally, the activity of its justices is only limited by nothing but their own moderation and self-control. And as the decisions of the Constitutional Court become themselves—until a new Constitution is framed, or until they are overruled or perhaps re-interpreted, not to mention their tacit *desuetudo* (this being presumable at present only as a theoretical chance)—parts of the constitutional foundations of the legal order, they had the possibility, as a law-repealing authority over the parliamentary legislature (what HANS KELSEN, having constructed the very idea of constitutional adjudication in Europe, described as *negativer Gesetzgeber*), both to define the pattern and the limits of the transition and to draw the constitutional standards and confines of the legal order in formation after Socialism had been over.

11 Wojciech Sadurski *Rights before Courts* A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe (Dordrecht: Springer 2005), p. 232.

Although back in that time the Constitutional Court consequently denied this,[12] it also caught the public eye already at the beginnings that the Constitutional Court was in fact "the most powerful and perhaps even the most active specimen of its kind in the world",[13] as "perhaps the most powerful in the region in that it encompasses all the known powers of Western constitutional courts." (pp. 6 & 34) In addition, this was noticeable not only as regards its competence and political over-activism, but also in the nearly total lack of regulation of its procedure (in what it starts proceeding, when, by whom and which way), within which—including also its own staff, literally—"anyone can file a petition about virtually any constitutional issue, with subsequent proceedings being very informal." (p. 6) All in all, this court proved to become "a very prolific importer of foreign law [...] in a systematic way." (p. 46)

Well, the circumstance that "the Hungarian Court imported German law" (p. 9) and "routinely relied on imported law as an adjudication strategy" (p. 11), played not just an incidental auxiliary role but did determine its entire strategy exactly in that it "provided the new values and constitutional benchmarks" (p. 12) in a way that, in the last analysis, "importing the law from German constitutional case law enabled the Hungarian Court to introduce a new concept of fundamental rights" (p. 54).

If we consider that in the devotion to a genuine transition in Hungary "the »rule of law« had a particularly strong appeal", because "it was the law that people had demonstrated for and

12 After the Constitutional Court president tried to intervene with the succession of justices unduly—but temporarily successfully, playing off the parties of contrasting interests against each other in his tactical game of the personal selection for a short time (e.g., joining with one party of the opposed pole in the Parliament against the author of the present paper as all the so called conservatives' candidate)—, he reproached me later on, as a result of an allegedly plenary meeting of the Court dedicated to exactly this very issue (!) and in which I was quasi-officially declared unacceptable for them as a candidate (!), having written about their overpower and criticised some of their decisions, even by giving voice to this in international publications. For an echo of this scandalous event in the press, see 'Alkotmánybírák: kivonulók kérték' [Constitutional justices: leavers] as well as László Sólyom [interviewed] 'Teljesen átpolitizált lett a választás' [The elections became totally politicised] *Magyar Narancs* VIII (November 21, 1996) in <http://www.mancs.hu/index.php?gcPage=/public/hirek/hir.php&id=653>.

13 Georg Brunner 'Development of a Constitutional Judiciary in Eastern Europe' *Review of Central and East European Law* 6 (1992), p. 539 (Dupré, p. 37).

fought for" (p. 21), this explains the contrast and paradoxical contradiction that the call-word 'rule of law' became incontestable (and not only legally but also socially and politically as well), while it was exactly under the pretence of the rule of law that, according to a growing number of analyses, the sense and the merit of the entire transition process got lost (i.e., the country's rebuilding and its chance to take a new start, integrating the nation in a manner ethically acceptable for generations). For at every crossroads the hypnotising siren's voice of a 'revolution led by the rule of law' could be heard, and indeed, "the role of law was primordial in that each step in this process, no matter how unexpected, was controlled and accompanied by a legal response." (p. 29)

The provision of the new, effective Constitution announcing the transition is rather laconic as its Article 2 reads: "1–The Republic of Hungary shall be an independent, democratic state under the rule of law."[14] However, it was this on which the Constitutional Court relied—or, otherwise formulated, "[i]t is from this one word, alternatively interpreted as promising a »rule of law« or »constitutional« state, that the court construed"[15]—in the dramatically decisive first epoch of its existence, in its decisions cutting the system change back to be a legitimate extension of the past's legal continuity. As the first president himself put it later on, "Of all constitutional principles, the rule of law played a special, symbolic role: it represented the essence of the system change",[16] and in practice this could mean nothing else than that "The

14 The version adopted in 1989—"The Republic of Hungary is an independent, democratic state under the rule of law […]"—was modified by Act XL (25 June 1990). For details, see Balázs Schanda 'Rechtsstaatlichkeit in Ungarn' in *Rechtsstaatlichkeit in Europa* hrsg. R. Hofmann, M. Marko, F. Merli & E. Wiederlin (Heidelberg: Müller 1995), pp. 219 et seq. and Géza Kilényi 'Ungarn schreitet in Richtung Rechtsstaatlichkeit' *Europäische GrundrechtsZeitschrift* (1989), pp. 513 et seq.

Such formulation is not peculiar to Hungary and raised dilemmas elsewhere as well in the region. E.g., Article 1 of the Czech Constitution holds that "1–The Czech Republic is a democratic state ruled by law." Cf. Libor Hanuš 'Are General Principles of Law a Source of Law in the Legal System of the Czech Republic?' *Právník* CXLVI (2007) 1, pp. 1–12.

15 Ruti Teitel 'Paradoxes in the Revolution of the Rule of Law' *Yale Journal of International Law* 19 (1994), p. 244.

16 *Constitutional Judiciary in a New Democracy* The Hungarian Constitutional Court, ed. László Sólyom & Georg Brunner (Ann Arbor: University of Michigan Press 2000), p. 38.

Hungarian Constitutional Court adopted a formalistic and neutral approach to the rule of law that focused on legal certainty" (p. 31). But from the well-schemed stand that

> "the rule of law—as the key concept for the transition and also in a technical sense—gained a meaning identical with legal safety that is regarded by the Constitutional Court […] as the »conceptual element« of the rule of law",[17] the practice followed that "the rule of law […] is construable as exclusively a formal rule of law".[18]

Accordingly, in the jurisprudence of the Hungarian Constitutional Court "the general clause of the rule of law [has become] [a]n own standard of constitutionality, on the one hand, and the source of rights and constitutional principles, on the other", which the Court did not hesitate to "break down into requirements in merit" at once,[19] proceeding from case to case, judging various issues at hand by pronouncing upon their merits with a constitutional force. That is, the Constitutional Court picked out one single partial element at random and endowed this with a general, somewhat of a nearly good-for-all role, from a complex and collective concept[20] that is undefined, therefore unsuited for formal inference, being construable only as the living ethos of a given active culture, interpretable exclusively as the direction of continuous striving for reconciliation amongst in-themselves opposing or even contradictory tendencies. The result is

17 László Sólyom *Az alkotmánybíráskodás kezdetei Magyarországon* [The beginnings of constitutional judiciary in Hungary] (Budapest: Osiris 2001), p. 686 [Osiris tankönyvek].

18 Decision no. 31/1990 (15 December) of the Constitutional Court in *Alkotmánybírósági Határozatok* (1990), 136 at 141.

19 Sólyom *Az alkotmánybíráskodás kezdetei…* [note 17], p. 464.

20 As just one example, cf., Richard H. Fallon, Jr. '»The Rule of Law« as a Concept in Constitutional Discourse' *Columbia Law Review* 97 (January 1997) 1, pp. 1–56. The very fact that "The meaning of the rule of law is contingent in nature" with "multiple rule-of-law values competing" within its reach, in which eventually "no one rule-of-law value is essential" in and by itself, is emphasised rightly and just in this specific Hungarian context by Ruti Teitel 'Transitional Jurisprudence: The Role of Law in Political Transformation' *The Yale Law Journal* 106 (1997), p. 2025.

disputable, above all just because the unsuitable method (that is, suited exclusively to conceal the arbitrariness—or falsity—of the derivation) itself is disputable. Also our scholarship agrees upon that a normative construction based on the exclusivity of "not entirely normatively definable" concepts and principles can prove nothing else than the "political hypertrophy" of constitutional judiciary[21]—exactly the end-result against which (notably, against the activism in the immoderate expansion of the playing field of free discretion and the assumed political role inevitably involved by this) HANS KELSEN (the one who once sowed the seeds of the very notion of constitutional adjudication and then took part also in implementing it in its early practice) tried to warn constitutional judiciary.[22]

Drawing from the Constitution's laconic formulation—Article 32 reads that "1–The Constitutional Court shall review the constitutionality of laws […]" and "2–The Constitutional Court shall annul the statutes or other legal norms that it finds to be unconstitutional"—, the Hungarian Constitutional Court rose to be the highest level political body on the pretext of interventionist activism. For example, already in the period before the amendment of the Constitution on 20 June 1990, it would have had an excellent opportunity for modestly waiting staying in the background, but instead, as the author claims, it used the transitory state of constitutional regulation as a strategic stepping-board. Notably, back at the time,

> "The Constitutional Court could have shied away from its role and waited for the adoption of a new constitution but instead, it seemed that the interim Constitution encouraged the Court to use its powers to the maximum of its creativity and capacity under SÓLYOM's presidency." (p. 34)

21 Jiří Přibáň 'Moral and Political Legislation in Constitutional Justice: A Case Study of the Czech Constitutional Court' *The Journal of East European Law* [Columbia University East European Law Center] 8 (2001) 1, pp. 28 & 16.

22 Hans Kelsen *Wer soll der Hüter der Verfassung sein?* (Berlin-Grunewald: Rotschild 1931) 56 pp. Also cf. Gábor Halmai 'Kelsen és az osztrák Szövetségi Alkotmánybíróság' [Kelsen and the Austrian Federal Constitutional Court] *Világosság* XLVI (2005) 11, pp. 3–14.

For this very reason, it is no mere chance that an analysis from the first years of the Court's operation (in 1992) already states:

> "Therefore, it is not surprising that the Constitutional Court has in no time become one of the key actors on the stage of Hungarian constitutional life whose performances are thoroughly watched and hotly debated, and both criticised and praised by the general public."[23]

I remember my Viennese colleague when he was amazed (and somewhat perplexed) to report me about their prior invitation extended to the Hungarian president in Vienna, an occasion which had solely been attributable to the mystery that had kept them all confounded. Namely, they wondered what this newly founded institution trusted in. Did this Court indeed suppose that the entire institutional system, the lawyerly elite and the people in great expectation of the Republic of Hungary would tolerate for good their continuous reprimand and persistent constitution-writing, further on and unchangedly? Yet, as my friend went on smiling, the invitee had gone on heralding their victory with perfect tranquillity.

True, it is more than a decade now that literature has described the phenomenon of "transjudicial communication" as the globalisation of the process in which "courts are talking to one another all over the world",[24] but this does by far not alter the formal obligation that "constitutional courts are meant to refer only to provisions of positive constitutional law"—in the same way as it does not provide exemption from the requirement of the division of powers whereas, in our case, "constitutional courts are strictly prohibited from acting as legislators." (p. 45) Given its lack of authorisation, how can we qualify such a proceeding of the Hungarian Constitutional Court, compelling the whole state apparatus? And while judging on issues of constitutionality, by

23 Brunner 'Development of Constitutional Judiciary…' [note 13], p. 540 (Dupré, p. 37).

24 Anne-Marie Slaughter 'A Typology of Transjudicial Communication' *University of Richmond Law Review* 1994, pp. 99–137 (Dupré, p. 43).

what right does this Constitutional Court demand consistency and proportionality with openness and transparency from all norm issuers and from all norms issued, while it may lack such properties? Because the *non consequitur* in the field of law—in fact the synonym of political activism here—denotes in this case too that the constitutionality criteria postulated in the transition's dramatic period by the Constitutional Court of the Republic of Hungary (which it unyieldingly enforced as the measure for its constitutional adjudication) does not derive from the Constitution of the Republic of Hungary with any logically compelling force. For the kind of constitutionality it has enforced is presumable at the most as one of the Constitution's numerous and equally feasible interpretational alternatives. Although, as it shall be seen, the Court broke away even from the consolidatedly reliable Western models of constitutionality as well, moreover sometimes diametrically opposing to them, denying their major values. This is to say that the operation of the Constitutional Court (with its outputs from official inputs in a black box) proved to be more inextricable and unforeseeable than, for instance, the activity of ancient Delphic oracles or antique Rome soothsayers (who observed the flight of birds or the intestines of animals). This operation might have followed from a deep insight of constitutional justices themselves but by no means from the exclusive constitutional basis of such an operation, notably, the textual frame of the Constitution as a supreme source of the law. The Constitutional Court was set up by its founders in alleged transcendence of Socialism, blocking its survival. In this socialism, we could already experience the exaltation of certain materialistic values (as, e.g., "the cause of Socialism") as the first rule, while usually the principle of *la loi du plus fort* as the second rule prevailed. So the question is: who has authorised the Constitutional Court to such an over-accomplishment? Because if it authorised itself to anything more than allowed by its original (and till now the only one) statutory assignment of a constitutional force, then that what is at stake here is scarcely anything more or else than what is called *usurpatio* in jurisprudence. And this raises the dilemma, at least in principle, whether decisions made this way are valid,

irrespective of whether or not the legal order of the Republic of Hungary knows any invalidating mechanism or sanctioning form for establishing invalidity which has to result from the overuse of power. For, it is an axiom known in every material doctrine starting from ancient Roman wisdom (only confirmed by the KELSENian doctrinal reconstruction of our times' modern formal law) that nobody can transfer more rights and entitlements than he himself has.[25] In other words, misuse is no source of law but, on the contrary, it is a quality depriving of rights and annulling alleged entitlements.

What is more, not only the call-word of the "rule of law" but also the (detested but existent) West-idolatry, arising from a lack of actual knowledge about the West captured the minds in Hungary. This was also true for circles of the intellectual elite as well as the peaks of authority occupied by it (even—or even more so—if their ideas were rooted in post-modern cosmopolitan a-historic universalism). On the final account, this *ignorantia* proved a bad counsellor: a false and, above all, self-deceiving one. As characterised by the author, "a glorified and idealised vision of the West and of liberal law" replaced the missed opportunities of "direct knowledge or experience" and, in result, "a cultural image of the West developed which did not correspond much to the reality." (p. 57[26]) Thus, not only the local past, tradition and arrangement (and therewith also the nation's endeavour and potentialities) were mostly ignored, but also the mechanical transfer of partial solutions, torn (by way of some mere technicality) out of the social-political complex of an entire working law and order, suggested an in itself false and distorted image about the benefits promised by it. In addition, the total lack of adaptation, that is, a ceaseless drive to meet some external (foreign) standards also pushed decision makers to extreme responses, eliminating the

25 "*Nemo plus iuris ad alium transferre potest, quam ipse haberet*." Ulpianus in *D*.50.17.54, and cf. also 170.

26 As, for instance, Ferenc Fehér described in his emigration the irrational (and absurd) utopianism of the "West is best" more than a decade ago—'Imagining the West' *Thesis Eleven* (1995), p. 52—, at about the same time when also the editorial 'Ex occidente lux?' in *Transit* (1995) formulated similar doubts. See also the pondering on the naturalness and probable pitfalls of "institutional optimism" by Péter Kende in his 'L'optimisme institutionnel des élites postcommunistes' in *Les politiques du mimétisme*…[note 8], p. 237.

chances for any "in-between solution" conceivable (p. 58). In today's state of Hungarian public speech, the author's self-assured judgement appears appalling, notably that back at its very beginning (ascertainably back to nearly two decades ago, that is, so to speak, as a defect from birth), "a procedural and minimalist conception of democracy" was adopted and enforced by the political elite[27]—perhaps because the genuine social foundation was missing and there was nothing onto which anything else (even a bit reminiscent of the daily operation of usual Western arrangements) could have been built. Paradoxically speaking, in want of any civil society established and functioning, there is a structure operating dysfunctionally, which should have in fact evolved exactly from this civil society but is instead imposed upon it from above as ideally ready-made in a sort of *vacuum*.[28]

3. An Example: Human Dignity in Isolation and Sterility So what is in fact at the heart of such developments? "The period 1990 to 1998, which corresponds to the first term of the Hungarian Constitutional Court, was characterised by an abundant use of foreign law in judicial reasoning." Within this, the construction of "human dignity interpreted as being the source of other fundamental rights" was framed with the intermediary role of a general personality right, "which the Court imported from German law." (p. 63[29])

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27 Karen Dawisha 'Introduction' to *The Consolidation of Democracy in East-Central Europe* ed. Karen Dawisha & Bruce Parrot (Cambridge & New York: Cambridge University Press 1997), p. 40 (Dupré, p. 58, note 51).

28 See, as the first disclosure, Bill Lomax 'The Strange Death of Civil Society in Post-communist Hungary' *Journal of Communist Studies and Transition Politics* (1997), pp. 41 et seq., while others, too—e.g., Linz & Stepan [note 7], p. 314—, establish that "political society after 1989 effectively demobilised civil society." In other words, the transition chased the best forces of society into party-like organisations, which, however, paralysed the chances of the emergence of any civil society for about one and a half decade, owing to the society's tragic splitting into two constituencies, dividing both political and socio-intellectual life in Hungary. I think that the transcendence, promising the hope of putting an end to the division, has presumably started at last, as an unexpected—and certainly not intended—by-product of the movement of so called civic circles [*'polgári körök'*], firstly and primarily in rural Hungary (in villages and small towns).

29 Also see, by Catherine Dupré, 'Le droit à la dignité humaine, emblême de la transition constitutionnelle?' in *System Transformation and Constitutional Developments in Central and Eastern Europe / Changement de régime politique et le développement de la constitution*

Doing so, however, our Constitutional Court (exactly because its actions were not openly done in want of any explicit or tacit authorisation) adopted—in contrast to the ethos it expected from everyone else on its behalf—an encoded speech, a pretence and insincerity aimed at reassuring. In order to reach a kind of approval on that its "decisions are based not on partisan political considerations but on neutral, objective law, even when the issue in dispute obviously has very contentious political origins and consequences",[30] the "imported law [was] used […] as a modern substitute for natural law […] couched in a discourse of globalisation or *ius commune*" (p. 157, similarly on p. 12). So no matter how modern, defendable and maybe even justifiable it was (as the Court must have thought it to be), in its present-day application our Constitutional Court did not assume even the openness of the relatively confined realm of positive (constitutional) law rules having been brought into a broader circle of principles—to the same extent that had once proven to be instrumental in the legal founding of how to face with the past after the World War Two, to surpass all the difficulties of making progress across obstacles[31] and eventually also to successfully cover the affair with the additional ethical splendour in result of the greatness of the goal and the obvious necessity of reaching it. Whenever it had a way to conceal, it did not assume sincerity or openness. For the Court had enough power and it did not want to really convince anyone. Instead,

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en Europe centrale et orientale ed. K. Tóth (Kecskemét & Szeged: Károli Gáspár Reformed University Press 1995), pp. 51 et seq. as well as 'Importing German Law: The Interpretation of the Right to Human Dignity by the Hungarian Constitutional Court' *Osteuropa-Recht* 46 (2000), pp. 144 et seq. & 'Importing German Case Law: The Right to Human Dignity in Hungarian Constitutional Case Law' in *The Constitution Found?* The First Nine Years of Hungarian Constitutional Review on Fundamental Rights (Budapest: INDOK 2000), pp. 215 et seq.

30 Herman Schwarz *The Struggle for Constitutional Justice in Post Communist Europe* (Chicago: University of Chicago Press 2000), p. 5 (Dupré, p. 158).

31 Heinrich Rommen 'Natural Law in the Decisions of the Federal Supreme Court and of the Constitutional Courts in Germany' *Natural Law Forum* IV (1959), pp. 5 et seq.; Wolfgang Friedmann 'Übergesetzliche Rechtsgrundsätze und die Lösung von Rechtsproblemen' *Archiv für Rechts- und Sozialphilosophie* 41 (1955), pp. 348–371; Peter Schneider 'Naturrechtliche Strömungen in deutscher Rechtssprechung' *Archiv für Rechts- und Sozialphilosophie* 42 (1956), pp. 98–109.

> "in order to maintain the semblance of an exclusively legal—that is, politically neutral—way of reasoning, while of course it practised a political and ideological activity in order to promote a new system of values […], it used German law as a timeless and incontestable natural law […] only to present its own legal novations and ideological choices as an enterprise of *rattrapage* with Western countries and the harmonisation of Hungarian law with norms and standards supposed as shared on the basis of consensus by the international community (although in reality there was no global legal practice about human dignity)."[32]

Aware of its legally unquestionable power and its inaccessibility, convinced that it was formally enough to communicate with the society only one-sidedly and from above without feedback, the Constitutional Court contented itself with mere declaratory rhetoric, in fact with the falsity implied by referring to nothing but "modern constitutions" and similar unspecified generalities (p. 160).

It is this very complex where what the author characterises with three qualities—namely, exteriority, anteriority and universality—as accomplished (p. 163). These qualities stand for the fact that the restructuring of the Hungarian legal system was performed by an unauthorised and (in want of any legal mechanism superordinate to it) unsupervised agent, through adopting patterns in the guise of universality from outside, as elaborated earlier by others and for others. Of course, we know that there is no global pattern *in abstracto*: what we operate with is always concrete. Well,

32 "*de maintenir l'apparence d'un mode de raisonnement uniquement juridique—donc politiquement neutre—, alors même qu'ils se sont livrés à une activité politique et idéologique de promotion d'un nouveau système de valeur. […] à faire passer le droit allemand pour un droit naturel, intemporel et incontestable […] de présenter ses propres innovations juridiques et ses propres choix idéologiques comme une entreprise de rattrapage des pays occidentaux et de mise en conformité du droit hongrois avec des normes et des standards supposés consensuels au sein de la communauté internationale (bien qu'il n'existe en réalité aucune jurisprudence globale sur la dignité humaine).*" Thierry Delpeuch [*compte rendu*] in *Droit et Société* (2005), No. 60, p. 593.

although "this was never made explicit by the Court", this took place in the form of reception from the Federal Republic of Germany (p. 171) as from the arrangement most familiar (linguistically, culturally, and by virtue of his earlier study trips) for the influential president of the Constitutional Court. All this was done on a scale resembling (for the external observer) neo-colonialism, with the ensuing underestimation of the own, exclusively binding constitutional background (p. 173). According to the author's illustration, in the decision no. 23/1990 on the death penalty,[33] only the International *Covenant on Civil and Political Rights* qualifies as a source of the law in Hungary at the time of decision making, from among all those referred to. And even this could hardly serve as a normative foundation by its having exclusively established the "recognition of a development towards the abolition of capital punishment" as a mere tendency, this covenant having also (as valid in Hungary from 1976) served with no difficulty the active capital punishment policy of the socialist People's Republic of Hungary. On the other hand, the *Sixth Additional Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms* (1983) and the *Declaration on 'Fundamental Rights and Fundamental Freedoms'* as adopted by the European Parliament (1989) had, at the time of the decision taken by the Constitutional Court, no legal effect whatsoever in Hungary. The fact that their reception was in fact "disguised" with the help of the formula of "modern constitutions" and other magical and in fact unidentifiable keywords (p. 67 and ch. 4, para. 1.1) was just a step on the way that led to a situation, in result of which now the author can illustrate on huge tables, with two dozens of conceptual details, which German solution served as the basis of which Hungarian actualisation of "human dignity" (pp. 69 et seq. & 76 et seq.), which of course included an import from the German Constitution as well as of a number of German Constitutional Court decisions (at times with official motives *in extenso*) and several scholarly stands[34] alike. This took place with

33 In *Constitutional Judiciary in a New Democracy*…[note 16], pp. 123 et seq.

34 Above all, Ronald M. Dworkin's *Law's Empire* and his *Taking Rights Seriously* referred to in the decisions nos. 9/1990 and 21/1990 (Dupré, p. 91). In more detail, see László Sólyom 'The Hungarian Constitutional Court and Social Change' *Yale Journal of International Law* 19 (1994), pp. 228 et seq.

such an enthusiasm and overwhelming routine that sometimes the Hungarian Constitutional Court resorted (again, in a legally unauthorised manner, i.e., arbitrarily) to external authority even in cases when a perfectly adequate provision might have been available in the very wording of the Hungarian Constitution as well (p. 86). So the practice of "modern constitutions" being referred to (as evident without further specification) may have served as an enchantment of almost a mythological character, a mere *captatio benevolentiae* (reminiscent of the ancient Greeks having sent jurisprudents to other cities to gain experience before framing their own constitution), the substitution of some alleged international consensus by some resounding circumlocution (p. 164). For

> "In fact, the Court often had in mind a very particular legal system and interpretation of a right and presented it as if this particular interpretation and use were recognised by all legal systems in the same manner." (p. 165)

Besides the fact that the Hungarian Constitutional Court's president could ascertain the magical approaching, voluntary harmonisation and even spontaneous unification of the jurisprudence of diverse national constitutional courts as a fact obviously provable, on what authorisation was the process of universalisation of the decisions of various constitutional courts based, in result of which it could produce a "globalisation of constitutional jurisdiction"? What may have been the basis of the fact that "as a study by the Hungarian Constitutional Court has shown, even the diversity of constitutions does not necessarily lead to different results in constitutional case law" and that constitutional justices are adjudicating the conformity of domestic laws to corresponding domestic constitutions until the point they do arrive at an "independence of constitutional justice from the constraints of national laws"?[35] Maybe with the effect that a not too

35 László Sólyom 'Sur la coopération des cours constitutionnelles: Introduction à la X^ième conférence des cours constitutionnelles européens' in *Rapports généraux sur la séparation des pouvoirs et la liberté d'opinion dans la jurisprudence des cours constitutionnelles* [Budapest, 6–9 mai 1996] [ms] (Dupré, p. 165).

distant future would bring about "an unprecedented movement of export/import of law in which states were no longer essential actors",[36] making perhaps continuous undisturbed concessions to the individual, to the cult of entitlements without obligations (of course, at the expense of the state, i.e., of taxpayers)?

It seems to be clear and unambiguously ascertainable by today that mainly in those dramatically decisive times determining the legal frameworks of our later development, "most of the cases decided by the Court […] were not simple cases of interpreting the Constitution […but…] political, or more precisely ideological rulings." (p. 159) As such, one may mention the invention—through "the artificiality of its argument stretched to its limits […] at its most absurd"[37]—of

> "[t]he concept of constitutional criminal law, whose aphoristic formulation—»The traditional basic principle of criminal law, according to which a deed is a crime once made so by the law, has become a rule of guarantee (protecting rights and liberties) in our present legal system by adding to it the additional formula of *nullum crimen sine lege constitutionali*«[38]—has permeated the practice of the Constitutional Court so far."[39]

4. Public Law Privatised with the State Targeted as a Common Enemy The end result is quite thought-provoking. The jurisprudence of the Hungarian Constitutional Court's first term was probably among the first even through all Europe in acknowledgement of the right to healthy environment, the right to

36 *Democracy without Borders* Transnationalisation and Conditionality in New Democracies, ed. Jean Grugel (London & New York: Routledge 1999) xv + 189 pp.

37 Sadurski *Rights before Courts* [note 11], pp. 254–255.

38 András Szabó 'Alkotmány és büntetőjog' [Constitution and criminal law] in *Székfoglalók a Magyar Tudományos Akadémián* [Inaugurals at the Hungarian Academy of Sciences] (Budapest: MTA 2000), p. 11.

39 László Majtényi 'Lesz-e magánéletünk?' [Will we have a private life?] *Élet és Irodalom* XLVI (29 March, 2002) 13 in <http://es.fullnet.hu/0213/publi.htm>.

relations of the same gender and children's rights to identify their fathers by blood; moreover, it provided an unprecedentedly one-sided, absolute and interventionist scope of liberties in respect of personal data protection depending exclusively on the individual concerned.[40] However, in its striving aimed chiefly at recognition and legitimisation by the West, it may have also become vulnerable, as in its self-built ivory-tower as a hiding-place it made itself both unapproachable to and uninterested in sensitive social issues, by having become content with being heard at times in form of unilateral revelations. Withdrawn in invisibility, like a snail in its shell, in a self-inflicted isolation, incapable of dialogue, abhorring the human warmth of sociability, as some lonely fighter who may only be admired—that is, consciously rendering itself transcendent—, it did not even start integration into the state structure with an entire lawyerly and academic community behind it, into the societal feedback underlying any law and order—of all

40 Notably, to monitor the entire route of data processing, thereby guaranteeing the right to know who used the data and when, where and for what purpose it was used (decision no. 15/1991).

In contrast, the resolution of the German Constitutional Court from nearly one decade earlier (1983) was a circumspect, balanced decision evaluating the personality at any time in social contexts. It was probably this that the Hungarian Constitutional Court's president may have found as needing further development, obviously in result of some more elevated worldview. Namely, according to this decision— *BVergGE* 65, 1 in *The Constitutional Jurisprudence of the Federal Republic of Germany* ed. Donald P. Kommers (Durham & London: Duke University Press 1997), p. 325 (Dupré, p. 90, note 7)—of the Germans,

> "However, the right to »informational self-determination« is not unlimited. The individual does not possess any absolute, unlimited mastery over »his« data; rather, he is a personality […] developing within the social community. Even personal information is a reflection of social reality and cannot be associated purely with the individual concerned. The Basic Law has resolved the tension between the individual and society by postulating a community-related and community-bound individual, as the decisions of the Federal Constitutional Court have repeatedly stressed. The individual must in principle accept certain limits on his right to informational self-determination for reasons of compelling public interest".

And as opposed to the conceptual requirements reduced to sheer formalism of such a Hungarian understanding of the rule of law, the decision of the French *Conseil constitutionnel* (29 December 1998)—in a hope of serving the tangible values of common good, beneficial for the whole nation—did by far not find it unconstitutional for the state to cross-reference personal data on different data-bases for the purpose of double-checking tax declarations submitted by citizens without informing them.

which constitutional judiciary itself is just one of the serving parts. Thus, adding that it has not even started dialogue with ordinary courts either (p. 178), which relation is characterised by "a certain rivalry rather than constructive co-operation" (p. 182), seems only hypercriticism[41] but at the same time also a core element shedding some light on the Hungarian Constitutional Court's autotelism. For even in terms of a decade-old criticism,

> "The court's assertion of exclusive interpretive power is highly problematic; in a constitutional democracy, understandings of legality and constitutionality are best promoted not by judicial monopoly over constitutional interpretation, but by a system allowing for simultaneous and parallel interpretation by the political branches and by the people."[42]

So instead of anything more markedly sociable, it retracted into an ivory tower, into the position of standing outside and above everything, into the mist of clouds, from the sublime heights of which it is only to communicate if it wants to and in the way it wants to. Consequently, it became the embodiment of the dysfunctionality of our new state organisation following Socialism and of the self-realising competition over rule of law claims on human rights, in which actors rivalled with one another, not only independently from but to the detriment of each other's competence, in which no public interest, no materially graspable social goal has anyone responsible for it any longer, as each and every of them functions self-centredly and self-propellingly,

41 Let us consider what is suggested by a style (with a corporative character behind it) that starts from a doctrinal point of view while pondering the nature of the Supreme Court's guiding (abstract) decisions aimed at the unity of judicial practice for that they can be subdued to the control by the Constitutional Court; then initiates a statutory amendment to extort this from above; and finally—of course, without even trying to agree with the branch of the judiciary—simply surpasses again the Constitutional Court's competence stipulated by the charter founding it with a constitutional force, and with noble simplicity, it just starts to bring these decisions under constitutional control, by judging unconstitutional and annulling some of these.

42 Teitel 'Paradoxes…' [note 15], p. 245.

inattentive of others, and the over-activity or the extension of competences by one actor may destroy the other's efforts—without any common responsibility, dialogue, moderation, or control. This is the paroxysm of rule-normativism, distorted from the parsimonious continental legal and statutory positivism of the end of the 19th-century into Socialist legality, functioning as a mechanical automatism, which enforces only rules, without assuming responsibility for the humane order to be formed thereby and for the practical outcomes of such an order as well. It is to be noticed that the further distorted forms of this may prove to be even more destructive than the dictatorship of Socialism was, as they relinquished the crucial issues of the nation's survival while they suggested the apotheosis of irresponsibility under the seal of a rule of law. For all this created a fetish out from what Socialism had nihilised in law. For the time being, unfortunately, this idolisation of the norm-autocracy in the guise of constitutionality has established neither the foundations of a liveable and workable, comprehensive legal order based on ethics nor a balance with equal regard to various sides, views, layers and components when pondering proportionately upon them with responsibility at all times.

The decade after the bitter half a century of Socialism was characterised by miracle expectation, wrapped in supra-historicity of some magical utopianism. For Socialism was actually followed by the threat of falling into just another trap, notably, that of becoming "guinea pigs" of neo-liberalism,[43] by a "faith in the ability of law alone to create and foster democracy [...] and in the power of words to achieve this." (p. 187) Not surprisingly, in this inefficient enchantment process the very phenomenon that "Repetition of legal definitions, in a manner similar to some magical incantation, was part of the reification process through which words became law" (p. 188) had the somewhat degenerate result suited to the above presuppositions.

43 Bennett Kovrig 'Marginality Reinforced' in *The Legacies of Communism in Eastern Europe* ed. Zoltán Barany & Iván Völgyes (Baltimore & London: Johns Hopkins University Press 1995), pp. 37–38 (Dupré, p. 179).

Was our domestic or external world outraged that certain parts of the state, relinquishing the indivisibility of national sovereignty, may—by losing all control—act totally at will, with each of them pursuing their idols, the self-generated practical anarchy of some alleged democracy? The vision of ALFRED JARRY (1873–1907) comes into view, or even more threateningly, the queen's cricket as LEWIS CARROLL[44] schemed it in his *Alice in Wonderland*, because if this is so, then the nation's future will be left, as a legally unsecured end-result, to a framework which is allegedly under the rule of law but is in reality doubtlessly the product of a kind of judicial arrogance, an *octroi* carried out through preponderance.

The worst in the whole process was that actually this presupposed the conscious atrophy of the inner forces of law development, which resulted—in terms of internal relations—in the lack of any adaptation (including, e.g., the withdrawal without compensation of those rights that were ensured even under Socialism) and—in terms of external relations—in the uncritical adoption of Western solutions, so to say as mechanic text-transplantations. Moreover, this process ignored whether these solutions had perhaps already been outdated, heavily criticised or even transcended in their countries of origin and it also dispensed with the fact that the atrophied innovation ability might prove unsuited for a reassuringly creative internal adaptation of these (pp. 190–191).

