

**CSABA VARGA**

**ON TRANSFERS,  
TRANSITION,  
AND RENOVATION  
OF LAW**



**Papers in**

**Hungary's Legal Assistance Experiences  
in the Age of Globalization**



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The issue of legal effects resulting in a transfer of law(s) had belonged to the circle of investigation of comparative law until the past few decades. By legal history, it was addressed only as far as this was inevitable, as the subject of the national or comparative description of a path covered exactly this and not another way. On the other hand, legal sociology (with legal anthropology which was considered at that time mostly as legal sociology's extension to rural or otherwise primitive marginal conditions) used to treat the above issue exclusively as a means to diagnose some admitted dysfunctionalities in case of failure, seen as quite exceptional or abnormal (compared to success regarded as normal), or—rarely—in order to propose a therapeutic substitute or some bypass measure to be resorted to eventually in order to remedy it.

The situation has radically changed since. The phenomenon itself with the political interest vested in it and the scholarly challenge to understand it and learn from it has equally become general by today. This is expressed by the changing conceptualisation used to describe the phenomenon (which conceptualisations themselves do truly reflect the changes in emphasis having taken place over the past decades while legal transfer became a global process), on the one hand, and also by the scholarly debates that followed (while also provoked) this continuous refinement of emphasis, on the other. The fact that the centre of gravity is being more and more shifted upon legal culture as the medium of sustainment has, as a specific counterbalance, cast a new light on the mere technicality of law as a compact compound ensuring a series of tools, skills and abilities (faceless in themselves) for a given legal culture to develop and manifest itself at all.

All this makes it possible now to draw a few consequences in the light of some examples to be taken as case studies.

## **1. Terms**

### **'Rezeption' / 'octroi & imposition' / 'Rechtsexport'**

What we know as Roman law's European continental and Anglo-Saxon revival having taken a start as an almost cultic adaptation after centuries of almost total oblivion; or the worldwide spread having proven the partly cross-cultural success of (above all) the French, the Austrian and the German, as well as, later on, the Swiss codes; or the by far not insignificant influence by codes on the development of the American states' and federal law, by codes and kinds of code-substitute textbook-writing on the one of the British Commonwealth law, or, even later on, by the code-substituting enterprise of the Restablishment of the Law on the internal law-harmonisation of the United States of

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America<sup>1</sup> (in an arrangement usually regarded as alien to the conceptualised systemic ideal of codification,<sup>2</sup> for it mainly starts out from an empirical inductivism<sup>3</sup>), well, all this appeared as a natural and organic process in jurisprudential analysis to the extent that descriptive concepts, drawing on the European continental experience and widely used therein, notably, ‘reception [*Rezeption* in German<sup>4</sup>]’ and the French ‘*octroi*<sup>5</sup> [*imposition* in English<sup>6</sup>]’, could present themselves almost self-evidently. Although having formed in different ways from differing roots, now they constitute symmetrically opposite notions: the former describes action on the recipient’s behalf, tacitly suggesting initiation originating from him,<sup>7</sup> and the latter indicates the deliverer’s initiative and mere toleration by the recipient under some pressure.<sup>8</sup>

However, what we see is not only that—with the exception of the administratively implemented cases of the extension of laws, extorted through the French (and, to an insignificant extent, the Austrian and the German) military occupation, and of the British imperial law-harmonisation—each of the above instances indicate quite a spontaneous need and initiative, moreover, a sequence of actions exclusively on the receiver’s behalf (accompanied by an almost entire passivity of the deliverer); it can also be established that once the conquest or the colonial subjugation ended, the one-time *octroi* calmed down as mostly transformed into a voluntary reception.<sup>9</sup> Or, this is to say that the dictate

<sup>1</sup> For the entire circle of questions, see, from the author, *Codification as a Socio-historical Phenomenon* (Budapest: Akadémiai Kiadó 1991) viii + 391 pp., passim.

<sup>2</sup> The explication of Gunther A. Weiss ‘The Enchantment of Codification in the Common-Law World’ *Yale Journal of International Law* 25 (2000), pp. 435–532 proves, however, that the codification of the common private laws within the European Union is all but alien—and therefore not to be taken as an external challenge indeed—to the historical spirit of Anglo-Saxon law.

<sup>3</sup> Cf., from the author, ‘La Codification à l’aube du troisième millénaire’ in *Mélanges Paul Amselek* org. Gérard Cohen-Jonathan, Yves Gaudemet, Robert Hertzog, Patrick Wachsmann, Jean Waline (Bruxelles: Bruylant 2004), pp. 779–800.

<sup>4</sup> From Latin: ‘*recipere* / *receptiō*’; however, this is not used to refer to such processes in the English language. For all such English etymologies, see *The Compact Edition of The Oxford English Dictionary* [1971] Complete Text Reproduced Micrographically, I–II (Oxford: Oxford University Press) xii + 4116 pp.

<sup>5</sup> Practically unknown as an English word. ‘*Octroyer*’ known in French started to spread from the 15<sup>th</sup> century in English in the exclusive sense of ‘grant; concession; authorisation’, involving some constraint or dictate. True, the form ‘*octroy*’ as a verb has infrequently been used since 1865 in the above legal sense, however, this having been drawn from the German ‘*oktroieren*’.

<sup>6</sup> On the pattern of the French ‘*enposer*’ in the 11<sup>th</sup> century and ‘*imposer*’ from 1302 on] as adopted from the Latin ‘*impōnere*’, it is already known by the end of the 16<sup>th</sup> century, for example in this context: “The Imposition of this Law upon himself is his own free and voluntary Act.” Richard Hooker *Of the Lawes of Ecclesiasticall Politie* I (1594), ii, § 6, quoted in *The Oxford English Dictionary* [note 4], p. 1389 (101–102).

<sup>7</sup> E.g., Roland R. Bahr ‘Rezeption als Kulturbegegnung (Zur Notwendigkeit eines erweiterten Rezeptionsbegriffes für die Beurteilung moderner Rechtsrezeptionen)’ *Ritsumeikan Law Review* (1987), No. 2, pp. 35–62; Ernst E. Hirsch *Rezeption als sozialer Prozeß* Erläutert am Beispiel der Türkei (1981) 139 pp. [Schriftenreihe zur Rechtssoziologie und Rechtstatsachenforschung 50]; Imre Zajtay ‘Die Rezeption fremder Rechte und die Rechtsvergleichung’ *Archiv für die civilistische Praxis* 156 (1957), pp. 361 et seq.; Andreas B. Schwartz ‘Rezeption und Assimilation ausländischer Rechte’ in his *Rechtsgeschichte und Gegenwart* Gesammelte Schriften zur Privatrechtsgeschichte und Rechtsvergleichung, hrsg. Hans Thieme & Franz Wieacker (Karlsruhe: Müller 1960), pp. 581 et seq. [Freiburger staats- und rechtswissenschaftliche Aghandlungen 13]; Alan Watson ‘Aspects of Reception of Law’ *The American Journal of Comparative Law* 44 (Spring 1996) 2, pp. 335–351; C. C. Turpin ‘The Reception of Roman Law’ *The Irish Jurist* III (1968), pp. 162–174; Peter Bender *Die Rezeption des römischen Rechts im Urteil der deutschen Rechtswissenschaft* (Frankfurt am Main & Bern: Lang 1979) 168 pp. [Rechtshistorische Reihe 8]; Ernst Pritsch ‘Das Schweizerische Zivilgesetzbuch in der Türkei – seine Rezeption und die Frage seiner Bewährung’ *Zeitschrift für vergleichende Rechtswissenschaft* 59 (1957), pp. 123 et seq.

<sup>8</sup> The German term ‘*Rechtsexport*’ is similar to it in many respects. Cf., e.g., Wolfgang Babeck ‘Stolpersteine des internationalen Rechtsexports’ *Aus dem Westen was Neues* (2002), No. 4: Interessenpolitik durch Rechtsexport [[www.forum-recht-online.de/2002/402/402babeck.htm](http://www.forum-recht-online.de/2002/402/402babeck.htm)].

<sup>9</sup> As ALAN WATSON has rightly observed, it is exactly this duality—even if once accepted under pressure, yet hardly replaceable by anything better today—that should encourage us to realise that such great historical transfers of law



*ratione imperii* had this time become replaced by a continuation *imperio rationis* for eternity, upon no conditionality by now.

The above symmetric conceptual designation—‘reception’ and ‘*octroi*’—can therefore also serve to draw a genealogical chain, or legal mapping within a taxonomic systematisation of legal systems through the generic concept organised by so called ‘legal families’. The above terms can therefore all along symbolise the great successes from Japanese legal modernisation to Turkish law-laicisation which, no matter how double-faced they appeared later on (in the light of legal anthropology’s more refined research methods),<sup>10</sup> had once implied a breakthrough on the whole, resulting doubtlessly in an almost complete change-over of laws as to their basic functions, and, thus, also in a success as to their objectives.

In the background, the comparative legal movement which has been originated, characteristically, on the European continent in the early 20<sup>th</sup> century, perceived above all a difference between the cultures of Civil Law and Common Law, most strikingly broken away from each other at the time. Otherwise speaking, it regarded the historical cultures of the one-time great Mediterranean (taken from the Egyptian, Mesopotamian and Jewish, via the Roman, to the Islamic and German ones), exclusively as either continued or discontinued historical preliminaries to these, for drawing up—by natural derivation from these all—the taxonomic map, exhaustive of the known legal systems in the past and present world.

### ‘*transfert de droit*’ / ‘legal borrowing’

‘Transfer of law [*transfert de droit*]<sup>11</sup>’ is a French conceptual product of the mid-20<sup>th</sup> century,<sup>12</sup> describing the law’s movement from the perspective of a neutral imaginary centre, in result of which something taken as a law (with its approach, doctrine, solution, rule, institution, or the partial or total set of these all) will serve as a law not only at a certain place (of origin) *A* but, from a given time on, also at a place (of reception) *B*, unknown to the latter until then but then getting transferred there in some way.

A similarly neutral meaning is implied by the expression ‘legal borrowing’, widespread in Anglo-American usage. It is not so much usual there as ‘*Rezeption*’ is prevalent in German; true, it does not tell more, either. For the term ‘borrowing’ expresses the same move in the same direction, albeit describing the action not from the side of receiving but from the one of borrowing.

### ‘legal transplant’

It is this setting in which *Legal Transplants*, the historical overview published by ALAN WATSON (professor of continental private law history at the time in Edinburgh) made a hit. This magisterial work marked a brand new path even in WATSON’s personal oeuvre, until then mainly focussed on Roman private law. It revealed the experience of the author’s elementary recognition (without taking genuine notice of the precursor “law of

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may have embodied some kind of optimality on the whole (even if we do not always exactly reconstruct what we have actually done in the given moment and why).

<sup>10</sup> Cf., e.g., June Starr *Dispute and Settlement in Rural Turkey* (Leiden: Brill 1978).

<sup>11</sup> From Latin: ‘*trans+ferre*’; in English ‘*transfer*’, used in the above sense as today from 1392.

<sup>12</sup> Jean Gaudemet ‘Les transferts de droit’ in *L’Année sociologique* 27 (1976), pp. 29–59 [Sociologie du droit et de la justice].

imitation", widely known for long on the entire field of cultural sociology by then<sup>13</sup>); notably, the realisation according to which imitation—i.e., instead of own invention, the utilisation of something belonging to someone else but freely available to anyone by mere chance at some given time—is one of the greatest varying invariants as incentive and practice, and indeed, as a backgrounding motive force in the history of legal development.<sup>14</sup>

So, 'legal transplant' has become a fashionable call-word and has, by virtue of its visual expressive properties, not only facilitated it for scholarly interest to open up towards problems at its heart but—seizing upon the eventualities of its metaphorical penumbra—was used as a pretext to engender specific controversies, too. Namely, 'transplant' as an English word of an obviously botanical origin, stemming from '*trans+plant+äre*', is proved to have been used as a verb in the sense 'to transplant [a seedling]' since 1440 and, as a noun—'[a seedling that has been transplanted]'—since 1756. It has been used as a metaphorical verbal expression, 'to transplant [a person]', since 1555 and, with a meaning 'to transplant [a people, etc.]' related to a larger group of people, since 1608. Later on, it has been known in a surgical context—transplantation of skin or of an organ—since 1786.<sup>15</sup> And this metaphor doubtlessly taken from far away, has by 1974 become the object of a further metaphorical association built upon the last, and now, owing to WATSON, we speak of 'legal transplant' upon the surgical pattern of organ-transplantation, likewise involving both a donor and a recipient.<sup>16</sup>

Whether this expression is felicitous or less so is perhaps an open question now, left to time to decide on. It is misunderstandable if one wants to, no doubt. And it seems that just as our human barbarities are able to overpower everything else with a so far unknown, targeted cruelty (perhaps as an outburst of the instinctual life suppressed more and more consistently in our so-called civilisatory development)—despite our days' growingly powerful homogenising socialisations, which are artificially constructed and, as such, do also incorporate inherently anti-natural urges—, well, sometimes it is exclusively the lack of coverage of our rationality that emerges from behind our scholarly self-assurance: the nakedness of the King in the well-known parable. Anyway, it appears also from the context referred to above that the word-magic in the way we cultivate scholarship is strong enough to generate debates, contradictions, negations—i.e., sets of misunderstanding mixing up or equating external linguistic forms with actual subjects even in productive thought—out of obviously metaphorical expressions that are surrounded by feasible associations which, if extrapolated, may lead to directions alien to the very actual subject; that is, we may leisurely debate on what—in so far as it could at all be taken conceptually seriously—should be regarded at least visually confused in its linguistic expression; in a manner as if jurisprudence had—obeying the still prevailing spirit of the worst of the German *Begriffshimmel's* doctrinarian traditions—no other subject except empty words, lacking any real reference.

<sup>13</sup> Gabriel Tarde *Les lois de l'imitation* Étude sociologique (Paris: Alcan 1890).

<sup>14</sup> Alan Watson *Legal Transplants* An Approach to Comparative Law (Edinburgh: Scottish Academic Press 1974).