So our Constitutional Court was motivated by an a-historical utopianistic universalism when it "grounded on a sort of *tabula rasa* fiction" by practically "negating the […] »legal culture«" (p. 192) at a time when it stipulated—insensitive of the domestic milieu and needs; heedless of the own traditions and conditions (either historical or legal or relating to the state structure); never as a partner in a common cause but always from the heights of its uncriticisability; considering the country (with its institutions and people) as mere addressees, autocratically and arbitrarily—the frameworks and also the details in merit of what it euphemistically called the 'rule of law'.

44 Pen name of CHARLES LUTWIDGE DODGSON (1832–1898).

However, being inspired from outside did not lead in fact to the unconditional reception of patterns imported for laying the foundations of a constitutional renovation. The result was often different (p. 104), as the model itself was sometimes instrumentalised instead of a mere copying of it (ch. 5). Therefore, it is especially timely to raise the question: In what direction did the Hungarian decisions differ from the German constitutional jurisprudence, by the way followed mostly both in topics and doctrinal structuring? In terms of what philosophy did the Hungarian disciple overwrite the German master? As already seen, the Hungarian Court denied the social rights that had been launched in some limited way during Socialism and postponed the total recognition of human dignity before birth—in contrast with the Germans, but making any concession to the public opinion most probably exclusively in this case and only now[45] (ch. 5, para 1.2/a). Most conspicuously, ignoring the balanced (although rather categorical) perspective of the German Basic Law—"Everyone shall have the right to the free fulfilment of his personality in so far as he does not violate the rights of others, or offend against the constitutional order or the moral code" (Article 2[46]) whereas, according to the original German doctrinal explication,

> "Human dignity resides not only in individuality but in sociality as well. Such dignity requires the protection of the personality and freedom of the individual, but must also promote the goods of relationship, family, participation, communication, and civility."[47]

45 Commenting on the death penalty case, the president himself who put it forward, now writes as a scholarly opinion that "According to the receptivity of the people to such slogans and the repeated attempts to organise a referendum on the reintroduction of the death penalty, it would appear that a large majority of the population remains in favour of it." *Constitutional Judiciary*…[note 16], p. 53, note 20.

46 "*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.*"

47 *The Constitutional Jurisprudence*…[note 40], p. 305 (Dupré, p. 125).

—, the Hungarian Constitutional Court took over from this all only its first short part alone and, handling this in itself as an "all-powerful provision", it did not any longer ponder the possibility of limitations, preconditions, additional obligations, and the risk of the injury of others' rights or other rights in parallel (pp. 120–122). Even in the motives of the decision declaring the capital punishment unconstitutional in Hungary, the Court did not reckon with the fact that there may be some people also with human dignity in the society, who would be entitled to some kind of protection against the inhumane wrongdoings and their obdurate, anti-social perpetrators as possibly threatened by death penalty (p. 124). While the German wisdom looked at those rights due to all humans objectively and in the context of a well-balanced social interdependence between society, the individual and the latter's rights, the ambitious Hungarian student rendered the entitlement in question absolute. "Such an individualistic vision is dissonant to the general spirit of the German law […]. It has become an absolute […], unconditional and unlimited right."[48] It seems that on the ruins of Communism, in a society having practically fallen apart, the Hungarian Court did not perceive any guiding star except itself, and coming down from the mountain and looking around—like once FRIEDRICH NIETZSCHE's *Zarathustra* paraphrasing *les fleurs du mal* of his epoch philosophically—, it saw nothing but individuals "in isolation and fighting against the state to protect their rights" (p. 122), where "human dignity surrounds the individual in a sort of protective sphere, and thus isolates individuals from each other." This reductionist—"negative and MANIchean" (p. 126)—approach, showing deep inner alienation (scarcely transcending the childish defiance in man's societal development), sees from the outset an antagonism—that is, irreconcilability and even as a chance, the community's total dissolution and its annihilation in and through the Ego at any time—between the good individual, worthy of absolute human dignity, on the one hand, and the bad and therefore to be tightly

48 "*Un telle vision individualiste est dissonante avec l'esprit général du droit allemand […]. Elle devient […] un droit absolu, […] inconditionnel et sans limitation.*" Delpeuch [note 32], p. 592.

controlled state, on the other (p. 126). All in all, such a thoroughly privatist vision—if lifted within a public law perspective[49]—atomises society from the outset and is capable of nothing but anarchist formulation in its libertinist liberalism that there is anyway. Because community development or the building of the future is scarcely conceivable on the basis of a "selfish picture of human beings as solely preoccupied by the realisation and protection of their own interests and achievements" (p. 125) in any other way than what we see going on as materialised in the growing disintegration of Hungarian and other Central and Eastern European societies, further promoted by huge a many unexpected turns in their alleged transition.[50]

If the notabilities of the Constitutional Court thought they were the SaintSTEPHENs (founder of the Hungarian statehood a millennium ago) of our times, then even if they acted without proper authorisation (i.e., misusing their powers and thus legally arbitrarily), in respect of the qualification they may have been right inasmuch as their decisions were not only singular acts within the system change but, regarding the massive proportions of their subsequent decisions and the dramatically unique impact of many of these, they came to define the whole path of our transition to the rule of law: its style, contents, as well as feasible progress restricted from the outset by their constitutional intervention in the former's limitations. In result of the fact that "the Hungarian Court [...] was seeking to import values or principles on the basis of which the Court could lay the foundations of a new constitutional order" and thereby "used imported law as a source of new criteria for constitutional justice" (p. 154) under the pretext of constitutional adjudication, the Constitutional Court took effective

49 The dysfunctionality of a civilist approach mixed in public law contexture is also remarked as quite a misleading analogy by Teitel 'Transitional Jurisprudence' [note 20], p. 2023.

50 Cf., by the author, 'Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisations (The Experience of Lithuania)' and 'Rule of Law – At the Crossroads of Challenges', both in the present volume, as well as Alfonsas Vaišvila 'Legal Personalism: A Theory of the Subjective Right' in *Ius Unum, Lex Multiplex* (Liber Amicorum: Studia Z. Péteri dedicata) Studies in Comparative Law, Theory of State and Legal Philosophy, ed. István H. Szilágyi & Máté Paksy (Budapest: Szent István Társulat 2005), pp. 557–572 [Philosophiae Iuris / Bibliotheca Iuridica: Libri amicorum 13].

control of the entire political process, pre-determining its basic directions. That is, it subjugated the whole society—its political classes, parties and governments and thereby also the original intent at a genuine transition (to transcend the past in merit and start to build a new nation)—to self-inflicted philosophies and approaches, views of society and of man as well as to a whole series of forced paths, coercions and prohibitions, ensuing from these.

5. A Future with no Past This same exposure and helplessness, that is, being at the mercy of the West, appears also in the impossible experiment of building a future without a past clarified. "[T]his unease with the past is palpable"—so much so that the Court, by occupying its most distinguished place in the state organisation, utterly abandoned the assumption of a stand to be taken in the dramatic issues of the present (through a transition from the past), which was in fact highly expected of it. In brief, "the Court […] never really addressed the past directly." (p. 192) And when its inevitably over-politicised role-playing forced it yet to do so, the result proved to be mostly a catastrophe: lifeless as quite a doctrinarian deduction can at all be.

> "In fact the Court seemed to make a point of considering that there was nothing particularly special nor problematic with this past and that its adjudication function was as normal as in any other Western country." (p. 192)

Thereby—according to another analysis in depth—

> "by repeating the mantra of the rule of law (without a textual anchor in the constitution, and under a highly arbitrary interpretation of the concept) […] the Court decided that its own highly arbitrary interpretation of the rule of law should prevail over politically defined understandings of the right mix of legalism and substantive justice."[51]

51 Sadurski *Rights before Courts* [note 11], p. 256.

This is just the attraction to extremity with *sui generis* fundamental differences effaced, about the mistaken partisanship of which[52] a monographic stand may have already concluded that

> "Not much is gained, and much is lost in terms of comprehending the complexity of the issue at hand, by »normalizing« such dilemmas through analogizing them to various routine constitutional dilemmas faced by consolidated constitutional systems in their day-to-day operations."[53]

Of course, subsequent wisdom may see deep realisations in this rule of law, built up with autocratic means by our Constitutional Court, allowing itself the further recognition in terms of which "constitutional court is one of the major actors of political system so it cannot do as if it worked in the sphere of sheer theory."[54]

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6. Legality with Justice Silenced: Crimes and Unpunishment
The decision of the Constitutional Court, by terms of which the possibility of processing the past "travesty of legality"[55] through criminal law gets contrasted with the "constitutionalisation of criminal law"[56] as ultimately enforced by it, shows distinctly the Court's corporate determination for formal interpretation by narrowing (indeed: reducing) the very idea of the Rule of Law to an

52 E.g., Eric A. Posner & Adrian Vermeule 'Transitional Justice as Ordinary Justice' *Harvard Law Review* 117 (January 2004) 3, pp. 761–825 & in <http.//www.law.uchicago.edu/academics/publiclaw/resources/40.eap-av.transitional.both.pdf>.

53 Wojciech Sadurski *»Decommunisation«, »Lustration«, and Constitutional Continuity* Dilemmas of Transitional Justice in Central Europe (Badia Fiesolana, San Domenico [Firenze]: European University Institute Department of Law 2003), p. 50 [EUI Working Paper Law No. 2003/15].

54 László Sólyom in [as interviewed by] András Sereg *Alkotmánybírák talár nélkül* [Constitutional justices without robe] (Budapest: KJK-Kerszöv 2005), p. 171.

55 Sadurski *»Decommunisation«...* [note 53], p. 2.

56 Szabó 'Alkotmány és büntetőjog' [note 38], p. 9, in terms of which "the reference of the principle of *nullum crimen sine lege* […] to a domain transcending the criminal law proper is the genuine provision for a guarantee." (p. 6)

understanding of legal security that assumes unbroken continuity to the past—a continuity which cannot any longer be either challenged or intervened with by legislatorial or other means. At stake was no less than the issue of whether after the inglorious collapse of a state having become criminal itself (by having offences committed against its own properly enacted criminal code, then gratifying this criminal service while also criminally retributing for any eventual social initiative at their effective prosecution), the successor state had to complete the proceedings in criminal law of such deeds (especially of homicide and torture) which had been previously made time-barred formally, that is, their adjudication according to the law of the place and time of perpetration, or it has, in the name and with the seal of its "rule of law" but by belying any sound ideal of law, to assume and enforce, in the new constitutional democracy, the MACHIAVELLIst cynicism of the dictators' murderous logic, suggesting that one can safely go on doing the dirty work, taking care for one thing only: to erect a power oppressing enough to last until the deeds implied by such a dirty work can be declared prescribed or pardoned. However, this decision of a stunning logic, directly and disproportionately beneficial for the perpetrator's side (which was received with noisy celebration by many in a world measuring with dual measures), has at once got into the focus of critical debate.

For in its decision no. 11/1992 (5 March), the Hungarian Constitutional Court stipulated repeatedly and with an unprecedented sharpness that

> "With respect to its validity, there is no distinction between »pre-Constitution« and »post-Constitution« law. The legitimacy of the different (political) systems during the past half century is irrelevant from this perspective; that is, from the viewpoint of the constitutionality of laws, it does not comprise a meaningful category."

And what obviously follows from this—since, from now on, "constitutional review does not admit two different standards for the review of laws"[57]—testifies to an utter, let us say, "constitutional indifference" towards the legal actualities of the Communist dictatorship.

From the correct description of what the statute of limitations is about—"The statute of limitations in the criminal law guarantees lawful accountability for criminal liability by imposing a temporal restriction on the exercise of the State's punitive powers"—as reflected to the bill just voted for by the Parliament, which had declared the legal passing of the prescription's time interrupted (in so far as—as it was termed by the bill—"State's failure to prosecute for criminal offences was based on political reasons"), well, the Court concluded that "Failure to apprehend [the criminal] or the dereliction of duties by the authorities which exercise the punitive powers of the State is a risk borne by the State." Thus, according to its judgement, in want of previous express statutory provisions to the opposite, the period of limitations can also expire through a lapse of time relieved from official procedure by a dictatorial (i.e., again, criminal) *rétorsion* of any victim's legal initiative at prosecution. Consequently, no subsequent differentiation whatever, no comprehension detached from the dictatorial past can now affront the reassessment of the cynicism implied by such an inhuman logical formalism which may even degrade the future becoming captive of complicity, trampling from the outset the ethical foundation and humanity of the new scheme of an alleged rule of law under foot: even under the constitutional guise of the reborn and democratic Republic of Hungary. For—as the verdict goes on—"If the statute of limitations has expired, the person has a right to immunity from criminal punishment."[58]

A recent monographic stand, overviewing issues ranging from lustration to facing with the past in criminal law in the region,[59] presents this decision as a veterinary horse with the potential of featuring up all such queries, formalistic floating and

57 *Constitutional Judiciary…* [note 16], p. 220.

58 *Idem.*, p. 223.

59 Sadurski *»Decommunisation«* [note 53], 50 pp. & as reconsidered in his *Rights before Courts* [note 11], ch. 9, pp. 223–262.

uncontrolled rush in loosing contact with anything sensibly lifelike. For, as the above author deems, "It is rather hard to see what values underlying the principle of legality support such a conclusion." Namely, the conditions referred to by the decision above, notably, the "failure to apprehend" and "the dereliction of duties" do let the limitations expire, of course, as accidental occurrences (due to incidental negligence or percentage of failure) in a society operating normally as due under the Rule of Law. But in our case concerned it was the system itself that degenerated, silencing its own law and order. With its flagrantly unlawful intervention brutally retaliating any potential lawfully retaliating intention, the past system annihilated, with its own law-related activity, the very normality the Constitutional Court's discretion now claims to have been existed. For, as known, all these limiting and excluding conditions have (by their nature, designation and systemicity) arisen by far not just as having turned up in a by-chance manner—"as if the »risk« in question were a matter of the negligent behaviour of the state"—but, just to the contrary, they "were part of the purposeful policy of the Communist state".

The author surveyed here emphasises clearly that fully irrespective of the fact (or, exactly due to it) what sequence of conclusions the Constitutional Court set up for itself arising from the transition's story traced back to negotiations and from a constitutionally fresh new start in principle, a legal equation like this between the dictatorial past and the allegedly constitutional present is not only unfounded but deeply unjust and also morally intolerable. Moreover, the Constitutional Court fails to notice opposites here, by mixing them up as well, as

> "Here the non-identity of the »state« before and after the transition is most crucially relevant, and the fiction of continuity at its most absurd. For, in terms of the Communist state, it was not a matter of a »risk« at all but rather of deliberate and lawless protection of offenders, whiles on the part of the successor state the »price« in the form of non-

> prosecution is unrelated to *its* negligent criminal policy."[60]

That is, in other words, the decision legally equated situations that are not only incommensurable but mutually flatly excluding in both essential ethoses and value-contents, stretching between the extreme border values of the democratic proclamation of the full ideal of the Rule of Law, on the one hand, and the dictatorial negation of the foundational traits of any rule of law, on the other. (By the same stroke, the decision also equated the involved human intentions and responsibilities, as well as the possible and actual judgements regarding the fate of the afterlife of the innocents and victims alike.)

We have to remember that situations of such unspeakable brutality and depravity (assassination and torture) are at stake here whose judicial processing and judgement is by now asserted all over the world by even human rights activists, rather cautious otherwise. Having given up their political fiction with which they were flooding us until recently and which presented the successor state as suspicious from a human rights point of view in case it dared investigate in the legacy bequeathed to it, and having at last been (perceiving the skeletons falling out again and again from the cupboards of continents from Latin-America to Africa and pressing the successor societies to take a stand in regard with this still unresolved issue which may even hinder their further democratic development) slowly changed their focus, well, these same activists now proclaim the successor state's duty to face with the past, even as—and within the framework of—a formal obligation, to be internationally acknowledged.[61]

Of course, nobody thinks in terms of (in themselves respectable) principles allowed to be put aside but in the necessity and significance of p o n d e r i n g and b a l a n c i n g amongst various values (whether or not complementing to or conflicting one

60 Sadurski *Rights before Courts* [note 11], pp. 253, 254, 254–255 & 255.

61 Cf. especially Juan E. Méndez 'Accountability for Past Abuses' *Human Rights Quarterly* 19 (1997), pp. 225–282, and also—as translated—*Kiáltás gyakorlatiasságért a jogállami átmenetben* [A cry for practicality in transition to rule of law] ed. Csaba Varga (Budapest: [AKAPrint] 1998) 122 pp. [A Windsor Klub könyvei II].

another), each of which is to be respected in its own way—as dichotomised, for example, in tension between prospectivity and equal justice,[62] legality and substantive justice,[63] or (in the terminology of the Hungarian Constitutional Court's jurisdiction) legal security and material justice, preferably not to be absolutised in a sober judgement. It is the more so as

> "a lawless and reprehensible refusal by the old regime to punish those who committed some of the most severe crimes as defined under the law valid at the time, seems to effectively vitiate the general moral reprobation of various forms of retroactivity in criminal law. Put simply, it would seem perverse if the crimes committed in the past were to go unpunished solely because those who committed them were part of the system that protected them, and made sure that, as long as the system lasted, their crimes would remain unpunished."[64]

Viewed from the perspective of end-results, the stand taken by the decision in question can indeed be interpreted (even if

62 In the case of, e.g., RUTI TEITEL. For Teitel 'Transitional Jurisprudence…' [note 20], p. 2024 reminds that "For the Berlin court, the controlling rule-of-law value was what was »morally« right, whereas for the Hungarian Court the controlling rule-of-law value was protection of preexisting »legal« rights." Yet we know that to have any moral foundation, some commonly shared values are presupposed, while "moral homogeneity […] is anathema to a liberal […] state." (Sadurski *Rights before Courts* [note 11], p. 231) This is just about which the theoretician might have written, with outrage rightful from this aspect, as a liberal argument to be rejected from the outset, that "An emphasis on corrective justice will divide the citizenry into two groups—evildoers and innocent victims." Bruce Ackerman *The Future of Liberal Revolution* (New Haven: Yale University Press 1992), p. 71. At the same time, the Hungarian Constitutional Court president's recollection refers exactly to such a TEITELian moral/legal duality, presenting his one-time inclination to extremity as a paradox: "This debate is morally insoluble. I find it right to have, as a constitutional judge, put legal security first. It is a different issue that I shall never be able to reassuringly settle the question of conscience that I have not fulfilled the rightful claims of several victims." László Sólyom in [as interviewed by] Péter Takács '»A morális alkotmányértelmezésnek a szöveghez kötöttnek kell lennie«' [Moral constitutional interpretation has to be linked to the text] *Fundamentum* 2001/1, p. 71.

63 E.g., in the case of WOJCIECH SADURSKI.

64 Sadurski *Rights before Courts* [note 11], p. 255.

wrongly) as an encouragement to crime, because it places the grace into the perpetrator's hand, allowing the latter to absolve itself, by administering that by due way and in due time, with effect at its own discretion. And it makes the successor state (innocent of the predecessor dictatorship's crimes in fact) inevitably an accomplice to crime whether or not it wants this, because in terms of the above—transcending a wicked predecessor notwithstanding—it can have no other choice than declare the wrongfully unprosecuted offences unprosecutable as legally final.

At the same time, it is obvious that such an exaggerating, profoundly artificial solution (destructive to the very chances and ethical foundations of a genuine re-start from the outset) was not inevitable; at least, it did not follow from the texture of the valid constitution. Because

> "by non-prosecution of these crimes, and by thus allowing them to become time-barred, the old regime successfully brought about a state of affairs practically identical to what it could have achieved by conferring upon itself and its members a blanket amnesty. Consistently with what has just been suggested, there is no special, conclusive obligation deriving from the principle of legal continuity to meticulously observe those privileges, and no obvious reason why to prosecute despite them would be an outrage to the principle of non-retroactivity of justice."

And, along with the associated malady often referred to in this context, i.e., extremism, for the most part categoricalness and inflexibility have to be mentioned here, that is, the lack of the intention to search for any in-between solution or a compromise. Now as always, the situation is not different:

> "The range of options is much broader than either full observance of all the entitlement-

> conferring rules of the predecessor system or a revolutionary rupture with the legal past."[65]

Consequently, we cannot but make the severe ascertainment according to which "the intervention of the Court […] can be seen as an arrogation of the power, by the Court, to dictate the terms of the transition".[66]

The bitter dilemma arises, when the Constitutional Court's pondering with its simplifying extremism, subordinating everything to its own one-focussed view, inquires into the ultimate issues of existence, the meaning of life, being solved and unsolved at the same time: "What is more important? Does man exist for the rule of law or does the rule of law exist for man? Or does the rule of law exist for itself?" This very dilemma is, if formulated at all, by far not any longer a result of predestination but of sheer incidence and, in it, of cultural misery. As a matter of fact, and quite alone in the whole region,

> "Our society was judged unsuited to face with the past by the Constitutional Court with its decisions from »above«, while in Germany the wise and precise legal thought addressed the problem itself, thereby allowing space for social debate as well."[67]

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7. Rule of Constitutional Court Dicta, not of Law According to a self-characterisation looking back, "The criterion of the integrity of the new system was to constantly demonstrate the rule of law." This demonstration proved in itself an open assumption of conflicts as, from the very start, "The possible contradiction

65 *Idem.*, pp. 261 & 262.

66 *Idem.*, p. 256.

67 Tamás Rumi 'Szembenézés a jogállam előtti múlttal – a német példa és tanulságai, különös tekintettel az elévülés kérdésére' [Facing with the past prior to the rule of law: lessons drawn from the German instance, with special consideration to the issue of limitations] *Collega* [Budapest] IX (October, 2005) 4, pp. 45–51, quotes on 46 & 51.

between justice and the guarantees of the positive law is programmed into this paradox concept [»revolution through the rule of law«].” For “no interest can break through the formal requirements of the rule of law”,[68] about which we may have already seen that these are something which the Constitutional Court itself is establishing through elaborating its “invisible constitution”, available exclusively from within its own vision,[69] of course, that is, arbitrarily and posteriorly. Only provided that the rule of law can be meant to be reduced to formal security in law (by “the Hungarian Court [having] posited a new constraint on the state: an individual right to security.”[70]); that “mother rights” can be produced out of the jurisprudence of foreign countries; and that by further derivation of laws (narrowing or broadening in given cases), the justices are free to operate in an unrecognisable distance from the very wording of the valid Constitution—well, then we can agree indeed to the conclusive force of the statement, according to which

> “It is this approach with which the Constitutional Court could transform the great political-ideological debates of the transition into problems of constitutional law and thereby neutralise them.”[71]

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68 Sólyom in Takács [note 62], pp. 69, 69 & 71.

69 “[T]he starting point is the totality of the Constitution. The Constitutional Court has to continue determining in its interpretations the principled bases of the Constitution and the rights laid down thereby and establishing a coherent system by means of its judgments, which as an »invisible Constitution« serves as a standard benchmark of constitutionality above the Constitution which is nowadays being amended in everyday political interest” [concurrent opinion to the decision No. 23 of 31 October 1990]; cf. also László Sólyom ‘Introduction to the Decisions of the Constitutional Court of the Republic of Hungary’ in *Constitutional Judiciary*... [note 16], pp. 41 et seq. Cf. also András Sajó ‘Reading the Invisible Constitution: Judicial Review in Hungary’ *Oxford Legal Studies* 15 (1995) 2, pp. 253–267 and K. Füzér ‘The Invisible Constitution: The Construction of Constitutional Reality in *Hungary*’ *International Journal of Sociology* 26 (1997) 4, pp. 48–65.

70 Teitel ‘Transitional Jurisprudence…’ [note 20], p. 2023.

71 Sólyom *Az alkotmánybíráskodás kezdetei*…[note 17], p. 689. This key sentence is forwarded in English with substantive variations: “The existence of the Constitutional Court during the transition […] allowed the transformation of political problems into legal questions that could be addressed with final, binding decisions”. Sólyom ‘The Hungarian Constitutional Court…’ [note 34], p. 223.

This also allowed the Constitutional Court to prescribe, by consequently enforcing its own will on the country and on its people, the character and extent of the distance that can be taken from past dictatorship, the degree of the velvety character of this revolutionless transition, and the impossibility of any definite action to be undertaken—beyond the daily routine of old and well-balanced Western democracies. All these may have contributed to the undisturbed survival of the power relations of the past and the unchanged inequality of the access to goods for some as inherited from Socialism, moreover, as having been sealed by this new rule of law, all these are inaugurated now as our local constitutional democracy. Because this forum, authorised to constitutional adjudication but grown up to become the most powerful, actually recognised nothing but continuity with the past, a stronghold of a new-old legality based upon legal continuity, the inviolability of past relations if once established, as well as the absolutisation of guarantees idealised as civic rights, both untouchable and inviolable.[72] This has perplexed even an American liberal constitutional scholar who felt that not even the Court's famous decision on statutory limitations in facing with the past was so much concerned with prescription as rather, and first of all, with the query of who is more powerful in Hungary. For—according to her—

> "The ZETENYI case stands for the proposition that the authority to assess the legality of the prior regime does not lie with Parliament, but instead with the Constitutional Court" and thus, as "a controversial power grab" that "enables the court to operate in a counterrevolutionary fashion while increasing judicial power", "the ZETENYI case could be less about the rule of law than about institutional distrust."[73]

72 Sólyom *Az alkotmánybíráskodás kezdetei…* [note 17] pp. 542–544. Cf. also András Bragyova 'Constitutional Law as Limit to Legal Change: The Constitutional Court and the Backward-looking Laws in Hungary' in *The Role of Judicial Review Bodies in Countries in Transition* [International Symposium, Nagoya University Center for Asian Legal Exchange, 29–30 July, 2005], pp. 1–10.

73 Teitel 'Paradoxes…' [note 15], pp. 246, 244 & 246.

On the final analysis, all this relates also to the burning issue of legitimacy. For "the court's emphasis on certainty of the law masked its own interpretive leaps and exercise of discretion" and thereby "[n]agging questions underlie the court's formalism." It is even more so as the concerns themselves whether and to what extent the court's activity may in fact "imply a moment of illegality, a glitch in the rule of law as the court has defined it" have only been addressed by its very "clinging to the fiction that a state under the rule of law cannot be—and was not in the case of Hungary—created by undermining rule of law", eventually "The court […] dismissed questions about its own legitimacy."[74]

8. A Sliding Self-image The Hungarian Constitutional Court has never confronted itself with its own self openly. As if with some strange modesty, it has always presented its own creature here and now (to affect the destiny of the whole country) as an evident choice with no alternative at all.[75] For instance, in the beginning, the president attributed only "a shaping of competence" to the Court,[76] then circumscribed the unspoken, namely by stating that

> "I am a convinced activist, unless we mean by activism someone transgressing his competence. Activism means that the court undertakes a decision even in border situations."[77]

74 *Ibidem.*, pp. 245–246.

75 It is precisely such a context about which it is subsequently established that "the asserted necessity […] is highly problematic. It is a *non sequitur* to say that if a new legal system wants to observe the rules of legality, it must adhere to prior settled law no matter what its content", independently of whether or not the Court has been used to conceal its "arrogation" by "presenting the matter as a simply dichotomy" that, owing to their sheer artificiality, may exclusively "tend to blur rather than clarify the real dilemmas raised". Sadurski *Rights before Courts* [note 11], pp. 262, 259 & 260.

76 László Sólyom 'Az Alkotmánybíróság hatáskörének sajátossága' [The specificity of the competence of the Constitutional Court] in *Tanulmányok Benedek Ferenc tiszteletére* (Pécs: [Janus Pannonius Tudományegyetem Állam- és Jogtudományi Kar] 1995), pp. 5–34 [Studia Iuridica Auctoritate Universitatis Pécs publicata 123] as well as Sólyom *Az alkotmánybíráskodás kezdetei…* [note 17], pp. 157–182.

77 Csilla Mihalicz 'Interjú Sólyom Lászlóval, az Alkotmánybíróság volt elnökével' [Interview with László Sólyom, the ex-president of the Constitutional Court] *BUKSz* (Winter 1998), p. 437.

However, seemingly he did not even assume the contradiction inherent in that the Court realised "direct participation in the normative creation of the constitutional order of the law-based state"[78] by erecting a constitutional order for the rule of law arbitrarily, with no due authorisation, thereby unavoidably destroying the goal through the means. And today it can be declared as a *fait accompli*, an evidence in the utilitarian silence kept by all parties in the Parliament with a view to short-term political interests—without this declaration causing the least sensation in either the profession or in the press[79]—, that its acts do in fact "appear as real amendments to the Constitution",[80] as they "implement a trend of positive norm-formulation" by "transforming their construction of the Constitution into rules [...which...] constitute a specific layer of material constitutional law". Thus, on the final account—and on the one hand—,

> "it depends on the choice of the Constitutional Court when and by means of which general clause and according to how strict criteria of basic rights it adjudicates. If it starts out from the general clause of the right to human dignity, it can declare new rights, thereby elevating them to the quality of basic rights",

78 Přibáň 'Moral and Political Legislation...' [note 21], p. 17.

79 We can only wonder at the fact (or explain it by exactly this) that DUPRÉ's book was accurately reviewed in Hungary by G[ábor] H[almai] 'Alkotmány és alkotmánybíráskodás a rendszerváltozások után' [Constitution and constitutional judiciary after the political transitions] *Fundamentum* 2004/1, pp. 211–215 & Renáta Uitz 'Az emberi méltósághoz való jog és a magyar demokratikus átmenet' [The right to human dignity and the Hungarian democratic transition] *Fundamentum* 2004/1, pp. 216–220, and was annotated by Imre Lévai in *Central European Political Science Review* 4 (Summer 2003) 12, pp. 177–179 & András Jakab in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 64 (2004) 1, pp. 243–246, who all seem to have failed to perceive the cardinality of that which exactly distinguishes our continental sensitivity in the *sine qua non* necessity of prior positive legal founding of judicial decisions from the materiality of Anglo-Saxon case law, which can explain in case of M. A. Sanderson alone in his review—*The Modern Law Review* (2004), pp. 537–540—to have perhaps also overlooked the actual message of the book; interestingly enough, by the way, not re-thematised again by its author in her later workshop paper [*Anticipating Membership* Importing the Law of the West <http://www.iue.it/LAW/Events/WSWorkshopNov2003/Dupre_paper.pdf>] or elsewhere.

80 Sólyom *Az alkotmánybíráskodás kezdetei*... [note 17], p. 258.

while—perhaps only as an example, on the other hand—

> "indeed the rule of law is the most suited as a basis of reference for the Constitutional Court to establish rights and principles which are missing from the Constitution itself."[81]

But all this was not self-evident even for fellow justices assembled in the Court themselves. One of the constitutional justices for instance, who had ever cultivated both scholarship and practice in especially public law at the highest level, and as such, he himself rivalling for the first presidency of the Court, felt compelled to declare in his dissent already in the earliest times that

> "At this time, from among the constitutional courts operating in the world […] the Constitutional Court of the Republic of Hungary has the broadest authorisation and store of instruments linked to such an authorisation for enforcing the Constitution. However, not even this extremely broad statutory authorisation is unlimited: it does by far not mean that the Constitutional Court can do anything it finds necessary in the interest of the Constitution".[82]

That is, accepting as perhaps the most comprehensive specific characterisation that Communism in our region has in general been followed by "system transformation […] within the framework of law and by the law",[83] then this channelling through

81 László Sólyom 'Alkotmányértelmezés az új alkotmánybíróságok gyakorlatában' [Constitutional interpretation in the practice of the new constitutional courts] *Székfoglalók a Magyar Tudományos Akadémián* 2001: Társadalomtudományok [Inaugurals at the Hungarian Academy of Sciences 2001: Social Sciences] (Budapest: Magyar Tudományos Akadémia 2005), pp. 452, 453 & 464.

82 Dissenting opinion of Géza Kilényi to the Constitutional Court's decision no. 57/1991 (8 November).

83 Mirosław Wyrzykowski 'Selected Problems of System Transformation' in *Rechtsfragen der Transformation in Polen* Schweizerisch–polnisches Kolloquium, ed. Josef Aregger, Jerzy Poczobut & Mirosław Wyrzykowski (Kraków: Wydawnictwo Baran i Suszczyńsi 1995), p. 10.

the law was implemented in Hungary in no other way than by a kind of "elegant flying to and fro above the legal system", as another justice of the Court sharply remarked.[84]

As the message of our system transition addressed to people at large, another justice from the Constitutional Court now looks back to the chance of a new nation-building wisely, and says: "even if we received it without our co-operation, it will not make us any happier without our own efforts added."[85]

Well, it is this field where the Constitutional Court may have undertaken too much indeed, even instead of others, outrunning certainly numerous institutions dedicated to a formative role, including the embodiment of the sovereignty of the nation in the Parliament as well.

84 Imre Vörös in [as interviewed by] Gábor Halmai & Csaba Tordai '»kevesebb lesz az elegáns röpködés a jogrendszer fölött«' ["»There will be less elegant flying to and fro above the legal system«"] *Fundamentum* 1999/2, p. 68.

85 János Zlinszky 'Nyertesek és vesztesek a rendszerváltás során' [Winners and losers in the political transition] in *Magister artis boni et aequi* Studia in honorem Németh János, ed. Daisy Kiss & István Varga (Budapest: ELTE Eötvös Kiadó 2003), p. 1027.

WHAT HAS HAPPENED AND WHAT IS HAPPENING EVER SINCE (In Remembrance of Deportations to Forced Work Camps at Hortobágy)*

(Preliminaries to a Betrayal) Our shame is twofold. Firstly, we feel ashamed for having let all this happen and, secondly, for the fact that Hungary has in fact still not faced all this, up to the present day.

Nearly sixty-five years ago, when the so called free world (first, the conquered Western Europe, then, the similarly attacked Great Britain, with the United States lining up behind them) entered—against two of the three aggressive dictatorial superpowers threatening the world with their direct responsibility for launching the war, the German Third Reich and the Japanese Empire—into a military and political alliance with the Soviet Union, they, as the repository of the Atlantic idea with an overwhelming desire for world peace, took, deliberately or not, the initiative in a new, not less imperialistic conquering, notably, the Soviet-type re-division of the world, which, in addition, proved to be an ideological one, aiming, besides economic exploitation, at ruthlessly expanding its own totalitarian ideology and politics.

Irrespective of the original intentions motivating the strategic planning and political bargains on behalf of the various actors, the final outcome was a combined result of the actions of all those involved, due to which the fate of Central Europe and the Balkanic South-Eastern Europe became sealed for the following half-century as the captive of an emerging moloch, the Third Rome with Asian traditions. What followed in Hungary was Soviet rule. It was egocentric, as it demanded complete submission to its rule through

* Prepared as outlined in the ending note 16 and first published as 'Ami megtörtént, és ami azóta történik (A hortobágyi kényszermunkatáborokba hurcoltatások emlékére)' *PoLíSz* (2005. május), No. 84, [Külvilágunk – belvilágunk, 5], pp. 34–42 & <http://www.krater.hu/site.php?func=polisz&file=cikkek&cnr=515>.

destroying all linkages and textures ever once established in those subdued societies, in fact by transforming man himself. In order to achieve this relentlessly, it did not refrain from releasing and appealing to the basest instincts. Besides the handful of ardent adherents, in founding its own regime it relied on the most miserable layers of any society, on those lacking any education, those without roots, those far away from civility of the middle classes, those who could be gained for any cause on the cheapest price. Experience from crises shows, sadly, that such marginal layers are eventually inevitably joined by masses of both those driven by sheer momentary interest and those propelled by fanatic hatred.[1] Therefore, as a paradox of the moral renewal following the war (with a bad conscience left behind), the orgy of the institutional destruction (devastating both man and his humanistic culture with wild fury) of everything built up by Christian morality in Europe for a thousand of years in this half of Europe of a population of hundreds of millions was to end in the latter's victimisation.

Direct and uncontrolled procedures, developed in wars, deprived of any moral limitation and driven solely by "revolutionary" utility, with momentary passions and profiteering in the background, became institutionalised in and by the victorious Soviet empire. These did include barbarian, uncivilised behavioural patterns giving free rein to base instincts which were used even by so called brown dictatorships not in military actions but, among others, in the German *SD*- and *SS*-controlled policing actions (in the course of alleged state security retaliations and the rapidly degenerating *KZ*-practice[2]); in the capture of prisoners during Japanese jungle wars, and then (let us notice here the shift in the negative direction), in the red occupation; in prisoner camps on behalf of each and every defeater (in German areas, especially in ones run especially by the Americans, deliberately exposing the

1 It is no mere chance that both categories above have been practically mixed together, as the psychiatric reaction to the revolutionary fever following the First World War. See, e.g., Gusztáv Oláh dr. *Politikai psychopaták* [Political psychopaths] (Budapest: Eggenberger n.y.) 12 pp. [lecture by the director (and ministerial counsellor) of the State Mental Hospital at Lipótmező, Budapest, at the 8th National Assembly of Hungarian Psychiatrists] [special publication from the issue 19–20 of *Népegészségügy* (1922)].

2 I.e., *Konzentrationslager* [concentration camp].

vanquished to physical annihilation); and, finally, in the murderous forced exodus of the German civilians, having settled in the North-East hundreds of years ago, driven back to their motherlands. True, Hungary's military occupation by the mighty Soviet victory had been followed by a short-lived coalition period in which, however, the ideal and moral capital of any civil alternative was rapidly done away with, degrading anyone to forced companion of route, by a Communist threat supported by Soviet occupants. So first, local Communists penetrated every institution as deeply as they could, forcing democratic entities to subduing co-operation. And after their Communist takeover had been accomplished with brutal policing means, next to ones usual in a civil war, they forced their program (initially by means of a much-promising propaganda) more and more uninhibited and unlimitedly. This program was schemed to implement a European expansion of Asian Russian Bolshevism, upon the basis of an artificial chaos, a *nihil* arising out of the total destruction of the national past, identity, and civic presence, only to be based by a "new" type of man to be born on this terrain.

It was the conscious lack of anything reminding of traditional ethics with an inhuman rage that lived on in this new and artificial medium[3] which, in its aggressive drive to be expanded, did from the beginning intoxicate the Soviet world war victory with a cruel Bolshevism of half a century behind it and growingly predominated by the raging paranoia of the Soviet leader in imperial enchantment of his mighty rule, inducing conflicts and posing threats worldwide repeatedly. The British wartime prime minister was the first to realise in his speech at Fulton that an Iron Curtain had descended in-between, starting a cold war among the victors of yesterday. Then, the Communist *International* had banned Yugoslavia as enemy after the unconditional subordination of TITO as one-time fighting partner to Moscow had failed.

Therefore the Soviet empire, with all the extraordinarity artificially generated, a few years after the World War Two was to

3 Robert Nisbet *The Quest for Community* A Study in the Ethics of Order & Freedom (San Francisco: ICS Press 1990) 272 pp. presents the role of war and Communist movements as surrogates in want of a genuine community, among others.

present again an eschatological fate divide forcing everyone to choose in such a tormenting final clash between the Good and the Evil. Or, everything appeared to be in preparation for a new, more bloody and totalitarian World War Three, conceived of as some profane Last Judgement, with every event taking from then on the inevitable form of some obscure, unhinged *danse macabre*.

For needless to say that Asian despotism and Byzantine rhetoric and audacity merged in the Muscovite Third Rome which, in forms reminiscent of Biblical prefigurations and in an atmosphere of chiliastic expectations, felt entitled to intervene by any means in fighting the evil preconceived by it.[4] Its homicidal machinery must have destroyed half a hundred million lives (tested earlier in mass proportions during the Spanish civil war) by the time when their invader hordes looting and raping (in replacement of the fighting elite units of the Red Army) arrived at the brim of a civilisation made alien and loathsome to them,[5] namely to Central and Eastern Europe. Within some years, before the Peace Treaty was finally concluded in 1948, General VOROSHILOV as the plenipotentiary representative in Hungary of the Allied Control Commission could have reminded the Prime Minister of Hungary with enchanting ease that in case of non-deference, entraining the populace of ten millions of Hungarians to Central Asia or Siberia would pose no problem for him logistically. Well, dragging away masses, picked at random from amongst the civilians transformed into prisoners of war, to forced labour camps beyond the Ural; lifelong deportation to *gulag*s of civilians feigned as court-martialled in one or two minutes' time in Russian, a language unintelligible to them; elimination of civil political enemies by Soviet military security agents—such and similar unscrupulous

4 Ironically, see the scholarly analysis by an authentic author, descendant of the equivalent to the GPU-founder Polish–Russian FELIX DZHERZHINSKII in Hungary, in Tibor Szamuely *The Russian Tradition* ed. Robert Conquest (London: Secker & Warburg and New York: McGraw-Hill 1974) xi + 443 pp.

5 The Soviet rule degraded even writers to put their talents in the loyal service of the hatred's ideology. For example, Ilya Ehrenburg's pamphlet *The Germans* [1944]—of which I could not find English, French or German edition but which became translated into some of the sovietised territories' languages, e.g., *A németek* (Budapest: Szikra 1945) 26 pp. or *Ob Němcích* (V Praze: Naš vojsko 1946) 53 pp.—presents the enemy as a target to be destroyed and extirpated, without sparing even its ridiculised and humiliated culture.

practices set examples for STALIN's best Hungarian disciple, RÁKOSI, and his neophyte henchmen. As soon as they seized power, their Communist party, with its uniformed terror organisations and army of agents, with their administration by local councils in form of soviets (built out systematically from the 1950's) and the all-powerful personnel departments at each and every place of employments, grasping absolute political control over the professions and the labour, were all dedicated to one single aim: the Communist "transformation" of all society's components, including man himself and his environment, i.e., even Mother Nature.

("Deportation" with Consequences) The circle of victims whom we today commemorate as deportees (according to the terminology used in the campaign calling for atrocity by the party central newspaper *Szabad Nép* [ironically: Free Nation] and to the official wording[6] of the time, in want of anything better but totally inaccurately) was formed on the basis of various considerations and under the widest variety of pretexts, quite randomly but in satisfaction of their central or local, politically or economically driven momentary needs.

These people were brutally dragged away from their homes mostly in the night, without previous notice, for the most part with all their family, deprived of their movable and immovable property with immediate effect (except for some domestic animals, a meagre stock of clothes and kitchen utensils). They were then taken (without valid legal authorisation, with false pretence to be enemy, within the action of the *ÁVH* [State Defence Authority], intentionally exposed from then on even to risk the loss of their very lives) to closed and uninhabitable, forced domiciles kept under

6 "In the instructions of the Ministry of the Interior [No. 00384/1950 (July 13, 1950), file IV], there is neither reference to the statutory provision on the basis of which the measures against those displaced have taken place nor does it give any legally usable naming of them. As far as their indication is concerned, the term »displaced persons« is used. This term is so far unknown in our law […]." A note by the Police Colonel—Head of Major Department—László Sebestyén to Comrade Deputy Minister Tibor Pőcze [in Hungarian National Archives, XIX–B–1–j, Box 40, 106.00269], as kindly provided to me by ZSUZSA HANTÓ.

armed control, made to do forced work often including children. All this happened without any official record, work contract and wage agreement, and with no institutional (social, healthcare and educational) supervision, and the sufferers were exposed, night and day, to the brutal harassment by their persecutors, trained for senseless revenging violence. Overall, they were more than seven thousand. They were dragged away mostly from hamlets near cold-war Western and Southern frontiers of the Soviet-controlled empiredom in Hungary (from Vas to Csongrád counties), as well as from the capital (with intention of a preventing cleansing), and from those settlements previously planned for socialist big-industry development in central Hungary. The deep reason (never officially stated) may have been either mistrust generated by war psychosis, and/or the short-cut intention to confiscate their private and business property, and/or just a local potential's wish for retaliation or personal revenge. Anyway, the underlying motivation could be everywhere the intimidation of all the rest of any civic society and—by devastating both wealthier village and middle-class town layers, alongside with the one-time "ruling class", sentenced to annihilation—breaking up society to atomised beings, incapable of any further self-organisation.[7] And this had gone on day to day, week by week, month by month, and year by year hopelessly, sensed as eternity for most of them, until the death of STALIN, which was followed by a Soviet succession which could eventually rock the hegemony of his "best Hungarian disciple" MÁTYÁS RÁKOSI (officially called "*Pajtás* RÁKOSI", made adored as the pal of the whole population), building Socialism with "ten million Fascists" with fire and sword, just to yield the field, out of tactics for a short time, to IMRE NAGY's boneless rule, introducing concessions but, nevertheless, disbanding the work camps eventually.

And the class struggle went on (ruthlessly, according to the pattern of the Soviet-type Socialism, having begun with Bolshevism half a century before), all through substantiating (although with changing means and in changed forms) the

7 As GYÖRGYI BADI, once deportee as a child, raised the issue in personal talks summarising her family experience, this crude interference might have been the final injury, causing total disintegration of local society, wrecked up to the present day, of her home Southern Transdanubian region called *Ormánság*.

Communist rule in Hungary (the perpetrators and disciples of which now proclaim to embody social democracy with just as much irresponsibility, out of mere hunger for power and control, as they used to introduce Soviet-type Socialism back at the time for the rest of society).

After all such turns, finally nothing was left to these victims but the chance of leaving the work camps physically (as not accompanied by any registration, any documentation on the work accomplished and any reckoning), but without the right to return in most cases (due to police prohibition of residence in frontier zone, in the capital and in industrial large towns). Forced to subsist on some meagre temporary aid granted one single time, they could try, with heroic efforts, to create again a livelihood from scratch, first sheltered by relatives, condemned to job search and, if successful at all (as all their official contacts remained shadowed by secret police notification), to be compelled to do the worst paid and roughest work, just to add lasting insult to their earlier injuries.

Of course, this applies only to those who could survive the atrocities. Deaths accelerated by lack of medical care, miscarriages arising from bodily or psychical strain, infant and child mortality as well as suicide (especially amongst farmers used to staunch inner autonomy) reduced the number of those returning. And what's about the lucky ones? They were happy to have stayed alive at all for three and a half decades after leaving the camp, stigmatised as class enemies, discriminated in studies, employment, career, promotion, and awards. Sometimes they became injured for a whole lifetime, mostly arising from forced child labour. They were under duress to leave a blank in their curricula vitae, making them accomplices to the crime done to them. They had to resume officially acknowledged work without the years in deportation taken into account in respect of employment, supplies and pension. In fact, they were sentenced to silence, intimidated not to speak about the atrocities against them up to the last day of Socialism, as the authorities labelled the cruelty made to them as mere accidence, to be strictly forgotten. At the same time, once the victims wanted to acquire a job or admission to a university, the addressee was always reached by a confidential

notice, preventing them from being hired or admitted. And this had lasted until Communism collapsed and the heroes of the Communists' new brave world started to build their renewed regime (now called "political transition") by privatising a vast proportion of the national property and fortune, this time in a West-conforming liberal guise.

Therefore, perhaps it is not improper to eventually raise the issue: are we anything more than living physicality, sheer biology? Is life anything more than wriggling of tired, humiliated bodies racked with pain? Demiurgic capacity (or just infinite cynicism) may reside in Communists if this time again exactly their sadistic executors were charged with the task of clearing up their own crimes (called incidental wrongful acts). All they did was keeping silence and silencing those insulted. The deeds had no consequences and those who had to suffer them were not offered any compensation. The deportees were just disbanded at the time with the repulsive warning to keep silent, and not even their collective suffering did get a name.

And as it was by far not commendable to speak even amongst relatives or friends, and the press and the public also kept unbroken silence for long, their narratives soon became difficult even to believe either in family circle or by friends, because such narratives had no point of reference or confirmation by either known segment of life. The atrocities became particularly hardly graspable for the coming offsprings of those who survived the injuries as kids, for nothing could support, contextualise or encourage narration in a country covered by total amnesia. This way, external suppression was heightened by a secondary, innerly self-inflicted suppression, which made it even less easy for guiltless sufferers and their families to process the abuses, to manage a healthily survival in order to live an ordinary life with full chances.

("Deportation" with no Silence Broken Since) And ever since? Has the nation, freed from the yoke of Communism, expressed any compassion towards those anguished without reason? Has our republic (so proud of its brand new scheme of an

alleged rule of law, yet maintaining unbroken legal continuity with the preceding unlawful dictatorship) made due apology to our nearly ten thousand fellow citizens for having been deprived of personal freedom for years, of life with equal chances for decades, and of property accumulated by their prior generations' honest work forever? Well, in fact, not one single word has been uttered or committed to paper by the authorities for almost twenty years now. Nothing has been either called by name or commemorated. How could their fate be appraised or simply accounted with if their tragedy, their ill-fate caused by citizen fellows has not even had a name? How could they be commemorated when no formal investigation or gathering of facts has ever taken place? Although we live now in a world abounding with civic organisations providing legal defence, supported by the state and by international resources as well as by social capital worldwide, every atrocity that was once perpetrated against them has up to now remained only alleged. It happened if we believe it happened. It happened if we happen to give credence to their plaintive sighs that can at times still be heard. Our rule-of-law-schemed cynicism built on sheer formalisms has become an accomplice itself, because it has in fact allowed, with culpable negligence, Communist amnesia conceived in sin to survive in the successor society.

Of course, the victims are no longer deprived of common rights, as they are now citizens under equal protection at least in a formal sense. Those of them who in the lack of any administrative registration at the time can nevertheless provide evidence of having been transported to a forced labour camp to work there for three years at least, fall under the legal category of those innocently imprisoned, to receive a supplement in addition to their monthly pension, equalling the paltry amount of the average money paid for few days' work today. As to their property confiscated, those who all that notwithstanding could provide proofs of ownership (often with efforts and sacrifices more costly than the actual compensation value, being then deprived of all their personal belongings and archives, so launching legal procedure rather out of reverence for their predecessors) fall under the category of those whose fortune was once nationalised and can fight for being entitled to so-called

compensation notes that have proven to be, despite early hopes but betrayed by governmental impotence, outrageously worthless. This is all the compensation they may have got—and nothing more—for their immeasurable sufferings.

In addition, considering the fact that our republic, having become accessory to these crimes by keeping silent, did not even name their victimisation, they themselves could not get factual knowledge of each other either. Our arrogant, newfangled rule of law scheme might as well even add to their inner uncertainty as they cannot help but puzzle over whether or not they were a rash in the adolescence of our Socialism proudly building its new, Communist society or an inevitable splinter in the brave hard work of wood-cutting, in demand of firmness first of all.

Namely, they were degraded as unnamed code number holders of closed camps,[8] and in the everyday painful experience of being shut together and the involuntary acceptance of a community inflicted upon them by their common slavery, could know about each other as co-mates to given small communities at the most. So it is by sheer accident that they could get at all some sporadic pieces of information on other deportations, deportees and camps, without any realisation of the deportation's systemicity. And this could only have a start, by happy chance, less than a decade ago.[9] They, and not the authorities of the republic, began searching each other, for companions in distress. That is, aggravating their and our common shame in their renewedly dishonoured and hard lives,

8 In fact, only headcount official data were produced about them in confidential reports, indicating the change caused by birth or death as "increment" or "diminution" respectively, except when their eventual move without formal permission had been followed by the ordinary police notice "wanted", issued as if they were criminals.

9 Their search for each other has become encouraged (in want of anything else) by the hope for and possibility of gaining evidence on what had happened, witnessing for one another upon the basis of the growing mass of mutual narratives at the beginning of the past decade in our shameless transition. As happened, it was sociologist ZSUZSA HANTÓ who managed to discover a list of the camps (the first documented proof of systematic persecution on a massive scale) in the spring of 2000 (despite the fact that the encryption of the data had been cancelled earlier, in 1994 and 1995, true, also too late a time), as a—perhaps not unexpected, but, so to say, inadvertent—result of three years of persistent research in the Central Records of the Ministry of the Interior. In possession of it, survivores could already organise a conference in the summer of the same year. As an institutional consequence, the Association of the Deportees to Forced Labour Camps in Hortobágy [*Hortobágyi Kényszermunkatáborokba Elhurcoltak Egyesülete*] was also founded.

they were to start devoting time and money (from their meagre pension) to be able to remember and also making us to remember.

And, from the collective remembrance, a genuine community has been born by now. Organised on their own, in the bounds of their private sphere and civility in a self-supporting way, to bring about a true community, by recalling and sharing memories. A community that may even have a name one day.

All they guess to be remembering includes also that the three conservative prime ministers up to now after the fall of Communism, who equally preached for Hungary's Christian traditions in sublime words, involves one having got stuck at the Communist calumny at the time justifying their deportation as a temporary policing solution to prostitution and also another one without the faintest knowledge and/or credence of their past and presence.

Has their treatment changed ever since? Fortunately, there are publications, commemorative events and one or two monuments. All subsidised from their donations and erected from their contributions. All are mostly managed within their own circles, inaugurated and unveiled by them, but by far not exclusively for themselves. Intended by them but not just for them: rather out of concern for the nation, to defend the Hungarian ocean in themselves like in a drop, to prevent the moral foundation and the very ideal of the republic itself from being undermined by the sinful reticence and amnesia continued regardless of political parties and of the constant verbal magic of a past surpassed, not interfering with the present any longer.

(Considerations on How to Treat the Past after the Communism has Fallen) But its seems obvious, even if browsing only among my earlier personal writings, that we have not delayed in recognising the necessities at the dawn of what we then hoped to be the start of a genuine change of regimes. The painful lack of the authorities' action was formulated as early as the beginning of the year 1990, in the first moments of the transition to parliamentary governance. Notably, as I cried out then,

"no exploration of facts and data has taken place in our country yet. […] However, due to the defencelessness arising from the isolation of private initiatives [appearing, in want of anything better, in popular periodicals], the procedure itself appeared so absurd that instead of the establishment of simple historical facts or of determent or awareness of the shame, all this became fixed in citizens' consciousness (owing to the media allegedly unbiased) as some suspicious manipulation (as it may have raised protest partly rightly). […Because…] however great journalistic force, power of revelation some works may have […], there may still remain some nostalgic pro-communist organs insisting on Socialism being in heir of the French Revolution, on STALINism as merely a desperate experiment in modernisation, and on professional revolutionaries as the heroes of social transition notwithstanding. Therefore, the very act of unveiling by revealing the names gives itself no form whatsoever. And a due form is necessary by all means."[10]

But struggling with the issue of form, of the proper and worthy forum and framework, points undoubtedly at the state as the only actor that can, similarly to European "white books" or American "state books", mediate reliable records at turning points of national history (e.g., after wars) about what happened in and to the community. Accordingly,

"There must be a national forum that establishes, clearly and with a force valid for the future too, what happened over the past fifty years, and how it happened. There must be a national forum that judges in an exemplary way at least for the most flagrant cases of personal involvement and responsibility. Or, there must be fora doing the job, and by far not necessarily with the aim of inflicting damage on anyone in person, but in order to prevent the past from passing unjudged. […] For the past is part of our present and

10 By the author, 'On Setting Standards' [intervention in the first symposion on the issue on 12 January 1990] in his *Jogállami átmenetünk* Paradoxonok, dilemmák, feloldatlan kérdések [Our transition to rule of law – Paradoxes, dilemmas, unresolved queries] (Budapest: [AKAPrint] 1998), pp. 104–105 and 109 [A Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Karának könyvei 5].

future. We are concerned with it exclusively in order for being able to serve these latter also by it."[11]

So, gathering information has immediately started in respect of both our neighbourhood and other continents as well, to find out how civilised nations are used to act when encountering the need to rebuild themselves after a dramatic past, with a tragic heritage behind it, is to be discontinued and closed down in some way emphatically.[12] And it became more and more obvious that what was needed for drawing a caesura-like separation of us from such a past was firstly nothing else then the establishment of facts with an all-covering legal evaluation of the relevant events through a judicial procedure, which might make this establishment both indisputable and unquestionable by the seal of legal force; and the undertakeable program of facing with the past in law was to be inevitably complemented by a thoroughly reliable and full documentation which could serve both as a historical record and as psychical prophylactics for the victims.

Back at the time when our trust in the honest feasibility of a *justitia*-programme was still unbroken and, aware of being right when also morally responsible, all this seemed to us to be a function of proper formulation justifiable for both sides, we ascertained that the victims are not only entitled to (1) a recognition by the National Assembly in representation of the whole nation, to (2) a judicial procedure through which those once

11 By the author, *Koncepció a múlttal szembenézés hatpárti egyeztető tárgyalásához* [Proposition to the six-party negotiations on coordinating how to face the past] [draft proposal for the Board of the Hungarian Democratic Forum {MDF}] [manuscript, 9 May 1990].

12 In my own scope of action, I sent out dozens of letters, from October 1990 to April 1991, to colleagues in legal philosophy worldwide, grappling with similar dilemmas. To mention just one or two addressees, they included, e.g., from the Spanish resister (also victim of imprisonment), now human rights professor in Madrid, GREGORIO PECES-BARBA, to professor of legal philosophy in Buenos Aires, having become from an activist of the civil resistance to a counsellor of the President of the Republic of Argentina, CARLOS NINO. And, in September 1999 (while several of those Hungarian embassies which were supportive of our government's *justitia*-programme also collected pieces of local information as forwarded to my office at the Advisory Board to the Prime Minister JÓZSEF ANTALL), I could report about experiences gathered through my field studies in Lisbon and Warsaw (financed mostly from scholarly research funds), besides other proposals.

victimising deeds and perpetrators are qualifiedly named, and to (3) a comprehensive documentation of the official clarification of all those relevant facts, but also to that

"Closing the past [...] could be the resultant of a harmonised, concerted activity [..., thus, in addition to the above, ...] (4/a) At the same time, the publication of a *White Book* which would name by its coherent analysis those fifty to one hundred persons bearing principal responsibility for events having led to the present *cul-de-sac*, independently whether or not provable in a criminal court (or prosecutable as a crime). [...] (Anyone finding it prejudicial to be named would of course be entitled to institute proceedings within the statutory frameworks [...].) (4/b) At the same time or perhaps subsequently, a regular periodical—e.g., under the title of *40 év* [40 years]—should be launched as funded from guaranteed state resources or sponsored by the parties in parliament at a subsidised price, in as broad circulation as possible, backed by a centre of documentation set up and maintained from similar funds, to publicise recollections by sufferers themselves and their witnesses, alongside with papers by publicists and historians on the issue, as well as documents, chronologies and lists of names (under serious control and philological supervision by editors, without, however, being necessarily censured). Documentation with by-products of and materials preparatory to those activities mentioned above could also appear here."[13]

Despite the tendency of international human rights movements at the turn of the 1980s and 1990s, suspecting encroachment of individual rights in any attempt at exploring the

13 Formulated by the present author, *A múlt lezárása* Javaslatok a hatpárti tárgyalásokhoz [Az MDF Választmányának címezve, az MDF Választmánya és az MDF Jogi Bizottsága képviselőinek 1990. május 9-én tartott megbeszélése eredményét rögzítve] [Closing the past: Concept for the six-party negotiations {addressed to the Elected Committee of the Hungarian Democratic Forum (MDF), recording the proceedings of the meeting of the latter with the representatives of the Legal Committee of MDF on 9 May 1990}] [manuscript] [the first version above being drafted by László Ferenc Maróti {MDF Elected Committee}, the second one by Csaba Varga {MDF Legal Committee}].

past by governments replacing dictatorships, many times hindering and at times even obstructing efforts (e.g., in Latin America), the willingness to face with the past in law became, already back at the time, a touchstone of the implied reason and sincerity, moreover, moral foundation of the new scheme of the rule of law. So, it is no mere chance that the admonition some years later was formulated as follows:

"Should these ideals turn out to be unfit in helping us transcend the past, our initial enthusiasm would inevitably cool off, our constitutional ideals themselves would lose their moral cohesion and appeal, and would inevitably dry out, as it were, with our democratic pathos and perspective evaporating away."[14]

(Cul-de-sac as Assessed even by Liberal Standards) Meanwhile, the lofty warriors, stuck with principles, lost a battle on this field too, as it turned out that the past afflictions left unsettled by them had not only caused survivors additional and even more unreasonable and unjustifiable suffering but had constituted themselves insurmountable obstacles to the rebuilding of democracy all over Latin America and Africa alike. And as they are longing for marching in the forefront by showing the way to others, the flag-bearers of so called liberalism changed their banner in the meantime without making a sound, now—by the way, correctly—declaiming about the political, moral and legal responsibility of the successor government, which they are trying to elevate to the level of an expressed duty under international law. Thus, their earlier ideological demagogy has now faded away at least in the Atlantic world. Perhaps their mottos fabricated out of Hungarian folksy wisdoms—"Why bother the past? Why stir up nothing but conflicts now?" and "Time will settle everything!" "Like pebbles in Transylvania's brooks, we shall be reconciled with each other little by little"—are going to be substituted to more sober, responsive

14 From the present author, 'Preface' to *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub], p. viii.

and responsible policies, more focussed on a long-term perspective.

If we consider the set of criteria stipulated nine years ago by some New-York-based office of the inscrutable, enigmatic, closed centre of operations called, perhaps ironically, Open Society Institute, known to us first of all from its partisan actions, the following requirements can be found:

> "a legacy of grave and systematic violations generates obligations that the state owes to the victims and to society. [...] [T]hey are in fact distinct duties, each one of which must be complied with to the best of the government's abilities. [...Thus...] 1. to investigate, prosecute, and punish the perpetrators—a right of the victim to see justice done; 2. to disclose to the victims, their families, and society all that can be reliably established about those events—a right to know the truth; 3. to offer the victims adequate reparations—an entitlement to compensation and also to nonmonetary forms of restitution; and 4. to separate known perpetrators from law enforcement bodies and other positions of authority—a right to new, reorganized, and accountable institutions."[15]

Looking at what can be ascertained out of them at the least is that none of these four mutually complementary basic requirements has been fulfilled in Hungary during the one and a half decades labelled "change of regimes" but resulting in "a regime re-instated" instead. What is even more, by now almost no disputes perturb in our peacefully thriving and contentedly harmonic society the abundance in success of a nation ruled by efficient governments surrounded by accord, unless some narrations, sighs and complaints from the peripheries about alleged injuries in the

15 Juan E. Méndez "Accountability for Past Abuses" *Human Rights Quarterly* 19 (1997), pp. 255 & 261, combining here into one block both sides of obligations and rights respectively.

remotely long-gone past bring some disharmony to the surface, causing unexpected disturbance…

Personal recollections made already available[16] all testify to the strong character of those dragged away to forced labour camps. Driven to the limits of human endurance, physically broken and deprived of worthy living conditions, however, those having survived the afflictions can only find consolation in the awareness of being moral victors of a lost match: they have become more than what they used to be. Living under conditions that are more comfortable today, it would be good to believe that one day we, too, can perhaps achieve if not the same but similar moral standards ourselves.

16 As a dramatic preliminary, see *Kitaszítottak* I: »Magukkal fogjuk megzsírozni a földet« [The outcast I: »We will grease the soil with you«] ed. Zsuzsa Hantó, János Takács & Miklós Füzes – II: Dokumentumok a hortobágyi zárt táborokról, 1950–1960 [Documents on closed camps at Hortobágy, 1950–1960] ed. Miklós Füzes (Budapest: Alterra ²2002 & 2002) 245 and 332 pp. – III: *Családok munkatáborokban* 1 [Families in labour camps] ed. Zsuzsa Hantó (Budapest: Magyar Ház 2006) 504 pp.; *Hortobágyi kényszermunkatáborok* 1950–1953 [Forced labour camps at Hortobágy, 1950–1953] ed. Zsuzsa W. Balassa, Mária Hajdú & Jolán Vecsernyés (Budapest: [Hortobágyi Kényszermunkatáborokba Elhurcoltak Egyesülete {Association of the Deportees to Forced Labour Camps at Hortobágy}] [2004]) 32 pp.; *Telepessors* [Settlers' destiny] ed. József Saád (Budapest: Gondolat 2004) 368 pp.; Badi Györgyi [née, Ottóné Bárány] *»Élet« a Lenin-tanyán* [»Life« on the Lenin-farm] [manuscript] (Debrecen 2005) 95 pp. and also in *Élned, halnod...* Kényszermunkatáborokba hurcolástól az 1956-os forradalomig [You must live and die… From being dragged to forced labour camps up to the revolution of 1956] ed. Zsuzsa Körmendy & László Kozma (Budapest: Kairosz 2006). It is this last title to which the present paper had originally been prepared as a foreword, at the second editor's request. My manuscrit was first met with enthusiastic approval, then, when the volume was completed, rejected under various political pretexts.

Csaba Varga

1956 JUDGED BY ETHICS AND LAW
Or the Moral Unity of the Law's Responsiveness as a Post-totalitarian Dilemma*

(Law and its Socio-ethical Basis) Law is part of our social being; this very law and, behind it, the whole culture through what we live every day, in mark of which we conceive the sense of our being and shape our personal life, justify our paths and take our decisions, are products and properties of a community that do comprise all us in one single enormous unit. In our thinking about worldly issues so much as in our collective identity, we do form one absolutely inseparable entity—independently of whether we judge ourselves in our reflected social being or in roles assigned to us by the law, among others.

In law so much as in other conglomerates bearing value-assessing mediatory functions (required for societal complexity to differentiate its parts from the overall social complex), the underlying basic ethos must be identical with that of the composing parts in a symptomatic unity. Surely, our law is an expression of our undivided societal culture as transformed into a specific instrument; our legal language is formed on the basis of common language, used in communication as especially shaped by professional elites; shortly: all what we find in law, from the ways of how to filter social relations, via fixing desiderata (targets and priorities), to implementing them through the instrumental net of

* Originally—in its second, policy part—presented on the occasion of the 50th anniversary of the Revolution and Fight for Freedom of 1956 at the conference on "The Blood of the Hungarians" organised by the Faculty of Law of the Pázmány Péter Catholic University on 16 October 2006, as well as—in its first, theoretical part—at the scientific workshop organised by the Institute for Legal Studies of the Hungarian Academy of Sciences on "Legal Question-marks Concerning 1956" on 3 November 2006, the Day of Hungarian Scholarship, and published the first time as '1956 erkölcsi és jogi megítélése, avagy a jog válaszadási képességének erkölcsi egysége mint a totalitarizmusok utáni korszak dilemmája' in *PoLíSz* (December 2006–January 2007), No. 100, [Our external world – our internal world], pp. 163–174 & <http://www.krater.hu/krater.php.do=3&action=a&pp=1726> as well as in *Iustum Aequum Salutare* III (2007) 1, pp. 31–44.

their (technical, conceptual, institutional, as well as system-bound) realisation—either borrowed from earlier or other laws, or crystallised out from communal culture for legal use—derive from this commonality and return also there; moreover, even the law's daily professional maintenance and operation (reproduction and operational manipulation) are achieved on the basis of such a commonality and feed back within it. Or, law rises over the undivided fundament of our social community in a way not detached from it even for a moment.

To be sure, with this recognition we have only returned to the re-drafting of a well known and basically sociological consideration. Namely, as soon as society gets internally differentiated, here and now these differentiations will not be effectuated in man him/herself but (even simultaneously) among his/her roles. Namely, concerning the possible hits of differentiation, its objectified forms and institutionalised presence, any separation or independence becoming autonomous will be kept within—while achieved through—specifically own but humanly filled ways and means, because "a human is hidden in the machinery".[1] Or, behind all such movements human beings stay, indelibly and with peerlessly individual personalities, as a social product of our undividedly common societal existence. It is not him/her we think about or fear for his/her becoming aware of a split; for diverting institutional expectations will not tear apart his/her individual ego. Just to the opposite. It is his/her different roles that different institutionalised expectations will be related and referred to (internationalised and externalised at the same time to various extents); and these are the roles he/she may want to perform exactly without him/herself pulling apart, that is, in his/her integrated social and human constitution simultaneously, through his/her role-assuming personality as a human and societal being.