<sup>15</sup> Cf. *The Oxford English Dictionary* [note 4], passim, as well as David Nelken 'Towards a Sociology of Legal Adaptation' in *Adapting Legal Cultures* ed. David Nelken & Johannes Feest (Oxford: Hart Publishing 2001), pp. 7–54 [The Ofati International Institute for the Sociology of Law], in particular at pp. 17–18, note 10.

<sup>16</sup> The word 'transplantation' in a legal sense is not used in English. However, in the compound of words 'legal transplant', the noun refers to the transplant itself, the *transplantatum*: "That which is transplanted; *spec.* in forestry, a seedling transplanted once or several times." *The Oxford English Dictionary* [note 4], p. 3384 (275/2).



In a surgical context, it is obvious that, being transplanted, a piece of skin, a half-kidney, or a pig's heart will either function further on and in the same way as the own organ, or will be thrown out (which means the failure of the intervention), or—according to a mere hypothesis constructible exclusively logically, having not occurred yet and inconceivable to ever occur in practice—it starts functioning in a different way (which, again, will in conclusion be equal to the second version, i.e., a medical failure, fatal again for the patient).

Still staying within a biological context, the transplanted organ may prove to be more vulnerable, less capable of either reaction or self-regeneration, or simply embodying a weaker version of its earlier self, while remaining otherwise identical with its original self. And again, in terms of biology, the analogy taken from forestry or general botany has probably similar possibilities too to offer. Another common feature is that once a seedling, plant, tree, piece of animal or human skin or organ is transplanted, every connection will be cut between the 'transplanter [from whom/what something is transplanted]' and the 'transplantee [into whom/what the *transplantatum* is transplanted]'<sup>17</sup> from the aspect of what has got transplanted. The transplant will from then on be exclusively connected to its new bearing environment, with no contact whatsoever with and chance to rely on its original bearing environment any longer.

Related to man's social mode of existence, however, be it an individual or an entire group of people that are "transplanted", it is obvious that, transcending the biological level, we ourselves can undergo a transformation in the receiving new environment. And this is quite natural an outcome. After all we do not live in order to reproduce some pure identity in ourselves as self-(re)generating automatons, but we live in a way (and we live for that we can live) by continually responding to the challenges of the prevailing (in our case: the new) environment, taken in a narrower or wider sense. Therefore, our ability to respond will grow both in diversity and internal differentiation as compared to the earlier status and expectations as well. In sum, the use of this metaphor in a social context presents the transplant—in contrast to the biological (botanical and human surgical) analogy, focussed on a functional reproduction of (self)identity—in direct interaction with and dependence upon its own new bearer and environment, as evolving from their further mutual development. Accordingly, as contrasted to the biological use of the metaphor, transplantation in a social sense can involve contacts with the former bearer and environment preserved, but exclusively in the outcome of an act not yet included in the merely factual act of transplantation made. That is, contact with the former bearing environment is feasible only provided that we aim, for instance, at caring for an uninterruptedly continuous interaction with the former one, instead of an *uno actu* effect extracted by one single occasion, notably by the very act of the once-made transplantation.<sup>18</sup>

As we shall see, contemporary scholarship has seized upon such a variety of associations, just to afford itself a problem (unnecessarily? artificially? perhaps still in a way to provoke some kind of a conceptual clarification) from the above metaphor.

<sup>17</sup> The terms have occurred—though rather rarely—since 1611, respectively since 1687.

<sup>18</sup> Although it is true that "part of the aim may also be somehow to recreate some aspects of the wider context from which the transplant is taken", yet, running against Nelken's quoted opinion (note 15, p. 19), the difference between the biological and the social is still not criterion-like, because conditions of further impacts by the original setting can, to some extent and in principle, be created and also set as a target in case of botanical and surgical transplantation as well.



Nevertheless, 'legal borrowing' and 'legal transplant', used merely as a signal without particular conceptual elaboration, have proven fit for WATSON to accentuatedly express the realisation he made as a legal historian, namely, that the real process of legal development and improvement takes place through patterns wandering here and there, by the pragmatism of MOLIÈRE in that "*je prends mon bien où je trouve*", in the manner of adoptions and adaptations of the continuously further developed solutions, taken from anywhere in the meantime or in the beginnings.<sup>19</sup>

*'building market economy, democracy and rule of law' / 'guaranteeing human rights' & 'European common law codification' & 'Law and Development' / 'Modernization and Law' / 'droit du développement'*

Today, when this realisation revealed three decades ago is already a common sense and the exerting of influence through exporting (even by a mercantile mentality, focussing above all on own profit, as mediated by "double agents"<sup>20</sup> trading with) legal patterns has become both trend-like and established and professionally routinised as a practice (in the main profile activity for centres concentrating capital and/or knowledge), new terms start replacing the old ones. 'Globalisation', 'building market economy, democracy, and rule of law', 'guaranteeing human rights', 'European common law codification'—when using such terms, we know exactly what and in what context we mean, that is, that shaping of laws upon basically external models is now at stake, although approaches and actors, chosen ways and instruments, methods and procedures may vary extremely.

We arrive at the same conclusion when we describe the organised interest in transfers of law, expressed now by academias and universities and even newly specialising branches of law. Well, 'Law and Development' denotes a clearly defined (and by now dated) ideology, implied by an American topic of research.<sup>21</sup> 'Modernization and Law' (or, more precisely, 'Modernization through the Law') refers to a specialised inquiry within legal sociology, related to the developing countries as well as the entire Central and Eastern European region as cultivated there and the entire Western world. '*Droit du développement*' denotes specialised learning taken as a branch of legal regulation and relevant practical experience,<sup>22</sup> free of ideology (beyond the national self-centredness still reluctant to leave behind the surviving memory of the French *gloire* and its irradiation).

'legal aid' & 'legal assistance'

<sup>19</sup> According to the present author's summation, reflecting his experience then, "Could it be that inertia is the most effective medium for human society to develop? Could it be that imitation is the humans' most lasting contribution to their own survival on more and more advanced conditions?" Csaba Varga 'Jogátültetés, avagy a kölcsönzés mint egyetemes jogfejlesztő tényező' [Transplanting of laws, or borrowing as a universal factor of legal development] *Allam- és Jogtudomány* XXIII (1980) 2, p. 191.

<sup>20</sup> Cf., e.g., Yves Dezalay & Bryant Garth 'The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars' in *Adapting Legal Cultures* [note 15], ch. 11, pp. 241–255, in particular on p. 246.

<sup>21</sup> E.g., *Law and Development* ed. Anthony Carty (Aldershot: Dartmouth 1992) [The International Library of Essays in Law & Legal Theory, Legal Cultures 2].

<sup>22</sup> Hence there are already 'development lawyers' as specialised agents in USA-based government agencies and big non-governmental organizations. Cf. Herbert Christian Merillat 'Law and Developing Countries' *The American Journal of International Law* 60 (1966), pp. 71 et seq., particularly on pp. 72 and 78.

Going on in the analysis of such proliferating terms, '[foreign] legal aid' or, more frequently and euphemistically, 'legal assistance [or in German: *Rechtsberatung*]',<sup>23</sup> are also the product of the same intellectual environment, focussing on the actor who takes the initiative by exerting an influence—terms neutral in themselves, instrumentally expressed. Regarding the form of action denoted, these latter expressions are even less definite than the former ones have been. However, in contrast to all terms surveyed in the previous paragraphs, this one does no longer conceive of law in its simple textuality; consequently, it does not trace the effect of external patterns upon the law (through refining its institutional regulative network) back to merely textual adoption. Symbolically, we can even perhaps postulate that the outcome is not any longer the product of "Comparative Law" (rooted back in rule-positivism) but the one of "Comparative Legal Cultures" (emphasising the moment of tradition and culture underlying mere forms).<sup>24</sup>

For legal assistance (with a variety of kinds of aid) may mobilise a multitude of procedures and methods, ranging from the cultural shaping of the interpreting (hermeneutical) background, via the organisation of the frameworks within and through which tradition is followed, knowledge is disseminated and educational targets and networks are set up, up to making the circle of the targeted professionals and/or addressees involved.

The common feature of all this is that textual adoption of law (in the form of rules) is from now on only one in the huge and extendable store of instruments. And providing that this is only one conceivable partial element among many others, its position will also be different in this case. After all, now the text is not the exclusive and by far not the final carrier of the law any longer. It is legal culture, interpreted as a whole, that alone is capable of giving the transplanted text—so far as such exists at all—both a significance and meaning.

Therefore, at the present level of our scholarly reconstruction, maybe this is the most adequate and comprehensive, at the same time the least specified concept, for it indicates only the intention of development and an external aid or assistance. All it conveys is that there is an external pattern and/or organisation assisting the transformation of law.

## 2. Technicality

In his original work, WATSON affords no definition to the concept. He simply speaks of the phenomenon of "moving of a rule" or of the "continual massive borrowing [ ] of rules".<sup>25</sup> He has given more details much later—in fact, only today, in responding to criticism. Now, however, he already surmises from the outset as obvious that "a rule once transplanted is different in its new home", and albeit he conceives of rule in the spirit of legal positivism, this is by far not taken from within the narrower-minded

<sup>23</sup> Cf., e.g., Mark M. Boguslawskij & Rolf Knieper *Konzepte für Rechtsberatung in Transformationsstaaten* (1995) and Wolfgang Gaul 'Sinn und Unsinn internationaler Rechtsberatung' in *Recht in der Transformation* Rechts- und Verfassungswandel in Mittel- und Osteuropa. Beiträge zur Debatte, hrsg. Christian Boulanger (Berlin: Berliner Debatte Wiss.-Ve. 2002), pp. 102 et seq. [Potsdamer Textbücher 7].

<sup>24</sup> Cf., from the author, 'Comparative Legal Cultures: Attempts at Conceptualization' *Acta Juridica Hungarica* 38 (1997) I 2, pp. 53–63 and 'Összehasonlító jogi kultúrák?' *Jogtudományi Közlemények* LVI (October, 2001) 10, pp. 409–416 & forthcoming as 'Comparative Legal Cultures?' in *Law Congress 2006* (Ankara: Ankara Bar Association).

<sup>25</sup> Alan Watson *Legal Transplants* 2<sup>nd</sup> ed. (Athens, Ga.: University of Georgia Press 1993), pp. 21 and 107.



rule-positivism of H. L. A. HART and the modern English analytic school, as he declares now as similarly obvious that “it is rules—not just statutory rules—institutions, legal concepts, and structures that are borrowed”. As an example, he quotes the memory of “a strongly held belief that throughout the Empire feudal law was one and the same, even if not identical from one state to the next. The lesson must be that through transplants law becomes similar, even if not identical, in many jurisdictions”.<sup>26</sup>

On more careful reading—not necessarily characterising our days’ reviewers—it can be noticed that actually he did give the key definition in his original work indeed, even if not in a way to fix contemporary critics’ attention. For as he declared at once as a temporary summary,

“law like technology is very much the fruit of human experience. Just as very few people have thought of the wheel yet once invented its advantages can be seen and the wheel used by many, some important legal rules are invented by a few people or nations, and once invented their value can readily be appreciated, and the rules themselves adopted for the needs of many nations.”<sup>27</sup>

Based on this, he himself has revised his earlier thesis of societal inertia,<sup>28</sup> by claiming that rules that may seem dysfunctional do not validate themselves as independent powers in a thoroughly mechanical social insensitivity, as they get applied by legal professionals, socialised in a culture that is able to transform, through interpretative skills, even formalisms inadequate in themselves into schemes made to function acceptably in practice.<sup>29</sup>

It is apparent, irrespective of his subsequent clarifications, that WATSON had in fact originally indeed insisted on the formal understanding of law. I myself had pointed out its restrictive tendency in my review at the time, indicating that

“when he speaks of law, of legal borrowing or legal change, he always means the written body of the rules of posited law. He does not conceive of the legal complex in its compound nature. For he separates from its ontic functioning the technical (conceptual, systemic, institutional, etc.) framework and medium of the law’s exerting an influence, which then gets expressed by shifts of emphasis and even distortions in his results.”<sup>30</sup>

<sup>26</sup> Alan Watson ‘Legal Transplants and European Private Law’ *E[lectronic]J[ournal of]C[omparative]L[aw]* 4 (December 2000) 4 [Ius Commune Lectures on European Private Law 2] [www.ejcl.org/ejcl/44/44-2.html](http://www.ejcl.org/ejcl/44/44-2.html), pp. 2 & 2 and 4.

<sup>27</sup> Watson [note 14], pp. 95–100.

<sup>28</sup> For its simultaneous criticism, see Richard L. Abel ‘Law as Lag: Inertia as a Social Theory of Law’ *Michigan Law Review* 80 (1982), pp. 785–809 and, for a criticism of the mirror theory involved in it, William Ewald ‘Comparative Jurisprudence (II): The Logic of Legal Transplants’ *The American Journal of Comparative Law* 43 (1995), pp. 489–510.

<sup>29</sup> Alan Watson ‘Legal Change: Sources of Law and Legal Culture’ *University of Pennsylvania Law Review* 131 (1982), pp. 1121–1157. This position is already halfway towards taking the opposite one—treating law as »a system of meaning« by which human experience is both shaped and represented—, as pointed out by its later improver, Edward M. Wise ‘The Transplant of Legal Patterns’ *The American Journal of Comparative Law* 38 (1990) 1, pp. 1–22.

<sup>30</sup> From the author, ‘Tehetlenség és kölcsönzés mint a jogfejlődés döntő tényezői’ [Inertia and borrowing as main factors in legal development {a review on Alan Watson ‘Comparative Law and Legal Change’ *The Cambridge Law*



Well, if and insofar as a

POPPER → KUHN → FEYERABEND

scheme of intellectual derivation can be justified in the philosophy of science at all, some suggest the relevance of the

ZWEIGERT-KÖTZ → WATSON → LEGRAND

sequence of development in the realm of the methodological approach to the comparison of laws as its equivalent.<sup>31</sup> After PAUL FEYERABEND methodologically destroyed<sup>32</sup> the frameworks within which THOMAS KUHN (following KARL POPPER's classical thoughts)<sup>33</sup> could at all depict scientific development in a self-disciplining process of traditions followed<sup>34</sup>—transcending the latter by offering a completely different framework of interpretation based on stochastic incidentalities building upon each other successively and solidifying as a standing practice—, well, after such preliminaries, interest in LEGRAND's accomplishment in transcendence became obviously enhanced.

As known, PIERRE LEGRAND has been waging to fight a two-front struggle for more than one and a half decades, with messages of the same substance. As WATSON's critic on a theoretical basis and as committed by his practical conviction, he felt he had the vocation to alert on that the common private law codification of the European Union with a *rapprochement* between the Civil Law and the Common Law, visualised as getting amalgamated in the foreseeable future, is not a realistic expectation. For LEGRAND has for long been of the opinion that law taken as a rule, as a merely textual objectivation, is simply uninterpretable without the deeper comprehension of the background culture, giving significance and meaning to all it. Or, rule and ruling culture are complementary aspects of one and the same entity, with components in interaction. Accordingly, what in fact underlies the eventual similarity or difference between rules, and/or the duality, of the Civil Law and the Common Law, is simply a difference between diverging developments and firmly established traditions. Basically, two entirely differing *mentalités juridiques* are at stake that cannot be brought to a common denominator. Therefore their difference in origins and underlying cultures cannot be unified overnight either by an act of will or simple resolution. One has to conclude that all these differences are to be taken as genuine *donnés* (or given conditions) which may have also shaped the backgrounding popular mind in history, so new *donnés*, able to overrun them or to compel them to break new paths, can only result from a momentous historical development, generating such new conditions. Well, such a *donné* can of course develop some time in the future; its development may be encouraged, moreover, openly promoted and even accelerated; yet by no means be generated from one day to another through a mere selection of some instrument and its temporary application.

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*Journal* 37 (1978) 2, pp. 315–336} *Jogi Tudósító* X (1979) 11–12, pp. 4–9, in particular p. 6 {reprinted in Csaba Varga *Jogi elméletek, jogi kultúrák* [Legal theories and legal cultures: review articles in philosophy of law and comparative law] (Budapest: ELTE "Comparative Legal Cultures" Project 1994) xix + 503 pp. [Jogfilozófiák], in particular p. 205}.

<sup>31</sup> Burkhard Schafer 'Form Follows Function Fails—As a Sociological Foundation of Comparative Law' *Social Epistemology* 13 (1999) 2, pp. 113–128.

<sup>32</sup> Paul Feyerabend *Against Method* Outline of an Anarchistic Theory of Knowledge (London: NLB 1975) 339 pp.

<sup>33</sup> Karl Popper *The Logic of Scientific Discovery* (New York: Basic Books 1959) 480 pp.

<sup>34</sup> Thomas S. Kuhn *The Structure of Scientific Revolution* [1962] 2<sup>nd</sup> enlarged ed. (Chicago: The University of Chicago Press 1970) [Foundation of the Unity of Sciences II:2].

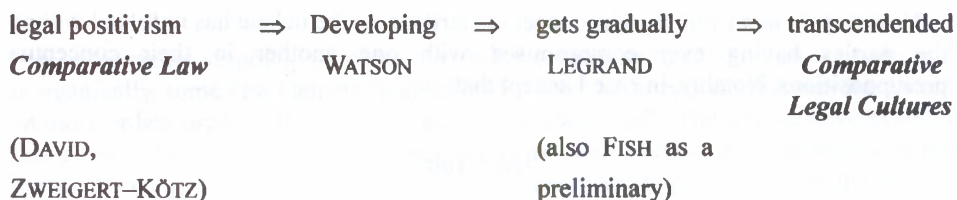
As their debate sharpened recently, LEGRAND too was hastened to give more details. As he declared, “a rule is never totally self-explanatory”, because this—being in itself nothing but a “surface phenomenon”<sup>35</sup>—cannot mean anything, either. And if we take rules in their involvement of meaning, then, transplantation is hopeless an undertaking from the very beginning. For assignment of meaning to a text, or definition of a meaning by a text, in a new environment is by far not yet perfected through the mere act of the physical transfer of a form, symbol or text (or of the extension of their respective validity by ordering the same elsewhere). As he goes on, “the rule that was »there« [ ] is not itself displaced over »here«.”—for more is at stake. He is right by declaring that “A rule is necessarily an incorporative cultural form.” Consequently, it is no use transferring just linguistic signs as nothing but symbols. When we try to get them rooted in another medium and environment, they will develop a new meaning more or less independently of the one grown in their original medium and environment. So one may conclude that “The borrowed form of words, thus, rapidly finds itself indigenised on account of the host culture’s inherent integrative capacity.” To sum up: no whole can be determined from the part, but the whole will be given (with)in its (new) context—after all, “*extra culturam nihil datur*.”<sup>36</sup>

If and insofar as the aforementioned sequence of intellectual derivation in the contemporary history of science philosophy has any meaning and relevance to our question at all, then it is—for me at least—nothing else than raising a critical aspect by its own right upon the basis of the Sisyphean work of experimental foundation and research in details and applications. Well, LEGRAND’s suggestion as one of the critical voices should actually enrich the methodological complexity of the problem’s approach, but having itself become one-focussed, it rather warns us for caution and modesty, while both theses, the criticising and the criticised ones as well, arrive, following their own logic, at their own limiting extreme values. If, therefore, such a scheme of origination as a sequence of development may have any message to us at all, I would find a representation like below more or less indicative of the path taken just recently:

<sup>35</sup> The term ‘surface phenomenon’ is used by Viktor Smith in his ‘Linguistic Diversity and the Convergence of European Legal Systems and Cultures: Is Legrand’s Pessimism Justified?’ in [pre-print for] *Langue et Culture / Language and Culture* [Copenhagen Studies in Language] 29 (2004), p. 2.

<sup>36</sup> The further quotes in this paragraph are from Pierre Legrand ‘What »Legal Transplants«?’ in *Adapting Legal Cultures*, pp. 55–70, in particular on pp. 57–58, 61, 59, 62 and 63. According to a suited statement quoted by him [E. Hoffman *Lost in Translation* (London: Minerva 1991), p. 275], “to translate a language, or a text, without changing its meaning, one would have to transport its audience as well”. As Max Rheinstein’s classical statement [‘Comparative Law – Its Functions, Methods and Usages’ *Arkansas Law Review* 22 (1968), p. 419] held nearly four decades ago, “Even words of the same language may have different meanings in different legal systems”, because—as pointed out in our days’ classic in hermeneutical approach [Hans-Georg Gadamer *Truth and Method* 2<sup>nd</sup> ed. trans. J. Winsheimer & D. B. Marshall (London: Sheed and Ward 1993), p. 190], “the meaning of the part can be discovered only from the context, i.e., ultimately from the whole”—what we see here is the realisation that new definitions make headway step by step with more or less success. Consequently—as the pioneer of the “Law and Literature” movement [James Boyd White *Justice as Translation* (Chicago, Ill.: The University of Chicago Press 1990), p. 248] declares—, “every element in the new text has different meaning from the old, for, like the old, the new one acquires its meanings from its context [ ] and this context is always new”. – Albeit a case-study on legal citation, even the title is messaging of one of Pierre Legrand’s old articles on ‘Form is also Culture’ [1994] in his *Fragments on Law-as-Culture* (Deventer: W.E.J. Tjeenk Willink 1999), ch. 4, pp. 35–56 [Schoordijk Institute].





In such a scheme, the direction of move is delineated by classical “comparative law”, standing for legal positivism in its approach to law that is, for its part, taken as a posited text, on the one hand, and by “comparative legal cultures”, conceiving of the law’s actual meaning in its interpretive medium, on the other. More precisely, it is a sequence like this where WATSON, with a positivist heritage and somewhat refined, as well as LEGRAND, programming the unconditional break with such a tradition, are given a catalyst’s roles. It is to be seen that LEGRAND’s aim and effect (successful in the debate *hic et nunc*) was the theoretical formulation of a counter-conceptualisation (of negation, no longer practical, up to the extremes); the same as the one played by, e.g., STANLEY FISH<sup>37</sup> (besides RONALD A. DWORKIN<sup>38</sup> or CHARLES YABLON<sup>39</sup> on the part of theory, or JAMES BOYD WHITE<sup>40</sup> on the part of launching the American movement of “Law and Literature”<sup>41</sup>) in formulating the foundations, in which the emphasis was shifted from legal text to personal intellectual reconstruction, aiming at understanding in law.

True, radically opposed to both former views, GUNTHER TEUBNER’s remark seems—as a third aspect, one of the exclusion of both former ones—thoroughly founded, claiming that the idea of ‘transplantation’ with its horticultural connotations is misleading from the beginning, as it works on the principle of “All-or-Nothing!”, while what we have here in mind is exactly the launching of new and by far not foreseeable events. It is no mere chance therefore that TEUBNER, provocatively from the beginning, uses everyday colloquial figurative language instead of professional terms, when he declares that “legal irritants [ ] unleash an evolutionary dynamic in which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change”.<sup>42</sup> Thus, we can see ‘irritants’ that ‘unleash’ some thing—i.e., something that, in reality, does not any longer belong either here (to the world of the transplant) or there (to the one of the transplantee). Or, that is to say that what is transplanted is a foreign body, expediently wedged in in the ongoing processes, on grounds of its foreplanned and expected suitability for stimulating local forces (perhaps otherwise inclined for inaction) to increased action and reaction.

<sup>37</sup> E.g., Stanley Fish *Doing What Comes Naturally* Change, Rhetoric and the Practice of Theory in Literary and Legal Studies (Durham & London: Duke University Press 1989) x + 613 pp.

<sup>38</sup> Cf. with Ronald Dworkin’s entire oeuvre, beginning from the publication of his ‘The Model of Rule’ *University of Chicago Law Review* XXXV (1967) 1.

<sup>39</sup> E.g., Charles M. Yablon ‘Law and Metaphysics’ *The Yale Law Journal* 96 (1987) 3, pp. 613–636.

<sup>40</sup> E.g., James Boyd White *Heracles’ Bow* Studies in the Rhetoric and Poetics of Law (Madison: University of Wisconsin Press 1985) xviii + 251 pp. [Rhetoric of Human Sciences].

<sup>41</sup> Cf., e.g., *Interpreting Law and Literature* A Hermeneutic Reader, ed. Sanford Levinson & Steven Mailloux (Evanston, Ill.: Northwestern University Press 1988) xvi + 502 pp.

<sup>42</sup> Gunther Teubner ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ *The Modern Law Review* 61 (1998) 1, pp. 11–32, quote on p. 12.



However, in fact I find the basic tenet unclarified, as the debate has unfolded without the parties having ever compromised with one another in their conceptual presuppositions. Notably, in case I accept that

“law = rule”

(that is, law is being traced back to rules, etc., which seems to be close to all positivistic approach, thus WATSON’s quoted view, too), then that what has been transplanted is an entity capable of functioning on its own from then on. Just as a seed, a seedling, etc., equally need an environment (as in our example: soil, watering, warmth, sunshine) to survive and start growing and evolve, certainly law understood as a rule, too, presupposes a favourably empathic environment (thus, above all, the intention to realise the law through operating its rules with the necessary skill as embodied in the lawyers’ profession); however, such an environment is nothing but an instrumental accessory, as one amongst the huge of many necessary additions. For still and by all means it remains the *transplantatum* itself that will play the decisive role, realising itself in the processes of its own life. However, in case the rule element present in the law anyway<sup>43</sup> is nothing more than an instrument and, as such, just one (even if endowed with special referential channelling ability) of the tools applied in the standardisation of legal processes (and this view is probably not far from LEGRAND’s opinion), then we arrive at the acceptance that

“*transplantatum* = nothing but an object”

(that is, an object merely) that gets operated as an instrument by the one who may happen just to get it. Consequently, whoever happens to get hold of it will be in a position to use it to a purpose and in a way he is anyway culturally inclined to (in function of his institutional and personal motivations, and so on).

If we, with the above insights in mind, wish to remain truly consistent, we do no longer have to say—because we no longer want to describe the everyday operation of a legal system, functioning in the settled state of balance between stability and necessary change, but the mechanism of a legal renewal enforced through legal transfer—that

“law = positivation + (interpretive medium of the rule, etc. + whole of the legal culture)”

<sup>43</sup> Upon the affirmative answer—supported by the description of a minimum “legal order” in Aleksander I. Solzhenitsyn *The Gulag Archipelago* I–III (New York: Harper & Row 1974, 1973, 1978)—of Antony Allott *The Limits of Law* (London: Butterworths 1980), pp. 255–256, could I take the stand—in my ‘Liberty, Equality and the Conceptual Minimum of Legal Mediation’ in *Enlightenment, Rights and Revolution* Essays in Legal and Social Philosophy, ed. Neil McCormick & Zenon Bankowski (Aberdeen: Aberdeen University Press 1989), ch. 11 {reprinted as ‘What is Needed to Have Law?’ in my *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE “Comparative Legal Cultures” Project 1995), p. 47 [Philosophiae Iuris]}—according to which “In Alice in Wonderland, Alice and the others might have believed at the beginning that, in the Queen’s game of croquet, croquet was really played. However, they soon had to realize from the Queen’s orders and their implementation that, instead, it was only the Queen’s game that was being played. And even though they may have become confused about the nature of so obscure a game, that did not change the fact that there was a game in progress, and it had rules, although there was actually but one rule reconstructable and foreseeable, namely that the Queen alone was competent to set all the further rules.”

in a normally ongoing process, but that we have wedged in, from outside and inorganically, some new element (unheard of till then) in the process that may have went on more or less organically until such an intrusion was made. Thereby we have exposed this element to movements in any case going on, thus leaving it at the mercy of the mostly unchanged actors who will then use it in a way and to purposes, with an intensity and drive, either by the inclination to adapt it back to their earlier ideals (ending in the sabotage of any genuine legal renewal) or with a commitment cherished exactly at the original birthplace of the said element (and thereby promoting genuine change); in any case in the way (with the intensity, etc.) as they find it feasible to formulate (and interpret) the outcome according to their worldview, professional ethos and legal culture within the accepted standards of justification; as they intend and are in a position to substantiate it, that is, in so far as and in as much as it is available to them to actually enforce it. Accordingly, the *transplantatum* is now exposed to a totally unforeseeable future which, depending on mere chances, is impossible to interfere with. For as a new component of the store of legal instruments (not depending on its own force any longer), it can so-to-say arbitrarily be used and/or sabotaged against (or, one could say: also abused and misused, only provided that that may have any meaning here any longer) in any direction.