The above mentioned connections are practically commonly shared phrases of those social ontologies and macro-sociologies which are governing our age. Due to HEGELian traditions (abundantly quoted by MARX), we may speak about schemes of

1 At one of my research courses a few years ago, a student of mine used this nice expression.

homogenisation building up on the heterogeneity of daily life in endless processes (simultaneously with institutionalisation and, within it, objectification); in terms of the LUKÁCSian ontology of social being, we refer to partial complexes having been developed inside the given social total complex, furthermore, to mediation through and inside each of these, as well as to a definitive mediating role played primordially by language and law, as forms of the specifically societal existence and as kinds of exteriorisation emerging inside this; and, at last but not least, starting from the background idea of LUHMANN, we may observe the growing separation through the never-ending process of *Ausdifferenzierung*, as a result of which processes themselves are getting separated from one another as growingly independent entities, while they do erect also their own institutional frames with adequate means for that their own specificity can prevail relatively freely. The keyword of all such movements is independence, on the one hand, with its relativity, on the other, namely, to become autonomous so much powerfully that eventually the object may even turn against the substance forming its own fundament for that, in this specification, it can realise what it received (similarly to other *ausdifferenzierend* conglomerates of such "homogenised" "partial complexes") as motivation and also as culture of motivation, within the totality of the overall "heterogeneity" of the "total complex".[2]

Using a symbolic expression, it is just what we could have already learned about the autopoietic operation, defining autotelic processions within systems at the same time open and closed, first, in example of the reproduction of living cells, later, within life sciences in general, ending as somewhat universalised in and for social sciences as well. Accordingly, as to law, it is open in any direction towards information from the external world, as a system collecting data drawn from the heterogeneity of daily life;

2 See, by Georg Lukács, *Die Eigenart des Ästhetischen* (Berlin & Weimar: Aufbau-Verlag 1981) and *Zur Ontologie des gesellschaftlichen Seins* in his *Werke* 13–14, ed. Frank Benseler (Darmstadt: Luchterhand 1984–1986), as well as, by the present author, *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1965), particularly ch. 5, pp. 101–156, on the one hand, and Niklas Luhmann *Ausdifferenzierung des Rechts* Beiträge zur Rechtssoziologie und Rechtstheorie (Frankfurt am Main: Suhrkamp 1981) 496 pp., on the other.

however, as to their processing by and within the law (homogenising heterogeneity by treating it from a narrowly legal aspect exclusively), this is already closed (since operating as a "black box"—LUHMANN writes—it can only answer in exclusive terms of a bivalent logic, qualifying the case to be either "legal" or "illegal"). Notably and on the one hand, the law's processing ability is unlimited, while and on the other, this very processing is both channelled into given paths and its alternative possibilities are also definitely limited. Consequently, we have to acknowledge now—as we have already had, by having realised the fact of social complexity and of structuralisation through *Ausdifferenzierung* within it—that our own social product may limit us in total movement; moreover, it may even prove to be counter running, since to the challenges—whatever they may be—the law will in principle always answer in its own way.[3]

Well, I wanted thereby only to support the allegation according to which we could have rightly got accustomed to treat all the parts (thus: society, culture, economy, politics, law, science, and so on) erected by our civilisational endeavours in this social totality as independently active components, however and at the same time, we can only interpret any and all of them within the frame of a relative and instrumental, i.e., institutional, autonomy. First of all—as we could see—"a human is hidden in the machinery" undividedly, who, in his/her own personality, will be role-assuming and role-playing simultaneously. However, such autonomies are merely instrumental and institutional ones, the basis of their existence being provided by everyday life. If the lawyer uses language, recourses to techniques, calls for an institution, construes an event established as a fact, or makes real persons to move, he refers to language, technique, institution, or human happenings and expectations which, within the womb of the

3 See, by the author, 'Judicial Reproduction of the Law in an Autopoietical System?' in *Technischer Imperativ und Legitimationskrise des Rechts* ed. Werner Krawietz, Antonio A. Martino & Kenneth I. Winston (Berlin: Duncker & Humblot 1991), pp. 305–313 [Rechtstheorie, Beiheft 11] & *Acta Juridica Academiae Scientiarum Hungaricae* XXXII (1990) 1–2, pp. 144–151, on the one hand, and *Theory of the Judicial Process* The Establishment of Facts (Budapest: Akadémiai Kiadó 1995) vii + 249 pp., particularly ch. 5, pp. 147–164, on the other.

law, are specifically filtered and thoroughly institutionalised to appear in a particular role assigned thereto by the law; simultaneously with the fact that all this is to take place in our daily life as the actualisation of the potential to be found in our common language, social techniques and institutions, common happenings and expectations which—all their *ausdifferenziert* aspects, meta-level meaning and significance notwithstanding—actualise something from their common properties. Indeed, by being stressed in law they gain some surplus, albeit never *in se* and *per se* (in themselves or by their own power, that is, through their sheer facticity) but in a frame artificially conventionalised and made to be accepted by all us as common knowledge, because it is us who have erected a specific network of references upon them in order to be able to re-assess their materialisation from the point of view of the set of available (moral, legal, political, or some other professional) references. To give only one example: the so-called legal language (or, to be more exact: the one of positive law, of the official practice in the name of law, of the doctrine systematically restablishing the law, and finally, of legal scholarship) is not to get understood and shaped directly and exclusively in function of some mere "law" but as one of the *ausdifferenzierend* variations to our common language, that is, as one instance or species of the feasible applications and actualisations out of its rich potential.

We may survey the connection between the overall totality and its parts also in relationship between goals and means as well as in an ontological perspective, too.

Concerning the former, if and in so far as I do accept a world concept on either a theological or a rational basis, then a series of goals and means can be built on each other within which the values themselves justifying the means are hierarchised to a certain extent, between the absolute and the relative. My actions in law or for law (i.e., *de lege lata* or *de lege ferenda*, that is, within the prevailing law or for the law to be made) are neither optionally accidental nor freely replaceable, for practical considerations do motivate it pragmatically (even if they are not necessarily broken down in logic or organised into a closed axiomatic system) that

there are basic fundamental values (to which further and in themselves valuable targets and preferences can be ordained), on the one hand, and varying sets of instrumental values, on the other, which are to be implemented in view (and for the sake) of the totality of law and the partial areas regulated by it. Taking into consideration either the message of theology and the so called social teaching by the Church or the tenets of humanistic philosophies, it is evident that even those great call-words considered today as undisputedly timelessly universal (deprived of their once particular and concrete historical and cultural embeddings) as well as those ideals suitable for launching historical mass movements—like 'democracy', 'multi-party system', 'parliamentarism', 'constitutionalism', 'human rights' (on the level of state organisation and politico-constitutional arrangement), or 'legal security', 'equality before the law' and similar ideas (heading the law)—are far from embodying values in and by themselves. Indeed, they may become value-bearer only provided that certain added conditions are also realised; and a huge part of values recognised and supported by law are simply brought in from the outside world through adequate adaptation and adjustment, i.e., transformation.[4] Or, taking seriously the lesson of the Catechesis and of classic humanism, earlier Communist annihilation of the law should not be simply replaced by some blind following or express fetishisation of law as the other extreme. Instead, some genuine value-assessing cultivation of scholarship with adequate education and socialisation in the background should have a start, as neither law as such, nor constitution itself (captive also of incidentalities), nor its casual-legal unfolding into elitist "invisible constitution" or legal dogmatics is in the position, even in case of supposed ideal perfection, to transcend the circle of instrumental values.

4 Cf., by the author, 'Buts et moyens en droit' in *Giovanni Paolo II* Le vie della giustizia: Itinerari per il terzo millennio (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato) a cura di Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75 & 'Goals and Means in Law, Or Janus-faced Abstract Rights' in *Jurisprudencija* [Vilnius: Mykolo Romerio Universitetas] (2005) 68(60): Terorizmas ir žmogaus teises, pp. 5–10 & <http://www.mruni.lt/padaliniai/leidyba/jurisprudencija/juris60.pdf>.

Concerning the ontological perspective, the societal totality and the commonness of all the constructs developed within it are to limit law by excluding contingency (albeit not variability) to some extent. Since what we have stated above on the autonomy of certain parts exerting influence up to the point when they are to run against the social totality's overall movement is still true, on the one hand, while we have had to conclude as to its decisive qualifying feature that all this is only relative, on the other. Well, one of the most important ascertainments of all social ontologies—as a reason of why we make differentiation between heterogeneity and homogeneity, or total complex and partial complexes, or kinds of processes within *Ausdifferenzierung*—is that at least tendentially, i.e., in their fundamental directions, some unity has to be reached amongst them.[5] No need to say that what I mean here is an ontological establishment of facts, without any normative wish or preference addressed to others. Or, the demand for the functional optimalisation with effective role-assuming leads necessarily to internal differentiation within so called grand systems, based on developing such distinctively particular features that presuppose a relatively independent operation which, as compared to similarly autonomous functioning of other parts or to the overall movement of the system itself, can manifest itself in the chance of eventual discrepancy, deviance, or counter-action as well. Nevertheless, all this can be produced in terms, interests, and upon the basis, of some final unity in support of the total movement, since in any other case the self-development of the system could only result in self-neutralisation and disorganisation—ending in self-destruction—what, in case of the want of self-disciplining or pressurised moderation, will necessarily be the case sooner or later, if suitable corrective mechanisms are not built in the system in due time, with the required optimalisation effect.[6]

5 See Lukács *Zur Ontologie*… [note 2] III, pp. 296, resp. Varga *The Place of Law*… [note 2], at the same place.

6 A biological comparison is perhaps needless, yet it is well known that the most destructive organic anomalies and sources of danger to our survival do result from our organisation's casual limitation in its ability to self-regulation. From such a point of view the

The question may only be answered retrospectively and in a system-specific way by subsequent description of the result of concrete analytical exploration, whether on the respective field of economy, politics, law, science, morality (etc.) (1) what kind of autonomy, (2) what profundity of tension and (3) what type and depth of deviation may be produced by own operation with the overall effect that the underlying system can not any longer simply tolerate but also accept it as stirring in overall functionality; or, in a reverse formulation, when it already ends by becoming destructive in its totality. For it is to be taken as granted that there is a limitation somewhere in each and every case (although theoretically disputable), beyond which what will already be at stake is not any longer an instrumental self-development or role-playing but the case of one of the parts overcoming the rest by (de)forming the overall totality.

(The Necessity of an Ethical Minimum in Law) Reformulating these considerations in terms of the relationship between morality and law, we can already draw some general conclusions therefrom.

Accordingly, we may state that law is rooted in society as one of the main performers of the given society's moral expectations.

Or, the other way round, this is also to mean that the law's proper instrumental values are exclusively of a mediatory nature: they may channel and refine legal processes but they are not to serve for deforming the law's basic function or making its fulfilment impossible.

Since only provided they could do this, it would be exactly as if humans could be diverted from their natural rationality. And in this case, what would all it be worth?

Concerning law, we know that it is abstract and formal, as it is matched to all its addressees in principle; however, it is to remain effective until its sanctions shall actually be meted out to a

cancer as an endemic of our age is just the outcome of the overgrowth of the organism, i.e., of cell-reproduction having become unrestricted so as to even destroy organic identity, ending by the termination of its underlying final tendential unity, destructing the whole system in question eventually. Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp., especially at para. 5.1.

fragment of its addressees.[7] Otherwise speaking, it will necessarily collapse once it runs counter an entire society or a massive practice not manageable any longer by law.

At the same time, we also know that until law is not yet actualised, there may be ones managing to withdraw themselves out of its timely control. This fact, however—and this is the essential point here—does by far not affect the validity of the law's principal operation, since at any time it may be referred to them, and then, obviously, the law's sanctioning might be enforced in their case, too.

Nevertheless, law can not—simply must not—tolerate that entire groups or nets of important relationships in and concerns for society with vital events significant for the whole nation prove simply untouchable by—as irrelevant for—it. (And what is actually meant here is the overall result, that is, the responding potential of the law in operation, not the depth of regulation it offers. For it is not true simply to state that law either addresses you or keeps silence. Because in fact it addresses you even in case when it keeps silent. Accordingly, insofar as it declares its irrelevance and thereby a total lack of own specific message, then it is just indifference that it enunciates.)

For if that occurred, then law would cut off itself from its vital roots and essential embeddings in the daily life of society, suspending its patterning power in conflicts threatening societal integration and, thereby, also its ability to guarantee overall order.[8] In such a case it would degenerate into mere coercion, an arbitrarily imposed external measure that does not arise from society through internal tensions and conflicts resolved but from what is coming from outside as an act of by chance coercive intrusion.

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7 Cf., by György Lukács, *A társadalmi lét ontológiájáról* III: Prolegomena (Budapest: Magvető 1976), p. 18 & *Prinzipienfragen einer heute möglich gewordenen Ontologie* [the last MS typed with autograph corrections in the Georg Lukács Archives of the Institute for Philosophical Research of the Hungarian Academy of Sciences in Budapest] LAK M/153, p. 17, resp. Varga *The Place of Law*… [note 2], para. 5.2.1 at p. 114: „*erst einer relativ kleinen Minorität gegenüber muß und kann der Rechtszwang effektiv wirkungsvoll werden.*"

8 The recognition concluded partly from cultural anthropological and partly from legal ontological analysis—cf., by the author, 'Anthropological Jurisprudence? Leopold Pospíšil

And if this yet happens, because law (in action, or beyond its inability for practical manifestation, perhaps still also in books) is like this, then it indisputably proves to be bad law. Its value, measure and instrument will certainly be false, for a false result like this will exclude defensibility from the very start.

Concludingly, if this nevertheless occurs, then it is greater a problem than any damage to or violation on society. Because law may answer this latter, and society may recover from it. However, the former one can deform even society. For if and insofar as such a false law can be built upon society, depriving society from its most natural ability to think in terms of—while providing for—its effective protection, making it believe that moral justice with means of effective defence may not perhaps get any place in law; that is, if such false law may lead to a widely shared feeling of self-abandonment, by sensing that law is neither strong enough nor equipped with means to effectively oppose violation, falsity, self-centredness within socially dangerous dimensions which, if untreatable, may even push society into disorganisation—well, then the rest of the moral sense of society with readiness to healthy reconstruction may also be lost, in a way suitable to cause in a longer period both retro gradation and loss of forces, decline and eventual decomposition as well.

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(The Drama of 1956, Unique and Superb) Well, what is the matter about the problem indicated by this paper's very title: "1956 Judged by Ethics and Law"?

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and the Comparative Study of Legal Development' in his *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE "Comparative Legal Cultures" Project 1994), pp. 451–452 [Philosophiae Iuris] and *Lectures*... [note 6], p. 204, note 1—, according to which "(1) Law is a global phenomenon embracing society as a whole […]. (2) Law is a phenomenon able to settle conflicts of interests which emerge in social practice as fundamental […]. (3) Law is a phenomenon prevailing as the supreme controlling factor in society.", is itself to circumscribe law not only exteriorly as a definition but also the law's *hic et nunc* relativity (to be seen as a phenomenon only retrospectively describable); which is to signal the law's demand for totality as well (that can be assessed in the perspective of its concrete presence at any given time exclusively), as an absolute *sine qua non* precondition for that its very underlying notion may have a case.

Some years or decades here and there passed: these are obviously microseconds in world history, yet with moments rather dense, they can turn to be decisive for a whole nation's destiny. And the events of 1956 proved to be like that.

At that time I was a secondary school boy at Pécs. My father had by then for long been expropriated from the factory—a factory that my grand-father had once founded for coach-producing, which then had planted the first fuel station in the province of Hungary, which my father had in the meantime transformed into a body manufacture (of automobiles, trucks and buses) known all over Transdanubia, with also selling, supplying for and servicing especially DKW and BMW cars—and, of course, also expelled from our living-house; for in terms of so called nationalisation (a predatory and in our case also illegal industry destruction, in fact by far not beneficial in any sense for the country), we as a family were also forcedly moved to a miner colony at the townside. Well, by the morning of 24 October, we looked, as regularly, for the news by the Radio Free Europe in Munich again (since against the artificial—defensive—waiver disturbance, it was strictly counter-advised to leave the radio programme finder button rightly adjusted to the wave, as an abrupt police visit or search of premises any time might have qualified its very fact as a *corpus delicti*, and the categorisation of the official biographies accompanying us as children as well with the sign "X"—standing for "class-alien; past exploiter"—might have immediately aggravated our case for becoming "class-enemy" as the former's "active" form, with direct conclusion of official revenge), then, due to the consternation by news from abroad, we listened to the short statement of—as threat by—the Hungarian broadcast, which advanced the power of revolt in the capital that I had at once understood in all its dimensions and self-multiplying effects. And then, having become conscious of the fact that from then on all of us happened to be participants of a momentous event, with the prospect of either a miracle or an even more terrible downfall in the background, I got out of a drawer, where we reserved some still empty hard covered registration books of the old factory, with sealed and numbered pages, one of the most luxurious of them, in order to fix the day divided into minutes by

recording the broadcasts word for word at the time except when I went to the town to observe the events and collect both leaflets and newspapers.[9]

Since the war, called as the Second Great one, until then having exacted the greatest bloody sacrifices, put an end only to two species of dictatorship. Because, as known, the red version, at the top of human devastation, had become winner of that conflict to such an extent that due to its territorial conquests and development of a potential suitable to massacre at the very size of continents, it could become, simultaneously and in a strange way, in the so called

9 By the middle of November, the enormous book was filled up and, from printed materials, I got a rich collection. Soon I could complete it with a number of amateur photos of the metropolitan silent demonstration against the reprisal by the *pufajkás* [Russian word for those uniformed in short warm quitted jacket]. My interest was such irresistible that finally I stolen a number of documents (issues of the émigré journals *Nemzetőr* and *Új Látóhatár*, in company of Western leaflets) exhibited under the title of "Counter-revolution in Hungary" in the once Korzó Coffee House's two stories (then Palace of the Trade Unions, besides the theatre of Pécs) as deterrence of the "imperialistic subversion", in an evening moment, when the guards were already tired, by moving the closing glass—although feared for but having passed undetected, thank for God. These remained my carefully kept treasures for years. Of course, I avoided speaking about them to anyone for security reasons until in the Spring (6 February) of 1961, the day of *en masse* arrests one night, revenging throughout the country some hundreds of priests and former fathers brought in connection with the clandestine youth movement *Regnum Marianum*, within which, referring to it as an illegal "organisation for the subversion of the state and societal order of the people's democracy", I got involved too in the series of state security police interrogations and investigations, mostly in the premises of the Faculty of Law at the University of Pécs, in room of the unit's party secretary. After some tormenting nights with apocalyptic visions instead of sleep, whilst digging into the ground for hiding these documents again and again, amongst awful considerations, I burnt all them and even dissolved the ash at the Mecsek hill. For the background of the "movement", cf. Zsongor László Aczél *Parázs a hamu alatt* Dokumentumok és visszaemlékezések a pécsi cserkészek katakombaéletéből, (1947)–1951–1965… (Brand under ash: Documents and memories from the scouts' catacomb life at Pécs (Budapest: Új Ember & Márton Áron Kiadó 2005) 339 pp.; as to my involvement in the events, the inverview with Ferenc Bárdfalvy in László Bükkösdi 'Az egyház nem rehabilitál' [The Church is not to rehabilitate] [originally: *A Helyzet* (September 15, 1989)] in his *Szeressétek a macskát!* Egy öregember emlékiratai [Love the cat! Memoirs of an old man] (Pécs: Pro Pannonia 2003), pp. 99–107 [Pannonia], further, as particularly affected in person, Ilona Jillek 'A világot nem tudom elképzelni Isten nélkül' (I can not imagine the world without God) *Új Ember* LVIII (February 24, 2002) 8 [No. 2795] & <http://ujember.katolikus.hu /Archivum/2002.02.24/0602.html>. For a complete record referring to my participation as well, see Mátyás Ivasivka & László Arató *Sziklatábor* A katakombacserkészet története: Visszaemlékezések és dokumentumok, (1945–)1948–1988 [Rock camp: History of catacomb scouting; Remembrance and documents] (Budapest: Új Ember & Márton Áron Kiadó 2006), particularly at pp. 125, 126, 414 and 492.

Cold War, both counter-party of and partner to the victorious Western powers. Hungary shared in the cynically meted out fate of a Central Europe of hundreds of millions—assisted by Communists in rivalry amongst them in both neophytism and the hate of anything domestic drawn from respective national pasts—in getting transformed into a defenceless colony of a barbarian Asian power, not simply differently but also truly under-civilised.

What the red dictatorship had actually done within its mighty competence it could do it in complete undisturbance, as the Western powers tolerated it in a most opportunist way. Thus they could easily ignore, for instance, the workers' rebellion at East-Berlin in 1953. And the intimidation, rétorsion, indoctrination, submission to common rituals were indeed of a totalising effect with the exclusion of any retreat into privacy, but destroying (through penetrating into) the smallest mouse-holes of withdrawal or hiding, reminding of the total defencelessness of *Doctor Zhivago*,[10] when anyone is pushed to become next to accomplice as wedged into barbarous dilemmas—contrary to the well-circumscribed spheres of relative privacy left even by brown dictatorships.[11] And nevertheless at home, in "church and school" (as remembered by a great poet),[12] in associations made by artistic expressions as well as within well-coded scientific or historical textures, I could meet compressed lips as a child too. Because to speak out, exchanging opinions or calling something/someone by deserved name might prove to be life-threatening but, happily and

10 Boris Pasternak *Доктор Живаго* (Milan: Feltrinelli 1957).

11 As even from perhaps the earliest self-description of the Third Reich—Ernst von Fraenkel *The Dual State* A Contribution to the Theory of Dictatorship, trans. E. A. Shils (New York & London: Oxford University Press 1941) xvi + 248 pp., resp. *Der Doppelstaat* (Frankfurt am Main: Europe Verlag-Anstalt 1974) 257 pp. [Studien der Gesellschaftstheorie]—we can learn that the Nazi regime had developed a Janus-faced policy: quasi-*Rechtsstaatlichkeit* for "us" and legally precisely implemented revengeful machinery for "them", namely (according to the categorisation of CARL SCHMITT), the enemy [*Feind*], distinguished from the friend [*Freund*]. Thus the dismissed Mayor of Cologne, KONRAD ADENAUER, could retire to its estate to run it, or the legal philosopher expulsed from the Heidelberg University, GUSTAV RADBRUCH, could in solitude carry on research on criminal law doctrinal history even during the greatest war-losses—only provided they were not any longer visible in public sight.

12 Sándor Reményik 'Templom és iskola' in his *Összes versei* [Complete Poems] II (Budapest: Révai 1941), p. 334 & <http://www.geocities.com/erdelyilobby/htm/remenyik.htm#nehagyd>.

rapturously, to agree through signs was already easier. We knew whom we should honour and why, although we did not name them except for rare and intimate occasions.

Amongst our miner neighbourhood and in addition to us, mostly those warrant-officers were newly settled who had arrived from rural ignorance after being quickly retrained for the people's army within the imagery of minister MIHÁLY FARKAS, to assist the Soviets when they would overrun TITO's Yugoslavia. Dark, small-minded men, with corpulent women and many healthy children, with whom I played soldiers at the townside (sometimes equipped with weapons loaded with ball as borrowed from their fathers), at a time when I was dreaming about a heroic life (inspired by youth novels with irresistingly timely messages, written mostly by Jesuit fathers between the two wars), ready to intelligent self-sacrificing in order to fight down this barbarism—as final secret target for a whole life.

Regarding all these, all today's assumed historiography which, reading words out of texts produced by momentary revolutionary initiatives and moves of this short period of time, tries reconstruing whys and prognoses with programs and party-preferences worth of academic debating now, seems to be quite frivolous and also rather boring. For in these movements nurtured by layers and generations with varying historical experiences in society I have always deemed to hear out the unison of the flat rejection of "Them"—or *Они*, as the Poles expressed it with an ostracising overtone in Russian[13]—, the barbarian invaders and their local henchmen, who had so proudly distinguished themselves from the rest of a submitted nation.

And there, in our direct neighbourhood, two children of a coal-miner family (one trainee boy and one truck-pushing boy) were the first who, by Soviet shot from behind the neck, with hands tied up with wire as twisted in the back, in *Schichta*[14] dresses (i.e., when returning to home from work, just having directly joined the armed resistants of the "invisibles at the mountain Mecsek"), at a

13 E.g. Teresa Toranska *Oni* Stalin's Polish Puppets, trans. Agnieszka Kolakowska (London: Collins Harwill 1987) 384 pp.

14 *Schicht* in Hungarian miners' language, derived from German for 'shift', standing for a day's work.

November night, with a few further companions murdered, were just unloaded from lorries by agents of the *ÁVH* [State Defence Authority] in front of the Forensic Institute of the University of Pécs. These young men, genuinely proletarians, educated by the regime to become its supposed favourites as uncorrupted representatives of the Hungarian Youth, became heroes; while I could bitterly cry at most.

And the events of 1956 rocked the world: the idea of Communism was displaced from the altar of idealism built by self-resignation of self-realising saloon-Communists in the Western world; the undertaking of Communist feeling was deservedly filled with guilty-conscience; the Soviets' dependence on sheer might and expediency was to change over with rational calculation within some *Realpolitik*; and, in last but not the least, the revolutionary fight for liberty in 1956 made light shimmering in darkness of the tunnel of barbarism to be seen or at least wished also by those half-blind (i.e., the societal average adjusting itself downwards, including those who could be bought cheaply or who wanted to be just comfortable or were simply indifferent).

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(Posterity Shame for the Law getting Silenced) Due to the European traditions of several thousand of years of the doctrine justifying tyrannicide[15] and to its doctrinal and casuistic natural

15 Cf., e.g., Simeon Baxter *Tyrannicide Proved Lawful* From the Practice and Writing of Jews, Heathens, and Christians; A Discourse delivered in the mines at Symsbury, in the colony of Connecticut to the Loyalists confined there by order of the Congress; On September 19, 1781 ([London]: Printed in America: reprinted for S. Bladon 1782) 31 pp.; *De la doctrine du tyrannicide* (Paris: chez Mlle Carié de la Charie 1828) 129 pp.; Walter Savage Landor *Tyrannicide* [Published for the benefit of the Hungarians in America] (Bath: Meyler and son, printers [1851]) [3 pp.]; Mykhailo Petrovych Drahomaniv *Le tyrannicide en Russie et l'action de l'Europe occidentale* (Genève: Rabotnik et de la Hromada 1881) 16 pp.; Miksa Mór [Kárpáthy-]Kravjánszky *Tanulmányok a zsarnokölés tanának történetéhez* (Studies to the history of tyrannicide) (Nagyvárad {now: Oradea in Romania}: [Szent László Rt.] 1914) 155 pp.; Alfred Coville *Jean Petit* La question du tyrannicide au commencement du XV^{e} siècle (Paris: A. Picard 1932) xi + 613 pp.; Léon Mirot *L'assassinat de Louis duc d' Orléans et la théorie du tyrannicide au XV^{e} siècle* (Paris: A. Picard 1933) 14 pp.; Oszkár Jászi & John D. Lewis *Against the Tyrant* The Tradition and Theory of Tyrannicide (Glencoe,

law version forged especially by the Spanish Jesuits,[16] I do not feel particular need to give reason why all what in 1956 had happened was legitimate also in a moral sense. I do not feel specific need to give reason either why even those limited atrocities were hardly avoidable in the given situation indeed, the occurrence of which (independently of their real burden) many (including myself) have thought to be tragic. As known, those taking part in the events and subsequently stricken dead by the *pufajkás*[17] or by *ÁVH* agents (perhaps just because the latter's shame had become thoroughly cognised by the former) or summarily executed, had endeavoured with all their might to forestall such atrocities (as all they fully understood how much brutal antecedents might have motivated similar reactions in mass activities individually and mob psychologically irresistibly), since however the thought of any lynch-law or popular verdict deviates truly from our moral sense, as responsible Hungarian I feel still rather pride that totally and in parts—whatever the official historiography of Socialism had wanted us to believe in re of the Revolution and Fight for Freedom in 1956 (as it pursued mere verification of own political

Ill.: The Free Press 1957) ix + 288 pp.; Roland Mousnier *The Assassination of Henry IV* The Tyrannicide Problem and the Consolidation of the French Absolute Monarchy in the Early Seventeenth Century, trans. Joan Spencer (London: Faber and Faber 1973) 428 pp.; Olivier Lutaud *Des révolutions d'Angleterre à la Revolution française* Le tyrannicide & Killing no murder: Cromwell, Athalie, Bonaparte (La Haye: Martinus Nijhoff 1973) xvi + 463 pp. [Archives internationales d'histoire des idées 56]; Stephanie Jed *Tyrannicidae Imago* Lorenzino de'Medici and the Imprint of Human Action [microform dissertation] (Connecticut: Yale University Department of Italian Language and Literature 1982); Franklin L[ewis] Ford *Political Murder* From Tyrannicide to Terrorism (Cambridge, Mass. Harvard University Press 1985) xii + 440 pp.; Anna Lisa Merklin Lewis *Tyrannicide* Heresy or Duty? The Debates at the Council of Constance (Dumbarton Oaks 1990) vi + 223 pp.; Lu Zhu sha bao jun *Diquan li* Bao jun fang fa li lun xin tan [The right of tyrannicide] (Chu ban / Taibei Shi: Shi ying chu ban she: zong jing xiao San min shu ju, Min guo 79 [1990]) 10 + 250 pp.; Mario Turchetti *Tyrannie et tyrannicide de l'Antiquité à nos jours* (Paris: Presses Universitaires de France 2001) 1044 pp. [Fondements de la politique: Essais].

16 Here it is usual to refer first of all to the doctrine of FRANCISCO DE VITORIA (1480–1546) and—in parts—to JUAN MARIANA *De rege et regis institutionae* (1599), banned by the Jesuits when following the Jesuit assassination of HENRY IV (1610), the author was also sued. Interpretation in modern times draws mainly from JOHN OF SALISBURY *Policraticus* (1159) (III, 15). Popularisation is mostly due to positive summaries by JEAN CALVIN (1590–1564), HUGO DE GROOT (1583–1645), and JÁNOS CSERE APÁCZAI (1625–1659) [*Magyar Encyklopaedia* (Utrecht 1665)] as well.

17 For the word, cf. note 9.

phantasmagoria)—our revolution had been started, pursued and remained all through in clear morality.

Revenge *en masse* with a narrow-minded brutality is only a continuation of antecedents and origins of 20th century Communism in realisation of Bolshevism.

If and insofar as this holds to be true, then it is hardly reparable a shame of our newly built law and order after Communism is collapsed that under the aegis of a vague constitutional declaration—"The Republic of Hungary shall be an independent, democratic state under the rule of law."[18]—, legal protection has primordially been extended to the dirt of a guilty past which, by criminal deeds committed against its nation, disregarded even the laws its own dictatorship had enacted, by the fact that passing of physical time in the hell of inhumanity has been lifted to normal status, making statutory limitations run as if the whole regime were under conditions of the Rule of Law.

Moreover, this is not simply one minor affair occurred. Not even may we claim that helplessness, impotence or perhaps incidental moves extinguishing each other may have been instrumental in producing such effect. For the Constitutional Court as the highest representative of the Rule of Law in Hungary declared it after long deliberations as the message of the Republic of Hungary, that the chance of subsequent judicial processing of such criminal deeds that had once been committed—and also the persecution of which had once been blocked—by agents of the dictatorial state for the sake of the same state, are ruled out from the rule of this law for pure reasons of the Rule of Law—if in the meantime these deeds were either cynically self-pardoned by the same regime or expired that period of statutory limitations which has ever been devised to conditions of the normal functioning of a state machinery.

In our civilisation and especially in periods of heroically began reconstruction from economic and societal wreckage as left here by Communism, no other nation sunk so low in a misunderstood rule of law servilism.

18 Article 2, section 1.

Not even the kind of coupling has elsewhere occurred that the same forum in re of the same object would at the same time declare an international law path to be exclusively available. *Nolens, volens* it has been messaged thereby that the law in force in Hungary does not extend any interest in and sensitivity to the chance of processing murderous deeds of the past in law, committed as fore-planned systematically—out of sheer considerations of tactics and mere purposefulness in flat disregard at own laws—by agents of the state then. The same way, as also messaged, it is quite alien to it to take account of either the human loss caused by those past deeds or the demands of the social sense of justice, by differentiating between the total denial of law in dictatorship and the unconditional affirmation of the law in a constitutional state.[19] At the same time, if independently of the Constitutional Court dictum there is some international law provision notwithstanding, superior to domestic control in its capacity to over-write domestic law, then the Court is ready to

19 "Legal certainty based on formal and objective principles is more important than necessarily partial and subjective justice." "Failure to apprehend or the dereliction of duties by the authorities which exercise the punitive powers of the State is a risk borne by the State." "[T]he statute of limitations [...] extinguishes punishability irrespective of the reasons for not prosecuting the offender; the offender cannot be burdened by the State's dereliction of its duty." "Retrospectively, the criminal legal policy of an epoch can as well be qualified as unconstitutional without, however, substantiating the claim to posteriorly declare selected parts of the punitive power operating contrary to the rule of law principles as non-existent, by concluding therefrom that, within the given circle, the period of limitation has not had even a start." Decision no. 11/1992 (5 March) of the Constitutional Court. Into such a narrowly rule-positivist stand—modelled by the 19th century-old German „*das Recht ist das Recht*" [law is nothing but law]—neither natural human reason, nor values of life at the foundation of law, nor any principle respected as immutable for thousands of years can penetrate in order to complement or substantiate mere positivation. Surprisingly, a paradox with open logical inconsistency was also formulated by the same decision: "With regard to the Act under review, the statute of limitations for the criminal offences committed between 21 December 1941 and 2 May 1990 could have been tolled only on the basis of reasons which were recognized by the law in effect at the time the offences were committed. That »the State's failure to prosecute its claim to punish was based on political reasons« did not exist as a justification for tolling the statute of limitations." Cf., for the translation of quotations (except to the third one), László Sólyom & Georg Brunner *Constitutional Judiciary in a New Democracy* The Hungarian Constitutional Court (Ann Arbor: The University of Michigan Press 2000), pp. 221, 226 & 228; and as to the background, by the present author, 'Creeping Renovation of Law through Constitutional Judiciary?' in the present volume.

acknowledge not to be in a position to stick up to it. All in all, the Hungarian Constitutional Court dictate has prevented, moreover, excluded the past to be faced in law; however, if there is a superpower, that of the international community, which can force its determination upon the country, then its path can be—*nolens, volens*, that is, unvoluntary but freely—followed.

Or, this is rare an occasion for a nation indeed to offer such a miserable self-picture of being proud of own disability.

Obviously, this negative solution is a standard component of our rule of law now, proclaimed by the highest state authority. Namely, how law can be cut away from its societal embeddings, from its underlying ethos accompanied by functional expectations, and at last but not the least, from the need encountered for centuries by countries in the Western hemisphere that the Rule of Law, as both a distant ideal and everyday reality in formation, shall always be developed organically and from bottom, with growing popular participation as pushed by the demand of democratic self-building, instead of some grace from above, from mere *voluntas* or power dictate, out of the pleasure or tyranny of anyone.

Have we missed the road somewhere? Well, in the year of 1956 we might have showed the road. And we have to hope that we may overcome one day all the faults of our strange change of regimes by querying its own ontology; and God grant not to be forced again to survive similar cataclysms.