Nevertheless, in a context like this, TEUBNER's above perception—marking an otherwise obvious opposition—seems to have outlined a kind of intermediary situation. For, it is true that through the “evolutionary dynamic”, he inserted a new factor into the process, on the one hand. On the other, the “fate” of the rule in question could only be in the focus of this entire analysis if we judged the legal process from the perspective of a gapless teleology (i.e., purposefully as imposed from outside and from above, extorting the goal set inexorably), which is simply not the case. For providing that nothing but a tool has been inserted into the process as a *transplantatum*, then it is by far not purely itself but its impregnation by (carrying and mediating) a given (and not another) culture that makes it what it is: this is for the purpose of which it has once been created, used and also transferred, and ultimately having handed it down to generations to come as well.

In view of the above, everything—not just statutory rules [but] institutions, legal concepts, and structures”—, by the confused multitude of mutual borrowings of which WATSON could characterise the thousands of years of legal development, does not appear any longer as just something that cannot be interpreted without a hermeneutic culture in the background, but also as something which is in itself nothing more than sheer technicality. That is, a tool—instrument in a technological procedure—that may only be applied in the hands of someone taking first hold of it. Irrespective of the ethos in the guise of which it is decorated, it cannot be a self-sustaining force with irradiation, able to dominate the one applying it. It is simply not in a position to define whether it will be applied or not, and to which purpose. Having come to a similar conclusion a quarter of a century ago, I formulated, as an expression of the feeling of something wanted from his explanation, that

“law can be compared to human techniques. They arise in a given medium to meet given requirements throughout history; however, once they have arisen in history, they become also utilisable beyond the original conditions of their emergence, within varying contexts,



as the common cultural treasure of humankind. And that means that law is relatively open-ended as one of the elements from within the huge technical store of instruments in the social *Gesamtprozess*.”<sup>44</sup>

Technicality not only presupposes the paradigmatically specific ways and manners, criteria and sensitivities of legal thought (notably, the requirement according to which eventually it has to strive for being able to derive validity through a chain of posited inferences and also to justify the result reached in any way posteriorly);<sup>45</sup> moreover, not even just the mutuality of legal technique and the doctrinal study of law (namely, that it is only the doctrinal study of law [*Rechtsdogmatik*] that can in the last resort afford some kind of guidance in the legally and logically free choice between the always available opposite techniques pre-defining logically contrary conclusions);<sup>46</sup> but, on the final account, technicality will also presuppose that everything—conceptuality, tradition of interpretation, set of underlying value-preferences and so on—available at all in law will exclusively be denoted by those recursing to them (and active in the given cultural medium) to mean exactly that what has been meant by them when selected out and used in actual practice. Or, there is no ‘rule’ and ‘principle’, ‘general norm’ and ‘exception’, or any other structuring element in law. It is our legal technical tradition that makes us both build such components in legislation and follow precedents in adjudication; but the question of what is what can eventually be revealed only in the course of the ongoing process—by describing posteriorly what has been made out of what and used as what in the actual process.<sup>47</sup>

Techniques with tools without residue had aroused debates in social philosophy one and a half centuries ago when, for instance, FERDINAND LASSALLE declared the reception of Roman law to be a misunderstanding of old traditions which KARL MARX regarded as inevitable. Well, in that controversy it was GEORG LUKÁCS a century later to respond to the quandary in his social ontology. For he hold that practical objectifications are to be assessed from the perspective of present needs at any time; therefore no epistemology can stand for ontological consideration. Otherwise speaking,

<sup>44</sup> Varga ‘Jogátültetés’ [note 19], p. 297.

<sup>45</sup> Cf., from the author, ‘Presumption and Fiction: Means of Legal Technique’ [co-authored by József Szájer] *Archiv für Rechts- und Sozialphilosophie* LXXIV (1988) 2, pp. 168–184 {reprint in Csaba Varga *Law and Philosophy* Selected Papers in Legal Theory (Budapest: ELTE Project on “Comparative Legal Cultures” 1994), pp. 169–185 [Philosophiae Iuris]} and *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) vii + 279 pp. [Philosophiae Iuris], passim.

<sup>46</sup> Cf., from the author, ‘Doctrine and Technique in Law’ in *Festschrift an Lothar Philipps* hrsg. Bernd Schünemann, Marie-Theres Tinnefeld, Roland Wittmann (Berlin: Berliner Wissenschaftsverlag 2006) {forthcoming} & [www.univie.ac.at/RI/IRIS2004/Arbeitspapierlin/Publikationsfreigabe/Csaba\\_Phil/Csaba\\_Phil.doc](http://www.univie.ac.at/RI/IRIS2004/Arbeitspapierlin/Publikationsfreigabe/Csaba_Phil/Csaba_Phil.doc) {abstract in *Law and Politics – In Search of Balance* Abstracts: Special Workshops and Working Groups [IVR 21<sup>st</sup> World Congress] ed. Christofer Long (Lund: [Media-Tryck] 2003), pp. 10–11} and ‘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’ *Jurisprudencija* [Vilnius: Mykolas Romeris Universitetas] (2005), No. 68(60), pp. 5–10 & <http://www.mruni.lt/padaliniai/leidvba/jurisprudencija/juris60.pdf> or <http://www.thomasinternational.org/projects/step/conferences/20050712budapest/varga1.htm>.

<sup>47</sup> Cf., from the author, ‘Structures in Legal Systems: Artificiality, Relativity, and Interdependency of Structuring Elements in a Practical (Hermeneutical) Context’ in *La structure des systèmes juridiques* [Collection des rapports, XVI<sup>e</sup> Congrès de l’Académie internationale de droit comparé, Brisbane 2002] dir. Olivier Moréteau & Jacques Vanderlinden (Bruxelles: Bruylant 2003), pp. 291–300.



epistemological assessment of ontic components of existence can hardly lead to anything but misunderstanding.<sup>48</sup>

### 3. Contrasts in Transfers of Law

Situations of transfers of “law” in the WATSONIAN extended sense of transferring “rules” have become less and less characteristic for the actual developments and events of the past half century.

#### *Contrasts*

True, it was in fact the result of the upswing period following World War II that various forms of legal transfer started to spread. However, both in case of countries that started to build their own independent legal system after the end of colonial subjugation and of other Afro-Asian or Latin-American states struggling against their retarding legacies, the direction of progress was first set under the slogan of “Europeanisation”, then, more and more definitely, under that of “Westernisation”, and, opening up later on, “modernisation”—denoting in fact unambiguously the capitalist forms in economic and institutional terms and the corresponding modes of thoughts. And since the Soviet Union became an imperial centre not only in military terms but also as an expansive power striving for hegemony, the extension of its sway—besides the vast Central and Eastern European region—over Third-World countries was practically equal to export them Soviet-type “socialism”. All this amounts to saying that the division of the world in two monolithic power blocks during the cold war period also involved the world’s ideological splitting into two. In our still over-ideologised world—strikingly characterised by the neo-utopianism of the programme of “ending the history”<sup>49</sup>—, most of the foreplanned legal transfers purports the export of rules either *in toto* or in part exclusively, as an instrument of mediated domination. For, on the whole, these aim at the target countries to join totally (ideologically, politically, economically, and in their organisational frameworks as well) one or another (past or still surviving) power bloc, introducing the latter’s lawyerly ethos, worldview and institutionalisation (with the same rules and other structuring elements or as adapted somewhat to local colours).

Or, in contrast to centuries of ideological disinterest (from the Roman law reception, via the Japanese modernising change-over of laws and the Turkish laicising codification, to the “fantasy-law” of the Ethiopian Civil Code promulgated in 1960<sup>50</sup>), when reform could be achieved as reduced to some rules’ adoption without ideological overtones, in the recent decades most of the legal reforms by external patterns—as if directed by some totalising *Gesamtplan*—are pushed ahead as civilisational efforts with a “missionary

<sup>48</sup> Cf., from the author, *The Place of Law in Lukács’ World Concept* (Budapest: Akadémiai Kiadó 1985; 2<sup>nd</sup> [reprint] ed. 1998), pp. 126–130.

<sup>49</sup> Francis Fukuyama *The End of History and the Last Man* (New York: Free Press & Toronto: Maxwell Macmillan Canada 1992) xxiii + 418 pp.

<sup>50</sup> For the latter and only in this sense, cf., e.g., René David ‘A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries’ *Tulane Law Review* 38 (1962–1963), pp. 187 et seq. and Jacques Vanderlinden *Codifying for Developing Countries A Case-study of the Ethiopian Civil Code* (Addis Ababa: Haile Selassie I University 1965).

hubris”<sup>51</sup> in mind in the new ideological contexture. This is how legal history, from a simple take-over of rules in the past, arrives now at re-proprietation of patterns with the brutal purpose of making an entire social philosophy—including views, conceptual paths and institutionalisations as well—adopted by third societies.<sup>52</sup>

### Criticisms

The way in which the American movement of “Law and Development” attempted in an enormous enterprise, and then failed to realise its plan, to transform the giant Latin-American subcontinent into a kind of a minor replica of the Northern one is exemplary. The ease with which the exporters used (and are used<sup>53</sup>) to present their own arrangement as the exclusively worthy and liveable (and, therefore, unconditionally pursuable) pattern of civilisation for the whole mankind, is now seen by merited criticism. No doubt, what followed was immense disappointment on encountering the meagre results. As the American dream is now re-assessed in cool detachment, in a counter light directed against itself and stripped, it starts realising the nature of its underlying primitive mechanical worldview (transcended in Europe through the sociological debates at the turn of the 19<sup>th</sup> and 20<sup>th</sup> centuries, maybe and hopefully once and for all), in the womb of which law and legal rules are portable and autonomous, and can therefore be transplanted.<sup>54</sup> Furthermore, that “no other country uses lawyers and legal institutions so extensively and expansively”, because “Virtually nowhere is litigation the weapon of social transformation.” This is to mean that the United States of America “is almost unique in the extent to which it entrusts the general lawmaking process [ ] to its courts.” Or, stating simply, the American political life is full of repulsion (with victory always and at any price in view) for real problems and for facing them. In the light of the “reluctance of American politicians to make decisions that cost votes”, this feature of a negative check & balance explains why “The courts [ ] perform the task of protecting minorities against political majorities.” Although—as they could have realised this earlier, based even on the well-founded conclusions of the Hungarian MARXist legal sociology back in the socialist era<sup>55</sup>—all this constitutes a

<sup>51</sup> This becomes characteristic of this era—James A. Gardner *Legal Imperialism American Lawyers and Foreign Aid in Latin America* (Madison: University of Wisconsin Press 1980) xii + 401 pp.—as a constant concomitant of such processes.

<sup>52</sup> The present American practice is now usually described as the worst of such processes, for it fails to take notice of how ideological it is to come up as ‘the’ starting point, by presenting the acceptance of their formalisms as a panacea, forgetting about the difficulties and implied blocks while implementing them in practice. See Thomas Carothers ‘The Rule of Law Revival’ *Foreign Affairs* 77 (1998), No. 2, pp. 95–106.

<sup>53</sup> As pointed out several times—by, e.g., Armin Höland ‘Évolution du droit en Europe centrale et orientale: assise-t-on à une renaissance du »Law and Development«?’ *Droit et Société* (1993), No. 25, pp. 467–488, the same was repeated on America’s behalf after the collapse of communist regimes, only perhaps more cynically, that is, pessimistically about the success, and, for this very reason, aimed at quickly squeezing out as much profit as possible. 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 ‘Amerikai önbizalom, orosz katasztrófa: Kudarcot vallott keresztshadjárat?’ [American self-confidence, Russian catastrophe: Failed crusade?] *PolisZ* (December 2002/January 2003), No. 68, pp. 18–28 & <http://www.krater.hu/site.php?func=polisz&file=cikkek&cnr=81>).

<sup>54</sup> Eric Feldman ‘Patients’ Rights, Citizen’s Movements and Japanese Legal Culture’ in *Comparing Legal Cultures* ed. David Nelken (Aldershot: Dartmouth 1997), pp. 215–236, quotation on p. 217.

<sup>55</sup> Cf., e.g., Kálmán Kulcsár *Modernization and Law* (Budapest: Akadémiai Kiadó 1992). – It may occur by far not by chance that the intellectual schemes marshalling and controlling transition in the post-socialist region in Europe—the New York-accredited Central European University in Budapest and the University of Chicago topical projects publishing the *East European Constitutional Review* in outcome—staffs specialists of Latin American



historically particular environment with the consequence that “The factors underlying [ ] cannot be reproduced elsewhere”.<sup>56</sup>

In addition, it is by far not only the culture offering itself as a model that has simply disregarded these facts. It just posed itself into a superior position from the beginning—conceited in mentality, maximising its own advantages and profits. Therefore, it is no chance that the initiative to supply models gets subsequently bitterly judged as having embodied “a privileged status” with an “artificially privileged access to power”, along with “an implied superiority of their own domestic »development« over foreign »underdevelopment« expertise”, in which “unfamiliarity with the target culture and society” was one of the decisive features. The blame is made even worse by the fact that its ignorance was both irresponsible and cynical, marked from the outset by a “relative immunity to consequences” in practice.<sup>57</sup>

The final balance can therefore be but devastating. Accordingly,

“the law and development movement was largely misdirected [ ] : ineffectual, if not harmful as technical assistance, and peripheral as scholarship.”<sup>58</sup>

So, the balance after a complex social and political evaluation of the whole venture is made cannot be else than remembering<sup>59</sup> situations of one-time subjection to

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development (with Spanish as exclusive foreign language) as experts with no local (regional) knowledge and field experience whatsoever.