It is another issue now how the celebration of the 50th anniversary of the Revolution and Fight for Freedom in 1956 by the present republic can after one and half a decade match this above philosophy. As the President of the Republic emphasised at the Hungarian State Opera gala performance on 22 October 2006 [cf. <www.keh.hu/keh>]—in a sensitive relationship with the stand having taken by him, then in quality of the President of the Constitutional Court—, "In the way the revolution in 1956 had immediately eliminated the legitimacy of RÁKOSI's regime, the legitimacy of KÁDÁR's regime was ceased in 1989 by the restitution of the name and honour of the revolution. […] There is no continuity between 56 and KÁDÁR. There is no continuity between KÁDÁR and the democratic state under the rule of law as established in 1989/90."

PERSPECTIVES

FAILED CRUSADE*
American Self-confidence, Russian Catastrophe†

(1. The Pattern-provider and its Transitology) For a long time now, we have been pondering about the question of what America may mean for us. What does it represent? What kind of future does it intend for us to have in our post-communist Central and Eastern Europe? Perhaps we still remember the admiration with which we looked upon anything having arrived from there only one and a half decades ago.

For one and a half decades ago, we embarked upon the change of regimes with open, almost naive expectations. However, our enthusiasm soon began to be troubled by ambiguities in our relationship to America over the period since then. For example, the entity called America has turned out to be far more spacious than we had first believed. We had also to realise that it stamps its action only insofar as it acts in its quality of a federal government. – For exactly this very reason, we sometimes found its aid policy rather strange. However, it turned out that although financed by the federal budget, for the ease of administration the aid distribution is getting managed by private foundations (most actively by one of them, linked to a native of Hungary who has for long been known for his politically partisan actions in the country). – We have noted its press to have a double-faced policy towards Hungary. But we have had to learn that media are a holy cow free for both distortion and defamation in a democracy. – At times, their Embassy in Budapest seemed to behave past comprehension, especially if contrasted to experience with our direct connections in Washington. Well, this too has turned out to be part of the price of democracy to be happily paid—at least so long as the officials loyal

* In its first version in Hungarian, 'Amerikai önbizalom, orosz katasztrófa: Kudarcot vallott kereszteshadjárat?' *PoLíSz* (December 2002–January 2003), No. 68, pp. 18–28 & <http://www.krater.hu/site.php?func=polisz&file=cikkek&cnr=81>.

† Stephen F. Cohen *Failed Crusade* America and the Tragedy of Post-Communist Russia (New York & London: W. W. Norton & Company 2000) xiv + 304 pp.

to the former government are replaced, according to the principle of prey in their political practice. – Sometimes we used to have the embarrassing impression as if Washington were simply unapproachable for certain issues important to us. And what became obvious is that America too has its friends, and prime interests connecting them may dictate opportunism as well.

There were times when we felt as if our words were not understood in Washington, London or Paris. We had already almost started feeling guilty when Bonn and Ottawa turned out to have the same complaints. After some time, we had to realise that our friends do not necessarily differ from their adversaries in that whether or not they can understand our problems. And what separates them may turn out to be almost indifferent for us. It would be, however, unjust to claim that they utterly ignored our then acute concern about transition. It is perhaps more fair to realise that they were inclined to have the most of empathy and goodwill towards their own ideas. Anything new or different was met by suspicion on their behalf, making their ears closed to the issue.

Their self-confidence was especially striking when they started to disseminate their own economic models and legal patterns across continents, having peoples adopt them. For originally all these were formed by them at their own place, tailored to their own needs and routines, and for their own use—but just because they made all them, they thought them to be applicable universally. They did not waste much time on pondering any further; actually, they did not trouble themselves about adjusting their models to the specific environments, conditions and traditions formed by the thousand-year-old history of the recipient peoples. On the basis of the single gesture that they sell in our country their one-book ideal of culture just in vogue with them at the time, they imagined themselves as historic heroes, or even Founding Fathers, civilising others by bringing them democracy. They shuddered even at the faintest idea of any kind of a third or alternative way, any intermediate solution. They rejected any road that was not known to or used by them from the outset, without the readiness even to tolerate it. Any of this simply did not fit in with their idea formed on the rule of law (or, perhaps, with their political

calculations or with the constraint of facing their own conscience)—ironically, as it was exactly America that had once taken the lead in extorting the trials of Nuremberg and Tokyo (not so much relevant now on account of their natural law foundations but rather owing to the sheer fact that the same America had once proven to be capable of creative thinking, detaching itself from its own domestic everyday routine, when eventually the lives of own soldiers had been at stake, without the counterbalancing power of economic interest)—when it was high time to assist the new democracies, recovering from the misery of Socialism imposed upon them, in facing the injustices [in German: *unRecht* = illegal practices organised into a dictatorial regime] of their past.[1]

The term is also false by which American scholars tried to transplant their own wishful vision first to the Mediterranean, freed from the generals' dictatorship, then to the entire Central and Eastern European region, recovering from the ruins left by Socialism's one-party dictatorship and centralised planned economy—as a new field of experimentation for American "Law and Development" efforts once made in Latin America, which were bound to end in ignominious failure of the idea of "social science", declared feasible by their leftist sociologists. Notably, they called their panacea transitology, a magic key reducible to its refusing the subjects of American experimentation upon them any genuine transition in fact.

It was also amazing to realise that only those Hungarian academic circles were paid attention by them who told the same as they did. Even with them, actually, the debate was orchestrated with shades within unison only. The result of this became augmented to cosmic dimensions, as though to make up for the want of diversity in approaches and opinions. Of course, in American imperial proportions, with hundreds of publishing

1 In the light of Hungarian case studies, see, by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris] and, with respect to imperialistic doctrinarianism in legal transfer, cf. also *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub] and *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law] ed. Csaba Varga (Budapest: AKAPrint 1998) 122 pp. [Windsor Klub könyvei II].

houses and thousands of periodicals pouring masses of scholarly papers, and where the participant cannot be informed otherwise than by the help of updated electronical bibliographical databases, none of us can have a reliable overview about the richness of the scholarly output. However, if one searches carefully enough, one may find stands and treatises intended to start polemics either for curative purposes and/or by moral protest; moreover, one may realise that at the margins of such monolithic gigantic buildings, these rare exceptions, too, can represent monumental dimensions with accumulating elements of certainty and useful lessons.

The present book by a historian specialising in Soviet studies at Columbia University is not simply the product of posterior argumentation and retrospective investigation. It is also the document of a scholar's outrage indignation. For he had been warning for years in vain as a contemporary participant to the processes mainly on the columns of the eminent *The Nation* that the arrogance of the political power, favouring financial vultures and befooled by intellectuals' irresponsibility, may cause horrible damages, and not exclusively to the poverty-stricken people of several hundreds of millions of the United States' temporarily shaken one-time adversary but, due to its own blindness, to America's future respect and self-esteem as well. With his fears having come true, the author has been trying to account on the issue, in order to help find a way out of the overall crisis and to prevent with the exclusive means available to a scholar, notably, critical evaluation, the old mistakes from repeating.

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(2.a. Organised Pressure on Making Patterns Followed) Already the stand taken at the beginning is to point out to some serious disorders.

> "But it was the CLINTON administration that turned the missionary impulse into an official crusade […] to transform post-communist Russia into some facsimile of the American democratic and capitalist system." (pp. 6 & 5)

As a kind of preventive step, the US federal government tried to determine how the "domestic transformation of Russia" should take place (pp. 6–7[2]), in order to prevent Russia from proceeding on by proposing "a strange, ambivalent path of its own confused devising". And thereby, from an American perspective, speaking "[m]etaphorically, Russia played helpless child, with the West as omnipotent adult" (p. 7 & note 5[3]).

> On America's behalf, it was the temporary concentration of interests by the political power, economic (investors aiming at maximum profits) and academic circles (specialists and advisors intent on gaining positions), as well as the media, that have contributed to sealing Russia's destiny after Communism.

As regards the political scene, President CLINTON was the first to take a stand clearly: "We have interests and values. They are embodied by the policies and direction of President YELTSIN." (p. 250, note 6[4]) Then, in this very spirit, Russia was stormed by "legions" of "enlightened missionaries" and "evangelists" in the "rush to give advice" (as, e.g., JEFFREY SACHS of Harvard) (p. 7 & note 8[5]). For instance, a programme circulated in Washington openly admitting that "The key to [Russia's] democratic recovery is no longer in its hand. It is in ours." (p. 8[6]) has never been denied since.

All this was accompanied by financial blackmailing in practice, which triggered corruption mechanisms on the other side

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2 As reported from the State Department by Elaine Sciolino in *New York Times* (February 4, 1993).

3 Steven Erlanger in *New York Times* (July 28, 1993), for the first quote, and *The New Russia* Transition Gone Awry, ed. Lawrence R. Klein & Marshall Power (Stanford: Stanford University Press 2000), p. 7 [Social Science Library: Economic Growth Center Collection], for the second one.

4 Quoted by Daniel Williams in *Washington Post* (April 5, 1993).

5 Francis X. Cline in *New York Times* (January 16, 1992) as well as Peter Passell in *New York Times Magazine* (June 27, 1993), p. 60, and James Risen in *Los Angeles Times* (September 5, 1991).

6 Quoted from ZBIGNIEW BRZEZINSKI in *Foreign Affairs* (Fall 1992), p. 33 and *New Times* [Moscow] (1993), No. 23, p. 26.

so heavily that Russia's Ambassador to Washington, VLADIMIR LUKIN, had to complain of "infantile pro-Americanism" at the end of 1992, trying to warn his nation that the continuous political and financial intervention by the US could promise no strategic solution whatsoever, because America would not aim at re-constructing Russian economy anyway, only at looting its natural resources (p. 107). Moreover, after the dollar had actually been proposed as a Russian currency, the *Duma* condemned in a formal parliamentary resolution the West's "crude interference in the internal affairs of Russia." (p. 109)

A new kind of cynicism built on the association of politics and business is now penetrating academic life. Eventually, American university institutions specialising in Soviet studies went so far as to conclude business agreements with investors to the final effect that—due to suspicious dealings and interpenetrations—the Institute for International Development of the Harvard University (not long ago directing Russian governments with great power arrogance) had to be suddenly dissolved.[7]

We get to know that American scholars are "devoted to a group-think" (p. 61) by "preferring consensus, even orthodoxy, to controversy" (p. 20). They may content themselves with applauding alternating mainstream trends, exalting the fashionable and keeping quiet about criticism or anything different.[8] So it may be an easy job for them to say that no matter how great the Russian sacrifice, it cannot be too much, and however "rocky" the road, the transition "to free-market capitalism and democracy" is "necessary"; or, that what is just going on is both "good" and "progressive", "great" and "historic" (p. 21[9]). No counter-

7 Cohen, p. 263, notes 87 and 90—e.g., *Harriman Review* [Columbia University] (June 1999)—and p. 269, note 117.

8 For example, Anders Åslund *How Russia Became a Market Economy* (Washington, D.C.: Brookings Institution 1995) xviii + 378 pp. is declared to be a basic work in *New York Times Book Review* (July 23, 1995), while Lynn D. Nelson & Irina Y. Kuzes *Radical Reform in Yeltsin's Russia* Political, Social, and Economic Dimensions (Armonk, N.Y.: M. E. Sharpe 1995) xiii + 256 pp. is not found worthy even of reviewing. Cohen, pp. 256–257, note 40.

9 Speech of Deputy Secretary of State Strobe Talbott in *Johnson's Russia List* (October 2, 1999); for the first usage of the attributes, see Michael McFaul in *Current History* (October 1994), p. 313, Thomas A. Dine in *Problems of Post-Communism* (May–June 1995), p. 27, as well as Jack F. Matlock, Jr. in *New York Times Book Review* (April 11, 1999), p. 11.

argument holds any longer, perhaps not even ethical concerns by academics. The coup of YELTSIN as the very first open attack against a working European parliament since the *Reichstag* fire (1933) was justified by world-renowned Harvard historian RICHARD PIPES as a constraint (even if "resorting to methods that in the West would be unacceptable"); and President YELTSIN, the putschist violating the Constitution was compared by the famously liberal Yale constitutional scholar BRUCE A. ACKERMAN to no lesser a personality than GEORGE WASHINGTON (pp. 19–20[10]).

As far as the American press is concerned, it was all along prepared and ready to incite, instead of unbiased observation and description. "Like old-time Soviet journalists, American correspondents pardoned present deprivations in the name of future benefits that never materialized." (p. 15) As they proclaimed, the greater the "rubble", the more promising the future. They called for the "demolition of the Soviet *ancien régime*" (p. 37). They drew trivially rude parallels: "One can't make an omelette without breaking eggs." (p. 14[11]) It has turned out only slowly that the illustrious media-expertise may scarcely know about anything whatever else than its own prejudices.

> "Russia was not the primary profession of most of [...] Russia-watchers [...], who actually knew little about the country, not even its language. (The latter factor no doubts accounts for the striking absence of references to the local press by most American correspondents in Moscow.)" (p. 17)

Aware of its own weakness in arguments, the American media retaliates also by insulting every critical or differing opinion. The Russians themselves are outraged so as to complain of "media

10 Richard Pipes in *New York Times* (March 14, 1993) as well as Bruce A. Ackerman in *ibid.* (March 3, 1993). Professor Cohen raised his voice in these very same days [*Washington Post* (March 28, 1993)] in warning that the United States "risks being remembered for having supported measures that destroyed another nascent Russian experiment with parliamentary democracy and plunged the country back into its despotic traditions." (p. 115)

11 Charles Krauthammer & Jim Hoagland in *Washington Post* (March 19, 1993), as echoed also by a politician in *US News and World Report* (November 29, 1993), p. 49.

propaganda". If you dare criticise the politics of YELTSIN or the International Monetary Fund, you are "already not a democrat, and you're lucky if they don't call you a Communist-Fascist." (p. 13 and note 21[12]) Not even the Soviet dissidents, having suffered so much in the former regime, are permitted to break away from the chorus echoed by the flock. If they do, the American media will promptly see to it that ALEKSANDER SOLZHENITSYN is dismissed as an "irrelevant political dinosaur" and ANDREI SINYAVSKY's "understanding of the Russian transition" is degraded as an "analysis based on emotion, conspicuous omission, disorientation, and anecdote" (p. 47[13]).

Or, the harsh reality is quite disappointing. How does bitter humour react to it?

> "We thought the Communists were lying to us about socialism and capitalism, but it turns out they were lying only about socialism." (p. 115)

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(2.b. Provoked Bankruptcy) What does all this look like from close by? An outsider, living in abundance, is of course readily pleased to dispense advice. As Harvard historian PIPES wrote with the authority of an oracle, it is "desirable for Russia to keep on disintegrating until nothing remains of its institutional structures." Theoretical economist RICHARD E. ERICSON even added to this:

> "Any reform must be disruptive on a historically unprecedented scale. An entire world must be discarded, including all of its economic and most of its social and political institutions, and concluding with the physical structure of production, capital, and technology."

12 Grigory Yavlinsky (who led a presidential campaign against YELTSIN in 1966) in *Известия* [Izvestiija] (July 12, 1995).

13 David Remnick in *New York Review of Books* (April 9, 1998), pp. 13–14, as well as Michael Scammell in *New York Times Book Review* (December 3, 1998).

Another economist explained,

> "A successful program must be trenchantly negative. […] It must aim at destroying institutions."

The World Bank does not back this up; all they do is rather to assist. One of their officials apologises only subsequently, in personal shame:

> "Some economic cold-warriors seem to have seen themselves on a mission to level the »evil« institutions of communism and to socially engineer in their place […] the new, clean, and pure »textbook institutions« of a private property market economy." (pp. 37–38[14])

In other words, just like a few decades ago the French nostalgically sought the fulfilment of their own unfinished Revolution in their attachment to the Soviets, however brutal the Bolshevik experiment was, Russia has become for the Americans a "superior laboratory" to test their liberal universalism (p. 263, note 86[15]). They got carried away by the epidemic of universalising anything originating from America so much that they declare even Sovietology outdated: they claim Sovietologists to have "lost their subject", as Sovietology became a mere application of their fantastic new universalism: "comparative", "universalistic", and indeed, "truly scientific" (p. 22). At bottom, the assumption is merely a "political conceit". "Arrogant" and "teleological", it is an academic expression of America's post-Soviet "triumphalism", a "pseudo-scientific version of FRANCIS FUKUYAMA's *End of History*

14 Richard Pipes in *Commentary* (March 1992), pp. 30–31; Richard E. Ericson in *Journal of Economic Perspectives* (Fall 1991), pp. 25 & 26; Joseph Stieglitz *Whither Reform?* (Washington, D.C.: World Bank 1999), p. 22.

15 M. Steven Fish in *Post-Soviet Affairs* (1998), No. 3, p. 215. In contrast, Professor Cohen started to keep asking as early as March 1992: "should everything created during the Soviet period be rejected as criminal or unworthy, and everything built from scratch?" Is it inevitable indeed to "imitate a Western model" or should they, "learning from Western experiences", rely on "Russian traditions and circumstances" instead? Is "shock-therapy" unavoidable indeed or would a "gradual" progress result in launching more favourable a procedure? (pp. 85–86).

thesis" which, along with the most of the 'Washington Consensus', "did not survive the twentieth century." (p. 23[16])

All in all, this is but a great power politics, in the mirror of which anything can only re-actualise something known from earlier sets of *déjà vu*—for America cannot help "seeing the world through a set of standard templates." (p. 61)[17]

For obvious reasons, this depth of practical concern—further deepened by American virtues like "the disdain for gradualism and penchant for extremist measures" (p. 39)—is not likely to bring too much benefit for Central and Eastern European states, made target countries now. So it is no use for the Russian press either to proclaim far and wide that in order "to build, it is not necessary to destroy everything first", or to compare their present with the devastation caused by the Second World War, with "genocide" and the destruction of a "medium-level nuclear attack"; anyhow, they feel now they are on the way to arrive "from a state of crisis to a state of catastrophe." (pp. 38 and 40[18])

The facts shown by statistical data reveal a cruel state. The money what Russians were actually to get, that is, what they were kept in check with until early 1992, amounted to not more than 7 percent of all American international aid schemes (in contrast to the 75 percent of European aid programs provided unconditionally). To make matters even more dubious, they were granted most of this amount in fact as a credit—just to enable them to buy up the agricultural surpluses of America!

In chronological order, events are as follows: the cessation of the Soviet Union (1991) followed by shock therapy (1992), including financial restrictions, withdrawal of consumer price supports and social allocations, the complete privatisation of state-

16 Even John Gray in *The Nation* (October 19, 1998), pp. 17–18 is amazed to find the conformity of opinions.

17 Michael Kelly in *Washington Post* (November 10, 1999).

18 GRIGORY YAVLINSKY, quoted in Nelson & Kuzes *Radical Reform in Yeltsin's Russia* [note 8], p. 21; G. Khanin & N. Suslov in *Europe–Asia Studies* (December 1999), p. 1450, Сергей Юревич Глазьев [Sergei Iurevitch Glaz'ev] *Геноцид* Россия и мировый порядок, стратегия экономическая роста на пороге XXI века [Genotsid: Rossiya i miroviy poryadok, strategiya ekonomitseskaya rosta na poroge XXI veka / Genocide: Russia and the World Order, or the Strategy of Economic Transition at the Beginning of the 21st Century] (Москва: Терра [Terra] 1998) 320 pp., Boris Kagarlitskii in *Новая Газета* [Novaia Gazeta] (February 21, 2000); N. Perlakov & V. Perlamutrov in *Вопросы экономики* [Voprosi ekonomiki] (1997), No. 3, p. 76.

owned companies, opening of markets to the world and minimisation of any governmental intervention. Financially all this was accompanied by hyper-inflation in 1992 and 1993, by the collapse of the economic system in 1994, ending in August 1998 by the devaluation of the rouble and the freezing of bank accounts (with an additional loss of 80 to 100 billion dollars for American investors, in which the share of GEORGE SOROS' *Quantum Fund* alone was about 2 billion dollars).

By this time, the GDP declined to barely half of the value at the beginning of the decade. Meat and dairy herds fell to one quarter, and real wages to less than one half of their previous level (let us remark just as a reminder that even the Great Depression once resulted in America a 27 percent decrease of the output). By 2000, investments fell to one fifth of their value a decade earlier (pp. 40 and 41). This caused the people a suffering unprecedented in peacetime (as the governor of Yakutiya told in the autumn of 1998: "Since 1991, we've survived six, seven years on the previous regime. As of today, those reserves are 100 percent exhausted." p. 41[19]), but profiteers (unless the fate of their own is at stake) are governed by principles and not empathy: "More shock therapy" is the American response to this all (p. 15), then at the turn of 1999 and 2000, when PUTIN was to come to power, an International Monetary Fund war-cry was heard again, calling for a "second beginning" (p. 57[20]).

On 21 September 1993, actually YELTSIN dispersed the *Duma* by force of arms, and took over control of legislation. Secretary of State WARREN CHRISTOPHER rushed to Moscow at once, putting aside both his own domestic political credo and the general conviction of the masses of Russians,[21] to greet this act of *fait*

19 Quoted by Michael Wines in *New York Times* (October 21, 1998).

20 From John Odling-Smee in *Financial Times* (August 23, 1999), via a long series of newsmen, specialists and officials, up to Michel Camdessus in *Moscow News* (December 15–21, 1999).

21 At the December 1993 elections controlled by YELTSIN, 85 percent of the participants voted against him (p. 129); in early 1995, *Общая газета* [Obshchaya Gazeta] protests in a two-page headline: "BORIS YELTSIN Is Guilty—Before the Law, Before the People, Before History!", and a mainstream insider forecasts that "No one will escape the people's retribution. All plunderers of Russia await their own Nuremberg trials." (p. 137); and by late 1999, 90 percent do not trust YELTSIN and 53 percent wants him put on trial, with street protesters claiming that "YELTSIN is an enemy of the people." (p. 141)

accompli on 23 October, praising the country "being reborn as a democracy" (p. 126 and note 12[22]). And the assertion of American interests would go on undisturbed. Former Soviet dissidents charge "the anti-democratic and criminal actions" of the YELTSIN-administration and add in warning that "Now the same policy is beginning with regard to PUTIN." (p. 194[23]) As the author writes,

> "History will also record that the president of the United States in effect twice endorsed or forgave Kremlin war crimes against its own citizens in Chechnya by equating them with LINCOLN's war against secession and slavery and then using the word *liberate* to characterize the destruction of Grozny." (p. 194[24])

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(2.c. Cui prodest?) The sarcasm is caustic when the author confronts the key words of the American success propaganda with the alarming facts of the actual state in Russia. Because

- what is presented as "reform" and "remarkable progress" by American scholarship and press has in reality been an industrial degradation, unprecedented in peacetime in modern Russian history, with losses in agriculture and livestock worse than even those caused by the STALINian rush for forming *kolkhoz*es, and a total dependence on imports regarding food and medicine, with the ensuing pauperisation of 75 percent of the population. If we look at the huge number of disintegrated families, the damages outweigh those by World War II, and 50 to 80 percent of school-age children are now burdened with marks of

22 *U.S. Department of State Dispatch* vol. 4, no. 43.

23 Manifesto of a group including ANDREI SAKHAROV's widow, quoted by Lars-Erik Nelson in *Johnson's Russia List* (February 23, 2000).

24 "to liberate": Steven Munson in *Washington Post* (February 6, 2000), as well as Peter Bouckaert in *ibid*. (February 25, 2000). As Professor Cohen adds (p. 279, note 29), when the Russian flag was raised over the rubble of Grozny, PUTIN also used this same word. Cf. Lyoma Turpalov in *Associated Press Dispatch* (February 6, 2000).

physical or mental defects, with an entire population in the background that "awaits the approaching winter with horror" (p. 28[25]);

- the reality behind "the best-performing emerging market" is nothing more ambitious than an economy artificially operated through presidential decrees and administrative measures—instead of competition; with contract killing as a supreme form of litigation—with a late recognition after the crash only that "fundamentals of a market economy remain unknown in Russian commercial life" (p. 28[26]);
- behind the "capitalism" of privatised banks, there are nothing but depositors, and institutions used for money-laundering with no loans for real production, which, in want of state treasury and proper property laws, channel immeasurably more capital abroad than to capital investment in domestic production (p. 29[27]);
- true, there was "privatisation" but no private economy has been established ever since. In the grip of state restrictions, small factories keep stagnating with a total of 870.000 workers, with half the productivity of Soviet times. The operation of banks is based on corrupt cross-loans between state and criminal circles, threatening to collapse every moment (pp. 29–30[28]);
- behind the slogans of "monetarism" and "victory over inflation" through a "stable currency", the bleak reality stands for governmental suspension of the payment of wages and pensions for nearly a decade with half of all

25 *Независимая газета* [Nezavisimaya Gazeta] (October 16 & 20, 1998).

26 Garry Kasparov in *Wall Street Journal* (October 16, 1998), acknowledging, a year after the total collapse, "a total divorce between the financial sector and the real economy". ERIC KRAUS, quoted by David Hoffman in *Washington Post* (August 17, 1999).

27 PUTIN's later Prime Minister acknowledges what he had known for one and a half decades, namely that most of those institutions "have never been banks in the real sense". MIKHAIL KASYANOV, quoted by Jonathan Fuerbringer in *New York Times* (April 21, 2000).

28 Again, MIKHAIL KHODORKOVSKY concedes belatedly that "privatization in Russia was largely formality rather than a true reform". Quoted by Steve Liesman & Andrew Higgins in *Wall Street Journal* (September 23, 1998).

commercial transactions taking place by way of barter (p. 30[29]);

- processes underlying the establishment of "civil society" and the "creation of a middle class" imply nothing but overall disorganisation arising from pauperisation. The population's savings have become devalued. The inhabitants have no incomes. In fact, they have long ago consumed the reserves once accumulated, and practically scarcely know money in everyday life (as 75 percent have to produce own food for themselves). Furthermore, 86 percent of inhabitants linger in misery without health provision, and men's life expectancy has dropped back to less than sixty years, a value already reached a century before (pp. 31 & 42[30]);
- "constitutional democracy" with "free press" and "federalism" on paper, while in fact a regime founded by a coup, with secret services in the background, and a monarch-like central rule by the President,[31] accompanied by a manipulated media network, a country totally fallen apart to territories ruled by "little princes", behaving like feudal barons in refusing tax payment, prohibiting goods from being taken out of their "fiefdoms" and even threatening to introduce their own currency (pp. 32 & 261, note 66);
- and all this under the claim of "joining the West" in a country where 96 percent of young people condemned the NATO-bombing of Yugoslavia led by the United States in 1999 as a "crime against humanity", and where 81 percent rejected US policy towards them as anti-Russian, imposing a "reverse iron curtain" upon them (p. 33).

Characteristically of the more recent developments, once the ever first post-Communist Russian Prime Minister to attain majority in the *Duma*, EVGENII PRIMAKOV (from September 1998 to

29 Duma deputy NIKOLAI GONCHAR, as quoted by Giulietto Chiesa in *La Stampa* (October 8, 1999), pointed out the return of state serfdom as a phenomenon of re-feudalisation.

30 Moreover, with "well stocked stores" resembling rather "museums, where people come to look but not to buy." Katrina van den Heuvel in *The Nation* (August 10–17, 1998), p. 5.

31 Ruling by issuing 2,300 decrees a year (i.e., by 6–7 ones per day!) (p. 137).

May 1999) announced changes, he became hated in Washington and, with reference to his past as a correspondent in the Arab region, his discrediting started with editorials "Beware Primakov", "Fire on Primakov" and the like (pp. 272–273[32]).

Кто виноватъ? Who is to blame? A failure may happen but there is no one to be held responsible. "U.S. politicians and officials, as we know, are allergic to self-criticism" (p. 60), therefore no one is named and no intervention is remembered.

Self-critical voices can be heard, if at all, only posteriorly, admitting, for instance, that owing to a "reform-to-ruins process", "We have done more harm than good to genuine reform." "We were wrong", for "we have viewed Russian reality through the lens of ideology", and thereby "We gravely misunderstood the patient" (pp. 61–62[33]). It is exclusively the machinery of disclaiming and rejecting acceptance of any responsibility that keeps on operating smoothly.

> "All Western papers were writing that all the Russian people were undertaking reforms. Now they are writing, with the same enthusiasm, that all Russian people stole that money. It wasn't the truth then and it isn't the truth now." (p. 208[34])

And if we, searching for an indirect response, consider the genuine interest involved in the question of *Cui prodest?*, all we can tell is that from behind the official wall of silence, both the CIA and the FBI took notice of the mutually corrupting connection between the "[h]undreds of billions of ill-gained dollars flowing from Russia to the West since 1992, owing significantly to U.S.-

32 Seymour M. Hersh 'Saddam's Best Friend' *New Yorker* (April 5, 1999), pp. 35–41, William Safire in *New York Times* (September 17, 1998), as well as *Wall Street Journal* (March 12, 1999).

33 David Ignatius in *Washington Post* (September 27, 1999), William Safire in *New York Times* (September 9, 1999), as well as KAREN DAWISHA, quoted by D. W. Miller in *Chronicle of Higher Education* (September 3, 1999), p. A24, Charles H. Fairbanks, Jr. in *Journal of Democracy* (April 1999), p. 52, Yoshiko Herrera *Program on New Approaches to Russian Security* ([Boston]: Harvard University Davis Center, October 1999), p. 82 [Policy Memo Series 85].

34 GRIGORY YAVLINSKY, quoted by Bloomberg in *Johnson's Russia List* (October 6, 1999).

designed policies adopted in Moscow" (p. 194[35]). Anyway, a CIA specialist on Russia told:

> "It is hard to escape the suspicion that the mammoth stake of American investment houses played a role in U.S. government and IMF behavior" (p. 195[36]).

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(2.d. Democracy Conceived in Tutelage) In the perspective of American history, all this is far from being inevitable, as there has ever been an alternative to the loathsomeness of a tutelage approach whenever they really wanted. As GEORGE F. KENNAN formulated already half a decade ago,

> "Let us not hover nervously over the people who come after, applying litmus paper daily to their political complexions to find out whether they answer to our concept of »democratic«. Give them time; let them be Russians; let them work out their internal problems in their own manner. [...] The ways by which peoples advance toward dignity and enlightenment in government are things that constitute the deepest and most intimate processes of national life. There is nothing less understandable to foreigners, nothing in which foreign interference can do less good." (p. 215[37])

President RICHARD M. NIXON pointed out, shortly before the inauguration of President CLINTON, that

35 Douglas Farah in *Washington Post* (October 2, 1997).

36 GEORGE TENET, quoted by Susan Ellis in *Johnson's Russia List* (February 3, 2000) and LOUIS J. FREEH, quoted by Fritz W. Ermarth in *ibid.* (January 20, 2000).

37 George Frost Kennan *American Diplomacy* 1900–1950 (New York: The New American Library 1952), p. 112.

> "I'm not enthused about this idea of sending our political experts over and telling these poor people how to win an election. I think it's a little silly and even insulting." (p. 271, note 6[38])

On the other side, once YELTSIN left the scene, the new President VLADIMIR PUTIN did not hesitate a moment to reject intervening tutelage. He declared plainly in late 1999 that

> "a truly successful revival of our Motherland without excessive costs cannot be achieved by simply transferring abstract models and schemes taken from foreign textbooks to Russian soil. [...] Russia will not soon become, if it ever becomes, a second edition of, let's say, the United States or England." (p. 181[39])

The present-day state of Russia is therefore rather meagre: degenerated into a "manipulative democracy", in which "democratic institutions" can "produce only results ordered by the state". Or, this is hardly more than "pseudo-democracy", properly speaking, "democracy without alternatives" (p. 185[40]).

Regarding the prospects, it would be futile to hope for any sudden turn in long-established directions, any major turnaround in profit-hungry attitudes. Significantly enough, in the presidential election campaigns of 2000, neither AL GORE nor GEORGE W. BUSH separated themselves from such past practices. The chief foreign policy adviser could not help echoing already

> "the crusade's missionary premise: »The twenty-first century will be based on American principles.«" (p. 246[41])

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38 *Time* (April 2, 1990), p. 48.

39 *Независимая газета* [Nezavisimaya Gazeta] (December 30, 1999).

40 SERGEI MARKOV, quoted by Mikhail Delyagin in *Johnson's Russia List* (January 29, 2000), Igor Oleinik in *Новая газета* [Novaia Gazeta] (January 10–16, 2000) and KONSTANTIN TITOV, quoted by Sophie Lambroschini in *Johnson's Russia List* (January 18, 2000).

41 CONDOLEEZZA RICE, later on National Security Advisor, then, Secretary of State in the GEORGE W. BUSH administration, quoted by John Simpson in *Electronic Telegraph* [UK] (January 16, 2000).

With such developments assessed, Professor COHEN cannot conclude anything more trustable than what CHRISTianity and KANT's categorical imperative have for centuries professed as Europe's common creed: "Americans should do nothing in Russia that we would object to a foreign state doing in our country."[42]

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(3. Becoming a Pray of Globalism) Looking back from the present, we can now realise how perilous winds whirled around us and how lucky we may be now to have avoided being carried along by some of the rushing currents despite being a small country. Of course, Professor COHEN's academic recollection is dedicated to the part played by America and does not therefore equally present all the players in the game. Nevertheless, we can see that no matter how much diversified the American domestic scene is—with politics planned to extend influence, business circles to make profits, foundations to prepare for social engineering, academia to professionalise transitology, and media to serve any mainstream—, participants have at once realised what the common denominator is (p. 144). And all became worthy partners (both as challengers and as partners in looting) to those less articulated Russians who, in response, managed to transform Communism into criminal hoarding. And, in fact, this could be carried out in an anarchy marshalled by a weak and corrupt government as assisted by those selling off the fortune of their nation, united in one conspiracy of "bandit liberalism", as ADAM MICHNIK once described it (p. 278, note 18[43]). This was a common

A losing candidate, former senator BILL BRADLEY criticised the CLINTON administration's Russia policy as "perilously counterproductive" [a speech at Brown University on 3 March 2000, quoted by Bill Bradley *The Journey from Here* (New York: Artisan 2000), ch. 8], and the candidate PATRICK J. BUCHANAN condemned the former government for "treating Russia as a defeated nation" in *Johnson's Russia List* (November 23, 1999).

42 With the notice generously added: "If any U.S. advice is really needed, e-mail is less intrusive and cheaper." (p. 216)

43 *Независимая газета* [Nezavisimaya Gazeta] (January 13, 2000). For additional contexts and details, cf. also Vladimir Shlapentokh *Russia* Privatization and Illegalization of Social and Political Life (Michigan State University Department of Sociology: September 25, 1995) 44 pp. [NATO CND {Chris Donally} (95 459)].

game for Russians and Americans involved, full of continuous tension but yielding great profits.