<sup>56</sup> Thomas M. Franck ‘The New Development: Can American Law and Legal Institutions Help Developing Countries?’ *Wisconsin Law Review* 12 (1972) 3, pp. 767 801, the first quote and the one before the last on pp. 782 and 784, the others on p. 783. According to another summary, focussed mainly on Asean instances—Pip Nicholson »Roots and Routes« Comparative Law in a Post-modern World’ [ms] (Melbourne: University of Melbourne Asian Law Centre 2001), p. 22 court [is taken] as a forum in which individuals can exercise (universal and essential) rights that are integral to the rule of law”, from the aspect of which any other approach, view and tradition will be “devalued, either explicitly or implicitly.”

<sup>57</sup> Bruce Zagaris ‘Law and Development of Comparative Law and Social Change – The Application of Old Concepts in the Commonwealth Caribbean’ *University of Miami Inter-American Law Review* 19 (1988), pp. 549 593, quotes from p. 555. – Country-specific micro-analyses are indeed preferred to simply forwarding general theoretical models by Elliot M. Burg in his ‘Law and Development: A Review of the Literature and a Critique of »Scholars in Self-Estrangement«’ *The American Journal of International Law* 25 (1975), pp. 492 530.

<sup>58</sup> 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), p. 18 [Stanford Studies in Law and Development], quoted by Zagaris [note 57], *ibidem*. – As one of the earlier formulations of this crushing criticism, Lawrence M. Friedman ‘On Legal Development’ *Rutgers Law Review* 24 (1969), pp. 11 64 objected to the ignorance of legal culture, serving as a medium for any reform, spellbound by an instrumental rationalising aspiration. – John Henry Merryman ‘Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement’ *The American Journal of International Law* 25 (1975), pp. 457 491 complains of actions taken without previous inquiry, through which developmentalists universalised the prevailing American mainstream with not even taking account of its own historical preliminaries as a kind of practical experience either. – The first self-criticism [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] mentioned “ethnocentrism” and “evolutionism”, in so far as history was viewed as a series of identical stages to be repeated by all societies. The second one [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] complemented it by “naïvety”, failing to represent legal reality not only of the developing world but of the United States as well.

<sup>59</sup> As E. Goldsmith *The Way An Ecological World View* (London: Rider 1992) remembers on p. 285, “The colonial powers sought to destroy the cultural patterns of traditional societies largely because many of their essential features prevented traditional people from subordinating social, ecological and spiritual imperatives to the short-term economic ends served by participation in the colonial economy [...] the young were deprived of that traditional knowledge which alone could make them effective members of their societies”.

exploitative trading relations and land seizures, by recalling the eventuality that not even the colonial era is necessarily over, as nowadays legal modernists may represent the same legal 'merchants' who once pursued profit for trading companies from the 17<sup>th</sup> century onwards.<sup>60</sup>

### *Alternatives*

All this is to say that the question is gradually elevated to social policy heights, with the nature of globalisation in its focus. After all, do we act narcissistically, inflicting our traditions on others, or can we support any foreign people selflessly, helping them to find their own way to optimum improvements? Is our interest driven by mere selfish hunger for more power, or by helpful intention? Eventually, which pattern do we prefer from between the stunt of will transference by a circus showman, or a gardener's humility attending all round at all times? True, it may be difficult to withstand the temptation by the former,<sup>61</sup> yet only a way leading back to the lessons drawn from experience can be successful in the long term.

Just to quote some examples from amongst the formulations of our days' dilemmas, it may happen that a right-based rule of law, mainstream in the United States, would only de-stabilise a society lacking in resources.<sup>62</sup> Or, in want of the cultural conviction that law has in the meantime transformed from a peremptory instrument of direct state intervention into a neutral mediator between equal parties, business life may withstand, rejecting even the attempt at reforming the old law (or touching upon any law).<sup>63</sup> The Western ideal of law may itself prove defective as depending upon accidental historical particularities, once it is established that the introduction of market economy may get into conflict with democratisation, for it may divide society by giving preference to minorities that had ever been anyway privileged from the outset to do business they are accustomed to,<sup>64</sup> or because democracy can unduly favour corruption,<sup>65</sup> or because instead anything of the rule of law—being so vague and confusing—, only partial objectives should be set; nevertheless reminding of the need to resist the urge to over-sell initiatives, since that could only undermine sustainability in any case in the long run.<sup>66</sup>

Therefore, there is already a conceptual shift in proposals that aim, for instance, at gradual progress, by counterbalancing the lack of complete series of transplantation of

<sup>60</sup> David F. Greenberg 'Law and Development in Light of Dependency Theory' *Research in Law and Sociology* An Annual Compilation of Research [Greenwich, Connecticut: JAI] 3 (1980), pp. 129–159.

<sup>61</sup> Jose E. Alvarez 'Promoting the »Rule of Law« in Latin America: Problems and Prospects' *George Washington Journal of International Law and Economics* 25 (1991), pp. 281–331 speaks invariably, in connection with the aid programs organised presently by the *US Administration of Justice*, of infliction of human rights ideals, notwithstanding the conflicts it may give rise to. Carol V. Rose 'The »New« Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study' *Law and Society Review* 32 (1998) 1, pp. 93–140 finds the basic underlying imperialistic attitude unchanged and therefore quite questionable whether or not the movement as such should at all be continued.

<sup>62</sup> Ugo Mattei 'The New Ethiopian Constitution: First Thoughts on Ethnical Federalism and the Reception of Western Institutions' in *Transplants, Innovation, and Legal Tradition in the Horn of Africa* ed. Elisabetta Grande (Torino: L'Harmattan Italia 1995), ch. 3, pp. 111–129.

<sup>63</sup> Kathryn Hendley 'Legal Development in Post-Soviet Russia' *Post-Soviet Affairs* 13 (1997), No. 3, pp. 228–251.

<sup>64</sup> As exemplified by South Africa, Kazakhstan and Vietnam, cf. Amy L. Chua 'Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development' *Yale Law Journal* 108 (1998), pp. 1–107.

<sup>65</sup> While, at the same time, rule of law in a "consultative" status is still considered acceptable by Wei Pan *Democracy or Rule of Law? China's Political Future* [ms] [presented at Conference on China's Political Options at Vail, Colorado, 19–21 May 2000].

<sup>66</sup> Stephen J. Toope *Programming in Legal and Judicial Reform* An Analytical Framework for CIDA [Canadian International Development Agency] Engagement [ms] [report] (1997) 25 pp.



exhaustive textual regulations by strict criminal law and de-emphasis on civil liberties,<sup>67</sup> or the transcending of (socialist) law in several steps, starting out from a basic, rudimentary, framework-creating foundation of (e.g.) property, contract, and company law, followed and refined if already rooted, by a social, environmental, antitrust (etc.) sensitivity built upon them.<sup>68</sup>

#### 4. Conclusions

With this, we have arrived at the practical illustration of our theoretical conclusion: encouraging own improvement alone.<sup>69</sup> Because the observer, if emphatic towards both directions, may know (and can also empirically generalise) that few laws are drafted, fewer are enacted, still fewer are implemented, and almost none induce their prescribed behaviours, for they tend to fall back on one of three counter-productive strategies: letting laws be the compromise of interest group bargaining, invoking the criminal law to ban the problem, or copying foreign law. Solution requires foreign consultants not to act as bill drafters, but to assist local drafters in the process in order to build up indigenous drafting capacity.<sup>70</sup> For, eventually, the destiny of the modernising reform is up to the selective force of the targeted system,<sup>71</sup> moreover, the latter's environment may determine the law's eventual fate.<sup>72</sup> This is the message for gaining which historico-comparative and theoretical studies should be further developed.

For it is better to find out first what the soil and its living milieu needs, and the gardener may also come afterwards.

#### 5. Further literature

- As to some general questions, *The Reception of Continental Ideas in the Common Law World 1820–1920*, hrsg. Mathias Reimann (Berlin: Duncker & Humblot 1993) 252 [Comparative Studies in Continental and Anglo-American Legal History 13]
- As to reception, Ferid Ayiter 'Das Rezeptionsproblem im Zeichen der kulturhistorischen Perspektive »Europa und das römische Recht« und unter besondere Berücksichtigung der Rezeption westeuropäischer Gesetzbücher in der modernen Türkei' in *Studi in memoria di Paolo Koschaker* II (1956), 130 et seq.;

<sup>67</sup> Richard A. Posner 'Creating a Legal Framework for Economic Development' *World Bank Research Observer* 13 (1998) 1, pp. 1–11.

<sup>68</sup> Thomas W. Waelde & James L. Gunderson 'Legislative Reform in Transition Economies: Western Transplants – A Short-Cut to Social Market Economy Status?' *International and Comparative Law Quarterly* 43 (1994), pp. 347–378.

<sup>69</sup> Robert D. Cooter 'The Rule of State Law and the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development' *Annual World Bank Conference on Development Economics* 1996 (Washington: The World Bank 1997), pp. 191–217.

<sup>70</sup> In respect of China, Laos, Sri Lanka, Mozambique, and the South African province of Gauteng—as in most of the developing world—, it is concluded by Ann Seidman & Robert B. Seidman 'Using Reason and Experience to Draft Country-Specific Laws' [draft, unpublished, intended to include in *Making Development Work* Legislative Reform for Institutional Transformation and Good Governance, ed. Ann Seidman, Robert B. Seidman, Thomas W. Walde (Kluwer Law International 1999) as ch. 13].

<sup>71</sup> Robert B. Seidman *The State, Law and Development* (New York: St. Martin's Press 1978) 483 pp.

<sup>72</sup> Jan Van Olden 'Legal Development Cooperation: Transplanting or Transforming Legal Systems' in *Legal Development and Corruption* CILC Seminar in Tribute for Jan Van Olden, The Hague, December 10, 2002, pp. 8–12 [[www.cilc.nl/seminar-publication](http://www.cilc.nl/seminar-publication)].

As to "Law and Development" and its criticism, Thomas Franck 'The New Development: Can American Law and Legal Institutions Help Developing Countries?' *Wisconsin Law Review* (1972) 3, 767 801; Elliot M. Burg 'Law and Development: A Review of the Literature and a Critique of »Scholar in Self-estrangement«' *The American Journal of Comparative Law* 25 (1977), 492 530; Biran Z. Tamanaha 'The Lessons of Law-And-Development Studies' *The American Journal of Comparative Law* 89 (1995), 471 477;

As to subsequent big projects, J. C. McPetrie 'Survey of Constitutions Drafted at the Colonial Office since 1944 in *Changing Law in Developing Countries* ed. James Norman Anderson (London 1963), 29 et seq.; Seymour J. Rubin *Foreign Development Lending Legal Aspects* [The Papers and Proceedings of a Conference of Legal Advisors of National and International Development Lending and Assistance Agencies] (Leiden: Sijthoff 1971) 352; Yves Dezalay *Marchands de Droit* (Paris: Fayard 1992); Alexander Kennaway *What is Wrong with Western Aid to the FSU and Central & Eastern Europe and How to Improve it* (Sandhurst: Royal Military Academy, May 1995) 24 [Conflict Studies Research Centre M11]; Constantine C. Menges 'An Initial Assessment of U.S. Aid to Russia, 1992 1995 and a Strategy for More Effective Assistance' *Demokratizatsiya The Journal of Post-Soviet Democratization* IV (January 1996) 4, 538 560; *Legal Assistance to Developing Countries* Swedish Perspectives on the Rule of Law, ed. Per Sevastik (Kluwer Law International 1997); *Legal Assistance to Developing Countries* Swedish Perspectives on the Rule of Law, ed. Per Sevastik & Gudmundur Alfredsson, etc. (Dordrecht: Kluwer Law International 1998) 277;

As to present-day theorising on the issue, Alan Watson 'Legal Transplants and Law Reform' *The Law Quarterly Review* 92 (1976), 79 84; E. Wise 'The Transplant of Legal Patterns' *The American Journal of Comparative Law* 38 (1990) [Supplement], 1 et seq.; Alan Watson 'From Legal Transplants to Legal Formants' *The American Journal of Comparative Law* 43 (1995), 469 476; G. Monateri 'The »Weak Law«: Contaminations and Legal Cultures' in *Italian National Reports to the XVth International Congress of Comparative Law* (Milan: Giuffrè 1998), 83 110; David Nelken 'Beyond the Metaphor of Legal Transplants? Some Consequences of Autopoiesis Theory for the Study of Cross Cultural Legal Adaptation' in *The Consequences of Autopoiesis* ed. Jirý Pribán & David Nelken (Aldershot: Dartmouth 2001);

As to some country-specific studies, Ferdinand Elsener *Studien zur Rezeption des gelehrten Rechts* hrsg. Friedrich Ebel *Ausgewählte Aufsätze* (Sigmaringen: Thorbecke 1989) 297, Alan Watson *Legal Transplants and European Private Law* ([Maastricht: Metro 2000]) 16 [Ius commune Lectures on European Private Law 2], Heinrich Scholler *Die Einwirkung der Rezeption westlichen Rechts auf die sozialen Verhältnisse in der fernöstlichen Rechtskultur* (Baden-Baden: Nomos 1993) 84 [Arbeiten zur Rechtsvergleichung 158], Christian von Bar *Islamic Law and its Reception by the Courts in the West* [Congress from 23 to 24 October 1998 in Osnabrück] (Köln, etc.: Heymann 1999) ix + 234 [Osnabrücker rechtswissenschaftliche Abhandlungen 57]; in canon law, Stephan Haering *Rezeption weltlichen Rechts im kanonischen Recht* Studien zur kanonischen Rezeption, Anerkennung und Berücksichtigung des weltlichen Rechts im kirchlichen Rechtsbereich aufgrund des Codex iuris canonici von 1983 (St. Ottilien:



EOS-Verlag 1998) xlvii + 336 [Münchener theologische Studien 3; 53]; for the Caribbean, Bruce Zagaris 'Law and Development of Comparative Law and Social Change – The Application of Old Concepts in the Commonwealth Caribbean' *University of Miami Inter-American Law Review* 19 (1988), 549–593; for China, Carol Jones 'Capitalism, Globalization and Rule of Law: An Alternative Trajectory of Legal Change in China' *Social and Legal Studies* 3 (1994), 195–221; Ann Seidman & Robert Seidman 'Drafting Legislation for Development: Lessons from a Chinese Project' *The American Journal of Comparative Law* 44 (1996), 1–44; for East Asia, John Gillespie 'Law and Development in »The Market Place«: An East Asian Perspective' in *Law, Capitalism and Power in Asia* ed. Kahishka Jayasuriye (London & New York: Routledge 1999), 118–150; for Egypt, N. J. Brown 'Law and Imperialism: Egypt in Comparative Perspective' *Law and Society Review* 29 (1995), 103–125; for Ethiopia, René David 'A Civil Code for Ethiopia: Considerations on the Codification of the Civil Law in African Countries' *Tulane Law Review* 37 (1962–1963), 187 et seq.; from John H. Beckstrom, 'Transplantation of Legal Systems: An Early Report on the Reception of Western Laws in Ethiopia' *The American Journal of Comparative Law* 21 (1973), 557 et seq. & 'Handicaps of Legal-social Engineering in a Developing Nation' *The American Journal of Comparative Law* 22 (1974), 697 et seq.; for India, Marc Galanter 'The Displacement of Traditional Law in Modern India' *Journal of Social Issues* (1968), No. 4, 65 et seq.; for Japan, Harro v. Senger 'Japan's drei Rechtsrezeptionen' *Zeitschrift für Rechtsvergleichung* 17 (1976); Ken Mukai & Nobuyoshi Toshitani 'The Progress and Problems of Compiling the Civil Code in the Early Meiji-Era' *Law in Japan I* (1967), 25 et seq.; C. W. Canaris 'Theorienrezeption und Theorienstruktur' *Wege zum japanischen Recht* (1992), 59–94; for Korea, Manfred Reh binder *Zur Rezeption des deutschen Rechts in Korea* (Baden-Baden: Nomos 1990) 111; for Latin America, Jorge L. Esquirol 'Continuing Fictions of Latin American Law' *Florida Law Review* 55 (2003), 41–114; for Russia, Peter J. Stavrakis 'Bull in a China Shop: USAID's Post-Soviet Mission' *Demokratizatsiya The Journal of Post-Soviet Democratization* IV (Spring 1996) 2, 247–270, David H. Swartz 'Problems in American Assistance Policy toward the Former Soviet Union: The Belarus Prism' *Demokratizatsiya The Journal of Post-Soviet Democratization* 4 (Winter 1996) 1, 97–107, Robert Sharlet 'Legal Transplants and Political Mutations: The Reception of Constitutional Law in Russia and the Newly Independent States' *East European Constitutional Review* 7 (Fall 1998) 4, 59–68; and for Taiwan, Tzong Li Hsu 'The Rule of Law in Taiwan: A Misplanted Western System of Rule of Law in Taiwan?' [International Association of Constitutional Law Conference, Rotterdam, 12–17 July, 1999]; for Vietnam, Carol V. Rose 'The »New Law and Development Movement« in the Post-cold War Era: A Vietnam Case Study' *Law & Society Review* 32 (1998 April) 1, 93–140; Per Bergling *Legal Reform and Private Enterprise The Vietnamese Experience* (Ume 1999) [Umea Studies in Law 1]; Penelope Nicholson *Borrowing Court Systems The Experience of the DRVN, 1945 to 1976* [PhD Thesis] [The University of Melbourne, December 2000]; Jean-Claude Alexandre Ho 'Die Rezeption fremder Rechte in Vietnam' *Aus dem Westen was Neues Interessenpolitik durch Rechtsexport* 4/2002.





# ***Transition to Rule of Law A Philosophical Assessment of Challenges and Realisations in a Historico-comparative Perspective***

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***Csaba Varga\****

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 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 are on the final analysis defined by either a historical universalism or historically bound particularism. The quest for open society, constitutionalism, 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.

No wonder that the big patterning powers are scarcely generating critical approaches to the transition process in the region as contrasted to 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 latter category of countries' descriptive and theoretical literature seems to be promising to lay the foundations of competitive explanations of what course has 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 in the research scheme, concentrating as a prism in one complex unit the very compound nature with in-built elements in mutual tension and exclusion, of the expectations towards, and timely fulfilment of, the perfected forms of a Transition to the Rule of Law in the region concerned.

## ***Radical Change and Unbalance in Law in a Central Europe under the Rule of Myths, not Law***

In contrast to the end of WWII, 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 upon step

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by step as marshalled by historical chances through the instrumentality of the rule of law, was to base on the only legacy left: annihilation of the sensitivity of public affairs and communitarian interests, withering away of the very idea of a self-governing civil society, emptying morals, and shattering whatever kind of authority. Instead of the allied care for that dictatorship will be rejected without offering it the chance of itself transforming into our future alleged liberalism, the political and legal continuity of the past has by far not been broken in fact from inside, for velvet revolution has only continued past legality.

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

Own legal traditions are being formed in the process, notwithstanding. These are mixed, drawing mostly from both socialist routine and Civil Law & Common Law Atlantic inspirations, as well as European Union practices, with a basic style and judicial understanding of law surviving from a past barely transcended.

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

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### ***Radical changes in law are always dangerous.***

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

When the wind of changes touched 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 that MARXISM would be right once again in that gradual accumulation of quantitative changes would lead to a new quality, and finally a complete change of the social, political and economic systems would take shape from the limited possibilities of a “soft dictatorship”.

The global euphoria ensuing the unexpected collapse of the former regime also strengthened the public belief that we just need to clean up the left-overs of the past, and the West will simply extend its borders 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 in the region received instead of a real help. Furthermore, this 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. It was naive and lazy enough not even to contemplate about some adaptation.<sup>1</sup>

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 high-soaring mentality, I found self-conceit addled into narcissistic self-complacency. For even the cavalcade of legal cultures, proving the rich variety of 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 verballity for granted actuality),<sup>2</sup> 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 to the Rule of Law.<sup>3</sup> 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<sup>4</sup> to armchair-theories of Chicago-economists on the curative effect of free markets without control—are advertised both on intellectual markets and at international agencies (mostly used as the fora of exerting imperialistic influence), as if they were the

<sup>1</sup> 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; from Gianmaria Ajani, 'La circulation des modèles juridiques dans le droit post-socialiste' *Revue internationale du Droit comparé* 46 (1994), pp. 1087 1105 and '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 p. Further on, cf. also, from the present author, '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.

<sup>2</sup> Cf., from the author, *Lectures on the Paradigms of Legal Thinking* (Budapest: Akadémiai Kiadó 1999) [Philosophiae Iuris].

<sup>3</sup> 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.

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

embodiments of some ever-lasting universal truth.<sup>5</sup> The humble consumer can realise it only later that how much he has been tricked by resounding phrases. It can happen that demolished fortresses and bombed churches are conserved in their ruins according to the Venice Charter on the protection of historical monuments,<sup>6</sup> and it would be a later (and sometimes also too late) realisation only that tourists 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 contemplate more deeply about the fact that maintenance workshops all over Europe have 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 lead our former local MARXists from their belief in historical determinism to some ahistorical floating. For our intellectual elite chases the newest thought-products as if it were the case of philosophical devotion. They are not even afraid of introducing their own "class-rule" in order to materialise them.<sup>7</sup> 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 disobedience",<sup>8</sup> 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 that the cult of complete freedom lacks both communitarian empathy and responsibility, added to mere responsiveness. Rejecting participation and responsibility, only their blind selfishness is increasing instead, which is about to arrogantly turn against everything historical, local and traditional, that is, everything that derives from common sense and everything people have bitterly experienced over generations. To all this adds an atmosphere

<sup>5</sup> Cf., as a case study, Stephen F. Cohen *Failed Crusade American and the Tragedy of Post-Communist Russia* (New York & London: Norton 2000) xiv + 304 pp. as reviewed by the present author as 'Amerikai önbizalom, orosz katasztrófa: Kudarcot vallott kereszteshadjárat?' [American self-confidence and Russian catastrophe: a Failed Crusade?] *Polisz* (December 2002 January 2003), No. 68, pp. 18 28 & <http://www.krater.hu/site.php?func=polisz&file=cikk&cnr=81>.

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

<sup>7</sup> 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 (New York: Harcourt Brace Jovanovich 1979) xix + 252 pp.].

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



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 very 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 even 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 the most.<sup>9</sup>

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 by 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. And 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.<sup>10</sup>

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; withering away of the very 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 that system afterwards: if we are only restricted to assure an equality of chances or declare rights at the mighty please of everyone (as in already well-established democracies), then we obviously will not be able to restore the damages occurred over generations in public morals and community

<sup>9</sup> Cf., from the author, ‘Trumbling Steps of the New Constitutional State’ in his *Transition* [note 8], pp. 78–89, and ‘A hagyomány talajáról [On the soil of tradition, 1991]’ in his *Útkeresés Kísérletek — kéziratban* [In search of a path: Attempts unpublished] (Budapest: Szent István Társulat 2001), pp. 144–148 [Jogfilozófiák].

<sup>10</sup> 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.

values. Instead of any curative effect, we can at the most deepen decomposition by mixing good and bad, and completing thereby the job by turning *les fleurs du mal* into virtues. Yet, construction presumes constructive action through intervention—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.<sup>11</sup>

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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 tentative conclusions.

(1) *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 falls 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 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 adaming impact if not followed by a prison reform, capable of effective prevention, through punishing that what usually results 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 for long be continued. 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 unilateral degeneration of past dictatorship is surely not degeneration into anarchy as the opposite extremity. Finally, one can see how much debates are characterised by a disintegrated equilibrium. For

<sup>11</sup> 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, from 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 and '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].



usual reactions by intellectuals in the region seem to perceive it as an exclusively old-new threat if individual concerns are not given preference from the perspective of own wishes, but are weighed from the point of view of the 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, taxation, effectiveness and policing of the police, or government collection of data and official statistics—all these can therefore easily prove abortive under such conditions.

(2) *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 (extension or restriction) in the establishing practice of how to have a balanced use of rights can only be afforded later on, after the experience of their enforcement was thoroughly considered in long debates, through the assessment of statistical data and judicial procedures. From the very act of putting together or transplanting alien substances we can hardly obtain an organic material, a living body. Just as the constitutional status of the Queen of England is not constructed from some 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 must 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 available that could only give meaning and life to the rudimentary structure of the above skeleton, also legal reform has the chance, if not backed by society, to turn easily inside-out. For instance, the freedom of press may give way to anarchy or monopoly, the weak regulation to clumsiness discrediting any policing, and the deficient legal background to spasmodic undertaking only characteristic of early, primitive forms of capitalism.

(3) *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<sup>12</sup> had this only suggestion for Hungary under Soviet occupation: in the terrible duel between "socialism" and "capitalism", the primary 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.<sup>13</sup> 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 the 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 which have to be recurrently re-achieved, and responses which defy less ambiguities than "in as much as", "more or less", "from this or that perspective". Except for borderline cases, rare in practice, the 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 determined and unconditional formulas of either "yes" or "no" (e.g.: "guilty / not guilty", "did steal / did not steal", "qualifies / does not qualify as the seizure or stealing of property"), including the entire qualified conceptual class. 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 which, for instance, a concrete proposal for avoiding bankruptcy

<sup>12</sup> 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, Tibor Vas*, hrsg. Csaba Varga (Budapest: Szent István Kiadó 2006) forthcoming [Philosophiae Iuris], on the one hand, and *Democracy, Revolution, Self-Determination Selected Writings*, ed. Károly Nagy, transl. András Boros-Kazai (New York: Columbia University Press 1991) [Atlantic Studies on Society in Change, 69], *Die Misère der osteuropäische Kleinstaaten* trans. Béla Rásky (Frankfurt am Main: Neue Kritik 1992) 140 pp. & *Misère des petits États d'Europe de l'Est* trad. György Kassai (Paris: L'Harmattan 1986, 1993) 462 pp., on the other.

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



of the entire national economy may qualify unconstitutional in the very limited perspective of the law, while the same law has no word against the actual declaration of bankruptcy—against that the government, getting tired of the failures of transition management, can finally give up and actually lead the country into bankruptcy. It is the unavoidable formalism in law that requires the balance of treating the 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 as the above bankruptcy 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 alongside its 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.

(4) *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 what that we have received (mainly through American mediation) as a ready-made recipe for post-modern understanding of the world means actually 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—and all these are being asserted as unquestionable truths, in which the absolute can only be the negation of anything absolute. What is left on the scene then? Various kinds of minority being and otherness: feminism, homosexuality, lesbianism, sects, refusal of military service, the cult of whatever types of watch-organisations with fragmented 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, balance of interests, with deprivals continuously counter-balanced, and disintegrating pretensions rejected. All in all, only respect for the community can elevate 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 historical contexture. For instance, the appalling heritage of 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<sup>14</sup>) the essentially similar treatment of essentially similar situations. To conceptualise them,

<sup>14</sup> According to the already classical stand of Chaim 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.

law has to operate through conceptual inclusion and exclusion. When issuing a norm, we aim at deviance, and deviant means being opposed to—by defying—something. Whereas “otherness”, according to any considerably acceptable meaning, is not negation but cultural variety—among the sets of thoughts, ideals and behaviours, the individual components of which are not inferior but less widespread or more insecure than the others.

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Too much ambition in legal borrowing is not only dangerous but risky as well. Most of the experiments are finally rejected as “fantasy-laws”<sup>15</sup> or can only 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 had an exclusively liberalising effect so far, (b) in want of established conventions, its reforming purport could materialise only through causing damage to the community, while (c) direct interference with local social processes was mainly partial, for its 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 efforts at serving human dignity also by law. It is neither finished, nor rounded. It reflects challenges to which historical nations happened to afford tentative answers under classical conditions responding to their own time and conditions. Therefore, in our search for the rule of law, we can only find past local initiatives, particular to given times and surroundings in England, North America, the Netherlands, France, or Germany or Italy, from behind the adorning veil of subsequent abstraction and conceptual generalisation. That part of the rule of law and human rights which has later become integrated into a common basis having compulsory force, is now international law. All this is to say that there is no other rule of law than the one only characterisable by sheer tradition, endeavour, and partial results—on behalf of nations that tried to answer own questions exclusively on their own way, within the framework of own experience. Therefore, talking about the rule of law we generalise particularities which have been afforded 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. Continuous, organic and balanced development, characteristic of the West, put the rising bourgeois middle classes into a position that could shape society, and then, build the institutions of *societas civilis* into the process of social dynamics as the motive power of continuous internal development. Internal checks and balances were thereby created, with agents of initiation from within. Rule of law does not tolerate revolutionary endeavours, radical change, or intention of disruption. It is not revolution but evolution that stands behind it: subtle adjustment and everyday compromises are characteristic to it. This is why it is

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<sup>15</sup> ‘*lois de phantasie*’, as used by Jacques Vanderlinden in his *Introduction au droit de l’Éthiopie moderne* (Paris: Librairie Générale de Droit et de Jurisprudence 1971).



high time to us to implant the rules of the actual social and political game so that this 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—both in the short and the long run. Starting from our own culture, our own tradition and experience in how to resolve and settle conflicts, we can only determine it subsequently what and how we should learn and what we need to continue. As to the questions unanswered so far (because in the cultures patterning the rule of law they happened not to be risen or not in a comparable way), we obviously have to search for answers within the general ethos and framework of what is known to be the culture(s) of the rule of law.<sup>16</sup>

‘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, and serves 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 of its answers gives a new life to it. In lack of any casuistics by a codified set of rules, it offers a culture so that we can, when faced with new challenges, 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.

### ***Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisations (A Case-study on the Experience of Lithuania)***

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 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.

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<sup>16</sup> Cf., as a cry for an all-societal care for building up an underlying culture, e.g., *Драма российского закона* [Drama of the Russian law] ed. В. П. Казимирчук (Moscow: Юридического Книга) 143 pp.; Ewa Letowska & Janusz Letowski *Poland Towards the Rule of Law* (Warsaw: Wydawnictwo Naukowe Scholar 1996) 176 pp. [Institute of Legal Studies of the Polish Academy of Sciences]; *Kidítás 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].

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 which were just awakening either in self-esteem or as a potential counterpole.<sup>17</sup> In consequence, each country had to embark upon separate efforts at reform, channelled by so-called open society agencies;<sup>18</sup> 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<sup>19</sup> was only one among a few shocking episodes. This alone might have made us realise that we should not 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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A Lithuanian theoretical response<sup>20</sup> will be overviewed in the following. It is certainly not the earliest one as its the author may have learned from the experience of others.<sup>21</sup> Yet it is remarkably rational and systematic. For he reconsiders ancient wisdoms in the

<sup>17</sup> Cf., from the present author, 'Amerikai önbizalom, orosz katasztrófa: Kudarcot vallott keresztshadjárat?' [American self-confidence, Russian catastrophe: failed crusade?] *Polisz* (December 2002 January 2003), No. 68, pp. 18 28 & <http://www.krater.hu/site.php?func=polisz&file=cikkek&cnr=81>.

<sup>18</sup> 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.

<sup>19</sup> Cf., e.g., from 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 'A »gyökeresen gonosz« a jog mérlegén' [»Radical evil« on trial] *Magyar Jog* 49 (June 2002) 6, pp. 332 337.

<sup>20</sup> Alfonsas Vaišvila *Teisinės valstybės koncepcija lietuvoje* [The Lithuanian approach to rule of law] (Vilnius: Litmo 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 проблемы его становления в Литве: Понски государственной 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)'. Chairholder for legal philosophy at the Faculty of Jurisprudence of the Law [now: Mykolas Römeris] University of 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].

<sup>21</sup> As a summary of the debates in Poland, see *Polskie dyskusje o państwie prawa* Zarys koncepcji państwa prawnego w polskiej literaturze politycznej 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 gyakorlatiasággá 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].



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.

The ideal of 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<sup>22</sup>—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”<sup>23</sup> is at stake. Looking back in history, Lithuanians may now realise that their ancestors in the 16<sup>th</sup> to 17<sup>th</sup> centuries<sup>24</sup> 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*.<sup>25</sup> 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 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 20<sup>th</sup>-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”.<sup>26</sup> 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.<sup>27</sup> 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 tumble on disintegrating contradictions and dysfunctions. While eliminating certain threats to human rights, the state ruled by law—writes the author in review—originates new ones immediately, which are inherent in the notion of human

<sup>22</sup> “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—‘Teisinės valstybės organizacija’ in *Lietuvos universitetas* 1927–1928 mokslo metais (Kaunas 1928), pp. 6–31, followed by their contemporaries as PETRAS LEONAS and others.

<sup>23</sup> Ekkehart Stein *Staatsrecht* 14., völlig neu bearb. Aufl. (Tübingen: Mohr 1993) xv + 497 pp.

<sup>24</sup> E.g. JONAS CHONDZINSKIS, ALBERTAS GOŠTAUTAS, MYKOLAS LIETUVIS, PETRAS ROIZIUS, AUGUSTINAS ROTUNDAS, LEONAS SAPIEGA, PETRAS SKARGA, ANDRIUS VOLANAS.

<sup>25</sup> 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].

<sup>26</sup> Römeris [note 6], p. 6.

<sup>27</sup> Vaišvila (2001) [note 4], p. 11.

rights itself,<sup>28</sup> 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.<sup>29</sup>

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 is 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.

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 as 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 state's 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 December 9, 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 non-legal

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<sup>28</sup> *Ibid.*, p. 6.

<sup>29</sup> *Ibid.*, p. 12.



basis (unauthorised by citizens, yet normatively). Moreover, not even the failure of regulation can result in breaking up the necessary balance between rights and duties or in impunity, 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.<sup>30</sup> Entering the 21<sup>st</sup> 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 20<sup>th</sup>-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).<sup>31</sup>

According to his vision, the prevalence of capital concentration with the split of society to the rich and the poor has 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 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 must 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 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 gets eventually supported by the 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

<sup>30</sup> 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.

<sup>31</sup> 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.

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<sup>32</sup>? What are the symptomatic indicators here? According to the author, the weakness of a middle-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 July 19, 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 Seym [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.<sup>33</sup> The population still trusts significantly more even a weak president 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:

<sup>32</sup> For the term, cf. Frank S. Meyer 'Libertarianism and Libertinism?' *National Review* (1969).

<sup>33</sup> 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.

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. Kuročkos apklauso protokolai* [archives manuscript], p. 15.] – The World Congress of Lithuanian Lawyers declared on May 24 31, 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 teisinės problemos: Pirmojo pasaulio leituvių teisininkų kongreso straipsnių ir tezių 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).]



President <i>ALGIRDAS BRAZAUSKAS</i>		Parliament
December 1993	60,0 %	34,0 %
June 1996	20,0 %	14,0 %
President <i>VALDAS ADAMKUS</i>		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).<sup>34</sup>

Or, the exclusive way to, 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.<sup>35</sup>

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. Accordingly, the equivalence in reciprocity of social relations is the pre-requisite of a ny 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 tho choose, for “Rights without obligations are nothing but downright privileges, while duties without rights can only stand for sheer violence.”<sup>36</sup>

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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

<sup>34</sup> Vaišvila (2001) [note 4], pp. 32–36.

<sup>35</sup> Also see, by Vaišvila, ‘Место наказания в правовом государстве’ in *Проблеми вдосконалення законодавства та практика його застосування з урахуванням прогнозу злочинності 1* (Луганськ 1999), pp. 44–49 [Вісник Луганського інституту внутрішніх справ МВС України] and ‘Социальное правовое государство: Приобретаемая и теряемая реальность’ in *Конституционно-правовые проблемы формирования социального правового государства* Материалы международной конференции (Минск: Белорусский государственный университет 2000), pp. 24–28.

<sup>36</sup> “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.”

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. This is exactly what the oeuvre 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 auctoritatem*] 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 “So much the worse for the facts”—this time at the overture to the 21<sup>st</sup> 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 postulate,<sup>37</sup> 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,<sup>38</sup> even if not yet transcending local self-analysis. Until now, scholars have failed to

<sup>37</sup> If the presuppositions of democracy are not provable, only tradition axiomatically taken from the credo of 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 & OCIFE Magyarország 2003), pp. 63–74 [Agóra II].

<sup>38</sup> Cf., e.g., Stephen Holmes & Cass R. Sunstein *The Cost of Rights Why Liberty Depends 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



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.

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### *Csaba Varga*

Having arrived at the 21<sup>st</sup> 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 their 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,<sup>1</sup> Germany or Turkey,<sup>2</sup> to mention just few examples. Those great legal effects starting out from the Atlantic world—be it a *par excellence* American or quite an international initiative on globalism with a centre in New York or Washington, or Swedish governmental supports in legal assistance—are today being criticised more and more sharply in general and not quite without reason.<sup>3</sup> Because in most cases it is merely universalistic projections that take place under the aegis of transfer of 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 by 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 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

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<sup>1</sup> 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 and the Kyrgyz Republic) as well as of Cambodia, Laos 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].

<sup>2</sup> 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 effect.

<sup>3</sup> Cf., e.g., from the author, 'Reception of Legal Patterns in a Globalising Age' [abstract] in *Law and Justice in a Global Society Addenda: Special Workshops and Working Groups* (IVR 22<sup>nd</sup> 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.

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 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 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 primarily through an economic and financial policy urged by American economic exploitation in particular<sup>4</sup>—with a difference that struck us as strange (and somewhat frightening already then, however, alluding revelatively to our present-day knowledge in an embryonic form): notably, the same network of experts and institutions and the same staff of specialists could also be seen in our neighbourhood, which had started “social-scientific” law-modernisation in Latin America decades ago, only to fail miserably afterwards, due to their ethnocentric blindness and liberal universalism, having thought to fulfil the mission of their movement “Law & Development” 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 with scholarly certainty the reason 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 adopted Western results of the time, and despite having been perhaps the first among the first with our system 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

<sup>4</sup> Cf., e.g., from 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 from abroad—*Kidáltás 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].



the first of these—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 the 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.<sup>5</sup> Secondly— fragmentation of responsibility —, I see another factor of a similar significance in that with the downfall of dictatorship since the first free parliamentary elections, 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 (mostly statal) fora 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, 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, apparently forgetting that also in 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, for instance, as the otherwise unapproachable judge of the legislature, instead of developing some humility presumable in common causes, only expected the 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 be behind the otherwise inscrutable action of the constitutional judiciary.

<sup>5</sup> 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 out that there is in fact not one single point on which they could agree. The reporter as a non-professional in law understands by rule of law the practical reality of the encounter of "state" and "law" surrounded by a certain level of perceptible safety, while the latter, finding this 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).

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 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 it and thus practised without control, excluding any responsibility whatsoever in either a legal or a political sense.

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It indicates good senses for choosing a self-marketing subject therefore, if a career-starter young researcher attempts writing a monograph<sup>6</sup> on the peculiarity of this 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) 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*<sup>7</sup>—, so it is no mere chance that

<sup>6</sup> 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].

<sup>7</sup> 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.



"[c]ountless experts [ ] flooded Eastern Europe" at the time (p. 50).<sup>8</sup> As to the contemporary widespread opinion, Hungary was the best and earliest prepared for transition, 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 dictat.<sup>9</sup> 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) 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".<sup>10</sup>

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."<sup>11</sup>

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

<sup>8</sup> As a Hungarian spectator ironically observes, "Allegedly, plane-loads 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, éd. 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).

<sup>9</sup> As an edifying case study concerning the ex-Soviet Union, see, from the author, 'Amerikai önbizalom, orosz katasztrófa: Kudarcot vallott keresztshadjárat?' [American self-confidence and Russian catastrophe: a failed crusade? {on Stephen F. Cohen *Failed Crusade* (2000)}] *PolisZ* (December 2002/January 2003), No. 68, pp. 18–28 [ <http://www.krater.hu/site.php?func=polisz&file=cikkek&cnr=81> ].

<sup>10</sup> 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).

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

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.

Although back in that time the Constitutional Court consequently denied this,<sup>12</sup> 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”,<sup>13</sup> 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 “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 fought for” (p. 21), this explains the contrast and paradoxical contradiction that the call-word ‘rule of law’ became incontestable (and not only legally

<sup>12</sup> 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 the 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 the conservatives’ candidate)—, he reproached me later on, as a result of an allegedly plenary meeting dedicated to exactly this very issue and in which I was 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 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) [<http://www.mancs.hu/index.php?gcPage=/public/hirek/hir.php&id=653>].

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



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."<sup>14</sup> 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"<sup>15</sup>—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 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",<sup>16</sup> and in practice this could mean nothing else than that "The 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",<sup>17</sup> the practice followed that "the rule of law [ ] is construable as exclusively a formal rule of law".<sup>18</sup>

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,<sup>19</sup> 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<sup>20</sup> that is undefined, therefore unsuited for

<sup>14</sup> 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.

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

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

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

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

<sup>19</sup> Sólyom *Az alkotmánybíráskodás kezdetei* [note 17], p. 464.

<sup>20</sup> 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

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 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<sup>21</sup>—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.<sup>22</sup>

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 a political body on the pretext of interventionist activism. For example, already in the period before the amendment of the Constitution on June 20, 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 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)

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.”<sup>23</sup>

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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 very context by Ruti Teitel ‘Transitional Jurisprudence: The Role of Law in Political Transformation’ *The Yale Law Journal* 106 (1997), p. 2025.

<sup>21</sup> Jiří Příbáň ‘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.

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

<sup>23</sup> Brunner ‘Development of Constitutional Judiciary’ [note 14], p. 540 (Dupré, p. 37).



I remember my Viennese colleague when he was amazed (and somewhat perplexed) to report me about their invitation extended to the Hungarian president in Vienna, an occasion which was solely attributable to the mystery that kept them all confounded. Namely, they wondered what this newly founded corporation 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 went 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”,<sup>24</sup> 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 Constitutional Court, compelling the whole state apparatus? And while judging on issues of constitutionality, by what right does the 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 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 follow 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 interpretation possibilities. 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 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

<sup>24</sup> Anne-Marie Slaughter ‘A Typology of Transjudicial Communication’ *University of Richmond Law Review* 1994, pp. 99 137 (Dupré, p. 43).

made this way are valid, irrespective of whether or not the legal order 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 than he himself has.<sup>25</sup> In other words, misuse is no source of law but on the contrary: it is a quality depriving of rights.