It is by far not the merit of smaller entities in Central and Eastern Europe that their institutional network and social structure were not as monolithic as the ones in the Soviet Union. Owing to this, after the collapse of Communism, they could transform into more articulated structures, focussing on the development of civil society. Or, their advantage may have resulted mainly from the fact that the Central and Eastern European diversity has ever been embodied in relatively small size states. As independent actors on the international scene, all we others could represent competing interests also complemented by mutual mistrust, and, due to such a programmation and having competing calculations of national profit-maximalisation in mind, on an international scene within which American foreign policy was determined not to foster any local and regional co-operation whatever, we proved less accessible for the mass manipulation by an American *Moloch*.

One part of the lessons that can be drawn now is certainly of a political nature, pointing to the significance of internal structuration and the necessity of collective strategy with co-operative schemes in Central and Eastern Europe. The other part carries a clearly professional message that, already in the past period, warned us (as against the then Muscovite universalism and voluntarism) of the dramatic import of the particularity of *hic et nunc* at any time. Paradoxically enough, this message was inherent (in contrast to our days' American devastating mainstream of an a-historical universalism) in the doctrine of MARXism (by virtue of the categories of historicity as well as of concreteness and particularity), and could thus substantiate some sensitivity against imperial, Moscow-dictated panels at a theoretically higher level, as providing a rather demanding academic response. I mean here the series of the Socialist research dedicated to modernisation—in history to sociology, economy to jurisprudence—in the last decades of the bygone regime, carried out within an all-Socialist academic co-operation, sensitive of domestic national interests to a by far

greater extent.[44] Among others, such a research may have demonstrated how much social institutions are embedded (through a manifold complex of mediating factors) in the social existence at any time (in a *continuum* of past and present, traditions and inspirations) in a way alien to mechanical treatment, which would enforce one single principle by ignoring the uniqueness and concreteness of the variety of the particular historical manifestations.

Aware that knowledge arises from experience (as refined by scholarly methodology), we have to rely on our own experience first of all, taking into account any accessible external experience as well. For own knowledge can exclusively arise from own history, traditions, past and present successes incorporated in own identity, from the memories of past failures and from the way we are used to processing them both emotionally and rationally, and from skills, abilities and uses formed in reaction to these all.

We may be tempted—and not without reason—to suppose that it is perhaps not some specifically Soviet or American affliction but a fate characteristic of big powers[45] that they frequently resort to simplifying schemes and explanations, reduced to one single principle. After all, their experiences are drawn from more universal or global a perspective and dimension, so they tend to become mistrustful towards anything unique, small-sized and changeable, out of their everyday routine. The situation is paradox. So is the fact that not long ago we still attributed the Communists' suspicion towards any spontaneity in society to their historico-

44 E.g., *Az 1970-es évtized a magyar történelemben* [The decade from 1970 in Hungarian history] ed. Miklós Stier (Budapest: [MTA KESz Sokszorosító] 1980) 71 pp. and, especially in jurisprudence, Kálmán Kulcsár *Modernisation and Law* (Budapest: Akadémiai Kiadó 1992) 282 pp.; Csaba Varga 'Le droit en tant qu' histoire' & András Sajó 'L'industrie d'État du changement et l'effort stabilisateur du droit' in *La modernisation du droit* réd. Radomir Lukiè (Beograd 1990), pp. 13–24 & 33–49 [Académie Serbe des Sciences et des Arts: Colloques scientifiques LII, Classe des Sciences sociales 11], as well as, by the author, 'The Law and its Limits' *Acta Juridica Academiae Scientiarum Hungaricae* 34 (1992) 1–2, pp. 49–56 & *Indian Socio-Legal Journal* [Jaipur] 25 (1999) 1–2, pp. 129–134.

45 As an early recognition, cf., e.g., Diarmuid Rossa Phelan »*It's God we Ought to Crucify*« (Florence: European University Institute 1992) iv + 117 pp. [EUI Working Paper: Law 92/33].

philosophical indoctrination by MARXism;[46] yet looking at presently felt global trends, we cannot rule out the chance that a direction determined for us from the outset may too, in some unhoped future, be valued as a perfection of the democratic principle.

History seems to be accelerating. We could experience the dramatic change (although not changeover) between "us" and "them" one and a half decades ago. In our world becoming a global market, everyone and everything can turn to be a fate and prey to the other. In the time of ARNOLD TOYNBEE, the paradigm of challenge and response could be demonstrated by the practice of minor communities. Today, however, all segments of the global village takes part (even if unintentionally) in the process of a continuous give-and-get. However, our history has not yet ended. It seems—and the last quote of *Failed Crusade* reminds us of this too—that its actors (*alter ego*s and their mutants) remain for long decisive actors of the beginning millennium.

46 Cf., by the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999), p. 104, note 5.

Csaba Varga

"RADICAL EVIL" ON TRIAL*

CARLOS SANTIAGO NINO, professor of legal philosophy in Buenos Aires and author of books on the philosophy of rights and liberal criminal theory, spent the 1980s as an advocate of the civil resistance against the regime of generals, then as a special advisor to President ALFONSÍN especially in matters of facing the past. His writings from this early time, moderate and responsibly balanced, yet definitely raising the dilemmas of historical justice, provoked a storm among his one-time friends from Yale Law School, protagonists of the abstract protection of rights.[1] NINO might have therefore felt the necessity of a summation (to be taken by us also as a posthumous message), borrowing IMMANUEL KANT's moral philosophical term (re-formulated by HANNAH ARENDT in a symbolic sense) for its title.[2] The book may provide some orientation in the prolific debate between the principled stand of legal incompetence[3] and the one extending protection to victims of

* In its first version, in 'A »gyökeresen gonosz« a jog mérlegén' *Magyar Jog* 49 (2002. június) 6, pp. 332–337. This original publication was accompanied by an Editorial Board comment, authored by János Zlinszky, 'Néhány kiegészítő gondolat a »gyökeresen gonosz« mérlegeléséhez' [Some additional ideas to considering the »radical evil«], p. 338.

1 Cf., by Carlos Santiago Nino, 'The Human Rights Policy of the Argentine Constitutional Government: A Reply' *Yale Journal of International Law* 11 (1985) 1, pp. 217–230, 'The Duty to Prosecute Past Abuses of Human Rights Put into Context: The Case of Argentina' *Yale Law Journal* 100 (1991), pp. 2619 et seq. [commented upon by Diane F. Orentlicher 'A Reply to Professor Nino' *ibid.*, pp. 2641 et seq.], as well as 'When Just Punishment is Impossible' in *Truth and Justice* The Delicate Balance: The Documentation of Prior Regimes and Individual Rights (Budapest: CEU Budapest College Legal Studies Program: The Institute for Constitutional and Legislative Policy 1993), pp. 67–74 [Working Paper 1].

2 Carlos Santiago Nino *Radical Evil on Trial* (New Haven & London: Yale University Press 1996) xii + 221 pp.

3 E.g., Samuel P. Huntington *The Third Wave* Democratization in the Late Twentieth Century (Norman & London: University of Oklahoma Press 1991) xvii + 366 pp. and Bruce Ackermann *The Future of Liberal Revolution* (New Haven & London: Yale University Press 1992) viii + 152 pp. I was somewhat startled by the unanimity with which renowned scholars (ranging from the one-time Vice-President of the Spanish Constitutional Court to the acting Foreign Minister of Poland) still advocated, without further ado, the Spanish way to be adopted as a master pattern by the huge Central & Eastern European region (conquered by a foreign army and kept in tight check through puppet governments) at a recent academic event, proposing a definite break with the past without having ever faced it, that is, total and mutual oblivion, equalling to amnesia. It appeared only from the

abuses of rights as well.[4] On their last meeting in Latin America, Professor OWEN FISS of Yale was given the manuscript for preparing it for publication, and eventually he also edited it subsequent to the author's death. This is a magisterial work by a great mind, by far not critically exploited ever since,[5] although this very contribution was among the first to raise the question having become topical again, after the end-of-the-millennium collapse of contemporary dictatorships, recalling the spirit of the Nuremberg and Tokyo trials in facing kinds of state-organised genocide: what is to be done, if at all, with those representatives of state power who had degenerated to perpetrating crimes and abuses of human rights? Early in pondering the availability of an honest response,[6] he became one of the first who went on unnoticed, eventually crowded

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concluding word by the President of the Open Society Foundation that the organisers considered administration of justice and democracy building not in terms of synonymity or mutual complementation but as concepts eventually neutralising, moreover excluding, one another. Michel Rosenfeld, Luis López Guerra, Bronisław Geremek, Aryeh Neier (et al.) in 'Conference on Peaceful Transition to Constitutional Democracy: Jacob Burns Institute for Advanced Legal Studies, April 8, 1997' in *Cardozo Law Review* 19 (July 1998) 6, pp. 1891–1985.

4 E.g., Alejandro M. Garro 'Nine Years of Transition to Democracy in Argentina: Partial Failure or Qualified Success?' *Columbia Journal of Transnational Law* 31 (1993), pp. 1 et seq. and Faime Malamud-Goti 'Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina' in *Impunity and Human Rights in International Law and Practice* ed. Naomi Roht-Arriaza (New York: Oxford University Press 1995), pp. 165 et seq.

5 For reviews, see Conceptión Gimena Presa in *Droit et Société* (1998), No. 38, pp. 145–149 and Juan A. Millán in *The American Journal of International Law* 93 (1999), pp. 548–551. For notices, see Marcus Faro de Castro in *The Law and Politics Book Review* VII (1997) 6, pp. 262–265, Jean Belhhe Elshlain in *Political Theory* XXVI (1998) 3, 419–422, Drolay Jones in *Ethics and Jal's Affairs* XII (1998), pp. 227–228, Wilber A. Chaffee in *Hispanic American Historical Review* LXXX (2000) 1, pp. 217-218 and Joseph Jupine & Gretchen Helmke in *Comparative Political Studies* 34 (2002) 2, pp. 120–126, as well as Anthony Pereira in *The Americas* [A Quarterly Review of Inter-American Cultural History] 54 (January 1998) 3 and Dorothy V. Jones in *Ethics & International Affairs* 12 (1998) and also Sonia Cardenas in *Latin American Research Review* 35 (2000) 2.

6 Having spent two semesters as an American Council of Learned Societies fellow at Yale Law School in 1987 to 1988, I had the opportunity to get acquainted with Professor NINO, then visiting to lecture there. Subsequently, he regularly mailed me press cuttings on attempts in Argentina to come to terms with the past. Later on, serving as a Political Adviser to the Prime Minister in the first freely elected government of Hungary, I turned to Professor NINO from 1990 on, asking for background literature—and having as reply only news about his impaired health, accompanied by a few documents, as remembered in his book (p. 24).

out of the professional debate of the master minds of our new civilisation heralding the mainstream trend of "constitutional revolution", rich in logical ideas but imbued with practical irresponsibility, deduced from principles and hardly harmonised with responsive compromises to truths, suffered through by very lives of generations.

A. Historical Background

Surveying pieces of experience gathered from mid-20th century historical scenes, the first part illustrates the actual purports of the challenge with factors of failure or success named.

In Germany, the Nuremberg trials might have hardly been deemed successful by the then prevailing public opinion. The allegation according to which National Socialism was a good idea though badly implemented was found to be correct by 53% of the German population before 1946 and by 40% in 1946. However, an increase in support followed, with 53% agreeing to it in 1947 and with 55,5% in 1948. Later on, by own jurisdiction, German courts imposed less than 100 life sentences and less than 300 imprisonments between 1959 and 1969, and 157 life sentences (out of 6000 convictions) between 1970 and 1982—as contrasted to the approximately 26,000 executions during the HITLERite regime (p. 97).[8]

In Austria, a governmental decree addressed those strongly and weakly implicated in the regime. Former *Gestapo* and *SS* members, anyone honoured by the party and/or having financially benefited from the regime had to face severe punishment. The rest had to face mostly a loss of public functions and homes. Half of the judges were replaced or not reappointed, with criminal procedures instituted against many. All in all, people's tribunals proceeded

7 Cf. John H. Herz 'Denazification and Related Policies' in *From Dictatorship to Democracy* Coping with the Legacies of Authoritarianism and Totalitarianism, ed. John H. Herz (Westport, Conn.: Greenwood 1982), p. 20.

8 Adalbert Rückert—*The Investigation of Nazi Crimes* 1945–1978: A Documentation (Hamden, Conn.: Achron Book 1980), 145 pp. and especially at 117—knows from official data by the Ministry of Justice about 85,802 cases heard by German judicial fora between 8 May 1945 and 31 December 1978, among which 6440 were concluded finally. These included 12 death and 156 life sentences, 114 fines and one case remitted to a juvenile court.

against a total of 17,500 people, 43 of which ended with capital sentences, with 29 executed. Nevertheless, before the elections in 1949 an amnesty was granted for those who had only been weakly implicated, and everyone blamed exclusively for having adhered to the party was exonerated by 1957 (p. 10[9]).

In Italy, following the cease-fire concluded by PIETRO BADOGLIO, a series of decrees were passed to conduct purge and on principles for the prosecution as well as to appoint Count CARLO SFORZA as the High Commissioner for Defascisation. The chances of prosecution were further strengthened in 1944 by some vague definitions of crimes (as the author remarks, with the aim to "hitting high and forgiving below") and by re-introducing the old penal code, once annulled by the Fascists. However, in the long run, judicialisation turned into a fiasco; the High Commissioner's Office was dissolved later on; and the Minister of Justice had finally to announce an amnesty. It serves as a bitter piece of experience that private revenge offered itself to be the only way having worked at all, targeting officially 1732 lives (according to neo-fascists, 3,400,000, with literature estimates of around 30,000) (pp. 10–11[10]).

In France, treason was re-defined in § 75 of the *Code pénal* with a retroactive effect in so broad terms that practically everyone not having expressly adhered to CHARLES DE GAULLE or joined the armed resistance could have been accused. A bit later, the facts that may constitute a case of collaboration in penal law were also re-defined retroactively, rendering even indirect moral support of the Vichy-regime liable to prosecution. As the third measure, a specific crime called "national indignity" was *ex post facto* defined so as to include any participation, production or distribution of propaganda, membership in either the Commissariat for Jewish Affairs or any organisation supporting collaboration. All in all, 120,000 to 150,000 internments were ordered administratively and 200,000 indictments took place with 100,000 sentences and 65,000 condemnations, as a result of which—until the amnesty in

9 Cf. Frederick C. Engelmann 'How Austria has Coped with Two Dictatorial Legacies' in *From Dictatorship to Democracy* [note 7], p. 144.

10 Cf. Giuseppe DiPalma 'Italy: Is there a Legacy and is it Fascist?' in *ibid*., pp. 119 et seq.

1953—899 out of 7000 death sentences were executed, 2750 convicts were sentenced to life imprisonment and 13,000 to forced labour. In addition and mostly in the initial times, deliberately held *ex-lex*, at least 40,000 people were murdered as collaborators, mostly within kinds of private revenge either organised by left-wing groups or carried out spontaneously by the mob (pp. 11–12[11]).

In Belgium, the Supreme Court declared all the orders by the exile government to be valid. In terms of them, approximately 400,000 persons (7% of the population) had to face prospects of trial, with tens of thousands actually condemned for collaboration. Its *ex post facto* broad formulation was also to cover those 60,000 having volunteered to work in Germany, so the socialist government had to issue an explanatory order in 1945 requiring additional proof of intent to help the German war machine, until the charges against the workers were finally all dropped (pp. 12–13).

In Japan, 5500 proceedings were initiated within the personal competence of the Supreme Commander of the Allied Powers (with the exclusion of acts committed by the Japanese to the injury of the Japanese). Altogether, these resulted in 900 capital sentences and 3500 imprisonments, less than 6000 removals from office and special military proceedings against further 28 soldiers. From among the latter, 7 were concluded with death sentences, 16 with life sentences and 2 with imprisonment until November 1948. However, these trials had been received rather dubiously: seen as the issue of the victor's justice, the Japanese eventually placed the ashes of the seven executed into a memorial urn, moreover, later on also erected a state monument above it in 1959 with the laudatory inscription "For the seven patriots". One of those convicted for war crime became even a foreign minister later. Then, by 1950, all the war criminals were freed and exonerated (pp. 13–14[12]).

In Spain, after more than 200,000 died in the prisons of the regime of FRANCISCO FRANCO between 1939 and 1942, Prime Minister ADOLFO SÚAREZ promised not to purge, while the opposition urged an amnesty for the so-called dissidents and

11 Cf. Roy C. Macridis 'France: From Vichy to the Fourth Republic' in *ibid.*, pp. 169 et seq.
12 Cf. Arthur E. Tiedemann 'Japan Sheds Dictatorship' in *ibid.*, pp. 184 et seq.

terrorists. Finally, in October 1977, SÚAREZ had to announce a general amnesty for all politically motivated crimes (pp. 16–17[13]).

In Portugal, in 1976 the constitutional president, General ANTONIO RAMALHO EANES and Prime Minister MARIO SOARES initiated purges and expulsions and even imprisonments against some leaders held responsible, yet the unfolding sharp political controversies had practically blocked any actual progress (pp. 17–18).

In Greece, in response to the soft measures of the interim government of CONSTANTINE KARAMANLIS, popular actions led to the declaration in a specific decree that legal offences committed during the dictatorship would never be favoured by an amnesty. A coup followed in reaction, but the government arrested the involved military leaders under the charge of high treason. Finally, in 1975 a parliamentary declaration manifested with retroactive force that the crimes of the dictatorship would be exempt of prescription. Proceedings were instituted against 18 former leaders, with governmental intervention subsequently reducing all the imposed death sentences to life sentences. During the coming time, further 100 to 400 proceedings were initiated under popular pressure (pp. 18–20[14]).

B. Normative Dimensions

Political, moral and legal considerations encouraging or discouraging trials in facing the past instances of "radical evil" are overviewed in the second part.

a) Political Aspects Within the range of political aspects (para. 3), the author criticises the claim according to which any facing of the past amounts to either a limitation of constitutionality or mere injustice. He argues just to the contrary. For the author

13 Cf. Julian Santamaría 'Transición controlada y dificultades de consolidación: El ejemplo español' in *Transición a la democracia en el sur de Europa y America Latina* ed. Julian Santamaría (Madrid: Centro de Investigaciones Sociologicas 1982), pp. 387 et seq. In broader contexts, cf. also Victor Pérez-Díaz *Spain at the Crossroads* Civil Society, Politics, and the Rule of Law (Cambridge, Mass.: Harvard University Press 1999) x + 214 pp.

14 Cf. Harry J. Psomiades 'Greece: From the Colonels' Rule to Democracy' in *From Dictatorship to Democracy* [note 7], pp. 257 et seq.

substantiates why this is exactly the fulfilment of lawful expectations through which any constitutional trust can be founded and reinforced at all.

> "[T]rials for human rights violations—he stresses—may be much closer to what ACKERMAN labels »constitutional moments«[15] than many attempts at formal or informal constitutional reforms." (p. 131)
>
> For—he continues—"The result of […] the educative effect of the trials [...] is a process of collective deliberation that [...], despite all the tensions and bitterness, will facilitate a convergence around certain basic values or create, in RONALD DWORKIN's terms, a »community of principles«,[16] so vital for democracy." (p. 133)

Both the diffusion of responsibility through society and the proper dissociation of the victims (with retributive feelings among society at large) may have a crucial role in this respect. All this can, at times, easily result from the logic of events themselves. We have known, after all, from historical examples taken from World War II and its aftermath that while the Germans and Austrians considered their victims as aliens, the French and the Belgians circumscribed and separated the perpetrators as collaborationists from the rest of society after the end of the war. The State of Israel identified itself, for obvious reasons, with the victims and dissociated itself absolutely from the perpetrators. As far as the Argentineans are concerned, they isolated those responsible from the common people first as subversive elements and, then, as those uniformed. In contrast, writer and resistance activist, then president of the Czech Republic, VÁCLAV HAVEL asserted a counter-ideology for the entire Central and Eastern European region, excluding any calling to account even conceptually. According to him,

15 Bruce Ackerman *We the People* I–II (Cambridge, Ma.: Belknap Press of Harvard University Press 1991).

16 Ronald Dworkin *Law's Empire* (Cambridge, Ma.: Harvard University Press 1986), pp. 208–224.

> "All of us are responsible, each to a different degree, for keeping the machine running. None of us is merely a victim of it, because all of us helped to create it together." (p. 201, note 11)

b) Moral Aspects As to conceivable moral aspects (para. 4), the author finds it relevant to reassert SHKLAR's position:[17] settling accounts (including Nuremberg) in terms of legalism as ideology is thoroughly unlawful. It is justifiable only in terms of legalism as social policy, using law as a political phenomenon. After all, there are sufficient grounds for it, as administration of justice sets a triple target here: (1) recording officially what actually happened, (2) strengthening procedurally the rule of law, and (3) appeasing the thirst for private revenge. In addition, trials may (4) help victims to recover their self-respect as holders of legal rights while also (5) promoting public deliberation in a unique manner[18] (pp. 146–147).

Hence, Professor NINO is of the opinion that, from a moral point of view, settling accounts raises no particular problems at all. He summarises his stand as follows, taking into consideration also the exposition of NAGEL:[19]

> "In the end, I believe that trials for massive human rights violations can be justified on preventionist grounds provided the trials will counter those cultural patterns and the social trends that provide fertile ground for radical evil." (pp. 145–146)

c) Legal Aspects As far as legal aspects are concerned (para. 5), the author examines the issue of legality, followed by the excuses that can be brought forward at all.

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17 Cf. Judith N. Shklar *Legalism* Law, Morals, and Political Trials (Cambridge, Ma.: Harvard University Press 1986) xiv + 246 pp.

18 The latter two have been connected to the previous ones by Jaime Malamud Goti 'Punishment and a Rights-based Democracy' *Criminal Justice Ethics* 10 (1991) 2, pp. 3–13.

19 In Lawrence Weschler *A Miracle, A Universe* Settling Accounts with Torturers (New York: Pantheon 1990), quoted by Nino, pp. 145–146.

According to his basic position, the usual discussion of the entire issue is mostly biased by a conceptual misunderstanding, for "what is really at stake is not the option of either law or morality but the confrontation between different moral values" (p. 157). Deciding the option of whether or not a case is prosecutable, not even the eventual lack of a previously posited law fulfilling the requirements of *nulla poena sine lege* and *nullum crimen sine lege*[20] can be taken as relevant, only provided that there is some adequate prior regulation available.

> "As soon as the validity of the laws authorizing these acts, like the anti-Semitic Nuremberg laws of the Nazi regime is shaken, the atrocities are clearly crimes according to the previous layer of valid laws! [...] These deeds should have been judged according to the crisp rules of the criminal code that was in force before being modified by the totalitarian regime, which legitimized the human rights violations. The deeds should be tried, to the extent possible, under the substantive and procedural laws, and by the judges provided by them, that would have been in place at the time of the deeds if it were not for the totalitarian enactments endorsing the abuses. This approach was followed for the most part in Greece and Argentina and could be applied in the former communist countries in Eastern Europe. [...] The laws authorizing the abuses should be held void *ex nihilo*, for their undemocratic origin allows an examination of the obnoxiousness of their content." (p. 163)

Legal defence may possibly be founded upon one or more of the following claims: (1) lack of agency; (2) necessity; (3) lawful defence or self-defence, or state of war; (4) due obedience; (5)

20 For instance, Telford Taylor—*The Anatomy of the Nuremberg Trials* A Personal Memoir (New York: Knopf 1992), p. 635—, back at the time when the Nuremberg trials were in a preparatory stage, strongly opposed the idea of justifying them through the Hague convention as he did not accept it as a penal code to satisfy the *nullum crimen sine lege* prohibition.

statute of limitations; and finally, (6) the selectivity of punishment. It should be borne in mind, however, that the author does not find any of them to be an unsurpassable obstacle, excluding the judicial settling of accounts from the very beginning. What they may imply is rather a reference for the lawyerly rhetoric to be rejected *ab ovo* as a mere pretext.

Accordingly, *ad* (1), reference to lack of agency cannot raise any difficulties, as the chain of commanding and ordering is in principle unbroken and any reference to it equals in practice to doubting why to call to account. For example,

> "the decision convicting some of the Argentine junta members [...] held each of the commanders responsible for the deeds of his subordinates without limiting or undermining the responsibility of the latter." (pp. 166–167)

Ad (2), revoking necessity may in itself sound conclusively. However, its judicial proof may scarcely be successful in any particular situation, for

> "The defense of necessity requires three conditions: (i) balance: that the evil prevented be greater than the evil caused; (ii) efficacy: that the necessary action effectively prevents the expected evil; and (iii) economy: that there be no other means less harmful for preventing the expected evil in an at least equally efficacious way." (p. 171)

Ad (3), invoking lawful defense or self-defense, or state of war, is not much use for excuse either. If there is no specific law available that provides such an entitlement in a democratically framed and constitutionally defendable way, its mere lack does by far not necessarily implicate the legality of the deed debated.[21] Otherwise speaking, referring to any of them has

21 According to Carlos E. Alchourrón & Eugenio Bulygin *Normative Systems* (Wien & New York: Springer 1971), pp. 119 et seq. [Library of Exact Philosophy 5], law is anything but a

no proper content, foundation or reserve in a legally relevant context.

Ad (4), referring to due obedience or to the obligation of the subordinate can only be based on a misunderstanding.

> "Insofar as due obedience is a derivative excuse based on duress or mistake, it can—the author expounds—be regulated retroactively without affecting the principle against retroactivity of the criminal law. Because excuses are irrelevant to the lawfulness of an act, previous knowledge of such excuses should not be a prerequisite to their applicability *vis-à-vis* those acts." (pp. 181–182)

Ad (5), statute of limitations is again an easily transcendable pseudo-object as the objection itself, its weight and most of its pre-requisites make it of just a rhetorical use. In the light of NINO's reasoning, albeit the personality of the perpetrator may have in the meantime changed, with easy provability elapsed and old emotions stormed anew,

> "These arguments in favor of a statute of limitations are weighty, but those who have committed

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closed system. Consequently, the lack of prohibition can imply permission only if an explanatory definition is also added: "That means that the legality of an act is not a question of logic but rather depends on evaluative questions which the courts can hardly avoid." (p. 178) Well, I think this conclusion to be worth of consideration although it is obviously a result of the American constitutionalising way of argumentation. Nonetheless, I have ever been of the opinion—Csaba Varga 'Do we have the Right to Judge the Past?' *Rechtstheorie* 23 (1992) 3, pp. 396–404 {reprinted in his *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE Project on "Comparative Legal Cultures" 1995) 190 pp. [Philosophiae Iuris], pp. 129–135, para. 6 at 135}—that "what is not forbidden is permitted in law."—conceding that forbiddance can also be achieved by principles and other standards and kinds of guidance as well. It is to be noted that I have suggested exactly this in a paper—Csaba Varga 'Law and its Approach as a System' *Acta Juridica Academiae Scientiarum Hungaricae* 21 (1979) 3–4, pp. 295–319 {and reprinted in *Informatica e Diritto* VII (1981) 2–3, pp. 177–199}—, referred to for the re-foundation of the consciousness of rights in opposition to the prevailing Socialist regime by László Sólyom 'Mit szabad és mit nem? Capriccio polgári jogi témákra' [What is permitted and what is not? Capriccio for civil law topics] *Valóság* (1985) 8, pp. 12–24, a key stand taken then, in an early phase of some coming transition to further liberalisation.

criminal acts should not be allowed to profit from the fact that they, or the regime to which they belong, impede justice. Therefore, legal rules that suspend the statute of limitations when prosecutions are impossible also appear attractive. This may be accomplished by retroactively extending the statute or declaring it to have been suspended during the dictatorship. Initially, this seems to clash with the principle which prohibits the retroactivity of criminal legislation, and this would be illegitimate under a liberal system of criminal law. This appearance, however, is deceptive. The prohibition of retroactive criminal laws is linked to the requirement that one must consent to assume the liability of punishment. [...] But consent is tied only to knowledge of those circumstances which are relevant to the unlawfulness of the act—the fact that this is one of the acts that the law seeks to prevent by way of punishment—and not to knowledge of other factual or normative conditions for actually imposing punishment. The statue of limitations is not relevant to the legality of the act. Prevention by way of punishment is in no way qualified by the delineation of a term during which the state's claim to punishment would expire. [...] People should decide whether or not to commit an act according to norms of unlawfulness and consequently run the risk of relying on factors which are irrelevant to such norms. If somebody commits a crime because he hopes that before he is caught the statute of limitations will run out, he must bear the burden of relying on factors alien to the legality of the act, just like the person who hopes that he will not be punished because all the prisons in the country will burn. Therefore, I do not believe that the principle prohibiting retroactive criminal legislation is an obstacle to extending or abolishing statutes of limitations for massive human rights abuses. The only

> issue that may legitimately arise is whether it is just to punish somebody for acts done in the distant past when that person has changed significantly in the interim" (pp. 182–183).[22]

Ad (6), the selectivity of punishment (with the ways of how to select for prosecution from among those involved) cannot erect any major obstacle either, for

> "nobody has a right that certain persons be punished and, consequently, nobody has a right not to be punished because others are not. Punishment does not call for equal treatment because it is not a benefit which is the object of positive rights. Punishment is the object of positive goals and only of negative rights. Punishment may therefore be selectively relinquished through persecutorial discretion, amnesties, or pardons without raising claims of equal treatment.[23] This selectivity, of course, should not be arbitrary but rather aimed at efficiently achieving legitimate goals." (p. 183)

Let us add one more conceivable defense, notably (7), the act of self-amnesty, noticed by just one of his reviewers, as follows:

> "persons should not benefit from their own wrongs—that is, those who have contributed to the suspension of democratically enacted laws that made

22 E.g., Alain Laquièze 'Le débat de 1964 sur l'imprescriptibilité des crimes contre l'humanité' *Droits* (2000), No. 31, pp. 18–40, especially at 25 declares—inspired by Stefan Glaser in *Le Monde* (December 17, 1964), p. 10: "Prescription […] does imply a benefit but not constitute a right."—that "Prescription is not a fundamental right." In terms of practice, Naomi Roht-Arriaza 'Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders' in *Impunity and Human Rights*…[note 4], pp. 57–70, identifies the disregard of limitations for the period of the practical denial of access to justice in the case initiated by the United States against an Argentinean general having fled to its territory in *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1550 (N.D. Cal. 1988).

23 Retributionism is self-destroying from the very start as it can only lead to the utterly unprincipled exemption of "Everyone has to be punished, so no one is" (p. 183).

> human rights abuses criminal acts should not benefit from that decision by successfully claiming that no law criminalized their conduct or that non-democratic laws sanctioned or pardoned such acts. This interpretation is consistent with the current trend under international law—as evidenced by reports of the UN Human Rights Committees and the Inter-American Commission on Human Rights to the effect that domestic laws, such as self-amnesties, that grant impunity to perpetrators of abuses should be denied legitimacy."[24]

After all, there are already some signs of a shift of opinion in the last decade of the international community about the dilemma of whether or not to face past injustices in law, in which way and upon the initiative of whom and with which distribution of its costs and burdens of proof in their resolution.[25] The dogmatically merciless indifference of human rights activism towards past victims by revoking the perpetrators' rights may have in the meantime corroded its very existential basis, compelling human rights watch organisations to re-consider why the memory of the unburied dead still keeps haunting after decades and why unhealed wounds are opened up again.

While earlier, those professionally committed to the cause of human rights were already suspicious of a limitation of rights whenever a posterior government attempted to examine past legal offences—thereby breaking the continuity of a prior dictatorship smoothly transiting to an arrangement based upon the rule of law—, now they are almost inclined to impute the downright obligation to the succeeding government to face in law all the major injustices committed by the prior dictatorship. If now they hesitate at all, they do so rather in selecting the justifiable means, whether or not also

24 Millán [note 5], p. 549.

25 Cf. *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law] ed. Csaba Varga (Budapest: [AkaPrint] 1998), part on »A múlt meghaladása« [Facing the past], pp. 73–117 [A Windsor Klub könyvei II] as well as *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub].

involving the judicial path or any other reaction considered satisfactory there and then in the actual case. For instance, the suggestion of DIANE F. ORENTLICHER fits in well with this change of attitude. According to her, the prosecution of crimes committed and left unpunished for political reasons by the past regime should be made a duty of the successor state as prescribed formally by international law. This is what even NINO finds an exaggeration, suggesting a more moderate solution which may well accord to his own sense of responsibility. He opts for international proceedings under international law, conducted by and upon the responsibility of an international actor, or, at least, for domestic attempt at settlement and/or proceedings as supported by international fora. For this is the proper way to prevent a situation in which the domestic democracy-building by a successor-state might get disadvantaged or simply blocked against a formal international obligation, providing for administration of justice in previously codified forms and procedure (pp. 188–189).

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The posthumous message of NINO' stand in such a sensitive topic is exemplary for the union of social and lawyerly responsibility. In his principles and theorising, Professor CARLOS SANTIAGO NINO was drawing from Western liberal traditions, and in his practical responses, he searched for a path through laborious work to reach eventually optimum compromises within the bounds of justifiability. His oeuvre is all along imbued with the pathos of taking seriously the instrumental values to be implemented through legal mediation—aware of the priority of practical problem-solving that can only be the result of careful pondering, sensing and balancing, convinced that the lawyer must not act as a sales agent or hawker, siding with any limiting position in conflicts of values and/or major interests without own sober assessment. Therefore, he is also aware of the fact that the law's instrumentality is by far richer than any particular procedural formula actually applied in everyday routine.

Or, law is a complex (and never fully exploited) aggregate of instrumental values, of working principles as well as of ways of (re-) establishing coherences and inferences (linkages and connections, imputations and ascriptions)—in brief, paths and ways, forms and modes of procedure—, which we (by mentally and also formally confronting available kinds of reasoning and argumentation in substantiation of the final decision) both serve and reproduce by each act of procedure through our intellectual operations and reconstructions.

Accordingly, practical challenge and conceivable legal response are not simply meant to qualify (by judging, criticising or even destroying) each other. Discourses in law are to strengthen them to dialogue and encounter within the (formally perfected but never exhaustively actualised) bounds of social acceptability and legal justifiability, to be ascertained and re-defined at any time in socio-legal continuity, taken—instead of strict formalism—in an exclusively widened macro-sociological (cultural and civilisational) sense.

Csaba Varga

RULE OF LAW BETWEEN THE SCYLLA OF IMPORTED PATTERNS AND THE CHARYBDIS OF ACTUAL REALISATIONS (The Experience of Lithuania)*

Transitology Questioned Having recovered from the trauma of surviving Soviet imperial socialism and compelled to open up new ways in independent state-building in parallel with the readjustment of what is left as local legal arrangement to common European standards, nations of Central and Eastern Europe all have faced the same dilemma: how can they manage international encouragement to adopt foreign patterns in promise of ready-made routes with immediate success, in a way also promoting the paths of organic development, relying on own resources and potentialities that can only be gained from tradition? Is it feasible at all to rush

* In its first version, *Acta Juridica Hungarica* 46 (2005) 1–2, pp. 1–11 & <http://www.akademiai.com/media/37knultrmmv9b6ykpee7/contributions/m/3/2/9/m3296v37841w54h0.pdf> & <http://www.akademiai.com/content/m3296v37841w54h0/fulltext.pdf> and *Rechtstheorie* 37 (2006) 3, pp. 349–359, as well as, as commissioned by Nagoya CALE for 2004, in *Hungary's Legal Assistance Experiences in the Age of Globalization* ed. Mamoru Sadakata (Nagoya: Nagoya University Graduate School of Law Center for Asian Legal Exchange 2006), pp. 195–203, under the common title I gave to my own project as 'Transition to Rule of Law: A Philosophical Assessment of Challenges and Realisations in a Historico-comparative Perspective'. As I promised in the research concept (p. 185), "No wonder if the big patterning powers are scarcely generating critical approaches to the transition process in the region as focussing on especially relatively small countries, the chances of survival of which are felt to be so much at stake as to form them conscious enough to ponder on expectations and realisations, chances of third roads and the pressure of forced paths as well. The descriptive and theoretical literature of this category of countries seems to be most promising to eventually lay the genuine foundations of competitive explanations on what course has been more or less commonly taken in the region. All the working hypotheses notwithstanding, one work will be selected out as representative of the various dilemma outlined, concentrating as a prism in one complex unit the very compound aggregate (with in-built elements in mutual tension and exclusion) of the expectations towards, and timely fulfilment of, the perfected forms of some Transition to Rule of Law in the region concerned."

forward by rapidly learning all the responses others elaborated elsewhere at a past time? Or are they expected themselves to become Sisyphus bearing his own way, at the price of suffering and bitter disillusionment? The question was not raised by each country individually as not much time was left for pondering in the rapid drift of events. Anyhow, cost-free solutions adopted from without may easily lead to adverse results far away from expectations. By the time of awakening, however, posterior wisdom may show that there is an alternative always available, even if its practicability is not clear to those affected at the urgently given moment.

One and a half decades after the collapse of the Soviet empire we fully realise now how painful the fact is that each country embarking on dramatic changes was completely left in isolation to face its national renewal programme, drifted by accidental circumstances. Neither the consciousness nor the organisational framework of the mutual dependence of those concerned was strong enough, and Moscow as the focus was this time substituted by another centre of power, even less interested in the target countries (each with proper peculiarities), which were just awakening either in self-esteem or as a potential counter pole.[1] In consequence, each country had to embark upon separate efforts at reform, channelled by so-called open society agencies;[2] however, as we all know, improvisation is not likely to outcome products worth of consolidation.

The early and total failure of the Hungarian efforts at coming to terms with the past[3] was only one among a few shocking episodes. This alone might have made us realise that we should not

1 Cf., from the present author, 'Failed Crusade: American Self-confidence, Russian Catastrophe' in the present volume.

2 See, e.g., Stephen Cohen *Failed Crusade* America and the Tragedy of Post-communist Russia (New York: Norton 2000) 305 pp. and—as a by-admission—Stephen Holmes 'Transitology' *London Review of Books* 23 (19 April 2001) 8, pp. 32–35.

3 Cf., e.g., by the present author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995) 190 pp. [Philosophiae Iuris], especially the part on »Coming to Terms with the Past«, pp. 119–155, *Coming to Terms with the Past under the Rule of Law* The German Model, ed. Csaba Varga (Budapest 1994) xiii + 136 pp. [Windsor Klub] as well as '»Radical Evil« on Trial', also in the present volume.

have attempted to respond to a considerably universal challenge just on our own, and perhaps a genuine trans-national co-operation might have evolved, had not been our initiative in Hungary too early, even pioneering.

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Lithuania A Lithuanian theoretical response[4] will be overviewed in the following. It is certainly not the earliest one as its author may have learned from the experience of others.[5] Yet it is remarkably rational and systematic. For he reconsiders ancient wisdoms in the light of our days' ideals, and draws historical lessons from his Lithuanian case study by responding to the shared failures of our global new world.

4 Alfonsas Vaišvila *Teisines valstybes koncepcija lietuvoje* [The Lithuanian approach to rule of law] (Vilnius: Litimo 2000) 647 pp. [with summaries: 'Law-governed State and its Problems of the Formation in Lithuania: The Outline of State Ideology', pp. 611–631 and 'Правовое государство и проблеми его становления в Литве: Поиски государстенной идеологии', pp. 632–635]. Cf. also his *Conception of the State Ruled by Law in Lithuania* (Summary of the research report presented for habilitation) (Vilnius 2001) 50 pp. [The Law University of Lithuania] as well as—in multiplication—his 'Rechtspersonalismus (Zusammenfassung)', 'Die Rechtsaxiomatik oder das Modell der vier Axiome als inhaltliche Grundlage des Rechtspersonalismus', 'Die geometrische Formel des Rechtes als des mehrstelligen Prädikats' and 'Das Recht als Prozess (als das Werden)'. Chair holder for legal philosophy at the Faculty of Jurisprudence of the Law [now: Mykolas Römeris] University at Vilnius, Professor VAIŠVILA is author of a number of works covering Lithuanian history of ideas, social compromise, liberalism, social-liberalism, tolerance, democracy, state of law (with moral preconditions), statism as well as crime control. In result of this present survey, he was commissioned by me to summarise his views especially through their philosophical foundations. As to the outcome, see his 'Legal Personalism: A Theory of the Subjective Right' in *Ius unum, lex multiplex* Liber Amicorum: Studia Z. Péteri dedicata (Studies in Comparative Law, Theory of State and Legal Philosophy) ed. István H. Szilágyi & Máté Paksy (Budapest: Szent István Társulat 2005), pp. 557–572 [Philosophiae Iuris / Bibliotheca Iuridica: Libri amicorum 13].

5 As a summary of the debates in Poland, see *Polskie dyskusje o państwie prawa* Zarys koncepcji państwa prawnego w polskiej literaturze politicznej i prawnej [Polish discussions on the state of law: summary of the concepts of the state of law in the Polish political and legal literature] red. Sławomira Wronkowska (Warszawa: Wydawnictwo Sejmowe 1995) 140 pp. Also cf. *Kiáltás gyakorlatiasságért a jogállami átmenetben* [A call for practicality in the transition to rule of law] ed. Csaba Varga (Budapest: [AkaPrint] 1998) 122 pp. [A Windsor Klub könyvei II].

(Ideal: Law and Balance) The ideal of the Rule of Law—formulated also in the preamble of the Constitution of Lithuania (1992) after she has returned to the path of independent state-building by 1990[6]—indicates a recognition according to which the unlimitedness of observing any law in a *Rechtsstaat* can be restricted by the value-centredness of a rule of law, which value shall be fully implemented by the principle of intervention of a *Sozialrechtsstaat* when care for "strengthening those socially weak and weakening the strong"[7] is also at stake. Looking back in history, Lithuanians may now realise that their ancestors in the 16th to 17th centuries[8] had already separated—in their search for a "well-organised" and "organic" state—law [*ius*] from the laws [*lex*] and demanded law to be right (by serving everyone's good with sound reason), moreover, that the presumed original freedom which may have led to their first integrative social contract could not entitle to anarchy but only prepare for balancing. The Lithuanian Statutes (1529, 1566 and 1588) ensured an extremely all-covering rule of law for the nobility. This was even further restricted by the Polish *liberum veto*.[9] After all, the disintegration of the ruler's power and responsibility could only result in either the tyranny of nobles (as beneficiaries) against everyone or the coming of foreigners to rule (free of any limitation whatsoever) with at least some promise of order. Well, as known from history, both alternatives did subsequently materialise in Lithuania.

Reconsideration is imperative for all concerned, only if in order to avoid the traps of the past. One has to be careful to escape

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6 "The Lithuanian nation strives for an open, just and harmonious civil society and a state ruled by law." The expression 'state of law' was first used in Lithuanian literature by MYKOLAS CIMKAUSKAS (1922) and described historically and systemically by MYKOLAS RÖMERIS—'Teisines valstybes organizacija' in *Lietuvos universitetas* 1927–1928 mokslo metais (Kaunas 1928), pp. 6–31—, followed by their contemporaries as PETRAS LEONAS and others.

7 Ekkehart Stein *Staatsrecht* 14., völlig neu bearb. Aufl. (Tübingen: Mohr 1993) xv + 497 pp.

8 E.g. JONAS CHONDZINSKIS, ALBERTAS GOŠTAUTAS, MYKOLAS LIETUVIS, PETRAS ROIZIJUS, AUGUSTINAS ROTUNDAS, LEONAS SAPIEGA, PETRAS SKARGA, ANDRIUS VOLANAS.

9 Cf. Ladislas Konopczyński *Le liberum veto* Étude sur le développement du principe majoritaire (Paris: Librairie Ancienne Honoré Champion & Varsovie, etc.: Librairie Gebethner et Wolff 1930) 297 pp. [Institut d'Études slaves de l'Université de Paris, Bibliothèque polonaise II].

the temptation of any kind of dogmatism—foremost that of absolutising universalisation—, even if some of the issues now crop up in global proportions, as a consequence of the new role assumed by the American foreign policy after the Cold War and the Soviet might are over. The early 20th-century Lithuanian classic of public law, MYKOLAS RÖMERIS already emphasised that the Rule of Law is hardly more than a specifically disciplined ethos, only conceivable as the direction of a constantly renewing ambition: it never arrives at completion, for "it cannot be answered once and for all".[10] Or, it is not even an external pattern to be simply followed and implemented, for it is not of the kind to presume the mechanically "obedient execution or imitation" of requirements once stipulated by others.[11] This is all the more remarkable now when the course of globalisation, maximising the rule by rule of law and human rights with a growing disregard to other considerations and values, is about to stumble on disintegrating contradictions and dysfunctions. While eliminating certain threats to human rights, the state ruled by law—writes the author reviewed—originates new ones immediately, which are inherent in the notion of human rights itself,[12] that is, in their abstract conceptualisation, totally insensitive to their own social (pre)conditions, ways of operation and consequences in the short as well as the long run.

The author inquires into the conditions of reaching states of genuine balance upon the basis of reciprocity between law and social solidarity, on the one hand, as well as between (with regards to the openness of social order) full social consent and (with regards to the openness of law and order) the inseparable unity of rights and duties, on the other. He reminds that just as the downfall of the first (1572–1795) and the second (1918–1926) Republic of Lithuania was due to the over-limitation of the sovereign, exposing the country to external despotism, what happens today is the liberalisation of anti-sociality through the restriction of the executive power with reference to abstract human rights.[13]

10 Römeris 'Teisines valstybes organizacija' [note 6], p. 6.

11 Vaišvila *Conception of the State*... [note 4], p. 11.

12 *Ibid.*, p. 6.

13 *Ibid.*, p. 12.

Preliminary to raising any issue relating to the Rule of Law is the assessment of the state of actual social conditions. For the author, the acknowledgement of the priority of the human person with inborn rights, taken as the source of his autonomy, as well as the overwhelming social co-operation based on contracts and mutual concessions together with the social majority's active and organised participation, are of equally utmost importance. In contrast, what reality shows now are rather legal statism and the exclusivity of the dominance of formal law. Even rule of law is mostly conceived of as formal institutionalisation, mere dictate of the law [*lex*]. However, until the Lithuanian Constitution (Article 109, Section 3) provides for the judges to proceed "exclusively according to the laws"—instead of laws "and law [*ius*]" as he claims—, no genuine division of powers can be achieved.

(Ideal: Rights Counterbalanced by Duties) Functionally, law is based upon the unity of subjective rights and legal duties. Rights cannot be but relative, otherwise they will degenerate into aggressive privileges unavoidably. This mutual dependence arises as part of the natural order from the natural state of humankind, open to exchange equivalent services. Such an interconnection is not anything made by the state. All that any statehood can do is to make statements about. Law [*ius*] in a democratic society can therefore only be built on a legal conception not reduced to mere laws [*lex*]. In a democratic society, only such claims can be posited in form of law that are in compliance with human rights, express social agreement and formulate as legal imperatives only such provisions whose realisation is also guaranteed by the state's instruments (i.e., to the extent of the state's economic capacity and their eventual approval by citizens) (ch. 4).

Or, the state is not in a position to met out justice or punish, moreover, it is not even the state to deprive anyone of his/her freedom. At the most, all a state can do is to officially establish the new status of the rights of a person when it gets diminished by his/her own action of rejecting the fulfilment of certain duties. Consequently, neither capital punishment, nor its possible abolishment is within the states' but exclusively within the

perpetrator's discretion. Anyone who kills, by negating the right to life of others, deprives himself of his right to his own life. The act of the Lithuanian Constitutional Court—argues the author—, having decided for the abolishment on 9 December 1998, declaring the Article 105 of the Lithuanian Criminal Code to be unconstitutional, can only be construed in that it either denied its citizens their natural right to equality in reciprocity or pardoned for the future in general terms on a legally unjustifiable basis (unauthorised in citizens' eyes, yet normatively). Moreover, not even the failure of regulation can result in breaking up the necessary balance between rights and duties or in impunishment, because, otherwise, criminal aggression would be encouraged. Therefore the formal, exhaustive and exclusive statutory definition of crimes needs to be complemented by the availability of judicial—casual—correction.[14] Entering the 21st century, the author perceives that the absolute prohibition of analogy in criminal law may have fairly been motivated by past experience of totalitarianism, on the one hand. On the other, he generalises—stemming out from the data of 20th-century international criminal practice, Anglo–American jurisprudence as well as continental penalising trends—that the actual boundaries of today's formally absolute prohibition are becoming increasingly flexible under contemporary well-balanced rule of law conditions (ch. 5).[15]

(Anything Except to Democracy in Outcome) According to his vision, the prevalence of capital concentration with the split of society to the rich and the poor has nowadays been generating a *sui generis* type of authoritarianism-cum-totalitarianism under the guise of total liberalism. Situations come about by threatening effects in terms of which enlarging groups of addressees will have to practically resign of their rights and legal rights-protection on the command of sheer biological survival. The present degree of

14 For case law can only counterbalance the fact actualised by those cases proving that legislation cannot be exhaustive, in order to ensure the universality of implementation of the basic principles of criminal law. *Ibid.*, p. 23.

15 Jörg Arnold 'Prinzipien und Grundsätze im deutschen Strafrecht und im Entwurf des Allgemeinen Teils des Litauischen Strafgesetzbuches' *Jurisprudencija* [Vilnius] 9 (1998) 1, pp. 62–74, in particular—using the expression '*fließend*' when surveying the German practice of *Analogieverbot*—on p. 68.

actual poverty and defencelessness in Lithuania is already about to genuinely erode the predisposition of the state. The shameful fact that only 40 to 42 per cent of the officially known criminal acts are actually prosecuted against can only mean that the other 60 to 58 per cent of national sovereignty relating to effective crime control is lost. However, this other part should not benefit the criminals—as is the case today—but the victims, either by providing them efficient protection or by giving them back the right to protect themselves against crime at least to a viable extent. It is little wonder if in situations like this, citizens' traditional confidence in the state is withdrawn, only to be replaced, instead, either in their own hands or in powers beyond this world. In 1996, only 25 per cent of the Lithuanian population claimed they trusted their own Parliament yet 74 per cent claimed that they trusted the Catholic Church. After many decades of Soviet occupation, it is tragic to recall that there was a time when power in Lithuania was seized by foreigners with promise of order they provided against the tyranny by Lithuanian nobles. Anyway, Lithuanian officials do ascertain now that their justice system is hardly sufficiently operable today. A criminal environment can grow to be effective enough to actually deter injured parties and witnesses from taking part in the administration of justice. Law is not a protective power any longer. Legal proceeding may have lost any sense. Criminals have in fact extended their control over law and order, practically depriving society of the chance of legal protection, degrading citizens to growingly becoming partners themselves to the very aggression criminals are used to commit against them. It is the aggression by criminal asociality that is eventually supported by an abstract protection of human rights.

Is it possible that after a totalitarian past, democracy will only arrive later on, when the present mixture of liberalism-cum-authoritarianism will have been left behind? Is there any logic in the actual course of history in that the former (Soviet-type) lack of freedom is now getting compensated by immoderate, even asocial (American-type) libertinism?[16] What are the symptomatic indicators here? According to the author, the weakness of a middle-

16 For the term, cf. Frank S. Meyer 'Libertarianism and Libertinism?' *National Review* (1969).

class in substantiation of democracy, the miserable state of economy, the lack of chance for any genuine civil (civic) initiative, the feeble self-assertivity of the populace (e.g., when all personal bank-savings of Soviet times were frozen by the Parliament once and for all on 19 July 1995, by a posterior and unilateral statutory modification of the conditions of fulfilment of contractual obligations laid down in the Article 471 of the Lithuanian Civil Code), the want of high state officials' respect for the law (e.g., when the President of the Republic or the *Sejm* [their Parliament] may fail to observe their formal duties without any legal consequences, or the state elite defines *ad hoc* measures when own remuneration is at stake), as well as the undisturbed misappropriation of public property (through commercial banks and companies with a state share)—all these are among the first to be considered.

Rule of Law is hardly imaginable without proper social and psychological, ideological and constitutional foundations. As to the current political experience in Lithuania, it calls for a stronger presidency as well as for a parliament with more effectivity in balancing. For what the constitutionalist RÖMERIS wrote once about *parliamentocracy* as a mere theoretical potentiality three quarters of a century ago had by now become everyday reality, until the last election in October 2000 brake the continuation of Communists' domination. In fact, pursuant to the Article 72, Sections 2–3, of the Constitution, any bill can be—even repeatedly and without the slightest alteration—passed by absolute majority, despite any veto by the President of the State. So, nine protests by President BRAZAUSKAS could be constitutionally ignored in 1997 without paying the least attention to his motifs. As to historical antecedents, the Article 51, Section 2, of their Constitution of 1928 followed the American model by providing for a qualified two-third majority in case a bill had been vetoed against. As fairly recalled, President ROOSEVELT interposed official veto 631 times until the *New Deal* could be implemented; moreover, Lithuania herself was in favour of a strong presidency both in far-away and recent past.[17] The population still trusts significantly more even a weak president

17 De-stabilisation efforts were also made in 1922, at the dawn of the young republic, under the pretext of stabilising the legal status of the Parliament.

than a Parliament formed by random circumstances and, as the case may be, sometimes tragically exposed to the play of mere chance. This is clearly indicated by the contrasted support through varying periods and circumstances notwithstanding:

	***President** ALGIRDAS BRAZAUSKAS*	***Parliament***
December 1993	60,0 %	34,0 %
June 1996	20,0 %	14,0 %
	***President** VALDAS ADAMKUS*	***Parliament***
June 1998	71,2 %	12,7 %
December 1998	76,4 %	13,4 %

Thus, there is a contradiction that can barely be eliminated by means of mere rhetoric, namely, that while the country is actually ruled by a power of a rather low esteem, the power preponderably trusted by the nation is without almost any sensible competence (ch. 8, para 2).[18]

Or, the exclusive way to, as well as standard and criterion of, a "well-organised" and "organic" state now are on the final analysis nothing but the "maintenance of comprehensive balance" on each field of the entire social, political and legal set-up as the exclusively available guarantee of political stability, social equality and legal reciprocity.[19]

The partisan movement *Žalioji rinktinė*, continuing the fight against the Soviet occupying powers in Eastern Lithuania, declared in 1945: "We want a presidential republic, similar to the one of the United States of America, with a powerful president." [*V. Kuroèkos apklausos protokolas* [archives manuscript], p. 15.] – The World Congress of Lithuanian Lawyers declared on 24–31 May 1992: "Exclusively a strong presidency can ensure the stability of social processes, block the way to chaos and neutralise the destructivity of those thirsting for revenge, in order to become the buttress of the further development of democracy." [I. Kaganas *Lietuvos Respublikos valdymo forma* Lietuvos valstybingumo teisines problemos: Pirmojo pasaulio leituviu teisininku kongreso straipsniu ir teziu rinkinys (Vilnius 1993), p. 7.] – It was President ALGIRDAS BRAZAUSKAS who took a stand when his vetoes were ignored, in that "To be able to operate efficiently, the President should also be given more power, following the introduction of the democratic pattern of governance." [*Lietuvos rytas* (February 14, 1997).]

18 Vaišvila *Conception of the State*... [note 4], pp. 32–36.

19 Also see, by Alfonsas Vaišvila, 'Место наказания в правовом государстве' in *Проблеми вдосконалення законодавства та практика його застосування з урахуванням прогнозу злочинности* 1 (Луганськ 1999), pp. 44–49 [Вісник

(Legal Personalism as a Response) This is the reason why the author developed his theory of so-called legal personalism, based on the axiomatics of the geometrical formula of law, taken as a compound predicate. I avail just to mention some of its fundamental tenets here. Accordingly, the equivalence in reciprocity of social relations is the pre-requisite of any open society. It follows therefrom that "subjective right is not the property of the individual but, as a compound predicate, is a relation established for the mutual protection of the interests of all persons concerned." Consequently, on the ground of the reciprocity having come about with the "unity of rights and duties", the individual is, depending upon his/her deeds, always in balance with his/her own respective rights and duties, because "by fulfilling or rejecting the latter, he has the former recognised, legalised or annihilated" automatically. And indeed, there is no other way to choose, for "Rights without obligations are nothing but downright privileges, while duties without rights can only stand for sheer violence."[20]

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A Call for Local Experience Assessed The oeuvre presented herewith is not a cry for help but the manifestation of a responsible scholarship gradually realising its own strength and independence. It is rewarding to learn that the same ethos that, after the Soviet regime is bygone, can introduce Western trends as desirable patterns to be followed with natural ease, also indicates the need for new foundations, by building up—having left behind its earlier forms rooted in Bolshevik ideology—own world-view consequently.

Луганського інституту внутрішніх справ МВС України] and 'Социальное правовое государство: Приобретаемая и теряемая реальность' in *Конституционно-правовое проблемы формирования социального правового государства* Материалы международной конференции (Минск: Белорусский государственный университет 2000), pp. 24–28.

20 "*Die Äquivalenz der Austausche […ist…] die Einheit von Rechten (der Erlaubnis) und Pflichten (dem Gebot) zu bestimmen […:…] die Menschenrechte werden nach der Erfüllung oder der Verzicht der entsprechenden Pflichten erworben, legalisiert oder verloren.*" "*Das subjektive Recht ist nicht die Eigenschaft des Individuums, es ist ein mehrstelliges Prädikat bzw. das Verhältnis, das für den gegenseitigen Schutz der Interessen der Personen geschaffen ist.*" "*Das Recht ohne Pflicht gleich einen Privilegien, die Pflicht ohne Recht ist bloße Gewalt.*"

This is exactly what this magisterial work just surveyed did. Having overviewed the mostly pattern-following and more or less promising or disappointing results of Lithuanian domestic development spanning over nearly one and a half decades as givens of their history, it assessed them monographically. His very approach presumed sound scepticism as pre-requisite to any responsibly constructive thought, subjecting any result to scrutiny, omitting reliance on either clearly personal [*ad hominem*] or exclusively authoritarian [*ad autoritatem*] reasons in their evaluation.

It would be a shock if the arrogance of force could define again itself in the guise of the renewed ideology of JOHANN GOTTLIEB FICHTE's "So much the worse for the facts"[21]—this time at the overture to the 21st century. It is a fact notwithstanding that ideas and constructions that stream towards us from overseas are expected to get rooted in a soil poor in resources, targeting a disintegrated society with distorted morals, in which only reliance to individual surviving strategies have still proven to be exclusively adequate a personal response amidst an economy fallen prey to the stronger and professionally only preoccupied with the exhaustion of national property.

According to the creed of many, the principles of free market, democracy and parliamentarism (with rule of law and human rights in the background) offer a kind of panacea curing all the ills in the world. Still, social science should be given the chance to record—if found so—that the same staff may not work here as it is used to work there amidst its natural surrounding; not with the same cost & benefit *ratio* at the least. Social science is open for ideas to both receive in test and reject upon criticism. Moreover, scholarship in Central and Eastern Europe is growingly aware of the fact that what it can provide is by far not marginal feedback but the very first testing and teasing proof on social embeddedness of ideas and ideals exported. For whatever we think of the cultural anthropological preconditions of such guiding stars of modernity and of the scientific verifiability of the concept of man they

21 "If the facts do not fit to the theory, the worse for the facts"—or „*Wenn die Tatsachen nicht mit der Theorie übereinstimmen, umso schlimmer für die Tatsachen*"—, understood originally in an exclusively philosophical sense.

postulate,[22] Western social development (with the ideocracy of DWORKIN, HABERMAS and RAWLS, in terms of which values are just a random function of supporting majority, and rights are made one of the gratuitous accessories of any human existence) is by no means separable from the economic reserves of such a development. Or, operation of any societal complexity requires resources in both social organisation and material production. In the Atlantic world, presently they seem they are available either through economic reproduction or by using up reserves. Consequently, if it proves to be too wasteful or costly, less powerful regions of the world may encounter problems of financing, for they are in want of reserves.

Scholarly sensitivity to issues like this has developed in the Western world as well,[23] even if not yet transcending local self-analysis. Until now, scholars have failed to address either other regions or their ideals' very preconditions. This is why the issues raised above are still questions—on and for us. This is why they shall have to be tackled at least by those concerned.

22 If the presuppositions of democracy are not provable, only tradition axiomatically taken from the *credo* of the Enlightenment can be the case. Cf. János Frivaldszky 'Gondolatok az emberi jogok radikális szemléletéből fakadó problémákról' [Thoughts on problems arising from the radical approach to human rights] in *Egy európai alkotmány felé* A nizzai Alapvető Jogok Chartája és a Konvent [Towards a European constitution: the Charter of Fundamental Rights and the European Convention on Human Rights] ed. János Frivaldszky (Budapest: JTMR Faludi Akadémia & OCIPE Magyarország 2003), pp. 63–74 [Agóra II].

23 Cf., e.g., Stephen Holmes & Cass R. Sunstein *The Cost of Rights* Why Liberty Defends on Taxes (New York: Norton 1999) 255 pp. as well as, by Richard A. Posner, *The Economics of Justice* (Cambridge, Mass.: Harvard University Press 1983) xiii + 415 pp. and *Economic Analysis of Law* (New York: Aspen Law & Business 1998) xxi + 808 pp. As an outlook, see also *Western Rights?* Post-communist Application, ed. András Sajó (The Hague: Kluwer Law International 1996) xviii + 386 pp.

WHAT CAN BE HOPED FOR NOW?

IN BONDAGE OF PARADOXES
Or Deadlock at the Peak of the Law we have Created for Ourselves*

(A 'Good' Constitution) Our Constitution is good and calls for immutability, only our nation has not got the maturity yet to appreciate and enforce constitutional values—we may hear such and similar sentences from many quarters and especially from jurists who once at their time formed it through their "invisible constitution", as a diagnosis that can shock the commoner in all of us.[1] What are they speaking about, and what does the experience of jurisprudence accumulated for thousands of years speak about? Well, the latter testifies first of all to the fact that law in our continent is just what is made in due form by those entitled to

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1. "Namely, wouldn't you touch the Constitution, as today so many are urging it?—There isn't any problem with the Constitution. I know quite well the constitutions of the world: a parliamentary democracy may be correctly operated by our basic law. The great moral debts of the regime change did not depend on the Constitution." László Sólyom [interviewed by Szabolcs Szerető & Károly Villányi] 'A jogállam próbája: Az alkotmánnyal az égvilágon semmi baj nincs' [Test of the rule of law: There isn't any problem with the Constitution] *Magyar Nemzet* (May 12, 2007) & <http://mn.mno.hu/index.mno?cikk=410927&rvt=9&s_text=az+alkotm%E1nnyal+az+%E9gvil%E1gon&s_texttype=1> as well as <http://www.keh.hu/keh/interjuk/20070512magyar_nemzet.html>. János Zlinszky exactly flogs for decisive responsibility of the lack of public participation in his 'Az alkotmányosság alkonya' [Twilight of constitutionality] *Magyar Szemle* [Hungarian review] XVI (August 2007), No. 78, pp. 8–14 & <http://www.magyarszemle.hu/szamok/2007/4/Az_alkotmanyossag_alkonya>, certainly undertaking not slim bias in order to substantiate rhetorical effects. Because, according to him, "the rub is not connected with the Constitution! [...] Where is then the mistake? It is to be found also in the fact—his almost exclusive answer holds on—that a genuinely constitutional culture, ...constitutional thinking and scale of values are missing from our society... and don't live in the citizens, [...] they don't bear, don't validate them... [for] priority of the financial values changed priority of the moral values... We condone of... We tolerate... we acknowledge, with conditioning brought still from the cheery shed of goulash-communism, keeping our mouth shut, while looking for a cosy corner for ourselves."

promulgate it. Therefore, only provided that anyone can be held responsible for the outcome, then he/she is responsible also for the prevailing result thereof, since nothing except the law can serve us as balm and defence in our daily affairs and societal troubles. Moreover, this responsibility is also objective, for neither former well-intention nor good faith of any of its authors can compensate us for incidental paltriness.

And what is about the people blessed by God, whose alleged immaturity is referred to this way by such highest jurists? Well, it is better for us to know what they certainly also know: no alleged immaturity may support any excuse or objection. Students of law in our country and also at other places of the world learn from their first university semester exactly that law is to serve by far not angels or ideal beings but frail humans: just a society composed of the most various individuals who are articulated in diverging interests and may in their variety span from the holiness of moral devotion to crookedness of a murderer. Or, law is not an ideal mind quiz, to be guessed for spending leisure time, but a demand for life or death of the cruel societal reality as given; the law has to share in its prevailing ruthlessness. Therefore we expect it to give answer to everything what can at all be imagined and what may occur actually. Moreover, jurisprudence directly suggests—what is evidence for our everyday sense too—that as law is what has been issued as such, we may not contest from it the incidental legislatory aim or the direct intent for what we now happen to miss in it. Since the law-maker calls also us when he keeps silence. Or, the one who as a member of the government having come into power by the first free election held after the destruction of four decades' dictatorship apologises now for the irrecoverable refraining from action of his past government by having deluded of their expectations of hoped-for modesty and withdrawal on behalf of the former beneficiaries,[2] will on final analysis declare himself also retrospectively irresponsible.

2 Cf., in representation of the characteristic answers of that time's governing forces, e.g., Géza Jeszenszky 'Bevallani a múltat! (Válasz Lovas István július 19-i írására)' [Confess the past! (Reply to István Lovas' article on 19 July)] *Magyar Nemzet* LXX (August 10, 2007) 212, p. 6 & <http://mn.mno.hu/index.mno?cikk=424579&rvt=15&rvt2=110&s_text=jeszenszky+g%E9za&s_texttype=1>.

As law assures equal chances in its game for all its addressees (until differentiation or discrimination is made), may we rightly wonder if anyone or groups of ones actually play it? May we resent from them that what we ourselves have granted to them? Did not we learn it already in early childhood that thunderbolt is used to act as thunderbolt, winter as winter, jackal as jackal, because all they had been created or made or developed like this? And is it not exactly for this very reason that we were convinced about all that that, by becoming adult, we could learn how to manage and defend ourselves from all these? And, in a civilisational perspective, do not we draw from the wisdom of the Far-East that our world is good because everything is such as it is and just for this given reason we have to surround it with ceaseless care and concern? Reviewing our European history, we know from JUSTINIAN, FREDERICK THE GREAT, NAPOLEON and all epoch-making legislators that he who sets the rules of the all-societal game will conceive a society according to ideas inherent in them.[3] Moreover, we may even make a step forward. Whether is anybody now irritated on grounds of Őszöd indeed?[4] Or, is one rather driven by the slowly ripening awareness that acting as unfaithful stewards, in the last two decades we have hardly gained, though we lost huge a lot from what we have still preserved as treasures from our legacy? Or, by the mere fact of living with reversed priorities, instead of caring for national defence and strategic survival, did we perhaps build castles in the air for a magic law indeed? For what other

3 In the waive of ancient fore-patterns, this deep idea, refined by the ideas of the Enlightenment, worked steadily all through in the rulers' and jurisprudents' inspiration of the legislation made during feudal absolutism and of the classical codification made in France, Austria, Germany, then in Switzerland, and further on as well uninterruptedly. For a theoretical background, cf., by the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp. and *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris].

4 As the relevant Wikipedia entry holds, "The Hungarian Prime Minister FERENC GYURCSÁNY gave a May 2006 closed meeting speech in Balatonőszöd to the *MSzP* [Hungarian Socialist Party] members of the National Assembly of Hungary. This meeting was supposed to be confidential but the Prime Minister' speech was taped and *Magyar Rádió* [Hungarian Radio] began broadcasting it late afternoon on Sunday September 17, 2006." See <http://en.wikipedia.org/wiki/Ferenc_Gyurcs%C3%A1ny%27s_speech_in_Balaton%C5%91sz%C3%B6d_in_2006_May> and <http://www.nowpublic.com/the_hungarian_prime_minister_has_a_fit_of_frankness> as well.

reason do anybody seem to be astonished now, watching gamblers who play exactly the rules of this law? Whether is it their responsibility if this law abounds in gaps upon which anyone may ground legally protected demands for scot-free? In turn, if I disapprove of whatever individual or group game in actual events, as stage manager I may exclusively be displeased at most at my own disability while having issued such rules. Moreover, in the name of the law I am not even entitled to denominate the subjects of my aversion, indignation or just apprehension, since in law I can only separate "us" from "them" in terms of rule abidance and rule breaking.