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 in Hungary captured the minds. 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 ahistoric 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<sup>26</sup>) 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 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 one and a half 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<sup>27</sup>—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 a 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*.<sup>28</sup>

<sup>25</sup> „Nemo plus iuris ad alium transferre potest, quam ipse habet.” Ulpianus in D.50.17.54, and cf. also 170.

<sup>26</sup> 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 on '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.

<sup>27</sup> 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).

<sup>28</sup> 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, 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



So what is in fact at the heart of these 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 the general personality right “which the Court imported from German law.” (p. 63<sup>29</sup>)

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”,<sup>30</sup> 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, defensible 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 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 World War II, to surpass all the difficulties of making progress across obstacles<sup>31</sup> 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,

“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

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intended—by-product of the movement of so called civic circles [*polgári körök*], firstly and primarily in rural Hungary (in villages and small towns).

<sup>29</sup> Also see, from Catherine Dupré, ‘Le droit à la dignité humaine, emblème 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 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* (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.

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

<sup>31</sup> 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 Friedman ‘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.

of consensus by the international community (although in reality there was no global legal practice about human dignity).<sup>32</sup>

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, it 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 here where what the author characterises with three qualities, namely exteriority, anteriority and universality, is 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, 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, neocolonialism, 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,<sup>33</sup> only the *International Covenant on Civil and Political Rights* qualified as a source of the law in Hungary at the time of the decision making, from among all those referred to. And even this could hardly serve as a normative foundation by its establishing 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 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 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

<sup>32</sup> „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 Delpuech [review] in *Droit et Société* (2005), No. 60, p. 593.

<sup>33</sup> In *Constitutional Judiciary in a New Democracy* [note 16], pp. 123 et seq.



(at times with whole justifications) and several scholarly stands<sup>34</sup> alike. This took place with such an enthusiasm and 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 adjudicate the conformity of domestic laws to corresponding domestic constitutions until they arrive at an “independence of constitutional justice from the constraints of national laws”?<sup>35</sup> Maybe with the effect that a not too distant future would bring about “an unprecedented movement of export/import of law in which states were no longer essential actors”,<sup>36</sup> 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”<sup>37</sup>—of

<sup>34</sup> 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.

<sup>35</sup> László Sólyom ‘Sur la coopération des cours constitutionnelles: Introduction à la X<sup>ième</sup> 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).

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

<sup>37</sup> Sadurski [note 11], pp. 254–255.

“[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 constitutionalis*«<sup>38</sup>—has permeated the practice of the Constitutional Court so far.”<sup>39</sup>

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 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.<sup>40</sup> 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 and lawyerly community, into the societal feedback underlying any law and order—of all 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<sup>41</sup> but at the same time

<sup>38</sup> 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.

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

<sup>40</sup> 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 a 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, “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”. *BVerGE* 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).

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.

<sup>41</sup> Let us consider what is suggested by a style (with a corporative character behind it) that starts from a doctrinal point of view, pondering the nature of the Supreme Court’s guiding (abstract) decisions aiming at the unity of judicial practice and the possibility of their 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 judiciary—simply surpasses



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."<sup>42</sup>

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, 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 19<sup>th</sup>-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 while 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 another trap, notably, that of becoming "guinea pigs" of neo-liberalism,<sup>43</sup> 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

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again its competence stipulated by a law of 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.

<sup>42</sup> Teitel 'Paradoxes' [note 15], p. 245.

<sup>43</sup> 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).

part of the reification process through which words became law" (p. 188) had the somewhat degenerate result suited to the above presuppositions.

Was our domestic or external world outraged that certain state parts, 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 drawn up as LEWIS CARROLL<sup>44</sup> schemed it in his *Alice in Wonderland*, because if all 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 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 in 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 own countries 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 ahistoric, utopianistic universalism when it "grounded on a sort of *tabula rasa* fiction" by practically "negating the [ ] »legal culture«" (p. 192); 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'.

However, being inspired from outside did not mean in fact 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<sup>45</sup> (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

<sup>44</sup> Pen name of CHARLES LUTWIDGE DODGSON (1832–1898).

<sup>45</sup> 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.



constitutional order or the moral code" (Article 2<sup>46</sup>) whereas, according to its 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."<sup>47</sup>

—, the Hungarian Constitutional Court took over from this 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, 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, 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 man and his rights, the ambitious Hungarian student rendered all them absolute. "Such an individualistic vision is dissonant to the general spirit of the German law [ ]. It has become an absolute [ ], unconditional and unlimited right."<sup>48</sup> It seems that on the ruins of Communism, in a society having 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* philosophically—, it saw nothing but individuals "in isolation and fighting against the state to protect her 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—between the good individual, worthy of absolute human dignity, on the one hand, and the bad and therefore to be tightly controlled state, on the other (p. 126). All in all, such a thoroughly privatist vision—if lifted within a public law perspective<sup>49</sup>—atomises society from the outset and is capable of nothing but anarchist formulation in its 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

<sup>46</sup> „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.“

<sup>47</sup> *The Constitutional Jurisprudence* [note 40], p. 305 (Dupré, p. 125).

<sup>48</sup> „Un telle vision individualiste est dissonante avec l'esprit général du droit allemand [ ]. Elle devient [ ] un droit absolu, [ ] inconditionnel et sans limitation.“ Delpuech [note 32], p. 592.

<sup>49</sup> Also remarked as quite a misleading analogy by Teitel 'Transitional Jurisprudence' [note 20], p. 2023.

Hungarian and other Central and Eastern European societies, further promoted by huge a many unexpected turns of their alleged transition.<sup>50</sup>

If the notabilities of the Constitutional Court thought they were the Saint STEPHENS (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 in as much 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 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.

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." 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

<sup>50</sup> Cf., from the author, 'Rule of Law between the Scylla of Imported Patterns and the Charybdis of Actual Realisations (The Experience of Lithuania)' *Acta Juridica Hungarica* 46 (2005) 1 2, pp. 1 11 & 'Rule of Law – At the Crossroads of Challenges' *Iustum, Aequum, Salutare* [Budapest] 1 (2005) 1, pp. 73 88, 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].



interpretation of the rule of law should prevail over politically defined understandings of the right mix of legalism and substantive justice.”<sup>51</sup>

This is just the attraction to extremity with *sui generis* fundamental differences effaced, about the mistaken partisanship of which<sup>52</sup> 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.”<sup>53</sup>

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.”<sup>54</sup>

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The decision of the Constitutional Court in which the possibility of processing the past “travesty of legality”<sup>55</sup> through criminal law gets contrasted with the “constitutionalisation of criminal law”<sup>56</sup> as ultimately enforced by it, shows distinctly the Court’s corporate determination for formal interpretation by narrowing (indeed: reducing) the rule of law idea to an 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 as 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

<sup>51</sup> Sadurski [note 11], p. 256.

<sup>52</sup> 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](http://www.law.uchicago.edu/academics/publiclaw/resources/40_eap-av.transitional.both.pdf) ].

<sup>53</sup> 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].

<sup>54</sup> László Sólyom in András Sereg *Alkotmánybírák talál nélkül* [Constitutional justices without robe] (Budapest: KJK-Kerszöv 2005), p. 171.

<sup>55</sup> Sadurski [note 53], p. 2.

<sup>56</sup> Szabó [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)

suggesting that one can safely go on doing the dirty work, taking care only for one thing: 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”<sup>57</sup>—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”)—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) retorsion 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 rule of law under foot: even under the constitutional guise of the reborn and democratic Republic of Hungary. For—the verdict goes on—“If the statute of limitations has expired, the person has a right to immunity from criminal punishment.”<sup>58</sup>

A recent monographic stand, overviewing issues ranging from lustration to facing with the past in criminal law in the region,<sup>59</sup> presents this decision as a veterinary horse with the potential of featuring up all such queries, formalistic floating and uncontrolled rush in loosing contact with anything sensibly lifelike. For, as the 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

<sup>57</sup> *Constitutional Judiciary* [note 16], p. 220.

<sup>58</sup> *Idem.*, p. 223.

<sup>59</sup> Sadurski [note 53], 50 pp. & [note 11], ch. 9, pp. 223–262.



“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 the 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 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, while on the part of the successor state the »price« in the form of non-prosecution is unrelated to *its* negligent criminal policy.”<sup>60</sup>

That is, in other words, the decision legally equated situations that are not only incommensurable but mutually flatly excluding in both essential ethos 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 the 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

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<sup>60</sup> Sadurski [note 11], pp. 253, 254, 254 255 & 255.

successor state's duty to face with the past, even as—and within the framework of—a formal obligation, to be internationally acknowledged.<sup>61</sup>

Of course, nobody thinks in terms of (in themselves respectable) principles allowed to be put aside but in the necessity and significance of pondering and balancing amongst various values (whether or not complementing to or conflicting one another), each of which is to be respected in its own way—as dichotomised, for example, in tension between prospectivity and equal justice,<sup>62</sup> legality and substantive justice,<sup>63</sup> 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.”<sup>64</sup>

Viewed from the perspective of end-results, the stand taken by the decision in question can indeed be interpreted (even if wrongly) as an encouragement of crime, because it places the grace into a perpetratorial hand, allowing it to absolve itself, by administering that by due way and in due time, with effect at its 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.

It is obvious at the same time 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

<sup>61</sup> Cf., *Kidáltás 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] and especially Juan E Méndez 'Accountability for Past Abuses' *Human Rights Quarterly* 19 (1997), pp. 225–282.

<sup>62</sup> In the case of, e.g., RUTI TEITEL. She reminds (Teitel 'Transitional Jurisprudence' [note 20], p. 2024) 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 [note 11], p. 231) This is about which the theoretician might have written, with outrage rightful from this aspect, as a liberal argument for a rejection 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 paradoxon: “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 Péter Takács [conversation] ‘»A morális alkotmányértelmezésnek a szöveghez köthetnek kell lennie«’ [Moral constitutional interpretation has to be linked to the text] *Fundamentum* 2001/1, p. 71.

<sup>63</sup> E.g., in the case of WOJCIECH SADURSKI.

<sup>64</sup> Sadurski [note 11], p. 255.



“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.”<sup>65</sup> 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”.<sup>66</sup>

The bitter dilemma arises, when the Constitutional Court’s pondering with its simplifying extremism, subordinating everything to its own one-focussedness, inquires into the ultimate questions 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?” For all, this is by far not a result of predestination but of sheer incidence and, in it, cultural misery. As a matter of fact and 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.”<sup>67</sup>

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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 because “The possible contradiction 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”,<sup>68</sup> 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, of course, arbitrarily and posteriorly. Only provided that the rule of law can be meant to be reduced

<sup>65</sup> *Idem.*, pp. 261 & 262.

<sup>66</sup> *Idem.*, p. 256.

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

<sup>68</sup> Sólyom in Takács [note 62], pp. 69, 69 & 71.

to formal security in law (by “the Hungarian Court [having] posited a new constraint on the state: an individual right to security.”<sup>69</sup>); that “mother rights” can be produced out of foreign jurisprudence; 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.”<sup>70</sup>

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 velvetiness 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.<sup>71</sup> 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.”<sup>72</sup>

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

<sup>69</sup> Teitel ‘Transitional Jurisprudence’ [note 20], p. 2023.

<sup>70</sup> 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.

<sup>71</sup> 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.

<sup>72</sup> Teitel ‘Paradoxes’ [note 15], pp. 246, 244 & 246.



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."<sup>73</sup>

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.<sup>74</sup> For instance, in the beginning, the president attributed only "a shaping of competence" to the Court,<sup>75</sup> 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."<sup>76</sup> 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"<sup>77</sup> 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<sup>78</sup>—, that its acts do in fact "appear as real amendments to the Constitution",<sup>79</sup> 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

<sup>73</sup> *Ibidem.*, pp. 245–246.

<sup>74</sup> 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.

<sup>75</sup> László Sólyom 'Az Alkotmánybíróság hatáskörének sajátossága' [The specificity of the competence of the Constitutional Court] in *Emlékkönyv Benedek Ferenc 70. születésnapja alkalmából* (Pécs 1995), as well as Sólyom *Az alkotmánybíráskodás kezdetei* [note 17], pp. 157–182.

<sup>76</sup> 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.

<sup>77</sup> Pribáň [note 21], p. 17.

<sup>78</sup> 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[almi] '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 positive legal founding of the judicial decision 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 (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](http://www.iue.it/LAW/Events/WSWorkshopNov2003/Dupre_paper.pdf)])—either).

<sup>79</sup> Sólyom *Az alkotmánybíráskodás kezdetei* [note 17], p. 258.

rights, thereby elevating them to the quality of basic rights”, 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.”<sup>80</sup>

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 law at the highest level, 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”.<sup>81</sup>

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”,<sup>82</sup> then this channelling through the law was implemented in Hungary in no other way than by a kind of “elegant flying to and fro above the legal system”.<sup>83</sup>

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.”<sup>84</sup>

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 parliamentary embodiment of the sovereignty of the nation as well.

<sup>80</sup> László Sólyom ‘Alkotmányértelmezés az új alkotmánybírószágok gyakorlatában’ [Constitutional interpretation in the practice of the new constitutional courts] *Székgözlők 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.

<sup>81</sup> Dissenting opinion of Géza Kilényi to the Constitutional Court’s decision no. 57/1991 (8 November).

<sup>82</sup> Mirosław Wyrzykowski ‘Selected Problems of System Transformation’ in *Rechtsfragen der Transformation in Polen* Schweizerisch–polnisches Kolloquium, hrsg. Josef Aregger, Jerzy Poczobut, Mirosław Wyrzykowski (Kraków: Wydawnictwo Baran i Suszczyński 1995), p. 10.

<sup>83</sup> Imre Vörös in Gábor Halmai & Csaba Tordai [conversation] ‘»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.

<sup>84</sup> 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.











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