(With Moral Crisis behind It) Anatomising the spirit of law further in a dilemma—raised nowadays (although having the chance of occurring at any time in the past, present, and perhaps also in the future)—: if the head of the state would adjudge now that the governing party had won election by bounce, then—as recently he was emphetically called in journalism[5]—meeting his charges defined by the Constitution, he could/should even dissolve the parliament and proceed to new general elections; since anyone could qualify such a step as legally problematic only as a result of a procedure institutionalised to its authoritative statement; but calculating with power distribution in parliament, no forum needed for such a conclusion to reach could be easily formed. Well, such a reasoning seems to be much astounding at the first sight, although it is one of the basic messages of our modern formal law in fact that the journalist explained, as a foundation stone of our legal thinking everywhere. Accordingly—and contrary to everyday reason—no legal quality does hold in itself ("I have the right to" or "I have contravened the law") but only as an issue of the competent state organ having established it in a given procedure. Therefore irrespectively of the circumstance that the President of the Republic might have had good reason to be unwilling to commit

5 Péter Techet 'Ön se féljen, elnök úr' [Mr. President, neither you should be afraid of] *Magyar Nemzet* LXX (March 29, 2007) 74, p. 6 & <http://mn.mno.hu/index.mno?cikk=403932&rvt=15> and, in antecedence, cf. also his 'Az alkotmány őre és lehetőségei' [The guard of the Constitution and its possibilities] *Magyar Nemzet* LXIX (December 5, 2006) 284, p. 6 & <http://mn.mno.hu/index.mno?cikk=386245&rvt=15&norel=1&pass=3>.

himself to such a step all through hazardous and risky as being based on such a by far implicit and therefore extremely weak authorisation, his averting by reference to the absence of explicit warrant and refusal of any radical argument are still not of necessarily convincing a strength; at any rate, as compared to his own past in rights's protection, this is close to inconsequentiality when, turning against the prevailing practice of Socialism and in lack of formal licensing, he did not conclude still to prohibition, usual in dictatorships, but to the freedom of action open on the given field.[6]

Now reassuringly he is discoursing on moral crisis caused by, and implying the responsibility of, a party, of the Prime Minister and his government, which he claims to be the case, due to the confessions of the Prime Minister slipped out from a closed party-circle to the public. We may raise the question: what may be hidden behind the logic of such an attitude? Although we may freely agree with others' personal impression, it is worth examining from closer quarter this answer from the point of view of consequentiality and competence.

Truly speaking, stating moral crisis is a mere cover up of the fact that our proudly old-new Constitution he assisted to as the then founding President of the Constitutional Court and what he now as head of state proclaims to be unproblematic and not calling for change, has nothing to say about such a behaviour injurious to and eluding the very spirit of the Constitution, moreover, it has even less any disposal forbidding or sanctioning this. Or, if neither the head of state nor anybody else does dispose of any procedural path or in-law chance to sanction it, then it becomes also questionable whether or not we may at all take it as running against the law. And the wise answer formulated by other illustrious jurists,[7] according to which we are now to eat only what we have cooked for ourselves

6 László Sólyom 'Mit szabad és mit nem? Capriccio polgári jogi témákra' [What is permitted and what is not? Capriccio to civil law topics] *Valóság* XXVIII (1985) 8, pp. 12–24. It is to note that the perspective of the author as civil rights defender in the last years of Socialism was obviously that of the citizen, i.e., according to his personal interest and professional experience, mostly reduced to civil law, what certainly does not give assurance that it can directly be lifted or equated to that of public law.

7 See explicitly Zlinszky [note 1], in a manner similar to the stand of most jurist-politicians of today's opposition forces.

(since our wretched people would have or would have had to place its votes at general election more prudentially) may hardly be higher or more reassuring than if it were to protect such law and order within the range of which if attacked, I may at the most flee into suicide in want of any other legally protected alternative—and this not being forbidden, I may quiet down in the perfection of our tirelessly refined law and order beyond all doubts.

And may the jurist acting now as head of state venture a word on moral crisis? I think, just he could do it hardly, at any rate without undertaking any discrepancy lengthening into his own past. Since at the time of the unwarranted but rather apparent (albeit creeping) re-writing of our established Constitution, just the Constitutional Court he then headed cancelled—by limiting its understanding of the Rule of Law to nothing except formal certainty of and security in law, granting such an understanding also constitutional force in its safe awareness of infallibility—any relevance of considerations to justice, morality and/or rational common sense, from the circle of values preferredly protected in case a conflict would arise.[8] Thereby it had showered to the public in such an unforeseeable flow the release and emptying of law from its safest foundation, namely, morality, that a prominent workshop of constitutional law[9] was prompted within short notice to doubt also the constitutionality of the legal basis of the court ruling on the final condemnation of the financial manipulation in the TOCSIK affair,[10] granting a legally irreproachable status to the socially destructive corruption of the excuse "immoral but lawful".[11] In turn, if the Constitutional Court's above reasoning is justifiable at

8 For the background, context and international criticism, cf., by the author, 'Creeping Renovation of Law through Constitutional Judiciary?' in the present volume.

9 From the Chair of Constitutional Law at the University of Pécs, Péter Tilk 'A jogállamiság és a jóerkölcs viszonya a Ptk. semmisségi szabályában' [Relationship between rule of law and good moral in the rule of nullity of the Civil Code] *Cég és jog* [Company and law] V (2003) 12, pp. 4–6.

10 Cf., e.g., P. J. O'Rourke 'The Godfather Decade: An Encounter with Post-communist Corruption' *Foreign Affairs* (November–December 2000), p. 4 & <http://www.foreignpolicy.com/Ning/archive/archive/121/godfatherdecade.PDF>.

11 For recent treatment in professional fora, cf., e.g., the reviews by Murray L. Schwartz 'The Zeal of the Civil Advocate' *American Bar Foundation Research Journal* 8 (Summer 1983) 3, pp. 543–563 & <http://links.jstor.org/sici?sici=0361-9486(198322)8%3A3%3C

all, then the journalist's avant-garde call is also justifiable. For the undergraduate student of our faculty who acted here as journalist did not claim more than what the unprecedented innovation of the Constitutional Court did; merely he operated with replacements as referred to the given situation. Accordingly, if security in law stands for safety and certainty of legal assessment in practice, then by the judicial declaration of immoral contracts to be null and void the self-disqualification is retroactively peremptory. Consequently—as the constitutionalist's argument holds on—the underlying disposal could be constitutional only provided that the law defined by previously exhaustive precision what is to be considered as immoral. That is to say, in case the general clause of morality would be replaced by exact enumeration. Well, after all, taking seriously the logical consequence, references to both morality and value-boundedness should have for once and all been driven out of the domain of law.[12]

All in all, logic can only conclude from the founding constitutional fathers' stand (who for almost a decade could write

543%3ATZOTCA%3E2.0.CO%3B2-4> and Joseph P. Tomain 'The Legal Heresiarchs' *American Bar Foundation Research Journal* 9 (Summer 1984) 3, pp. 693–703 & <http://links.jstor.org/sici?sici=0361-9486(198422)9%3A3%3C693%3ATLHL%22G%3E2.0.CO%3B2-H>.

12 Luckily enough, our acting government did not slip into such a tragic dénouement. According to the new *Civil Code* in preparation by the Ministry for Justice—*Polgári törvénykönyv* Javaslat: Normaszöveg [Bill: Text] (Budapest, 2006. december 31.) & <http://www.irm.gov.hu/download/ptknormaszoveg.pdf/ptknormaszoveg.pdf>, § 5:72 [Contract contrary to good moral] "The contract obviously contrary to good moral is void." (p. 255). Its justification is quite unambiguous—not only in merit, but in answering our query as well. Accordingly, "the contract may also be invalid, if it runs against the demands of good moral without fringing upon any provision of the law. No view can be upheld according to which anything not forbidden explicitly by legal provisions may be freely done. [...] No legal provision is suitable to define in details the contentual limits and criteria of »good moral«. Anyway, once the moral norm has been transformed into a legal one to become a legal provision itself, the contract will not then be »obviously contrary to good moral« but to the legal provision itself. For the system of moral norms is not stated in legal norms. It gets formed firstly by public opinion, and judicial practice is destined to convey the system of moral norms—shaped by the accepted public opinion—to contractual law." *Polgári törvénykönyv* Ötödik könyv, Kötelmi jog; Javaslat: Normaszöveg és indokolás [Draft text and motivation of the Book V of the Civil code] (Budapest, July 31, 2006) & <http://www.irm.gov.hu/download/otodiktervezet.pdf/otodiktervezet.pdf>, p.76.

Within some months, however, by change of ministers, the following modification has in the meantime been inserted: § 5:74 "(1) The consumer contract obviously contrary to good

their "invisible constitution" by re-writing all through the contexture of the Constitution itself undisturbedly as adjudicating constitutional justices) that in want of explicit disposal and sanctioning, not even an election won by fraud may qualify as unlawful, moreover, its moral condemnation is also legally irrelevant, mattering hardly more than a private opinion. Accordingly, if the head of state denunciates the country's twisting in moral crisis without ascribing specific legal status or consequence to this (i.e., without the authoritative establishment of a case of law-abidance or law-breaking in official procedure), then he only shares with us his personal view or sociologising opinion, impersonalised by reference to public opinion. Or, it is just a debut symbolically asserting his moral self-portrait as a substitute action with moral radiation at the most.

At the same time, if worrying about present conditions we try to see deeper by detecting the enigmatic strings—which seem to disappear in various knots but the longer we continue untangling them, they appear as leading from the farer and (according to some fears) to the even more farer—of the road connecting the present with the past, on last resort all this seems to be as if our full political class set a trap for itself. Since till today, it has stood for both such Constitution and constitutional court adjudicational activism exhausted by creeping constitution re-making—apart from some occasional snort and naughty exhibitionism. In certain parts, parties and groups of it—accompanied by undivided hurrah on behalf of the country's jurisprudents and political scientists,

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moral is void. (2) The same as (1) holds also for contracts concluded through participation by organs and undertakings managing public property, as well as in cases stipulated by the law." <http://irm.gov.hu/download/ptk-normaszoveg-tervezet_20071029.pdf/ptk-normaszoveg-tervezet_20071029.pdf>. For—as its motivation holds—"In market economy it cannot be upheld as a general rule that contracting partners may encounter the available final sanction for anything not previously prohibited by positive law. This is to be held as the unproportionate limitation of contractual freedom. In case of consumer contracts as an exception to this the characteristically defenceless position of the customer is compensated by the recognition of widened judicial weighing. In other contractual relationships, the so called prohibited contract is fairly enough to assure the safe functioning of economy and business." *Az új Polgári Törvénykönyv tervezete* (Az Igazságügyi és Rendészeti Minisztérium 2007. december 3-ig közigazgatási egyeztetésre bocsátott javaslata) [Draft of the civil code] in <http://irm.gov.hu/download/ptk-osszefoglalo_20071029.pdf/ptk-osszefoglalo_20071029.pdf>.

rather than by raising questions or doubts responsibly—it has always concluded apparently negligible concessions only, taken temporarily as advantageous to some hidden secondary issues; however, under the spell of its own magnificent existence, survival, stratagem, power, and nearly endless freedom, it did not realise that such creativities in the service of diverging interests have always been directed to one single sense, by having ceaselessly run into the repeatedly further breaking down of still existing barriers.

(In Want of Legal Defence Available) And then, we have not said a word about cut-back of armed defence of the country, and, what is even more painfully to observe in my profession, about our glaring disinterest in the effective implementation of humanitarian law instruments to defend ourselves, our remained property and cultural goods, as compared to the preparation done in our nearer and farer neighbourhood. Just as if those responsible were actually to live in delirium fever of "the end of history",[13] calculating with their blessed activity to be carried on with national mandate in this historical environment in short-term only.

And what would happen if one day we awoke that outrage organised by the state would accompany civil governance? Could our law extend protection to us if it would happen—by any actor, for whatever reason and under any condition—that what had already occurred once, in the live laboratory of Socialism (to create a brave new world indeed): vanishing, tortures, murders were to be used by agents of the state machinery to "pacify" people, with proper foresight to that their acts should be granted pardon or become statute-barred within due time-limits? Whilst in over-politicised reactions to daily scrums or short-lived scandals via media, diligent preparations of new bills are on the agenda (mostly

13 In his theory, Francis Fukuyama—*The End of History and the Last Man* (New York: The Free Press & Toronto: Maxwell Macmillan Canada [& London: Penguin] 1992) xxiii + p. 418—as universal oracle in American mass-effect for some years, but soon withdrawn—because rocked by the next recognition subsequently transformed into a basic doctrine of the American world politics, cf., among others, Samuel P. Huntington 'The Clash of Civilizations' *Foreign Affairs* 72 (Summer 1993) 3, pp. 22–28 [enlarged in *The Clash of Civilizations and the Remaking of World Order* (New York: Simon & Schuster 1996) 367 pp.]—, already dreamed about the global victory of liberalism, in which there will be no reason left to fight for, since national autonomies as possible roots of conflict will lose their sense, too.

aiming further limitation of main civil rights only) and release some day of killers sentenced to life imprisonment is pondered by and through,[14] well, what would be the answer of our proudly self-conceited rule of law, if state terrorism in devastation of humans sweeped over our people again? Whatever shameful it may be, but: silence, incompetence and impotence. After one and half a decade unchangedly, the last word said on the issue is the same internationally unique decision of our Constitutional Court.[15] In accordance with it, the legality of the cynical negative self-prescription of the predecessor regime (just as an act of self-pardoning, also to be held unalterable) overwrites the chances of the successor regime. For the aerial nobleness of constitutional justices did not sense any difference in whether or not criminal prosecution had been to end without success despite efforts required by the law (e.g., in cases of infanticide or theft) or had been intimidated or deterred from having a start, that is, whether legal normality or abnormality by a state based on criminal terror over citizens and state machinery alike, had operated the period of statutory prescription to be expired. For it is to note that from that time on, neighbouring states have already edified from our inability, and edicted specific laws with the prospective effect that dictatorial annihilation of law shall never be recognised by the Rule of Law for fear that self-legalisation of terrorism can end in its re-legitimation and incite other states in trouble as well to have its test anew. Well, has any political force cropped up already in our country to prevent the repetition of such a scandalous solution *vis-à-vis* our future at least? Or has silence proven to be more advantageous for all involved partners, only to hide their former (often dubious) role?

Early 20th century author of the doctrine of modern formal law, HANS KELSEN cared in his time for himself building ramparts so that liberal democratic conviction may not endanger basic values by devaluating the protection of humans and their community. It

14 What at proper place and within due limits all may of course be rightly justified.

15 Cf. *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models, ed. Csaba Varga (Budapest 1994) xxvii + 178 pp. [Windsor Klub] and note 8.

seems that successors today are less tender, as they have been overcome—whatever should be the price of our self-closure in the bondage of paradoxes to be paid by all us in our common future for a long time—by mere principles of their own doctrinairism.

Csaba Varga

AT THE CROSSROADS OF CIVIL OBEDIENCE AND DISOBEDIENCE*

(Civil Disobedience) Civil disobedience is an idea that stands for confrontation and moral rebellion, describing one of the feasible ways of how to enforce our conscience's word. This is one of the historically developed choices for self-sacrificing for others in human altruism with implied risk taken, which exerts its impact mostly in particular manners, on by-pass roads it channels. Just because all its elements are thoroughly pervaded by undertaking a moral front as a most specific feature of it—the first time, the expression had been used by the moral hero THOREAU in his conscientious rebellion against American slavery, then by GHANDI launching a movement that conceptualised it as a programmatic tenet after more than half a century—, certainly it is not for antipathetic or cynical outsiders and even less for those counter-interested to qualify it. When the actor identifies his deed as civil disobedience, abbreviatedly he/she simply refers the intended reason and target back to a given tradition.

Civil disobedience is not a legal concept. Moreover, it is not part of the law's concept in a larger sense either, as it just denies the compulsory force of some valid law in the light of the superior validity of some higher order, in order just to change this very law. At the same time, not even the expression itself is a legal concept, as the law has no reference to it. Or, civil disobedience is an outside event, either heterogeneous or differently homogeneous, in the course of which some provision of the valid law is broken and to the perception of which the law can only react by meting out the prescribed sanction.

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* First published as 'A polgári engedetlenség és az erkölcs szava (Különösen visszás, ha a morális lázadás gyakorlását a közhatalom birtokosa minősítgeti)' [Civil disobedience and the ethical stand (It is outstandingly awkward to see representatives of the public power to qualify practiced moral rebellion)] *Magyar Nemzet* [Hungarian nation – a daily] LXX (2007. február 8.), Vélemény, p. 6 & <http://mn.mno.hu/index.mno?cikk=396021&rvt=15>, then enlarged as 'A polgári engedelmesség és engedetlenség válaszútjain' in *Az év esszéi 2007* Antológia [Anthology of the essays of the year], szerk. Andrea Ekler & Ildikó Rosonczy (Budapest: Magyar Napló Kiadó 2007), pp. 212–218.

At this point it is high time to revealing the subtly complex network of mutual impacts in operation between morality and law, when civil disobedience challenges both of them. For, on the one hand, civil disobedience is a moral challenge to law. It is an open declaration of conflict in terms of which the law is intentionally broken under some moral demand. On the other hand, the law which is calibrated to sense the outside world through the lenses of its own categorial system exclusively, may not and will not perceive anything else in this than the mere breach of some legal provisions. At the same time, considering the fact that civil disobedience usually achieves its target by forcing the legal machinery to response, the offense is mostly made publicly and with defiant unambigouity. For its provocative gesture is just aimed at excluding, on behalf of that machinery, any insensitivity, evasion, quibble or compromise solution by avoiding a definite answer to be offered by the law. On the law's side, all this is simply taken as an injury. For law has no access or path to sense moral gesture or tradition called civil disobedience in the deed, just because no such concept is provided for and by the law. Consequently, instead of the merits or moral connotations of the deed, exclusively the act through which the injury was committed will be named by the law. Accordingly, not even the fact that the offender acted magnanimously as pushed by moral considerations in order to provoke a change to be made in law can be part of the officially established facts of the case, unless there is a specific provision on all concrete individual circumstances of the deed to be both recorded and considered for the judgment rendered. Otherwise such moral motive is to be noticed within the proceedings as personal feature at the most—without its chance to add to legal qualification itself.

It follows therefrom that not even the conceptual expression itself is normative but merely descriptive as conventionally established. Albeit its moral motive offering self-sacrifice may be accompanied by pathos in its societal perception, this is hardly a reason to stint civil disobedients this quality by disqualifying them, if we happen not to agree with them or their deed. It is somewhat awkward to see representatives of state power to qualify civil

disobedience practiced. For those against whom moral rebellion (culminating in intentional law breaking) is directed are from the beginning loosers in the moral dilemma having led to civil disobedience: it was the civil disobedient and not them who first came out for against some insupportable condition. Their acquiescence is in vain covered by the holy gown of the rule of law; at most the conceptual levels will be mistaken, as the mere fact of having recoursed to civil disobedience will testify to that the institutional rule of law network failed—as proved to be helpless—in the given situation.

The operational mechanism of civil disobedience lies in dislocating state and legal practices from daily routine. They have either to punish (with teeth furiously locked up and taste bittered in the mouth) or to acknowledge own defeat, looking for bypasses to support the underlying moral cause. Or, civil disobedience is by definition exceptional and spoiling everyday peace by its declaring a conflict irrevocably. It is also of a polarising effect by announcing a split made in society, which is the more divisive the more live it is, the stake being the fate of moral considerations shared by powerful sectors of society.

Therefore it is understandable (although hardly sympathetic) to encounter power reactions these times—particularly when the official stand is not shared by the social majority—damping down the merits by either over-dimensioning the injury or rolling down the original intent to disqualify the person or his/her case.

The world must be abject in which such huge amount of insensitivity, stubborness, life-strange causeless conceit or simple power game may be compressed into symbolic values by gratuitous gestures that will either force the community to prostrate itself before the state's altar or lead to explosion. It is abject to encounter such a rule of law that in addition to repeating own mantras has no sensitivity left to curing actual troubles.

Situations of unlimited power are also dangerous for being at the same time both challenging and self-exciting. For Rule of Law remains an empty framework and mere procedural frame until it will be impregnated with contents worth of being lived in a democracy asserting final human values. Well, it was a one-sided

official act exercised as a symbolic gesture that the action of so called cordon removal called to account.[1]

It was strange to perceive continuity in that the same intellectual class of media that had once greeted past disorder (called taxi blockade) as movement of civil disobedience and heated it further in order to eventually overturn the government,[2] now, as unconsecrated prelate of omniscience, deprived the event of its quality of civil disobedience by identifying it with a party action, instead of a moral cause. At that time and now as well, media mainstream failed to cover its political judgment with objective knowledge or relevant arguments. For we may remember that taxi-blockaders, taken away by merely pecuniary self-interest, brought millions of humans into case of necessity, while its rousing fighters fled as rats from assuming the consequences of their unlawful acts. Accordingly, it is not an issue of political likes or dislikes whether or not we had to qualify the event as a case of civil disobedience or just of common law-breaking. In case we had called it civil disobedience, we would have deprived its concept of its differential sense by identifying mob reactions with the self-sacrificing moral espousal of HENRY DAVID THOREAU, MAHATMA GANDHI, MARTIN LUTHER KING and others, putting the state in an insoluble conflict: either excusing resistance with no sanction (risking the state's moral collapse) or meting out sanctions to a mass self-reproducing endlessly (unfeasible in any long run as threatening with institutional collapse). Well, the self-qualification is hardly to contest from those having dismantled the cordon yesterday if accompanied by the risk of getting sanctioned. Today's wisdom of mainstream journalism announcing it "contravention,

1 For the event on 2 February 2007, cf., e.g., <http://www.budapestsun.com/cikk.php?id=12083>, <http://www.budapestsun.com/cikk.php?id=12083> and <http://www.eppfrakcio.hu/en/new/96/>.

2 Cf., by the author, *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE "Comparative Legal Cultures" Project 1995), part on »Skirmishes and the Game's Rule«, pp. 91 et seq. [Philosophiae Iuris], and for the historical contexture, Nigel Swain *Hungary: Political Developments* 1989–90 (Liverpool: The University of Liverpool n.y.) 31 p. [Centre for Central and Eastern European Studies Working Paper 4] <http://www.liv.ac.uk/history/research/ceg_pdfs/Book4.pdf>.

not civil disobedience"[3] sneakes on total ignorance as to its genuine nature. (It is their old self that psychologically can exclusively motivate such a stand, which once channelled political decision makers to become reconciled to taxi blockade as civil disobedience and also granting blockaders mercy.) For—legally speaking—civil disobedience is common violation of the law which—speaking in terms of moral intention or the logic of a political action—, as committed intentionally, without violence, in public, with the penalty (which is by all means to be meted out) undertaken from the beginning, does serve ideal (not material) targets, just in order to induce change to be effected in law. Discussing the fact this time whether or not each and every procedural path in law has previously been exhausted is highly irrelevant. For, on the one hand, no such condition is implied by such an utterly a-legal concept, and, on the other, its long tradition refers this to those taking the risk to deliberate on the alternatives, if any; that is, if (even in a plain cost/benefit analysis) there are further ways open to them, leading to comparable outcome with less risks. In policing and judicial reaction to such injury, also government has to face this challenge by making it clear for the daily practice of constitutional civil rights, namely, what will separate civil governance from a police state, proceeding on with unquestionable autocracy.

It is worth wondering about chances, sense, dilemmas and limits of civil disobedience. One has to remember forerunners, emphasise the seriousness of offering ourselves to punishment and unconditional sacrifice, recall that the contemporary well developed doctrine of civil disobedience is due to a past when many heroes languished in long-term prison for their espousal. We have also to learn that civil disobedience as a pattern implies the danger of spreading, therefore it must be kept as an exception, not to easily allure to anarchical attitude—once we have actually reached legal normality.

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3 E.g., Gábor Halmai 'Ez nem polgári engedetlenség' *Népszabadság* [People' Liberty a daily] (3 February 2007) in <http://nol.hu/cikk/434059>.

(Civil Obedience) And what remains to society, if it chooses the way of civil obedience? It is sad to state but: hardly more than what can at all be met as coming from increasingly alienated reified structures. It might have already been a squealing sign to observe how much our society expected its own salvation to materialise from the all-curing idol of law and of the Rule of Law after the fall of Communism. Instead of common sense and well-planned responsible action not shrinking even from risks, it shed its hopes in rules and judgements made by others (as if the blind was to lead the blind). It resigned to the death of the deed once the magic words of prophets promising a brave new world from idleness got in its ear. And it became even more squealing a sign, when a major part threw away its natural sense of justice, when it was made to believe the superiority of alleged 'lawfulness' and 'constitutionality', said to derive from formal ideal operations with unvenalable automatism. After the Socialist regime had annihilated law, society began to adore it as a fetish. Albeit in the depth nothing else happened than what already COMENIUS had reported on,[4] watching "distinguished men" in the *Labyrinth of the World*, who, pushing mysterious linkages here and there on tables and

4 Jan Amos Komenský *Labyrint sveta a ráj srdce* (Amsterdam 1663), ch. 15: „*The Pilgrim Observes the Legal Profession* 1 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. 2 JUS CIRCA QUID VESETUR For, in the first place, I noticed that the barriers enclosed neither the soul, the mind, nor the body of man, but solely his property, which is of incidental importance to him; and it did not seem to me worthy of the extremely difficult toil that was, as I saw, expended upon it. 3 FUNDAMENTUM 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 millenium; and all with not a little pride. For the more a man broke through some bar or

monologuising about connections and separations, did in fact allocate fate of properties and empires, in a manner "founded upon the mere whim of a few men". This is to reach here what MARX had in a classical age rightfully grieved about, how much artefacts generated by humans ever for their own welfare can turn against humans by taking the rule over the world. As dazed from poppy seeds, we ourselves are also acting as cussed.[5] One may remember Russia having fallen in crushing chaos and misery due to the fury of mostly Americans chasing after profit, when less than a decade ago those profiteering from all this shouted: "More shock therapy!".[6] Well, as if we had nothing left except to nestle to the new moloch: "Still more law! More Rule of Law!".

We should eventually return to the rationality of natural sense to clear it finally: who is to serve? and whom? Is the fate of our nation for the law's sake or law is for man's sake? Were we born, do we live and die only to have an ideal legal perfectionism been fulfilled? Or, since we live, in our life we slowly build culture, then and therein law—in order to be improved?

Our system of election raised unusually high threshold to get in popular representation, thereby excluding just differentiated representation of the variety of life relations and historical experiences. We speak about morals with dandy affectation, only just against taking over of power through false means we do not have any remedy. And although our Constitution encourages people

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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. Observing this tomfoolery sufficiently, I shook my head, exclaiming: »Let us hurry away! I feel distressed here!« »Is there anything in the world to your liking?« my interpreter angrily retorted. »You find fault even with the noblest of callings, you weathercock!« »It seems that he is religious-minded; let us take him to see the clerical professions; perhaps he will find it to his liking,« Mr. Ubiquitous suggested." <http://www.oldlandmarks.com/lab15.htm>.

5 Cf., by the author, '»Thing« and Reification in Law' in his *The Place of Law in Lukács' World Concept* (Budapest: Akadémiai Kiadó 1985, ²1998), Appendix, pp. 160–184.

6 Stephen F. Cohen *Failed Cruisade* America and the Tragedy of Post-Communist Russia (New York & London: W.W. Norton & Company 2000). Cf., by the author, 'Failed Crusade: American Self: confidence, Russian Catastrophe' in the present volume.

to direct participation, today's descendants of those "distinguished men" limit it to a low-grade implementation. Our rush in human rights' defence is managed to become so perfect that real man can hardly survive it. For reassurance, we may also take notice of the right of resistance, protected already in the *Golden Bull* throughout our Middle Ages called dark,[7] but in our post-modern Enlightenment we—as alleged by the mainstream press[8]—proudly assigned it to Constitutional Court justices. Thus we have actually arrived at one of the best possible worlds, in which we have succeeded in making ourselves totally defenceless and unprotected. Not much is left from the property of the nation, however, even less from self-esteem and readiness to act. And not even pearls were received in return for our renunciation of the future.

I remember well how it seemed to be astoundingly brave and just frivolous to learn, when I was young, from DICEY,[9] genius of British constitutionalism, that all the achievement for what his nation had fought and made it a principle of everyday practice is based eventually on the force of public opinion, instead of formulas committed to paper. That is, for a mature nation, the genuine soul is not hidden in stones, rules, or reified entities. Strength is not drawn from such tangible ephemera but from cultural continuity. Otherwise speaking, what may be got into hand, whatever chased it should be, is only reminder. And what anyone thinks today is merely a daily affair. Or, successive days are not derived from stones or texts concluded the previous day—and certainly not cut out by geometric compasses and rules—but from what the nation will draw up out of itself in the challenge of the next day, actualising its own primordial tradition. People in a culture like this are never tired, because they are always ready to continue their further cultural adaptation, trusting in the continuability of such a

7 Cf., as a first orientation, <http://www.britannica.com/eb/article-9037229/Golden-Bull-of-1222> and <http://en.wikipedia.org/wiki/Golden_Bull_of_1222>.

8 Péter N. Nagy 'A tőkétől a kerítésig' [From the capital to the fence] *Népszabadság* [People's Liberty – a daily] (11 February 2007) in <http://nol.hu/cikk/434884/>.

9 Albert Venn Dicey *Introduction to the Study of the Law of the Constitutuion* [1885] 2nd. ed. (London: Macmillan 1923) and *Lectures on the Relation between Law and Public Opinion in England* during the Nineteenth Century [1905] 2nd ed. (London: Macmillan 1926).

culture and being matured enough to undertake responsibility—assured in that they may count on themselves.

In a social science perspective, the *Bible* is a corpus of historical wisdom on man. It tells us what is worthy to know about those having peopled the Earth (although others may regard it as dated, unable to meet the new profane requirements of political correctness). Since it reports on us as a herd to be kept driving by shepherds, who needs both birdlime and lash not to lose the way. We may get to know therefrom to be destined to get easily tired as unwilling to work. At the same time, we are easily tempted to the voices of sirens, although we should realise lastly that we can only arrive at what we have laboured for.

The historical data collection of Europe is a profusion of results due to bloody battles only. Our populous minorities are humiliated day to day in so called succesor states in our direct neighbourhood, however, instead of launching real fight, we sublimate our anxiety to self-discipline of dictions and artistic mourning. In consequence, our noble heart is adequately praised as we are busy with ourselves, not giving anybody much trouble. As known quite well, national entities that matter at all with a firm determination to reach anything are used to actually doing for it. Albeit voices of sirens are tempting everywhere to reducing desire to act and discouraging assessment of interests. For mostly those are tempted in fact who are already flabby to act and dissuaded from following own paths, even if rough. By reading newspapers, it catches your eyes who listens to such voices and who to whatever else. Because there is hardly to write anything about those enchanted by others.

Is law anywhere else better? Yes or no, but readiness to act may be greater. For those who listen to themselves and their articulated interests are ready to act: they know what law is for. Namely, it is to use it, since we have created it as part of our culture. It is not a fetish, so we do not idolise it. It is not our supra-natural commander, therefore we do not throw our fate in front of it as mere spoil. Law is my part what I live with, in order to pursue our collective life in a nobler way. And as we live our culture on a daily basis, we aim for implantation of all that is left to us in the

potential of our law and for seeing its fruits materialised again in our everyday life.

Law is not a goal, only means.[10] To live merely for means, I would lose perspectives. Goal may derive only from values resulting from our being a Godly creature and attached to our personal dignity. Our means may exclusively serve us, humans. And even if hindered, they can not divert us from the goal yet.

Have we resigned from forming our law? Have we abandoned dignity born with us in order to respect law not as our reified Lord but as our servant, formed as an artefact from ouselves? Have we declined to such extent that we place law—any law—as fetish to the altar of the highest reason of existence—instead of God? On last resort we should notice at least that no law formed by others is formed for us. Or, the sequence of MADÁCH describing the *Tragedy of Man* is by far not contingent: we have to *strive on* creating an anabasis upon which we can already nurture *trust*—by *having faith* in.[11] For, from miracle expectation, no planche will result, no solid soil inviting to pass on will emerge, as neither personality mature for struggle is likely to grow.

Our law has been formed by elites to their own pleasure. This is not simply good or bad, even if we are urged to observe that in significant regards it is alien to genuine needs, too doctrinal and weak, and avoids real problems to be faced.[12] Albeit with readiness to act we could shape it. This is the reason why we had better to develop an own civil society.

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10 See, by the author, 'Buts et moyens en droit' in *Giovanni Paolo II* Le vie della giustizia: Itinerari per il terzo millenio (Omaggio dei giuristi a Sua Santità nel XXV anno di pontificato) a cura die Aldo Loiodice & Massimo Vari (Roma: Bardi Editore & Libreria Editrice Vaticana 2003), pp. 71–75 and enlarged as 'Goals and Means in Law: or Janus-faced Abstract Rights' in *Jurisprudencija* [Vilnius: Mykolo Romerio Universitetas] (2005) 68(60): Terorizmas ir žmogaus teises, pp. 5–10 & <http://www.mruni.lt/padaliniai/leidyba/jurisprudencija/juris60.pdf> & <http://www.thomasinternational.org/projects/step/conferences/20050712budapest/varga1.htm>.

11 Imre Madách *The Tragedy of Man* [1860] trans. George Szirtes, ending by The Lord's words: "Man, I have spoken: strive on, trust, have faith!" in <http://mek.oszk.hu/00900/00918/html/madach15.htm>.

12 Cf., e.g., as a compendium of contemporary Western criticism, *Kiáltás gyakorlatiasságért a jogállami átmenetben* [Cry for practicalness in transition to rule of law] ed. Csaba Varga (Budapest: [AKAPrint] 1998) 122 pp. [Windsor Club II].

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† In [year(s)] following the title, the date of the publication—in case of authored works, of the version(s) in Hungarian, and in case of edited works, of the original publication—is indicated.

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Having explored aspects of law, justice to be administered as well as rule of law under limiting conditions, among others, in his book on *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest 1995) and documentation on *Coming to Terms with the Past under the Rule of Law* The German and the Czech Models (Budapest 1994), CSABA VARGA resumes now his interest on rule of law and change-over of laws, facing a criminal past and constitution remaking under the cover of adjudication activism, imposition doctrinarism and the quest for own theories, all in writings of the present book, collected from the last decade. Being sensitive of the issue why justice and legality has become antagonistic in the Constitutional Court marshalled new rule of law scheme in Hungary and how such scheme can at all survive if emptied from morality, his reflections are focussed especially on universalism *vs.* historical *hic et nunc* particularity of human ideas and institutions, on the vocation and nature, values and social preconditions of any rule of law, as well as on what in addition to merely formal certainty of the law is wanted for that the scheme itself can transform into liveable practice. International literature is assessed and reflected upon when applied to domestic and regional case studies and wide historical comparisons. Diagnosing change-over of past nihilism with recent fetishism of the legal instrumentality, the outcome is a cry for own theorising potential within the challenge-and-response paradigm, suitable to offer a perspective of historicity.